

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

CASE NO. 2021-CP-32-02752
Appellate Case No. 2023-000317

Orthofix, Inc., ... Respondent,

v.

South Carolina Department of Revenue, ... Appellant.

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT

Orthofix Inc.

Plaintiff,

vs.

South Carolina Department of Revenue,

Defendant.

Case No. 2021-CP-32-02752

ORDER

This matter came before the Court on a hearing addressing cross motions for summary judgment on November 2, 2022. Present before the Court were counsel for Plaintiff, Michael J. Hilkin, Esq. and Rick Reames, III, Esq., and counsel for Defendant, Marcus D. Antley, III, Esq. The record before the Court included Stipulations of Fact as further described herein, along with pre-trial briefs and oral arguments of each party.

Having heard the arguments of counsel and weighing all of the evidence in the record, the Court concludes that Plaintiff is entitled to declaratory relief against Defendant.

STATEMENT OF THE CASE

Plaintiff filed this action on August 20, 2021, seeking declaratory relief in the form of a judgment that: (1) declares facially unconstitutional that portion of South Carolina Code § 12-36-2120(74)(c), as it requires that a seller must have its principal place of business in South Carolina in order to be eligible for a sales tax exemption provided for certain sales of “durable medical equipment and related supplies”; and (2) Plaintiff is entitled to a refund of South Carolina sales tax plus any applicable interest, on its sales of durable medical equipment and related supplies, which would have qualified for the exemption as written in South Carolina Code

§ 12-36-2120(74) if it did not require Plaintiff to have its principal place of business in South Carolina in order to qualify for the exemption.

As reflected in the pleadings and the Stipulation of Facts filed in this case, and further addressed in briefing, Plaintiff Orthofix Inc. is a Delaware corporation with its principal place of business in Texas. Defendant South Carolina Department of Revenue is a State agency created under Title 12, Chapter 4 of the South Carolina Code, and has offices throughout the State.

Following Plaintiff's service of a Complaint for Declaratory Relief, the parties filed cross Motions for Summary Judgment under Rule 56 of the South Carolina Rules of Civil Procedure, along with subsequent briefs responding to those cross motions.

FACTUAL STIPULATIONS

In conjunction with the motions for summary judgment filed by both parties, the Court was directed to a Stipulation of Facts filed on May 6, 2022, in which the parties agreed to a number of material facts that were not in dispute. These stipulated facts are restated below and are taken as true for purposes of this action:

1. Plaintiff, referred to by Defendant¹ in its Determination as "Taxpayer," is a Delaware corporation with its principal place of business in Texas.
2. Plaintiff holds a South Carolina retail sales license and sells tangible personal property at retail, including durable medical equipment and related supplies in South Carolina.
3. Plaintiff timely remitted South Carolina sales tax to Defendant on the durable medical equipment and related supplies sales to customers in South Carolina.

¹ Note that the Stipulation of Facts refers to Plaintiff as "Petitioner" and Defendant as "Respondent" or the "Department."

4. On June 1, 2020, Petitioner submitted refund claims totaling \$351,790.00 for sales tax paid on durable medical equipment and related supplies sold to customers in South Carolina during the period of March 1, 2017 through March 31, 2020.

5. On August 27, 2020, Defendant denied the refund claims for sales tax paid on durable medical equipment and related supplies sold to customers in South Carolina on the basis that Plaintiff's principal place of business is not located in South Carolina.

6. Plaintiff timely protested the denial. Plaintiff only disputed the constitutionality of the sales tax exemption statute. Specifically, Plaintiff asserts that the sales tax exemption provided in Title 12 for retail sales of durable medical equipment is facially unconstitutional because it discriminates against out-of-State businesses and violates the dormant Commerce Clause of the United States Constitution.

7. On November 16, 2020, Defendant's Appeals Section held a teleconference with Plaintiff. Defendant and Plaintiff were unable to resolve the protest, leading to Defendant's issuance of the Determination on July 22, 2021 in which Defendant denied the refund claim.

8. Plaintiff timely filed its request for contested case hearing in the Administrative Law Court on August 20, 2021 to review Defendant's Determination.

9. On August 20, 2021, Plaintiff also filed an action in the Lexington County Court of Common Pleas challenging the constitutionality of the sales tax exemption's discrimination against otherwise qualified taxpayers doing business in South Carolina that do not have a principal place of business in South Carolina.

10. The parties do not dispute that retail sales of durable medical equipment and related supplies are subject to sales tax in South Carolina. The parties also do not dispute that South

Carolina law provides for an exemption from sales tax paid on durable medical equipment and related supplies at South Carolina Code § 12-36-2120(74).

11. Plaintiff sold durable medical equipment and related supplies, as defined under federal and State Medicaid and Medicare laws, to customers in South Carolina. Plaintiff only seeks a refund of sales tax for those sales of durable medical equipment and related supplies.

12. The durable medical equipment and related supplies sold to customers in South Carolina for which Plaintiff seeks a refund of sales tax were paid for directly by funds of South Carolina or the United States under the Medicaid or Medicare programs, where State or federal law or regulation authorizing the payment prohibited the payment of the sale or use tax.

13. The parties do not dispute that Plaintiff holds a South Carolina retail sales license.

14. There is no other basis for denial of Plaintiff's refund claim addressed in Defendant's Determination other than a statutory requirement of the sales tax exemption as written that the taxpayer's principal place of business must be located in South Carolina in order to qualify for the exemption.

DISCUSSION

Plaintiff and Defendant agree that Plaintiff's challenge to the constitutionality of the sales tax exemption set forth in South Carolina Code § 12-36-2120(74) is ripe for adjudication. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCF; *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 365, 649 S.E.2d 488, 490 (2007).

South Carolina Code § 12-36-2120(74) provides an exemption for gross proceeds from sales of "durable medical equipment and related supplies":

(a) as defined under federal and state Medicaid and Medicare laws;

(b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and

(c) sold by a provider who holds a South Carolina retail sales license and *whose principal place of business is located in this State.*

(Emphasis added).

This case deals with the final requirement of the exemption, i.e., that a seller must have its “principal place of business . . . located in” South Carolina.

The Limitation of the Exemption in South Carolina Code § 12-36-2120(74) to Sellers with a “Principal Place of Business” in South Carolina Violates the Commerce Clause of the U.S. Constitution.

Plaintiff asserts that to disallow an exemption from sales tax to an out-of-State company simply because it is an out-of-State company is a violation of the Commerce Clause of the U.S. Constitution. Plaintiff further maintains that the exemption set forth in South Carolina Code § 12-36-2120(74) violates the Commerce Clause because it limits the availability of the exemption to sellers “whose principal place of business is located in” South Carolina.

The Commerce Clause of the U.S. Constitution affirmatively grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3. Additionally, the U.S. Supreme Court recognizes the Commerce Clause has a “negative implication . . . 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 (2008) (internal quotations omitted). This “negative implication,” commonly referred to the “dormant Commerce Clause”:

effectuates the Framers' purpose to prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.

Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996) (internal quotations omitted).

Fundamentally, the Commerce Clause prohibits a State from "impos[ing] a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). Consistent with this prohibition, the U.S. Supreme Court, in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278-79 (1977), established a four-prong test to be used in determining whether a State tax on an out-of-State business violates the Commerce Clause. In order to comply with Commerce Clause requirements, a State tax: (1) must be applied to an activity with a substantial nexus with the taxing state; (2) must be fairly apportioned; (3) must not discriminate against interstate commerce; and (4) must be fairly related to services provided by the taxing State. *Id.* The limitation of the exemption at South Carolina Code § 12-36-2120(74) to sellers "whose principal place of business is located" in South Carolina violates the prohibition against taxes that discriminate against interstate commerce.

Tax schemes favoring in-State activity over out-of-State activity are unconstitutionally discriminatory. A tax discriminates against interstate commerce in violation of the dormant Commerce Clause "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Tax'n*, 490 U.S. 66, 75 (1989). Discriminatory tax schemes that favor in-State activity over out-of-State activity violate the dormant Commerce Clause. *See, e.g., Fulton Corp.*, 516 U.S. at 333 (striking a North Carolina tax imposed on stockholders that was measured on the value of stock, reduced by the

portion of the issuer's income taxable in North Carolina, holding that the tax scheme was facially discriminatory because it served "at least, to discourage [North Carolina] corporations from plying their trades in interstate commerce"); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406 (1984) (striking a New York corporate tax credit that increased or decreased depending on whether a taxpayer's subsidiary conducted more or less of its export activities in New York, ruling that the credit "foreclose[d] tax-neutral decisions and . . . create[d] . . . an advantage for firms operating in New York") (internal quotations omitted); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 337 (1977) (striking amendments to New York's tax on stock transfers that provided tax benefits to stock transfers made through a New York-based exchange, to the exclusion of stock transfers on out-of-state exchanges, holding that the amendments "discriminatorily tax[ed] . . . business operations performed in [an]other State") *Shasta Beverages (Div. of Consol. Foods Corp.) v. S.C. Tax Comm'n*, 280 S.C. 48, 54, 310 S.E.2d 655, 658 (1983) (concluding that, under the Commerce Clause of the U.S. Constitution, "a state cannot impose a tax which would require an interstate commerce business to transfer a part of its business operations to the taxing state in order to receive equal tax treatment").

Applying the language on the face of South Carolina Code § 12-36-2120(74), Defendant denied Plaintiff's refund claim for the sole reason that Plaintiff does not have its principal place of business in South Carolina. The language of the statute on its face discriminates against interstate commerce. The limitation of the exemption at South Carolina Code § 12-36-2120(74) to companies with a principal place of business in South Carolina has "the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause." *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015).

Defendant argues that the limitation in South Carolina Code § 12-36-2120(74) is constitutional because it “encourages economic development in South Carolina by encouraging more corporate executives to locate in South Carolina and more businesses to conduct the bulk of their corporate activities in South Carolina.” But the means by which the statute encourages such activity – providing a tax exemption for a specific in-State activity based on the other in-State versus out-of-State activity of a taxpayer – has repeatedly been held to be unconstitutionally discriminatory even if those means were intended to promote in-State economic development. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (finding “unpersuasive the State’s contention that there was no discriminatory intent on the part of” the Hawaii legislature when it passed tax exemptions for certain liquors primarily produced in Hawaii in order “to promote a local industry,” stating that if the Court “were to accept that justification, [it] would have little occasion ever to find a statute unconstitutionally discriminatory”); *Boston Stock Exchange*, 429 U.S. at 326-28 (striking New York State tax benefits provided for purposes of “encouraging” stock transactions on the New York Stock Exchange instead of out-of-State exchanges).

A taxing statute that discriminates against interstate commerce must “pass the strictest scrutiny,” and “[t]he State’s burden of justification is so heavy that facial discrimination by itself may be a fatal defect.” *Or. Waste Systems, Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 101 (1994) (internal quotations omitted). In this case, Defendant’s primary justifications for the limitation in South Carolina Code § 12-36-2120(74) are that the limitation was intended to promote economic development and that the limitation had a mere incidental impact on interstate commerce. No justification that Defendant has provided satisfies the “strictest scrutiny” burden of justification for a facially discriminatory statute. *See, e.g., Fulton Corp.*, 516 U.S. at 333 n.3 (stating that the

U.S. Supreme Court has “never recognized a ‘*de minimis*’ defense to a charge of discriminatory taxation under the Commerce Clause”); *Bacchus Imps.*, 486 U.S. at 272-73 (discussed above, rejecting an argument that a discriminatory tax may be excused because the statute is intended to support economic development); *Boston Stock Exch.*, 429 U.S. at 326-28 (same).

Therefore, the limitation of the exemption in South Carolina Code § 12-36-2120(74) to sellers with a “principal place of business” in South Carolina must be held to be unconstitutionally discriminatory in violation of the Commerce Clause of the U.S. Constitution.

The Unconstitutional Limitation of the Exemption in South Carolina Code § 12-36-2120(74) May be Severed from the Rest of the Exemption.

“[E]stablished principles of construction” permit this Court to conclude that, even if a portion of a taxing statute “is constitutionally invalid,” that “the remainder of the statute” may be “severable” so that it may “continue in force and effect.” *Shasta Beverages*, 280 S.C. at 57, 310 S.E.2d at 660.

Plaintiff asserts that the doctrine of severance should be applied in this case, so that the unconstitutionally discriminatory limitation of South Carolina Code § 12-36-2120(74) is eliminated and the rest of the statutory language as written by the South Carolina General Assembly is preserved.

The South Carolina Supreme Court has stated that “[t]he test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution” *Thayer v. S.C. Tax Comm’n*, 307 S.C. 6, 13, 413 S.E.2d 810, 814-15 (1992) (internal quotations omitted).

In this case, the test for severability supports a conclusion that the exemption provided by South Carolina Code § 12-36-2120(74) is severable and should continue in force and effect without the unconstitutional limitation. First, the exemption within South Carolina Code § 12-36-2120(74) remains complete itself, wholly independent of the language which is unconstitutional. With the removal of the unconstitutional limitation, South Carolina Code § 12-36-2120(74) will only provide an exemption to sellers meeting the other requirements of the statute – specifically, the exemption will be available for sales of “durable medical equipment and related supplies”:

- (a) as defined under federal and state Medicaid and Medicare laws;
- (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
- (c) sold by a provider who holds a South Carolina retail sales license.

The requirement in South Carolina Code § 12-36-2120(74) that a product must be sold by a seller “whose principal place of business is located in this State” would be eliminated, and no additional language is necessary to make the exemption workable and complete in itself.

Further, this Court finds that it may fairly be presumed that the South Carolina General Assembly would have passed the exemption in South Carolina Code § 12-36-2120(74). The South Carolina Supreme Court has applied the doctrine of severance to preserve tax benefits provided within statutes that included discriminatory limitations. *See Shasta Beverages*, 280 S.C. 57, 310 S.E.2d at 660. The South Carolina Supreme Court has also applied the doctrine of severance to preserve sales tax exemptions contained in paragraphs with unconstitutional elements. *Thayer*, 307 S.C. at 12-13, 310 S.E.2d at 814-15. On balance, this Court concludes that a similar solution to the constitutional infirmity presented by South Carolina Code § 12-36-2120(74) is proper here.

As such, this Court rejects Defendant's argument that, if the limitation of the exemption in South Carolina Code § 12-36-2120(74) to sellers with a principal place in South Carolina is unconstitutional, that the entirety of the statute must be declared void. While numerous States provide sales tax exemptions for durable medical equipment, this Court has found no state with such an exemption that was limited to sellers having a principal place of business in the taxing State – and Defendant could not identify a single state with such a limitation. Notably, if this Court were to accept Defendant's argument, Plaintiffs may still be entitled to a remedy in the form of a refund of sales tax under the Due Process Clause of the U.S. Constitution, requiring this Court to consider yet another constitutional problem. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990).

But a consideration of a remedy under the Due Process Clause is unnecessary here, because this Court has determined that severability will preserve most of the statutory language added by the South Carolina General Assembly in South Carolina Code § 12-36-2120 – without requiring any additional language to be added to the statute. Therefore, the sales tax exemption provided within South Carolina Code § 12-36-2120(74) must be provided to all sellers that qualify for the exemption, regardless of the location of the seller's principal place of business in South Carolina or another State. *See Thayer*, 307 S.C. at 12-13, 413 S.E.2d at 814-15 (holding that one portion of a paragraph of South Carolina Code § 12-36-2120 was severable and that the exemptions provided for in the rest of the paragraph may remain in place).

THEREFORE, it is hereby ORDERED that:

1. That portion of South Carolina Code § 12-36-2120(74), as it requires that a seller must have its principal place of business in South Carolina in order to be eligible for a sales tax

exemption provided for certain sales of “durable medical equipment and related supplies,” violates the Commerce Clause of the U.S. Constitution;

2. Applying the doctrine of severability, because Plaintiff would be eligible for the sales tax exemption provided by South Carolina Code § 12-36-2120(74) without the unconstitutional limitation, Plaintiff is hereby eligible for such exemption on the sales at issue in this matter; and

3. Plaintiff is entitled to a refund of sales tax paid, plus any applicable interest, on its sales of durable medical equipment and related supplies for the period of March 1, 2017 through March 31, 2020. The parties are directed to reach agreement on the exact amount of sales tax to be refunded (and applicable interest due) based on this ruling, and are further directed to report to this Court if they are unable to reach such an agreement.

[Judge’s electronic signature follows on separate page]



Lexington Common Pleas

Case Caption: Orthofix, Inc. VS Department Of Revenue South Carolina
Case Number: 2021CP3202752
Type: Order/Summary Judgment

Circuit Judge (Code #2050)

s/ William P. Keesley

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Orthofix Inc.,

Plaintiff,

vs.

South Carolina Department of Revenue,

Defendants.

IN THE CIRCUIT COURT

ELEVENTH JUDICIAL CIRCUIT

Case No. 2021-CP-32-____

**COMPLAINT FOR DECLARATORY
RELIEF**

The Plaintiff, by and through its undersigned counsel, would respectfully show the Court the following:

PARTIES

1. The Plaintiff Orthofix Inc. ("Orthofix") is a Delaware corporation with its principal place of business in Texas.

2. The Defendant South Carolina Department of Revenue ("Department") is a state agency created under Title 12, Chapter 4 of the South Carolina Code. The Department has offices throughout the state with its principal place of business in Lexington County, South Carolina.

JURISDICTION AND VENUE

3. This case seeks a declaration that the sales tax exemption provided in South Carolina Code § 12-36-2120(74) is facially unconstitutional and related relief. Accordingly, this Court has subject matter jurisdiction pursuant to South Carolina Code § 12-60-80(B), and venue is proper before the Court. *See* S.C. Code § 15-77-50.

BACKGROUND AND FACTUAL ALLEGATIONS

4. The time period at issue in this proceeding is March 1, 2017 through March 31, 2021 ("Period at Issue").

5. South Carolina imposes sales tax on the “gross proceeds of sales” of “every person engaged or continuing within [South Carolina] in the business of selling tangible personal property at retail.” S.C. Code § 12-36-910.

6. South Carolina provides the following exemption from sales tax for gross proceeds of sales of durable medical equipment and related supplies:

(a) as defined under federal and state Medicaid and Medicare laws;

(b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and

(c) sold by a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State.

S.C. Code § 12-36-2120(74).

7. Since before the Period at Issue, Orthofix has held a South Carolina retail sales license.

8. Since before the Period at Issue, Orthofix has sold tangible personal property, including property that qualifies as “durable medical equipment” under South Carolina Medicaid and Medicare laws, to customers in South Carolina.

9. The durable medical equipment sold by Orthofix was paid for directly by funds of South Carolina or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibited the payment of the sale or use tax.

10. Orthofix remitted South Carolina sales tax to the Department during the Period at Issue on the durable medical equipment sales to customers in South Carolina.

11. Orthofix thereafter timely filed a refund claim for such sales tax on the basis that the sales tax exemption in South Carolina Code § 12-36-2120(74) applied such its durable medical equipment sales to customers in South Carolina are exempt from payment of sales tax.

12. On August 27, 2020, Orthofix's refund claim was denied by the Department.

13. Orthofix timely protested the denial of its refund claim.

14. On July 22, 2021, the Department issued its Department Determination upholding the refund claim denial, which acknowledged that the sole basis for its determination that Orthofix is not entitled to a refund of sales tax paid for durable medical equipment is "because the Taxpayer's principal place of business is not located in this State." Department Determination, p. 1 (**Exhibit A**).

15. The Department Determination conceded that Orthofix sells qualifying durable medical equipment and related supplies in South Carolina and that Orthofix holds a South Carolina retail sales license. **Exhibit A** at p. 1.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

16. Orthofix incorporates the foregoing allegations as if restated verbatim.

17. Orthofix must be permitted to take the sales tax exemption in South Carolina Code § 12-36-2120(74) because it satisfied prongs (a) and (b) of the exemption, it held a South Carolina retail sales license, and the requirement in prong (c) that the seller's principal place of business be located in South Carolina is facially unconstitutional.

18. To disallow an exemption to an out-of-state company simply because it is an out-of-state company is a violation of the Commerce Clause of the U.S. Constitution.

19. Fundamentally, the Commerce Clause prohibits a state from "impos[ing] a tax which discriminates against interstate commerce... by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U. S. 450, 458 (1959).

20. The U.S. Supreme Court, in *Complete Auto Transit v. Brady* 430 U.S. 274 (1977), established a four-prong test to be used in determining whether a state tax on an out-of-state business violates the Commerce Clause. In order to comply with Commerce Clause requirements, a state tax: (1) must be applied to an activity with a substantial nexus with the taxing state; (2) must be fairly apportioned; (3) must not discriminate against interstate commerce; and (4) must be fairly related to services provided by the taxing state. *Complete Auto Transit*, 430 U.S. at 279.

21. The Department denied Orthofix's refund claim for the sole reason that Orthofix does not have its principal place of business in South Carolina. The exclusion of out-of-state sellers from the sales tax exemption for otherwise exempt sales of durable medical equipment to South Carolina customers violates the third prong of the *Complete Auto Transit* test.

22. Accordingly, the requirement of South Carolina Code § 12-36-2120(74) that the seller have its principal place of business in South Carolina, is facially unconstitutional and the Department's denial of Orthofix's refund claim based solely thereon is erroneous.

23. In an abundance of caution and to ensure preservation of its rights, including as to receipt of the refund due, Orthofix has simultaneously filed a protest before the Administrative Law Court, but anticipates asking that matter be stayed pending this Court's declaration that South Carolina Code § 12-36-2120(74) is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Orthofix respectfully requests the following:

- (a) That the Court declares unconstitutional that portion of South Carolina Code § 12-36-2120(74)(c), as it requires that a provider must have its principal place of business in South Carolina in order to be eligible for the sales tax exemption on durable medical equipment;
- (b) That the Court grant Orthofix's refund claim; and

(c) For such other and further relief as the Court deems just and proper.

s/ Rick Reames, III

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August 20, 2021
Columbia, South Carolina

*Attorneys for Plaintiff
Orthofix, Inc.*

EXHIBIT A

ROA 020
STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF THE GENERAL COUNSEL

300A Outlet Pointe Blvd.
Columbia, SC 29210



PO Box 12265
Columbia, SC 29211-9979

July 22, 2021

VIA US MAIL

Orthofix Inc.
3451 Plano Parkway
Lewisville, TX 75056-9453

Re: **Orthofix, Inc.**
Periods Involved: March 2017 – March 2020
DOR File Number: 210075

Dear Taxpayer,

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within thirty (30) days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a \$500.00 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: PO Box 12265, Columbia, SC 29211-9979.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in blue ink that reads "Marcus D. Antley, III". The signature is stylized with a large, flowing "M" and "A".

Marcus D. Antley, III, Esquire
Associate Counsel

MDA/hch
Enclosures

DEPARTMENT DETERMINATION

Taxpayer:

Orthofix, Inc.
3451 Plano Pkwy
Lewisville, TX 75056

Periods Involved:

March 1, 2017 through March 31, 2020

Matter in Dispute:

Is Orthofix, Inc. (Taxpayer) entitled to a refund of sales tax paid for durable medical equipment?

Amount In Dispute:

Refund Claim	\$351,790.00
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Determination:

The Taxpayer is not entitled to a refund of sales tax paid for durable medical equipment.

Relevant Facts:

1. The Taxpayer is a Delaware corporation with its domicile and principal place of business located in Texas. The Taxpayer sells tangible personal property at retail, including durable medical equipment and related supplies in South Carolina. The Taxpayer holds a South Carolina retail sales license.
2. On June 1, 2020, the Taxpayer submitted a refund claim totaling \$351,790.00 for sales tax on purchases of durable medical equipment and related supplies.¹
3. On August 27, 2020, the Department denied the refund claims for durable medical equipment because the Taxpayer's principal place of business is not located in this State.
4. The Taxpayer timely protested the denial by letter dated September 3, 2020. The Taxpayer only disputed the constitutionality of the sales tax exemption statute.²
5. On November 16, 2020, the Department's Appeals Section held a teleconference with the Taxpayer. The Department and Taxpayer were unable to resolve the protest, leading to the

¹The Department refunded the Bad Debts claimed by the Taxpayer.

²Specifically, the Taxpayer argues by limiting the exemption to providers whose principal place of business is in this State, the statute facially discriminates against out-of-state businesses and violates the dormant Commerce Clause of the United States Constitution.

issuance of this Department Determination.

Analysis:

Under South Carolina law, a sales tax of six percent of "the gross proceeds of sales, is imposed upon every person³ engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. §§ 12-36-910(A) and 12-36-1110 (2014).

I. The Taxpayer is not entitled to a refund of sales tax paid for durable medical equipment.

The Taxpayer does not dispute that it is otherwise subject to sales tax in South Carolina for the durable medical equipment. It only disputes whether it should be entitled to the durable medical equipment exemption. When considering eligibility for a tax exemption, the language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (internal citations omitted).

S.C. Code Ann. § 12-36-2120(74) (2014) grants a sales tax exemption for durable medical equipment. Specifically, Section 12-36-2120(74) provides:

Exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of:

- (74) durable medical equipment and related supplies:
- (a) as defined under federal and state Medicaid and Medicare laws;
 - (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
 - (c) sold by a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State... (emphasis added).

The element of the exemption statute at issue is the second half of subsection (c) because the Taxpayer's principal place of business is not located in South Carolina. The Taxpayer admits its principal place of business is not located in this State. Because the Taxpayer does not meet the statutory requirements as written, it is not entitled to a refund of sales tax paid for durable medical equipment.

³For sales and use tax purposes, the term person "includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality." S.C. Code Ann. § 12-36-30 (2014).

Conclusion:

Because the Taxpayer does not meet the elements required to receive a sales tax exemption for durable medical equipment, the Department must deny the refund claim.

Department Determination drafted by Department Representative:

Marcus D. Antley, III, Esquire
Associate Counsel
South Carolina Department of Revenue

July 22, 2021

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Orthofix, Inc.,

Plaintiff,

v.

South Carolina Department of Revenue,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2021-CP-32-02752

**SOUTH CAROLINA DEPARTMENT OF
REVENUE'S ANSWER TO THE
PLAINTIFF'S COMPLAINT FOR
DECLARATORY JUDGMENT**

**TO: RICK REAMES, III, ESQUIRE, AND JENNIFER J. HOLLINGSWORTH,
ESQUIRE, ATTORNEYS FOR PLAINTIFF AND TO THE PLAINTIFF ABOVE-
NAMED:**

The Defendant herein files its Answer to the Plaintiff's Complaint for Declaratory Judgment ("Complaint") and would respectfully show as follows:

FOR A FIRST DEFENSE

1. Every allegation of the Plaintiff's Complaint not admitted is expressly denied.
2. Upon information and belief, the Defendant admits the allegations of Paragraph 1 of the Complaint.
3. The Defendant admits the allegations in Paragraph 2 of the Complaint.
4. The Defendant admits so much of the allegations of Paragraph 3 as alleged that the Plaintiff seeks a declaration that the sales tax exemption provided in S.C. Code Ann. § 12-36-2120(74) (2014) is facially unconstitutional. The Defendant denies that the referenced sales tax exemption is unconstitutional and also denies all remaining allegations in Paragraph 3.
5. Paragraph 4 does not appear to require any response. To the extent that a response is required, the Defendant objects to the Plaintiff's designation of the period at issue. The Department Determination later referenced designates March 1, 2017 through March 31, 2020 as

the period at issue. In responding to any paragraph, the Department substitutes March 1, 2017 to March 31, 2020 for Period at Issue. Further responding, the Defendant admits that it determined that the Plaintiff was not statutorily eligible for the sales tax exemption found at S.C. Code Ann. § 12-36-2120(74) (2014).

6. Paragraphs 5 and 6 state conclusions of law to which no response is required. To the extent that a response is required, the Defendant admits that the Plaintiff has accurately quoted S.C. Code Ann. §§ 12-36-910 (2014) and 12-36-2120(74) (2014).

7. Paragraph 7 is admitted.

9. Paragraph 9 is denied.

10. Paragraphs 10 and 11 are admitted upon information and belief.

11. Paragraphs 12 and 13 are admitted.

12. In response to Paragraph 14 and 15 of the Complaint, the Defendant would show that the Department Determination issued on July 22, 2021 speaks for itself and no response is required.

13. The Defendant incorporates the foregoing answers as if restated verbatim in response to Paragraph 16 of the Complaint.

14. The Defendant denies the allegations in Paragraph 17 and 18 of the Complaint.

15. In response to Paragraph 19 of the Complaint, the Defendant would show that *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), speaks for itself and no response is required.

16. In response to Paragraph 20 of the Complaint, the Defendant would show that *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), speaks for itself and no response is required.

17. The Defendant denies the allegations in Paragraph 21 of the Complaint.

18. The Defendant denies the allegations in Paragraph 22 of the Complaint.

19. Paragraph 23 states the Plaintiff's intent to which no response is required. To the extent that a response is required, the Defendant admits that the Plaintiff has filed a protest before the Administrative Law Court upon information and belief. The Defendant reserves the right to raise legal claims and defenses as appropriate in any matter before the Administrative Law Court.

20. The "Wherefore" paragraph is denied.

FOR A SECOND DEFENSE

21. The Complaint fails to state a claim upon which relief can be based and accordingly, the Defendant is entitled to judgment as a matter of law pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

22. The Plaintiff has failed to exhaust its administrative remedies, which is a complete bar to this action. Therefore, the Complaint should be dismissed.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendant would pray that the same be dismissed with cost being granted to it. The Defendant also prays for such other and further relief as the court deems just and proper.

{Signature on following page}

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Marcus D. Antley, III, Esq.

Marcus D. Antley, III, Esquire (Bar No. 102176)

Associate Counsel

Adam J. Neil, Esquire (Bar No. 69594)

Associate General Counsel, Litigation

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Phone: 803.898.5623

Facsimile: 80.896.0171

Attorneys for Defendant

South Carolina Department of Revenue

Columbia, South Carolina
September 21, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO.: 2021-CP-32-02752
	)	
Orthofix, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SOUTH CAROLINA DEPARTMENT OF
	)	REVENUE'S MOTION FOR SUMMARY
	)	JUDGMENT
South Carolina Department of Revenue,	)	
	)	
Defendant.	)	

TO: RICK REAMES, III, ESQUIRE AND JENNIFER J. HOLLINGSWORTH, ESQUIRE, ATTORNEYS FOR PLAINTIFF AND TO THE PLAINTIFF ABOVE-NAMED:

YOU WILL PLEASE TAKE NOTICE, that Defendant, the South Carolina Department of Revenue ("Department"), by its undersigned attorney, will move before the Presiding Judge of the Lexington County Court of Common Pleas on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an order granting summary judgment to the Department in the above-captioned matter. There is no material issue of fact in the case because the Parties stipulated to all material facts and filed the stipulation with the Court on May 6, 2022. Thus, this matter involves only an interpretation of the sales tax exemption found at S.C. Code Ann. § 12-36-2120(74).

This Motion is made pursuant to Rule 56, SCRCP, and will be supported by the pleadings herein, the applicable law, the aforementioned stipulation of facts, and a memorandum in support of the Department's position to be submitted prior to the hearing.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Marcus D. Antley, III, Esq.

Marcus D. Antley, III, Esquire (Bar No. 102176)

Adam J. Neil, Esquire (Bar No. 69594)

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803.898.5623

Attorneys for Defendant South Carolina Dep't of Revenue

Columbia, South Carolina
July 8, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO.: 2021-CP-32-02752
	)	
Orthofix, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SOUTH CAROLINA DEPARTMENT OF
	)	REVENUE'S MEMORANDUM IN SUPPORT
	)	OF ITS MOTION FOR SUMMARY JUDGMENT
South Carolina Department of Revenue,	)	
	)	
Defendant.	)	

TO: RICK REAMES, III, ESQUIRE, AND JENNIFER J. HOLLINGSWORTH, ESQUIRE, ATTORNEYS FOR PLAINTIFF AND TO PLAINTIFF ABOVE-NAMED:

Defendant, the South Carolina Department of Revenue (Department), submits this Memorandum in Support of its Motion for Summary Judgment. For the following reasons, the Court should grant the Department's Motion because the material facts, which are not in dispute, demonstrate that the Department is entitled to judgment as a matter of law. Plaintiff is not entitled to the exemption from sales tax for gross proceeds of the sales of durable medical equipment and related supplies.

FACTS AND PROCEDURAL HISTORY

For the purposes of this Motion, the parties have filed a joint Stipulation of Facts that are not in dispute. The Department incorporates by reference the Stipulation of Facts as if set forth fully herein. *See* Stipulation of Facts ("Stip. Facts"), attached as Exhibit 1.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Young v. S.C. Dep't of Disabilities & Special Needs*, 374 S.C. 360, 649 S.E.2d 488 (2007); *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *Eagle Container Co., LLC v.*

County of Newberry, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any genuine issue as to any material fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007); *Med. Univ. of S.C. v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Moore v. Weinberg*, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

The material facts referenced above are not in dispute, and those facts viewed in the light most favorable to Plaintiff establish that Plaintiff is not entitled to a sales and use tax exemption under S.C. Code § 12-36-2120(74) (2014), which is known as the "durable medical equipment exemption" ("DME Exemption"). Therefore, the Court should grant the Department's Motion for Summary Judgment.

ARGUMENT

Section 12-36-2120(74) provides:

Exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of:

(74) durable medical equipment and related supplies:

- (a) as defined under federal and state Medicaid and Medicare laws;
- (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal

law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
(c) sold by a provider who holds a South Carolina retail sales license and **whose principal place of business is located in this State** (emphasis added).

Undisputedly, Plaintiff's principal place of business is not located in South Carolina.¹ Therefore, Plaintiff does not qualify for the DME Exemption under the plain language of the statute.

I. The DME Exemption in Section 12-36-2120(74) is presumed constitutional, and Plaintiff cannot demonstrate that it violates the dormant commerce clause.

A. Section 12-36-2120(74) is presumed constitutional.

Plaintiff contends that the durable medical equipment exemption is unconstitutional because it is available only to "a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State." According to the Plaintiff, this is a violation of the United States Constitution's Dormant Commerce Clause.

As a fundamental matter, the South Carolina Supreme Court has made clear that statutes are presumed constitutional:

This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.

Joytime Distributors & Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (internal citations omitted). "The burden of establishing the unconstitutionality of a statute rests on the party asserting a constitutional violation." *Y. C. Ballenger Electrical Contractors, Inc. v. Reach-All Sales, Inc.*, 276

¹ The Fourth Circuit recognizes two tests to determine a corporation's principal place of business: the nerve center (where the corporation's officers direct, control, and coordinate its activities) and corporate activities (where the bulk of corporate activities take place). See *Long v. Silver*, 248 F.3d 309, 314 (4th Cir. 2001); *Athena Auto., Inc. v. DiGregorio*, 166 F.3d 288, 290 (4th Cir. 1999); *Peterson v. Cooley*, 142 F.3d 181, 184 (4th Cir. 1998).

S. C. 394, 279 S. E. 2d 127 (1981); *State v. Byrd*, 267 S. C. 87, 226 S. E. 2d 244 (1976). In doing so, Plaintiff must “negate every conceivable basis” for upholding the law. *Thomson Newspapers v. City of Florence*, 287 S.C. 305, 338 S.E.2d 324 (emphasis added). “The taxpayer bears the burden of proving the tax [exemption] is unconstitutional and it must overcome this Court's mandate to sustain a legislative enactment if there is “any reasonable hypothesis to support it.” *D.W. Flowe & Sons, Inc. v. Christopher Constr. Co.*, 326 S.C. 17, 482 S.E.2d 558 (1997) as cited in, *Ed Robinson v. South Carolina Department of Revenue*, 588 SE2d 97(October 13, 2003). Thus, in order to prevail in this matter, Plaintiff bears the burden of overcoming the presumption that the DME Exemption is constitutional.

Here, the Plaintiff has failed to prove that the DME Exemption is unconstitutional under the Dormant Commerce Clause. “A state tax withstands a Dormant Commerce Clause challenge so long as the tax (1) ‘is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.’ ” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (quoting *Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079). Here, the sales tax (and the exemption at issue in this case) applies to entities selling tangible personal property at retail within South Carolina, so the activity has a substantial nexus with South Carolina. S.C. Code Ann. § 12-36-910 (2014). The sales tax is fairly apportioned because if every state were to impose an identical tax, the taxpayer would not be subject to overlapping tax obligations. *Travelscape*, 391 S.C. at 107, 705 S.E.2d at 37-38 (citing *Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 588-589 (1989)). South Carolina only taxes that portion of the Plaintiff's sales from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Travelscape*, 391 S.C. at 107, 705 S.E.2d at 38 (citing *Goldberg v. Sweet*, 488 U.S. at 262, 109 S.Ct. at 589 (1989)). The sales tax does not discriminate against interstate commerce because it “applies to all sales made within this State

without regard to the intended use either within or without South Carolina.” *Int'l Harvester Co. v. Wasson*, 281 S.C. 458, 462, 316 S.E.2d 378, 380 (1984). The sales tax is in “proper proportion” to Plaintiff’s “sales activity within South Carolina and, therefore, to their ‘consequent enjoyment of the opportunities and protections which the state has afforded’ in connection with those activities.” *Id.* at 316, S.E.2d at 381 (1984).

The South Carolina Supreme Court has long upheld the constitutionality of the sales and use tax. *See Int'l Harvester Co. v. Wasson*, 281 S.C. 458, 316 S.E.2d 378 (1984). Further, Plaintiff does not challenge the constitutionality of the sales and use tax. Plaintiff only challenges the constitutionality of the DME Exemption under the third prong of the *Complete Auto* test. Notably, *Complete Auto* related to a tax instead of exemption, and the tax in that case was found constitutional.

- B. The Court should uphold the DME Exemption in Section 12-36-2120(74) as constitutionally valid because it furthers a legitimate government interest in promoting promote economic development in the State.*

One of the primary reasons the Legislature created this exemption is for economic development purposes. By providing an exemption to taxpayers who locate their principal place of business in South Carolina, the Legislature sought to induce foreign corporations to move their operations here to encourage economic development in the State.

The Legislature has repeatedly used sales tax exemptions as a means to promote economic development. *See* S.C. Code Ann. § 12-36-2120(51) (sales tax exemption for material handling systems and material handling equipment used in the operation of a distribution facility or a manufacturing facility if the taxpayer invests “thirty-five millions dollars in real or personal property in this State...”); S.C. Code Ann. § 12-36-2120(64) (sales tax exemption for “sweetgrass baskets made by artists of South Carolina using locally grown sweetgrass”); S.C. Code Ann. § 12-36-2120(65) (sales tax exemption for computer equipment if “the taxpayer invests at least three hundred million dollars in real or personal property or both” in this State); S.C. Code Ann. § 12-36-2120(67) (sales

tax exemption for “construction materials used in the construction of a new or expanded single manufacturing or distribution facility, or one that serves both purposes, with a capital investment of at least one hundred million dollars in real and personal property at a single site in the State”); S.C. Code Ann. § 12-36-2120(72) (sales tax exemption for “building materials used to construct a new or renovated building or any machinery or equipment located in a research district”); and S.C. Code Ann. § 12-36-2691 (effectively five-year sales and use tax exemption for a person if it has a distribution facility and invests at least \$125 million and maintains 1,500 full-time jobs in the State). The DME Exemption is no different. Rather than discriminate against interstate commerce, the exemption encourages economic development in South Carolina by encouraging more corporate executives to locate in South Carolina and more businesses to conduct the bulk of their corporate activities in South Carolina.

C. Any burden on interstate commerce is incidental.

To the extent the Court finds that denying the sales tax exemption to companies whose principal place of business is out of the state places a burden on interstate commerce, that burden is—at most—incidental or *de minimis*. See *Thorpe v. State*, 107 P.3d 1064, 1073 (Colo. App. 2004) (plaintiffs did not establish that statutes refunding sales tax only to full year in-state residents “have anything more than an incidental burden on interstate commerce”), cert. denied 2005 WL 334196, Colo. Feb. 14, 2005; cert. denied, 546 U.S. 976, 126 S.Ct. 545 (2005). Presumably, a taxpayer whose principal place of business is in South Carolina would compensate the State through payment of other taxes for enjoyment of the opportunities and protections it receives. Relief from sales and use tax may help level the playing field between taxpayers shouldering additional tax burdens due to having their principal place of business in this State and taxpayer with their principal place of business elsewhere. No taxpayer is forced to give up their right to conduct their business solely in interstate commerce in order to receive the same tax advantage available to local taxpayers. See

Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm'n, 280 S.C. 48, 52, 310 S.E.2d 655, 657 (1983).

II. If the Court determines the principal place of business requirement in the DME Exemption is unconstitutional, then the entire DME Exemption must be declared void.

A. The DME Exemption is severable—not the “principal place of business” element.

If section 12-36-2120(74) is unconstitutional, the Court should declare the entire exemption void. “The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution.” *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999) (internal citations omitted). Here, the nature of the exemption, along with general principles related to the interpretation and application of tax statutes in South Carolina, demonstrate that the principal place of business element of the DME Exemption is not severable.

As a starting point, South Carolina law presumes that the sale of tangible personal property is subject to a sales tax. South Carolina imposes sales tax on the “gross proceeds of sales” of “every person engaged or continuing within [South Carolina] in the business of selling tangible personal property at retail.” S.C. Code Ann. § 12-36-910. Exemptions are the exception; not the rule. Taxpayers bear the burden of bringing themselves squarely within the parameters of the statute which grants the exemption. See *Owen Indus. Prods., Inc. v. Sharpe*, 274 S.C. 193, 262 S.E.2d 33 (1980); *S. Soya Corp. of Cameron v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969); *S. Weaving Co. v. Query*, 206 S.C. 307, 34 S.E.2d 51 (1945). Exemption statutes are construed strictly against the taxpayer. *Home Medical Systems, Inc. v. S.C. Dep’t of Rev.*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (“The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption.”). Moreover, the “refund of taxes is solely a matter of governmental

grace,” and any party seeking such must bring itself squarely within the authorizing statute. *Asmer v. Livingston*, 225 S.C. 341, 82 S.E.2d 465 (1954).

Here, by including the principal place of business requirement, the Legislature signaled its intent to limit the exemption only to certain taxpayers, rather than granting the exemption to any taxpayer who sells durable medical equipment. Because sales tax exemptions are a matter of legislative grace as an exception to the general rule of taxability, it cannot be fairly presumed that the Legislature would have passed the DME Exemption independent of a principal place of business limitation. Clearly the Legislature did not intend for taxpayers like Plaintiff to get the exemption. Thus, the offending provision of section 12-36-2120(74)(c)—i.e. the principal place of business element—is not severable.

In *Thayer v. South Carolina Tax Com’n*, our Supreme Court considered a sales and use tax exemption granted to “religious publications, including the Holy Bible.”² 307 S.C. 6, 413 S.E.2d 810 (1992). The Court held that the exemption violated both the Free Press Clause and Establishment Clause of the United States Constitution. The Court found that the religious publication exemption was severable from “the remaining exemptions are complete in themselves and that the legislature would have passed the remaining exemptions independently.” *Id.* at 13, 413 S.E.2d at 815. Here, the DME Exemption is incomplete without the “principal base of business” element and the Legislature would not have passed the exemption without this element. However, the DME Exemption can be severed from the remaining exemptions. The DME Exemption was passed independently from the exemptions provided in the other subsections. Therefore, the entire DME Exemption fails, but the remaining sales and use tax exemptions stand.

² S.C. Code Ann. § 12-35-550(7) (1976) is essentially the same exemption that was later recodified as S.C. Code Ann. § 12-36-2120(8) (2014).

B. Plaintiff is not entitled to the DME Exemption.

If unconstitutional, the appropriate remedy would be to revert to the default that gross proceeds of durable medical equipment sales are taxable. “[R]elief as a matter of federal law only when taxpayers involuntarily pay a tax that is unconstitutional under existing precedents.” *Id.* at 13, 413 S.E.2d at 815. However, the sales and use tax is constitutional. *Id.* Therefore, as in *Thayer*, Plaintiff was not entitled to an exemption in the past; nor is it entitled to an exemption if this Court severs the durable medical equipment exemption. *See id.* at 14, 413 S.E.2d at 815. This Court “cannot create an exemption by reading something into the statute which the Legislature did not intend.” *Id.* Regardless of its constitutionality, Plaintiff does not receive the DME Exemption.

CONCLUSION

For the reasons discussed above, section 12-36-2120(74) is constitutional, but clearly does not apply to the Plaintiff. On the other hand, if the exemption is unconstitutional, the remedy is to strike the entire exemption from the Code, not to make the exemption universally applicable. Therefore, the durable medical equipment exemption is still not applicable to the Plaintiff’s sales.

WHEREFORE, the Department asks that this Court enter an order finding that section 12-36-2120(74) is constitutional and that the Department’s Motion for Summary Judgment is granted.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Marcus D. Antley, III, Esq.

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Attorneys for Defendant South Carolina Dep’t of Revenue

Columbia, South Carolina
July 8, 2022

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT

Orthofix Inc.

Plaintiff,

vs.

South Carolina Department of Revenue,

Defendant.

Case No. 2021-CP-32-02752

**ORTHOFIX INC.'S MOTION FOR
SUMMARY JUDGMENT**

TO: MARCUS D. ANTLEY, III, ATTORNEY FOR DEFENDANT:

PLEASE TAKE NOTICE that Plaintiff Orthofix Inc. ("Orthofix" or "Plaintiff" herein), by and through its undersigned counsel, will move before the Presiding Judge in the Court of Common Pleas for the County of Lexington, State of South Carolina on the tenth day after service hereof, or at such time and place as is scheduled by the Court for an Order granting summary judgment on its claims against the South Carolina Department of Revenue ("SC DOR" or "Defendant" herein) pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. For the reasons set forth more fully below, there are no genuine issues of material fact in dispute and Plaintiff is entitled to summary judgment as a matter of law.

Specifically, Plaintiff will request the Court to find that: (1) the portion of the sales tax exemption provided in South Carolina Code § 12-36-2120(74) (the "Durable Medical Equipment Exemption," or the "Exemption") that requires a seller of durable medical equipment to have its principal place of business in South Carolina in order to qualify for the Exemption is facially unconstitutional because it discriminates against interstate commerce; (2) Plaintiff is entitled to the Exemption for its sales that otherwise meet the constitutional statutory requirements of the Exemption; and (3) therefore, Plaintiff is due a refund of South Carolina sales tax plus interest as

statutorily provided for the period of March 1, 2017 through March 31, 2020 (the “Period at Issue”).¹

I. BACKGROUND²

South Carolina generally imposes sales tax on the “gross proceeds of sales” of “every person engaged or continuing within [South Carolina] in the business of selling tangible personal property at retail.” S.C. Code § 12-36-910(a). However, South Carolina law provides several exemptions from this general rule of imposition. This case deals with South Carolina Code § 12-36-2120(74), which provides an exemption for gross proceeds from sales of “durable medical equipment and related supplies”:

- (a) as defined under federal and state Medicaid and Medicare laws;
- (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
- (c) sold by a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State.

Id.

Plaintiff is a Delaware corporation with its principal place of business in Texas. Stip. ¶ 1. Plaintiff holds a South Carolina retail sales license and sells tangible personal property at retail in South Carolina. Stip. ¶¶ 2, 13. Certain tangible personal property sold by Plaintiff is classified as “durable medical equipment and related supplies,” as defined under federal and State Medicaid and Medicare laws, and such property is sold to customers in South Carolina. Stip. ¶¶ 2, 11.

¹ At this time, Plaintiff and Defendant are jointly reviewing the Refund Claims to determine the precise refund amount at issue if this Court grants Plaintiff’s Motion for Summary Judgment. See Stip. ¶ 14.

The undisputed nature of the material facts is evidenced by a Stipulation of Facts entered between Plaintiff and Defendant and filed with this Court on May 6, 2022. All citations to “Stip.” are to the filed Stipulation.

² Unless otherwise indicated, all facts outlined in this section are applicable to the Period at Issue.

Plaintiff timely remitted South Carolina sales tax to Defendant on all sales of durable medical equipment and related supplies to customers in South Carolina. Stip. ¶ 3. On June 1, 2020, Plaintiff submitted refund claims totaling \$351,790.00 for sales tax paid on certain durable medical equipment and related supplies sold to customers in South Carolina during the Period at Issue (the “Refund Claims”) on the basis that such sales qualified for the Durable Medical Equipment Exemption. Stip. ¶ 4. The Refund Claims relate to durable medical equipment and related supplies: (a) as defined under federal and State Medicaid and Medicare laws; (b) sold to customers in South Carolina for which Plaintiff was paid directly by funds of South Carolina or the United States under the Medicaid or Medicare programs; and (c) where State or federal law or regulation authorizing the payment prohibited the payment of the sale or use tax. Stip. ¶¶ 11, 12.

On August 27, 2020, Defendant denied the Refund Claims solely on the basis that the Exemption did not apply because Plaintiff’s principal place of business is not located in South Carolina. Stip. ¶¶ 5, 14; *see also* **Exhibit A** (the “Denial”). Defendant concedes that there is no other basis for the Denial other than this statutory requirement that Defendant’s principal place of business must be located in South Carolina in order to qualify for the Exemption. Stip. ¶ 14. The Stipulation of Facts evidences that Plaintiff is otherwise entitled to the Exemption. *See* Stip. ¶¶ 11-13.

Plaintiff timely protested the Denial, asserting that the Durable Medical Equipment Exemption is facially unconstitutional because it discriminates against out-of-State businesses and violates the dormant Commerce Clause of the United States Constitution. Stip. ¶ 6. After holding a teleconference, Defendant issued a Department Determination on July 22, 2021 again denying the Refund Claims for the sole stated reason that the Plaintiff’s principal place of business is not in South Carolina. Stip. ¶ 7; *see also* **Exhibit B** (the “Determination”).

On August 20, 2021, Plaintiff filed an action for declaratory relief in this Court. Stip. ¶ 9.³

II. STANDARD OF REVIEW

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) (citation omitted); *see also Matsell v. Crowfield Plantation Cmty. Servs. Ass’n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011). “[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted.” *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (quoting *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997). As to the issue on which Plaintiff seeks summary judgment, which is the constitutionality of the Durable Medical Equipment Exemption, to Plaintiff’s knowledge there are no genuine issues of material fact in dispute. *See Matsell*, 393 S.C. at 70, 710 S.E. 2d at 93; *see also Town of Hollywood v. Floyd*, 403 S.C. 466, 478, 744 S.E.2d 161, 167 (2013) (upholding summary judgment where zoning administrator had no lawful authority to approve subdivision plats); *Palmetto Princess, LLC v. Georgetown County*, 369 S.C. 34, 38, 631 S.E.2d 68, 70 (2006) (upholding summary judgment where county lacked legal authority to enact ordinances prohibiting gambling cruises).

In this case, the Plaintiff and Defendant have entered into a Stipulation containing the facts outlined above. As evidenced by the Stipulation, there are no genuine issues of material fact in dispute and the sole issue to be determined by this Court is whether the requirement in the Durable Medical Equipment Exemption as written—requiring Plaintiff’s principal place of business to be located in South Carolina in order to qualify for the Exemption—unconstitutionally burdens

³ On the same day, Plaintiff also filed a request for a contested case hearing in the Administrative Law Court to review the Determination. Stip. ¶ 8. This filing was made in accordance with the South Carolina Revenue Procedures Act (S.C. Code § 12-60-10 *et seq.*) out of an abundance of caution and to ensure preservation of Plaintiff’s rights. The Administrative Law Court has since agreed to stay the case pending the Declaratory Judgment action before this Court.

interstate commerce, thus necessitating a ruling striking the unconstitutional portion of the Exemption statute and ordering Defendant to issue refunds.

III. ARGUMENT

The final requirement of the Durable Medical Equipment Exemption—stating that the Exemption only applies to equipment and related supplies “sold by a provider . . . whose principal place of business is located in this State”—categorically denies the Exemption for otherwise applicable sales by a seller that has a principal place of business outside of the State. Such a requirement makes locating in (or relocating to) South Carolina a prerequisite to qualifying for the Exemption. This requirement unconstitutionally penalizes sellers for choosing to have a principal place of business outside of South Carolina and creates an unconstitutional tariff under the dormant Commerce Clause.

Fortunately, there is a straightforward solution to this constitutional infirmity—this Court should strike the unconstitutional requirement in the Durable Medical Equipment Exemption and allow an exemption for gross proceeds from sales of durable medical equipment that otherwise meet the constitutional statutory requirements. The South Carolina Supreme Court has already blessed such an approach when a tax statute included unconstitutionally discriminatory provisions. *See Shasta Beverages (A Division of Consolidated Foods Corp.) v. S.C. Tax Commission*, 280 S.C. 48, 310 S.E.2d 655 (1983).

Therefore, Plaintiff requests that this Court: (1) declare that the Durable Medical Equipment Exemption unconstitutionally discriminates against interstate commerce; and (2) direct Defendant to issue the refunds, plus interest as statutorily provided, for sales qualifying for the Exemption without the unconstitutional element during the Period at Issue.

a. State Taxes that Burden Interstate and Foreign Commerce Violate the U.S. Constitution's Commerce Clause

The Commerce Clause of the U.S. Constitution affirmatively grants Congress the power “[t]o regulate Commerce with foreign nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3.

Additionally, the U.S. Supreme Court recognizes the Commerce Clause has a “negative implication . . . 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 (2008) (internal quotations omitted). This “negative implication,” referred to the “dormant Commerce Clause”:

effectuates the Framers’ purpose to prevent a state from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.

Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996) (internal quotations omitted).

Under U.S. Supreme Court precedent, a State tax will survive scrutiny under the dormant Commerce Clause only if it: (1) applies to an activity with a substantial nexus to the taxing State; (2) is fairly apportioned; (3) does not discriminate against interstate (or foreign) commerce; and (4) is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

This case focuses on the constitutionality of the Durable Medical Equipment Exemption. By denying the Exemption to sales by sellers with a principal place of business outside of South Carolina, this case implicates the dormant Commerce Clause’s prohibition against discriminatory taxes.

b. The Durable Medical Equipment Exemption's Requirement that a Seller have its Principal Place of Business in South Carolina Unconstitutionally Discriminates Against Interstate Commerce

The Durable Medical Equipment Exemption's requirement that a seller have its principal place of business in South Carolina is unconstitutionally discriminatory and operates as a punitive tariff. It advantages sales of durable medical equipment and related supplies under Medicare and Medicaid programs made by sellers that have a principal place of business in South Carolina.

Under the Exemption as written, sales of durable medical equipment will be subject to South Carolina sales tax when sold by sellers having a principal place of business outside of the State, while sales by sellers with a principal place of business in the State are exempt from the tax. This is plainly the type of situation that the dormant Commerce Clause is intended to protect against, and therefore the unconstitutional requirement within the Durable Medical Equipment Exemption must be struck down.

i. U.S. Supreme Court Case Law Confirms the Durable Medical Equipment Exemption Unconstitutionally Discriminates Against Interstate Commerce

The precedent of the U.S. Supreme Court overwhelmingly establishes that tax schemes favoring in-State activity over out-of-State activity are unconstitutionally discriminatory. A tax discriminates against interstate commerce in violation of the dormant Commerce Clause "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Tax'n*, 490 U.S. 66, 75 (1979). Discriminatory tax schemes that favor in-State activity over out-of-State activity violate the dormant Commerce Clause.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Court unanimously struck down a New York tax on stock transfers, which provided a lower tax if a stock transfer was made through a New York-based exchange. *Boston Stock Exch.*, 429 U.S. at 324.

The tax scheme was found to be unconstitutional because it “discriminatorily tax[ed] . . . business operations performed in [an]other State.” *Id.* at 337.

Similarly, in *Fulton Corporation v. Faulkner*, 516 U.S. 325 (1996), the Court struck a North Carolina intangibles tax imposed on stockholders that was measured on the value of stock, reduced by the portion of the issuer’s income taxable in North Carolina. The Court ruled the tax facially discriminatory because it served “at least, to discourage [North Carolina] corporations from plying their trades in interstate commerce.” *Id.* at 333.

And in *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), the Court struck down a New York corporate franchise tax credit that increased or decreased depending on whether a taxpayer’s subsidiary conducted more or less of its export activities in New York. Relying on *Boston Stock Exchange*, the Court found that the credit “‘foreclose[d] tax-neutral decisions and . . . create[d] . . . an advantage’ for firms operating in New York.” *Id.* at 406 (quoting *Boston Stock Exchange*, 429 U.S. at 331).

Here, the application of the Durable Medical Equipment Exemption imparts the same unconstitutional favoritism. Just as in *Boston Stock Exchange* and *Fulton*, the Exemption is predicated on a seller’s activity in South Carolina. This impermissibly penalizes sales by a seller (like Plaintiff) that happens to have its principal place of business outside of South Carolina. It improperly “forecloses tax-neutral decisions” by pressuring a seller to locate in (or relocate to) South Carolina in order for its sales to qualify for the Exemption, thereby favoring in-State, and burdening out-of-State, economic interests. *Boston Stock Exch.*, 429 U.S. at 331.

The unconstitutional discrimination in this case is even more pronounced than that in *Westinghouse*. The Durable Medical Equipment Exemption has an all-or-nothing toggle switch—based solely on whether seller of equipment has its principal place of business in South Carolina

(or not). Thus, the Court's *Westinghouse* holding also cannot be reconciled with the offending language in the Exemption.

ii. South Carolina Case Law Confirms the Durable Medical Equipment Exemption Unconstitutionally Discriminates Against Interstate Commerce

The South Carolina Supreme Court also has recognized that unconstitutionally discriminatory tax provisions may not be allowed to stand. In *Shasta Beverages (A Division of Consolidated Foods Corp.) v. S.C. Tax Commission*, 280 S.C. 48, 57-58, 310 S.E.2d 655, 660 (1983), the Court held provisions of South Carolina's since-repealed soft drink tax were unconstitutionally discriminatory. At the time, South Carolina's soft drink tax was "assessed on the volume of the product sold." *Id.*, 280 S.C. at 51, 310 S.E.2d at 656. South Carolina soft drink tax statutes provided a discount and an alternative method of reporting tax, but "in order to receive" these benefits, "a bottler" was required by statute to "market its goods on its own . . . leased or owned soft drink truck . . . in the normally accepted store-door delivery method." *Id.*, 280 S.C. at 51, 310 S.E.2d at 656-57 (internal quotations omitted). The Court concluded that such statutory provisions limiting the availability of the discount and alternative reporting method were unconstitutionally discriminatory because they "forced" soft drink bottling companies "to conduct store-door delivery in South Carolina in order to receive" the benefits—thereby forcing companies "to give up their right to conduct their business solely in interstate commerce in order to receive the same tax advantage available to local bottlers." *Id.*, 280 S.C. at 52, 310 S.E.2d at 657.

Interpreting U.S. Supreme Court case law (including *Boston Stock Exchange*), the South Carolina Supreme Court stated:

The fundamental point of the Commerce Clause . . . is that a company has a constitutional right to conduct its business entirely in interstate commerce, and it cannot be subjected to discriminatory taxation by virtue of that choice. The United States Supreme Court has made it clear that a state cannot impose a tax which would require an interstate commerce business to transfer part of its business operations to the taxing state in order to receive equal tax treatment.

Id., 280 S.C. at 53-54, 310 S.E.2d at 658.

The constitutional infirmity embedded within the Durable Medical Equipment Exemption virtually parallels that in *Shasta*. Just as in *Shasta*, Plaintiff is required by South Carolina law to relocate into South Carolina in order for its sales to receive the Exemption available to sellers with a principal place of business in South Carolina. The Court in *Shasta* concluded that the offending provisions “constitute[] a clear violation of the [dormant] Commerce Clause.” *Id.*, 280 S.C. at 52, 310 S.E.2d at 657. The same conclusion is necessary in this case.

iii. The Effect of the Exemption as Written is that it Operates as a Tariff on Interstate Activity

The Durable Medical Equipment Exemption as written operates as a tariff, which is defined by Black’s Law Dictionary as a “duty imposed on imported . . . goods.” *Black’s Law Dictionary* (11th ed. 2019). The U.S. Supreme Court has described a “protective tariff or customs duty” as a charge “which taxes goods imported from other States, but does not tax similar products produced in State.” *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). “A tariff is an attractive measure” for States “because it simultaneously raises revenue and benefits local producers by burdening their out-of-state competitors.” *Id.* However, tariffs “violate[] the principle of the unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States.” *Id.*

Applying dormant Commerce Clause principles, the U.S. Supreme Court has struck down State tax regimes that operate as tariffs. Recently, in *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015), the U.S. Supreme Court struck down Maryland’s taxation regime, whereby residents of Maryland did not receive a tax credit for taxes paid to other States. According to the Court, Maryland’s regime caused income earned by Maryland residents outside of the State to be subject to tax twice, which the Court said had “the same economic effect as a state tariff, the

quintessential evil targeted by the dormant Commerce Clause,” that was “among the principal problems that led to the adoption of the [U.S.] Constitution.” *Id.* at 545, 570 (emphasis added).

In this case, the Durable Medical Equipment Exemption imposes sales tax solely on products sold by a seller with a primary place of business outside of South Carolina. Such tax, in effect, is no different than imposing a formally labeled tariff on products from an out-of-State seller. As the Court stated in *Wynne*, “tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means.” *Id.* at 565 (quoting *West Lynn Creamery*, 512 U.S. at 193). But whether it is formally labeled as a tariff or not, the requirement that a seller have its principal place of business in South Carolina to qualify for the Exemption has the same effect as a tariff, and therefore may not be allowed to stand.

c. The Only Proper Remedy is to Allow Plaintiff to Claim the Durable Medical Equipment Exemption

There is a straightforward remedy to the constitutional infirmity caused by the language of the Durable Medical Equipment Exemption—allow Plaintiff to claim the Exemption on its sales that would qualify without the unconstitutionally discriminatory requirement in the statute.

The South Carolina Supreme Court previously blessed such an outcome in *Shasta*. In that case, the Court “appl[ied] established principles of construction” to conclude that an unconstitutional portion of a single statutory provision may be disregarded while “the remainder of the statute is severable and should continue in force and effect.” *Shasta*, 280 S.C. at 57-58, 310 S.E.2d at 660 (holding that former S.C. Code § 12-21-2120 would remain in place after “the deletion of” the “portions” of the statute declared unconstitutional). Therefore, the taxpayer in *Shasta* received refunds of tax paid based on the application of the statutes without the discriminatory requirements. *Id.*

The same remedy must be provided in this case to Plaintiff. Thus, Plaintiff is entitled to a refund of sales tax on its sales that would qualify for the Exemption without the unconstitutionally discriminatory requirement in the statute.

IV. CONCLUSION

Because there are no genuine issues of material fact in dispute, and for the reasons stated herein, Plaintiff Orthofix respectfully requests that this Court enter judgment in its favor, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Rick Reames, III

Rick Reames, III, SC Bar No. 68327

Jennifer J. Hollingsworth, SC Bar No. 73535

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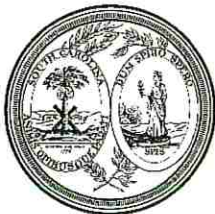
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July 8, 2022
Columbia, South Carolina



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 125, Columbia, South Carolina 29214

August 27, 2020

Orthofix Inc.
Attn: Stacy Kohn, Vice President
3451 Plano Parkway
Lewisville, TX 75056

File: 099369962
Deadline Date: November 27, 2020
Period(s) covered: March 2017-March 2020
Refund request amount: \$ 351,790.00

Dear Ms. Kohn,

This letter is in reference to your request for refund dated 06/01/2020, for sales tax paid for the following period(s): 03/2017-03/2020.

Code Section 12-36-2120(74) provides an exemption for durable medical equipment and related supplies, provided that the following conditions are met:

(a) as defined under federal and state Medicaid and Medicare laws;

(b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and

(c) sold by a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State;

The principal place of business for Orthofix, Inc is located in Lewisville, Texas. As such, because the principal place of business is not in South Carolina, the requirements for the exemption has not been met. Therefore, the refund request in the amount of \$351,790.00 has been denied.

The portion of your claim attributed to Bad Debts was previously refunded to you.

If you disagree with the refund denial, you may contact this office. If after contacting this office you still disagree with any of the refund denial that have been proposed by the Division, a **written protest** must be submitted to this office by the deadline date. Should you have any questions, please call the telephone number listed below, or mail all responses to the South Carolina Department of Revenue.

Sincerely,

Jennifer Gagnon, Manager
South Carolina Department of Revenue
Taxpayer & Business Services Division
803-898-5285

Encl: Taxpayers' Bill of Rights

cc: Gregory Pullman, KPMG

ROA 052
STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF THE GENERAL COUNSEL

300A Outlet Pointe Blvd.
Columbia, SC 29210



PO Box 12265
Columbia, SC 29211-9979

July 22, 2021

VIA US MAIL

Orthofix Inc.
3451 Plano Parkway
Lewisville, TX 75056-9453

Re: **Orthofix, Inc.**
Periods Involved: March 2017 – March 2020
DOR File Number: 210075

Dear Taxpayer,

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within thirty (30) days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a \$500.00 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: PO Box 12265, Columbia, SC 29211-9979.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in blue ink that reads "Marcus D. Antley, III". The signature is stylized with a large, flowing "M" and "A".

Marcus D. Antley, III, Esquire
Associate Counsel

MDA/hch
Enclosures

DEPARTMENT DETERMINATION

Taxpayer:

Orthofix, Inc.
3451 Plano Pkwy
Lewisville, TX 75056

Periods Involved:

March 1, 2017 through March 31, 2020

Matter in Dispute:

Is Orthofix, Inc. (Taxpayer) entitled to a refund of sales tax paid for durable medical equipment?

Amount In Dispute:

Refund Claim	\$351,790.00
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Determination:

The Taxpayer is not entitled to a refund of sales tax paid for durable medical equipment.

Relevant Facts:

1. The Taxpayer is a Delaware corporation with its domicile and principal place of business located in Texas. The Taxpayer sells tangible personal property at retail, including durable medical equipment and related supplies in South Carolina. The Taxpayer holds a South Carolina retail sales license.
2. On June 1, 2020, the Taxpayer submitted a refund claim totaling \$351,790.00 for sales tax on purchases of durable medical equipment and related supplies.¹
3. On August 27, 2020, the Department denied the refund claims for durable medical equipment because the Taxpayer's principal place of business is not located in this State.
4. The Taxpayer timely protested the denial by letter dated September 3, 2020. The Taxpayer only disputed the constitutionality of the sales tax exemption statute.²
5. On November 16, 2020, the Department's Appeals Section held a teleconference with the Taxpayer. The Department and Taxpayer were unable to resolve the protest, leading to the

¹The Department refunded the Bad Debts claimed by the Taxpayer.

²Specifically, the Taxpayer argues by limiting the exemption to providers whose principal place of business is in this State, the statute facially discriminates against out-of-state businesses and violates the dormant Commerce Clause of the United States Constitution.

issuance of this Department Determination.

Analysis:

Under South Carolina law, a sales tax of six percent of “the gross proceeds of sales, is imposed upon every person³ engaged or continuing within this State in the business of selling tangible personal property at retail.” S.C. Code Ann. §§ 12-36-910(A) and 12-36-1110 (2014).

I. The Taxpayer is not entitled to a refund of sales tax paid for durable medical equipment.

The Taxpayer does not dispute that it is otherwise subject to sales tax in South Carolina for the durable medical equipment. It only disputes whether it should be entitled to the durable medical equipment exemption. When considering eligibility for a tax exemption, the language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (internal citations omitted).

S.C. Code Ann. § 12-36-2120(74) (2014) grants a sales tax exemption for durable medical equipment. Specifically, Section 12-36-2120(74) provides:

Exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of:

(74) durable medical equipment and related supplies:

- (a) as defined under federal and state Medicaid and Medicare laws;
- (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
- (c) sold by a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State... (emphasis added).

The element of the exemption statute at issue is the second half of subsection (c) because the Taxpayer's principal place of business is not located in South Carolina. The Taxpayer admits its principal place of business is not located in this State. Because the Taxpayer does not meet the statutory requirements as written, it is not entitled to a refund of sales tax paid for durable medical equipment.

³For sales and use tax purposes, the term person “includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.” S.C. Code Ann. § 12-36-30 (2014).

Conclusion:

Because the Taxpayer does not meet the elements required to receive a sales tax exemption for durable medical equipment, the Department must deny the refund claim.

Department Determination drafted by Department Representative:

Marcus D. Antley, III, Esquire
Associate Counsel
South Carolina Department of Revenue

July 22, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO.: 2021-CP-32-02752
	)	
Orthofix, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SOUTH CAROLINA DEPARTMENT OF
	)	REVENUE'S RESPONSE TO PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT
South Carolina Department of Revenue,	)	
	)	
Defendant.	)	

TO: RICK REAMES, III, ESQUIRE, AND JENNIFER J. HOLLINGSWORTH, ESQUIRE, ATTORNEYS FOR PLAINTIFF AND TO PLAINTIFF ABOVE-NAMED:

Defendant, the South Carolina Department of Revenue (Department), submits this Response to Plaintiff's Motion for Summary Judgment. For the following reasons, the Court should deny Plaintiff's Motion and grant the Department's Motion. The undisputed, material facts demonstrate that Plaintiff is not entitled to the exemption from sales tax for gross proceeds of the sales of durable medical equipment and related supplies as a matter of law.

ARGUMENT

Plaintiff admits that it does not qualify for the DME Exemption as written. However, Plaintiff asks this Court to defy South Carolina Supreme Court precedent and rewrite the DME Exemption to exempt Plaintiff from the State's constitutional sales and use tax. This Court should deny Plaintiff's request for two reasons. First, Plaintiff failed to carry its burden to overcome the presumption that the DME Exemption is constitutional. Second, even if Plaintiff were able to successfully carry its burden to overcome the presumption of constitutionality, the remedy is to declare the whole DME Exemption void. In either event, Plaintiff is not eligible for the DME Exemption.

I. The DME Exemption in Section 12-36-2120(74) is presumed constitutional, and Plaintiff cannot demonstrate that it violates the dormant commerce clause.

The purpose and effect of the DME Exemption is to promote economic development. The United States Supreme Court held: “No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry.” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271, 104 S.Ct. 3049, 3055, 82 L.Ed.2d 200 (1984). In *Boston Stock Exchange v. State Tax Comm’n*, a case cited by Plaintiff, the U.S. Supreme Court held:

Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. 318, 336–37, 97 S. Ct. 599, 610, 50 L. Ed. 2d 514 (1977). The DME Exemption does not cause products manufactured or business operations performed in other states to be discriminatorily taxed. The DME Exemption is not a tariff in intent or effect. The origin of durable medical equipment and related supplies is irrelevant to the DME Exemption. Nothing prevents a person qualifying for the DME Exemption from importing goods from out of state. Moreover, sales and use tax applies to tangible personal property not business operations. Therefore, the DME Exemption does not result in unconstitutional discrimination.

Interestingly, Plaintiff also cites *Amerada Hess Corp. v. Dir., Div. of Tax’n*, 490 U.S. 66 (1989) in which New Jersey denied an effective deduction by providing an add-back of federal windfall profit tax and taxpayers with crude-oil production out of state appealed. The appellants produced oil out of state and sold it in state. The appellants claimed that local independent retailers had more favorable tax treatment in violation of the Commerce Clause. Specifically, they argued “that the add-back provision, by denying a deduction for windfall profit tax payments, discriminates against oil producers who market their oil in favor of independent retailers who do not produce oil.” *Id.* at 78.

The Supreme Court affirmed the constitutionality of the taxing scheme and held that “the add-back provision does not discriminate against interstate commerce.” *Id.* “[A] deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing State.” *Id.* Other cases cited by Plaintiff involved state subsidies for local businesses and double taxation, which are both absent in the instant case. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) and *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015). Simply put, the United States Supreme Court’s concerns regarding unconstitutional taxation are not present in this case.

Like the Department, Plaintiff cites *Shasta* in support of its position. In *Shasta*, the Supreme Court concluded that the limitation of the tax exemption, which required soft drink bottlers to market its goods on its own “leased or owned soft drink trucks ... in the normally accepted store-door delivery method” was unconstitutional. The Court noted, “If a bottler conducts store-door delivery on its own trucks, then by definition it is no longer conducting its business solely in interstate commerce as it has a right to do. The discrimination against interstate commerce is apparent from the statutes themselves.” *Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm’n*, 280 S.C. 48, 51-52, 310 S.E.2d 655, 657 (1983). Unlike the soft drink tax exemption at issue in *Shasta*, no taxpayer is forced to give up its right to conduct business solely in interstate commerce in order to receive same tax advantage available to local taxpayers. *See id.* Plaintiff offered no claim that its ability to conduct business in interstate commerce has been hindered by the DME Exemption. It simply does not like South Carolina’s efforts to attract businesses to the state by affording a sales tax exemption.

II. If the Court determines the principal place of business requirement in the DME Exemption is unconstitutional, then the entire DME Exemption must be declared void.

If the DME Exemption as written is unconstitutional, the Court must declare the exemption in its entirety void. In *Shasta*, the South Carolina Supreme Court based its decision to strike the unconstitutional provision on its “opinion that the General Assembly would not have intended all bottlers to return to the antiquated use of tax crowns and lids for the payment of their tax in the event the limitation provision is found to be invalid.” *Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm’n*, 280 S.C. 48, 57, 310 S.E.2d 655, 660 (1983). In contrast, if the Court strikes down the exemption in its entirety, all taxpayers selling durable medical equipment and related supplies are on the same footing because all would be liable for sales and use tax. This does not subject taxpayers to some antiquated taxing system. In other words, retailers of durable medical equipment would follow the same taxing scheme as other retailers of tangible personal property.

If the Court finds a constitutional infirmity, the straightforward solution consistent with long-standing South Carolina case law on strictly construing tax exemptions against taxpayers is to limit, not expand, the exemption by striking the whole DME Exemption. Nearly a decade after *Shasta*, the South Carolina Supreme Court held this to be the appropriate remedy in *Thayer v. South Carolina Tax Com’n*, 307 S.C. 6, 413 S.E.2d 810 (1992). The appellant in *Thayer* asserted that her tax assessment be forgiven citing to *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, (1990). The South Carolina Supreme Court rejected the appellant’s assertion and held that “*McKesson* is inapplicable when, as here, taxpayers have been subjected to a constitutional tax.” *Thayer* at 13. The constitutional tax referenced is the very sales and use tax to which Plaintiff has been subjected and that it now asserts should be forgiven. As in *Thayer*, the Court should not create an exemption for which Plaintiff did not qualify before or after severance of a constitutional infirmity.

Therefore, the proper remedy would be to sever the entire DME Exemption and deny Plaintiff an exemption for which it never qualified.

CONCLUSION

For the reasons discussed above and in the Department's Motion for Summary Judgment, section 12-36-2120(74) is constitutional, but clearly does not apply to Plaintiff. However, if the exemption were unconstitutional, the remedy is to strike the entire exemption from the Code, not to make the exemption universally applicable. Therefore, Plaintiff cannot receive the DME Exemption.

WHEREFORE, the Department asks that this Court enter an order finding that section 12-36-2120(74) is constitutional and that the Department's Motion for Summary Judgment is granted.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

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Columbia, South Carolina
August 1, 2022

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT

Orthofix Inc.

Plaintiff,

vs.

South Carolina Department of Revenue,

Defendant.

Case No. 2021-CP-32-02752

**ORTHOFIX INC.'S MEMORANDUM
IN OPPOSITION TO THE SOUTH
CAROLINA DEPARTMENT OF
REVENUE'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff Orthofix Inc. ("Orthofix" or "Plaintiff" herein), submits this memorandum opposing the South Carolina Department of Revenue's ("Defendant's") Motion for Summary Judgment. As set forth herein, this Court should deny Defendant's Motion for Summary Judgment¹ because, as demonstrated in Plaintiff's Motion for Summary Judgment filed with this Court on July 8, 2022 ("Plaintiff's Motion," cited as "Pl. Mot."), as a matter of law the exemption from sales tax for durable medical equipment provided in South Carolina Code § 12-36-2120(74) (the "Durable Medical Equipment Exemption," or the "Exemption") violates the dormant Commerce Clause by discriminating against out-of-State sellers such as Plaintiff. This infirmity may be cured by severing the constitutional portion of the Exemption from the unconstitutional requirement. Therefore, for the period of March 1, 2017 through March 31, 2020 (the "Period at Issue"), Plaintiff is entitled to the Exemption from sales tax.

¹ Defendant's Motion for Summary Judgment was accompanied by a Memorandum in Support of its Motion for Summary Judgment. Collectively, both of these documents will be referred to herein as "Defendant's Motion," while the Memorandum in Support of Defendant's Motion for Summary Judgment will be cited as "Def. Memo."

ARGUMENT²

Defendant's Motion states that under the dormant Commerce Clause of the U.S. Constitution, taxpayers may not be "forced to give up their right to conduct their business solely in interstate commerce in order to receive the same tax advantage available to local taxpayers." Def. Memo. at 6. Plaintiff wholeheartedly agrees. But by limiting the tax benefit provided by the Durable Medical Equipment Exemption to sellers whose "principal place of business" is in South Carolina, the Exemption as written *would force Plaintiff to move* their "principal place of business" to South Carolina to receive equal tax treatment. If requiring such a move to qualify for the Exemption does not constitute being "forced" to give up the right to do business in interstate commerce in order to receive a tax advantage available to local South Carolina taxpayers (i.e., those taxpayers with a "principal place of business" in South Carolina), it is hard to conceive what would.

The Durable Medical Equipment Exemption plainly violates the dormant Commerce Clause's prohibition against economic protectionism. Therefore, the "invalidity" of the Exemption "appears so clearly as to leave no room for reasonable doubt that it violates" the dormant Commerce Clause. *Joytime Distrib. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (quoted in Def. Memo. at 3). Defendant's arguments that the Exemption is constitutional do not withstand scrutiny.

I. The Durable Medical Equipment Exemption's Requirement that a Seller Have its Principal Place of Business in South Carolina is *Per Se* Invalid

While Defendant correctly states the law that "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid" (Def. Memo. at 3, quoting *Joytime*

² All citations to "Stip." are to the Stipulation of Facts entered between Plaintiff and Defendant and filed with this Court on May 6, 2022. Plaintiff agrees with Defendant that the facts jointly filed Stipulation of Facts evidences the undisputed nature of the material facts in this matter.

Distrib., 338 S.C. at 640, 528 S.E.2d at 650), it ignores that “the discrimination against interstate commerce is apparent from the [Exemption] statute[]” itself. *Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm’n*, 280 S.C. 48, 53, 310 S.E.2d 655, 658. “State laws discriminating against interstate commerce on their face are ‘virtually *per se* invalid.’” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Oregon Waste Sys. Inc. v. Dept. of Envt. Quality of Ore.*, 511 U.S. 93, 99 (1994)) (emphasis in original).

Defendant recites the elements for withstanding a dormant Commerce Clause challenge stated by the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), but discusses the elements as applied to the sales tax generally, rather than the exemption from sales taxation challenged here. *See* Def. Memo. at 4. Defendant offers regarding the critical element in *Complete Auto* (addressing discrimination): “The *sales tax* does not discriminate against interstate commerce because it ‘applies to all sales made within this State without regard to the intended use either within or without South Carolina.’” Def. Memo. at 4-5 (emphasis added) (quoting *Int’l Harvester Co. v. Wasson*, 281 S.C. 458, 462, 316 S.E.2d 378, 380 (1984)). But what is challenged here is the *exemption* from sales tax for certain sales of durable medical equipment, not the imposition of the sales tax in general. Curiously, Defendant makes no attempt to assert that the *Exemption* satisfies the *Complete Auto Transit* elements.

Defendant relies on *International Harvester*, which instead supports Plaintiff’s case. In *International Harvester*, the sales tax on the local activity (sale of property) applied “whether made by local businesses or made by businesses outside the state so long as delivery is within South Carolina.” *Int’l Harvester*, 281 S.C. at 461, 316 S.E.2d at 380. The South Carolina Supreme Court ruled the tax was constitutional because “there [was] no discrimination since both local and foreign businesses are treated alike.” *Id.* The Court contrasted this to the situation in the U.S. Supreme

Court case *Maryland v. Louisiana*, 451 U.S. 725 (1981):

Unlike the use tax situation in *Maryland v. Louisiana*, supra, where in-state users were given credits against the use tax and this derived an advantage over other users, the instant sales tax does not favor sales by local sellers but rather treats all sellers equally.

Int'l Harvester, 281 S.C. at 462, 316 S.E.2d at 380. Limiting the Durable Medical Equipment Exemption to “local businesses” operates as a credit against the sales tax, and in doing so the Exemption violates the mandate of *International Harvester* (not to mention other cases cited herein and in Plaintiff’s Motion) because in-State and out-of-State businesses are *not* treated alike. Consequently, the Exemption does not satisfy the third element of *Complete Auto Transit*.

II. Promotion of Economic Development Does Not Excuse Unconstitutional Discrimination by the Durable Medical Equipment Exemption

Plaintiff’s Motion relies on several U.S. Supreme Court and South Carolina Supreme Court cases to demonstrate that the Exemption’s requirement that a seller have its “principal place of business” in South Carolina is unconstitutionally discriminatory and operates as a punitive tariff. Pl. Mot. At 7-9 (citing *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318 (1977); *Fulton Corp.*, 516 U.S. 325; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); and *Shasta Beverages*, 280 S.C. 48, 310 S.E.2d 655). Meanwhile, Defendant’s Motion cites *no case law whatsoever* for its broad claim that the Exemption is “constitutionally valid because it furthers a legitimate government interest in promoting economic development” in South Carolina. Def. Memo. at 5. Defendant’s Motion only identifies other exemptions set forth in South Carolina sales tax statutes made available to certain taxpayers with South Carolina operations, and summarily

concludes that the mere existence of these other statutory exemptions proves the constitutionality of the Durable Medical Equipment Exemption. *See* Def. Memo. at 6.³

While Plaintiff agrees that States often use tax laws to incentivize in-State business activity, each incentive nevertheless must pass constitutional muster. To conclude otherwise would ignore U.S. and South Carolina Supreme Court precedent.

For example, New York's stock transfer tax incentive struck down in *Boston Stock Exchange* (which provided a lower tax if a stock transfer was made through a New York-based exchange) was passed in response to a "concern" that the stock transfer tax "created a competitive disadvantage for New York trading and was thus responsible for the growth of out-of-state exchanges." 429 U.S. at 323-24. While the New York State Court of Appeals held that the stock transfer tax incentive was "a nondiscriminatory, and therefore constitutionally permissible, means of 'encouraging' sales on the New York Stock Exchange," the U.S. Supreme Court struck it down on the basis that it "discriminate[d] against interstate commerce in violation of the [dormant] Commerce Clause." *Id.* at 328. In doing so, the Court flatly rejected the promotion of economic development as an acceptable justification for discriminatory tax provisions.

In his seminal state and local tax treatise, University of Georgia tax law professor Walter Hellerstein analyzes U.S. Supreme Court case law addressing the constitutionality of State tax incentives under the dormant Commerce Clause (including in the *Boston Stock Exchange* and *Westinghouse* cases) and contrasts tax exemptions that are not unconstitutionally discriminatory with those exemptions that are. Jerome R. Hellerstein, Walter Hellerstein & Andrew Appleby, *State Taxation* ¶ 4.14[3][b][v] (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with

³ Whether the other tax exemptions identified in Defendant's Motion are constitutional is not before this Court as neither party has requested this Court to make a determination with respect to any sales tax exemption other than the Durable Medical Equipment Exemption.

updates through April 2022) (online version accessed on Checkpoint (www.checkpoint.riag.com) July 14, 2022).⁴

Professor Hellerstein explains that tax exemptions intended to incentivize in-State activity may be constitutionally sustainable if they do not “rely on the coercive power of the state to compel a choice favoring in-state investment.” *Id.* A tax exemption that does not unconstitutionally discriminate says, in effect, “Come to our state and we will not saddle you with any additional property or sales tax burdens. Moreover, should you choose not to accept our invitation, nothing will happen to your tax bill—at least nothing that depends on our taxing regime.” *Id.*

By contrast, the U.S. Supreme Court has consistently found unconstitutional exemptions where a State said, in effect:

You are already subject to our taxing power because you have engaged in taxable activity in this state. If you would like to reduce those burdens, you may do so by directing additional business activity into this state. Should you decline our invitation, we will continue to exert our taxing power over you as before, and your tax bill might even go up.

Id.

Here, the Durable Medical Equipment Exemption clearly falls under Professor Hellerstein’s second scenario. There is no dispute that Plaintiff is generally subject to South Carolina sales tax because it sells durable medical equipment to customers in the State. *Stip.* ¶ 2. With the Exemption’s requirement that a seller have its “principal place of business” in South Carolina to qualify, the State is in effect offering to reduce a preexisting tax burden to taxpayers that direct additional business activity to South Carolina. Thus, the Exemption’s language imposes

⁴ The U.S. Supreme Court regularly cites Professor Hellerstein’s articles and his treatise in support of the conclusions reached in their decisions applying the dormant Commerce Clause to U.S. state and local tax issues. *See, e.g., South Dakota v. Wayfair*, 138 S. Ct. 2080, 2092 (2018); *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 561 (2015) (citing Professor Hellerstein’s treatise); *Ala. Dep’t of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 28 (2015) (citing Professor Hellerstein’s treatise); *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 25, 27, 29, 31 (2008) (citing Professor Hellerstein’s treatise).

the very type of discriminatory requirement that the U.S. Supreme Court consistently strikes down as unconstitutional. The purported desire to incentivize in-State activity does not excuse the Exemption's unconstitutionally discriminatory requirement.

III. The Unconstitutional Burden on Interstate Commerce Included in the Durable Medical Equipment Exemption is Not "Incidental"

Next, Defendant claims that if the Durable Medical Equipment Exemption discriminates against interstate commerce, the burden created by such discrimination must be excused because it is "incidental or *de minimis*." Def. Memo. at 6. Not only does Defendant fail to offer any meaningful authority for the claim, but the argument is little more than speculation and conjecture of how the burden "presumably" or "may" be justifiable. *See id.*

To place the argument in context, South Carolina's statewide sales tax rate is six percent⁵—meaning that, if Plaintiff and a competitor sell a product at the same price in South Carolina before sales tax, but the competitor's sale is not subject to sales tax by application of the Exemption, Plaintiff's final sale price will be six percent higher than its competitor. Bafflingly, Defendant justifies this discriminatory outcome by speculating that "[p]resumably, a taxpayer whose principal place of business is in South Carolina would compensate the State through payment of other taxes for enjoyment of the opportunities and protections it receives," so that the Exemption as written "*may* help level the playing field between taxpayers shouldering additional tax burdens due to having their principal place of business in this State." *Id.* (emphasis added). No case law is cited for the proposition as none exists, and the argument has at least three glaring and fatal flaws.

First, "the U.S. Supreme Court has flatly rejected the notion of a "de minimis" defense to an allegation that a tax is discriminatory under the Commerce Clause." *Owner Operator Indep.*

⁵ This 6 percent rate consists of a base 5 percent rate under S.C. Code § 12-36-910(A), plus an additional 1 percent rate under S.C. Code § 12-36-1110. *See also* <https://dor.sc.gov/tax/sales> (last accessed July 14, 2022).

Drivers Ass'n v. N.Y. State Dep't of Taxation & Fin., 34 N.Y.S.3d at 338-39 (citing *Fulton Corp.*, 516 U.S. at 333 n.3).

Second, Defendant's conclusion that "[n]o taxpayer is forced to give up their right to conduct business solely in interstate commerce in order to receive the same tax advantage available to local taxpayers" is blatantly incorrect—as outlined above, the Exemption's requirement that a taxpayer have its "principal place of business" in South Carolina would force sellers of durable medical equipment to relocate their principal place of business to South Carolina⁶ in order to qualify for the Exemption's "tax advantage" that is made available only to South Carolina-based sellers. Def. Memo. at 6. "For over 150 years, [the U.S. Supreme Court's] cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer." *West Lynn Creamery Corp. v. Healy*, 512 U.S. 186, 202 (1994)).

Third, Defendant's claim that the discriminatory impact of the Exemption be excused because local taxpayers pay other South Carolina taxes operates in a vacuum, wholly disregarding the fact that companies having a principal place of business in another State will inevitably shoulder increased burdens of "other taxes for enjoyment of the opportunities and protections it receives" in that other State. Def. Memo. at 6.

IV. The Durable Medical Equipment Exemption May Be Preserved by Severing its Nondiscriminatory Elements

Contrary to Defendant's claim, there is a straightforward cure to the constitutional infirmity within the Durable Medical Equipment Exemption—eliminate the unconstitutional language that

⁶ Defendant in fact raises this obligation to relocate in its Motion when asserting the economic development justification for the Exemption. Def. Memo. at 6. Defendant's arguments thus contradict one another.

discriminates against out-of-State taxpayers like Plaintiff.

In *Shasta Beverages*, the South Carolina Supreme Court reviewed two statutes within South Carolina's (since repealed) soft drink tax, one that limited "the availability of a discount and exemption in the amount of annual tax" to bottlers marketing goods on their own "leased or owned soft drink trucks . . . in the normally accepted store-door delivery method," and another that provided an "alternate method of paying" the tax that foreclosed bottlers conducting their business in interstate commerce from using the alternate method. *Shasta Beverages*, 280 S.C. at 50-51, 310 S.E.2d at 656-57. Holding "[t]he discrimination against interstate commerce [was] apparent from the statutes themselves," the South Carolina Supreme Court determined the "single concept" of the discount statute was unconstitutional in its entirety, while the alternate reporting method statute "should simply be made available to the claimants here and to all other bottlers in their circumstances who are paying soft drink taxes to the State of South Carolina." *Id.*, 280 S.C. at 53, 56-58, 310 S.E.2d at 658-60. Thus, with respect to the alternative method statute, the Court excised only the unconstitutionally discriminatory language from the statute and left the rest of the statute intact. *Id.* The Court called the original method of reporting tax "antiquated," concluding the South Carolina General Assembly "would not have intended all bottlers to return" to using it. *Id.*, 280 S.C. at 57, 310 S.E.2d at 660.

The same logic applies here. "The principle that a statute may be constitutional and valid in part and unconstitutional and invalid in part is generally recognized." *Strom v. AMVETS*, 280 S.C. 146, 148, 311 S.E.2d 721, 723 (1984) (quotation omitted). The "vast majority" of States do not subject durable medical equipment to sales tax.⁷ And of those states that specifically exempt

⁷ Nevada Secretary of State Barbara K. Cegavske, *State of Nevada Statewide Ballot Questions 2016* at 44, available at <https://web.archive.org/web/20161110005645/https://www.nvsos.gov/Modules/ShowDocument.aspx?documentid=4434> (last accessed July 15, 2022) (explaining that a subsequently passed constitutional amendment to exempt durable

durable medical equipment paid for by Medicare and Medicaid programs, South Carolina is the only State that includes the extra requirement that such equipment must be purchased from a company having its “principal place of business” in the State to qualify for the exemption.⁸ Defendant does not cite any support for its claim that the General Assembly “would not have passed the exemption without” the principal place of business element, nor is there any specific legislative intent or purpose set forth in the text or title of the legislation adding the Exemption. Def. Memo. at 8; 2007 Act No. 99 (enacted June 19, 2007); *see also Joytime Distrib.*, 338 S.C. at 649, 528 S.E.2d at 655 (“it is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature”). Indeed, there is nothing that suggests the several parts of the Exemption cannot be treated independently.

Keeping durable medical equipment for sales to beneficiaries of Medicare and Medicaid out of the sales tax base is sound policy. The vast majority of States exempt from sales taxation durable medical equipment for beneficiaries of these federal and State programs aimed to protect and preserve the health of the most vulnerable populations,⁹ and it is difficult to imagine that, if faced with the choice of severing the unconstitutional portion of the Durable Medical Equipment Exemption so that all sellers benefit from transacting with South Carolina’s elderly and poor residents or instead eliminate the Exemption entirely, the General Assembly would choose to expand the tax burden on such transactions in a step out of line with the vast majority of other States. As such, this Court may “fairly presume[]” that the General Assembly “would have

medical equipment from Nevada sales tax would “help[] sick, injured, and dying patients and their families” and “bring Nevada in line with the vast majority of states which do not tax this type of equipment for home use”).

⁸ See, e.g., the sales tax exemptions provided by Alabama (Ala. Code § 40-9-30(d)), Arizona (Ariz. Rev. Stat. Ann. § 42-5061(A)(13)); and Mississippi (Miss. Code Ann. § 27-65-105). While these States have exemptions for medical equipment that specifically apply to equipment purchased under Medicare or Medicaid, none of these States’ exemptions are limited to in-State sellers.

⁹ *Supra* note 7.

passed” the Exemption “independent of” the language “which conflicts with the Constitution.” *Joytime Distrib.*, 338 S.C. at 648-49, 528 S.E.2d at 654.

V. Defendant’s “Cure” to the Exemption’s Constitutional Infirmary is Also Unconstitutional

Separately, Defendant’s assertion that the cure for the Exemption’s constitutional infirmity is to eliminate it in whole, thereby foreclosing Plaintiff from the tax benefit that had been afforded to in-State taxpayers for which Plaintiff properly asserted claims for refund, creates *yet another* constitutional infirmity. As stated by the U.S. Supreme Court, “[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.” *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990). As explained in *McKesson*, the Due Process Clause of the U.S. Constitution requires a taxpayer wrongly subjected to a discriminatory tax scheme to be provided *actual* relief. Here, eliminating the Durable Medical Equipment Exemption alone does not cure the discriminatory treatment of Plaintiff and similarly situated out-of-State sellers as compared to competing sellers of durable medical equipment whose principal place of business was in South Carolina during the Period at Issue.¹⁰

When a taxpayer has been subjected to a discriminatory tax regime violating the dormant Commerce Clause, the U.S. Supreme Court has identified three potential remedies: (1) the State

¹⁰ This case is distinguishable from the situation presented in *Thayer v. S.C. Tax Commission*, 307 S.C. 6, 13, 413 S.E.2d 810, 815 (1992), where the South Carolina Supreme Court rejected retroactive relief under *McKesson* by application of the “companion case” *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990). In *American Trucking*, the U.S. Supreme Court did not require any retroactive relief under the Due Process Clause because the tax at issue in that case had been established “in reliance on the . . . precedents” of the U.S. Supreme Court, and a “State cannot be expected to foresee that a decision of [the U.S. Supreme Court] would overturn established precedents.” *Id.* at 182-83. By contrast, “[w]here a State can easily foresee the invalidation of its tax statutes, its reliance interests may merit little concern.” *Id.* Here, given that the discriminatory language of the Exemption has been repeatedly found unconstitutional by the U.S. and South Carolina Supreme Courts (*see Shasta Beverages*), “[t]he State can hardly claim surprise at the [South Carolina] courts’ invalidation of the scheme.” *Id.* at 182; *see also Fulton Corp.*, 516 U.S. at 331 (“State laws discriminating against interstate commerce on their face are ‘virtually *per se* invalid.’”).

may refund the “difference between the tax [a taxpayer] paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received”; (2) “the State may assess and collect back taxes from [the taxpayer’s] competitors who benefited from the rate reductions during the contested tax period”; or (3) the State may provide a “combination of a partial refund to [the taxpayer] and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriminate against interstate commerce.” *McKesson Corp.*, 496 U.S. at 40-41.

The Period at Issue in this case began March 1, 2017, long after the statute of limitations for assessing favored in-State competitors had passed.¹¹ It is impractical, if not impossible, for Defendant to “assess and collect back taxes from [Plaintiff]’s competitors who benefitted from the [Exemption] during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme.” *McKesson Corp.*, 496 U.S. at 40. Consequently, the only constitutionally adequate option is a refund of sales tax paid by Plaintiff on sales during the Period at Issue that would have qualified for the Durable Medical Equipment Exemption if the Exemption did not have the unconstitutional requirement that a taxpayer have its “principal place of business” in South Carolina. This outcome is also consistent with South Carolina’s tax scheme and the handling of refund claims for taxpayers that prevail on claims that a tax has been imposed wrongfully as a matter of law. *See* S.C. Code § 12-60-480. Based on the foregoing, Defendant’s

¹¹ Under South Carolina law, generally “taxes must be determined and assessed within thirty-six months [i.e., three years] from the date of the return or document was filed or due to be filed, whichever is later.” S.C. Code § 12-54-85(A). A typical taxpayer must file its sales tax returns monthly. *See* S.C. Code § 12-36-2580 (only allowing quarterly returns when a taxpayer’s sales tax liability “does not exceed one hundred dollars for any month”). Therefore, the statute of limitations for most (if not all) of Plaintiff’s competitors during much of the Period at Issue has already passed.

claim that Plaintiff is not entitled to a refund, even if the Exemption is unconstitutional, is erroneous as a matter of law.

VI. CONCLUSION

Because there are no genuine issues of material fact in dispute, and for the reasons stated herein, Plaintiff Orthofix respectfully requests that this Court enter judgment in its favor as outlined in its Motion for Summary Judgment, deny Defendant's Motion for Summary Judgment, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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August 1, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT

Orthofix Inc.

Plaintiff,

vs.

South Carolina Department of Revenue,

Defendant.

Case No. 2021-CP-32-02752

**ORTHOFIX INC.'S REPLY TO THE
SOUTH CAROLINA DEPARTMENT
OF REVENUE'S RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff Orthofix Inc. ("Orthofix" or "Plaintiff" herein), submits this memorandum replying to the South Carolina Department of Revenue's ("Defendant's") Response to Plaintiff's Motion for Summary Judgment.

I. PURPORTED INTENT TO PROMOTE ECONOMIC DEVELOPMENT CANNOT SALVAGE DISCRIMINATORY LANGUAGE IN THE DURABLE MEDICAL EQUIPMENT EXEMPTION STATUTE

Defendant's Response opens with the broad claim that "[t]he purpose and effect of the [Durable Medical Equipment] Exemption is to promote economic development." Def. Resp. at 2. While the inference that promoting economic development was the primary (if not the sole) purpose of the Exemption is questionable due to the Department's own public guidance (*see* Section II), as explained in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment: (1) the promotion of economic development does not excuse unconstitutionally discriminatory tax statutes; and (2) under U.S. and South Carolina Supreme Court precedent, the Exemption is unconstitutionally discriminatory. (Pl. Opp. Memo at 4-6).

In an attempt to excuse the unconstitutional nature of the Exemption's statute's limitation to equipment and related supplies "sold by a provider . . . whose principal place of business is located in" South Carolina, Defendant's Response claims that the Exemption "does not cause products manufactured or business operations performed in other states to be discriminatorily

taxed.” Def. Resp. at 2.

But under South Carolina law, “[a] sales tax . . . is imposed upon every person engaged or continuing within [South Carolina] in the business of selling tangible personal property at retail.” S.C. Code § 12-36-910(A). The most recent version of the South Carolina Sales and Use Tax Manual, dated December 2021, *which is prepared and released by Defendant*, acknowledges that “[u]nlike most other states, South Carolina’s sales tax is a ‘vendor’ tax,” meaning that “the retailer is liable for the tax, regardless of whether or not the sales tax is collected by the retailer from the purchaser.” S.C. Dep’t of Revenue – Policy Div., *South Carolina Sales and Use Tax Manual* (Dec. 2021) at Introduction.¹

As the South Carolina sales tax is imposed upon vendors (such as Plaintiff), the fact that the Durable Medical Equipment Exemption statute provides relief solely to vendors with a “principal place of business” in South Carolina means that the Exemption, in effect, does cause business operations performed outside of South Carolina to be discriminatorily subjected to tax. Or, in other words, the fact that the Exemption does not discriminate on the basis of the location where durable medical equipment is manufactured does not excuse the broader discrimination on the basis of the location where the durable medical equipment vendor has its principal place of business.

Further, Defendant’s Response argues that *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66 (1989) supports the constitutionality of the Exemption’s discriminatory language when the case does nothing of the sort. That case examined New Jersey’s corporate income tax, which added back to New Jersey taxable income a federally allowable deduction from income for a federal windfall profit tax imposed on producers of crude oil. While Defendant is

¹ Available at <https://dor.sc.gov/resources-site/lawandpolicy/Documents/SC%20Sales%20Tax%20Manual.pdf> (last accessed Oct. 28, 2022).

correct that the U.S. Supreme Court found the add back was not unconstitutionally discriminatory, Defendant misses the reason why. Defendant cites language from *Amerada Hess* stating that “a deduction denial” such as that applied to the federal windfall profit tax “does not unduly burden interstate commerce just because the deduction denied relates to economic activity performed outside the taxing State.” *Id.* at 78 n. 10 (quoted by Def. Resp. at 3).

Defendant, however, leaves out the first part of the sentence making such statement. The sentence in full states the following: “Thus, *in the absence of discriminatory intent* or a statute directed specifically at economic activity that occurs only in a particular location [citation omitted], a deduction denial does not unduly burden interstate commerce just because the deduction denied relates to an economic activity performed outside the taxing State.” *Id.* (emphasis added). *Id.* In *Amerada Hess*, there could be no such discriminatory intent because New Jersey as a State lacks oil reserves, so “[d]enying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for oil producers to move their oil-producing activities to New Jersey.” *Id.* at 78.

Finally, Defendant’s Response does not fully address the implications of *Shasta Beverages (A Division of Consolidated Foods Corp.) v. S.C. Tax Commission*, 280 S.C. 48, 301 S.E.2d 655 (1983). That case focused on two provisions of South Carolina’s (since repealed) soft drink tax and found both to be unconstitutionally discriminatory. Most relevant to this case is the provision that provided a beneficial “alternate method of paying the tax, but limit[ed] its use to certain bottlers.” 280 S.C. at 50, 310 S.E.2d at 656. Such alternative method was provided either to (1) bottlers who “conduct store-door delivery in South Carolina” or (2) “any bottler whose plant is located” in South Carolina. 280 S.C. at 52, 310 S.E.2d at 657. According to the South Carolina Supreme Court, “the provision that the [beneficial] reporting method shall be available to any

bottler whose plant is located in” South Carolina made the existence of unconstitutional “discrimination . . . *even clearer*.” *Id.* (emphasis added).

Just like in *Shasta*, the Durable Medical Equipment Exemption provides Plaintiff with a choice – move its principal place of business to South Carolina, or do not receive the Exemption. This is just as unconstitutional as the South Carolina statute examined in *Shasta* providing a tax benefit for moving a bottling plant to the State.

II. SOUTH CAROLINA PRECEDENT SUPPORTS PRESERVING CONSTITUTIONALITY OF DURABLE MEDICAL EQUIPMENT EXEMPTION BY SEVERING NONDISCRIMINATORY STATUTE LANGUAGE

For the reasons outlined in Plaintiff’s Opposition Memorandum: (1) South Carolina precedent supports the preservation of the Durable Medical Equipment Exemption by severing and preserving the nondiscriminatory portion of the Exemption’s statutory language (Pl. Opp. Memo at 8-11); while (2) eliminating the Exemption in whole would not cure the discriminatory treatment of Plaintiff because it is impractical, if not impossible, for Defendant to assess competing sellers of durable medical equipment whose principal place of business was in South Carolina during the Period at Issue (Pl. Opp. Memo at 11-13).

Defendant provides *no support* for its suggestion (by citing *Shasta*) that the South Carolina General Assembly would have intended, in contrast with the law of all other states that exempt from sales tax durable medical equipment paid for by Medicare and Medicaid programs, to eliminate the Exemption if it could not solely apply to sales by companies having a principal place of business in South Carolina. *See* Pl. Opp. Memo at pgs. 9-10 & n. 8.

Notably, even Defendant’s own publications suggest that the primary intention of the Exemption is to provide a “general public good exemption” rather than support in-State economic development, placing the Exemption in the same category as exemptions for: “[m]eals provided

to elderly or disabled persons at home by nonprofit organizations,” “[m]edicine and prosthetic devices sold by prescription,” “[h]earing aids,” and “[m]edicine and medical supplies, including diabetic supplies and diabetic diagnostic and testing equipment, sold to a health care clinic providing free medical and dental care to all patients.”² Severing the Exemption from its unconstitutional language would serve the “general public good” that Defendant repeatedly claims is indeed the primary purpose of the Exemption.

Further, in supporting its position that the Exemption should be eliminated in full, Defendant misconstrues the South Carolina Supreme Court’s determination in *Thayer v. S.C. Tax Commission*, 307 S.C. 6, 413 S.E.2d 810 (1992). In *Thayer*, the South Carolina Supreme Court faced a constitutional challenge (under the First Amendment, rather than the Commerce Clause) to a sales tax exemption under S.C. Code § 12-36-2120(8), which stated (and notably, still states to this day) that an exemption from sales tax is provided for “newsprint paper, newspapers, and religious publications, including the Holy Bible.” The taxpayer was a publisher of a publication that collected “advertisements placed by real estate brokers to publicize homes available for purchase.” 307 S.C. at 8, 413 S.E.2d at 812. The taxpayer alleged, and the Court held, that the exemption given to religious publications violated the establishment clause of the First Amendment – even though the Court rejected an allegation that the exemption given to newspapers violated the free press clause of the First Amendment. 307 S.C. at 9-10, 413 S.E.2d at 813.

This left open the question of severability. While the exemption statute at hand broadly provided an exemption for newspapers and religious publications, the Court’s determination that

² S.C. Dep’t of Revenue, *South Carolina Sales and Use Tax Manual* (Dec. 2021) (Chapter 9, pgs. 16-19 identify “General Public Good Exemptions” and include the Durable Medical Equipment Exemption on pg. 18) (available at <https://dor.sc.gov/resources-site/lawandpolicy/Documents/SC%20Sales%20Tax%20Manual.pdf> (last accessed Oct. 28, 2022)); S.C. Dep’t of Revenue, *South Carolina Tax Incentives for Economic Development* (Jan. 2022) (Chapter 7, pgs. 18-20 identify “General Public Good Exemptions” and include the Durable Medical Equipment Exemption on pg. 19) (available at <https://dor.sc.gov/resources-site/lawandpolicy/Documents/SCTIED-2022-Complete%20Manual.pdf> (last accessed Oct. 28, 2022)).

the exemption for religious publications was unconstitutional *did not* cause the Court to throw out the exemption in total. Instead, the Court allowed the constitutional portion of S.C. Code § 12-36-2120(8) (during the years at issue in *Thayer* numbered as section 12-35-550(7)) applicable to newspapers to remain in place (as it does to this day) on the basis that the “constitutional portion of the statute remain[ed] complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution.” 307 S.C. at 13, 413 S.E.2d at 814-15 (internal quotation omitted). This is exactly what Plaintiff is requesting – eliminate the unconstitutional portion of the Durable Medical Equipment Exemption statute and keep the rest of the statute in place.

Defendant’s discussion about the proper application of *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) fails to consider that the *Thayer* Court discussed *McKesson* in the context of constitutionally required remedies under due process – and *not* in the context of determining the severability of a statute with an unconstitutional element. As discussed in Plaintiff’s Opposition Memorandum, the constitutional infirmity caused by eliminating the Exemption in whole arises if Defendant fails to provide the refund requested while allowing other taxpayers to claim the Exemption for the Period at Issue. Nothing in the *Thayer* decision suggests that the taxpayer in that case made a constitutional argument regarding the need for a remedy to cure a discriminatory imbalance in previously received tax benefits – in fact, *Thayer* does not address discrimination at all.

III. CONCLUSION

Because there are no genuine issues of material fact in dispute, and for the reasons stated in Plaintiff's Motion, Plaintiff Orthofix respectfully requests that this Court enter judgment in its favor as outlined in its Motion for Summary Judgment, deny Defendant's Motion for Summary Judgment, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/Rick Reames, III

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October 28, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CIVIL ACTION NO.: 2021-CP-32-02752
	)	
Orthofix, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SOUTH CAROLINA DEPARTMENT OF
	)	REVENUE'S REPLY TO PLAINTIFF'S
	)	RESPONSE TO THE DEPARTMENT'S
	)	MOTION FOR SUMMARY JUDGMENT
South Carolina Department of Revenue,	)	
	)	
Defendant.	)	

**TO: RICK REAMES, III, ESQUIRE, AND JENNIFER J. HOLLINGSWORTH,
ESQUIRE, ATTORNEYS FOR PLAINTIFF AND TO PLAINTIFF ABOVE-
NAMED:**

Defendant, the South Carolina Department of Revenue (Department), submits this Reply to Plaintiff's Response to the Department's Motion for Summary Judgment. The Department incorporates all arguments from its primary memorandum and its memorandum in opposition to the Plaintiff's motion for summary judgment. For the following reasons, Plaintiff's arguments are unpersuasive, and the Court should deny Plaintiff's Motion and grant the Department's Motion. The undisputed, material facts demonstrate that Plaintiff is not entitled to the exemption from sales tax for gross proceeds of the sales of durable medical equipment and related supplies as a matter of law.

ARGUMENT

Plaintiff does not qualify for the DME Exemption. The General Assembly explicitly excluded taxpayers like Plaintiff, yet Plaintiff asks this Court to grant the exemption anyway. Since Plaintiff does not qualify for the DME Exemption as written, it suggests that the Court should effectively rewrite the DME Exemption so it will qualify. Plaintiff goes so far as to explain why its proposed new DME Exemption would "serve the general public good." Whether or not Plaintiff

believes an unlimited durable medical equipment sales tax exemption is good public policy is irrelevant. The Department, as part of the executive branch, and this Court, as part of the judicial branch, do not legislate. The Department must administer the law as written, and the Court must uphold the Legislature's laws within constitutional bounds. Only the Legislature can decide whether a broad DME Exemption is good or bad policy for South Carolina. Because Plaintiff asks this Court to ignore the clear principles of separation of powers, the Court should deny Plaintiff's request. First, Plaintiff failed to carry its burden to overcome the presumption that the DME Exemption is constitutional. Second, even if Plaintiff were able to successfully carry its burden to overcome the presumption of constitutionality, the remedy is to declare the whole DME Exemption void without retroactivity. Ultimately, Plaintiff is not eligible for the DME Exemption.

I. The DME Exemption in Section 12-36-2120(74) is presumed constitutional, and Plaintiff cannot demonstrate that it violates the dormant commerce clause.

A. Plaintiff cannot overcome the presumption of constitutionality and negate every conceivable basis to support the DME Exemption beyond a reasonable doubt.

The burden is upon the taxpayer to prove the unconstitutionality of a tax beyond a reasonable doubt, and he must negate every conceivable basis that might support it. *Sandy Springs Water Co. v. Dep't of Health & Env't Control*, 324 S.C. 177, 181, 478 S.E.2d 60, 62 (1996). The Department offered one such conceivable basis: the purpose and effect of the DME Exemption is to promote economic development. The United States Supreme Court has held "that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984). Conversely, under Plaintiff's logic, all economic development exemptions would be unconstitutional. For example, an artist of Texas who uses locally grown sweetgrass is ineligible for the sales tax exemption offered to artists of South Carolina. *See* S.C. Code Ann. § 12-36-2120(64). As another example, the numerous sales tax exemptions for equipment and construction materials contingent on the taxpayer investing in real

or personal property in the State would “force” taxpayers to give up the right to do business in interstate commerce. *See* S.C. Code Ann. § 12-36-2120(51), (65), (67), and (72). A third example is found in Section 12-36-2691, which effectively provides a five-year sales and use tax exemption for a taxpayer if it has a distribution facility and invests at least \$125 million and maintains 1,500 full-time jobs in the State. The Code is replete with tax exemptions that would be subject to the same constitutional challenge if the Court adopts Plaintiff’s position. These tax exemptions go beyond those applicable to sales and use tax and would extend to other taxes like the motor fuel user fee credit, which only benefits South Carolina filers. Although only the DME Exemption is before the Court, the consequences granting Plaintiff Motion for Summary Judgment will extend much further.

Still, economic development is only one basis to support the DME Exemption. Another basis could be to shorten the supply chain to ensure South Carolina’s “most vulnerable populations” have access to durable medical equipment. Perhaps, the Legislature had the foresight to pre-empt potential supply shortages like those experienced during the COVID-19 pandemic. Regardless, Plaintiff must prove beyond a reasonable doubt—the same burden of proof that the State must carry to convict a person of a capital crime—that no conceivable basis exists to support the statute. South Carolina currently has eighty-three (83) sales and use tax exemptions, not including effective exemption like Section 12-36-2691. Notably, Plaintiff cites no sales tax exemption declared in violation of the Commerce Clause.

B. Any burden on interstate commerce is incidental.

Plaintiff confuses the Department’s use of the terms “incidental” and “*de minimus*.” The United States Supreme Court prohibits an unconstitutional tax no matter how small—i.e. incidental or *de minimus*. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334, n.3 (1996). However, the United States Supreme Court allows a constitutional tax that has an incidental or *de minimus* effect on interstate commerce. *Id.* at 331 (“In evaluating state regulatory measures under the dormant Commerce Clause,

we have held that “the first step...is to determine whether it ‘regulates evenhandedly with only “incidental” effects on interstate commerce, or discriminates against interstate commerce.’”(internal citations omitted)). If the DME Exemption places any burden on interstate commerce, that burden would be incidental or *de minimus* in the latter sense. As the Party with the burden of proof, it is incumbent on Plaintiff to show otherwise. For the reasons above and in the Department’s previous filings, Plaintiff cannot prove beyond a reasonable doubt that the DME Exemption is unconstitutional.

II. If the DME Exemption is unconstitutional, then the entire DME Exemption must be declared void.

If the Court determines the DME Exemption as written is unconstitutional, the remedy is to declare the exemption in its entirety void without imposing a burden of retroactivity on the Department. In other words, no taxpayer receives the DME Exemption prospectively, and the Department is not forced to assess taxpayers who previously received the exemption or refund Plaintiff and all similarly situated taxpayers who were previously denied the exemption. Plaintiff contends the Court should sever the principal place of business requirement but leave the rest of the exemption, but this result would undoubtedly expand the sales tax exemption far beyond what the Legislature intended and flies in the face of South Carolina precedent regarding how sales tax exemptions should be construed.

A. The “principal place of business element” is not severable.

The distinguishing facts in *Shasta* show that the DME Exemption should not be expanded. See *Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm’n*, 280 S.C. 48, 310 S.E.2d 655 (1983). Declaring the entire DME Exemption void simply subjects Plaintiff to the current sales tax that applies to all retailers in the business of selling tangible personal property, not some antiquated system as Plaintiff implies. Plaintiff would be liable for the same sales tax that applied to all sellers of durable medical equipment prior to July 1, 2007 and has always applied to Plaintiff. Further, the

DME Exemption was slowly phased in over five and a half years. The Legislature may have wanted to gauge how the exemption affected the general fund. This also suggests the Legislature would not want to immediately make the DME Exemption available without the specific limitations it included.

The more recent *Thayer* case offers the best insight as to how to treat an unconstitutional exemption. *See Thayer v. South Carolina Tax Com'n*, 307 S.C. 6, 413 S.E.2d 810 (1992). The exemption at issue in *Thayer* included a number of different categories of items, including newsprint papers, newspapers, and religious publications (including the Bible and the Department of Agriculture's The Market Bulletin). Each of these categories are unrelated and have very little in common, so it is reasonable to think that even if one category of items were severed from the exemption the Legislature would still have exempted the remaining categories. However, the DME Exemption applies to a single category of items, but only in limited circumstances if certain restrictive elements are met. One of those elements explicitly excludes taxpayers like Plaintiff from receiving the DME Exemption. Contrary to Plaintiff's contention, it is unreasonable to assume the Legislature would have granted such a broad exemption if one of those limiting elements were severed. In fact, prior to July 1, 2007, no taxpayer received a sales tax exemption for durable medical equipment. Even after its effective date, the Legislature slowly phased in the DME Exemption. Therefore, it cannot be fairly presumed that the Legislature would have passed the statute without the "principal place of business element."

B. Exemptions and refund claims are strictly construed against the taxpayer.

The lack of severability is further enforced by the fact that the statute at issue is an exemption statute. Taxation is the rule, and exemptions are the exception. Our courts have long held taxpayers to elevated burden to prove eligibility for an exemption from tax. *See State v. Hood*, 49 S.C.L. (15 Rich.) 177, 185 (1868) ("Every exemption must be couched in such plain and unambiguous language as to satisfy the Court beyond doubt that the Legislature intended to create the exemption. Such a

right can never arise by mere implication, and all laws granting the exemption are to be most strictly construed.”(internal citation omitted)). Taxpayers bear the burden of bringing themselves squarely within the parameters of the statute which grants the exemption. See *Owen Indus. Prods., Inc. v. Sharpe*, 274 S.C. 193, 262 S.E.2d 33 (1980); *S. Soya Corp. of Cameron v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969); *S. Weaving Co. v. Query*, 206 S.C. 307, 34 S.E.2d 51 (1945). Exemption statutes are construed strictly against the taxpayer. *Home Medical Systems, Inc. v. S.C. Dep’t of Rev.*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (“The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption.”). Moreover, Plaintiff seeks a refund, and the “refund of taxes is solely a matter of governmental grace,” and any party seeking such must bring itself squarely within the authorizing statute. *Asmer v. Livingston*, 225 S.C. 341, 82 S.E.2d 465 (1954). Under this high burden, it cannot fairly be presumed that the Legislature would have passed such a broad exemption.

In *Thayer*, the Court provides a helpful summary when it held that the taxpayer

was not entitled to an exemption in the past; nor is she entitled to an exemption now that we have severed that portion of section 12–35–550(7) relating to religious publications. This Court cannot create an exemption by reading something into the statute which the Legislature did not intend.

Id. at 14, 413 S.E.2d at 815. Plaintiff would be in the same position as the taxpayer in *Thayer*. It was not entitled to an exemption in the past nor is it entitled to an exemption if found unconstitutional. Similarly, this Court cannot create an exemption by reading something into the statute which the Legislature clearly did not intend.

C. Plaintiff cannot receive retroactive relief.

Also as in *Thayer*, the result should be prospective if the Court declares the DME Exemption void. Like Ms. Thayer, Plaintiff claims its prior sales tax assessments (for durable medical equipment) must be forgiven and points to *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep’t of Bus. Regul.*

of *Fla.*, 496 U.S. 18, 18, 110 S. Ct. 2238, 2240, 110 L. Ed. 2d 17 (1990). Even if Plaintiff were granted relief under *McKesson*, “[t]he State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements.” *Id.* at 51–52. In other words, the State decides whether to provide a refund to Plaintiff, assess taxpayers who received the exemption, or some combination of refunds and assessments.

However, “*McKesson* requires relief as a matter of federal law only when taxpayers involuntarily pay a tax that is unconstitutional under existing precedents.” *Id.* at 13, 413 S.E.2d at 815. The Court in *Thayer* held that *McKesson* must be read in conjunction with its companion case *American Trucking*. Importantly, the United States Supreme Court in *American Trucking* held:

In light of *McKesson*'s holding that a ruling that a tax is unconstitutionally discriminatory under the Commerce Clause places substantial obligations on the States to provide relief, the threshold determination whether a new decision should apply retroactively is a crucial one, requiring a hard look at whether retroactive application would be unjust.

Am. Trucking Associations, Inc. v. Smith, 496 U.S. 167, 181, 110 S. Ct. 2323, 2333, 110 L. Ed. 2d 148 (1990). Here, Plaintiff offers no authority directly on point that the DME Exemption was unconstitutional when the Legislature passed it over fifteen years ago. As discussed above, the Legislature has passed multiple statutes before and after the DME Exemption that fail to meet constitutional muster under Plaintiff's theory. Plaintiff itself did even not challenge the constitutionality of the DME Exemption as evidenced by the fact that it is only now seeking a refund after having paid the tax for at least three years without protest. Therefore, the proper remedy would be to sever the entire DME Exemption prospectively and deny Plaintiff's request for a retroactive exemption for which it has never qualified.

CONCLUSION

For the reasons discussed above and in the Department's previous filings, section 12-36-2120(74) is constitutional and clearly does not apply to Plaintiff. However, if the exemption is

declared unconstitutional, the remedy is to strike the entire exemption from the Code, not to expand the exemption by making it universally applicable. Therefore, Plaintiff cannot receive the DME Exemption prospectively or retroactively.

WHEREFORE, the Department asks that this Court enter an order finding that section 12-36-2120(74) is constitutional and that the Department's Motion for Summary Judgment is granted.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

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Columbia, South Carolina
November 1, 2022

State of South Carolina)
) Court of Common Pleas
County of Lexington)
 2021-CP-32-2752, 2753

Orthofix, Inc.; KCI USA, Inc.)
 vs.) Transcript of Record
)
South Carolina Department of)
Revenue)
)
 Defendant)

November 2, 2022
Lexington, South Carolina

B E F O R E:

Honorable William P. Keesley, Judge

A P P E A R A N C E S:

Rick Reames, III, Esq.
Michael J. Hilkin, Esq.
Catherine A. Battin, Esq.
Attorneys for the Plaintiffs

Marcus D. Antley, III
Attorney for the South Carolina Department of Revenue

Recorded by Melinda D. Jones
Transcribed by Joy E. Holston

Joy E. Holston
Official Court Reporter

1 THE COURT: Y'all want to argue both motions at the
2 same time?

3 MR. ANTLEY: Yes, Your Honor.

4 MR. REAMES: Yes, Your Honor.

5 THE COURT: Who represents KCI?

6 MR. ANTLEY: Your Honor, Rick Reames, Counsel for
7 Plaintiff, KCI USA, Inc. and Orthofix, Inc. We have
8 cocounsel, Michael Hilkin for both parties as well, who
9 has been admitted, Michael has been admitted pro hac.

10 THE COURT: Okay. For the State, you are?

11 MR. ANTLEY: Your Honor, I am Marcus Antley, III. I
12 go by Trey but I am here on behalf of the Department.

13 THE COURT: I read your briefs. So let me hear from
14 the moving party, please.

15 MR. REAMES: May it please the Court, Your Honor.

16 THE COURT: Yes, sir.

17 MR. REAMES: Judge, as I said, I am Rick Reames, I am
18 Counsel for Orthofix, Inc.; and KCI USA, Inc. We have,
19 Judge, we have a tax case for you. You have a courtroom
20 full of tax people, we have tax lawyers and we have
21 accountants in the back for Orthofix. We appreciate your
22 and Judge McLeod's scheduling this so that we could be, we
23 can be heard in this matter today. Judge, these are
24 companion cases, the parties have stipulated to the facts.
25 There is no material facts in dispute and the parties have

1 agreed that, resolve these matters via dispositive motions
2 for summary judgment. And, again, I appreciate the
3 Court's scheduling on that. We are here on a dispute over
4 the constitutionality of an exemption against the sales
5 tax. Judge, DOR is here because they have a duty to then
6 administer South Carolina statutes as written. I
7 appreciate the position they are in, I took this matter up
8 a couple of years ago. I worked for the Department of
9 Revenue so I am, in particular, appreciate the position
10 that they are in. But we believe that this is a straight
11 forward issue, that this exemption against the sales tax
12 is perpetual in nature and it is discriminatory on its
13 face and violates the U.S. and State Constitution. And my
14 cocounsel, Mr. Hilkin, will talk in great detail about
15 this. I am framing the issues and introducing these
16 concepts for the Court. Fortunately we think that,
17 although it is a straightforward case of unconstitutional
18 discrimination, there is a straightforward remedy that has
19 been sanctioned by the U.S. Supreme Court and the State
20 Supreme Court. But before I turn it over to Mr. Hilkin, I
21 will talk in a little more detail about that. Let me
22 frame the issues of the sales tax very briefly for the
23 Court's benefit. So when South Carolina, the sales tax
24 applies to a retail sale of tangible personal property.
25 An example of that, Judge, is if you go into a department

1 store and purchase a shirt, that is a retail sale of
2 tangible personal property. And the department store,
3 under South Carolina law, has a duty to remit the sales
4 tax associated with the sale of that shirt. South
5 Carolina says it is a vendor tax, a seller tax which means
6 that, whether that department store passes that six or
7 eight cents, depending on the County you are in, of every
8 dollar in sales tax belongs to you as the customer; the
9 Department, the department store, the seller has a duty to
10 send that money to the State. We are not here challenging
11 the sales tax, Judge. What we have concerns about is an
12 exemption against the sales tax. Because South Carolina
13 law imposes or allows many, many exemptions for particular
14 transactions. One of which is an exemption against the
15 sales tax for sales of durable medical equipment. And
16 that is what is at issue here. The exemption for durable
17 medical equipment has four requirements, Judge. One of
18 which we believe is unconstitutional on its face. That is
19 the requirement, that in order to qualify for an exemption
20 that the seller of the durable medical equipment have a
21 principal place of business inside of South Carolina. So
22 an in-state seller with a principal place of business gets
23 the exemption and out-of-state seller does not get it.
24 Again, we believe that is a straightforward case of
25 unconstitutional discrimination that violates the commerce

1 clause. And, again, we believe that there is a
2 straightforward remedy that allows a curing of that. And
3 so with that I will close and I am going to allow Mr.
4 Hilkin talk in a little bit more detail about these
5 issues. Thank you, Your Honor.

6 THE COURT: Yes, sir.

7 MR. HILKIN: If it please the Court.

8 THE COURT: Yes, sir.

9 MR. HILKIN: Your Honor, as my cocounsel has
10 highlighted, this case poses a narrow but fundamental
11 question. May the State of South Carolina exempt from its
12 sale tax, and otherwise taxable sale of tangible personal
13 property with the condition that the seller have its
14 primary place of business in the State of South Carolina.
15 Now, my clients, KCI USA and/or Orthofix are both
16 companies that sell durable medical equipment within the
17 State of South Carolina. Now, KCI USA sells a product
18 called a back therapy mechanism which is used to assist in
19 the healing of deep wounds; while Orthofix sells spine and
20 bone fusion therapy devices that aid in the bone healing
21 process after a spinal or extremity surgery. Now, both of
22 the products are all the products that my clients sell are
23 tangible personal property, they are durable medical
24 equipment. And they have been subjected to sales tax in
25 the State of South Carolina. And more importantly they

1 have not been allowed to take advantage of the durable
2 medical equipment exemption in the State of South Carolina
3 that is limited solely to companies that have a principal
4 place of business in this State. Now, Your Honor, I
5 believe our briefing has overwhelmingly established that
6 South Carolina's law captions these equipment sales by
7 non-South Carolina companies. While exempting the exact
8 same sales a South Carolina company violates the dormant
9 commerce clauses prohibition against discriminatory
10 passes. And that is why we are asking this Court to hold
11 that South Carolina sales tax exemption for durable
12 medical equipment sales with its limitation to in-state
13 companies is unconstitutionally discriminatory. And, Your
14 Honor, that is also why we are asking this Court to cure
15 the unconstitutional nature of this statute by applying
16 the South Carolina courts doctrine severance whereby a
17 statute that is brought, that broadly could be
18 constitutional if a single unconstitutional element was
19 removed, can be applied so that the constitutional element
20 is severed from the unconstitutional element in the
21 language that is in the South Carolina code is preserved
22 to the extent possible. So to give a roadmap of my
23 argument that I am going to give today I am going to start
24 by talking about South Carolina's sales tax being largely
25 along the lines of what my cocounsel has already explained

1 and also provide background about the commerce clause of
2 the U.S. Constitution. And how courts have consistently
3 applied the commerce clause to disallow a statute that
4 would discriminate against interstate commerce; or to use
5 the words of the South Carolina Supreme Court to disallow
6 statutes that would, "require an interstate commerce
7 business to transfer a part of it's business operations to
8 the taxing State in order to receive equal tax treatment."
9 And then I will explain exactly why the durable medical
10 equipment exemptions limitation to in-state companies does
11 exactly what the commerce clause is intended to prevent
12 and why there is no justifiable excuse for the
13 discrimination caused by the durable medical equipment
14 exemption to limitation. And finally, I will explain how
15 this Court may, as if it chooses, apply the doctrine of
16 severance to preserve the vast majority of the durable
17 medical equipment statute and eliminate the single
18 unconstitutional element of it. So to start with a little
19 bit of background about South Carolina sales tax scheme,
20 my cocounsel has already highlighted that the sales tax in
21 the State of South Carolina, like most States is basically
22 a tax that is imposed upon stuff. Whether it be, you know
23 your shirts, maybe this table or in this case, durable
24 medical equipment as tangible personal property. And also
25 to reiterate, the tax indeed is a vendor tax. It is a tax

1 that is imposed upon the retailer, even though the
2 retailer may have a right to seek collection from a
3 purchaser. So under South Carolina sales tax law,
4 generally speaking, tangible personal property is indeed
5 subject to sales tax. And South Carolina, like most
6 States, provides a variety of exemptions from taxation for
7 certain items, certain sales of tangible personal
8 property. And many of these exemptions are provided in
9 South Carolina Code 12-36-2120 which contains dozens upon
10 dozens of exemptions including the one most relevant to
11 this Court today. The exemption in paragraph (7) (4)
12 which provides an exemption for gross proceeds from sales
13 of durable medical equipment and related supplies as long
14 as four elements of a test are met. First, the durable
15 medical equipment and related supplies must meet the
16 definition of those terms under Federal and State and
17 Medicare and Medicaid laws. Now when it comes to durable
18 medical equipment, the most common example of items that
19 meet this definition are canes, crutches, walkers,
20 hospital bed and the like. But it has been stipulated by
21 all parties in two separate stipulations of facts in this
22 case, that both of my clients with respect to the sales at
23 issue in this case sell durable medical equipment and
24 related supplies under this first element. Second, the
25 durable medical equipment and related supplies must be

1 paid for directly by the funds of the State of South
2 Carolina or the United States under medicaid and medicare
3 programs where State or Federal law are regulation
4 authorizing the payment prohibits the payment of sale or
5 use tax. Here again, this element has been stipulated to
6 by all sides in this case, in both cases. The third
7 element is that the durable medical equipment must be sold
8 by a provider who holds South Carolina retail sales
9 licenses. And here again, both of my clients, Orthofix
10 and KCI hold those licenses and it has been stipulated to.
11 And that brings us to the final element of the durable
12 medical equipment exemption test. The element that ask or
13 requires a company to have its principal place of business
14 located in the State of South Carolina. Now, all sides
15 have also stipulated on this particular point. There is
16 no dispute in this case that neither KCI nor Orthofix has
17 its principal place of business in the State of South
18 Carolina. As we have highlighted in both stipulations of
19 facts, both companies have their principal places of
20 business in Texas. And that is why both parties are here
21 today on summary judgment. Simply put, there are no
22 material facts at issue in this case. And this case comes
23 down to a single fundamental constitutional question and
24 that is whether the final element of the durable medical
25 equipment exemption is or is not constitutional under the

1 dormant commerce clause. So that brings us to the
2 constitution and the dormant commerce clause, a phrase I
3 have used a few times. But to step back first, let's talk
4 about what the commerce clause of the U.S. Constitution
5 says. What it says, is that Congress has the power to,
6 "regulate commerce among the several states." But the
7 United States Supreme Court for centuries now has
8 recognized that the commerce clause has a, "negative
9 implication, driven by concern about economic
10 protections." That is regulatory measures designed to
11 help benefit in-state economic interest, by burdening
12 out-of-state competitors. This is from the case of
13 Department of Revenue versus Avis. And this negative
14 implication, which is what I have been referring to and
15 courts typically refer to as the dormant commerce clause
16 is intended to quote the U.S. Supreme Court to effectuate
17 the framer's purpose, to prevent the State from retreating
18 into economic isolation or jeopardizing the welfare of the
19 nation as a whole as it would do if it were free to place
20 burdens on the flow of commerce across these borders.
21 Now, State taxes have been recognized by the Supreme Court
22 for centuries as inherently impacting commerce which is
23 why they are subject to commerce laws scrutiny. And in
24 numerous cases the U.S. Supreme Court has said state tax
25 will meet the requirements of the dormant commerce clause

1 and therefore be constitutional as long as four elements
2 of a test are met. This test was outlined in the case in
3 Complete Auto versus Brady which is cited in full of our
4 briefs. And perhaps what is most helpful to us and to
5 this Court is that three of the four elements of the
6 Complete Auto test are not in dispute today. The only
7 dispute we have in this case is whether the durable
8 medical equipment exemption limitation to in-state
9 companies as opposed to out-of-state company is
10 unconstitutional on the basis that it discriminates
11 against interstate commerce. So let's talk about that
12 fundamental question. Does the durable medical equipment
13 exemptions limitation to in-state companies discriminate
14 against interstate commerce. And, Your Honor, here again,
15 I believe our briefing has overwhelmingly established that
16 on its face, the durable medical equipment statute
17 discriminates against interstate commerce. Because as it
18 says in the statute, the exemption is available to a
19 company that has its principal place of business in the
20 State of South Carolina, it simply is not available to a
21 company that does not have its principal place of business
22 in South Carolina. Now there is no dispute in this case,
23 that we, as the tax payers, have the burden to establish
24 that the statute at hand, the durable medical equipment
25 exemption is specifically this limitation, is

1 discriminatory in nature. But that is established by the
2 language in the statute. And the next question, once that
3 burden is established is, where does the burden shift.
4 And, Your Honor, the U.S. Supreme Court case law has
5 established that once it has been proven that there is a
6 discriminatory tax the burden shifts from the tax payer to
7 the State to establish some sort of excuse, some sort of
8 justification that makes such discrimination not
9 unconstitutional. But unfortunately for the State, that
10 burden is incredibly heavy. That burden to quote the U.S.
11 Supreme Court, "is the burden of strictest scrutiny". And
12 there is no excuse that the Department can provide and I
13 respect that they need to try their best to bend the
14 statute again today but there is no excuse that they will
15 be able to provide that will meet this strictest scrutiny
16 standard. And this is specifically true because U.S.
17 Supreme Court case law has already confirmed that statutes
18 intended to support economic development are not allowable
19 when they are discriminatory in nature. If a statute is
20 intended to support economic development but is
21 discriminatory, it is unconstitutionally discriminatory.
22 And further, to the extent that there is a discriminatory
23 statute in place, U.S. Supreme Court case law has said
24 that there is no excuse on the basis that the statute has
25 a de minimus impact on interstate commerce. So I am going

1 to start with the burden that we carry here in this State
2 today. The burden is shown that the durable medical
3 equipment exemptions limitation to in-state companies is
4 discriminatory. Now, Your Honor, I would suggest that on
5 its face the statute says exactly what it says. And what
6 it says, in-state companies can get this exemption and
7 out-of-state companies cannot. And that is facially
8 discriminatory. But the Department's own briefing
9 supports my point. In both of their memoranda in support
10 of their motions for summary judgment on page five, they
11 state that the purpose of the exemptions limitation to
12 in-state companies is to, "induce foreign corporations to
13 their operations, in South Carolina to induce economic
14 development." By this admission in the Department's own
15 briefing, they effectively conceded that the exemptions
16 limiting language, "Department of Revenue versus Davis",
17 U.S. Supreme Court case. The limitation is designed to
18 benefit in-state economic interest by burdening
19 out-of-state competitors. Simply put, that is exactly
20 what is happening here. If you choose to sell tangible
21 personal property in the State of South Carolina,
22 specifically durable medical equipment, you are going to
23 be subject to sales tax on it. And you are still going to
24 be subject to sales tax on it if you meet three of the
25 four elements of the durable medical equipment exemption

1 test, just because you happen to have your principal place
2 of business outside of the State of South Carolina. Now,
3 the U.S. Supreme Court has in a discriminatory task like
4 this, to be, "virtually per se invalid." And that comes
5 from the case of Oregon Waste System versus the Department
6 of Environmental Quality; which goes on to say that a
7 discriminatory statute requires justification that pass
8 the strictest scrutiny. In other words, to the extent
9 there is a discriminatory statute in place the burden
10 shifts from the tax payer to the Department to meet, to
11 provide an explanation that survives strictest scrutiny.
12 But the same court case goes on to say that the State's
13 burden of justification under strictest scrutiny, "is so
14 heavy that facial discrimination by itself may be a failed
15 defect." Now, it probably goes without saying but U.S.
16 Supreme Court decisions on the constitutionality of tax
17 law applies in the State of South Carolina. But
18 unfortunately for the tax payers, South Carolina Supreme
19 Court has also determined that South Carolina tax statutes
20 are under unconstitutional discriminatory, applying U.S.
21 Supreme Court case law that we have discussed in our
22 briefing. The most relevant example of this is a case
23 that all parties cite in their briefs. Shasta Beverages
24 versus South Carolina Tax Commission, which addresses a
25 couple of provisions in South Carolina's now old -- soft

1 drink tax. One provision addressed a number of tax
2 benefits in other statutes of the South Carolina soft
3 drink tax. And said, those taxes are not available to a
4 company that does not market its own goods on its own soft
5 drink in the State of South Carolina. Another tax statute
6 provided in full, in a single statute, a preferential tax
7 reporting method but only provided that method to tax
8 payers who either had those trucks in the State of South
9 Carolina or had bottling plants located in the State of
10 South Carolina. Now in Shasta, the South Carolina Supreme
11 Court had no trouble at all finding that both of these tax
12 provisions were unconstitutionally discriminatory. What I
13 think is most relevant to this Court today is the
14 explanation in Shasta as to exactly why those provisions
15 were unconstitutional. South Carolina Supreme Court said,
16 and I quote, "the United States Supreme Court has made it
17 clear that a State cannot impose a tax which would require
18 an interstate business commerce business to transfer part
19 of its business operation to the taxing state in order to
20 receive equal tax treatment." And, Your Honor, this
21 brings me back to the Department's own admission in its
22 briefing where it said that the purpose of the, of the
23 durable medical equipment exemptions limitation to
24 in-state commerce was to, "induce foreign corporation to
25 move their operations here to encourage economic

1 development." Now, that basically sounds to me like a
2 paraphrasing exactly what the Court in Shasta said, the
3 U.S. Supreme Court said, it is not allowed. And that,
4 Your Honor, establishes that South Carolina courts have
5 the power and have used the power to determine that a
6 statute is unconstitutionally discriminatory. Now, since
7 we have established that this tax statute limitation to
8 in-state companies in the durable medical equipment
9 exemption is discriminatory, that causes a burden shift
10 under Federal law. It causes a burden shift forcing the
11 Department to provide a justification passing, "the
12 strictest scrutiny", to satisfy, that even though may be
13 on its face, the statute looks discriminatory, we are
14 going to say that discrimination is acceptable and not
15 unconstitutional. But, again, that is incredibly,
16 incredibly high marks, strictest scrutiny. And while
17 States, including South Carolina in this case today, have
18 to make their best attempt to defend their statutes that
19 have a discriminatory provision within them, the common
20 excuses provided have already been analyzed in U.S.
21 Supreme Court case law and has already, has been shot
22 down. Now, the first most common example of an
23 explanation for discriminatory taxes is the tax, is
24 intended to support economic development, an explanation
25 that has been provided in the Department's briefing in

1 this case. But in the case of Boston Stock Exchange
2 versus State Tax Commission the U.S. Supreme Court
3 unambiguously stated that such an excuse does not pass
4 constitutional muster. In that case, New York passed, to
5 their tax laws to try and provide a benefit to the New
6 York Stock Exchange to encourage the New York Stock
7 Exchange not to move outside of the State. And while it
8 was acknowledged in the facts of the case that that was
9 the purpose and indeed that was successful. And while it
10 probably goes without saying that the New York Stock
11 Exchange is incredibly important to the economic health of
12 the State of New York. The U.S. Supreme Court,
13 nevertheless, had no trouble, that that excuse was not
14 sufficient to overcome the strictest scrutiny placed upon
15 the State of New York to justify its discriminatory
16 statute. Now, similarly, a common excuse for a
17 discriminatory statute is, it only has to pass so
18 therefore we don't need to apply the Constitution to
19 determine that it is unconstitutional. But here again, in
20 the case of Fulton versus Faulkner, the U.S. Supreme Court
21 has said, and I quote, "it never recognized a de minimus
22 defense to a charge of discriminatory taxation under the
23 commerce clause." So to summarize, Your Honor, on its
24 face, the durable medical equipment exemption, limitation
25 to in-state companies discriminate under the dormant

1 commerce clause. On its face it says it is available to
2 in-state companies but not to out-of-state companies. And
3 there is simply no excuse that the Department can provide
4 to overcome the strictest scrutiny that is applied to such
5 a discriminatory statute. So, Your Honor, that leaves the
6 question, if the durable medical equipment exemption
7 statute, as we say, as written, is unconstitutionally
8 discriminatory based on the final limitation in the
9 statute, what can or should this Court do about it. How
10 can the Court cure this unconstitutional statute. Now, I
11 believe the cleanest and most eloquent solution open to
12 this Court is to apply the doctrine of severability, a
13 doctrine that has been applied in at least two tax cases
14 dealing with unconstitutional statutes. And it is a
15 doctrine that allows the Court to preserve the
16 constitutional language of a statute by simply eliminating
17 or disregarding the unconstitutional element. Now, Your
18 Honor, using the doctrine of severability, effectively
19 preserves the vast majority of a language in the statute.
20 And here, since there are three elements for the durable
21 medical equipment exemption that work on their own and do
22 not inherently rely on the fourth element, there is no
23 need for this Court to insert language into the durable
24 medical equipment exemption. There is no need to add more
25 language, to take the role of a legislature. All you have

1 to do is eliminate the unconstitutional portion and
2 preserve the rest of the language written by the South
3 Carolina Legislature. Under the doctrine of severability,
4 not only is this acceptable but it has been used in State
5 tax cases. And, Your Honor, we believe that this is a
6 situation where it is most appropriate. And in fact, I
7 would point this Court to the Shasta case that we had
8 discussed earlier and it is discussed in both of our
9 briefs where the Court analyzed that second
10 unconstitutional tax statute we were discussing, the one
11 involving an alternative reporting method that was only
12 applicable to certain in-state companies. And when
13 determining, after determining that statute was
14 unconstitutional the next step was to determine, what are
15 they going to do with the unconstitutional statute. And
16 the South Carolina Supreme Court came to the conclusion
17 that under the doctrine of severability they simply set
18 aside the unconstitutional language and preserved the
19 simplified filing method for all. Now finally, Your
20 Honor, if the doctrine of severance is not applied here,
21 at the very least my clients must be provided with the
22 refunds requested in this case to be made whole or to be
23 made equal with their in-state South Carolina competitors.
24 If the doctrine of severability is not applied, when it
25 comes to the years at issue in this case, the simple fact

1 is that the discrimination, unless some cure is provided,
2 will continue, will survive for that period. And this is
3 why, under the case of McKesson Corporation versus the
4 Department of Alcohol and Beverages, the U.S. Supreme
5 Court has established that when there is a discriminatory
6 statute in place some sort of cure must be provided to
7 prevent unlawful depravation under the due process laws.
8 Now, I continue to maintain that the cleanest way to cure
9 the unconstitutional nature of the durable medical
10 equipment exemption is to apply the doctrine of severance.
11 But if the Court chooses not to go along that path,
12 McKesson establishes that another constitutional question
13 will be created here. So ultimately this Court has a
14 choice to make if it determines that the durable medical
15 equipment exemption as written is unconstitutional. One,
16 apply the doctrine of severance and be done; or two, not
17 apply the doctrine of severance and have yet another
18 constitutional question on its hands. So to conclude,
19 Your Honor, the durable medical equipment exemption as
20 written is unconstitutional. It discriminates against
21 interstate commerce because on its face it is solely
22 available to companies that have their principal place of
23 business in the State of South Carolina. We, as the tax
24 payers, have carried our burden to establish this. And
25 simply put, the South Carolina Department of Revenue now

1 has a heavy burden of strictest scrutiny to provide a
2 justification for having a discriminatory statute in
3 place. It is a burden they cannot practically leave and
4 therefore we ask this Court to determine that the durable
5 medical equipment exemption limitations for in-state
6 companies is unconstitutional, sever that unconstitutional
7 language to preserve the rest of the statute which is
8 constitutional and utilizable in and of itself and to
9 prove the refunds requested by my clients. Thank you,
10 Your Honor.

11 THE COURT: Thank you, Mr. Hilken. Alright, I will
12 hear from the DOR now.

13 MR. ANTLEY: May it please the Court. I am Marcus
14 Antley, Counsel for the Department. Plaintiffs have
15 provided an explanation of the South Carolina Sales tax
16 and the commerce clause. And I plan to be briefer and I
17 will go straight to the issues of this case. As written
18 and as the Plaintiff stated, they do not qualify for the
19 durable medical equipment exemption. The exemption itself
20 is presumed constitutional. Plaintiffs bear the burden to
21 prove that the exemption statute is unconstitutional
22 beyond a reasonable doubt. That is their burden to prove.
23 They must negate every conceivable basis for upholding the
24 law. The Department, in its filings, have provided a
25 couple of bases for upholding the law. One is encouraging

1 domestic industry. The U.S. Supreme Court held that a
2 State may enact laws that have the purpose and effect of
3 encouraging domestic industry. And that is the Bacchus
4 case from 1984. In fact, the State has enacted numerous
5 laws, many of which are cited in the Department's filings
6 that would be unconstitutional under Plaintiffs logic.
7 The Department cited examples in its filings from, ranging
8 from a sales tax exemption for local sweet grass artist,
9 under 12-36-2120, subsection 64. And tax payers who have
10 a distribution facility in the State and invest at least
11 \$125 million dollars and maintain at least 1,500 full time
12 jobs in this State. And that is section 12-36-2690.
13 Those are just two of the examples that the Department
14 cited. Still, encouraging domestic industry, that is a
15 single basis for upholding the exemption as written. And
16 Plaintiffs must show that there is no conceivable basis to
17 support the law. Touching on a couple of their comments
18 about Complete Auto. Reading of Complete Auto might
19 suggest that the, the four part test is more a description
20 of what would be good policy and not necessarily a test.
21 That was declared by the Supreme Court. But beyond that,
22 for the reasons the Department explains in its filings,
23 this is not a discriminatory tax, a tax payer could be
24 incorporated in South Carolina, have the principal place
25 of business outside of the State, still would not qualify.

1 The durable medical equipment could be manufactured here
2 in the State and still would not qualify if the principal
3 place of business is outside of the State. Another point
4 that they raise, I would like to address, it has also been
5 addressed in the Department's filings, is about whether
6 the effect on interstate commerce is de minimus. And so,
7 I think there is a difference or a little confusion over
8 the meaning of de minimus. In the same case that they
9 cite a footnote from, the Court explains that de minimus
10 is okay if the tax, itself, is constitutional. If they
11 are de minimus or incidental, is the term the Court uses,
12 affects on interstate commerce, that is okay. The issue
13 is when there is an unconstitutional tax, it doesn't
14 matter if that tax is for a penny. If it is
15 unconstitutional, it is unconstitutional. That is the de
16 minimus argument that the Supreme Court has never
17 recognized. Not whether or not a constitutional tax has
18 an incidental or de minimus affect on interstate commerce.
19 So even if Plaintiff's were able to carry this high burden
20 of beyond a reasonable doubt and negate every conceivable
21 basis for upholding the statute, the Court must declare
22 the entire exemption void. In other words, the principal
23 place of business language is not severable. This Court,
24 this State has a long history of showing that, upholding
25 that tax exemptions are strictly and narrowly construed

1 against tax payers. Taxation is the rule and exemptions
2 are the exceptions. The affect of striking the principal
3 place of business language would broaden the exemption,
4 not narrow it, broaden it and expand it to tax payers that
5 the General Assembly never intended, tax payers, that the
6 General Assembly explicitly excluded. This policy, the
7 Department cites in its filings a case from 1868 where our
8 Courts held that Plaintiff's must prove beyond a doubt
9 that the General Assembly intended to create the
10 exemption. Plaintiff's cannot show that the General
11 Assembly intended to create an exemption for them when
12 they were explicitly excluded from the exemption. I would
13 also like to address briefly, Shasta. So the facts in
14 Shasta, if the entire exemption or the effective exemption
15 was declared void then that would send these soft drink
16 companies back to a system of tax crowns, a system that
17 the Court described as antiquated. That is not the case
18 here. They will be subject to the same sales and used tax
19 that they are currently subjected to, that you and I are
20 subject to, if we go to, for their example, to the
21 department store and buy a shirt, there is not some
22 antiquated system that we would be reverting to. They
23 would just be subject, they would continue to be subject
24 to the tax. The South Carolina Supreme Court in Thayer,
25 which is a 1992 case, and I think this is an important

1 case. It declared a sales tax exemption for the Holy
2 Bible and other religious publications, but the Holy Bible
3 to be unconstitutional. And so what the Court did in that
4 case is they removed the exemption for the Holy Bible. In
5 that same section there were exemptions for newspapers.
6 They didn't take that out, they didn't have to, they
7 didn't have to declare that section void. That was a
8 separate, even though they are in the same sentence, that
9 was a separate exemption, separate category of exemption
10 that the Court could reasonably or fairly presume the
11 General Assembly would have passed without the sales tax
12 exemption for the Holy Bible. And significantly in that
13 case, so in that case, in Thayer, the South Carolina
14 Supreme Court found that the cure was to strike that
15 provision and not, instead of expanding the exemption to
16 additional tax payers who, in other words the Court
17 narrowed the sales tax exemption rather than expand it to
18 the tax payer in that case, Ms. Thayer, who was selling
19 real estate pamphlets. She was denied an exemption. And
20 similarly here, the remedy would be to declare the whole
21 exemption void and deny it to all tax payers rather than
22 expand it to every tax payer. There was some brief
23 discussion about rather this remedy should be retroactive.
24 This is only if we get to the point that it is declared
25 unconstitutional and that the remedy is to strike the,

1 strike the entire exemption. The remedy in this case
2 should be prospective. This exemption became effective
3 over 15 years ago, on July 1st of 2007. The Department
4 cited numerous other statutes, similar statutes related to
5 supporting economic industry that have not been challenged
6 or overturned. Notably there is no case on point that the
7 Plaintiff's cites to show that this would have been a bad,
8 unconstitutional at the time it was, it was passed. And
9 the Plaintiffs cites McKesson. Well, McKesson is a South
10 Carolina, sorry, a U.S. Supreme Court case and that case
11 is addressed in the South Carolina Supreme Court case of
12 Thayer. And our Supreme Court explained that McKesson has
13 to be read in conjunction with American Trucking. And in
14 American Trucking, the U.S. Supreme Court held that it
15 would be unjust to impose a burden of retroactivity on the
16 State when the State relied on valid existing precedent in
17 enacting, in implementing its tax. And so too in this
18 case, just as in the Thayer case, if the Court deems that
19 this exemption is unconstitutional and it is void in its
20 entirety then the remedy is prospectively, no tax payers
21 gets the exemption. There is no need to cure that
22 infirmity. And even, even if the Court says that there is
23 a need to do that, that would be a decision for the
24 Department. In McKesson, itself, the U.S. Supreme Court
25 held that the State may choose the method of remedy. So

1 even if we get to that point, the State gets to decide
2 whether it provides a refund to the tax payers or it
3 accesses the tax payers that received the previously, the
4 previously held to be constitutional for medical equipment
5 exemption. And so for that reason, one way or the other,
6 either way, the tax payers do not get the durable medical
7 equipment exemption.

8 THE COURT: Thank you. Any response?

9 MR. HILKIN: Yes, Your Honor. First and foremost, I
10 think the Department may misunderstand the burden shift
11 that U.S. Supreme Court case law requires in this
12 circumstance. I will invite the Court to look at the
13 Oregon Waste case that is cited in the briefing here to
14 help make up your mind as to what party carries the burden
15 and when the, such party carries that burden. We have
16 established that there is no dispute that we, as the tax
17 payer, have the burden to establish that the durable
18 medical equipment exemptions limitation to in-state
19 companies is unconstitutionally discriminatory. That is
20 our burden, we agree, we just happened to think that the
21 case law overwhelmingly supports the conclusion that
22 indeed it is discriminatory. And at that point the
23 question arises, what exactly must be done to address
24 whether that statute is discriminatory or not for
25 constitutional purposes. Who carries the burden now.

1 That burden under Oregon Waste is clearly carried by the
2 State. Again, Oregon Waste contains this language saying
3 that once the statute is shown to be discriminatory the
4 State must provide a justification that satisfies, quote,
5 "strictest scrutiny". Now, unfortunately under the
6 Department's theory here, that strictest scrutiny simply
7 never applied. They are proposing that the burden remains
8 on the Defendant, or on the tax payer after establishing
9 that a statute is discriminatory, to come up with a reason
10 why all possible explanations for that discriminatory
11 statute is unallowable. That is just simply not what
12 Oregon Waste says. Similarly, the Department, I believe
13 is, maybe misunderstanding what the case law says at the
14 U.S. Supreme Court regarding what constitutes allowable
15 statutes that encourage at economic level. Now, I want to
16 make it abundantly clear here, we are not challenging any
17 other South Carolina sales tax statute today other than
18 the statute at hand, the durable medical equipment
19 exemption and specifically the durable medical equipment
20 exemption limitation to in-state companies. But what is
21 notable to me is that the Department, in its briefing,
22 making a similar argument, what, we have the right to have
23 tax statutes that encourage economic development, cite the
24 case Bacchus Imports versus Dias for this proposition.
25 And indeed it contains the language that the Department

1 says it contains but that case goes on to address a Hawaii
2 liquor excise tax. And an excise tax that had an
3 exemption for certain types of liquor. A liquor that was
4 brandy made out of a adventitious (phonetic) root in the
5 State of Hawaii and Root Wine. Neither of these
6 exemptions specifically mention the State of Hawaii. But
7 nevertheless the U.S. Supreme Court had no trouble
8 whatsoever in Bacchus concluding that even though
9 economically, statutes encourage economic development may
10 be allowable, these statutes would not because they were
11 discriminatory. Now, a more detailed but I think
12 convenient framework for differentiating between
13 constitutional economic development statutes and
14 unconstitutional ones may be found in our memoranda
15 opposing the Department's motions for summary judgment on
16 pages five or six. But for purposes of our argument today
17 I think those pages can be boiled down into a relatively
18 simple explanation. The difference between a
19 constitutional economic development statute and one that
20 is unconstitutionally discriminatory, is that an
21 unconstitutional statute imposes a protectionist barrier
22 to commerce by burdening otherwise taxable in-state sales
23 transaction based upon the amount of in-state versus
24 out-of-state activity that a seller and agent, separate
25 and apart from the otherwise taxable transaction. This is

1 the theme of numerous U.S. Supreme Court cases cited in
2 our briefs. I think it provides a convenient way to
3 differentiate between what is unconstitutionally
4 discriminatory and what is a constitutional statute
5 encouraging economic development. Next, I also believe
6 the Department may misunderstand the idea of what
7 constitutes an incidental burden on interstate commerce
8 that is acceptable. The Department is saying that
9 incidental burdens are acceptable and in their most recent
10 briefing they have quoted Oglethorpe, (phonetic) versus
11 Faulkner for this proposition. But I think we have to
12 look at the entirety of the language from that case to
13 understand exactly what is and is not allowable. In that
14 case and to quote the Department's final brief, U.S.
15 Supreme Court have held that the first step is to
16 determine whether a statute regulates even handily with
17 only incidental effects on interstate commerce or
18 discriminates against interstate commerce. Here, the
19 durable medical equipment exemption limitation does not
20 regulate even handily. On its face it says if you meet
21 the first three elements you don't get it if you are an
22 out-of-state company. But if you are an in-state company
23 you do get it. So based on the language from Fulton we do
24 not have a statute that is regulating even handily so the
25 question of whether incidental affects on interstate

1 commerce are not allowable. And that is why the Fulton
2 case later on establishes that a de minimus defense to
3 discriminatory taxes is not an acceptable justification or
4 a discriminatory tax. Now, I think the Department is also
5 perhaps, has applied the case law regarding statutory
6 interpretation of the doctrine of severability. I
7 understand that when it comes to statutory exemption they
8 are generally read in a relatively mirror fashion, that is
9 what the case law says. But there is really no dispute as
10 to how to read the statute to be placed today. All
11 parties agreed that on the face of the statute the
12 language as written in the statute in full, my clients do
13 not get it. The question really is about
14 constitutionality and if that final element of the durable
15 medical equipment exemption test is unconstitutional what
16 does this Court do next. The doctrine of severability
17 applies and any case law applying general statutory
18 interpretation does not apply to the doctrine of
19 severability. I have not been provided with any case law
20 that has blended these two concepts into a single unified
21 concept. And for what its worth, it certainly wasn't
22 applied in the Shasta case. This is a case where to, you
23 know, we use the Department's argument, expanded a tax
24 benefit to out-of-state companies by taking of the
25 language of a single statute that provided a tax benefit

1 but limited it to certain in-state companies and simply
2 erased the language admitting it to those in-state
3 companies. Therefore we can see from the South Carolina
4 Supreme Court case law that is relevant and precedential
5 to this Court that severability is very much an allowable
6 option even if it expands the statute's availability to
7 others. I also think that we need to take a step back and
8 consider the language in the Thayer case. Now, Thayer,
9 first and foremost applies to this case and frankly I
10 think the Department has already acknowledged that by
11 saying that in Thayer the doctrine of severability was
12 applied to a single sales tax statute, a single paragraph
13 of a sales tax statute, to remove the unconstitutional
14 language and keep the rest of the language. Now, I
15 understand the Department's argument that well, what
16 really happened there was in -- of the statute. But you
17 have to keep in mind, there was not, there certainly was
18 not a case addressing discriminatory tax. So the question
19 of whether eliminating a portion of a statute or
20 eliminating the statute in whole in Thayer did not create,
21 did not address the question of discrimination that is
22 relevant to our analysis today. And also I want to
23 highlight the McKesson case, the case that, you know, I
24 believe establishes some sort of remedy in this case must
25 be provided. Now the Department is arguing that McKesson

1 establishes that no remedy needs to be provided and
2 amongst other things they are suggesting a reason for this
3 is because there is no clear case law on point
4 establishing the, the durable medical equipment exemption
5 is written with a limitation to in-state companies is
6 unconstitutional. Your Honor, I think in this particular
7 case we have identified decades upon decades of cases,
8 both from the U.S. Supreme Court and perhaps most
9 importantly to you, the Shasta case. Now, in Shasta the
10 Court said explicitly that a State, "cannot impose a tax
11 which would require an interstate commerce business. If
12 you transfer a part of its business operations then the
13 taxing states, in order to receive to equal tax
14 treatment." Now, Your Honor, that is exactly by the
15 Department's own admission, what the durable medical
16 equipment exemptions limitation to in-state company is
17 intended to do. Because as I quoted from their brief,
18 they say it is intended to induce corporations to move
19 their operations here to encourage economic development.
20 In other words, there is case law directly on point. That
21 case law is Shasta. And to the extent the Department
22 wishes to suggest that while case law isn't directly on
23 point because it does not discuss or address a durable
24 medical equipment exemption specifically, I honestly think
25 would lead to a very type of economic chaos that the

1 commerce clause is intended to prevent. Now, if the test
2 to determine whether there must be some sort of cure
3 provided for an unconstitutionally discriminatory statute
4 is that there has to be a specific case that addresses the
5 exact language of a State sales tax statute, so that is
6 not allowable. And it has to involve the exact type of
7 property that is at issue. It would be very easy for
8 States to play a game of wackable where by they would
9 write a discriminatory statute and say, well, this is a
10 discriminatory statute unlike any discriminatory statute,
11 any State has ever thought of before. And it would take
12 years for that discriminatory statute to be challenged in
13 court. And for years the State could collect a
14 discriminatory tax creating unequal burden on interstate
15 commerce. Your Honor, I simply do not believe that that
16 is what the Court intended from the McKesson case. I
17 think really stands for the proposition that if there is
18 case law on point that establishes that provision, that a
19 tax provision is unconstitutionally discriminatory, it is
20 indeed unconstitutionally discriminatory and a cure must
21 be provided. And to sum up here, one final thing that the
22 Department suggested is that they have an option that if
23 McKesson does apply in this case, exactly what cure must
24 be applied. I do not deny that McKesson does outline a
25 number of options that a State indeed does hold for

1 providing a cure. But unfortunately, those options,
2 specifically the option that the Department mentioned
3 other than the option to provide a refund simply
4 practically speaking, cannot be applied here. Now, why is
5 that. So here is an issue in this case, these cases go
6 back to the year of 2015. And so since at least 2015,
7 in-state sellers of durable medical equipment have been
8 exempted from tax while out-of-state sellers have not.
9 And the extent that the State wishes to suggest, well, we
10 can just go back and access those in-state companies for
11 back taxes. I don't think that is possible under the
12 State's statute of limitations which limits collecting
13 back taxes from filers in the State of South Carolina to
14 three years. The year 2015 is what, at this point, seven
15 years in the past. So that cure is not available. So no
16 refund is provided to my client, they will remain
17 unconstitutionally discriminated against in the vast
18 majority of the period at issue in this case. Thank you,
19 Your Honor.

20 THE COURT: Thank you. Mr. Antley, you have anything
21 else?

22 MR. ANTLEY: Very briefly, Your Honor. More like
23 bullet points. On the issue of the burden. The
24 Department has cited numerous cases in its filings. I
25 will point to one in particular is Thomas Newspaper v. the

1 City of Florence. And that is the case that says, negate
2 and this is in quotes, "negate every conceivable basis."
3 And that is to support the statute. Point out again that
4 Bacchus does say that domestic, states can encourage
5 domestic industry. The question may become, where is the
6 line. In this instance the Department argues that that
7 line has not been crossed. As to the issue of
8 severability. There was a comment about not blending the
9 two concepts. I will just blend those two concepts. I
10 think filings did it and I thought I had done it earlier.
11 But I just want to be completely clear. With
12 severability, with severability, this is quoting from
13 Thayer. "The test, first part is if the statute would be
14 complete in itself if you took out the language that is
15 unconstitutional." The second part and this is where I
16 will quote, "is of such a character as that it may fairly
17 be presumed that the legislature would have passed it
18 independent of that which is in conflict with the
19 constitution." So if there is a general presumption
20 against exemptions then it cannot be fairly presumed that
21 the legislature would have broadened this exemption, would
22 have passed it without this limitation. And lastly, with,
23 the points about McKesson, whether it is impossible and
24 practical. With all due respect, that is for the
25 Department to decide. McKesson made that clear, that the

1 State may choose the form of relief. Thank you.

2 THE COURT: Do you have a simultaneous case before
3 the Administrative Law Court?

4 MR. ANTLEY: Yes, Your Honor.

5 THE COURT: Why is the Circuit Court the one that
6 should decide this.

7 MR. REAMES: Your Honor, I will speak to that real
8 briefly. So this is, as you just heard in great detail, a
9 challenge to a statute on its face. That is the exclusive
10 jurisdiction of the Circuit Court. The South Carolina
11 Administrative Law Court, which as you know, hears the
12 vast majority of tax cases, can only hear a constitutional
13 challenge to a statute as applied. That is not what we
14 are saying, Judge. We are saying that by reading this
15 statute on its face, it applies, an exemption applies to
16 in-state businesses but not out-of-state businesses. We
17 filed, we, the Plaintiffs, tax payers, filed with the
18 Administrative Law Court, out of an abundance of caution
19 to preserve our rights. And then immediately filed a
20 summons and complaint in the Circuit Court. So, Judge
21 Lenski in the Administrative Law Court has agreed to hold
22 that case in abeyance because he understood and recognized
23 that the Circuit Court had jurisdiction over the facial
24 constitutional challenges. So that case is sort of on
25 hold until we see, we obtain a ruling here.

1 THE COURT: Alright, you have anything on that, Mr.
2 Antley?

3 MR. ANTLEY: Maybe just a bit of words. I wouldn't
4 say the Court has exclusive, circuit courts have exclusive
5 jurisdiction because, but the ALC does not have
6 jurisdiction over a facially constitutional, a question as
7 to the constitutionality of a statute on its face. But
8 our Court of Appeal, our Appellate Courts would also have
9 jurisdiction. So if that matter went to the ALC, then on
10 appeal those Appellate Courts would have an opportunity to
11 decide on the matter.

12 MR. REAMES: Your Honer, If I may. I am in
13 agreement, I may have used that word carelessly. The
14 point is, the South Carolina Revenue Procedures Act, which
15 governs tax disputes provides very clearly that a facial
16 challenge should be filed in Circuit Court, not the
17 Administrative Law Court. But I appreciate Mr. Antley's
18 response there.

19 THE COURT: Did I read in the brief that South
20 Carolina is the only State that has the limitations to
21 in-state?

22 MR. HILKIN: Unaware of another State that has
23 in-state limitation even though the vast majority of
24 States provides some sort of durable medical equipment
25 exemption.

1 THE COURT: Anything on that?

2 MR. ANTLEY: I am not aware of another State that has
3 this particular limitation but not all States grant the
4 exemption.

5 THE COURT: Alright, this is not a ruling, it is not
6 a leaning. It is just to keep things moving along. I
7 want to read these cases myself, particularly the Thayer
8 case and make up my mind. But to keep things moving I am
9 going to ask the attorneys for KCI and for Orthofix to
10 submit a proposed order to me granting the motion;
11 granting the severance and the refund. I ask that you not
12 Efile that order, that you not submit it through the
13 Efiling system, but that you submit it as a Word, a Word
14 document attached to an email to me. The email addresses
15 in South Carolina for Judges and their staff, you may know
16 the -- they put the first initial and then the last name
17 and then they put J for Judge; they put the first initial
18 and the last name of the Judge and LC for Law clerk. And
19 the first initial and the last name and SC for
20 administrative assistant or secretary. A few years ago
21 Court Administration decided to list our secretary's email
22 addresses as ours in some of these directories. I prefer
23 that you send it straight to me and the Law Clerk. So the
24 J and the LC at the end, I have a new Law Clerk who is
25 starting today. This will probably be the first thing she

1 gets. I will try to get a final decision to you as
2 quickly as I can. Thank you very much. I appreciate it.
3 It is obvious both of you are well prepared, you studied
4 it, researched it and it always helps the Court when I
5 have good lawyers. Thank you.

6 MR. ANTLEY: Thank you, Your Honor.

7 MR. HILKIN: Thank you, Your Honor.

8 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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1 CERTIFICATE OF REPORTER
2
34 State of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter do hereby
9 certify that the foregoing is a true, accurate and
10 complete transcript of record of the proceedings had and
11 evidence introduced in the trial of the captioned case,
12 relative to appeal, in the County of Lexington, South
13 Carolina on the 2nd day of November, 2022.14 I do further certify that I am neither of kin,
15 counsel nor interest to any party hereto.16 The proceedings were transcribed to the best of my
17 ability with the information and recordings provided.
1819 April 3, 2023
2021 Joy E. Holston
22

23 Joy E. Holston, Court Reporter

24 My Commission expires: May 2, 2026
25

ROA 130
STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF THE GENERAL COUNSEL

300A Outlet Pointe Blvd.
Columbia, SC 29210



PO Box 12265
Columbia, SC 29211-9979

July 22, 2021

VIA US MAIL

Orthofix Inc.
3451 Plano Parkway
Lewisville, TX 75056-9453

Re: Orthofix, Inc.
Periods Involved: March 2017 – March 2020
DOR File Number: 210075

Dear Taxpayer,

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within thirty (30) days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a \$500.00 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: PO Box 12265, Columbia, SC 29211-9979.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

A handwritten signature in blue ink that reads "Marcus D. Antley, III". The signature is stylized with a large, flowing "M" and "A".

Marcus D. Antley, III, Esquire
Associate Counsel

MDA/hch
Enclosures

DEPARTMENT DETERMINATION

Taxpayer:

Orthofix, Inc.
3451 Plano Pkwy
Lewisville, TX 75056

Periods Involved:

March 1, 2017 through March 31, 2020

Matter in Dispute:

Is Orthofix, Inc. (Taxpayer) entitled to a refund of sales tax paid for durable medical equipment?

Amount In Dispute:

Refund Claim	\$351,790.00
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Determination:

The Taxpayer is not entitled to a refund of sales tax paid for durable medical equipment.

Relevant Facts:

1. The Taxpayer is a Delaware corporation with its domicile and principal place of business located in Texas. The Taxpayer sells tangible personal property at retail, including durable medical equipment and related supplies in South Carolina. The Taxpayer holds a South Carolina retail sales license.
2. On June 1, 2020, the Taxpayer submitted a refund claim totaling \$351,790.00 for sales tax on purchases of durable medical equipment and related supplies.¹
3. On August 27, 2020, the Department denied the refund claims for durable medical equipment because the Taxpayer's principal place of business is not located in this State.
4. The Taxpayer timely protested the denial by letter dated September 3, 2020. The Taxpayer only disputed the constitutionality of the sales tax exemption statute.²
5. On November 16, 2020, the Department's Appeals Section held a teleconference with the Taxpayer. The Department and Taxpayer were unable to resolve the protest, leading to the

¹The Department refunded the Bad Debts claimed by the Taxpayer.

²Specifically, the Taxpayer argues by limiting the exemption to providers whose principal place of business is in this State, the statute facially discriminates against out-of-state businesses and violates the dormant Commerce Clause of the United States Constitution.

issuance of this Department Determination.

Analysis:

Under South Carolina law, a sales tax of six percent of “the gross proceeds of sales, is imposed upon every person³ engaged or continuing within this State in the business of selling tangible personal property at retail.” S.C. Code Ann. §§ 12-36-910(A) and 12-36-1110 (2014).

I. The Taxpayer is not entitled to a refund of sales tax paid for durable medical equipment.

The Taxpayer does not dispute that it is otherwise subject to sales tax in South Carolina for the durable medical equipment. It only disputes whether it should be entitled to the durable medical equipment exemption. When considering eligibility for a tax exemption, the language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (internal citations omitted).

S.C. Code Ann. § 12-36-2120(74) (2014) grants a sales tax exemption for durable medical equipment. Specifically, Section 12-36-2120(74) provides:

Exempted from the taxes imposed by this chapter are the gross proceeds of sales, or sales price of:

(74) durable medical equipment and related supplies:

- (a) as defined under federal and state Medicaid and Medicare laws;
- (b) which is paid directly by funds of this State or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibits the payment of the sale or use tax; and
- (c) sold by a provider who holds a South Carolina retail sales license and whose principal place of business is located in this State... (emphasis added).

The element of the exemption statute at issue is the second half of subsection (c) because the Taxpayer's principal place of business is not located in South Carolina. The Taxpayer admits its principal place of business is not located in this State. Because the Taxpayer does not meet the statutory requirements as written, it is not entitled to a refund of sales tax paid for durable medical equipment.

³For sales and use tax purposes, the term person “includes any individual, firm, partnership, limited liability company, association, corporation, receiver, trustee, any group or combination acting as a unit, the State, any state agency, any instrumentality, authority, political subdivision, or municipality.” S.C. Code Ann. § 12-36-30 (2014).

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Conclusion:

Because the Taxpayer does not meet the elements required to receive a sales tax exemption for durable medical equipment, the Department must deny the refund claim.

Department Determination drafted by Department Representative:

Marcus D. Antley, III, Esquire
Associate Counsel
South Carolina Department of Revenue

July 22, 2021

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT

Orthofix, Inc.

Plaintiff,

vs.

South Carolina Department of Revenue,

Defendant.

Case Number. 2021 -CP-32-02752

STIPULATION OF FACTS

As contemplated by S.C. Code Section 12-60-3320, the Petitioner, Orthofix Inc., and the Respondent, South Carolina Department of Revenue, do hereby stipulate to the following facts for purposes of this contested case hearing:

1. Petitioner, referred to by Respondent in its Department Determination as "Taxpayer," is a Delaware corporation with its principal place of business located in Texas.

2. Petitioner holds a South Carolina retail sales license and sells tangible personal property at retail, including durable medical equipment and related supplies in South Carolina.

3. Petitioner timely remitted South Carolina sales tax to Respondent on the durable medical equipment and related supplies sales to customers in South Carolina.

4. On June 1, 2020, Petitioner submitted refund claims totaling \$351,790.00 for sales tax paid on durable medical equipment and related supplies sold to customers in South Carolina during the time period of March 1, 2017 through March 31, 2020.

5. On August 27, 2020, Respondent denied the refund claims for sales tax paid on durable medical equipment and related supplies sold to customers in South Carolina on the basis that Petitioner's principal place of business is not located in South Carolina.

6. Petitioner timely protested the denial. Petitioner only disputed the constitutionality of the sales tax exemption statute. Specifically, Petitioner asserts that the sales tax exemption provided in Title 12 for retail sales of durable medical equipment is facially unconstitutional

because it discriminates against out-of-state businesses and violates the dormant Commerce Clause of the United States Constitution.

7. On November 16, 2020, the Department's Appeals Section held a teleconference with Petitioner. Respondent and Petitioner were unable to resolve the protest, leading to Respondent's issuance of the Department Determination on July 22, 2021 in which Respondent denied the refund claim.

8. Petitioner timely filed its request for contested case hearing in the Administrative Law Court on August 20, 2021 to review the Department Determination.

9. On August 20, 2021, Petitioner also filed an action in the Lexington County Court of Common Pleas challenging the constitutionality of the sales tax exemption's discrimination against otherwise qualified taxpayers doing business in South Carolina that do not have a principal place of business in South Carolina.

10. The parties do not dispute that retail sales of durable medical equipment and related supplies is subject to sales tax in South Carolina. The parties also do not dispute that South Carolina law provides for an exemption from sales tax paid on durable medical equipment and related supplies at South Carolina Code Section 12-36-2120(74).

11. Petitioner sold durable medical equipment and related supplies, as defined under federal and state Medicaid and Medicare laws, to customers in South Carolina. Petitioner only seeks a refund of sales tax for those sales of durable medical equipment and related supplies.

12. The durable medical equipment and related supplies sold to customers in South Carolina for which Petitioner seeks a refund of sales tax were paid for directly by funds of South Carolina or the United States under the Medicaid or Medicare programs, where state or federal law or regulation authorizing the payment prohibited the payment of the sale or use tax.

13. The parties do not dispute that Petitioner holds a South Carolina retail sales license.

14. There is no other basis for denial of Petitioner's refund claim addressed in the Department Determination other than a requirement of the sales tax exemption as written that the Taxpayer's principal place of business must be located in South Carolina in order to qualify for the exemption.

15. The foregoing factual stipulations will apply both in this proceeding and in the parallel contested case proceeding in the South Carolina Administrative Law Court.

The Parties so stipulate.

May 6, 2022
Columbia, South Carolina

s/ Rick Reames, III
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Attorneys for Plaintiff

May 6, 2022
Columbia, South Carolina

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Attorney for Defendant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

CASE NO. 2021-CP-32-02752
Appellate Case No. 2023-000317

RECEIVED

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S.C. SUPREME COURT

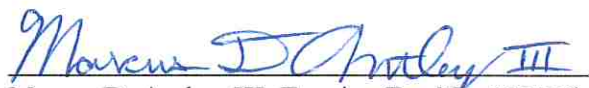
Orthofix, Inc., ... Respondent,

v.

South Carolina Department of Revenue, ... Appellant.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), SCACR, the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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Attorneys for Appellant

South Carolina Department of Revenue

July 10, 2023