



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CITY OF TUSCALOOSA, a)
municipal corporation;)
SCHOOL DISTRICT OF THE)
CITY OF TUSCALOOSA, aka)
Tuscaloosa City Schools, and)
CITY OF MOUNTAIN BROOK,)
a municipal corporation;)

Plaintiffs,)

v.)

Case No. _____

VERNON BARNETT, in his official)
capacity as Commissioner of the)
Alabama Department of Revenue,)

Defendant.)

COMPLAINT

For their Complaint against Vernon Barnett (“the Commissioner”), in his official capacity as Commissioner of the Alabama Department of Revenue (“ADOR”), Plaintiffs City of Tuscaloosa (“Tuscaloosa”), School District of the City of Tuscaloosa aka Tuscaloosa City Schools (“TCS”), and City of Mountain Brook (“Mountain Brook”) state as follows:

BACKGROUND AND SUMMARY

1. Government is often critiqued as being slow to keep up with the times. Sometimes, however, government fails to keep up with the law itself. It is that latter failure – the Commissioner’s and ADOR’s failure, and indeed the failure of the State

of Alabama (the “State”), to keep up with the law itself, which has placed the State in the position of having failed to comply with its own law and has forced the City and TCS to file this lawsuit. Before setting out the legal claims, we first explain the genesis and the “why” of this lawsuit.

2. From the early 1990s forward, United States Supreme Court precedent, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), required that, for a state or locality to collect a sales or use tax on a transaction, the United States Constitution required that the involved merchant have a physical nexus to the various taxing jurisdictions. As internet sales began in the late 1990s and early 2000s, and later escalated in the 2010s, the then-applicable *Quill* standard blocked states and localities from lawfully taxing increasing numbers of sales transactions often involving “remote” sellers.

3. During the reign of *Quill*, the State of Alabama enacted alternative-universe taxing apparatus, the Simplified Seller’s Use Tax or “SSUT,” Ala. Code § 40-23-190 *et seq.* (the “SSUT Statute”). Merchants could choose whether to participate or not in the SSUT Program – it was (and remains) entirely voluntary. In order to participate, however, the participant had to meet the statutory definition of either an “eligible seller” or a “marketplace facilitator.” The Commissioner is charged with making the determination whether the participant meets these statutory definitions – either determining that a merchant directly selling goods meets the SSUT’s statutory definition of “eligible seller,” or whether a market maker (such as

DoorDash or UberEats) qualifies as a “marketplace facilitator.” Any SSUT program participant who collects and remits SSUT is by law exempt from collecting any traditional State or local sales taxes.

4. But the controlling law changed. In June of 2018, recognizing the realities of the ever-expanding internet marketplace, the United States Supreme Court overruled *Quill* in the case of *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018). Under *Wayfair*, remote merchants (that is, merchants having no physical presence with a taxing jurisdiction) were deemed nevertheless the proper subject of state and local taxation so long as there was a “substantial nexus” between the transaction and the taxing jurisdiction. The “substantial nexus” test is satisfied when the merchant conducts a significant amount of commerce with residents of the taxing jurisdiction. *Wayfair* changed the law. Under *Wayfair*, even remote sellers are the proper subject of traditional State and local sales tax, *Wayfair* leveled the playing field and allowed remote sellers to be subject to the same sales taxes collected by Alabama’s counties and cities, so long as the subject merchant has the required “substantial nexus” with the taxing jurisdiction.

5. Despite the overruling of *Quill* in favor of *Wayfair*, nothing in the SSUT world has changed since *Wayfair*. Despite the removal of the Constitutional impediment to the imposition of traditional State and local sales and use taxes, and despite a direct command by Alabama statute that taxing power is coextensive with

Wayfair, the SSUT remains alive and well. Thus, merchants who post-*Wayfair* are legally required to collect State and local sales taxes have continued to be allowed to opt out of that traditional taxing system and, at the merchant's own option, to collect SSUT instead of traditional State and local sales tax. The result: literally millions of internet-facilitated transactions in the State of Alabama – even involving merchants with physical presences in the State – evade traditional state and local taxes to which they are properly and legally subject. All of this is at the option and choice of the merchant. Under the SSUT statute, moreover, an SSUT participant is completely exempt from collection of any State or local sales tax – and local taxing authorities cannot even audit a participant's records.

6. Because the merchant has the choice to collect or not collect State and local sales tax – tax which the merchant would be otherwise lawfully required to collect under *Wayfair* – the “merchant's choice” aspect of SSUT is after *Wayfair* unconstitutional as a matter of Alabama Constitutional law – for reasons we explain further in this Complaint. The bottom line is that the State has not kept up with the change in the law. *Wayfair* rendered traditional State and local sales tax legally collectible, negating the entire reason for the SSUT's creation and existence. This in turn has caused the merchant-optional feature of the SSUT Statute to infect the entire SSUT system, rendering it unconstitutional under the Alabama Constitution.

7. Making matters worse, the Commissioner has (before and after *Wayfair*) deemed to be qualified dozens of merchants, indeed prominent ones, as being either “eligible sellers” or “marketplace facilitators” which do *not* meet the statutory qualifications for those respective categories. Thus, even if the SSUT program can survive attack under the Alabama Constitution after *Wayfair*, the Commissioner has nevertheless acted unlawfully, and has exceeded his statutory authority, in deeming qualified entities which are statutorily unqualified for the SSUT program. This is no small matter: the most common merchants one can think of – Amazon, Wal-Mart, Target, Kroger – in fact fail to meet the requirements imposed by the SSUT Statute for being an “eligible seller;” and likewise DoorDash, UberEats, Instacart, Shipt, and other prominent internet-based merchants do not meet the SSUT Statute’s definition of a “marketplace facilitator.”

8. The SSUT’s unlawful existence and enforcement has had, continues to have, and will in the future have devastating financial impacts on Alabama’s municipalities and school systems. As mentioned earlier, SSUT and the conventional sales and use tax are completely different taxes. The SSUT is an eight percent (8%) state sales tax, distributable under a statutory scheme described in the chart below. By contrast, the conventional combination of State and local sales tax for a hypothetical transaction - subject to tax in Tuscaloosa - would be four percent (4%) state sales tax, three percent (3%) Tuscaloosa County tax; and three percent (3%)

Tuscaloosa tax. Aside from the fact that the very taxes themselves are different (SSUT vs. traditional sales tax), the distribution of these respective taxes – even the portion of the SSUT distributable to the State vs. the distribution of traditional State sales tax – is entirely different. Here is a chart illustrating the difference in taxation of an SSUT-governed transaction vs. a hypothetical sales transaction in Tuscaloosa:

FEATURE	SSUT	CONVENTIONAL
Rate	<i>Per Ala. Code § 40-23-193(c)</i> 8% flat rate; capped	10% total current total rate • 4% State of Alabama • 3% Tuscaloosa County • 3% City of Tuscaloosa
Distribution	<i>Per Ala. Code § 40-23-197</i> 4% to State • 75% to General Fund • 25% to Education Trust Fund 1.6% to All Counties <i>Prorated according to Census population</i>	Sources: Multiple , compiled at https://www.revenue.alabama.gov/tax-types/sales-tax/ 4% to State • All to Education Trust Fund, with minor exceptions¹ 3% to Tuscaloosa County • 25% to Tuscaloosa County Schools • 20% to Tuscaloosa City Schools • 19% to City of Tuscaloosa • 14.3% to County General Fund

¹ The exceptions are as follows:

- The first \$378,000 is distributed to the Counties.
- \$1,322,000 is distributed to the Department of Human Resources.
- 42% of the 2% tax on gross proceeds from sale of automotive vehicles and from sale of mobile home set-up materials and related supplies goes to the General Fund.
- An amount equal to 5% of the value of food stamp benefits issued statewide in excess of the amount paid by recipients is distributed to the Department of Human Resources.
- An amount for debt service is distributed to the Alabama Public School and College Authority.
- Act 2021-445 amended Ala. Code § 40-23-35 to provide that, beginning October 1, 2021 and annually thereafter, \$7 million will be distributed to the Department of Conservation and Natural Resources for capital outlay, repairs, and maintenance of the state parks system. Beginning with the fiscal year that starts on October 1, 2022, the State Treasurer shall annually adjust the amount distributed to the Department of Conservation and Natural Resources based on the cumulative change in the Consumer Price Index.
- Beginning January 1, 2016, all proceeds from the tax on sales of consumable vapor products will be disbursed to the General Fund.

	2.4% to All Municipalities <i>Prorated according to Census population</i>	• 10% to TCRIC (Tuscaloosa County Road Improvement Commission) • 6.7% to DCH Healthcare System • 5% to City of Northport 3% to City of Tuscaloosa • 66.6% to City General Fund • 33.3% to Elevate Tuscaloosa Fund (<i>per operating policy; not codified</i>)
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9. The chart above, and the ever-deepening hole for school systems apparent from the chart above, demonstrates most vividly the “why” of this case. Like dozens of other Alabama municipalities and school districts, Tuscaloosa/TCS and Mountain Brook are losing millions of dollars every year because of merchants’ voluntary elections to decline collecting traditional State and local sales and use taxes, and instead collecting SSUT. Those losses will escalate every year as internet sales continue to deteriorate traditional brick-and-mortar sales transactions. In the current fiscal year alone, Tuscaloosa is projected to lose \$14.6 million in local tax revenues, calculated as the difference between the portion of SSUT distributable to Tuscaloosa vs. the approximate amount of tax revenue Tuscaloosa would receive in a conventional sales tax collection for transactions delivered to Tuscaloosa residents. This amount can only be estimated, of course, because under the SSUT statutory method, cities like Tuscaloosa are blocked from auditing SSUT Program participants to determine their actual sales being delivered to the taxing jurisdiction.

10. This lawsuit seeks to declare the SSUT Statute invalid and unconstitutional under the Alabama Constitution as to “eligible sellers” and to enjoin the Commissioner from further enforcement of the SSUT Statute regarding that category of participants. This lawsuit seeks, in the alternative, to require the Commissioner to perform his duty, required by the SSUT Statute itself, to disqualify a number of SSUT participants which do not meet the statutory definitions of either “eligible seller” or “marketplace facilitator,” and to compel the Commissioner to perform his statutory duty to require that such SSUT-ineligible participants immediately begin collecting traditional State and local sales and use tax.

PARTIES, JURISDICTION, and VENUE

11. Tuscaloosa is a municipal corporation organized and existing under the laws of Alabama. The community within Tuscaloosa’s city limits was organized before the State of Alabama obtained statehood in 1819.

12. TCS was created by an act of the Alabama Legislature in 1884. It serves a school district serving students residing largely within the corporate boundaries of Tuscaloosa and has done so continuously for over 140 years.

13. Mountain Brook is a municipal corporation organized and existing under the laws of Alabama.

14. The Commissioner is an officer of the State of Alabama charged by law to serve as chief executive officer of ADOR, an agency of the State.

15. This Court has subject matter jurisdiction over this action. This action falls directly within the exception to the State immunity otherwise conferred under Ala. Const. Art. I, Sec. 14, because it is an action seeking to declare a statute unconstitutional, and it is an action against a State official seeking to compel that State official to perform his statutory duty, and to refrain from acting in a manner exceeding his statutory authority.

16. Venue is proper in the Circuit Court of Montgomery County, Alabama, in that this is an action against a State official whose primary office is in Montgomery County. *Ex parte Neeley*, 653 So. 2d 945, 947 (Ala. 1995).

ALLEGATIONS COMMON TO ALL COUNTS

17. Under the SSUT Statute, Ala. Code § 40-23-190(a), an out-of-state vendor has a “substantial nexus with the State for the collection of both state ***and local*** use tax” (emphasis added) – *i.e.* the vendor is required to collect State and local sales and use tax -- if two statutory conditions are met –

- a. “the out-of-state vendor and an in-state business maintaining one or more locations within this state are related parties;² and
- b. “the out-of-state vendor and the in-state business [(a)] use an identical or substantially similar name, tradename, trademark, or

² Entities are deemed to be “related parties” under this section according to the test established in Ala. Code § 40-23-190(c).

goodwill, to develop, promote, or maintain sales, or [(b)] the in-state business and the out-of-state vendor pay for each other's services in whole or in part contingent upon the volume or value of sales, or [(c)] the in-state business and the out-of-state vendor share a common business plan or substantially coordinate their business plans, or [(d)] the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market."

18. ADOR's implementing regulations, Ala. Admin. Code § 810-.90-.01(3) defines "substantial nexus" broadly, to the farthest extent of the State's jurisdictional taxing authority: "Substantial nexus is a connection between a seller and the state, created by the seller's business activities in the state, which is substantial enough to cause the seller to be subject to the jurisdictional taxing authority of the state."

19. Entities such as Amazon, Kroger, Target, Wal-Mart, and other national vendors who directly or indirectly (through "related entities") have physical presences in Alabama therefore have a "substantial nexus" to Alabama under the statutory test of Ala. Code § 40-23-190(a). Such entities are thus by law required to collect "State and local" sales and use tax and to remit them as any other traditional brick-and-mortar establishment, unless some exception applies.

20. The SSUT Remittance Program, codified at Ala. Code § 40-23-191 *et seq.*, allows an “eligible seller” to participate in the voluntary SSUT collection and remittance program. An “eligible seller” is defined as “[a] seller that sells tangible personal property or a service, but does not have a physical presence in this state or is not otherwise required to collect and remit state and local sales or use tax for sales delivered into the state.” Ala. Code § 40-23-191(b)(2).

21. The SSUT Program is voluntary – it is at the election of the merchant. As Section 40-23-192(a) states, “[p]articipation in the program ***shall be by election of the eligible seller*** and only those eligible sellers accepted into the program as set out herein shall collect and remit the simplified sellers use tax.” (emphasis added).

22. Under the controlling statute, a putative SSUT program participant (the “applicant”) makes application with ADOR to participate the SSUT Program under section 40-23-192(c). ADOR then determines whether the applicant meets the statutory requirements of an “eligible seller.” ADOR (and the Commissioner), moreover, are statutorily charged with the mandatory duty to remove a Program participant if the participant no longer meets the requirements of being an “eligible seller.” Ala. Code § 40-23-192(e)(3) (“a participating eligible seller ***shall*** be removed from the program...[u]pon a determination that the seller is no longer an eligible seller, as defined by this part”) (emphasis added).

23. An “eligible seller” once admitted into the SSUT Program then collects and remits the SSUT, a tax which is capped at eight percent (8%), in lieu of collecting and remitting State and local taxes. Ala. Code § 40-23-193(b) & (c). Thus, under section 40-23-193(c) -

No eligible seller shall be required to collect the tax at a rate greater than eight percent, regardless of the combined actual tax rates that may otherwise be applicable. Additionally, no sales for which the simplified sellers use tax is collected shall be subject to any additional sales or use tax from any locality levying a sales or use tax with respect to the purchase or use of the property, regardless of the actual tax rate that might have otherwise been applicable.

24. Local taxing authorities, moreover, lack any ability to audit, to review, or to question an “eligible seller’s” business activities within the cloak of the SSUT Program. Ala. Code § 40-23-195(a).

25. Under the plain language of Ala. Code § 40-23-191(b)(2), national retailers with physical stores in the State, such as Wal-Mart, Target, and Kroger, do not meet the definition of an “eligible seller,” because (a) each of them has a physical presence, or (b) they otherwise have a “substantial nexus” to Alabama under Ala. Code § 40-23-190(a) (as discussed *supra*), and thus they are required to collect state “and local” sales and use taxes under that very section.

26. Despite these statutory requirements, the Commissioner has unlawfully, and in a manner exceeding his statutory authority, deemed qualified as “eligible sellers” for SSUT Program participation affiliates of national retailers such as Kroger,

Target, and Wal-Mart, and dozens more, which have at all times maintained a physical presence in Alabama with traditional brick-and-mortar stores, and thus could never meet the “eligible seller” statutory test. The Commissioner has exceeded his statutory authority in qualifying such entities for SSUT Program participation, and has failed to fulfill his statutory duty to disqualify these merchants as being ineligible to participate in the SSUT Program.

27. Note that we didn’t mention Amazon yet. It’s a special case. The only exception to the “substantial nexus” test for a merchant’s requirement to collect State “and local” sales and use tax, *per* Ala. Code § 40-23-190(a), is a statutory “grandfather” provision, grafted onto that same statute during the 2018 Regular Session of the Alabama Legislature. It’s set out in Ala. Code § 40-23-190(a)(2):

An out-of-state vendor that is an eligible seller participating in the Simplified Sellers Use Tax Remittance Program, as these terms are defined in Section 40-23-191, that establishes a substantial nexus in this state only through the acquisition of an in-state business and thereafter meets the provisions of subsection (a) may elect to satisfy the requirements to collect and remit tax for the out-of-state vendor’s Alabama sales by continued participation in the Simplified Sellers Use Tax Remittance Program.

(Emphasis added); accord Ala. Code § 40-23-191(b)(2) second sentence (grafting similar language onto the statutory definition of “Eligible Seller”).

28. This statutory grandfather was added in early 2018 in an effort to accommodate Amazon’s June 2017 acquisition of Whole Foods, which had multiple brick-and-mortar stores within Alabama. At the time of Amazon’s acquisition of

Whole Foods, Amazon was an SSUT “eligible seller” without any other physical presence in Alabama. Thus, the statutory carve-out was passed in order to allow Amazon to continue participating in SSUT despite its establishment of a physical presence through the acquisition of Whole Foods.

29. The 2018 carve-out, however, requires that the “substantial nexus” of the subject merchant is created or established “only” through the “acquisition of an in-state business.” It therefore will *not* accommodate remote merchants who, though previously qualifying for “eligible seller” status, later establish a “substantial nexus” with Alabama through the commencement and maintenance of physical operations in the State *not* arising from the acquisition of an extant in-state business.

30. Months after the 2018 amendment became law, Amazon established a physical presence in Alabama in an entirely different way from its Whole Foods acquisition: by building and later opening its first warehouse in Bessemer, Alabama. See Jerry Underwood, “Amazon kicks off construction of first Alabama fulfillment center,” Alabama Department of Commerce Press Release of October 2, 2018 (accessible and available at: <https://www.madeinalabama.com/2018/10/amazon-kicks-off-construction-of-first-alabama-fulfillment-center/>). And since that time, Amazon has established multiple additional physical presences in Alabama by opening and operating numerous other distribution centers throughout the State. Amazon even has physical counters at physical locations in Alabama, and it has tens

of thousands of physical lockers in hundreds of Alabama venues, where its packages are delivered and picked up.

31. Once Amazon established a physical presence in Alabama independent from its acquisition of Whole Foods, Amazon ceased being an “eligible seller” under the 2018 grandfather provision in Ala. Code § 40-23-190(a)(2) and the second sentence of Ala. Code § 40-23-191(b)(2).

32. Despite Amazon’s disqualification from being an “eligible seller” under the statutory language, the Commissioner has unlawfully allowed Amazon to continue participating in SSUT Program as an “eligible seller” and has refused to fulfill his statutory duty to disqualify Amazon from SSUT Program participation.

33. We now turn to another SSUT category of businesses, known as the “marketplace facilitators.” Marketplace facilitators also participate in the SSUT Program – though unlike “eligible sellers,” they are required either to participate in the SSUT Program or report their transactions to ADOR for putative collection at the consumer level. Oddly, the SSUT statute’s provisions governing “marketplace facilitators” do not appear to confer upon them the statutory option to remit conventional State and local sales tax, see Ala. Code § 40-23-199.2(b) and following, though such entities would be required to do so under Ala. Code § 40-23-190(a) due to their having a “substantial nexus” with Alabama.

34. Under Ala. Code § 40-23-199.2(2), a “marketplace facilitator” is an entity which “contracts with marketplace sellers **to facilitate** for a consideration, regardless of whether deducted as fees from the transaction, **the sale** of the marketplace seller’s products through a physical or electronic marketplace operated by a person....” (emphasis added). A “marketplace seller,” in turn, is “[a] seller that is not a related party, as prescribed in Section 40-23-190(c), to a marketplace facilitator and **that makes sales** through any physical or electronic marketplaces operated by a marketplace facilitator.” (emphasis added). In other words, the statutory language requires that the “marketplace seller” “make[]” the actual sale, and that the “marketplace facilitator” “facilitate” the sale. The statutes working together require that there be only one sale, not two separate sales.

35. Some transactions in the internet retailing world admittedly fall within the scope of “marketplace facilitator.” For example, when eBay advertises a third-party seller’s goods on its website and receives a cut of the seller’s take from the sale, eBay might be acting as a “marketplace facilitator.” The marketplace seller is the merchant; and the merchant ships the good to the buyer using the eBay platform, which facilitates the coming together of buyer and seller.

36. But other common transactions do not fall within the statutory scope of “marketplace facilitator” because not one, but two separate, sales are involved. When a customer orders Chick-fil-A for delivery through DoorDash, for example,

DoorDash upcharges the customer from what Chick-fil-A would charge the customer directly. DoorDash in that instance is buying Chick-fil-A's goods at wholesale, and not paying sales tax thereon at pick-up, then charging the customer the DoorDash price for the goods in a second retail sale to the customer. DoorDash in turn collects SSUT only on the retail transaction with its customer. But a resale is not the activity of a proper "marketplace facilitator" under the statutory definition, because marketplace "facilitat[ion]" involves only one sale of the goods. Accordingly, reseller entities like DoorDash, UberEats, Instacart, and Shipt – all of which charge substantially more for a merchant's goods than the merchant itself charges consumers - are actually not "marketplace facilitators" under the controlling statutes, but instead are traditional retailers falling within the scope of general "substantial nexus" taxing power, under Ala. Code § 40-23-190(a), for collection of traditional State "and local" sales tax.

37. By deeming entities engaged in such wholesale/retail transactions to be qualified to be "marketplace facilitators" and allowing them to participate in the SSUT Program, the Commissioner has exceeded his statutory authority and is acting contrary to law. Moreover, to the extent the Commissioner requires a "marketplace facilitator" to participate in SSUT rather than collecting and remitting conventional State and local sales tax, to which the "marketplace facilitator" would be subject

under Ala. Code § 40-23-190(a), the Commissioner has acted and continues to act in a manner contrary to that latter statutory requirement.

COUNT ONE – SSUT PROGRAM VIOLATES ALA. CONST. Sec. 212

38. Plaintiffs reallege and adopt by reference the allegations above, as if set forth fully herein.

39. Under Sec. 212 of the Alabama Constitution, “[t]he power to levy taxes shall not be delegated to individuals or private corporations or associations.” Note that this confers the power to levy “taxes” – not solely State taxes – so that includes county and municipal taxes.

40. The SSUT Program, at Ala. Code § 40-23-192(a), gives those participants categorized as “eligible sellers” the choice to collect and remit SSUT or to collect and remit the conventional State and local sales taxes.

41. Such “eligible seller” participants in the SSUT Program, however, are required by law to collect and remit conventional State “and local” sales taxes, under Ala. Code § 40-23-190(a), because these participants have a “substantial nexus” with the State and each of the localities to which goods are being delivered.

42. By participating in the SSUT Program, the “eligible seller” participants are allowed to choose, at their sole and absolute discretion, not to levy and collect conventional State and local sales taxes.

43. In so doing, the SSUT “choice” provision delegates to the “eligible seller” merchant the decision whether or not to levy and collect from the consumer the State or applicable local sales taxes.

44. Based on the foregoing, the SSUT’s “participant’s choice” provision violates Ala. Const. Sec. 212 as to participating “eligible sellers.”

45. By allowing SSUT Program participants to choose whether or not to collect taxes which are legally required to be collected, the Commissioner has acted and is continuing to act in an unconstitutional manner, and he is exceeding the proper scope of his statutory authority.

WHEREFORE, Plaintiffs request that the Court declare that Ala. Code § 40-23-192(a)’s “participant choice” provision violates Ala. Const. Sec. 212; that the Court enjoin the Commissioner to comply with Ala. Code § 40-23-190(a) and thereby require all SSUT Program “eligible seller” participants with a “substantial nexus” to collect and remit conventional State “and local” sales taxes forthwith; for costs of this action; and for such further relief as may be just and equitable.

COUNT TWO – “ELIGIBLE SELLER” DISQUALIFICATION

46. Plaintiffs reallege and adopt by reference the allegations above, as if set forth fully herein.

47. Under Ala. Code § 40-23-191(b), an “eligible seller” does not have a physical presence in Alabama and is not otherwise required to collect State and local

sales and use tax. However, under Ala. Code § 40-23-190(a), virtually all internet sellers, and certainly national retailers with physical stores in Alabama, have a “substantial nexus” with Alabama and are therefore legally required to collect and remit State and local sales tax.

48. Under the plain language of Ala. Code § 40-23-191(b)(2), national retailers with physical stores in the State, such as Wal-Mart, Target, and Kroger, do meet the definition of an “eligible seller,” because (a) each of them has a physical presence, or (b) they otherwise have a “substantial nexus” to Alabama under Ala. Code § 40-23-190(a) (as discussed *supra*), and thus they are required to collect state “and local” sales and use taxes under that very section.

49. Despite these statutory requirements just discussed, the Commissioner has unlawfully, and in a manner exceeding his statutory authority, deemed qualified as “eligible sellers” for SSUT Program participation national retailers such as Kroger, Target, and Wal-Mart, and dozens more, which have at all times maintained a physical presence in Alabama with traditional brick-and-mortar stores, and thus could never meet the “eligible seller” statutory test.

50. The Commissioner has therefore exceeded his statutory authority, and has acted in a manner contrary to law, in qualifying such entities for SSUT Program participation, and has failed to fulfill his statutory duty to disqualify these merchants as being ineligible to participate in the SSUT Program.

51. With respect to Amazon, moreover, Amazon has a “substantial nexus” to the State under Ala. Code § 40-23-190(a) and thus must legally collect conventional State “and local” sales tax. And for the reasons discussed in a number of paragraphs above, Amazon ceased to fall within the SSUT’s statutory grandfather of § 40-23-190(a)(2) and Ala. Code § 40-23-191(b)(2) (second sentence), once Amazon (in 2018-19) established a physical presence in Alabama through its construction and operation of warehouses physically located in the State.

52. By allowing Amazon to continue collecting and remitting SSUT under the statutory grandfather provision, the Commissioner has acted and continues to act in a manner contrary to law.

53. The Commissioner has a statutory duty, imposed by Ala. Code § 40-23-192(e), to remove from the SSUT Program any participant which ceases being an “eligible seller” or which is not so qualified.

54. By allowing non- “eligible sellers” to participate in the SSUT Program, the Commissioner has violated and continues to violate his statutory duty to remove such persons from the SSUT Program.

WHEREFORE, Plaintiffs request that the Court enter an Order directing the Commissioner to disqualify from the SSUT Program each and every SSUT Program participant which does not qualify as an “eligible seller” (the “Disqualified ESes”); that the Court enjoin the Commissioner to direct that all Disqualified ESes

immediately begin collecting and remitting conventional State and local sales and use tax under Ala. Code § 40-23-190(a); for costs of this action; and for such further relief as may be just and equitable.

COUNT THREE –
“MARKETPLACE FACILITATOR” DISQUALIFICATION

55. Plaintiffs reallege and adopt by reference all prior allegations of the Complaint, as if set forth fully herein.

56. Under Ala. Code § 40-23-190(a), virtually all internet middlemen, including nationally operating entities like DoorDash, UberEats, Instacart, and Shipt, have a “substantial nexus” with Alabama and are therefore legally required to collect and remit State and local sales tax.

57. The Commissioner has deemed these entities identified above, and perhaps dozens of others, to be qualified as “marketplace facilitators.” However, these entities do not meet the definition of “marketplace facilitator” under the controlling statute, because they do not facilitate a single sale of goods of the seller. Instead, they are wholesalers which purchase goods at wholesale from a merchant, then resell the goods to the purchaser for an increased price. Such transactions do not involve the subject entity’s “facilitation” of the “sale” of the “marketplace seller’s” goods. Instead, the seller is actually the subject entity, and what ADOR contends is the “marketplace seller” is in fact a wholesaler. The putative

“marketplace facilitator” is not facilitating the seller’s sale; instead, the facilitator is actually conducting its own independent retail sale of a merchant’s goods.

58. Based on the foregoing, entities which engage in wholesale/retail-reselling are not “marketplace facilitators” under the statutory definition of Ala. Code § 40-23-199.2(3). And the Commissioner has therefore acted unlawfully and without statutory authority to deem such entities qualified for participation in the SSUT Program.

59. The Commissioner has no statutory authority to qualify an entity as a “marketplace facilitator” which does not meet the statutory requirements. In qualifying such merchants as “marketplace facilitators,” the Commissioner has acted contrary to law and in excess of his statutory authority.

WHEREFORE, Plaintiffs request that the Court enter an Order directing the Commissioner to disqualify from the SSUT Program each and every SSUT Program participant which does not qualify as an “marketplace facilitator” (the “Disqualified MFs”); that the Court enjoin the Commissioner to direct that all Disqualified MFs immediately begin collecting and remitting conventional State and local sales and use tax under Ala. Code § 40-23-190(a); for costs of this action; and for such further relief as may be just and equitable.

Date: August 12, 2025.

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