IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MICHAEL LABELL, JARED LABELL, THOMAS PEPPLE, NATALIE BEZEK, EMILY ROSE, and BRYANT JACKSON-GREEN	)	Case No. 2015 CH 13399
Plaintiffs,	)	
v.	)	
THE CITY OF CHICAGO, and DAN WIDAWSKY, in his official capacity as Comptroller of the City of Chicago,	)	
Defendants.		

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. On June 9, 2015, the City of Chicago's Finance Department issued a ruling extending the city's 9% "Amusement Tax" to cover Internet-based streaming video services such as Netflix, Internet-based streaming audio and music services such as Spotify, and Internet-based gaming services such as Xbox Live – services the City has never taxed before and which the City Council has never authorized the Finance Department to tax. This lawsuit challenges that ruling for exceeding the Finance Department's authority, as a violation of the federal Internet Tax Freedom Act, 47 U.S.C. § 151 note (2015), and as a violation of the Illinois and federal constitutions.

Jurisdiction

2. This Court has subject matter jurisdiction over this matter under 735 ILCS 5/2-701 because Plaintiffs seek a declaratory judgment that a tax ruling issued by the City of Chicago Comptroller exceeds Defendants' authority under the law.

3. This Court has personal jurisdiction over Defendants because this lawsuit arises from the Defendants' actions in the State of Illinois.

4. Venue is proper in Cook County because Plaintiffs reside in Cook County, Illinois, and Defendants are located in Cook County.

Parties

5. Plaintiff Michael Labell is a resident of Chicago, Cook County, Illinois, and currently pays for subscriptions to Netflix's Internet video-streaming service and Spotify's Internet music-streaming service and to Amazon Prime, which among other things provides members with video and music streaming services.

6. Plaintiff Jared Labell is a resident of Chicago, Cook County, Illinois, and currently pays for a subscription to Amazon Prime, which among other things provides members with video and music streaming services.

7. Plaintiff Silas Pepple is a resident of Chicago, Cook County, Illinois, and currently pays for a subscription to Xbox Live's "Gold" Internet gaming and digital media delivery service.

8. Plaintiff Natalie Bezek is a resident of Chicago, Cook County, Illinois, and currently pays for a subscription to Spotify's Internet music-streaming service.

9. Plaintiff Emily Rose is a resident of Chicago, Cook County, Illinois, and currently pays for subscriptions to Netflix and Hulu's respective Internet video-streaming services and to Amazon Prime, which among other things provides members with video and music streaming services.

10. Plaintiff Bryant Jackson-Green is a resident of Chicago, Cook County, Illinois, and currently pays for subscriptions to Netflix and Hulu's respective Internet video-streaming services and Spotify's Internet music-streaming service and to Amazon Prime, which among other things provides members with video and music streaming services.

11. Defendant City of Chicago is an Illinois municipal corporation.

12. Defendant Dan Widawsky is the Comptroller for the City of Chicago and has held that office at all relevant times. As Comptroller, Defendant Widawsky is the head of the Finance Department and is authorized to adopt, promulgate and enforce rules and regulations pertaining to the interpretation, administration and enforcement of Chicago's Amusement Tax. Chi. Mun. Code 4-156-034.

Factual Allegations

Chicago's Amusement Tax

13. The City of Chicago imposes a 9% "Amusement Tax" on admission fees or other charges paid for the privilege to enter, witness, view or participate in certain activities within the City of Chicago that the ordinance defines as "amusements." Chi. Mun. Code 4-156-020.

14. The Chicago Municipal Code defines the "Amusement" subject to the Amusement Tax to include just three categories of activities:

> (1) any exhibition, performance, presentation or show for entertainment purposes, including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling or billiard or pool games;
>
> (2) any entertainment or recreational activity offered for public participation or on a membership or other basis including, but not limited to, carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities; or
>
> (3) any paid television programming, whether transmitted by wire, cable, fiber optics, laser, microwave, radio, satellite or similar means.

Chi. Mun. Code 4-156-010.

15. Until June 9, 2015, the City did not interpret the Code's definition of "amusement" to include Internet-based streaming services for video, audio and gaming, such as Netflix, Spotify, and Xbox Live, and accordingly did not tax those services.

16. On June 9, 2015, however, Defendant Widawksy issued Amusement Tax Ruling #5 (the "Ruling") (attached as **Exhibit A**), declaring that the term "amusement" as defined by Chi. Mun. Code 4-156-010 would now include "charges paid for the privilege to witness, view or participate in amusements that are *delivered electronically*" (emphasis in original).

17. According to the Ruling, "charges paid for the privilege of watching electronically delivered television shows, movies or videos are subject to the amusement tax, if the shows, movies or videos are delivered to a patron (i.e., customer) in the City."

18. Further, the Ruling states that "charges paid for the privilege of listening to electronically delivered music are subject to the amusement tax, if the music is delivered to a customer in the City."

19. The Ruling also states that "charges paid for the privilege of participating in games, on-line or otherwise, are subject to the amusement tax if the games are delivered to a customer in the City."

20. According to the Ruling, "[t]he amusement tax does not apply to sales of shows, movies, videos, music or games (normally accomplished by a 'permanent' download). It applies only to rentals (normally accomplished by streaming or a 'temporary' download). The charges paid for such rentals may be subscription fees, per-event fees or otherwise."

21. The Ruling states that providers that receive charges for electronically delivered amusements are considered owners or operators and are required to collect the City's Amusement Tax from their Chicago customers.

22. The Amusement Tax applies to any customer whose residential street address or primary business street address is in Chicago, as reflected by his or her credit card billing address, zip code or other reliable information. The determination of sourcing made by the City of Chicago Department of Finance is based on rules set

forth in the Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638/1 et seq.

23. The Ruling states that where a charge is "bundled" by including both taxable and non-taxable elements, the Department of Finance applies the rules set forth in Personal Property Lease Transaction Tax Ruling #3 (June 1, 2004). Thus, the amount of Amusement Tax is based on the amount paid for any amusement, but excludes any separately-stated charges not for amusements. However, if an operator fails to separate the amusement portion of the price from the non-amusement portion, the entire price charged shall be deemed taxable, unless it is clearly proven that at least 50% of the price is not for amusements.

24. The Effective Date of the Ruling is July 1, 2015, but the Ruling states that "the Department will limit the effect of this ruling to periods on and after September 1, 2015."

Harm to Plaintiffs

25. Plaintiffs are subscribers to various services that provide media delivered electronically, including Netflix, Hulu, Spotify, Xbox Live, and Amazon Prime.

26. Netflix is a provider of an on-demand Internet streaming media service, which allows subscribers to watch video content online, and of a flat-rate video-by-mail service, which allows subscribers to borrow DVD and Blu-ray video discs and return them in prepaid mailers. Hulu provides a similar video-streaming service but does not offer video-by-mail service.

27. Spotify is a music streaming service, which allows consumers access to a large library of recorded music without commercial interruptions for a subscription fee. Similar streaming music services are offered by Pandora, Apple Music, and Google Play.

28. Xbox Live Gold is an online multiplayer gaming and digital media delivery service created and operated by Microsoft, which for a fee, allows users to play games with others on an online network. Xbox Live Gold also provides paid members with the following features: matchmaking/smartmatch, private chat, party chat and in-game voice communication, game recording, media sharing, broadcasting one's gameplay via the Twitch live streaming application, access to free-to-play titles, "cloud" storage for gaming files, and early or exclusive access to betas, special offers, Games with Gold, and Video Kinect.

29. Amazon Prime is a membership service that provides members with certain benefits provided by Amazon.com, including free two-day shipping and discounts on certain items sold on its website, but also provides access to streaming movies, and music, cloud photo storage, and the ability to borrow e-books.

30. Plaintiffs Rose, Jackson-Green, and Michael Labell, as paid subscribers to Netflix streaming video service, are harmed because they must pay the tax on Internet-based video-streaming services, which increases the cost of subscribing to Netflix by nine percent.

31. Plaintiff Rose, as paid a subscriber to Hulu streaming video service, is harmed because she must pay the tax on Internet-based video-streaming services, which increases the cost of subscribing to Hulu by nine percent.

32. Plaintiffs Bezek, Jackson-Green, and Michael Labell, as paid subscribers to Spotify's streaming music service, are harmed because they must pay the tax on Internet-based streaming music services, which increases the cost of subscribing to Spotify by nine percent.

33. Plaintiff Pepple, as paid a subscriber to Xbox Live Gold Internet-based gaming service, is harmed because he must pay the tax on Internet-based gaming services, which increases the cost of subscribing to Xbox Live Gold by nine percent.

34. Plaintiffs Rose, Jackson-Green, Jared Labell, and Michael Labell, as paid Amazon Prime members, are harmed because they must pay the tax on Internet-based video and music services portion of the price of their membership, but if Amazon does not separate the price of these services from its non-taxable services, then they must paid the Amusement Tax on the full price of their Amazon Prime membership, either of which will increase the cost of subscribing to Amazon Prime.

Count I
The City of Chicago Comptroller has exceeded his authority by adopting Amusement Tax Ruling #5 and by extending the City's Amusement Tax to Internet-based streaming video services

35. Plaintiffs reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

36. The Chicago Municipal Code authorizes the Comptroller to "adopt, promulgate and enforce rules and regulations pertaining to the interpretation, administration and enforcement" of Chicago's Amusement Tax.

37. The Municipal Code does not, however, authorize the Comptroller to impose new taxes that the City Council has not authorized through a city ordinance.

38. The Comptroller may not use his rulemaking power to adopt a rule that is inconsistent with or exceeds the specific language in the ordinance that authorizes his rulemaking.

39. Rules that are inconsistent with the ordinance under which they are adopted are invalid.

40. Here, the Amusement Tax's definition of "amusement" does not include video services streamed from the Internet and provided to a customer on a computer, mobile device, or other electronic device.

41. Nor does the ordinance's imposition of a tax on amusements "within the city" authorize a tax on video services streamed from the Internet, which may be provided anywhere, to customers with residency or billing address in the City of Chicago who might use those services, partially or entirely, outside of the City.

42. The Comptroller has exceeded his authority under the ordinance by issuing a rule that imposes a new tax that the City Council did not authorize in enacting the Amusement Tax.

43. In addition, the imposition of the Amusement Tax on Amazon Prime is a tax on a membership fee which covers a wide variety of both amusement and nonamusement activities. In addition to access to streaming movies and music, Amazon Prime provides paid members with free two-day shipping, discounts on certain items sold on its website, cloud photo storage, and the ability to borrow e-books.

44. A tax on the membership fee of Amazon Prime is not a tax on "amusements" or "places of amusements" pursuant to 65 ILCS 5/11-42-5.

45. Therefore Defendants have exceeded their authority in imposing the Amusement Tax on membership fees for Amazon Prime.

46. The imposition of a tax of nine percent on streaming video services injures the Plaintiffs because their costs for these services have increased, or will imminently increase, by nine percent.

47. Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green have a right to enjoin the unlawful taxation of streaming video services.

48. Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green have no adequate administrative remedy.

49. The injury to Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green is irreparable.

50. Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green have no adequate remedy at law.

Wherefore, Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green respectfully pray that the Court grant the following relief:

A. Declare that Defendant Comptroller Dan Widawsky has exceeded his authority by adopting Amusement Tax Ruling #5, which purportedly authorizes the City of Chicago to tax Internet-based streaming video services.

B. Enjoin Comptroller Dan Widawsky and the City of Chicago from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on Internet-based streaming video services.

C. Award Plaintiffs damages for the amount of Amusement Tax paid on Internet-based streaming video services.

D. Award Plaintiffs any additional relief the Court deems reasonable and proper.

Count II
The City of Chicago Comptroller has exceeded his authority by adopting Amusement Tax Ruling #5 and by extending the City's Amusement Tax to Internet-based streaming audio services

51. Plaintiffs reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

52. The Amusement Tax's definition of "amusement" does not include audio services streamed from the Internet and provided to a customer on a computer, mobile device, or other electronic device.

53. Nor does the ordinance's imposition of a tax on amusements "within the city" authorize a tax on audio services streamed from the Internet, which may be

provided anywhere, to customers with residency or billing address in the City of Chicago who might use those services, partially or entirely, outside of the City.

54. The Comptroller has exceeded his authority under the ordinance by issuing a rule that imposes a new tax that the City Council did not authorize in enacting the Amusement Tax.

55. In addition, the imposition of the Amusement Tax on Amazon Prime is a tax on a membership fee which covers a wide variety of both amusement and nonamusement activities. In addition to access to streaming movies and music, Amazon Prime provides paid members with free two-day shipping, discounts on certain items sold on its website, cloud photo storage, and the ability to borrow e-books.

56. A tax on the membership fee of Amazon Prime is not a tax on "amusements" or "places of amusements" pursuant to 65 ILCS 5/11-42-5.

57. Therefore Defendants have exceeded their authority in imposing the Amusement Tax on membership fees for Amazon Prime.

58. The imposition of a tax of nine percent on streaming audio services injures the Plaintiffs because their costs for these services have increased, or will imminently increase, by nine percent.

59. Plaintiffs Michael Labell, Jared Labell, Rose, Bezek, and Jackson-Green have a right to enjoin the unlawful taxation of streaming media services.

60. Plaintiffs Michael Labell, Jared Labell, Rose, Bezek, and Jackson-Green have no adequate administrative remedy.

61. The injury to Plaintiffs Michael Labell, Jared Labell, Rose, Bezek, and Jackson-Green is irreparable.

62. Plaintiffs Michael Labell, Jared Labell, Rose, Bezek, and Jackson-Green have no adequate remedy at law.

Wherefore, Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green respectfully pray that the Court grant the following relief:

A. Declare that Defendant Comptroller Dan Widawsky has exceeded his authority by adopting Amusement Tax Ruling #5, which purportedly authorizes the City of Chicago to tax Internet-based streaming audio services.

B. Enjoin Comptroller Dan Widawsky and the City of Chicago from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on Internet-based streaming audio services.

C. Award Plaintiffs damages for the amount of Amusement Tax paid on Internet-based streaming audio services.

D. Award Plaintiffs any additional relief the Court deems reasonable and proper.

Count III
The City of Chicago Comptroller has exceeded his authority by adopting Amusement Tax Ruling #5 and by extending the City's Amusement Tax to Internet-based streaming gaming services

63. Plaintiffs reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

64. The Amusement Tax's definition of "amusement" does not include gaming services streamed from the Internet and provided to a customer on a computer, mobile device, or other electronic device.

65. Nor does the ordinance's imposition of a tax on amusements "within the city" authorize a tax on gaming services streamed from the Internet, which may be provided anywhere, to customers with residency or billing address in the City of Chicago who might use those services, partially or entirely, outside of the City.

66. The Comptroller has exceeded his authority under the ordinance by issuing a rule that imposes a new tax that the City Council did not contemplate or authorize in enacting the Amusement Tax.

67. In addition, the imposition of the Amusement Tax on Xbox Live Gold is a tax on a membership fee which covers a wide variety of both amusement and nonamusement activities. In addition to the ability to play games with others on an online network, Xbox Live Gold provides paid members with matchmaking/smartmatch, private chat, party chat and in-game voice communication, game recording, media sharing, broadcasting one's gameplay via the Twitch live streaming application, access to free-to-play titles, "cloud" storage for gaming files, and early or exclusive access to beta versions of software, special offers, "Games with Gold," and "Video Kinect."

68. A tax on the membership fee of Xbox Live Gold is not a tax on "amusements" or "places of amusements" pursuant to 65 ILCS 5/11-42-5.

69. Therefore Defendants have exceeded their authority in imposing the Amusement Tax on membership fees for Xbox Live Gold.

70. The imposition of a tax of nine percent on the membership fee for Xbox Live Gold injures Plaintiff Pepple because the costs for these services have increased, or will imminently increase, by nine percent.

71. Plaintiff Pepple has a right to enjoin the unlawful taxation of streaming media services.

72. Plaintiff Pepple has no adequate administrative remedy.

73. Plaintiffs Pepple's injury is irreparable.

74. Plaintiff Pepple has no adequate remedy at law.

Wherefore, Plaintiff Pepple respectfully prays that the Court grant the following relief:

A. Declare that Defendant Comptroller Dan Widawsky has exceeded his authority by adopting Amusement Tax Ruling #5, which purportedly authorizes the City of Chicago to tax Internet-based streaming gaming services.

B. Enjoin Comptroller Dan Widawsky and the City of Chicago from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on Internet-based streaming gaming services.

C. Award Plaintiffs damages for the amount of Amusement Tax paid on Internet-based streaming gaming services.

D. Award Plaintiffs any additional relief the Court deems reasonable and proper.

Count IV
Amusement Tax Ruling #5's tax on streaming services violates the Internet Tax Freedom Act, 47 U.S.C. § 151 note (2015).

75. Plaintiffs reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

76. The Internet Tax Freedom Act ("Act"), which is set forth in a note to 47 U.S.C. § 151, provides that no State or political subdivision of a State may impose multiple or discriminatory taxes on electronic commerce.

77. The Act defines discriminatory tax, in part, as "any tax imposed by a State or political subdivision thereof on electronic commerce" that:

> (i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;
>
> (ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period; [or]
>
> (iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means. . . .

Act § 1105(2)(A).

78. The Act defines "electronic commerce" as "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access." § 1105(3).

79. The term "tax" under the Act includes those "for the purpose of generating revenues for governmental purposes" and those imposed on "a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity." § 1105(8).

80. Chicago Municipal Code 4-156-020, as interpreted and applied by the Comptroller through Amusement Tax Ruling #5, imposes an unlawful discriminatory tax on electronic commerce because it applies to Netflix's video streaming service but does not apply to Netflix's video-by-mail service.

81. The Amusement Tax, as interpreted and applied by the Ruling, also unlawfully discriminates against electronic commerce because it imposes a higher tax rate on theatrical, musical, and cultural performances that are delivered through an online streaming service than it imposes on those same performances if they are consumed in person.

82. The Amusement Tax provides an exemption for in-person live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the city whose maximum capacity, including all balconies and other sections, is not more than 750 persons. Section 4-156-020(D)(1).

83. The Amusement Tax provides a reduced rate of five percent for in-person live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the city whose maximum capacity, including all balconies and other sections, is more than 750 persons. Section 4-156-020(E).

84. However, electronically delivered audio or video of the same performances is taxed at nine percent.

85. Thus, performances consumed in person are subject to an Amusement Tax of either 0% or 5%, depending on the capacity of the venue at which they are performed, but streaming audio or video of such performances is subject to an Amusement Tax of 9%.

86. The Ruling thus forces Plaintiffs to pay a higher tax rate if they choose to consume a musical, theatrical, or cultural performance through a streaming media service than if they choose to attend a performance in person. In this way, the Amusement Tax, as interpreted and applied by the Ruling, imposes an unlawful discriminatory tax on electronic commerce.

Wherefore, Plaintiffs Michael Labell, Jared Labell, Rose, and Jackson-Green respectfully pray that the Court grant the following relief:

A. Declare that the Amusement Tax, as interpreted by Amusement Tax Ruling #5 and applied by the Comptroller, violates the Internet Tax Freedom Act, 47 U.S.C. § 151 note (2015) because it taxes Internet-based streaming services for video and audio while exempting or not taxing other services for video and audio not delivered via the Internet.

B. Enjoin Comptroller Dan Widawsky and the City of Chicago from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on Internet-based streaming services for video and audio where similar services not delivered via the Internet are not taxed or taxed at a lower rate.

C. Award Plaintiffs damages for the amount of Amusement Tax paid on Internet-based streaming services for video, audio, and gaming.

D. Award Plaintiffs' reasonable costs and expenses of this action, including attorney fees, pursuant to 42 U.S.C. § 1983 and § 1988 or any other applicable law;

E. Award Plaintiffs any additional relief the Court deems reasonable and proper.

Count V
Amusement Tax Ruling #5's tax on streaming services violates the Uniformity Clause of the Illinois Constitution, Article IX, Section 2.

87. Plaintiffs reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

88. The Uniformity Clause, Article IX, Section 2, of the Illinois Constitution provides:

> In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable.

89. In order to comply with the Uniformity Clause, a tax must meet two requirements: (1) it must be based on a "real and substantial" difference between those subject to the tax and those that are not; and (2) it must "bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 150 (2003).

90. The Amusement Tax, as interpreted and applied by the Ruling, imposes a higher tax rate on theatrical, musical, and cultural performances that are delivered

through an online streaming service than it imposes on those same performances if they are consumed in person.

91. The Amusement Tax provides an exemption for in-person live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the city whose maximum capacity, including all balconies and other sections, is not more than 750 persons. Section 4-156-020(D)(1).

92. The Amusement Tax provides a reduced rate of five percent for in-person live theatrical, live musical or other live cultural performances that take place in any auditorium, theater or other space in the city whose maximum capacity, including all balconies and other sections, is more than 750 persons. Section 4-156-020(E).

93. However, electronically delivered audio or video of the same performances is taxed at nine percent.

94. There is no "real and substantial" difference between those subject to the tax – persons watching theatrical, musical, and cultural performances online – and those that are not – persons watching theatrical, musical, and cultural performances live.

95. Further, taxing some customers of theatrical, music, and cultural performances at higher rate than others does not bear any reasonable relationship to the purpose of the amusement tax or to public policy.

96. Thus, the Amusement Tax, as interpreted and applied by the Ruling, violates the Uniformity Clause of the Illinois Constitution.

Wherefore, Plaintiffs respectfully pray that the Court grant the following relief:

A. Declare that the Amusement Tax, as interpreted by Amusement Tax Ruling #5 and applied by the Comptroller, violates the Uniformity Clause, Article IX, Section 2, of the Illinois Constitution because it taxes Internet-based streaming services for video and audio while exempting or not taxing other services for video and audio not delivered via the Internet.

B. Enjoin Comptroller Dan Widawsky and the City of Chicago from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on Internet-based streaming services for video, audio, and gaming.

C. Award Plaintiffs damages for the amount of Amusement Tax paid on Internet-based streaming services for video, audio, and gaming.

D. Award Plaintiffs' reasonable costs and expenses of this action, including attorney fees, pursuant to 740 ILCS 23/5(c) or any other applicable law;

E. Award Plaintiffs any additional relief the Court deems reasonable and proper.

Count VI
Amusement Tax Ruling #5's tax on streaming services violates the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3.

97. Plaintiffs reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

98. The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, grants Congress the power to regulate interstate commerce and prohibits state interference with interstate commerce.

99. A local tax satisfies the Commerce Clause only if it "(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." *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992).

100. The Amusement Tax, as interpreted and applied by the Ruling, does not satisfy the first requirement of the Commerce Clause because the activities that it taxes – Internet-based streaming of video, audio, and gaming– do not have a substantial nexus with the taxing jurisdiction, Chicago, since the activities do not take place in Chicago, but on the Internet.

101. Further, the Amusement Tax, as interpreted and applied by the Ruling, does not satisfy the second requirement of the Commerce Clause – that it be fairly apportioned – because the tax is not limited to the portion of value that is fairly attributable to economic activity within the taxing jurisdiction. The City cannot tax economic value that is exclusively attributable to out-of-state activities – here the provision of Internet-based streaming services by out-of-state companies.

102. In addition, the Amusement Tax, as interpreted and applied by the Ruling, does not satisfy the third requirement of the Commerce Clause – that it not discriminate against interstate commerce. The Amusement tax imposes a higher tax rate on theatrical, musical, and cultural performances that are delivered through an online streaming service provided by out-of-state providers than it

imposes on those same performances if they are consumed exclusively in the City of Chicago.

103. Finally, the Amusement Tax, as interpreted and applied by the Ruling, does not satisfy the fourth requirement of the Commerce Clause – that the activity taxed be fairly related to the services provided by the City. Internet-based streaming video, audio, and gaming services from providers that have no connection to the City of Chicago, except that some of their customers have billing addresses in Chicago, are in no way related to any services provided by the City. Sporting events and concerts and other amusements that take place in the City of Chicago and cable television, are given "protection, opportunities and benefits" of the City of Chicago and state of Illinois, whereas out-of-state providers of Internet-based streaming services receive no such protection, opportunities and benefits. *See Asarco, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).

104. Thus, the Amusement Tax, as interpreted and applied by the Ruling, violates the Commerce Clause of the United States Constitution.

Wherefore, Plaintiffs respectfully pray that the Court grant the following relief:

A. Declare that the Amusement Tax, as interpreted by Amusement Tax Ruling #5 and applied by the Comptroller, violates the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution because it is applied to an activity with no substantial nexus with the City; it is not fairly apportioned; it discriminates against interstate commerce, and/or it is not fairly related to the services provided by the City.

B. Enjoin Comptroller Dan Widawsky and the City of Chicago from enforcing Amusement Tax Ruling #5's application of the Amusement Tax on Internet-based streaming services for video, audio, and gaming.

C. Award Plaintiffs damages for the amount of Amusement Tax paid on Internet-based streaming services for video, audio, and gaming.

D. Award Plaintiffs' reasonable costs and expenses of this action, including attorney fees, pursuant to 42 U.S.C. § 1983 and § 1988 or any other applicable law;

E. Award Plaintiffs any additional relief the Court deems reasonable and proper.

Dated: December 17, 2015

Respectfully submitted,

By: _____
One of their attorneys
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Exhibit A

CITY OF CHICAGO
DEPARTMENT OF FINANCE
AMUSEMENT TAX RULING

Pursuant to Sections 2-32-080, 2-32-096, 3-4-030, 3-4-150 and 4-156-034 of the Municipal Code of Chicago, the City of Chicago hereby adopts and promulgates Amusement Tax Ruling #5, effective July 1, 2015.

Dated: June 9, 2015

Dan Widawsky
Comptroller

Amusement Tax Ruling #5

Subject: Electronically Delivered Amusements

Effective Date: July 1, 2015

Ordinance Provisions

1. Section 4-156-020(A) of the Municipal Code of Chicago ("Code") states, in pertinent part:

> Except as otherwise provided by this article, an amusement tax is imposed upon the patrons of every amusement within the city.

2. Code Section 4-156-010 states, in pertinent part:

> "Amusement" means: (1) *any exhibition, performance, presentation or show for entertainment purposes*, including, but not limited to, any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basketball, softball, football, tennis, golf, hockey, track and field games, bowling or billiard or pool games; (2) *any entertainment or recreational activity offered for public participation or on a membership or other basis* including, but not limited to, carnivals, amusement park rides and games, bowling, billiards and pool games, dancing, tennis, racquetball, swimming, weightlifting, bodybuilding or similar activities; or (3) *any paid television programming*, whether transmitted by wire, cable, fiber optics, laser, microwave, radio, satellite or similar means. (emphasis added).

3. Code Section 4-156-030(A) states in pertinent part:

It shall be the joint and several duty of every owner, manager or operator of an amusement or of a place where an amusement is being held, and of every reseller *to secure from each patron or buyer the tax* imposed by Section 4-156-020 of this article and to remit the tax to the department of finance not later than the 15th day of each calendar month for all admission fees or other charges received during the immediately preceding calendar month ... (emphasis added).

4. Code Section 4-156-010 states in pertinent part:

"Owner" means: (1) with respect to the owner of a place where an amusement is being held, any person with an ownership or leasehold interest in a building, structure, vehicle, boat, area or other place who presents, conducts or operates an amusement in such place or who allows, by agreement or otherwise, another person to present, conduct or operate an amusement in such place; (2) *with respect to the owner of an amusement, any person which has an ownership or leasehold interest in such amusement or any person who has a proprietary interest in the amusement* so as to entitle such person to all or a portion of the proceeds, after payment of reasonable expenses, from the operation, conduct or presentation of such amusement, excluding proceeds from nonamusement services and from sales of tangible personal property; (3) with any person operating a community antenna television system or wireless cable television system, or *any person receiving consideration from the patron for furnishing, transmitting, or otherwise providing access to paid television programming*. (emphasis added).

5. Code Section 4-156-010 states in pertinent part:

"Operator" means any person who sells or resells a ticket or other license to an amusement for consideration or *who, directly or indirectly, receives or collects the charges paid for the sale or resale of a ticket or other license to an amusement*. The term includes, but is not limited to, persons engaged in the business of selling or reselling tickets or other licenses to amusements, whether on-line, in person or otherwise. The term also includes persons engaged in the business of facilitating the sale or resale of tickets or other licenses to amusements, whether on-line, in person or otherwise. (emphasis added).

6. Code Section 4-156-010 states in pertinent part:

"License" means a ticket or other license granting the privilege to enter, to witness, to view or to participate in an amusement, or the opportunity to obtain the privilege to enter, to witness, to view or to participate in an amusement, and includes but is not limited to a permanent seat license. (emphasis added).

7. Code Section 4-156-010 states in pertinent part:

"Ticket" means the privilege to enter, to witness, to view or to participate in an amusement, whether or not expressed in a tangible form.

Taxability

8. The amusement tax applies to charges paid for the privilege to witness, view or participate in an amusement. This includes not only charges paid for the privilege to witness, view or participate in amusements *in person* but also charges paid for the privilege to witness, view or participate in amusements that are *delivered electronically*. Thus:

a. charges paid for the privilege of watching electronically delivered television shows, movies or videos are subject to the amusement tax, if the shows, movies or videos are delivered to a patron (*i.e.*, customer) in the City (*see* paragraph 13 below);

b. charges paid for the privilege of listening to electronically delivered music are subject to the amusement tax, if the music is delivered to a customer in the City; and

c. charges paid for the privilege of participating in games, on-line or otherwise, are subject to the amusement tax if the games are delivered to a customer in the City.

The customer will normally receive the provider's electronic communications at a television, radio, computer, tablet, cell phone or other device belonging to the customer.

9. Providers who receive charges for electronically delivered amusements are owners or operators and are required to collect the City's amusement tax from their Chicago customers. *See* paragraphs 13 and 14 below. As of the date of this ruling, the rate of the tax is 9% of the charges paid.

10. The amusement tax does not apply to *sales* of shows, movies, videos, music or games (normally accomplished by a "permanent" download). It applies only to *rentals* (normally accomplished by streaming or a "temporary" download). The charges paid for such rentals may be subscription fees, per-event fees or otherwise.

11. Charges that are not subject to the amusement tax may be subject to another tax (such as the City's personal property lease transaction tax, Code Chapter 3-32), but this ruling concerns only the amusement tax.

Bundled Charges

12. Where a charge is "bundled" by including both taxable and non-taxable elements (either non-taxable in the first instance or exempt), the Department of Finance ("Department") will apply the same rules that are set forth in Personal Property Lease Transaction Tax Ruling #3 (June 1, 2004). That ruling states, among other things, that "[i]f the lessor fails to separate the

lease or rental portion of the price from the non-lease or non-rental portion, the entire price charged shall be deemed taxable, unless it is clearly proven that at least 50% of the price is not for the use of any personal property." *See also* Code Section 4-156-020(H) (providing that the taxable "admission fees or other charges" do not include charges that are not for amusements, but only if those charges are separately stated and optional). Therefore, if a bundled charge is primarily for the privilege to enter, to witness, to view or to participate in an amusement, then the entire charge is taxable.

Sourcing

13. The Department will utilize the rules set forth in the Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638, to determine sourcing for the amusement tax. In general, this means that the amusement tax will apply to customers whose residential street address or primary business street address is in Chicago, as reflected by their credit card billing address, zip code or other reliable information.

Nexus

14. Because the amusement tax is imposed on the patron, and applies only to activity (*i.e.*, the amusement) that takes place within Chicago, there is no question that the tax applies whenever the amusement takes place in Chicago. The issue of nexus arises, at most, with regard to the question of whether a given provider has an obligation to *collect* the tax from its customer. That issue is beyond the scope of this ruling, and any provider with a question about that topic should consult its attorneys. In addition, a provider may request a private letter ruling from the Department, pursuant to Uniform Revenue Procedures Ordinance Ruling #3 (June 1, 2004).

Implementation

15. In order to allow affected businesses sufficient time to make required system changes, the Department will limit the effect of this ruling to periods on and after September 1, 2015. This paragraph does not release or otherwise affect the liability of any business that failed to comply with existing law before the effective date of this ruling.