IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
TAX AND MISCELLANEOUS REMEDIES SECTION

MICHAEL LABELL, JARED LABELL, et al.	)	
	)	
Plaintiffs,	)	No. 2015 CH 13399
	)	
v.	)	(Transferred to Law)
	)	
CITY OF CHICAGO DEPARTMENT OF FINANCE, et al.	)	Judge Walker
	)	
	)	
Defendants.	)	

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Section 2-1005 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-1005, defendants City of Chicago ("City") and its Comptroller hereby move for summary judgment as to all of plaintiffs' claims. Defendants will file a separate memorandum in support of their motion.

WHEREFORE, defendants move for summary judgment as to all of plaintiffs' claims.

Dated: November 15, 2017

Respectfully submitted,

By: _____

Weston Hanscom
Steven Tomiello
Marques Berrington
City of Chicago, Department of Law
Revenue Litigation Division
30 North LaSalle Street, Suite 1020
Chicago, IL 60602
(312) 744-9077/7803/6995
Attorney No. 90909
steven.tomiello@cityofchicago.org

CERTIFICATE OF SERVICE

I, Marques A. Berrington, an attorney, certify that on November 15, 2017, I caused the foregoing Cross-Motion for Summary Judgment to be served on Defendants by causing such to be mailed to the address set forth above before 5:00 p.m.

Marques A. Berrington

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DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants City of Chicago ("City") and its Comptroller submit this memorandum in opposition to plaintiffs' motion for summary judgment ("Motion") and in support of their cross-motion for summary judgment.

Introduction

Plaintiffs are Chicago residents who subscribe to three "streaming services" for which they pay the City's amusement tax: Netflix, Hulu and Spotify (the "Products").[1] Netflix and Hulu offer monthly subscriptions to watch movies and television shows. Spotify offers monthly subscriptions to listen to music. In their Motion, plaintiffs argue that the City's amusement tax may not be applied to the Products for a number of reasons, all of which are addressed in this memorandum. Plaintiffs do not specify whether their challenge is facial or as-applied. Either way, based on the undisputed facts, defendants are entitled to summary judgment.

[1] Some of the plaintiffs also subscribe to Amazon Prime, but they do not pay any amusement tax on their subscription fees, which are annual membership dues that pay for a number of benefits, such as expedited shipping and discounts on purchases. See Motion at 6 ¶ 25.

Statement of Facts

1. The City took the depositions of plaintiffs Bryant Jackson-Green and Zachary Urevig. Prior to entering into an agreed briefing schedule on the instant motions, the parties stipulated that the remaining plaintiffs would have testified consistently with the two deponents.

2. Mr. Jackson-Green lives in Chicago and subscribes to Netflix, Hulu, Spotify, and Amazon Prime. Jackson-Green Dep. (Exhibit A) at 4, 8. He began subscribing to Netflix by signing up on his laptop, while in Chicago. *Id.* at 11. When he signed up, he provided his credit card information, as well as his Chicago address. *Id.* at 11-12. Netflix automatically bills the credit card account provided by the subscriber. *Id.* at 12. Netflix bills its customers one month in advance to obtain the ability to use the service for the next month. *Id.* at 14. Netflix offers a wide variety of movies and shows, including its own original programs. *Id.* at 15. Subscribers can watch movies or shows as many times as they want, and the subscriber gets charged the same amount regardless of use. *Id.* at 14, 18. Netflix does not offer pay-per-view for special events, nor could Mr. Jackson-Green attest that Netflix streams any live events. *Id.* at 18-19.

3. Mr. Jackson-Green watches Netflix through his television, cell phone and iPad. *Id.* at 19. Seventy-five percent of his Netflix use is on his home television. *Id.* at 19-20. Outside of his home, he has watched Netflix on his laptop or cell phone while at cafés in Chicago. *Id.* at 21. Most of his Netflix use occurs in Chicago. *Id.* He could not recall a month when he did not use his Netflix account at all. *Id.* at 22. There was never a month when his use of Netflix was entirely or primarily outside of Chicago. *Id.* at 23. Approximately three to four times per year, he uses Netflix when he travels for periods of not longer than a week. *Id.* at 20, 36.

4. Mr. Jackson-Green also subscribes to Hulu. Like Netflix, Hulu streams video content. He subscribes to Hulu because it offers different movies and shows than Netflix,

including its own original programming. *Id.* at 23-24. Hulu's sign-up and billing procedures are identical to those of Netflix. *Id.* at 25. Hulu does not stream live events. *Id.* His answers about how he uses Netflix are consistent with how he uses Hulu. *Id.* at 26.

5. Mr. Jackson-Green also subscribes to Spotify. He first subscribed to Spotify while living in Chicago. *Id.* at 27. The sign-up procedure is similar to that of the other streaming services. *Id.* He uses Spotify predominantly on his cell phone. *Id.* at 28. He was not aware of any streaming of live events by Spotify. *Id.* at 29-30. He uses Spotify while commuting, at home and anywhere he has his cell phone. *Id.* at 30-31. He could not recall any months when his use of Spotify was either entirely or primarily outside of Chicago. *Id.* at 31.

6. Mr. Jackson-Green was not familiar with what an automatic amusement device is, but he has occasionally used a jukebox at a bar. *Id.* 39-40. He attends concerts one to two times per year, most recently in 2015. *Id.* at 44. He agreed that the cost to attend a concert would generally be somewhere between 80 and 100 dollars. *Id.* at 46.

7. Mr. Jackson-Green also subscribes to Amazon Prime. He could not recall whether he ever paid amusement tax on his subscription, but billing statements later produced confirm that no amusement tax has been charged. See Exhibit C.

8. Mr. Urevig lives in Chicago and subscribes to Netflix, Spotify, and Amazon Prime. Urevig Dep. (Exhibit B) at 4, 7. His testimony was essentially the same as that of Mr. Jackson-Green on all of the topics discussed above. He said he uses Netflix and Spotify more than 90% of the time in Chicago. *Id.* at 17.

9. Attached are copies of (a) an informational bulletin issued in March 2009 (Exhibit E) and (b) printed pages from the websites of the providers of various products discussed in this

memorandum (Exhibits F through S), describing features and pricing, along with terms and conditions. See affidavit of Marques Berrington.

Discussion

In their Motion, plaintiffs frequently reference Amusement Tax Ruling #5 ("Ruling"), which the City's Department of Finance ("Department") issued in June 2015. The amusement tax ordinance ("Ordinance") was amended in November 2015 to incorporate the key terms of the Ruling. Specifically, the Ordinance was amended to add the following provision:

> In the case of amusements that are delivered electronically to mobile devices, as in the case of video streaming, audio streaming and on-line games, the rules set forth in the Illinois Mobile Telecommunications Sourcing Conformity Act, 35 ILCS 638, as amended, may be utilized for the purpose of determining which customers and charges are subject to the tax imposed by this chapter. If those rules indicate that the tax applies, it shall be presumed that the tax does apply unless the contrary is established by books, records or other documentary evidence.

See Section 4-156-020(G.1) of the Municipal Code of Chicago ("Code"). In light of this amendment, the Court dismissed Counts I through III of the complaint, which alleged that the Ruling improperly exceeded the scope of the Ordinance. This case, therefore, is really a challenge to the Ordinance, rather than the Ruling.

"[L]egislative enactments are presumed to be constitutional" and "reasonable doubts concerning the validity of a statute must be resolved in its favor." See O'Connor v. A & P Enterprises, 81 Ill. 2d 260, 266 (1980). This rule applies equally to ordinances adopted by the City of Chicago. See National Pride of Chicago, Inc. v. City of Chicago, 206 Ill. App. 3d 1090, 1101 (1st Dist. 1990). A plaintiff who challenges a home rule ordinance has a "particularly heavy" burden: See Chicago Park District v. City of Chicago, 111 Ill. 2d 7, 14 (1986) (quoting Walter Pecket Co. v. Regional Transportation Authority, 81 Ill. 2d 221, 224 (1980)). As we

explain below, plaintiffs have not met their burden of showing that the Ordinance is facially invalid or invalid as applied to them.

I. Defendants are entitled to summary judgment on plaintiffs' claims regarding the City's authority to tax streaming services.

A. The undisputed facts do not support a facial challenge to the Ordinance.

In the case of a facial challenge, the plaintiff must establish that there are "no circumstances" under which the law would be valid. Carter v. City of Alton, 2015 IL App. (5th) 130544 ¶20; Lamar Whiteco Outdoor Corp. v. City of West Chicago, 355 Ill. App. 3d 352, 365 (2d Dist. 2005). A central premise of plaintiffs' case is that the City may not tax the Products because the Products can be used on mobile devices and therefore can be used outside the City. Plaintiffs' premise is refuted by Rozner v. Korshak, 55 Ill. 2d 430, 433 (1973), in which the Illinois Supreme Court upheld Chicago's home rule authority to impose its annual "wheel tax" (a/k/a "City sticker tax") on Chicago residents who use their vehicles in Chicago, even though the vehicles are also used in other places.

Plaintiffs do not (and cannot) deny that the City has both statutory and home rule authority to tax amusements that take place within Chicago. 65 ILCS 5/11-42-5; Kerasotes Rialto Theater Corp. v. City of Peoria, 77 Ill. 2d 491 (1979); Mr. B's, Inc. v. City of Chicago, 302 Ill. App. 3d 930 (1st Dist. 1998). Plaintiffs also do not (and cannot) deny that some (if not all) Chicago residents use the Products either exclusively or primarily within Chicago – whether on a stationary device at home, a mobile device at home, or a mobile device elsewhere within the City. Indeed, plaintiffs admit that nearly all of their own use of the Products takes place in Chicago, with most of it occurring at home. See Statement of Facts ¶¶ 3-5, 8. Plaintiffs therefore do not (and cannot) meet their burden of establishing that there are "no circumstances" under which the Ordinance could validly apply to streaming services.

B. The undisputed facts do not support an as-applied challenge to the Ordinance.

If plaintiffs instead are asserting an as-applied challenge, they must establish facts that entitle them to relief. Plaintiffs cannot do that, because they have testified that they almost always use the Products either at home or elsewhere in the City. See Statement of Facts ¶¶ 3-5, 8. The mere fact that they occasionally use the Products outside the City does not mean that the City may not tax their entire monthly subscription charge. See Rozner v. Korshak, *supra* (upholding annual wheel tax on Chicago residents, in a flat amount). Netflix, Hulu and Spotify all charge their customers a flat amount that does not vary based on usage. By paying that flat amount, plaintiffs obtain the privilege of using the Products in Chicago, and they have testified that they do not recall any months in which they have not taken advantage of that privilege. See Statement of Facts ¶¶ 3-5, 8.

In In re M.I., 2013 IL 113776 ¶ 32, the Illinois Supreme Court stated:

> The general rule is that courts will not consider the validity of a statutory provision unless the person challenging the provision is directly affected by it or the unconstitutional feature is so pervasive as to render the entire statute invalid. [citations omitted] Generally, if there is no constitutional defect in the application of the statute to a litigant, that person does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. [citation omitted] In the absence of facts demonstrating an unconstitutional application of the statute, a person may not challenge the statute on the ground that it might conceivably be applied unconstitutionally in some hypothetical case.

See also Wells Fargo Bank, N.A. v. Bednarz, 2016 IL App (1st) 152738 ¶ 10.

Plaintiffs cannot prevail in an as-applied challenge based on the mere possibility that they or some other Chicago resident might at some point pay tax on charges for a subscription that is used exclusively outside Chicago. Nor would plaintiffs be entitled to bring such a challenge without first exhausting their administrative remedies by filing a refund claim with the Department. See Tri-State Coach Lines, Inc. v. Metropolitan Pier and Exposition Authority,

315 Ill. App. 3d 179 (1st Dist. 2000) (explaining that an as-applied challenge is subject to the exhaustion requirement).[2]

C. Defendants have express statutory authority to apply the Mobile Sourcing Act to streaming services provided by telecommunications companies.

The Mobile Telecommunications Sourcing Conformity Act ("Mobile Sourcing Act" or "Act"), 35 ILCS 638, states that all charges for mobile telecommunications services "are authorized to be subjected to tax ... by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunications services originate, terminate, or pass through ..." 35 ILCS 638/20. The Act defines "place of primary use" to mean "the residential street address or the primary business street address of the customer ... within the licensed service area of the home service provider." 35 ILCS 638/10. The term "home service provider" means "the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services." *Id.*

The Act implements the terms of the federal Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 116 - 126. See 35 ILCS 638/5, 15(a). Congress intended the federal legislation to apply to a wide variety of state and local taxes involving the issue of how to source mobile devices - "regardless of the terminology used to describe the tax." See 4 U.S.C. § 116(a).[3]

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[2] Moreover, plaintiffs seek declaratory and injunctive relief that could not extend to other people in any event. See Morr-Fitz, Inc. v. Blagojevich, 231 Ill.2d 474, 498 (2008) (a plaintiff that prevails on an as-applied claim may enjoin the objectionable enforcement of the statute only against itself); City of Chicago v. Alexander, 2015 IL App (1st) 1222858-B at ¶25 (same).

[3] In some jurisdictions, amusements are taxed as part of the state sales taxes. See, e.g., Ala. Code Sec.40-23-2(2); Fla. Stat. 212.02(1), 212.04; Ga. Code Ann. Sec. 8-2-(31) (C); Mo. Rev. Stat. sec. 144.020.1(2); Vt. Stat. Ann., tit. 23, sec. 9771(4). Likewise, in some jurisdictions, telecommunications are taxed as part of the state sales taxes. See, e.g., Mass. Gen. Laws ch. 64H, § 1; N.Y. Tax Law § 1105; Tenn. Code Ann. § 67-6-221; Tex. Tax Code § 150.0101.

When it enacted the Mobile Sourcing Act, the General Assembly specifically stated that it intended "to inform State and local government officials of its provisions as it applies to the taxes of this State." Id. (emphasis added). The "taxes of this State" include amusement taxes imposed by local governments. See e.g., Kerasotes, supra; 65 ILCS 5/11-42-5. The amusement tax is "levied by ... a taxing jurisdiction within this State ... measured by gross amounts charged to customers for mobile telecommunications services ..." 35 ILCS 638/15(a). The charges taxed are for "mobile telecommunications services," because they are "charges for, or associated with, the provision of commercial mobile radio service" and/or "charges for, or associated with, a service provided as an adjunct to a commercial mobile radio service." 35 ILCS 638/10 (emphasis added).[4]

As noted, the Act applies to charges "which are billed by or for the customer's home service provider," which means "the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services." 35 ILCS 638/20; 35 ILCS 638/10. While some providers of streaming services may not be "home service providers," others definitely are. For example, AT&T and Comcast are facilities-based carriers, T-Mobile is a reseller, and they all offer streaming services. See Exhibits P, Q and R. In March 2009, the Department issued an information bulletin informing telecommunications companies who offer pay television on mobile devices that they should collect amusement tax on their charges for that

[4] Section 20.3 of Title 47 of the Code of Federal Regulations, as in effect on June 1, 1999 (35 ILCS 638/10), defined commercial mobile radio service as "[a] mobile service that is: (a) (1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section." 47 C.F.R. § 20.3. The term "mobile service" was defined as "[a] radio communication service carried on between mobile stations or receivers and land stations ..." 47 C.F.R. Section 20.3.

service, using the Mobile Sourcing Act. See Exhibit E. This was consistent with the approach later codified in the Ordinance. At a minimum, the Mobile Sourcing Act applies to streaming services provided by telecommunications companies. Thus, at a minimum, the Ordinance is valid as to them, so plaintiffs again cannot show that there are "no circumstances" under which the Ordinance can be validly applied to streaming services.

D. Defendants have implied authority to apply the Mobile Sourcing Act to all streaming services.

Defendants have implied authority to apply the Mobile Sourcing Act to all streaming services, as the Act is a reasonable means of dealing with the issue of how to source charges related to the use of mobile devices. See 65 ILCS 5/8-3-15 ("The corporate authorities of each municipality shall have all powers necessary to enforce the collection of any tax imposed and collected by such municipality, whether such tax was imposed pursuant to its home rule powers or statutory authorization ..."). See also Virgin Mobile USA, SP v. Arizona Department of Revenue, 230 Ariz. 261 (2012) (upholding application of the Act to 911 tax on prepaid phone service, even though the Act excludes prepaid phone service); T-Mobile South, LLC v. Bonet, 85 So. 3d 963 (Ala. 2011) (same). Since the Act clearly applies to streaming services provided by telecommunications companies, it is reasonable for the City to apply it to the same services when they are provided by other businesses.

E. The holding and rationale of the Hertz decision do not apply to this case.

Plaintiffs cite Hertz Corp. v. City of Chicago, 2017 IL 119945 ("Hertz"), for the proposition that Chicago is acting in an extraterritorial manner by imposing the amusement tax on Chicago residents who might use the Products on mobile devices while outside of Chicago. Motion at 9-11. As we discuss below, Hertz involved a very different situation and is not controlling in this case.

Hertz was a challenge to a ruling that the Department issued concerning collection of the personal property lease tax, Code Chapter 3-32, for short-term car rentals from locations in the Chicago suburbs. The ruling stated that companies at those locations were required to ask Chicago residents who rented from them whether they planned to use the car primarily in the City during the rental term. If the customers said yes, then the companies were required to collect the City's lease tax from them and remit it to the Department. If the customers said no, then the companies were required to keep a record of that response to support not having collected the tax. If the companies did not keep such a record, the Department would presume, in the event of an audit, that the Chicago customers had used their rental cars primarily in the City, and the Department would assess the companies for tax, interest and penalties.

As noted, Hertz involved the City's personal property lease tax. The lease tax is "imposed upon: (1) the lease or rental in the city of personal property, or (2) the privilege of using in the city personal property that is leased or rented outside the city." Code Section 3-32-030(A). The first "prong" of the tax did not apply ("the lease or rental in the city of personal property"), because the customers were renting from suburban locations. Hertz at ¶ 27. This meant that Chicago had no grounds for applying the tax unless the second "prong" applied, which required evidence of "actual use" in the City. *Id.* at ¶¶ 27, 29.

The court held that there was no evidence of "actual use," and it rejected the ruling's "conclusive presumption of use based on Chicago residency." *Id.* at ¶ 30. It concluded that the ruling amounted to "a tax on transactions that take place wholly outside Chicago's borders." *Id.* (emphasis added). On a more general policy note, the court expressed a concern that the ruling "would result in greatly expanded obligations on vehicle lessees to estimate the percentage of use

they intend to make in each taxing jurisdiction and on motor vehicle rental companies to collect and remit taxes to multiple jurisdictions." *Id.*

This case is very different from Hertz. To begin with, this case concerns the amusement tax, which does not require "actual use" in the City. The amusement tax applies to charges paid for the privilege of viewing amusements in Chicago, whether or not the customer actually takes advantage of (and therefore "uses") the privilege. See Code Section 4-156-020 (stating that the tax applies to the "charges paid for the privilege to enter, to witness, to view or to participate in" an amusement). Thus, for example, if a customer buys a ticket to watch the Cubs play at Wrigley Field, the tax applies to the ticket price, even if the customer ends up not going to the game. Similarly, if a Chicago resident pays Netflix a subscription charge of $8 a month, payment of the charge provides that person with the privilege of watching Netflix videos in Chicago, and the amusement tax applies to that charge regardless of whether the person chooses to watch the videos exclusively in Chicago, partly in Chicago, or not at all.[5]

Second, Netflix, Hulu and Spotify offer their Products on a subscription basis, and plaintiffs accept those offers each month when they make their payments using credit cards with a Chicago billing address. See, *e.g.*, Exhibit D. This case, therefore, is more like a car rental from a Chicago location (which would be taxable under the first "prong" of the lease tax) than the suburban car rentals at issue in Hertz (which concerned the second "prong" and required proof of "actual use" in Chicago). See Stahl v. Village of Hoffman Estates, 296 Ill. App. 3d 550, 554 (1st Dist. 1998) (home rule municipalities have authority to tax events occurring within their territorial limits); National Realty & Investment Co. v. Illinois Dept. of Revenue, 144 Ill. App.

[5] The full $8 subscription charge applies as well – Netflix does not give a refund because the customer decides not to use the Product that month, nor does it apportion the charge based on the amount of usage.

3d 541, 547 (2d Dist. 1986) (receipt of installment payment as taxable event). It is also analogous to the City's wheel tax, by which Chicago residents pay a flat annual sum for each vehicle registered in the City, regardless of how much the vehicle is used outside the City. See Rozner v. Korshak, supra, 55 Ill. 2d 430, 433 (1973). Unlike the situation in Hertz, this is not "a tax on transactions that take place wholly outside Chicago's borders." Hertz at ¶ 30.

Third, the court in Hertz clearly believed that the City had no basis for assuming that a Chicago resident renting a car from a suburban location would actually use the car in Chicago. See Hertz at ¶ 27 ("At most, there is only a tenuous connection between the City and the taxed transaction."). By contrast, in the case of a monthly subscription for Netflix, Hulu or Spotify, it is entirely reasonable to assume that a Chicago resident will in fact use the Product in Chicago during that month. That assumption is supported by the evidence in this case, where plaintiffs have testified that they almost always use the Products either at home or elsewhere in the City. See Statement of Facts ¶¶ 3-5, 8. It is further supported by the Mobile Sourcing Act, which assumes that a customer's residence will be his or her "place of primary use" of a mobile device. 35 ILCS 638/10. See Friends of the Parks v. Chicago Park Dist., 203 Ill. 2d 312 (2003) (legislative findings are entitled to deference). Even assuming that the Act applies only to streaming services provided by telecommunications carriers, there is no reason to believe that the presumption of primary use would be any less accurate for streaming services provided by other businesses, as they involve the same services, received on the same mobile devices. Indeed, it would be illogical to assume that the uses would be any different, just because the providers are different.

Fourth, unlike in Hertz, there is no "conclusive presumption" contained in the Ordinance. To the contrary, the Ordinance simply states that the rules set forth in the Mobile Sourcing Act

"may be utilized" by providers who collect the tax, and it specifically states that the presumption that the tax is owed by Chicago residents is rebuttable. Code Section 4-156-020(G.1). It has been over two years since the Ruling was issued and almost two years since the Ordinance was amended. In that time, if any problems have occurred at all, they are certainly nothing "so pervasive as to render the entire statute invalid." In re M.I., 2013 IL 113776 ¶ 32.

Fifth, unlike in Hertz, Chicago is not requiring businesses such as Netflix, Hulu and Spotify to ask questions about where their customers intend to use their Products, nor is it requiring the customers to answer such questions. The Ordinance simply states that providers, as tax collectors, "may utilize" the sourcing rules set forth in the Mobile Sourcing Act - just as telecommunications providers utilize those same rules for cellular telephone service. If any problems do arise in individual cases, they can and should be dealt with on an as-applied basis. For all these reasons, the holding and rationale of the Hertz decision do not apply to this case.

II. Defendants are entitled to summary judgment on plaintiffs' claims regarding uniformity.

A. Uniformity standards

The Uniformity Clause provides that "[i]n 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." Ill. Const. 1970, Art. IX, § 2. Under the Uniformity Clause, a classification must be based on a real and substantial difference between the people taxed and not taxed, and there must be some reasonable relationship to the object of the legislation or to public policy. Geja's Café v. Metropolitan Pier and Exposition Authority, 153 Ill. 2d 239, 247 (1992). Statutes are presumed constitutional and, therefore, broad latitude is afforded to legislative classifications for taxing purposes. *Id.* at 248. The Uniformity Clause

enforces a minimum standard of reasonableness and fairness as between groups of taxpayers; it does not require perfect rationality as to each and every taxpayer. *Id.* at 247, 252.

In response to a Uniformity Clause challenge, a taxing body need only produce a justification for its classifications. *Id.* at 248. The plaintiff then has the burden of "clearly establishing" that the classification is arbitrary or unreasonable; if any state of facts can be reasonably conceived that would sustain it, the classification must be upheld. See Empress Casino Joliet Corp. v. Giannoulias, 231 Ill. 2d 62, 69 (2008), citing Allegro Services, Ltd. v. Metropolitan Pier & Exhibition Authority, 172 Ill. 2d 243, 250-251 (1996); Geja's, supra, at 248, citing Illinois Gasoline Dealers Association v. City of Chicago, 119 Ill. 2d 391, 403 (1988).

The plaintiff in a uniformity case may not rely upon hypothetical situations, Citizens Utilities Company of Illinois v. Illinois Pollution Control Board, 133 Ill. App. 3d 406, 410 (3rd Dist. 1996), infrequent situations, Fiorito v. Jones, 48 Ill. 2d 566, 572 (1971), Marcus Corp. v. Village of South Holland, 120 Ill. App. 3d 300, 304 (1st Dist. 1983), or scenarios that do not affect it, Jacobs v. City of Chicago, 53 Ill. 2d 421, 426-27 (1973). In a Uniformity Clause challenge the court is not required to have proof of perfect rationality as to each and every taxpayer. Geja's, *supra*, at 252. The Uniformity Clause was not designed as a straitjacket for the legislature. *Id.* Rather, it was designed to enforce minimum standards of reasonableness and fairness as between groups of taxpayers. *Id.*

B. Non-residents

Plaintiffs argue that the Ordinance violates the Uniformity Clause because it does not tax non-residents who use Products in the City. Motion at 14. The fact that the City does not tax non-residents does not mean the City may not tax residents. There are real and substantial differences between non-residents and residents. Among other things:

- The City provides protection and other benefits to its residents and their property on a regular and ongoing basis, whereas non-residents are here only on occasion as visitors.

- Consistent with the Mobile Sourcing Act, along with the evidence in this case, it is reasonable to assume that residents use the Products here on a regular basis, whereas it is reasonable to assume that non-residents will use them here only occasionally.

In addition, attempting to tax non-residents for their occasional use of the Products in the City would not be practical (or even feasible), and the Illinois courts have long recognized that administrative convenience is a legitimate uniformity justification. See, *e.g.*, Williams v. The City of Chicago, 66 Ill. 2d 423, 432 (1977).

C. AADs

Plaintiffs argue that the Ordinance violates the Uniformity Clause because it imposes a flat tax of $150 per year on an automatic amusement device ("AAD"), whereas the amusement tax applies to the Products at a 9% rate.[6] This argument fails for a number of reasons.

First, plaintiffs are comparing apples to oranges, as there are real and substantial differences between AADs and the Products. To give just a few examples:

- An AAD is owned by a business such as a bar or arcade (which pays the $150 tax), whereas the Products are used on devices owned by the customers themselves.

- An AAD is a stationary device that the customer may not take away from the establishment, whereas the Products can be used on a mobile device, at any location that the customer may choose.

- An AAD is shared among all of the establishment's customers, whereas the Products can be used exclusively by the customer.

- Many AADs are operated with coins on a per-use basis, whereas the Products are generally paid for by credit card on a subscription basis, including unlimited use.

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[6] An "automatic amusement device" means "any machine, which, upon the insertion of a coin, slug, token, card or similar object, or upon any other payment method, may be operated by the public generally for use as a game, entertainment or amusement ... and includes but is not limited to such devices as jukeboxes, marble machines, pinball machines, movie and video booths or stands ..." Code Section 4-156-150.

- Most AADs offer a limited selection of amusements, whereas the Products offer an extremely wide selection of amusements. See Exhibits F, H, J, M, S.

Second, even if AADs were otherwise similar to the Products, the City Council could have reasonably determined that imposing a flat annual tax on each AAD was administratively convenient. See DeWoskin, supra (rejecting challenge to County amusement tax based in part on administrative convenience). Specifically, the City Council could have determined that requiring owners of bars, restaurants and arcades to collect a percentage-based tax from patrons who pay small amounts of money to play individual songs or games, often using coins, would be administratively inconvenient for the businesses, their customers, and the Department.

Third, plaintiffs assume that a 9% tax on a Product would always be higher than a flat tax of $150 per year on an AAD. In fact, that might or might not be the case, depending on the price and amount of usage for the AAD. See In re M.I., supra ("In the absence of facts demonstrating an unconstitutional application of the statute, a person 'may not challenge the statute on the ground that it might conceivably be applied unconstitutionally in some hypothetical case.'").[7]

Fourth, none of the plaintiffs subscribe to Xbox Live Gold or any other online gaming products. Therefore, plaintiffs do not have standing to bring a claim concerning those products. See Wells Fargo, supra ("a challenger lacks standing where ... he argues only that the statute would be unconstitutional if applied 'to third parties in hypothetical situations' ... or 'in other situations not before the Court.'").

Plaintiffs rely on National Pride of Chicago, Inc. v. City of Chicago, 206 Ill. App. 3d 1090 (1st Dist. 1990). Motion at 17. There, the court held that there was no real and substantial difference between the plaintiff's self-service car wash facilities (which were taxed) and

[7] In order to generate $150 in tax at a rate of 9 percent, an AAD would have to yield $1,667 in revenues over the course of a year.

automatic and tunnel car washes (which were exempted). The fact that the self-service facilities provided the customer with hands-on control of the wand that directed water to the vehicle was viewed by the court as a distinction that did not justify taxing them and not their competitors. 206 Ill. App. 3d at 1102. Here, the Products and AADs are both taxed, but in different ways. And, as discussed above, there are real and substantial differences between the Products and AADs which clearly justify this approach.

This case is more like Peoples Gas Light and Coke Company v. City of Chicago, 9 Ill. 2d 348 (1956), where the court held that taxing sellers of natural gas differently from sellers of electricity was permissible. Specifically, the City taxed Peoples Gas at a rate of 5% of gross receipts under one ordinance, whereas it taxed Commonwealth Edison at a net rate of 1% of gross receipts under another ordinance, because it gave Commonwealth Edison a credit for franchise fees paid. 9 Ill. 2d at 351. In upholding this arrangement against a uniformity challenge, the court stated that although "both electricity and gas are forms of energy which can be used for the same ultimate purpose ... there are basic differences in the means by which the two products are produced, distributed and used; and so many variable factors are involved in determining their respective market positions as to negate the absolute necessity for a single classification." 9 Ill. 2d at 334. Likewise, it is true that the Products and AADs can be used for the same ultimate purpose (for example, listening to a song), but there are basic differences that more than justify taxing them in different ways.

D. Live Cultural Performances

Plaintiffs' arguments concerning live cultural performances are similarly flawed.[8] Here again, plaintiffs are comparing apples to oranges, as there are real and substantial differences between live cultural performances and the Products.

Plaintiffs correctly note that the Ordinance exempts live cultural performances at small venues and provides for a lower rate at larger venues. Code Section 4-156-020(D)(1), (E). In 1998, when the City Council passed these provisions, it made the following findings:

> WHEREAS, The City Council wishes to foster the production of live performances that offer theatrical, musical or cultural enrichment to the city's residents and visitors; and
>
> WHEREAS, Small theaters and other small venues often promote the local production of new and creative live cultural performances, and often have the most difficulty absorbing or passing on any additional costs; and
>
> WHEREAS, Costs faced by those who produce live theatrical, musical, or other culturally enriching performances at smaller venues are substantial, and such performances often require governmental support since they could not otherwise flourish. See Exhibit T.

In Pooh-Bah Enterprises, Inc. v. County of Cook, 232 Ill. 2d 463 (2009), the Illinois Supreme Court approved the favoring of "live fine arts performances" over other forms of amusement. In doing so, the court noted that the goal of the exemption "is to encourage live fine arts performances in small venues" and that this goal would not be advanced by "movies, television, promotional shows, [or] performances at adult entertainment cabarets ..." *Id.* at 496. Illinois courts have upheld classifications wherein the differentiated objects of the legislation were substantially more similar than live cultural performances are to streamed movies and

[8] The Ordinance defines a "live theatrical, live musical or other live cultural performance" as " a live performance in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings." Code Section 4-156-010.

music. See, e.g., Empress Casino, 231 Ill. 2d at 80 (upholding classification of river boat casinos with annual gross revenues over and under $200 million); Geja's, 153 Ill. 2d at 249 (upholding a tax on carry-out food purchased at restaurants and full service bars but not at other establishments); Peoples Gas, *supra*.

Plaintiffs argue that viewing a performance in person versus streamed is a difference in form and not substance. Motion at 18. Plaintiffs' contention is without merit, as anyone who has attended a live cultural event knows. There are real and substantial differences between an amusement that is viewed in person and one delivered electronically for viewing on a television or other device. It is why people pay to attend events that they could have viewed for free, or for a much lower price, on a television or other device. Consider the following examples:

- The movie version of a play is a very different product from a live performance at the theater. A streamed version of the movie might be available on Netflix with a subscription for $8 a month. By contrast, a ticket to attend the play in person might cost $100 or more, and many people would be willing to pay for such a ticket even if they owned a DVD of the movie. Why? Because it is a very different product from the movie. See Exhibits F, H and N for examples.

- The streamed version of a live concert is a very different product from a ticket to attend the concert in person. A subscriber to Netflix or pay television might theoretically be able to watch the streamed version of a live concert, on a television, computer, tablet or cell phone, at a "pay-per-view" price of $20. By contrast, a ticket to attend the concert in person might cost $100 or more, and many people would be willing to pay for such a ticket instead of watching the streamed version from a remote location. See Exhibits J and O for examples. Indeed, if a customer paid for a ticket to attend the concert in person, that customer would undoubtedly be upset if the venue wound up saying that it had over-sold the event and the customer instead had to watch the concert from a remote location. In that case, the customer would have paid for one product but received another.

Plaintiffs suggest that watching a Chicago performance on a device could be beneficial to the venue and enriching to the persons viewing it, and thus that the City Council should have provided a lower rate or exemption for performances viewed on devices, as well as performances viewed in person. Motion at 18. Plaintiffs' suggestion lacks merit, as it ignores the many other

reasons for encouraging attendance at live cultural events. For example, live cultural performances attract tourists from out of town and increase business at hotels, restaurants and stores - unlike the Products, which people can use without ever leaving their homes.

In addition, even if plaintiffs' suggestion did have merit, the fact that a law could conceivably have been drafted differently does not make it unlawful. Geja's, *supra*, 153 Ill. 2d at 252 (rejecting plaintiffs' arguments as "boiling down to mere assertions that they can draw better taxing lines than the General Assembly"). Moreover, plaintiffs do not cite a single example of a live cultural event streamed from a venue in Chicago, so plaintiffs' assertions on this issue are entirely hypothetical. See Citizens Utilities, *supra*, 133 Ill. App. 3d at 410 (uniformity claims may not be based upon hypothetical situations). In fact, Netflix, Hulu and Spotify do not even offer real-time transmissions of live cultural performances. See Statement of Facts ¶¶ 2, 4-5.

III. Defendants are entitled to summary judgment on plaintiffs' claims under the ITFA.

Plaintiffs argue that the amusement tax violates the Internet Tax Freedom Act ("ITFA") by discriminating against electronic commerce. A tax is "discriminatory" under the ITFA if it treats electronic commerce less favorably than "transactions involving similar property, goods, services, or information accomplished through other means." 47 U.S.C. § 1105(2)(A) (emphasis added). Thus, for example, because a shirt is the same product whether bought on-line or at a store, the ITFA would prohibit applying a higher sales tax rate to the on-line transaction.

The ITFA provides no definition of the term "similar." However, because federal preemption of state and local taxes is disfavored, the term must be construed narrowly. See, *e.g.*, Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 345 (1994) (federal statutes should be interpreted to preempt traditional state powers only if that result is "the clear and manifest purpose of Congress."); BFP v. Resolution Trust Corporation, 511 U.S. 531, 544

(1994); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 533 (1992). Certainly, if there is a real and substantial difference between two products for uniformity purposes, then the two products should not be treated as "similar" under the ITFA.

As discussed in Sections II(C) and (D) above, there are real and substantial differences among the Products, AADs and live performances. While it is true that a given recording of a song available on Spotify may also be available on a juke box, that is not the issue. The issue is whether Spotify is so "similar" to a jukebox that it must be taxed the same, and the answer is that it is not. Likewise, while a video available on Netflix may be the movie version of a play that is showing at a local theater, that is not the issue. The issue is whether Netflix is so "similar" to a live cultural performance that it must be taxed the same, and the answer again is that it is not. Moreover, plaintiffs have admitted that Netflix, Hulu and Spotify do not even offer real-time transmissions of live performances, so there are no similar "electronic commerce" versions of those products for the Ordinance to discriminate against. See Statement of Facts ¶¶ 2, 4-5.

IV. Defendants are entitled to summary judgment on plaintiffs' claims under the Commerce Clause.

A. As resident consumers, plaintiffs do not have standing to bring a challenge under the Commerce Clause, and defendants are entitled to summary judgment on that basis alone, without reaching the merits.

"[T]he Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Geja's, *supra*, 153 Ill. 2d at 256, quoting New Energy Co. v. Limbach, 486 U.S. 269, 273 – 4 (1988). "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Id.*, quoting Goldberg v. Sweet, 488 U.S. 252, 266 (1989). "Thus, the class protected by the commerce clause is *competitors*, not consumers ..." *Id.* (emphasis in original). See also Terry v. Metropolitan Pier and Exposition Authority, 271 Ill. App. 3d 446, 455 (1995) (affirming

dismissal of Commerce Clause challenge to the MPEA airport departure tax and noting that the plaintiffs had not pled how they were part of interstate commerce). Here, Plaintiffs are all resident consumers – not non-resident businesses. For this reason alone, defendants are entitled to summary judgment on plaintiffs' claims under the Commerce Clause, without even reaching the merits.

B. The undisputed facts do not support a facial or as-applied challenge to the Ordinance under the Commerce Clause.

Plaintiffs' key arguments concering the Commerce Clause are similar to their arguments about the City's authority to tax the Products under Illinois law – specifically, that they may not be taxed because they can be used outside the City. For the reasons discussed in Sections I(A) and (B) above, the undisputed facts do not support plaintiffs' arguments, either as a facial or an as-applied challenge to the Ordinance.

C. Congress has authorized use of the Mobile Sourcing Act.

Plaintiffs' Commerce Clause claims also fail as a matter of law because Congress has authorized use of the Mobile Sourcing Act, at least for telecommunications providers. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Northwest Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985). Because there is no question that using the Mobile Sourcing Act for streaming services provided by telecommunications companies does not violate the Commerce Clause, there can be no possible basis for concluding that using it for streaming services provided by other businesses does violate the Clause.

D. The Ordinance complies with the Commerce Clause.

In Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992), the court held that a tax survives a 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." The Ordinance complies with all of these requirements: (1) it taxes an activity with a substantial nexus with the State, as it taxes Chicago residents who pay for and receive the privilege of viewing or listening to amusements in Chicago; (2) it is fairly apportioned, as discussed in detail below; (3) it does not discriminate against interstate commerce, as it applies only to Chicago residents; and (4) it is fairly related to services provided, as the Chicago residents who pay the tax receive many services from Chicago.

In Goldberg v. Sweet, 488 U.S. 252 (1989), the court upheld the Illinois telecommunications tax against a Commerce Clause challenge. In doing so, it made the following comments about the apportionment requirement:

> [T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. ... [W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. ... To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. ... The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. ... We recognize that, if the service address and billing location of a taxpayer are in different States, some interstate telephone calls could be subject to multiple taxation. This limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme. ... It should not be overlooked ... that the external consistency test is essentially a practical inquiry. ... An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers. ... 488 U.S. at 260 – 265 (emphasis added).

As in Goldberg, the Ordinance is internally consistent, because if every jurisdiction were to impose an identical tax, no multiple taxation would result. Using the Mobile Sourcing Act rules for mobile devices, the Chicago amusement tax applies only to Chicago residents. If every

jurisdiction imposed an identical tax, no multiple taxation would result, because the other jurisdictions would tax only their own residents.

Also as in Goldberg, the Ordinance is externally consistent. A premise of the Mobile Sourcing Act is that taxing the full amount charged to a resident (for example, $8 per month charged for a Netflix subscription) "reasonably reflects the in-state component of the activity being taxed" (Goldberg, 488 U.S. at 262), because (as evidenced by plaintiffs) it is a reasonable assumption that the taxpayer's residence will be his or her place of primary use. See 4 U.S.C. 124; 35 ILCS 38/10. Although the assumption may not always be true, the external consistency test "is essentially a practical inquiry," and the alternative of apportionment based on the location of each individual use "would produce insurmountable administrative and technological barriers." Goldberg, 488 U.S. at 264 - 265.

Plaintiffs' argument concerning the possibility of multiple taxation is, at best, hypothetical. Plaintiffs do not claim that it has happened to them, nor do they explain how it could happen to anyone else. The occasional use of a mobile device in another jurisdiction, by a Chicago resident, would not provide a sufficient basis for that jurisdiction to tax the Chicago resident. See Goldberg, 488 U.S. at 263 ("We doubt that States through which the telephone call's electronic signals merely pass have a sufficient nexus to tax that call."). Plaintiffs also do not explain how a jurisdiction could possibly identify, bill and collect tax from a Chicago resident who used a Product on a mobile device within its boundaries. In any event, even assuming that it could happen, "[t]his limited possibility ... is not sufficient to invalidate" the Ordinance. Goldberg, 488 U.S. at 264. See also Irwin Industrial Tool v. Illinois Department of Revenue, 238 Ill. 2d 332 (2010) (holding that the application of the State's use tax to the full

price paid for an airplane was permissible, even though the airplane was used in many places other than Illinois, where it was registered).

Conclusion

The amusement tax is one of the least regressive taxes by which the City can raise needed revenues, because amusements are not necessities. All of the plaintiffs are Chicago residents who regularly benefit from the protection and services that the City provides. People who subscribe to cable TV pay the amusement tax, and cable TV is certainly "similar" to Netflix and Hulu. Likewise, people who subscribe to streaming services through telecommunications companies pay the amusement tax, and those streaming services are "similar" - and in some cases identical – to those provided by Netflix, Hulu and Spotify. By contrast, there are real and substantial differences among the Products, AADs and live cultural performances. The undisputed facts do not support a facial or an as-applied challenge, and defendants are entitled to summary judgment.

Dated: November 15, 2017

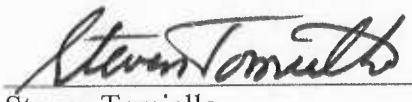
Respectfully submitted,

By: 

Weston Hanscom
Steven Tomiello
Marques Berrington
City of Chicago, Department of Law
Revenue Litigation Division
30 North LaSalle Street, Suite 1020
Chicago, IL 60602
(312) 744-9077/7803/6995
Steven.Tomiello@cityofchicago.org
Attorney No. 90909

CERTIFICATE OF SERVICE

I, Steven Tomiello, certify that today, November 15, 2017, I caused Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of their Cross-Motion for Summary Judgment to be served on the individuals listed on the Service List below by United States Mail (First Class, postage paid) and email before 5:00 p.m.



Steven Tomiello

SERVICE LIST

Jacob H. Huebert -- jhuebert@libertyjusticecenter.org
Jeffrey Schwab -- jschwab@libertyjusticecenter.org
Liberty Justice Center
190 S. LaSalle St., Suite 1500
Chicago, IL 60603