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

Performance Marketing Association, Inc.,	)	2011CH26333 CALENDAR/ROOM 02 TIME 00:00 Declaratory Jdgmt
Plaintiff,	)	
	)	No._____
v.	)	
	)	
Brian A. Hamer, in his capacity as Director, Illinois Department of Revenue,	)	
	)	
Defendant.	)	

FILED
DATE: 12/30/2011
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COMPLAINT FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

The Plaintiff, Performance Marketing Association, Inc. ("the PMA"), brings this complaint pursuant to 735 ILCS 5/2-701 for declaratory and injunctive relief against the Defendant, Brian A. Hamer, in his capacity as the Director of the Illinois Department of Revenue ("Department"), and states as follows:

A. Introduction

1. This is an action by the PMA, the nation's largest trade association representing the interests of the performance marketing industry, challenging the constitutionality of a new Illinois law, effective July 1, 2011, that unlawfully targets the business of online, performance marketing. Illinois House Bill 3659 ("the Act" or "HB 3659"), represents an unprecedented attempt by the State of Illinois, in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3, and the federal Internet Tax Freedom Act (*see* the notes to 47 U.S.C. § 151) ("ITFA"), to use the relationship between in–state publishers of online advertisements and out–of–state advertisers as a basis for expanding the State's regulatory authority beyond its borders. HB 3659 seeks to impose burdensome and discriminatory use tax

collection obligations on Internet retailers with no physical presence in Illinois and has caused substantial harm to the business of thousands of Illinois publishers, including PMA members, through the loss of advertising contracts with Internet retailers.

2. In January 2011, the Illinois General Assembly passed, and in March 2011, Illinois Governor Pat Quinn signed into law, HB 3659. The Act amends the definition of "retailer maintaining a place of business in this State" to include any retailer that: (a) has one or more contracts with publishers "located in Illinois," pursuant to which the publisher displays an advertisement on its website that links Internet users to the retailer's website, in return for which the publisher receives compensation based on sales made to customers who reached the retailer's website via the link; and (b) realizes at least $10,000 in gross receipts from such sales over a one–year period.

3. Under Illinois law, a "retailer maintaining a place business in this State" is subject to various regulatory requirements, including the obligation to register with the Department, collect Illinois "occupation" taxes (*i.e.*, sales taxes) or use taxes on sales to Illinois residents, remit such taxes to the Department and file periodic reports. Consequently, under HB 3659, based solely upon a remote seller's contractual relationships with Illinois publishers for the display of online advertisements that permit Internet users to gain access to the retailer's website via an online link, an out–of–state retailer is obligated to collect and remit Illinois use tax on all of its taxable sales to Illinois consumers. Internet retailers who have no business location or other physical presence in Illinois have no obligation to register with the Department or to collect Illinois sales or use tax because of the limitation on state taxing power under the Commerce Clause of the United States Constitution, as clearly established by the United States Supreme

Court decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). HB 3659 purports to impose such obligations on out-of-state Internet retailers who contract with Illinois publishers.

4. Indeed, under the amended definition set forth in HB 3659, an out–of–state retailer is deemed to be "maintaining a place of business" in Illinois regardless of whether the publisher's computer servers storing and displaying the advertisement are located in Illinois, whether the sales made by the retailer as a result of the advertisement are to Illinois consumers, or whether the publisher engages in *any* activity in Illinois on behalf of an out–of–state retailer.

5. Because out–of–state retailers can avoid the effect of HB 3659 by terminating their relationships with Illinois publishers, many of them did so shortly after Governor Quinn signed the Act. As a result, HB 3659 has caused substantial harm to the business of thousands of Illinois publishers. No additional use tax revenue will be remitted to the State by those retailers who terminate their business relationships with Illinois publishers, although such retailers will continue to make sales to Illinois residents who access the retailers' websites directly or via the websites of publishers located outside of Illinois.

6. Moreover, HB 3659, by targeting online, performance marketing arrangements as the basis for imposing Illinois tax reporting and collection obligations upon retailers who do nothing more than advertise on the Internet through publishers located in Illinois, while not imposing tax reporting and collection obligations upon retailers who advertise nationally through other media, discriminates against transactions accomplished via online advertising, as compared to other forms of advertising.

7. The harm to affected Illinois publishers of online advertisements is severe, resulting in a substantial loss of advertising revenue. Retailer–advertisers located outside of Illinois are also harmed by being forced either to discontinue national Internet advertising

through Illinois publishers, or, instead, to accept new burdensome and discriminatory use tax reporting obligations, despite their lack of any physical presence in Illinois. Because the Act exceeds the limits of the State's power to regulate interstate commerce under the Commerce Clause, and discriminates against electronic commerce in violation of the ITFA, the PMA, on behalf of its affected publisher–members and retailer–members, seeks a declaration that HB 3659 violates both the United States Constitution and federal law.

B. The Parties

8. The Plaintiff, Performance Marketing Association, Inc., is a nonprofit trade association incorporated in Delaware as a nonstock corporation, with headquarters in Camarillo, California. The PMA is the leading trade association in the United States representing the interests of businesses, organizations, and individuals using and supporting performance marketing methods, with members located throughout the country, including Illinois. PMA members include publishers of online advertisements, retailers and other businesses that advertise online, and many other businesses that facilitate, manage, and promote performance marketing arrangements and methods.

9. The Defendant, Brian A. Hamer, is the duly appointed Director of the Illinois Department of Revenue. The Defendant is charged with enforcement of the Act.

C. Jurisdiction and Venue

10. The Court has jurisdiction over this action pursuant to the Illinois declaratory judgment statute, 735 ILCS 5/2-701, as well as under 42 U.S.C. § 1983, because the action presents an actual controversy and claims arising under the Constitution of the United States and a federal statute as to which PMA members are entitled to a declaration of their rights.

11. Venue is proper in this Court pursuant to 735 ILCS 5/2-103(a), because the Defendant has a principal office in Cook County.

D. Standing

12. The PMA has standing to bring this action on behalf of affected PMA members who publish, and who purchase, online advertisements pursuant to the standards for associational standing set forth by the Supreme Court in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977). A central purpose of the PMA is to advance the interests of companies involved in performance marketing in securing fair and non–discriminatory treatment under both federal and state laws and regulations. In addition, PMA publisher–members located in Illinois and retailer–members located outside Illinois would have standing in their own right to bring suit, because they are harmed by HB 3659's unconstitutional expansion of the regulatory authority of Illinois and its discriminatory treatment against electronic commerce, all in violation of federal law. Affected PMA members face injuries as a result of the Act, which are real, immediate and direct, including the loss of profitable contractual relationships and advertising revenue. No individual member's participation is required for the relief sought by the PMA to redress the injuries suffered by PMA members — a declaration that the Act's expanded definition of "retailer maintaining a place of business in this State" violates the Commerce Clause, on its face, and discriminates against electronic commerce in violation of the ITFA. Moreover, the PMA's publisher–members, to the extent it may be necessary, have *jus tertii* standing under the principles set forth in *Craig v. Boren,* 429 U.S. 190 (1976).

E. Factual Background

Online Performance Marketing

13. The PMA is a national trade association of companies, organizations, and individuals engaged in or supporting the business of performance marketing, including specifically online advertising.

14. Performance marketing is a comprehensive term that refers to marketing and advertising programs in which the person or entity that displays an advertisement — also known as a "publisher" or an "affiliate" — is paid when a specific action is completed, such as a sale or lead. Advertising rates are paid if and when a consumer makes a purchase or completes a lead form.

15. Performance marketing is a common form of advertising conducted on the Internet. Online advertising is inherently interstate, and even international, in scope. Many online retailers use performance marketing in connection with promoting their sale of goods and services. There are a variety of technical and compensation arrangements among advertisers and publishers that involve the publisher placing an advertisement on its website, often in the form of a link that takes a website visitor who clicks on the link directly to the advertiser's website.

16. Most performance marketing agreements provide that the advertiser will compensate the publisher when the retailer completes a sale that originated via the advertisement on the publisher's website. The publisher is not, however, involved in receiving or transmitting customer orders, processing customer payment, delivering purchased products, or providing pre–sale or post–sale customer services.

17. On information and belief, nationally there are more than 200,000 online publishers, including for–profit and not–for–profit organizations, and over 5,000 advertisers using or supporting performance marketing arrangements.

18. On information and belief, at the time of the enactment of HB 3659, there were at least 9,000 such publishers with an Illinois business location.

19. There are PMA members located in Illinois who, before HB 3659 took effect, published advertisements on their websites for out–of–state retailers, and who received compensation based on sales made by the retailers to customers who reached the retailers' websites via the advertisements appearing on the publishers' websites.

Illinois Use Tax Law

20. Illinois law imposes a use tax on "the privilege of using in this State tangible personal property purchased at retail from a retailer." 35 ILCS 105/3; *see also* 35 ILCS 110/3 (Service Use Tax). The use tax is levied upon the purchaser of property acquired for use in the state.

21. Every retailer "maintaining a place of business" in Illinois is required by law to register with the Department. A retailer who fails to register with the Department but engages in the sale of tangible personal property in Illinois is guilty of a Class 4 felony. A retailer not "maintaining a place of business" in Illinois is not required to register with the Department.

22. Illinois law requires a "retailer maintaining a place of business in this State" to collect Illinois use tax from purchasers at the time of sale and to remit the tax to the Department. Retailers subject to such a collection obligation are required to file use tax returns on a monthly basis, and to maintain such tax records as the Department may require.

23. Retailers that have no office, store, property, employees or other physical presence in Illinois are not obligated under Illinois law, and are protected by the Commerce Clause of the United States Constitution from being required, to collect Illinois sales or use taxes on retail sales to Illinois consumers.

24. Many Internet retailers have no physical presence in Illinois, but sell products and services to consumers in Illinois and elsewhere from facilities located outside the state by using the instrumentalities of interstate commerce. Many Internet retailers with no physical presence in Illinois do not collect Illinois sales or use taxes.

25. For retail sales on which the retailer does not collect sales or use tax, Illinois law requires Illinois purchasers to self–report the transaction and remit use tax to the Department. Illinois purchasers are expected to report their use tax liability on an Illinois Use Tax Return, Form ST–44, or on their Illinois Individual Income Tax Return, Form IL–1040. The Department is empowered to assess and collect use taxes directly from consumers.

26. Illinois publishers of online advertisements have no Illinois sales or use tax liability, or reporting obligations, in connection with purchases made by Illinois consumers from out–of–state retailers whose advertisements appear on the publishers' websites. Illinois use tax is due from an Illinois consumer on an Internet purchase regardless of whether the consumer gains access to the online retailer's website via a link on a publisher's website, or instead accesses the site directly.

HB 3659's Amended Definition of "Retailer Maintaining a Place of Business in This State"

27. Enacted in March 2011, HB 3659 amends Section 2 of the Illinois Use Tax Act, 35 ILCS 105/2 by revising the definition of "retailer maintaining a place of business in this State," effective July 1, 2011 to include:

> [A] retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by a link on the person's Internet website. The provisions of this paragraph 1.1 shall only apply if the cumulative gross receipts from sales of tangible personal property by the retailer to customers who are referred to the retailer by all persons in this State under such contracts exceed $10,000 during the preceding 4 quarterly periods ending on the last day of March, June, September and December.

HB 3659 similarly amends the definition of "serviceman maintaining a place of business in this State" set forth in Section 2 of the Service Use Tax Act, 35 ILCS 110/2.

28. Neither HB 3659, nor any other provision of Illinois use tax law, defines the term "located in this State." A publisher may be "located in" Illinois for purposes of the Act even if the computer servers that display the publisher's website, and on which a retailer's advertisement appears, are located in another state.

29. By its terms, the expanded definition in the Act applies to any retailer whose "cumulative gross receipts" from sales completed after a customer clicks on an online ad displayed by a publisher located in Illinois exceed $10,000 over a one–year period. The law does not limit the measure of "cumulative gross receipts" necessary to trigger the law's operation solely to sales made to purchasers located in, or for use in, Illinois.

The Consequences of Illinois HB 3659 to Publishers and Advertisers

30. Prior to the enactment of HB 3659, retailer–advertisers who entered into contracts for the appearance of their advertisements on the websites of Illinois publishers were under no obligation under Illinois law to collect and remit Illinois use tax on sales of tangible personal property to Illinois purchasers. HB 3659 purports to impose, effective July 1, 2011, an obligation on each out–of–state retailer–advertiser that has contracts with publishers "located in"

Illinois, and meets the minimum threshold of $10,000 in gross receipts resulting from such relationships, to register with the Department and comply with Illinois sales and use tax obligations, including collecting and remitting Illinois use tax on all of its sales of tangible personal property to purchasers for delivery in Illinois.

31. Many out–of–state Internet retailers, in response to the enactment of HB 3659's expanded definition of "retailer maintaining a place of business in this state," have notified Illinois publishers that they are terminating their contracts with the publishers. For example, after enactment of HB 3659 on March 10, online retailer Amazon.com informed Illinois publishers that it would discontinue its contracts and relationships with Illinois publishers as of April 15, 2011. On information and belief, other Internet retailers have terminated and will continue to terminate their advertising contracts with Illinois publishers as a result of the Act taking effect on July 1, 2011. Affected Illinois publishers will therefore lose advertising revenue as a result of the enactment of HB 3659.

32. By terminating their contracts with Illinois publishers of online advertisements, out–of–state Internet retailers with no physical presence in Illinois will not be deemed to be "maintaining a place of business in this State" and will not be subject to Illinois use tax collection and remittance obligations. The State will receive no additional use tax revenue through remittances by such terminating retailers. Illinois consumers can continue to make purchases from Internet retailers who have terminated their relationships with Illinois publishers and such purchasers will continue to be subject to the obligation to self–report the applicable use tax to the Department.

33. Due to the loss of contracts with advertisers, Illinois publishers of Internet advertisements will collectively lose millions of dollars of advertising revenue each year.

Indeed, some Illinois publishers will likely go out of business as a result of the loss of their relationships with advertisers who discontinue their agreements with publishers in the state. Some publishers formerly located in Illinois have decided to move their businesses to other states in order to reduce the harm done to them by HB 3659.

34. As a result of their loss in revenues, Illinois publishers will report and pay substantially less Illinois corporate and personal income tax than they did prior to the enactment of HB 3659.

F. Causes of Action

COUNT I — DECLARATORY JUDGMENT
Pursuant to 42 U.S.C. § 1983 and 735 ILCS 5/2-701
For Improper and Unduly Burdensome Regulation of Interstate Commerce in Violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3

35. The PMA repeats and incorporates by reference each of the allegations set forth in paragraph 1 – 34 as if fully set forth herein.

36. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides that Congress has the power to regulate commerce among the states.

37. The Commerce Clause correspondingly limits the power of the states, including Illinois, to regulate interstate commerce.

38. The Commerce Clause bars state laws that unduly burden interstate commerce.

39. Under the Commerce Clause, there must be a sufficient, minimum connection, or "substantial nexus," between an out–of–state retailer and a state, in the form of a physical presence by the retailer, before the state may impose sales and use tax obligations on a retailer.

40. The appearance of advertisements for an out–of–state retailer, that include a link to its website, on the websites of publishers located in Illinois is not sufficient, as a matter of law,

to constitute "substantial nexus" between Illinois and the out–of–state retailer for purposes of the Commerce Clause.

41. The State of Illinois lacks the authority under the Commerce Clause to expand its taxing authority to retailers located outside the state based solely on their relationships with publishers of online advertisements located in Illinois.

42. The amended definitions of "retailer maintaining a place of business in this State" set forth in HB 3659, on their face, violate the Commerce Clause.

43. As the state official charged with enforcement of the Act's amended definitions of "retailer maintaining a place of business in this State," the Defendant is liable pursuant to 42 U.S.C. § 1983 for the deprivation of rights secured by the Commerce Clause.

44. An actual controversy exists between the parties regarding the issues set forth hereinabove.

45. This Court is empowered, pursuant to 735 ILCS 5/2-701, to declare the rights of retailers and publishers, including PMA members, under the Commerce Clause.

46. The PMA is entitled to declaratory relief, and attorneys' fees pursuant to 42 U.S.C. § 1988, as requested below.

COUNT II — DECLARATORY JUDGMENT
Pursuant to 42 U.S.C. § 1983 and 735 ILCS 5/2-701
For Improper Regulation of Commerce Occurring Outside of Illinois' Borders in Violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3

47. The PMA repeats and incorporates by reference each of the allegations set forth in paragraph 1 – 46 as if fully set forth herein.

48. The Commerce Clause of the United States Constitution strictly limits the power of the states, including Illinois, to regulate interstate commerce occurring outside the state's borders.

49. HB 3659 requires out–of–state retailers to register with the Department for purposes of Illinois use tax based solely on Internet advertisements displayed by publishers "located in Illinois." Neither HB 3659, nor any other provision of Illinois use tax law, defines the term "located in this State." Nothing in HB 3659 requires that the online advertisement displayed by a publisher that links to the retailer's website be stored on and displayed using computer servers located in Illinois.

50. Nothing in HB 3659 requires that a publisher located in Illinois engage in *any* activity in Illinois on behalf of an out–of–state retailer as a condition of the retailer being deemed to be a "retailer maintaining a place of business in this State."

51. HB 3659 applies to retailers with $10,000 in gross receipts over a one–year period from sales to consumers who link to the retailer's website from online advertisements displayed by publishers "located in Illinois," but does not require that such customers be located in Illinois or request that goods be shipped to Illinois.

52. The expanded definition under the Act will, by its plain terms, include within its regulatory sweep transactions in interstate commerce between non–Illinois retailers and non–Illinois purchasers, by requiring affected Internet retailers to register for use tax reporting in Illinois on the basis of sales occurring entirely outside the State.

53. The definitions of "retailer maintaining a place of business in this state" set forth in HB 3659 are, therefore, per se invalid under the Commerce Clause.

54. As the State official charged with enforcement of the Act, the Defendant is liable pursuant to 42 U.S.C. § 1983 for the deprivation of rights secured by the Commerce Clause.

55. An actual controversy exists between the parties regarding the issues set forth hereinabove.

56. This Court is empowered, pursuant to 735 ILCS 5/2-701, to declare the rights of retailers and publishers, including PMA members, under the Commerce Clause.

57. The PMA is entitled to declaratory relief, and attorneys' fees pursuant to 42 U.S.C. § 1988, as requested below.

COUNT III — DECLARATORY JUDGMENT
Pursuant to ITFA § 1101 *et seq.* and 735 ILCS 5/2-701
For Violation of the Federal Internet Tax Freedom Act

58. The PMA repeats and incorporates by reference each of the allegations set forth in paragraph 1 – 57 as if fully set forth herein.

59. The ITFA prohibits a state from imposing a discriminatory tax on electronic commerce. ITFA § 1101(a)(2).

60. Under the ITFA, a "discriminatory tax" includes "any tax . . . on electronic commerce that . . . 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." *Id.* § 1105(2)(A)(iii).

61. The term "tax" under the ITFA includes both revenue raising measures and "the imposition 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." *Id.* § 1105(8). "Electronic commerce" is defined as "any transaction conducted over the Internet . . . comprising sales . . . of delivery or property, goods, service or information . . ." *Id.* § 1105(3).

62. HB 3659 imposes a statutory obligation to collect Illinois use tax on retailers who complete sales transactions accomplished through Internet–based performance marketing, as opposed to other forms of national advertising. No similar Illinois tax collection obligations are

imposed on out–of–state retailers who accomplish transactions for sales of similar goods and services via other advertising media.

63. By way of illustration, Illinois use tax law does not require use tax collection by out-of-state retailers who enter into contracts with Illinois publishers of non-Internet advertising which is disseminated primarily to consumers located outside of Illinois. *See* 35 ILCS §§ 105/2 (definition of "retailer maintaining a place of business in this State," subsection 3). However now, pursuant to HB 3659, Illinois use tax law imposes a use tax collection obligation on out-of-state retailers who contract with Illinois publishers of online advertisements, even though such ads are similarly disseminated primarily to consumers located outside the state.

64. HB 3659 constitutes an impermissible "discriminatory tax" in violation of the ITFA.

65. An actual controversy exists between the parties regarding the issues set forth hereinabove.

66. This Court is empowered, pursuant to 735 ILCS 5/2-701, to declare the rights of PMA members under the ITFA.

67. The PMA is entitled to declaratory relief, as requested below.

Prayer for Relief

WHEREFORE, the PMA requests that the Court:

A. Declare HB 3659's definitions of "retailer maintaining a place of business in this state" unconstitutional;

B. Declare that HB 3659's definitions of "retailer maintaining a place of business in this state" violate Section 1102(a)(2) of the ITFA;

C. Enter a permanent injunction enjoining the Defendant from enforcing the definitions of "retailer maintaining a place of business in this state" contained in HB 3659;

D. Award the PMA its attorneys' fees pursuant to 42 U.S.C. § 1988;

E. Award the PMA its costs; and

F. Award such further relief as the Court deems just and proper.

Dated: July 27 2011

Respectfully submitted,

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