STATE OF MICHIGAN

COURT OF CLAIMS

LPL FINANCIAL HOLDINGS, INC.,

Plaintiff,

v

RACHEL EUBANKS[1], STATE OF MICHIGAN, and DEPARTMENT OF TREASURY

Defendants.
_____/

OPINION AND ORDER

Case No. 19-000028-MT

Hon. Colleen A. O'Brien

LPL FINANCIAL HOLDINGS, INC.,

Plaintiff,

v

RACHEL EUBANKS, STATE OF MICHIGAN, and DEPARTMENT OF TREASURY

Defendants.
_____/

Case No. 19-000029-MT

Hon. Colleen A. O'Brien

[1] Plaintiff's suit originally named former state Treasurer Nick A. Khouri. He was replaced by Rachel Eubanks in January 2019, who is hereby substituted as a party pursuant to MCR 2.202(C) (permitting an action to proceed against a successor public officer "without a formal order of substitution.").

Pending before the Court in this consolidated matter are the parties' competing motions for summary disposition filed pursuant to MCR 2.116(C)(10). For the reasons that follow, defendants' motion is GRANTED and plaintiff's motion is DENIED.

I. BACKGROUND

These consolidated tax cases arise under the Michigan Business Tax Act (MBT)[2] and concern four tax years—2008, 2009, 2010, and 2011. The issues raised by plaintiff concern whether certain deductions plaintiff made to its gross receipts under MCL 208.1111 should have been permitted. At issue are commissions plaintiff paid to independent investment advisors who solicited sales in this state on plaintiff's behalf.

A. NATURE OF PLAINTIFF'S BUSINESS

Plaintiff is a nationwide broker-dealer registered with the Securities and Exchange Commission. Plaintiff provides services to independent financial advisors (IFAs), who in turn place orders for financial products and securities on behalf of clients. The issue in this case concerns commissions earned by IFAs who operated in this state during the audit period of 2008 through 2011.

Plaintiff's business relationship with the IFAs is governed by what plaintiff refers to as "Representative Agreements." These agreements appoint an IFA as a "limited agent" on plaintiff's behalf. Section 3 of the Representative Agreement is labeled "Independent Contractor Relationship," and again asserts that IFAs are "limited agents" of plaintiff only, with "no authority to bind [plaintiff] in any way except to communicate to clients materials supplied by [plaintiff]

[2] The MBT was replaced by the Corporate Income Tax, effective January 2012. See MCL 206.601 *et seq.*

and to accept purchases of securities offered through [plaintiff]." Under the Agreement, the IFA is to solicit the purchase of securities and investment products offered through plaintiff in plaintiff's capacity as a broker-dealer. The agreement specifies that the IFAs are to operate out of an entity such as a local financial institution or credit union, and that the IFA is responsible for his or her own operating expenses, such as clerical expenses, office expenses, and equipment expenses, to name a few.

An addendum to the Representative Agreements sets forth a commission schedule pursuant to which plaintiff pays the IFAs. Once again, the agreement begins by noting that plaintiff appoints its IFAs as "limited agent[s] to solicit purchases of securities and investments . . . ." With respect to paying the IFAs, plaintiff agreed that it "[s]hall pay" commissions from transactions generated by the IFA. In general, the agreement specified that plaintiff was to receive all commissions, and that certain, pre-determined amounts were "reallowed" to the IFAs. This "reallowance" typically amounted to the IFA receiving 90% of all commissions; plaintiff retained the other 10% of the commissions. Plaintiff retained some control over the commissions, as ¶ 1(B)(2) of the commission schedule expressly stated that plaintiff "reserves the right to require any Commission payments to be refunded by the [IFA] to the customer if it determines that this is appropriate after a review of the circumstances of the sale." IFAs working as plaintiff's "limited agents" typically ordered securities and investment products for their clients in one of two ways—via "Direct Orders" or "Indirect Orders"—and they received commissions on both types of orders.

B. PLAINTIFF'S TAX RETURNS, AUDITS, AND DETERMINATION OF DEFICIENCY

The MBT imposed two types of taxes on businesses operating within this state: a business income tax and a modified gross receipts tax. *Int'l Business Machines Corp v Dep't of Treasury,*

496 Mich 642, 649; 852 NW2d 865 (2014). At issue in this case is the tax imposed on plaintiff's modified gross receipts in the pertinent tax years. The modified gross receipts tax is one that is "imposed upon the privilege of doing business and not upon income or property." MCL 208.1203(2). The MBT defines "gross receipts" in pertinent part as "the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes . . . ." MCL 208.1111(1). A taxpayer's gross receipts are reduced by a number of statutory deductions. MCL 208.1111(1)(a)-(ff); *Int'l Business Machines*, 496 Mich at 664. Deductions pertinent to this case will be discussed *infra*.

On each of its tax returns for the 2008-2011 tax years, plaintiff deducted the commissions paid to its Michigan-based IFAs from its gross receipts. Plaintiff reported sales in Michigan in excess of $100 million for the 2008-2010 tax years and it reported several hundred thousand dollars in MBT liability during those tax years. For the 2011 tax year, plaintiff did not report any Michigan sales, but it reported payroll and gross receipts, and it computed a much smaller MBT liability—under $10,000, as opposed to liability in excess of $500,000 in two of the previous years—in 2011.

Defendant Department of Treasury disallowed the gross-receipts deductions on audit for each of the tax years in issue. Plaintiff filed two complaints in this matter that are largely identical, except for their references to different tax years. The complaint in Docket No. 19-000028-MT pertains to the 2010 to 2011 tax years and alleges that the commissions paid to IFAs were correctly deducted from gross receipts during those tax years. The complaint in Docket No. 19-000029-MT pertains to the 2008 and 2009 tax years. In short, Counts I-II of the complaints allege that various statutory deductions to gross income apply and permit the deduction plaintiff originally took in these matters. Counts III and IV argue, alternatively, that the decision to disallow the deductions runs afoul of the Due Process and Commerce Clauses of the United States Constitution.

II. ANALYSIS

This matter is now before the Court on the parties' competing motions for summary disposition filed pursuant to MCR 2.116(C)(10). Summary disposition is warranted under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

A. STATUTORY INTERPRETATION

Resolution of plaintiff's first two issues requires an examination of the pertinent sections of the MBT. A court's goal when it interprets a statute is to ascertain and to give effect to the Legislature's intent. *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 408; 926 NW2d 276 (2018). "The Legislature is presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). "In reading and applying the plain language of a statute, we must give effect "to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Total Armored Car Serv, Inc*, 325 Mich App at 408 (citation and quotation marks omitted).

The first two issues in this case concern a deduction from gross receipts. Tax exemptions and deductions "must be construed narrowly in favor of the government" and against the taxpayer. *Ally Fin Inc v State Treasurer*, 502 Mich 484, 491-492; 918 NW2d 662 (2018). However, the requirement to construe deductions narrowly does not "permit a strained construction that is contrary to the Legislature's intent." *Id*. at 492 (citation and quotation marks omitted). Moreover, plaintiff, as the party seeking an exemption or deduction, bears the burden of proving entitlement

to the claimed deduction. See *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 164; 838 NW2d 195 (2013).

B. MCL 208.1111(1)(A)'S DEDUCTION DOES NOT APPLY

Under the MBT, a taxpayer's gross receipts are, in relevant part, "the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes . . . ." MCL 208.1111(1). This amount is subject to a number of deductions, including one that permits the taxpayer to deduct from his or her gross receipts "Proceeds from sales by a principal that the taxpayer collects in an agency capacity solely on behalf of the principal and delivers to the principal." MCL 208.1111(1)(a). The plain language of this deduction requires, among other matters, that: (1) the taxpayer acts as an agent for a principal; and (2) the amounts collected in the agency capacity are collected "solely on behalf of," and delivered to, the principal.

Examining the plain language of the statute, and keeping in mind that a tax deduction must be construed against the taxpayer, the deduction in MCL 208.1111(1)(a) cannot apply in this case. The Court agrees with defendants' assertion that plaintiff did not act as the agent of its IFAs with respect to the receipt and payment of the commissions. Caselaw counsels that "[t]he test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). An agency relationship can arise from contractual agreement, express or implied. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 326 Mich App 684, 699; 930 NW2d 416 (2019). Here, it is apparent from the Representative Agreements that the IFAs do not have control over plaintiff; rather, the opposite is true. As defendants note, the Representative Agreements expressly designate the IFAs as "limited agents" who are to act on plaintiff's behalf. Moreover, and more

significantly, the Representative Agreements give plaintiff control over the payment of commissions to the IFAs, thereby defeating plaintiff's assertion that it acts as a conduit or agent on behalf of the IFAs with respect to the payment of commissions only. The commissions are paid to plaintiff, and plaintiff retains control over the manner in which the commissions were paid to the IFAs. Notably, the Representative Agreement requires, in § 1(b)(2) of the Commission Schedule, that IFAs must be registered with plaintiff in order to be eligible to receive a payment. Furthermore, the same section expressly reserves to plaintiff the right to require that commissions be refunded to an IFA's client if plaintiff, and plaintiff alone, "determines that this is appropriate after a review of the circumstances of the sale" of securities. This section affirms that plaintiff, not the IFA, has control over the payment of commissions. Furthermore, as plaintiff freely admits, it also withheld commission payments in response to garnishment orders. In short, the evidence in the record suggests that plaintiff, not the IFAs, had control over the payment of commissions. Where indicia of control by the IFAs are lacking, the IFAs cannot be considered the principal with respect to the payment of the commissions. See *Meretta*, 195 Mich App at 697. See also *Law Offices of Jeffrey Sherbow*, 326 Mich App at 699-700 (citation and quotation marks omitted) ("[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him."). The deduction at issue cannot apply to the commissions paid to IFAs.[3]

[3] Plaintiff's complaints cite MCL 208.1111(1)(b) as well, and argue that the same permitted the deduction. Plaintiff's briefing has not addressed this matter, however, and the Court considers any claim based on this deduction to be abandoned and not deserving of substantive discussion. See *Henry Ford Health Sys v Everest Nat'l Ins Co*, 326 Mich App 398, 406; 927 NW2d 717 (2018). Furthermore, because the deduction in MCL 208.1111(1)(b) is also dependent upon plaintiff being an agent, any claim made with respect to the deduction is meritless, for the reasons stated above.

C. PLAINTIFF'S CITATION TO MCL 208.1113(6) IS UNAVAILING

The next issue concerns plaintiff's alternative contention that the commissions paid to its IFAs qualify as "purchases from other firms," which can be deducted from gross receipts pursuant to MCL 208.1113(6).[4] Under the MBT, a taxpayer's modified gross receipts tax base may be reduced by what the MBT refers to as "purchases from other firms." MCL 208.1113(6); *Total Armored Car Servs*, 325 Mich App at 407. At first glance there appears to be a level of disconnect between plaintiff's complaints and plaintiff's briefing, because the complaints expressly cite MCL 208.1113(6)(c) and (d), but the briefing addresses MCL 208.1113(6) as a whole, without asserting which of the several subsections plaintiff believes apply. Nevertheless, the Court will, on this motion for summary disposition, turn its attention to the claims pled in the complaint. Turning first to MCL 208.1113(6)(c), the statute permits a deduction from gross income for purchases from other firms consisting of "materials and supplies, including repair parts and fuel." As defendants point out, plaintiff is not eligible to claim this deduction because the Court of Appeals in *Total Armored Car Serv*, 325 Mich App at 409-410, limited the "materials and supplies" deduction to tangible property. Here, there are no allegations that the commissions amount to tangible property, and it does not appear from plaintiff's briefing that plaintiff is continuing to pursue this theory. As

[4] In addressing this issue, the Court rejects defendants' contention that plaintiff lacks standing to litigate theories that plaintiff never raised before litigation for the reason that plaintiff is not aggrieved by the Department with respect to the new theories. To that end, plaintiff is raising issues that go directly to the audit and to the assessments, as opposed to seeking an entirely new way to file its taxes. Cf. *Total Armored Car Serv*, 325 Mich App at 415 (opining that, even if the taxpayer had developed its argument regarding whether it should have been permitted to file as an individual instead of as a unitary business group, the taxpayer would not be aggrieved by a decision of the Department of Treasury because it never attempted to file an amended return as an individual taxpayer).

a result, plaintiff is not eligible for the materials and supplies deduction under MCL 208.1113(6)(c). See *id*.

The next subsection cited in plaintiff's complaints is MCL 208.1113(6)(d). This subsection applies to "a staffing company" and it permits a deduction for "compensation of personnel supplied to customers of staffing companies." A "staffing company" to which the deduction applies is "a taxpayer whose business activities are included in industry group 736 under the standard industrial classification code as compiled by the United States department of labor." MCL 208.1113(6)(d)(*ii*). Here, as defendants point out, the standard industrial classification code listed on plaintiff's tax returns is 602, which refers to a "Commercial & Stock Savings Bank." In other words, plaintiff is not a "staffing company" that can claim the deduction under the plain language of MCL 208.1113(6)(d)(*ii*). Defendants are entitled to summary disposition on Count II.

Before concluding on this matter, the Court will briefly address the contention made in plaintiff's briefing that, when read as a whole, MCL 208.1113(6) supports the deduction of commissions paid to IFAs. Despite plaintiff's contentions, the Supreme Court's decision in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014), does not declare that MCL 208.1113(6) must be construed to encompass the same scope of expenses articulated in 26 USC 162(a). Plaintiff's position fails to find support in either the Supreme Court's decision in *Int'l Business Machines* or in the plain language of MCL 208.1113(6).

D. PLAINTIFF'S DUE PROCESS CLAIM IS WITHOUT MERIT

The Court next considers Count III of plaintiff's complaints, which asserts a violation of the Due Process Clause of the United States Constitution. "In order to meet the requirements of the Due Process Clause there must be some definite link, some minimum connection, between a

state and the person, property or transaction it seeks to tax." *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 311-312; 497 NW2d 595 (1993) (citation and quotation marks omitted). See also *South Dakota v Wayfair, Inc*, __ US __, __; 138 S Ct 2080, 2093; 201 L Ed 2d 403 (2018). "It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process." *Wayfair*, __ US at __; 138 S Ct at 2093, citing *Burger King Corp v Rudzewicz*, 471 US 462, 476; 105 S Ct 2174; 85 L Ed 2d 528 (1985). The Supreme Court of the United States has explained that, in determining whether a state has the requisite minimum connection with a taxpayer or object of the tax, it "borrows from the familiar test of *Int'l Shoe Co v Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 2d 95 (1945)" that is used to determine whether personal jurisdiction exists. *North Carolina Dep't of Revenue v The Kimberly Rice Kaestner 1992 Family Trust*, __ US __, __; 139 S Ct 2213, 2220; 204 L Ed 2d 621 (2019). In this respect, this state "has the power to impose a tax only when the taxed entity has certain minimum contacts with the state such that the tax does not offend traditional notions of fair play and substantial justice." *Id*. (citation and quotation marks omitted).

Contrary to its suggestions, plaintiff had sufficient minimum contacts with this state to satisfy the demands of due process. As noted, plaintiff appointed the IFAs as its "limited agents" for the purpose of soliciting purchases of securities and investments through plaintiff. These limited agents were to solicit investments on plaintiff's behalf from Michigan-based clients. The sales of securities and investments from the Michigan-based clients resulted in the payment of the commissions at issue. An entity's decision to purposefully direct its activities at this state is sufficient for due process purposes. See *Gillette*, 198 Mich App at 313. And "the conduct of economic activities in the taxing state, performed either by the taxpayer's personnel *or others on its behalf*, can satisfy" the requisite test. *JW Hobbs Corp v Revenue Div, Dep't of Treasury*, 268

Mich App 38, 44; 706 NW2d 460 (2005) (emphasis added). Here, plaintiff's decision to appoint agents to solicit economic activity on its behalf from residents of this state produced the requisite minimum contacts to satisfy due process. See *id*. Moreover, as defendants note, plaintiff otherwise engaged in activity in this state that, in three of the four tax years in issue, resulted in millions of dollars in Michigan sales. And, in every tax year plaintiff reported and paid tax liability to this state related to plaintiff's activities involving this state. Plaintiff's assertion that it lacks the requisite minimum contacts, but only with respect to the payment of the commissions at issue, is belied by the record in this case.

The Court's conclusion in this regard is not swayed by plaintiff's attempts to discount the actions taken by IFAs as being merely actions by third parties and which cannot be attributed to plaintiff. The problem with plaintiff's contention is that it overlooks the fact that the documentary evidence in this case reveals the IFAs were plaintiff's agents, i.e., they were given authority to act on plaintiff's behalf. The Court is also unmoved by plaintiff's attempts to focus narrowly on the transactions after the orders are placed, such as noting that the trades and purchases were executed outside of this state. Plaintiff's position fails to account for the notion that the solicitation of business that led to these purchases and orders occurred in Michigan at plaintiff's behest by individuals plaintiff appointed as its "limited agents." The commissions were then paid in Michigan by Michigan-based clients of Michigan-based IFAs who were acting on plaintiff's behalf. Based on this activity, which plaintiff purposefully directed at Michigan residents, plaintiff's due process argument fails. See *JW Hobbs Corp*, 268 Mich App at 44.

E. PLAINTIFF'S COMMERCE CLAUSE CLAIM IS WITHOUT MERIT

Plaintiff's only remaining claim arises under the Commerce Clause of the United States Constitution. The Commerce Clause, art 1, § 8 of the United States Constitution, authorizes

Congress to "regulate Commerce with foreign nations, and among the several States . . . ." "Although the Commerce Clause says nothing about the protection of interstate commerce in the absence of any action by Congress, the Supreme Court has greatly expanded this Clause to include a negative sweep by "prohibit[ing] certain state actions that interfere with interstate commerce." *Gillette Commercial Operations NA & Subsidiaries v Dep't of Treasury*, 312 Mich App 394; 878 NW2d 891 (2015) (citation and quotation marks omitted). For present purposes, the Commerce Clause does not prohibit state taxation of interstate commerce, "so long as the tax does not create any effect forbidden by the Commerce Clause." *Wayfair*, __ US at __; 138 S Ct at 2091 (citation and quotation marks omitted). Those "forbidden" effects are avoided if the tax: "(1) applies 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 the State provides." *Id*.

Plaintiff's complaints cite the first and fourth prongs of the above-noted test. Turning to the first prong, which is the primary focus of plaintiff's briefing, the concept of a "substantial nexus" is "closely related" to the due process requirement described above. *Id*. at __ US __; 138 S Ct at 2093. In the past, having a "substantial nexus" meant that the entity or person subject to tax must have a physical presence in the taxing state. See *Quill Corp v North Dakota By and Through Heitkamp*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992). However, in a case that was decided before the filing of plaintiff's complaints, the Supreme Court of the United States overruled *Quill* with respect to the physical presence rule. *Wayfair*, __ US at __; 138 S Ct at 2099. Under *Wayfair*, a substantial nexus no longer requires a taxpayer to have a physical presence in the state, and the constitutional standard may be satisfied when the taxpayer "avails itself of the substantial privilege of carrying on business in that jurisdiction." *Id*. (citation and quotation marks

omitted). See also *Apex Laboratories Int'l Inc v Detroit (On Remand)*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 338218), slip op at 2-4.

Returning to this case, it is apparent that plaintiff availed itself of the substantial privilege of carrying on business in this state and that it had a substantial nexus with this state. As explained in *Wayfair*, the quantity of business carried on by a taxpayer can demonstrate that the taxpayer availed itself of the substantial privilege of carrying on business in a state. See *Wayfair*, __ US at __; 138 S Ct at 2099. Here, as noted above, the amounts listed on plaintiff's tax returns reveal a significant volume of financial products and services marketed and sold to Michigan residents, as can be ascertained from the amounts of the commissions at issue. These products and services were specifically, and repeatedly, directed at Michigan residents, and plaintiff directed its agents to sell these products to Michigan residents on its behalf. See *Magnetek Controls, Inc v Revenue Div, Dep't of Treasury*, 221 Mich App 400, 412; 562 NW2d 219 (1997) (explaining that substantial nexus can exist based on activities of those who are acting on behalf of the taxpayer). Furthermore, the record before the Court reveals that plaintiff enjoys the state's resources, for many of the same reasons noted above. See *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 632, 642; 732 NW2d 116 (2007) (discussing substantial nexus and the use or enjoyment of a state's resources). Thus, a substantial nexus exists.

In arguing for a different result, plaintiff cites the order of this state's Supreme Court in *Vestax Securities Corp v Dep't of Treasury*, 489 Mich 939; 798 NW2d 15 (2011). An order issued by the Supreme Court is binding precedent, even if understanding the order requires an examination of other opinions. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018). The order in *Vestax Securities* is brief and it contains no factual analysis. As a result,

it is necessary to examine the underlying Court of Appeals decision in *Vestax Securities* in order to appreciate the holding in the case and to determine whether it is controlling in the instant case.

As articulated in the Court of Appeals' unpublished decision in *Vestax Securities*, the case arose under the former Single Business Tax and the primary issue on appeal concerned whether, for purposes of the Commerce Clause, the taxpayer, which was a securities broker-dealer, had a substantial nexus with this state. *Vestax Securities Corp v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2010 (Docket No. 292062); pp. 1-2. In analyzing this issue, the panel cited the test from *Quill*, 504 US at 315, and expressly noted that a physical presence was required to satisfy the substantial nexus requirement. *Vestax Securities*, unpub op at 2. The panel determined that the taxpayer satisfied the test in that case. In so concluding, the panel noted that the taxpayer used what it referred to as "independent registered representatives" (IRRs) that in turn used the taxpayer—as well as other securities broker-dealers—to facilitate securities transactions. *Id*. The taxpayer then used a different entity, Pershing, LLC, to process and administer securities transactions on national exchanges. *Id*.

Based on the taxpayer's relationship with the IRRs and the IRRs' utilization of the taxpayer's services, the panel concluded that a substantial nexus existed. *Id*. at 3-4. The panel noted that the IRRs were required to use a broker-dealer, such as the taxpayer, in order to conduct their customers' transactions. *Id*. at 3. The panel concluded that the IRRs were the taxpayer's agents. *Id*. And, the panel explained, the activity of those agents in this state, which resulted in sales for the taxpayer, showed that the taxpayer conducted economic activities in this state. *Id*. at 3-4. "This activity satisfies the constitutional substantial nexus requirement." *Id*. at 4.

The taxpayer in *Vestax Securities* applied for leave to appeal the panel's decision. The Supreme Court considered the application and, in lieu of granting leave to appeal, reversed the Court of Appeals' decision. *Vestax Securities*, 489 Mich 939. The Supreme Court's order stated as follows in support of its decision to reverse the Court of Appeals:

> The evidentiary record does not support the Court of Appeals determination that the independent registered representatives were the [taxpayer's] agents or that there exists a substantial nexus between Michigan and the [taxpayer's] business activities sufficient to impose Michigan Single Business Tax upon it. [*Id*.]

Hence, the Supreme Court concluded that: (1) no agency relationship existed between the taxpayer and the IRRs; and (2) no substantial nexus existed.

Returning to the instant matter, the Court finds plaintiff's citation to *Vestax Securities* unavailing for two reasons. First, although the facts of the instant case bear some surface-level parallels to *Vestax Securities*, they are nevertheless distinguishable in key respects. Notably, the Supreme Court in *Vestax Securities* rejected the notion that the IRRs were the agents of the taxpayer. And there is no evidence in the available opinions to suggest the existence of an agency relationship in *Vestax Securities*. Here, by contrast, the IFAs were plaintiff's agents, for the reasons stated above. And the actions of those agents, taken on behalf of plaintiff, demonstrate a substantial nexus. Furthermore, the facts of the instant case are distinguishable because plaintiff in the instant matter has not generally contested whether it is subject to taxation in Michigan or that it lacks a substantial nexus with the taxing state, generally. Rather, plaintiff is attempting to argue that, despite the existence of a substantial nexus, the requisite nexus is lacking with respect to one aspect of its business. By contrast, it is not apparent that the taxpayer in *Vestax Securities* admitted Michigan's authority to subject it to tax, save for one, discrete aspect of the taxpayer's business. Finally, the facts of this case are distinguishable from those in *Vestax Securities* because,

in the instant matter, plaintiff generated a substantial volume of business in this state. As demonstrated by *Wayfair*, __ US at __; 138 S Ct at 2099, a taxpayer's quantity of business arising from the taxing state demonstrates the taxpayer availed itself of the substantial privilege of carrying on business in the taxing state. By comparison, there is no discussion in *Vestax Securities* about the volume and quantity of business generated in this state, let alone such a substantial amount as plaintiff in this case generated during the audit periods at issue.

Second, in addition to being factually distinguishable from *Vestax Securities*, it must be noted that the law has changed since the Supreme Court issued its order in that matter. The *Wayfair* decision eliminated the physical presence requirement found in *Quill*, thereby creating a less demanding threshold for the "substantial nexus" test. And contrary to the conclusory assertion by plaintiff in its reply briefing, this Court must apply the *Wayfair* standard, which was announced and applied by the Supreme Court before this complaint was even filed, to the case at bar. See *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 94; 795 NW2d 205 (2010) (discussing retroactivity). See also *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 74 (1993) (explaining that when the Supreme Court of the United States "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").[5]

[5] And this state's Supreme Court has already mandated the retroactive application of *Wayfair* in a different matter. See *Apex Laboratories Int'l Inc v Detroit*, 503 Mich 1034; 927 NW2d 243 (2019) (remanding to the Court of Appeals for reconsideration in light of *Wayfair*).

As a result, the Court finds no merit in plaintiff's assertion that a substantial nexus is lacking with respect to the transactions at issue.

Finally, the Court rejects plaintiff's remaining Commerce Clause challenge, which is predicated on the assertion that the tax imposed is not fairly related to the services provided by the taxing state. The purpose of the "fairly related" prong of the applicable test "is to ensure that a State's tax burden is not placed upon [companies] who do not benefit from services provided by the State." *Caterpillar, Inc v Dep't of Treasury, Revenue Div*, 440 Mich 400, 427-428; 488 NW2d 182 (1992) (citation and quotation marks omitted). This test does not require that the tax be limited to the cost of the services incurred by this state on account of the activity at issue; rather:

> interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct benefit. . . . The fourth prong of the . . . test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. [*Id*. at 428 (citation and quotation marks omitted.]

Benefits provided to a taxpayer such as law enforcement and fire protection, public roads, and "other advantages of civilized society" can satisfy the requirement that the tax be fairly related to the benefits a state provides to a taxpayer. *Id*. (citation and quotation marks omitted).

Returning to the instant case, the tax imposed on plaintiff was fairly related to the benefits plaintiff received from this state. Plaintiff authorized agents to solicit and conduct business in this state on its behalf. These agents, pursuant to Representative Agreements with plaintiff, conducted their activities in financial institutions located throughout the state. And as a result of its efforts directed at the state, plaintiff reported extensive business activity and sales originating in this state. The nature and extent of these activities demonstrate that plaintiff "received the benefits of a 'civilized society' that Michigan provides . . . ." *Id*. at 428. See also *Wayfair*, __ US at __; 138 S

Ct at 2096 (discussing the benefits a taxpayer can receive from "sound local banking institutions"). This conclusion is unchanged by plaintiff's repeated assertions that the only benefits were received by third parties, i.e., the IFAs. To that end, the *Caterpillar* court recognized that the taxpayer's ownership interest in patterns and tooling used by *unrelated* third parties—let alone by agents—lent credence to the notion that the tax imposed in that case was fairly related to the services provided by this state. *Caterpillar*, 440 Mich at 428-429.

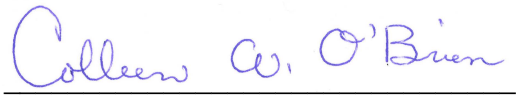
III. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(10) in these consolidated cases.

IT IS HEREBY FURTHER ORDERED that plaintiff's competing motion for summary disposition is DENIED.

This order resolves the last pending claim and closes the case.

Dated: April 28, 2020



Colleen A. O'Brien
Judge, Court of Claims