Written Statement Submitted on Behalf of Grand River Enterprises Six Nations, Ltd. ("Grand River") Opposing HB 1173

Grand River submits the following written statement in opposition to HB 1173.

Grand River is a tobacco product manufacturer wholly owned by Native Americans who are members of the Six Nations, more commonly known as the Iroquois Confederacy. Grand River's products are sold under the brand name "Seneca," and they are imported into the U.S. from Grand River's factory located on the Six Nations of the Grand River Reserve, in Ohsweken, Ontario, Canada. We wish to provide the legislature with a history and backdrop of Grand River's business and compliance with the Maryland escrow law that has been in place for over 20 years. The changes to that law proposed in HB 1173 would have dramatic adverse effects both on Grand River and the multiple businesses, Native and non-Native, that distribute these products and the products of similarly situated manufacturers and businesses. In particular, they would require Grand River and similar companies to make direct payments to the State as though they had agreed to the terms of the Master Settlement Agreement (discussed below) but without any (i) specific claim or adjudication of any wrongdoing by them and (ii) without any of the benefits conveyed to the companies that settled with the States, including Maryland.

Grand River started out as a partnership and then assumed its current corporate form in 1996. Grand River's business model then and now includes production of tobacco products for distribution in the U.S. and Canada. In 1998, however, 46 States (including Maryland) and the major U.S. tobacco product manufacturers entered into a settlement agreement known as the "Master Settlement Agreement" or "MSA." The MSA settled claims brought against these major manufacturers arising from their marketing practices, including lying about the addictiveness of their products, manipulating the nicotine content of their products, and targeting their marketing to youth with these addictive properties in mind. The settlement provided a full release to these accused companies in return for their annual settlement payments to the MSA States.

When negotiating the MSA, the accused companies were concerned that, when they raised their prices to make the annual MSA payments, they would lose market share to smaller companies that were not sued nor accused of any wrongdoing. All of this is detailed extensively in the record of a lawsuit that Grand River and other companies brought in federal court commencing in 2002 against 30 States, including Maryland. To accommodate the accused companies, the States (including Maryland) agreed to two things in the MSA. First, the States agreed to allow a select few manufacturers such as the companies now known as Liggett Group

LLC, ITG Brands LLC, and Japan Tobacco International USA Inc. to join the MSA within 90 days of November 1998 (the MSA's effective date) with a perpetual exemption from the MSA's payment requirements, amounting to 100s of millions of dollars each year, for any volume of cigarettes they sell that does not exceed 125% of their 1997 market share or 100% of their 1998 market share, whichever is greater. Herein, Grand River refers to these companies as the Exempt Companies.

Second, the States agreed to include in the MSA a model law – which is the law that is proposed to be amended by HB 1173. The model law, commonly referred to as the "Escrow Statute," has been adopted in each MSA State (including Maryland) and requires companies that do not join the MSA (such as Grand River) to deposit money into an escrow account for each of their cigarettes sold in Maryland. These companies are called Non-Participating Manufacturers (NPMs) – manufacturers that have not joined the MSA nor been sued or accused of the wrongdoing committed by the accused manufacturers that settled the claims against them under the MSA. The amount deposited into escrow by NPMs is based on the equivalent amount they would have to pay if they joined the MSA **WITHOUT ANY EXEMPTION**; and the funds are held for 25 years and can be used or accessed by a State only if a State sues and obtains a judgment against (or settles with) an NPM for the type of wrongdoing settled under the MSA.

As mentioned, Grand River, along with other companies, initially sued multiple states in federal court, claiming that the MSA and its Escrow Statute were unfair, unconstitutional, and anticompetitive on multiple grounds. The Exempt Companies mentioned above, for example, receive hundreds of millions of dollars in payment exemption under the MSA. This exemption relieves these MSA companies from making any payment requirement under the MSA up to the amounts mentioned above; and as MSA participants they are exempted completely from making any escrow payments that are required to be made by NPMs under current law **<u>or</u>** from paying any assessment proposed under HB 1173. GRE and the other NPMs currently on the Maryland Tobacco Directory were never offered, and they do not and cannot benefit from, any payment exemption similar to that given to these Exempt Companies. Indeed, in its 2022 annual report, the corporate parent of two Exempt Companies – Liggett Group LLC and Vector Tobacco Inc. – boasts to shareholders about the competitive advantage it receives under the MSA, noting how it will maximize value in the following way:

- "Capitalize on our tobacco subsidiaries' cost advantage in the United States cigarette market due to the favorable treatment that they receive under the Master Settlement Agreement ("MSA")"

Elsewhere in the report, the company reports:

- "Under the MSA reached in November 1998 with 46 states and various territories, cigarette manufacturers selling product in the U.S. must make settlement payments to the states and territories based on how many cigarettes they sell annually. Liggett, however, is not required to make any payments unless its market share exceeds its grandfathered market share established under the MSA of approximately 1.65% of the U.S. cigarette market. Additionally, Vector Tobacco has no payment obligation unless its market share exceeds approximately 0.28% of the U.S. cigarette market. We believe our tobacco

subsidiaries have gained a sustainable cost advantage over their competitors as a result of the settlement."

When confronted about this clear disadvantage to NPMs, the States have argued through their MIT Health Economist, Jonathan Gruber, that the NPMs are not disadvantaged by the Escrow Statute vis-à-vis these Exempt Companies because among other things the Escrow Statute operates as a forced savings, which NPMs may invest to earn income, and the principal is returned to the NPMs after 25 years. For these reasons, it has also been argued that the Escrow Statute does not operate as a tax on NPMs because the funds deposited into escrow remain the property of a NPM and are never paid to the States.

Following these arguments and positions, the litigations brought by NPMs against multiple States, including Maryland, were either dismissed or discontinued. NPMs such as Grand River and those others on the Maryland Tobacco Directory proceeded in reliance on and grounded in the foundation and position taken by the States that the Escrow Statute merely implemented a regulatory regime of "forced savings" through non-taxation of NPMs. In short, the NPMs adapted to compete with those "privileged" and "favored" companies that received exemptions under the MSA, and they found a way to survive in a market heavily favoring these Exempt Companies. Even with the earnings NPMs make on their forced savings accounts and the 20+ year reliance expectations created by both the terms of the Escrow Statute and the States' 20+ years of arguments and positions surrounding that law, the exemptions given to the Exempt Companies allow them to price their products in the Maryland market for less than what NPMs can price their products. The competitive balance is delicate and precarious. To now transform the escrow obligations into a tax assessment and taking would, in effect, impose a triple detriment to NPMs and create another unfair advantage for these Exempt Companies.

In short, we ask the General Assembly to inquire of the proponents of HB 1173 as to why the bill is needed and why now? Has any impact study or data been presented to show a competitive imbalance or other reasons that would justify HB 1173 in the face of the anticompetitive and discriminatory treatment outlined above?

For example, the Escrow Statute currently requires each NPM to deposit into escrow for 25 years approximately $8.90 per carton for each carton of the NPM's cigarettes sold in Maryland. Exempt Companies (whose products are already priced lower than NPM products) get away with paying $0 for any carton of cigarettes they sell in the U.S. (including Maryland) that is under 100% of their 1998 market share or 125% of their 1997 market share, whichever is greater.

In short, HB 1173 proposes to target for extinction NPMs such as Grand River through unfair, anticompetitive, and unconstitutional means, and no reasonable or acceptable explanation exists to consider or adopt HB 1173 in the face of such injustice.