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HOUSE HEALTH AND GOVERNMENT
OPERATIONS COMMITTEE
240 Taylor House Office Building
Annapolis, Maryland 21401

Re: House Bill 870 – Opposition

Dear Chair Melnyk and Members of the Committee:

My name is Dustin McDaniel. I am the Co-Chair of the Cozen O'Connor State Attorney General Practice Group, which is based in Washington, DC. I have a national law practice representing various sectors of American businesses in their dealings with state Attorneys General. I served in the Arkansas House of Representatives before I was elected to serve two terms as Arkansas's 55th Attorney General. I served as Co-Chair of the Democratic Attorneys General Association for three years, as the Southern Regional Chair of the National Association of Attorneys General (NAAG) for 3 years, and as the NAAG Tobacco Project Co-Chair for four years. I have served as the Democratic Co-Chair of the Society of Attorneys General Emeritus (SAGE) for the last six years.

As NAAG Tobacco Chair, I worked to protect the interests of every state, including Maryland, to secure their rights and settlement funds under the Master Settlement Agreement ("MSA"), which was executed between the states and "big tobacco" in 1998. I still work to ensure compliance with the MSA for my sole tobacco client, Xcaliber International, Ltd., L.L.C. ("Xcaliber"), whose general counsel, Eric B. Estes, is one of the nation's foremost experts on the MSA and tobacco policy. Mr. Estes will be one of two representatives of the company testifying against House Bill 870 ("HB 870" or "bill").

HB 870 proposes to establish an "equity fee," on some, but not all, sellers of tobacco products in Maryland. Under this bill, Non-Participating Manufacturers ("NPMs") operating in Maryland would be required to pay a new tax directly to the State instead of into escrow as required by the Master Settlement Agreement ("MSA"). Tobacco is a harmful and addictive product that should be taxed and regulated heavily, but fairly. This bill does not establish nor impose a tax burden fairly nor evenly. The bill imposes a tax on just 1% of the cigarettes sold

in the state and exempts the remaining 99%. If the goal were to either raise money or deter smoking, it falls very short as written.

XCaliber supports tobacco taxes in general, so long as they apply to all sellers without targeting individual sellers. HB 870 does not meet that basic fairness test. Furthermore, it generates very little revenue for the state, because of its limited scope.

This bill is NOT equitable as it does not give NPMs a liability release, which PMs enjoy forever, and requires NPMs make payments quarterly, while PMs get to hold their money and pay at the end of each year.

This bill unfairly changes the rules that NPMs have been strictly following. Below you will find additional testimony to further support my respectful opposition to this bill. The Maryland Model Escrow Statute is the recognized system for regulating NPMs under the MSA. Specifically, under the Maryland Model Escrow Statute:

- NPMs deposit sums into a qualified escrow account for sales in Maryland during the preceding year. MD. CODE ANN. BUS. REG. 16-4030.
- Escrow is held for a period of 25 years. The escrowed funds may only be obtained by the State through legal processes to satisfy certain health-related claims relating to an NPM's conduct. MD. CODE ANN. BUS. REG.16-403
- During the 25-year escrow period, the NPMs are permitted to obtain and use the interest on the escrow funds. MD. CODE ANN. BUS. REG.26-40

The Model Escrow Statute has been upheld by courts and justified by policymakers. HB 870, however, would replace the court-approved, gold standard, nationally accepted escrow system with a new, discriminatorily applied tax. HB 870 is contrary to two of the fundamental premises of the Model Escrow Statute:

- (1) No money is taken from the NPM. It remains the NPM's property in an interest-bearing account, and
- (2) the statute is designed to ensure that the NPMs pay no more than the PMs.

HB 870 undermines both of the above well-established principles. Converting the escrow payments into a tax creates a taking without due process or litigation. It does not match the MSA payments made by PM's, as they were providing compensation to states for the wrongs they committed before XCaliber was ever formed as a company, and the PM's get a release from the states forever for those payments. It represents a breach of an almost 25 year old understanding between the NPMs and the model statute despite zero instances of legal wrongdoing by NPMs.

A superior policy position would be to increase tobacco taxes evenly on all manufacturers. PM's would still have to pay their MSA payments, NPM's would still make escrow payments,

but all would pay an increased state tax on every stick sold. That would generate tens of millions of dollars for state revenue and have a real impact on deterring smoking.

In closing, it is my opinion that HB 870 is not only unnecessary, but its passage would lead to significant litigation between Maryland and those NPMs operating lawfully in the state. There is no justification for this risk, especially given the inequities and ineffectiveness of this bill, as presented here and in written testimony by affected NPM.

Thank you for your service to your state and for your consideration of my testimony on this complicated matter.

Respectfully,

A handwritten signature in blue ink, appearing to read "Dustin McDaniel", is written in a cursive style.

Dustin McDaniel

DBM/plr