FILED
08-20-2026
CIRCUIT COURT
DANE COUNTY, WI
2025CV004117

BY THE COURT:

DATE SIGNED: August 19, 2026

Electronically signed by Benjamin Jones
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 1

InterSystems Corporation,
Petitioner,

v. Case No. 2025CV4117

Wisconsin Department of Revenue,
Respondent.

DECISION AND ORDER

Introduction

Petitioner InterSystems Corporation (InterSystems) seeks judicial review of a final decision issued by the Wisconsin Tax Appeals Commission (Commission) which upheld Respondent Wisconsin Department of Revenue's (Department) assessment requiring InterSystems to pay additional tax for 2010 to 2017. The Commission concluded that Epic's payments to InterSystems for the right to sublicense InterSystems' software to Epic's end user customers for use outside of Wisconsin resulted in taxable Wisconsin income. For the reasons stated below, the Court affirms the Commission's final decision.

Factual Background

In their proceedings before the Commission, InterSystems and the Department stipulated to a series of facts with associated exhibits. Joint Stipulation of Facts (JSF), Dkt. 34.[1] InterSystems is a Massachusetts corporation that specializes in creating database management system software called Caché. *Id.*, ¶¶ 1-2. InterSystems contracts with third parties, called "Application Partners" (APs), that develop software applications using Caché and deliver those software applications to their customers, referred to as "end user customers." *Id.*, ¶ 3. Caché is used by the APs as a tool for developing specific software applications and by end user customers as a database management system to operate applications created by APs. *Id.*, ¶ 4.

Epic Systems Corporation (Epic) has been one of InterSystems' APs since the late 1980s. *Id.*, ¶ 10. Certain Epic software applications depend on Caché to manage the large repositories of patient-related data accessed by those applications. *Id.*, ¶ 12. Generally, end user customers contact Epic for support, and Epic contacts InterSystems as needed to provide support for such applications. *Id.*, ¶ 14.

InterSystems' relationship with Epic is governed by two written agreements between the parties: the Application Partner Agreements and Application Partner Profiles, as the parties have interpreted and applied those agreements in the course of their relationship. *Id.*, ¶ 15. Both agreements were in effect the entirety of the Audit Period, with some small language changes to each agreement in 2016. *Id.*, ¶¶ 16-19. Regardless of these changes, the way in which InterSystems authorized the use of Caché by end user customers did not change throughout the Audit Period. *Id.*, ¶ 21.

InterSystems has granted Epic as an AP the right to use Caché in developing Epic's own software applications, such that Epic's software application can run in conjunction with Caché.

[1] The record is filed as 40 separate docket entries, plus a certification by the Commission's clerk. Dkts. 5-46. The parties and the Court cite to the record by docket number.

Id., ¶ 23.[2] "While Caché is used in conjunction with Epic's software, it is separate and distinct from Epic's software, though it may appear otherwise to end users." *Id.*, ¶ 22.

InterSystems fulfills orders for application-specific licenses for Caché by issuing a license key, which is unique to the end user customer. *Id.*, ¶¶ 25, 27. The license key specifies the license size (number of concurrent users authorized to use Caché at the same time) and other particular limitations. *Id.*, ¶ 28. The license key must be present on the end user customer's system in order for the end user customer to operate Caché with Epic's application. *Id.*, ¶ 29. License keys issued by InterSystems are order by Epic and then provided to Epic for delivery to the end user customer. *Id.*, ¶¶ 26, 30. The license key may be installed on the end user customer's system by either Epic or the end user customer itself. *Id.*, ¶ 31. The license key restricts the end user customer from using Caché in any way not authorized by InterSystems. *Id.*, ¶ 32. Before an end user receives a license key, the end user must agree to the InterSystems' Caché Addendum. *Id.*, ¶ 44.

End users did not make payments directly to InterSystems. Dkt. 34, ¶ 37. "InterSystems does not receive any revenue for an application-specific license until, among other things, Epic has secured a sale of its application to an end user customer, placed an order with InterSystems for an application-specific license for Caché, and InterSystems has accepted such order and has issued a license key for such application-specific license to the end user customer through Epic." *Id.*, ¶ 38. Epic determined the price of the license fees for its end users and was entitled to retain any remained in excess of the amount Epic owed and remitted to InterSystems. *Id.*, ¶ 40. Epic determined the markets in which it would sell or license Epic's software that was dependent on Caché, but InterSystems retained the right to reject any order submitted by Epic. *Id.*, ¶ 42.

---

[2] InterSystems has also granted Epic the right to use Caché internally, which is not at issue in this case. To the extent Epic pays InterSystems for Epic's use of the internal development license, InterSystems does not dispute that this revenue should be sourced to Wisconsin for income tax and franchise tax purposes. Dkt. 34, ¶ 24.

Procedural History

InterSystems did not complete certain updated tax forms for the tax years at issue. Dkt. 34, ¶ 57. In December 2017, the Department initiated a technical review. *Id.*, ¶¶ 53-54, Ex. B. In April 2019, InterSystems received a Notice of Audit from the Wisconsin Department of Revenue for each year from January 1, 2010, through December 31, 2017 (the Audit Period). Dkt. 34, ¶¶ 51, 58. The total amount of tax, interest, and fees the Department identified in its assessment to InterSystems was approximately $66 million for the Audit Period. Dkt. 6.

InterSystems timely appealed the assessment to the Department in June 2019. Dkt. 34, ¶¶ 59-60, Ex. E. In March 2020, the Department changed the statute it relied on. Dkt. 53 at 7. InterSystems sought clarification regarding the department's position. Dkt. 34, ¶ 65. In May 2020, the Department informed InterSystems that its appeal had been denied but again changed its rationale. Dkt. 34, ¶ 67; Dkt. 53 at 7. In June 2020, the Department formally denied InterSystems' petition for redetermination. Dkt. 34, ¶ 69. Including additional interest, the Department identified the amount due at that time was approximately $74 million. Dkt. 6 at 84-85.

InterSystems timely petitioned the Commission for review of the Department's final decision upholding the assessment on August 10, 2020, and both parties subsequently moved for summary judgment. Dkt. 34, ¶ 72; Dkt. 6; Dkt. 35; Dkt. 37. On November 20, 2025, the Commission issued a ruling and order (Order) denying InterSystems' motion for summary judgment and granting summary judgment in favor of the Department. Dkt. 44. The Commission made the following conclusions of law:

> 1. There must be a contract in order for end-users of Epic's computer software to have a licensor-licensee relationship with InterSystems. There is no contract between end-users of Epic software and InterSystems, and so InterSystems does not license its computer software to the end-users of Epic's computer software. Wis. Stat. § 71.25(9)(df) is not applicable to determine the source of the income InterSystems derives from end-users of Epic's computer software.

> 2. Because the purchaser is billed for the intangible product at an address in Wisconsin, under both Wis. Stat. §§ 71.25(9)(dj) and (dk), the income InterSystems receives from Epic's customers for the use of its Caché software alongside Epic's software is properly sourced to Wisconsin.
>
> 3. As they are applied to Petitioner, Wis. Stat. §§ 71.25(9)(dj) and (dk) do not violate the Commerce Clause of the United State Constitution.

Dkt. 44 at 33. InterSystems now seeks judicial review of the Commission's Order. Dkt. 2.

Legal Standard

Judicial review of administrative decisions under Wis. Stat. ch. 227 is confined to the record. Wis. Stat. § 227.57(1). A court shall affirm an agency's action unless it finds grounds to set aside, modify, remand, or order agency action. Wis. Stat. § 227.57(2). A court affords "no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11). However, the court gives "due weight" to the "experience, technical competence, and specialized knowledge of the administrative agency involved, as well as discretionary authority conferred upon it." Wis. Stat. § 227.57(10). *See also Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496.

"The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action." *City of La Crosse v. DNR*, 120 Wis. 2d 168, 178 (Ct. App. 1984). The challenging party can satisfy its burden, among other ways, by showing that an agency erroneously interpreted a provision of law.[3] Wis. Stat. § 227.57(5). Additionally,

> The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

[3] The parties dispute whether Wis. Stat. § 227.57(6), (7), or both apply to the Court's review. The Commission's findings of fact in this matter were stipulated, meaning the parties' discussion as to how the Court must treat the Commission's findings of fact is immaterial.

Wis. Stat. § 227.57(8).

Analysis and Legal Conclusions

InterSystems contends that the Commission erred when it determined that Wisconsin's apportionment statute subjects the income that InterSystems generates from Epic's end-user customers use of Caché located outside of Wisconsin to taxation by Wisconsin. InterSystems advances several arguments as to why the Commission erred in upholding the Department's assessment. The parties' central dispute is whether Wis. Stat. § 71.25(9)(df) or (dj) applies to the income at issue.

InterSystems argues that Epic's end-user customers are "licensees" under (df), and the situs of income should therefore be the location where Epic's end-user customers use Caché. In the alternative, InterSystems argues even the situs of income is determined under (dj), the relevant use of intangible property occurs outside of Wisconsin, and the situs of income is still location where Epic's end-user customers use Caché.

The Department argues that Epic's end-user customers are sublicensees, not licensees, making (df) inapplicable under *Wisconsin Dep't of Revenue v. Microsoft Corp.*, 2019 WI App 62, 389 Wis. 2d 350. The Department argues that (dj) applies instead, because the income at issue is generated by Epic's purchase of the intangible right to sublicense Caché. The Department concludes that the location of end-user customers that use Caché is not relevant under (dj), and the situs of that purchase lies in Wisconsin.

I. The Commission correctly concluded that Wis. Stat. § 71.25(9)(df) does not apply to the income at issue in this case.

A. Governing legal framework

1. Wis. Stat. § 71.25(9)(df)

Subsection (df) states:

> 1. Gross receipts from the use of computer software are in this state if the purchaser or licensee uses the computer software at a location in this state.
>
> 2. Computer software is used at a location in this state if the purchaser or licensee uses the computer software in the regular course of business operations in this state, for personal use in this state, or if the purchaser or licensee is an individual whose domicile is in this state. If the purchaser or licensee uses the computer software in more than one state, the gross receipts shall be divided among those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the computer software in those states. To determine computer software use in this state, the department may consider the number of users in each state where the computer software is used, the number of site licenses or workstations in this state, and any other factors that reflect the use of computer software in this state.

Wis. Stat. § 71.25(9)(df).[4]

2. *Wisconsin Dep't of Revenue v. Microsoft Corp.*

Both parties agree that *Wisconsin Dep't of Revenue v. Microsoft Corp.* is controlling precedent. 2019 WI App 62, 389 Wis. 2d 350. In *Microsoft*, the Wisconsin Court of Appeals upheld the Tax Appeals Commission's determination that "royalties Microsoft Corporation received from licensing its software to original equipment manufacturers (OEMs) that are not located in Wisconsin, but whose products are used in Wisconsin, should not be considered in calculating Microsoft's franchise tax liability to the State of Wisconsin … under WIS. STAT. § 71.25(9)(d) (2005-06)." *Id.*, ¶ 1. The court held that Wisconsin end-users of the Microsoft software in computers sold by OEMs were not 'licensees' as that term is used in Wis. Stat. § 71.25(9)(df). *Id.*, ¶ 12.

The Department argued that the end-users were licensees of Microsoft in two ways: (1) as a matter of law; and (2) viewing the transactions as a whole. *Id.*, ¶ 23. The court rejected both arguments. The court rejected DOR's first argument because the DOR failed to provide legal

[4] The Commission and both parties seemingly cite to the current version of Wis. Stat. § 71.25 (2023-24). Older versions were in effect during the relevant Audit Period, but the provisions at issue have not been meaningfully changed. As such, the Court will refer to the version used by the Commission and the parties.

authority to support its assertion that a sublicensee is still a licensee of the licensor. *See id.*, ¶¶ 25-28. The court rejected its second argument based on "the pertinent statutory framework; the Commission's findings of fact regarding the Microsoft and OEM transactions and the OEM and end-user transactions; and the terms of the end-user agreements." *Id.*, ¶ 29.

B. There must be a licensor-licensee relationship between InterSystems and Epic's end-user customers for sub. (df) to apply.

InterSystems argues that sub. (df) applies where use of the software generates income, regardless of whether the software user is a "purchaser or licensee." The Commission concluded, and the Department argues, that sub. (df) "requires that a licensor receive income from a licensee in order for the relevant inquiry to be the location of the use of the software." The Court concludes that InterSystems's argument cannot be reconciled with either the plain text of the statute or the *Microsoft* court's reasoning.

"Statutory interpretation begins with the plain language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633 (citation omitted). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶ 46. "Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous." *Id.*, ¶ 50.

InterSystems contends "the phrase 'purchaser or licensee' in subsection (df) is descriptive of how software use generates income. It ensures that all the ways someone might 'use' computer software to generate revenue are captured by this subsection." Dkt. 53 at 13.

Neither "purchaser" nor "licensee" is defined in Wis. Stat. § 71.25, but these words have a common and accepted meaning that can be determined by consulting a dictionary. *Kalal*, 271 Wis.

2d 633, ¶ 53.

> A licensor grants a portion of its rights, such as intellectual property rights in software, to a licensee through a license. *See* Black's Law Dictionary 1061, 1062 (10th ed. 2014). A licensee may grant to another, through a sublicense, a portion or all of the rights granted to the licensee by the original license. *See id.* at 1652. The party holding a sublicense is known as a sublicensee. *See* Webster's Third New International Dictionary 2276 (1993).

Microsoft, 2019 WI App 62, ¶ 24.

InterSystems heavily relies on an unauthored draft article to purportedly support Wisconsin's "long-standing underlying tax policy." Dkt. 53 at 13 (citing Dkt. 34, ¶ 79, Ex. 12). The Court need not consult extrinsic sources and even if it did, "nonlegislative sources do not carry as much probative value as legislative statements." *See Juneau Cnty. v. Courthouse Emps., Loc. 1312, AFSCME, AFL-CIO*, 221 Wis. 2d 630, 643 (1998).

InterSystems then cites to a Legislative Fiscal Bureau Joint Committee Finance Paper which, InterSystems argues, supports the conclusion that the location of the use of computer software dictates the situs of income for tax purposes. *See Citation Partners, LLC v. DOR*, 2021 WI App 86, ¶ 33, 400 Wis. 2d 260 ("[C]ourts may consider legislative history to confirm a plain-meaning interpretation or when a plain-meaning interpretation produces an absurd result.").

InterSystems's argument glosses over the plain language of the statute. For the location of the software use to be relevant, the software must be used by a purchaser or licensee as those terms are used in the statute. This interpretation is made explicit in *Microsoft*, "WIS. STAT. § 71.25(9)(df) is limited to a 'licensee' who uses Microsoft's software in Wisconsin. The text of the statutory provision makes no reference to use of the computer software in Wisconsin by a *sublicensee*." *Microsoft*, 2019 WI App 62, ¶ 30. In *Microsoft*, the end users were located in Wisconsin, so the court did not need to discuss any relevancy the location of where the software was used may have on determining whether sub. (df) applied. However, the court's interpretation of the word "licensee" is clear.

C. The Commission correctly concluded that Epic's end-user customers were not "licensees" of InterSystems.

Both the Department and InterSystems focus on the *Microsoft* court's discussion as to whether a contract with the end user is required in order to find a licensee relationship. InterSystems contends that the Commission overread *Microsoft* to require a contract between InterSystems and the end user. The Court agrees with InterSystems to the extent the *existence* of a contract between InterSystems and Epic's end-user customers does not automatically define the end-user customer as a "licensee."

However, the *Microsoft* court determined the *non-existence* of a contract between Microsoft and the end user meant the end user could not, as a matter of law, be considered a licensee. 2019 WI App 62, ¶ 34. "Without that basic requirement for a contract, there were no licenses between Microsoft and the end-users, and the end-users were not licensees of Microsoft." *Id.*, ¶ 34. The *Microsoft* court emphasized that it had to respect the legislature's choice to include "licensee" in sub. (df) and to *not* include "sublicensee." *Id.*, ¶ 30.

1. There is no contract between InterSystems and Epic's end-user customers.

InterSystems argues that if a contract between InterSystems and the end users were required, the Commission erred in finding that one did not exist. Ultimately, the question is not whether any contractual obligations exists between InterSystems and end users, but whether the relationship between those end users was as a licensee of InterSystems or a sublicensee of Epic. However, the Court finds there is no contract between InterSystems and the end users, meaning there these end users are not licensees.

The interpretation of an unambiguous contract is a question of law that the Court reviews de novo. *Amazon Logistics, Inc. v. LIRC*, 2023 WI App 26, ¶ 20, 407 Wis. 2d 807. "Where the terms of a contract are plain and unambiguous, we construe the contract as it stands." *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 153 (Ct. App. 1999). "Contract interpretation generally seeks to give effect to the parties' intentions." *Tufail v. Midwest Hosp., LLC*, 2013 WI 62, ¶ 25, 348 Wis. 2d 631. Courts construe contract language according to its plain and ordinary meaning, consistent with what a reasonable person would understand the words to mean under the circumstances. *Id.*, ¶ 28. If the contract is unambiguous, the court's analysis ends with the four corners of the contract, without consideration of extrinsic evidence. *Town Bank v. City Real Est. Dev., LLC*, 2010 WI 134, ¶ 33, 330 Wis. 2d 340. Contract provisions must be interpreted in the context of the contract as a whole. *MS Real Est. Holdings, LLC v. Donald P. Fox Fam. Tr.,* 2015 WI 49, ¶ 43, 362 Wis. 2d 258.

Here, InterSystems argues it is a party to the Caché Addendum. As found by the Commission, the end user receives the Caché Addendum as part of the contract the end user signs when purchasing software from Epic. Dkt. 44 at 26. The Caché Addendum is not signed by a representative of InterSystems. *Id*. No part of the purchase contract signed by an end user is signed by InterSystems. *Id*. InterSystems relies on Epic's representation to InterSystems that the Caché Addendum has been provided to an end user prior to InterSystems' issuing a product key to an individual end-user. *Id*. InterSystems "does not track whether the Caché Addendum has been provided to the end user by Epic." *Id*.

These facts led to the Commission's conclusion that "[i]t is too much of a stretch to find that an addendum, which one "party" cannot know has been provided to another "party" constitutes proof of mutual assent to the end-user agreement (here, the Caché Addendum)." *Id.* The Court agrees with the Commission's conclusion, and determines that there is no contract between

InterSystems and Epic's end-user customers. Under *Microsoft*, the end-user customer cannot be considered a licensee of InterSystems for purposes of Wis. Stat. § 71.25(9)(df).

2. Even if there is a contract between InterSystems and Epic's end-user customers, that contract would only provide a sublicense.

InterSystems argues that it does track which end users accept the Caché Addendum because it tracks the number of its end-user customers as well as the location of all end-user customers that have been granted an application specific license, which constitutes offer and acceptance, and the fees received from each customer's use of Caché, which constitutes consideration. As described above, the Commission and this Court disagree that a contract has been formed by these limited contacts.

However, only the non-existence of a contract is dispositive in determining the existence of a licensee-licensor relationship. Even assuming the *existence* of a contract between InterSystems and Epic's end-user customers fails to establish that these customers are licensees. The facts and circumstances of the transactions between InterSystems and Epic, and Epic and Epic's end-user customers makes clear that Epic's end-user customers are only granted "a portion or all of the rights granted to the licensee by the original license," rendering Epic's end-user customers sublicensees. *Microsoft*, 2019 WI App 62, ¶ 24.

InterSystems asserts that the end users cannot be sublicensees because Epic can only merely *offer* the use of Caché, but it does not have the right to *grant* the use of Caché. InterSystems argues only InterSystems can issue the license key necessary to access its software. The relevant Application Partner Agreements (APAs) and Application Partner Profiles (Partner Profiles) between InterSystems and Epic state otherwise:

> 2016 APA: "[InterSystems] hereby grants you the right to grant sublicenses to Users to use the Licensed Software and receive Services, provided that you grant such sublicenses using the standard [InterSystems] addendum to your User

> agreement attached hereto as Exhibit A." Dkt. 34 at 13.
>
> 2010 APA: "13. Sublicensing. Either you [Epic] will resell Caché licenses and Services to the User or, as may be approved from time to time, you will grant sublicenses to Caché." Dkt. 34 at 12
>
> 2016 Partner Profile: "Epic is hereby authorized to offer non-production sublicenses ("Non-Production User Licenses") to Users . . . governed by the terms of the license set forth in Exhibit A." Dkt. 34 at 34.
>
> 2010 Partner Profile: "Epic may resell licenses to each of its customers to use Caché for non-production purposes only including configuration, training, testing, and demonstrations . . . ." Dkt. 34 at 23.

In turn, the required Caché Addendum states: "The following terms and conditions apply to the sublicense of the Sublicensed Software from Epic to You, the User, as required and authorized by InterSystems." Dkt. 34 at 48. The Caché Addendum defines "Sublicensed Software" as "the computer programs . . . licensed by InterSystems through Epic to You." Dkt. 34 at 51.

The plain language of the APAs, the Partner Profiles, and the Caché Addendum each state that InterSystems grants Epic the right to sublicense Caché to its end-user customers, and InterSystems is not separately and individually granting "licenses" to each of these users as that term is used by Wis. Stat. § 71.25(9)(df).

Beyond the plain language of the operative agreements, the surrounding facts and circumstances demonstrate Epic's end-user customers are sublicensees. The sublicenses granted to end-user customers are application-specific. Dkt. 44 at ¶ 32. License keys are provided by InterSystems and delivered by Epic to end-user customers. Dkt. 44 at ¶ 37. Epic's software dependent on Caché will not operate without Caché access. Dkt. 44 at ¶ 39. Epic pays the license fees directly to InterSystems. Dkt. 44 at ¶¶ 42, 44-45. The entirety of the relationship, as defined between InterSystems and Epic, establishes that what end-user customers are provided is a sublicense, making Wis. Stat. § 71.25(9)(df) inapplicable to determining the situs of income in this case.

II. The Commission correctly concluded that Wis. Stat. § 71.25(9)(dj)1. applied.

A. Subsection (dj) appropriately defines the situs of income in this case.

Subsection (dj) governs income derived from royalty payments. The statute provides, in relevant part:

> 1. Except as provided in subd. 2m. and par. (df), gross royalties and other gross receipts received for the use or license of intangible property, including patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customer lists, are sales in this state if any of the following applies:
>
> > a. The purchaser or licensee uses the intangible property in the operation of a trade or business at a location in this state. Except as provided in subd. 2m., if the purchaser or licensee uses the intangible property in the operation of a trade or business in more than one state, the gross royalties and other gross receipts from the use of the intangible property shall be divided between those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the intangible property in those states.
> >
> > b. The purchaser or licensee is billed for the purchase or license of the use of the intangible property at a location in this state.
> >
> > c. The purchaser or licensee of the use of the intangible property has its commercial domicile in this state.

Wis. Stat. § 71.25(9)(dj)1.

InterSystems contends that even if (dj) applies instead of (df), subpart (dj)1.a. requires apportioning based on where the end user is located and therefore, the income should be apportioned according to subdivision (dj)1.a.

The intangible property at issue in this case is Epic's right to sell sublicenses for Caché to its end-user customers. The intangible property at issue is not the right to use that software, as that right is granted through a sublicense. In other words, Epic's end-user customers' use of Caché is not synonymous with Epic's own use. Instead, Epic's right to sublicense Caché does not have an identifiable physical location in which Epic uses this property in the operation of a trade or business. The use in a trade or business that does have a discernable physical location is done by the end-user customer, who, for reasons previously articulated in this decision, are not the licensee or the purchaser.

Wis. Stat. § 71.25(9)(dj)1. itself contemplates that the use described by that subsection may not have a fixed physical location. If it did not, then the alternatives of 1.b and 1.c. that define the situs of income would be superfluous. Where, as is the case here, there is no use location for intangible property (the right to grant sublicenses), the sequential application of the statute provides that (dj)1.b. defines the situs of income, i.e., the location where Epic is billed for the purchase or license of the intangible property. That location is in Wisconsin, making Wisconsin the situs of income generated by the sale of the right to sublicense Caché.

B. The Commission's application of subsection (dk) is harmless error.

Subsection (dk) governs income received from the sale of intangible property. The statute provides:

> Sales of intangible property, excluding securities, are sales in this state if any of the following applies:
>
> > 1. The purchaser uses the intangible property in the regular course of business operations in this state or for personal use in this state. If the purchaser uses the intangible property in more than one state, the sales shall be divided between those states having jurisdiction to impose an income tax on the taxpayer in proportion to the use of the intangible property in those states.
> >
> > 2. The purchaser is billed for the purchase of the intangible property at a location in this state.
> >
> > 3. The purchaser of the intangible property has its commercial domicile in this state.

Wis. Stat. § 71.25(9)(dk).

InterSystems asserts that it was erroneous for the Commission to apply sub. (dk) because it applies on its face to sales of intangible property and InterSystems does not sell Caché to Epic or to end users. Rather, InterSystem says this case is about only "authorized use, however characterized." Dkt. 53 at 29. Neither the end users nor Epic have any permanent right of ownership to Caché or any of its associated IP. InterSystems further argues that even accepting the Commission's characterization of Epic's payments to InterSystems as a sale of a sublicense, that sale should still be traced under the first subdivision of sub. (dk) to where the sold intangible property is used, i.e., the locations of the end users.

The Department conceded the Commission erred in applying (dk). The Department contends the result is harmless error because it did not affect the outcome of the Commission's decision. "For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 28, 246 Wis. 2d 1. Here, the Commission's correct application of (dj) results in the same outcome as the Commission's incorrect application of (dk), making the Commission's redundant application of (dk) harmless error. *See Seebach v. Pub. Serv. Comm'n of Wisconsin*, 97 Wis. 2d 712, 724 (Ct. App. 1980) ("Agency action will not be upset because of harmless error.").

III. InterSystems's challenge to the constitutionality of (dj).

Challenges to the constitutionality of a statute generally fall into two categories: as-applied and facial. *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 37, 393 Wis. 2d 38. As-applied challenges address a specific application of the statute against the challenging party. *Id*. A facial challenge is a claim that a law is unconstitutional in all applications, seeking to strike down the law in its entirety. *Id.*, ¶ 38.

A constitutional challenge to a state tax under the Commerce Clause examines whether 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 services provided by the state." *United Parcel Serv. Co. v. DOR*, 204 Wis. 2d 63, 72 (Ct. App. 1996). A tax formula "will only be disturbed when the taxpayer has proven by 'clear and cogent evidence' that the income attributed to the state is in fact 'out of all appropriate proportion to the business transacted in the state' or has 'led to a grossly distorted result.'" *Id.* (citation omitted).

A. InterSystems's facial challenge is underdeveloped.

Legislative enactments are presumed constitutional, and InterSystems bears a heavy burden in making a facial constitutional challenge to Wis. Stat. § 71.25(dj). *Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 36, 383 Wis. 2d 1. Any reasonable doubt is resolved in favor of upholding the provision as constitutional. *Id.*

InterSystems challenges (dj) and (dk) as unconstitutional on their face under the Commerce Clause of the U.S. Constitution. The Commission appropriately declined to address the issue because it lacks the authority to find that a statute is unconstitutional on its face. *McManus v. DOR*, 155 Wis. 2d 450, 454 (Ct. App. 1990). InterSystems did not substantively develop its facial challenge except for a single paragraph included in its Reply Brief. Dkt. 59 at 18. The Court need not consider arguments that are undeveloped and raised for the first time in a reply brief and declines to do so here. *Wal-Mart Real Est. Bus. Tr. v. City of Merrill*, 2023 WI App 14, ¶ 32, 406 Wis. 2d 663.

B. InterSystems's fails to meet its heavy burden to establish Wisconsin's tax law violates the Commerce Clause as-applied in this case.

InterSystems contends that the manner in which the Department has apportioned incomes from Epic's sales of sublicenses to Wisconsin violates the Commerce Clause. InterSystems asserts that the Department selectively applied the subdivisions of (dj) in a way that if other states were to also selectively apply would result in multiple taxation in violation of the Commerce Clause.

As described above, (dj)1.a. does not apply because Epic's use of the intangible property right to sublicense Caché has no discernable location. The Department then is allowed to sequentially apply the next subpart of (dj) to conclude the situs of the income is Wisconsin because Epic is billed for licensing Caché in Wisconsin. Based on the correct sequential application of the statute, as described in this decision, the apportionment of income for right to grant sublicenses to Epic's end-user customers results in a situs of income located exclusively in Wisconsin and no other states. Therefore, as applied in this case, Wis. Stat. § 71.25(9) does not violate the Commerce Clause.

ORDER

For the reasons stated, the Court finds that InterSystems has not meet its burden to show that Commission's decision should be set aside. Accordingly, the Commission's final decision is AFFIRMED.