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July 17, 2009

VIA FEDERAL EXPRESS

Paul Pisano, Esq.
National Beer Wholesalers Association
1101 King Street, Suite 600
Alexandria, Virginia 22314

Re: ***Representation Concerning the “Model Permit Bill”***

Dear Mr. Pisano:

I recently received your July 9, 2009 letter regarding the adoption of the “Model Permit Bill” by the National Conference of State Legislatures (“NCSL”).

Your letter’s focus, and apparently its only reason for being written, is its assertion that our firm has made “incorrect” representations to federal courts in Massachusetts and Texas regarding the NCSL Model Bill. To make its intentions plain, the letter closes with a request that we “notify” these courts of our alleged “mistake.” Of course, we greatly value the truth-seeking function of the courts, and our firm’s reputation for candor and accuracy in the statements to courts we make on our clients’ behalf. We therefore offer the following thoughts and facts for your consideration.

Background

The central relevance of the Model Permit Bill to the Texas and Massachusetts cases is that the Bill establishes beyond dispute that there is a viable alternative to Texas’s and Massachusetts’s discriminatory laws. The attractiveness and viability of that alternative is confirmed by the fact that 30-odd states have passed the Model Permit Bill in some form. See Family Winemakers of California *et al.*’s Response Brief of Appellees at 6 n. 3; Siesta Village Market LLC *et al.*’s Response-Reply Br. at 34 n.15.

A second point of relevance — also beyond dispute — is that Model Permit Bill has been “adopted” by a body convened by the NCSL and in that sense “endorsed” by the NCSL. NCSL’s own view is that its task forces “have been very effective at developing positions on highly complex and controversial issues.” <http://www.ncsl.org> (State-Federal/Committees Task

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Forces Tab). Your letter does not deny that in this instance a NCSL task force endorsed and approved the Model Permit Bill in 1997. Nor does it deny that the NCSL has done nothing since that time to repudiate its approval. Nor does it deny that since 1997, more than two dozen states have enacted versions of the Model Permit Bill, making the Model Permit Bill an especially good example of a successful piece of NCSL model legislation. Indeed, the fact that the NCSL's consideration of the matter occurred in the context of a dedicated task force — as opposed to a multi-issue compromise — makes the task force's conclusions in some ways more significant, as does the resulting bill's widespread adoption by state legislatures.

Accordingly, your letter says nothing that is inconsistent with the facts we had previously understood to be true.

Our Review

We have nevertheless reviewed the statements we have made regarding the NCSL Model Bill in briefing submitted to the Massachusetts and Texas courts. Having completed that review, we believe that our statements to those courts are accurate. For example, we have stated that the Model Permit Bill was “[a]dopted by the National Conference of State Legislatures in 1997.” See *Siesta Village v. Perry*, Appellants' Response-Reply Brief at 34 n.15; Family Winemakers of California, Response Brief of Appellees at 56. In the *Granholm* briefing to the Supreme Court, we referred to the Model Permit Bill as “the National Conference of State Legislatures' Model Direct Shipping Bill.” Respondents' Br. at 36.

Consistent with these representations, the NCSL's Executive Director states that “the Model [Permit Bill] was *approved* by the NCSL Task Force on the Wine Industry on November 5, 1997.” April 9, 2009 Letter of William T. Pound (emphasis added). Moreover, the NCSL Executive Director also states “no further action” on the Model Permit Bill has been taken by the NCSL. In particular, there apparently has been no subsequent withdrawal or repudiation of the task force's work product, either by the task force itself over its remaining five years of existence, by the NCSL's Executive Committee, or the NCSL's membership as a whole.

Your Letter's Errors

For these reasons, we do not understand your concerns. You appear greatly concerned that the Courts be advised that “only” a task force of the NCSL approved the Model Permit Bill. But to us that fact, if anything, makes the Model Permit Bill more authoritative. We recognize that no one ever sought to transform the Model Permit Bill into an official public policy position of the entire NCSL. But our understanding is that such official NCSL public policy positions are often debated and adopted in instances where multiple approaches compete for the NCSL's endorsement. Here, the Model Permit Bill is NCSL's *only* state legislative handiwork on the relevant issue. The NCSL has never been asked to embrace it in preference to other alternatives,

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likely because no viable alternatives to the Model Permit Bill have ever achieved a critical mass of support in state legislatures.

Additionally, we wonder about your letter's timing. The deadline for submitting briefing in the Massachusetts and Texas cases is now long passed. The innocuous letter from the NCSL's Mr. Pound is dated three months before your letter to us and prior to the NBWA's submission of its *amicus brief* in the First Circuit case. If Mr. Pound's letter conveyed something new or important in your eyes, why wasn't it referenced in your First Circuit brief?

In any event, the essential concern of your letter — that the Model Permit Bill was approved and endorsed by a focused, a dedicated task force of the NCSL as opposed to the generalist NCSL membership as a whole — appears to us as either a helpful fact for our side of the debate, or at most an instance of quibbling over details. In our view, the situation would be different only if the NCSL Executive Committee or its membership had expressly acted to repudiate or rescind the handiwork of its focused, dedicated, task force. Because we know of no evidence that such a repudiation has occurred, we conclude that our statements to the Texas and Massachusetts courts were appropriate.

If by any chance you possess evidence that the NCSL has withdrawn or repudiated its task force's Model Permit Bill, we ask that you please share it with us so that we can then consider whether and how to relay that information to the Massachusetts and Texas courts. Otherwise, we trust that this letter puts this matter to rest.

In conclusion, we are surprised and disappointed to receive this letter. Through mutual friends in the beverage industry, we have reached out to you and the NBWA on behalf of wine industry clients seeking ways of defusing future legal disputes before they become expensive, time-consuming litigation. Consequently, we would not have expected the NBWA to send a letter making what, very candidly, appears to be precisely the sort of quarrelsome, diversionary, hair-splitting distinctions that serve only to multiply wasteful litigation expense and bog down our courts of law.

Sincerely,

/s/ Tracy K. Genesen

Tracy K. Genesen

cc: James C. Ho, Esq.
David Hadas, Esq.