IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANHEUSER-BUSCH, INC., *et al.*,	)	
	)	
Plaintiffs,	)	No. 10 CV 01601
	)	
v.	)	
	)	Judge Robert M. Dow, Jr.
STEPHEN B. SCHNORF, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

WSDI'S MEMORANDUM OF LAW IN SUPPORT OF INTERVENTION

Proposed Intervenor-Defendant the Wine & Spirits Distributors Association ("WSDI"), an Illinois nonprofit trade association, by its attorneys and pursuant to Rule 24 of the Federal Rules of Civil Procedure, submits the following Memorandum of Law in support of its Motion to Intervene (the "Motion"):

ARGUMENT

I. WSDI Is Entitled To Intervene As Of Right

Under Federal Rule of Civil Procedure 24(a)(2), intervention as of right should be granted if (i) the proposed intervenor possesses an interest in the subject matter of the action, (ii) the disposition of the matter may as a practical matter impair that interest, (iii) the intervenor's interest is not adequately represented by the existing parties, and (iv) the motion is filed timely. *Id.*; s*ee also Ligas v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007). WSDI meets this test.

A. This Case Is An Attack on Illinois' Three-Tier System Of Regulating Alcohol Sales And Distribution And, As WSDI And Its Members Are An Integral Part Of That System, WSDI Possesses An Interest In The Subject Of This Action Which Interest Will Be Impacted By A Disposition Here

1. The Three-Tier System

The 21st Amendment to the United States Constitution gives states unique regulatory authority over the sale and distribution of alcoholic liquors. After the repeal of Prohibition, most states, including Illinois, created a "three-tier" (manufacturers/suppliers, wholesalers/distributors and retailers) system of regulating the sale and distribution of alcoholic liquor, in part to maintain order in the marketplace.

Illinois' three-tier system is reflected in and mandated by the Illinois Liquor Control Act of 1934 (the "Act").[1] The three-tier system helps ensure that there is adequate oversight of alcohol sales and helps prevent aggressive marketing and monopolistic sales tactics. Thus, under the system, manufacturers generally are barred from holding ownership interests in entities in the other tiers. The system also puts significant restraints on how entities in one tier do business with those in other tiers, prohibiting practices such as giving something "of value" to another tier's trade buyer to influence that trade buyer's purchasing decisions. The middle tier, *i.e.*, distributing, is a

[1] *See* 235 ILCS 5/1-2 (delineating the scope of the Act as necessary to promote and maintain a sound, stable, and viable three-tier distribution system of alcoholic beverages to the public in order to promote the public health, safety and welfare of the citizens of the State and foster temperance) and 5/6-4 (prohibiting tied house arrangements whereby certain manufacturers hold interests in, or are affiliated with, members of another tier) and 5/1-3.15, which prohibits manufacturers from holding Illinois distributor class licenses.

vital component of Illinois' regulatory structure because distributors act as a buffer between potentially overzealous manufacturers and the retailers over whom they may seek to exert undue influence.

Plaintiffs admit that Illinois has a three-tier system, Complaint, ¶19, and that the United States Supreme Court reaffirmed that the three-tier system was "unquestionably valid" in its most recent case involving the relation between the 21st Amendment and the dormant Commerce Clause, *Granholm v. Heald*, 544 U.S. 460, 466 (2005). *See, e.g.,* Plaintiffs' Motion to Schedule An Expedited Declaratory Judgment Hearing on Commerce Clause Claim, Docket #18.

2. Plaintiffs Seek To Weaken The Three-Tier System

Though paying lip service to its validity, in this action Plaintiffs seek to weaken substantially the three-tier system by asking this Court to declare unconstitutional certain provisions of the Act governing licensing and prohibiting "tied-house" relationships and eliminating the established, legislatively-mandated independent middle distributing tier.

Plaintiffs allege that ABInc. is an out-of-state brewer and manufacturer of beer and the holder of a Non-Resident Dealer's license ("NRD") [2] that exports beer from out of state into Illinois -- *i.e.*, a member of the first tier -- and that it should be permitted to own (and sell that beer to) a subsidiary distributor -- *i.e.*, a member of the second tier -- who then would sell the beer directly to Illinois retailers. Complaint, ¶¶ 36, 48 and 54. By acquiring distributor City

[2] An NRD is a manufacturer that exports alcoholic liquor into Illinois for sale to a distributor. *See* 235 ILCS 5/1-3.29 and discussion below.

Beverage Illinois, LLC ("City Beverage") in its entirety, ABInc. intends that City Beverage "will generate many synergies for ABInc. and its affiliates." *Id.*, ¶32. According to ABInc., acquiring City Beverage, a major distributor in the Chicagoland market, will allow it to compete more effectively against in-state brewers, enjoy "greater profits due to self-distribution" and also maximize "the competitiveness of [its] brands through unique control and focus of the distribution function." *Id.*, ¶48.

While ABInc. acknowledges that it is "the leading U.S. brewer and producer of beer in the United States," Complaint, ¶11, it is more than that. As the principal subsidiary of Anheuser-Busch InBev ("ABI"), it is part of a publicly-traded company based in Leuven, Belgium. ABI was acquired by InBev in November, 2008 for an aggregate purchase price of $52.5 billion. ABI financed the merger by borrowing $54.8 billion. ABI, the leading global brewer and one of the world's top five consumer products companies, manages a portfolio of well over 200 beer brands, including global flagship brands Budweiser, Stella Artois and Beck's, fast-growing multi-country brands like Leffe and Hoegaarden, and strong "local champions" such as Bud Light, Skol, Brahma, Quilmes, Michelob, Harbin, Sedrin, Klinskoye, Sibiriskaya, Korona, Chernigivske and Jupiler, among others. In addition to the beer brands it owns outright, ABI holds a 50% equity interest in the operating subsidiary of Grupo Modelo, Mexico's leading brewer and owner of Corona, the leading Mexican beer brand globally. *See* ABInc.'s 2009 Annual Report, available at http://www.ab-inbev.com/go/media/annualreport2009.

By its talk of "synergies," ABInc. seeks to collapse the upper tiers of the three-tier system and achieve vertical integration so it may exercise complete control over the distributor. If it were to succeed, the result would be a profound loss for the citizens of Illinois, who will see consumer choice decline (as smaller manufacturers are squeezed out of what would be an ABInc.-dominated distribution tier) and orderly markets disrupted through a rise in retail prices (as ABInc. exerts greater pressure on the retail tier through increased market dominance) or, equally as harmful, cheap alcohol availability as a result of ABInc.'s increased market share through reduced prices. ABInc.'s business plan is based on mass merchandising and extensive promotions, both of which run counter to the public policy of fostering temperance.

The "synergies" also will place greater stress on the Illinois Liquor Control Commission (the "Commission"), the administrative agency charged with oversight, investigative and enforcement responsibilities over the entirety of Illinois' alcoholic beverage industry, as it will be regulating without the checks and balances of separate tiers.

Should Plaintiffs succeed in their challenge to the three-tier system, other manufacturers would be forced to adopt ABInc.'s aggressive business model. Ultimately, this would supplant the General Assembly's expression of public policy -- with disastrous consequences for Illinois' independent distributors, as discussed below.

3. WSDI, Its Purpose, Its Members and Their Interests

WSDI is an Illinois nonprofit trade association comprised of family-owned Illinois licensed distributors -- presently over 50 of them -- engaged in the distribution of alcoholic beverages. *See* Affidavit of Paul Jenkins, Executive Director of WSDI, at ¶¶1-3. (A true and accurate copy of the Jenkins Affidavit is attached as Exhibit A.)

Some WSDI members have been in business since Prohibition was repealed. Collectively, WSDI members handle the great majority of all wine and spirits products distributed in Illinois. WSDI members, in the aggregate, operate in all parts of the State of Illinois, and range in size from single-person operations to closely-held multimillion dollar companies with hundreds of employees in the State. Each distributor member has a substantial monetary investment in its distribution business, including warehouse facilities approved by the Commission, equipment and rolling stock, inventory and employee staff and distributorship rights under contracts with suppliers. Jenkins Aff., Exhibit A at ¶4.

All WSDI members, and for that matter, all alcoholic beverage distributors in Illinois, have ongoing business relationships with the alcoholic beverage manufacturers from which they purchase products. Typically, WSDI members have distributorship agreements with product suppliers, most of which are located outside of Illinois and some of which are located in Illinois. *Id.* at ¶5.

WSDI is intimately familiar with: (a) the statutory framework being challenged in this action; (b) the rationale behind the licensed three-tier distribution system of beer, wine and spirits in Illinois; (c) the practical workings of the licensed three-tier distribution system, which knowledge will assist the Court in understanding the issues raised and the facts relevant thereto; and (d) the impact/implications of any ruling that would result in declaring unconstitutional any portion of the Act. *Id.* at ¶6.

WSDI also is familiar with: (a) the large investments its distributor members have made in their businesses; (b) the business concerns and affairs of its constituent association members and distributors in general; and (c) the objective of its members to preserve the integrity of the three-tier system challenged here. *Id.* at ¶7.

4. The Impact Of This Action On WSDI And Its Members

To intervene as of right, the interest an applicant must claim in the subject of the action is more than the minimum Article III interest; they must be someone whom the law challenged was intended to protect. *Flying J, Inc. v. J.B. Van Hollen*, 578 F.3d 569, 571-572 (7th Cir. 2009).

WSDI easily meets both these requirements. As set forth above, WSDI and its members are part of and substantially invested in Illinois' three-tier system and this lawsuit challenging that system may have very serious consequences for them.

Trade associations with purposes and interests and members with interests similar to WSDI have been found to have standing to sue in their own

right. *See, e.g.*, *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1071 (N.D. Ill. 2005) (associations of entities that created, published, distributed, sold and rented video games had standing to sue governor and public officials to enjoin the enforcement of Illinois' Violent Video Games and Sexually Explicit Video Games laws.) Moreover, trade associations with purposes and interests like WSDI and comprised of members with interests like WSDI have been permitted to intervene in lawsuits that, like this one, challenge the constitutionality of state liquor laws and concern the three-tier system. *See, e.g., Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428-30 (6th Cir. 2008); *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008); *Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1131 (9th Cir. 2008); *Siesta Vill. Market, LLC v. Steen*, 595 F.3d 249, 251 (5th Cir. 2006); *Siesta Vill. Market, LLC v. Granholm*, 596 F. Supp. 2d 1035, 1037 (E.D. Mich. 2008); *Heald v. Granholm*, 457 F. Supp. 2d 790, 791 (E.D. Mich. 2006); *Siesta Vill. Market, LLC v. Perry*, 2006 WL 1880524, at *2 (N.D. Tex. Jul. 7, 2006).

It is not an overstatement to say that the long-term survival of many of WSDI's members depends on the outcome of this litigation. WSDI has a direct and vested interest in the continued viability and enforcement of Illinois' three-tier system. The Court should grant it leave to intervene as of right.

B. WSDI Has Additional Defenses, Including Lack Of Subject Matter Jurisdiction, That Have Not Been Presented To This Court And Thus Its Interests Are Not Adequately Represented

The Attorney General represents Defendants, the Illinois Liquor Control Commission and its members and general counsel, in this action. As set forth in the Complaint, those Defendants have expressed opinions about the interpretation of certain provisions of the Act and among other things issued a "Declaratory Ruling" based thereon.

WSDI's intervention would present this Court with the additional arguments, not yet raised, that:

- this Court lacks subject matter jurisdiction over Plaintiffs' claims,
- the Commission lacks authority to issue a "Declaratory Ruling" and as a result the "Declaratory Ruling" is void and of no effect,
- the interpretation of the Act espoused by the Commission's staff and in the advisory "Declaratory Ruling" was contrary to the Act's plain language and the rules of statutory construction,
- regardless of the interpretation of the Act advanced by the Commission or its staff, the *conclusion* that ABInc. is not entitled to hold a Distributor's license actually is consistent with the Act, as *no* Manufacturer is allowed a Distributor's license and the Act thus does not discriminate between in-state and out-of-state, and
- alternatively, even Plaintiffs' erroneous contention that the proper interpretation of the Act is that a Brewer is eligible for a Distributor's license does not discriminate between in-state and out-of-state, as under that interpretation *all* Brewers would be eligible.

WSDI thus brings its own interests and arguments to the defense side of this matter. These arguments are set out below and in WSDI's proposed Answer

and Affirmative Defenses, a copy of which is attached as Exhibit B as required by Rule 24(c) of the Federal Rules of Civil Procedure. [3]

1. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Commerce Clause Claim

Plaintiffs' Commerce Clause claim should be dismissed because this Court lacks subject matter jurisdiction and Plaintiffs have failed to state a claim thereunder. Plaintiffs have suffered no injury because as a matter of law the unauthorized "Declaratory Ruling" was *void ab initio* and because, as Plaintiffs plead, for decades ABInc. has had, and currently still has, a Distributor's license. Moreover, on its face the Act *does not favor in-state economic interests over out-of-state economic interests*. It does not discriminate at all. There is thus no burden on interstate commerce.

a. Plaintiffs Have Suffered No Injury And Have No Standing

Standing "is perhaps one of the most important of the jurisdictional doctrines." *Kochert v. Greater LaFayette Health Services, Inc.,* 463 F.3d 710, 714 (7th Cir. 2006). The pled facts here show that Plaintiffs have suffered no injury.

[3] The Attorney General also at least to date has taken the position that Plaintiffs' Commerce Clause claim is substantially a matter of law and does not involve substantial questions of fact or require significant discovery. WSDI maintains that this Court lacks subject matter jurisdiction over the Commerce Clause claim and also that the plain language of the Act demonstrates that it does not discriminate between in- and out-of-state interests and therefore should be dismissed. Should Plaintiffs be permitted to proceed, however, WSDI respectfully disagrees that little or no discovery is needed and maintains that a full evidentiary record is essential for this Court to decide whether the State regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489.

At Plaintiffs' request, the Commission held a "hearing" on ABInc.'s proposed purchase of an additional 70% of City Beverage, a licensed Distributor. Complaint, ¶¶40, 43. The Commission opined that ABInc. could not acquire the additional 70% interest in City Beverage and issued a "Declaratory Ruling". *Id.*, ¶44 and Exhibit B.

The "Declaratory Ruling," however, was purely a prospective, nonbinding, advisory opinion: the Commission has no authority under Illinois law to issue binding declaratory rulings.

The Commission's actions under the Act are governed by the Illinois Administrative Procedure Act ("IAPA"). 235 ILCS 5/3-13. The IAPA, however, specifically requires an agency to enact rules governing its use of declaratory rulings before it is authorized to issue them:

> § 5-150. Declaratory rulings.
>
> (a) Requests for rulings. Each agency may in its discretion provide by rule for the filing and prompt disposition of petitions or requests for declaratory rulings as to the applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency. Declaratory rulings shall not be appealable. The agency shall maintain as a public record in the agency's principal office and make available for public inspection and copying any such rulings. The agency shall delete trade secrets or other confidential information from the ruling before making it available.

5 ILCS 100/5-150. The IAPA also requires an agency making a rule to do so through set procedures and public notice and comment, otherwise the rule is invalid. 5 ILCS 100/5-10.

The Commission has not enacted any rules for declaratory rulings.

When an agency issues a declaratory ruling for which it has not enacted rules, in violation of the IAPA, its actions are *void ab initio. See, e.g., Harrisonville Tel. Co. v. Ill. Commerce Comm'n*, 176 Ill. App. 3d 389, 392-393 (5th Dist. 1988) ("Our research has revealed no rule of the Commerce Commission which provides for the rendering of declaratory rulings. Barring the adoption of such a rule in compliance with appropriate rule-making procedures, the Commission has no authority to render declaratory rulings.")

As a matter of law, therefore, the Commission has taken no binding action which affects or limits ABInc.'s purchase of City Beverage -- or anything else. The "Declaratory Ruling" is void. It does not "thwart" or "foreclose" Plaintiffs from pursuing any claims they may have in State court. Plaintiffs simply have chosen to come to federal court on a non-decision by a state agency.

Moreover, the Complaint itself pleads that Plaintiffs have not suffered any actual harm or had any burden imposed on them. Plaintiffs freely admit that: their product has been and is "widely distributed, sold, and consumed in Illinois," Complaint, ¶26, for 28 years the Commission has approved ABInc.'s NRD license, *id.*, ¶27, between 1982 and 2005 the Commission approved Distributor's licenses for ABInc., *id.*, ¶28, and since 2005 the Commission has approved the Distributor's license for its restructured subsidiary, City Beverage, *id.*, ¶31.

Furthermore, regardless of any statements made verbally or in writing by the Commission or its staff regarding the reasons for the determination that

ABInc. could not own a Distributor, that decision was correct. Under the plain language of the Act, *no* Brewer/Manufacturer or NRD may have a Distributor's license. However, even if the proper interpretation of the plain language of the Act is that, as Plaintiffs contend, *all* Brewers/Manufacturers are eligible for a Distributor's license, the proper way to resolve the question is to file a declaratory action in state court, not seek relief under §1983 in federal court.[4] As the "Declaratory Ruling" Plaintiffs requested was unauthorized and void as a matter of law, it does not preclude Plaintiffs from pursuing state court relief.

b. The Act On Its Face Does Not Discriminate Between In-State and Out-of-State Interests

The Act does not authorize the Commission to license *any* Brewer as a Distributor, regardless of location. To the contrary, it prohibits it.

ABInc. brews beer and as such meets the definition of and is a Brewer under the Act. Complaint, ¶11; 235 ILCS 5/1-3.09.

ABInc. operates out of state and also holds a Non-Resident Dealer's ("NRD") license. *Id.*, ¶27.

As a Brewer, ABInc. also is a Manufacturer under the Act. The Act defines the word "Manufacturer" to mean every "*brewer*, fermenter, distiller, rectifier, wine maker, blender, processor, bottler, or person who fills or refills an original package, whether for himself or for another, and others engaged in brewing, fermenting, distilling, rectifying, or bottling, alcoholic liquors as above defined." *Id.* at 5/1-3.08 (emphasis added).

[4] Plaintiffs show that, besides ABInc., only two small brewers, Goose Island Beer Company and Argus Brewery, have been issued Distributors' licenses. Complaint, ¶37; Defendants' Answer, ¶37.

The Act expressly defines "Distributor" to mean "any person, *other than a manufacturer or non-resident dealer licensed under this Act*, who is engaged in purchasing, storing, possessing, or warehousing any alcoholic liquors for sale or reselling at wholesale, whether within or without this State." 235 ILCS 5/1-3.15 (emphasis added). Thus, by definition, a Distributor cannot be a Manufacturer or NRD.[5]

The Act expressly provides that, "unless the context otherwise requires, words and phrases are used in this Act in the sense given them in the [definitions provisions]". 235 ILCS 5/1-3. Accordingly, the Act (i) expressly prohibits a Brewer from being a Distributor because a Brewer is a Manufacturer and a Manufacturer cannot be a Distributor, and (ii) expressly prohibits an NRD from being a Distributor. The Act does not distinguish between in-state and out-of-state interests. Thus, while Plaintiffs argue that ABInc. was denied a Distributor's license because it is from out-of-state, the fact is that ABInc. cannot be a Distributor because it is both a Manufacturer (as a Brewer) and an NRD and neither can be a Distributor under the Act.

Illinois administrative agencies may exercise only those powers expressly delegated to them by the General Assembly and powers necessarily implied from those delegated powers. *See, e.g.*, *Granite City Div. of Nat'l Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 171 (1993) (if an entity is a creature of

[5] The phrase "other than a manufacturer or non resident dealer" qualifies the preceding phrase "any person," not any subsequent phrase in the definition. The well-established "last antecedent rule" of statutory construction "requires that relative or qualifying words, phrases, or clauses are to be applied to the words immediately preceding, and do not modify words, phrases, or clauses that are more remote." *See, e.g., Swank v. Ill. Dep't of Revenue*, 336 Ill. App. 3d 851, 857 (2d Dist. 2003).

statute, "any power or authority claimed by it must find its source within the provision of its enabling statute."); *Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 551 (1977) (same); *Ill. Dep't of Revenue v. Ill. Civil Service Comm'n*, 357 Ill. App. 3d 352, 364 (1st Dist. 2005); *Resource Technology Corp. v. Commonwealth Edison Co.*, 343 Ill. App. 3d 36, 44 (1st Dist. 2003) ("An administrative agency derives its power to act solely from the statute by which it was created, although the agency charged with enforcing a statute is given 'inherent authority and wide latitude to adopt regulations or policies reasonably necessary to perform the agency's statutory duties.'").

The Act's provisions above clearly prohibit the issuance of a Distributor's license to a Brewer or NRD. There is no provision elsewhere in the Act giving the Commission authority to do so, either.

The Act delegates certain powers to the Commission, among them, the power "to issue licenses to manufacturers, foreign importers, importing distributors, distributors, non-resident dealers . . ." 235 ILCS 5/3-12. The Act does so in a fashion that maintains the three-tier system of separating Manufacturers (and therefore Brewers) from Distributors to further the public policy concern of protecting against vertical integration and hence monopolistic control.

The Act long has been interpreted as starting from a point of prohibition. *See, e.g., Daley v. Berzankis*, 47 Ill. 2d 395, 398 (1971) ("The business of selling liquor is not favored; no inherent right exists to carry it on and it may be entirely prohibited."). The Act, "must be interpreted as starting from a point of

prohibition. The Act then provides exceptions where persons may conduct certain activities involving alcohol as long as they have a valid liquor license." *People v. Select Specialties, Ltd.*, 317 Ill. App. 3d 538, 544 (4th Dist. 2000). In other words, under the Act, that which is not expressly permitted is prohibited.

Notably, the Act does expressly authorize self-distribution for a particular category of manufacturers -- wine makers producing less than 25,000 gallons of wine whether in or out of Illinois. *See id.* at 5/3-12(17)(A). It does not do this for Brewers. The conclusion that a Brewer may not self-distribute is underscored by the rule of statutory construction *expressio unius est exclusio alterius*, which instructs that where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions. *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007).

The Act lists the categories of licenses that the Commission may issue. It provides that a Manufacturer's license "shall allow the manufacture, importation in bulk, storage, distribution and sale of alcoholic liquor to persons without the State . . . and to licensees in this State as follows". 235 ILCS 5/5-1(a). It further provides that the Commission may issue a Class 3 Manufacturer's license to Brewers, and does not limit the location of the Brewer's license to Illinois. *Id.* at 5/5-1(a) Class 3.

The Act specifies the holder of a Manufacturer's Class 3 Brewer's license may "make sales and deliveries of beer to importing distributors, distributors, and to non-licensees, and to retailers provided that the brewer obtains an

importing distributors license or distributor license *in accordance with the provisions of this Act*." *Id.* (emphasis added).

There are no provisions in the Act, however, to allow any Brewer -- large or small, in-state or out-of-state -- to be a Distributor. The license provision does not alter the definition of Distributor, set forth above, which excludes not only any Manufacturer (including a Brewer), but any NRD, preserving the three-tier system and its public purpose.

The plain language of a statute is the best guide to statutory construction. *People v. O'Connell*, 227 Ill. 2d at 36.[6] The Act is plain and unambiguous: it does not allow ABInc., which by its own admission is a Brewer and therefore a Manufacturer as well as an NRD, *or any other* Manufacturer/Brewer or NRD, to hold a Distributor's license. In fact, a review of all the relevant provisions reveals that the Act straightforwardly commands the Commission to treat each industry participant, be they a Manufacturer, Distributor or Retailer as a participant or applicant without geographical discrimination. Where the Act does depart from the three-tier system (as with small wine-makers), it expressly instructs the Commission how to regulate the distribution. It does not do so with Brewers.[7]

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[6] The Seventh Circuit has observed that, because legislation is commonly a compromise among competing interests, pushing the meaning of a statute beyond its actual language is a recipe for judicial legislation. *Heath v. Varity Corp.*, 71 F.3d 256, 258 (Easterbrook, J.) ("Yet a court should endeavor to apply all parts of a statute whenever possible. Tensions among statutory provisions are common. Legislation reflects compromise among competing interests); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) ("Statutes are law, not evidence of law.")

[7] Brewers may have won a preliminary legislative battle by persuading the General Assembly to take the initial step of inserting a proviso allowing them to hold a

Alternatively, even if the Act were interpreted, as Plaintiffs would have it, to allow *any* Brewer to have a Distributor's license to sell beer (which for many reasons is a distorted interpretation and contrary to the three–tier system's public policy), there is nothing on the face of the Act that imposes any restrictions or limitations on an out-of-state Brewer.[8] The Act on its face therefore still would not discriminate against out-of-state interests -- or implicate interstate commerce.

This case does not pit in-state interests against out-of-state interests. Rather, it concerns whether a Brewer/Manufacturer and member of the first tier may own and function as a Distributor and member of the middle tier. This is a matter of state law properly left to an Illinois state court to decide.

2. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Due Process Claim

Plaintiffs' federal Due Process claim should be dismissed because this Court lacks subject matter jurisdiction and Plaintiffs have failed to state a claim thereunder.

"The law is clear that the Constitution must not be trivialized by permitting parties to drag it into every dispute involving the state or local government." *Brown v. Brienen*, 722 F.2d 360, 364-365 (7th Cir. 1983) (Posner,

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Distributor's license if they obtained a license "in accordance with the provisions of this Act", but there are no provisions that instruct the Commission when and how to issue such a license and there is nothing in the Act's definitions to create the possibility that a Distributor could be a Manufacturer, or an NRD, or both.

[8] Plaintiffs admit that the definition of Brewer "contains no such qualification" in their Memorandum of Fact and Law to the Commission for the March 2, 2010 hearing. *See id.* at 25, a copy of which is Tab B-5 of the Appendix to Plaintiffs' Summary Judgment motion, Docket No. 31-7.

J.) (affirming District Court dismissal of state employees' §1983 case based on breach of employment contract case when employees could litigate in state court).

Plaintiffs sought the issuance of the nonbinding advisory "Declaratory Ruling." As explained above, regardless of any statements made verbally or in writing regarding the reasons for its determination that ABInc. could not own a Distributor, that decision was correct: the plain language of the Act directs that no Brewer/Manufacturer or NRD may have a Distributor's license. Even if, however, the correct interpretation of the Act is, as Plaintiffs contend, that all Brewers/Manufacturers are eligible for a Distributor's license, the proper way to resolve the question is to file a declaratory action in state court, not seek relief under §1983 in federal court. As the "Declaratory Ruling" was unauthorized and void as a matter of law, it does not preclude Plaintiffs from pursuing state court relief.

It is well-settled in this Circuit that errors of state law are not a violation of the federal Due Process Clause and that the remedy for failure to implement state law lies in state court. *See, e.g., Brown*, 722 F.2d at 364-65*; Germano v. Winnebago County*, 403 F.3d 926, 929 (7th Cir. 2005) (affirming district court's grant of summary judgment in favor of county because no due process violation occurred based on fact that county had acted in violation of state law and the remedy lay in state court); *Cote v. Village of Broadview*, 2009 WL 2475117 (N.D. Ill. August 11, 2009) (dismissing plaintiff's §1983 due process claim against village for terminating pension contributions as no due process violation occurred

based on fact that village had acted contrary to state law and the remedy lay in state court); *Beary Landscaping, Inc. v. Ludwig*, 479 F. Supp. 2d 857, 868-869 (N.D. Ill. 2007) (dismissing §1983 action by landscapers and landscape companies against Illinois Department of Labor ("IDOL") seeking injunctive and declaratory relief and claiming that IDOL's enforcement of the Prevailing Wage Act denied them due process because it was "fundamentally predicated on the mistaken notion that alleged errors and violations by [IDOL] concerning the interpretation and application of the Illinois Prevailing Wage Act constitute a Due Process violation.")

The Seventh Circuit has observed that "[a] state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules. Indeed, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (Easterbrook, J.) (no §1983 due process claim for dispatcher's violation of state law; due process was opportunity for state court remedy).

3. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Contract Clause Claim

Plaintiffs' Contract Clause claim should be dismissed because this Court lacks subject matter jurisdiction and Plaintiffs have failed to state a claim thereunder.

"Just as the Due Process Clause of the Fourteenth Amendment 'does not transform every tort committed by a state actor into a constitutional violation,' … nor does it transform every breach of contract committed by a state actor into a constitutional violation." *Taake v. County of Monroe*, 530 F.3d 538, 542 (7th Cir. 2008) (citations omitted) (remanding to district court for dismissal for lack of subject matter jurisdiction a case where plaintiff sued county under §1983 because county allegedly reneged on contract to sell him land).

First, Plaintiffs here have not alleged that any new law was passed or that any recent legislative change impaired their January 2010 contract.[9] To the contrary, they allege that Defendants misinterpreted the law and applied it in a new way contrary to how it had been applied for some thirty years prior. Plaintiffs therefore have no Contract Clause claim. *See, e.g.*, *Khan v. Gallitano*, 180 F.3d 829, 832 (7th Cir. 1999) (affirming district court's dismissal of attorney's Contract Clause claim against village for interfering with her contract with a client because while she alleged that defendants acted tortiously and possibly unconstitutionally she did not allege that they had passed an unconstitutional law).

Second, in order to prove a substantial impairment -- one of the required elements of a Contract Clause claim -- a party must show that the law disrupts the parties' expectations. The court must consider whether the challenged law

[9] Plaintiffs admitt that "[t]here has been no change in the law, either statutorily or via case law, under which the Commission issued distributor's licenses to ABInc.-owned entities for almost 30 years" in the Memorandum of Fact and Law submitted to the Commission for the March 2, 2010 hearing. *See id.* at 22, a copy of which is Tab B-5 of the Appendix to Plaintiffs' Summary Judgment motion, Docket No. 31-7.

was foreseeable or at least "in the direct path of the plausible" when the original contract was made. If the area of economic activity covered by the contract is highly regulated, then new legislative changes are more likely foreseeable than if the challenged law marks the state's first foray into the area. *Chrysler Corp v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894-895 (7th Cir. 1998) (Posner, J.) (affirming district court's grant of summary judgment for dealer and against Chrysler in Chrysler's suit to have an amendment to Wisconsin's Motor Vehicle Law declared unconstitutional as a violation of the Contract Clause).

Liquor is obviously a highly regulated industry and, as the Complaint itself attests, legislative changes occur. Even were that not the case, however, Plaintiffs could not rely on or have any expectation that a contract for an out of state supplier to purchase a distributor was lawful -- when the Act on its face prohibits such inter-tier ownership.

C. <u>This Motion Is Timely Filed</u>

The Complaint for Declaratory Judgment and Injunctive Relief in the instant action was filed March 10, 2010. *See* Docket #1. WSDI learned of the filing the day after. *See* Jenkins Aff., Exhibit A at ¶10. On April 2, 2010, the Attorney General filed an Answer on behalf of all named Defendants. *See* Docket #25. Also on April 2, 2010, at the initial status in the matter, pursuant to the agreement of and at the request of both counsel for Plaintiffs and the Attorney General, this Court entered an order setting a briefing schedule for

Plaintiffs to file a summary judgment motion and supporting memorandum of law on their Commerce Clause claim. *See* Docket #24.[10]

A prospective intervenor should file "as soon as … [it] knows or has reason to know that [its] interests might be adversely affected by the outcome of the litigation." *Sokaogon Chippewa Community v. Babbit*, 214 F.3d 941, 949 (7th Cir. 2000). Also, in deciding timeliness, a court should consider the prejudice to the original parties caused by any delay and the prejudice to the intervenor if the motion is denied. *Id.* at 949.

This answer was filed as soon as possible and is timely. It has been just over a month since the action was filed. And just over a week from the day WSDI learned that its interest might not be adequately represented by the Attorney General by examining the Answer it filed which defends the positions of the Commission and the Commissioners and the staff but does not contest this Court's jurisdiction over Plaintiffs' claims or seek their dismissal. Further, as of this filing, this Court has not issued any rulings, there has been no discovery and no hearing date on the summary judgment motion or trial date has been set.

As for Plaintiffs, they suffer no real prejudice because this action was filed here in error and should be dismissed. WSDI and its members, however, will suffer greatly if the three-tier system is dismantled.

[10] The order also in light of the briefing schedule set on the summary judgment motion denies as moot Plaintiffs' motion to schedule an expedited declaratory judgment hearing on their Commerce Clause claim which had been noticed up for April 2, 2010.

Given the foregoing, the Motion is timely. *See, e.g., Flying J,* 578 F.3d at 572 (motion filed by association of gas sellers after attorney general failed to appeal was timely); *Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006) ("We don't want a rule that requires a potential intervenor to intervene at the drop of a hat … in the absence of prejudice even a six-week delay would not necessarily be untimely").

II. Alternatively, This Court Should Exercise Its Discretion To Permit WSDI To Intervene

Permissive intervention under 24(b)(1)(B) "is wholly discretionary and will be reversed only for an abuse of discretion. *See, e.g., Sokaogon*, 214 F.3d at 949. The motion need only be timely and show that the applicant has a claim or defense that has a question of law or fact in common with the main action. Neither the "impair or impede" requirement nor the "interest" requirement apply to permissive intervention. *Flying J,* 578 F.3d at 573.

WSDI meets the two requirements for permissive intervention.

First, as set forth above, the motion is timely. Second, there are common questions of law and fact. These are made clear, above, and also are set forth in WSDI's proposed Answer and Affirmative Defenses to the Complaint for Declaratory Judgment and Injunctive Relief, a copy of which is attached to this Memorandum as required by Rule 24(c).

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CONCLUSION

For the foregoing reasons, this Court should grant the relief requested in WSDI's Motion to Intervene.

Dated: April 12, 2010

Respectfully submitted,

By: s/Claudette P. Miller

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CERTIFICATE OF SERVICE

I, Claudette P., Miller, an attorney, certify that on April 12, 2010, the foregoing document was served on all ECF registrants of record in this action using the CM/ECF system.

s/Claudette P. Miller