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

ANHEUSER-BUSCH, INC., WHOLESALER EQUITY DEVELOPMENT CORPORATION, CITY BEVERAGE – ILLINOIS, L.L.C., CITY BEVERAGE L.L.C., CITY BEVERAGE – MARKHAM L.L.C., CHICAGO DISTRIBUTING L.L.C., SD OF ILLINOIS, INC., And DOUBLE EAGLE DISTRIBUTING COMPANY Plaintiffs, v. STEPHEN B. SCHNORF, JOHN M. AGUILAR, DANIEL J. DOWNES, SAM ESTEBAN, MICHAEL F. MCMAHON, MARTIN MULCAHEY, DONALD O'CONNELL, Commissioners, of the Illinois Liquor Control Commission, in their official capacities; And RICHARD R. HAYMAKER, Chief Legal Counsel of the Illinois Liquor Control Commission, in his official capacity Defendants.	Case No. 10 CV 01601 Hon. Robert M. Dow, Jr. Hon. Michael T. Mason

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON THEIR COMMERCE CLAUSE CLAIM

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Defendants admit *all* of Plaintiffs' material facts[2] and have not set out additional facts showing a genuine issue for trial. (Defs'. LR 56.1 Resp. ¶¶ 1-29; Defs'. Resp. at 3.) Most importantly, Defendants admit that they now discriminate against out-of-state brewers with respect to their ability to distribute beer in Illinois. Pursuant to the Supreme Court's decision in *Granholm*, Plaintiffs are entitled to judgment as a matter of law.

AB Inc. has been a distributor in Illinois' three-tier system for more than 25 years. The three-tier system has not collapsed. Illinois' interest in temperance and tax collection has not suffered. Now, however, Defendants' unconstitutional actions threaten this status. This Court should act swiftly to ensure AB Inc. maintains the same right to distribute beer that in-state brewers have.

I. THE LIQUOR CONTROL ACT'S EXPLICIT DISCRIMINATION AGAINST OUT-OF-STATE BREWERS IS SUBJECT TO THE *PER SE* INVALIDITY STANDARD SET FORTH IN *GRANHOLM*.

A. This case is about discrimination against out-of-state brewers.

Under *Granholm*, laws that discriminate by their own terms against out-of-state liquor producers and their products are subject to the rule of *per se* invalidity. *Granholm v. Heald*, 544 U.S. 460, 473-76, 489 (2005) ("State policies are protected under the Twenty-first Amendment

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1 Capitalized and abbreviated terms used herein are ascribed the same meaning as in Plaintiffs' opening brief.

2 Defendants deny paragraph 19 of Plaintiffs' statement of material facts based on citation to record evidence that fails to demonstrate any actual dispute. (*See* Defs'. LR 56.1 Resp. ¶ 19.) The record evidence Plaintiffs cite supports paragraph 19 and thus it must be deemed admitted. First, under Defendants' interpretation, the Liquor Control Act did not prohibit out-of-state brewers from holding Distributor's and Importing Distributor's Licenses prior to 1982. (Plfs'. Tab B4 at 2, 5; Plfs.' LR 56.1 Stmt. ¶ 14.) In addition, according to Defendants, the ILCC did not begin enforcing this provision of the Liquor Control Act in earnest until 2000. (Plfs'. Tab B4 at 5 (*see e.g.*, "The reason for this cannot be explained other than to state that the commission either failed to enforce the provisions of the Act or interpreted the Act in error to allow an NRD to be a distributor.").) In any event, paragraph 19 is not material to the issue of whether Defendants violate the Commerce Clause.

when they treat liquor produced out-of-state the same as its domestic equivalent . . . . The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers."). As they must, Defendants acknowledge that *Granholm* prohibits discrimination against out-of-state liquor producers. (Defs'. Resp. at 16.) Therefore, to avoid certain invalidation of their discrimination against out-of-state beer producers, Defendants attempt to portray this case as one that involves the question of "who can be a distributor." (Defs'. Resp. at 3, 10.) To that end, Defendants contend that the discrimination at issue impacts AB Inc. "only insofar as it wants to act as a *distributor*" and that the discrimination does not affect AB Inc. "in its capacity as producer." (Defs'. Resp. at 14, 16 (emphasis in original).) Thus ignoring the discrimination against out-of-state brewers that *defines* this case, Defendants proceed under a Twenty-first Amendment "core concerns" analysis, which Defendants say three post-*Granholm* cases used to conclude that discrimination is constitutional so long as it has some connection to the distributor or retailer tiers of the three-tier system.

Not surprisingly, unconstitutional discrimination against out-of-state producers cannot be cured through a simple linguistic disguise. Defendants' cited authority of *Siesta Village, Arnold's Wines*, and *Brooks* do not support Defendants' view that discrimination against out-of-state producers is permissible if the state is determining "who can be a distributor." To the contrary, these cases held that only when discrimination against out-of-state producers *is not at issue,* does the Twenty-first Amendment permit states to enact laws that distinguish between retailers and distributors based on the location of their operations. *See, e.g., Siesta Vill. Mkt. LLC v. Steen*, 595 F.3d 249, 258 (5th Cir. 2010) (noting that although *Granholm* prohibits discrimination against out-of-state alcohol products or their producers, "[s]uch discrimination among producers is not the question today"); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) ("Because

New York's three-tier system . . . does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce Clause principles."); *Brooks v. Vassar*, 462 F.3d 341, 352-54 (4th Cir. 2006) ("[Defendants'] argument must be that in-state retailers are favored over out-of-state retailers. . . . [T]his argument is foreclosed . . . . because the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers . . . ."). Indeed, the laws at issue in those cases did not involve producers or distributors in any respect, but rather, involved discrimination against retailers that sought to sell and deliver liquor, from outside the state, to consumers. *Arnold's Wines*, 571 F.3d at 190; *Siesta*, 595 F.3d at 256, 260; *Brooks*, 462 F.3d at 352. In fact, these cases actually *confirmed* that a law that "discriminates in favor of in-state producers or products . . . will only be upheld if it reasonably advances state interests that cannot be adequately served by reasonable nondiscriminatory alternatives." *Arnold's Wines*, 571 F.3d at 189; *Siesta Village*, 595 F.3d at 258 ("At least as to producers, the [*Granholm*] Court held that the [Twenty-first] amendment does not supersede other provisions of the Constitution . . . ."); *Brooks*, 462 F.3d at 354.[3]

It is obvious that the discrimination here is against out-of-state producers. Defendants readily admit that the Liquor Control Act uses the geographic location of brewers to determine "who can be a distributor"—in-state beer producers are eligible to enjoy the advantages of distributing beer in Illinois, while out-of-state producers are not. (Defs'. LR 56.1 Resp. ¶¶ 13-15.) This disparate treatment impacts producers in that an out-of-state brewer's beer must flow

[3] *Brooks* has a particularly interesting twist. That case originally also involved Virginia laws that permitted in-state wineries and breweries to deliver wine and beer to retailers (described as an in-state "distribution privilege") but prohibited out-of-state wineries and breweries from doing the same. *Brooks*, 462 F.3d at 346. The Fourth Circuit did not have to rule on the constitutionality of the in-state "distribution privilege," however, because *Granholm* was decided in the middle of the case, after which "Virginia *conceded* that [the in-state "distribution privilege" was] unconstitutional under *Granholm*." Id. at 347 (emphasis added). Defendants overlooked this history in asserting here that *Brooks* and its sister decisions support discrimination against producers concerning who may enjoy distribution privileges.

through an unaffiliated distributor to reach retailers and thus cannot access the Illinois market on equal terms with in-state brewers, who may sell their beer directly to retailers.[4]

Because the discrimination in this case is focused on out-of-state liquor producers, *Granholm* controls. Indeed, *Granholm itself* shows that Defendants' attempt to reframe the law as involving the question of "who can be a distributor" is futile. In *Granholm*, the Michigan and New York laws permitted in-state wineries to sell wine directly to retailers or consumers but required out-of-state wineries to sell through wholesalers. Under Defendants' view, the Supreme Court should have found these laws valid under the Twenty-first Amendment because they involved a determination of "who can act as a distributor" and "who can act as a retailer." Likewise, according to Defendants, these laws should have been protected by the Twenty-first Amendment because the sale of alcohol to consumers is the traditional function of a retailer in the three-tier system, and thus the winemakers were not acting in the "capacity of a producer." The Court, however, engaged in none of these word games, and instead simply held that these laws *involved discrimination against producers* and thus were not protected by the Twenty-first Amendment. *Granholm*, 544 U.S. at 473-76, 489 ("The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers.").

Defendants' related attempt to distinguish *Granholm* on the ground that AB Inc. seeks to act on multiple tiers of the three-tier system, rather than bypass the three-tier system entirely, is

[4] Defendants admit that in-state producers enjoy a competitive advantage in distributing beer that is denied to out-of-state brewers. (Defs'. LR 56.1 Resp. ¶ 28 ("Defendants admit that the acquisition of the remainder of the CITY Beverage business will permit AB Inc. to 'realize the same common advantages that in-state brewers may achieve by distributing beer.'"); *see also* Defs'. Resp. at 8-9 ("Anheuser-Busch intends to build efficiencies into its beer *production* and distribution process . . . and permit the companies to leverage the competitiveness of their *brands*.") (emphasis added).)

also unavailing.[5] Defendants do not offer an explanation or cite to any legal authority that renders this purported distinction important to the Commerce Clause analysis. This is because their argument consists of pure semantics. As Justice Thomas points out in his dissent in *Granholm* (which Defendants generally cite approvingly) describing a producer as "bypassing the three-tier system" is just another way of saying that the producer is acting as its own wholesaler and retailer. *Granholm*, 544 U.S. at 524 (Thomas, J., dissenting). Either formulation has the same result: an out-of-state producer's product must flow through an unaffiliated distributor to reach retailers and thus cannot access the Illinois market on equal terms with in-state producers who may sell their product directly to retailers. Defendants' purported distinction is thus illusory.[6]

Defendants cannot escape the fact that alcohol beverage laws violate the Commerce Clause if they "create[] specific exceptions to the states' three-tier systems favoring in-state producers." *Arnold's Wines*, 571 F.3d at 191 (noting that such exceptions are "exactly the type of economic protectionist policy the Commerce Clause sought to forestall"). Notwithstanding Defendants' attempt to assert that this case is about "who can be a distributor," the Liquor Control Act's discrimination against out-of-state brewers does exactly this—it creates an

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[5] Plaintiffs' statement that they seek to operate within the three-tier system is intended to make clear that they are not challenging Illinois' right to impose separate regulations on an entity performing the distributor function, as distinct from the regulations imposed on entities performing the producer function. AB Inc. merely seeks to be subject to the same regulations that the Liquor Control Act imposes on any other duly licensed entity that is performing the distributor function in Illinois.

[6] Defendants state that Plaintiffs have presented no case that addresses "the issue presented here." (Defs'. Resp. at 19.) Putting aside the fact that *Granholm* is controlling precedent, Defendants do not acknowledge, let alone attempt to distinguish, Plaintiffs' citation to *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247 (W.D. Wash. 2005), which held that a provision of Washington law that permitted domestic breweries and wineries to be licensed as distributors under the state's three-tier system was unconstitutional under *Granholm*. The *Costco* court thus recognized that laws like the one at issue here involve unconstitutional discrimination against producers. Moreover, *Brooks* demonstrates that Virginia also disagrees with Defendants, as it conceded that the laws that permitted wine and beer producers to enjoy a "distribution privilege" were unconstitutional under *Granholm.* 462 F.3d at 346-47.

exception in favor of in-state producers to the purportedly strict separation of the distributor and producer functions—and thus is subject to the rule of *per se* invalidity.[7]

B. Because the discrimination here is explicit, plaintiffs need not establish a discriminatory purpose or effect for the *per se* standard to apply.

Defendants also incorrectly assert that the *per se* invalidity standard is inapplicable because Plaintiffs do not establish that the law at issue here has a discriminatory purpose or effect. (Defs'. Resp. at 17-18 (describing the "second" and "third" reasons that discrimination is not present here).) A law is subject to the rule of virtual *per se* invalidity if it discriminates against interstate commerce in any one of three ways: the law discriminates explicitly; it has a discriminatory purpose; or it has substantial discriminatory effects. *See, e.g.*, *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 33 (1st Cir. 2007) (noting that a state law that discriminates "on its face, in purpose, or in effect . . . engender[s] strict scrutiny under the jurisprudence of the dormant commerce clause). (*See also* Plfs'. Op. Mem. at 9.) Laws that discriminate explicitly are ones that by their own terms treat disparately in-state and out-of-state economic interests (and favor in-state interests) and sometimes are described as discriminatory "on their face" or "facially discriminatory." *See, e.g.*, *Baude v. Heath*, 538 F.3d 608, 611 (7th Cir. 2008), cert. denied, 129 S. Ct. 2382 (2009).

Defendants' argument therefore first fails because, when a law is explicitly discriminatory, it is unnecessary to establish that it has a discriminatory purpose. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994) (holding that "the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory") (citations omitted); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-76 (1997)

[7] As set forth in more detail *infra*, Arg. III.A, the purported strict separation that Defendants claim is a hallmark of the traditional three-tier system is not as they have portrayed.

("It is not necessary to look beyond the text of this statute to determine that it discriminates against interstate commerce."). This principle recognizes that "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia v. N.J.*, 437 U.S. 617, 626 (1978) (holding in case involving an explicitly discriminatory law, that "[t]his dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue to be decided in this case."); *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 344 (1992) (quoting *Philadelphia*, 437 U.S. at 626-27) (emphasis added) ("[W]hatever [a State's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State . . . .").

With respect to discriminatory effect, Defendants do not argue that the Liquor Control Act provisions at issue do not have a discriminatory effect on out-of-state brewers. It is obvious that permitting in-state producers access to the market on preferential terms, while denying out-of-state producers the same, "benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472. Defendants here specifically admit as much, conceding that the acquisition of the remainder of the CITY Beverage business will permit AB Inc. to "'realize the same common advantages that in-state brewers may achieve by distributing beer.'" (Defs'. LR 56.1 Resp. ¶ 28.) (*See also* Defs'. Resp. at 8-9.)

Defendants instead argue that even though the discrimination here is explicit and has an obvious effect, Plaintiffs must demonstrate that they are "effectively blocked" from the market or are "struggling to survive." (Defs.' Resp. at 17.) This argument fails because there is no *de minimis* exception for a law that explicitly discriminates against interstate commerce. *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) (noting that "actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing

on the determinative question whether discrimination has occurred"); *New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988) ("[W]here discrimination is patent . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); *Jelovsek v. Bredesen*, 545 F.3d 431, 437 (6th Cir. 2008) ("[T]here is no *de minimis* exception when evaluating whether a law is discriminatory on its face."), *cert. denied*, 130 S.Ct. 199 (2009).

The lack of a *de minimis* exception for explicitly discriminatory laws also dooms Defendants' argument that there is no significant discriminatory impact here because "only two small in-state brewers actually act as distributors." (Defs'. Resp. at 7.) The degree to which the discriminatory provision is currently utilized by in-state brewers (*i.e.*, "only *two* small in-state brewers" actually act as distributors) is irrelevant because a law that mandates discriminatory treatment by its own terms is invalid even if there are *no in-state businesses* that currently benefit from the discrimination. *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.2, 340-41 (1989). In *Healy*, a Connecticut statute limited the price that interstate brewers could charge for beer sold in Connecticut, but did not restrict the price that a brewer who sold beer only in Connecticut could charge. *Healy*, 491 U.S. at 340-41.[8] Despite the fact that Connecticut had no brewers of its own or local businesses that actually benefited from the law, the Court held that the statute violated the Commerce Clause because "[o]n its face, the statute discriminate[d] against brewers and shippers of beer engaged in interstate commerce." *Id.* at 326 n.2, 340. In a concurring opinion, Justice Scalia noted that the "statute's invalidity is *fully established* by its facial discrimination against interstate commerce" and specifically rejected the contention that a plaintiff is required

[8] Defendants mistakenly characterize *Healy* as solely related to "extraterritorial" regulation. (Defs'. Resp. at 11.) The Court, however, held that the Connecticut statute also violated the Commerce Clause on the separate ground that the statute expressly discriminated against out-of-state brewers. *Healy*, 491 U.S. at 340.

"to show that a statute which facially discriminates against out-of-state business in fact benefits a particular in-state business." *Healy*, 491 U.S. at 344 & n.* (concurring) (emphasis added).[9]

* * *

Defendants thus fail in their attempt to show that *Granholm*'s *per se* invalidity standard does not apply.

II. THE LIQUOR CONTROL ACT'S DISCRIMINATION AGAINST OUT-OF-STATE BREWERS VIOLATES THE COMMERCE CLAUSE UNDER THE *PER SE* INVALIDITY STANDARD SET FORTH IN *GRANHOLM*.

Defendants concede that by its very terms the Liquor Control Act does not evenhandedly regulate the economic interests of in-state and out-of-state beer producers. (Defs'. LR 56.1 Resp. ¶ 13-15.) Thus, the second step of the applicable Commerce Clause analysis is to determine whether the law meets the very narrow exception to the "virtually *per se* rule of invalidity" by "advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 476, 489; *Or. Waste Sys.*, 511 U.S. at 101. Defendants bear the heavy burden of demonstrating that the "*discrimination* is demonstrably justified." *Granholm*, 544 U.S. at 492 (quoting *Chem. Waste*, 504 U.S. at 344 (emphasis in original)). To meet its burden, the State must come forward with concrete record evidence, rather than mere speculation, that this discrimination *both* serves a legitimate local purpose and that this interest cannot be served by reasonable nondiscriminatory alternatives. *Granholm*, 544 U.S. at 492-93; *New Energy*, 486 U.S. at 280.

9 Justice Scalia further noted that, since there is no *de minimis* exception to the Commerce Clause, "[i]t would make little sense to require a showing that an in-state business in fact exists" and concluded that there was "no reason to impose such a burden in order to strike down a statute that is facially discriminatory under the Commerce Clause . . . ." *Healy*, 491 U.S. at 344 n.*.

In their response, rather than shoulder this burden, Defendants defend this case by arguing that the *per se* invalidity standard does not apply here. Indeed, even in the section entitled "Illinois' three-tier system is legitimate under the Supreme Court's recent *Granholm* decision," Defendants simply attempt to explain why *Granholm*'s *per se* invalidity test is inapplicable. As a result, Defendants do not address their legal burden of demonstrating that the discrimination advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, let alone attempt to satisfy that burden.

To be sure, in the context of explaining why they contend that this case is an attack on the three-tier system, Defendants discuss reasons why "allowing AB Inc. to act as a distributor would undermine the three-tier system." (*See, e.g.,* Defs'. Resp. at 7-9.) Defendants essentially argue that AB Inc.'s exclusion from the distributor tier is justified by the relative size of the current in-state brewers compared with AB Inc. and "the importance of local regulatory control and risk of tax evasion." These arguments, however, seek to justify the existence of a three-tier system, rather than legitimize the need to *discriminate* against out-of-state brewers. Because Defendants have not attempted to meet their burden, Plaintiffs' summary judgment motion must be granted. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986) (holding that summary judgment must be granted to the moving party if the non-moving party fails to establish an essential element of his case on which the non-moving party bears the burden of proof); *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996) (same).

Even if the Court were to consider Defendants' alleged justifications of the three-tier system as an attempt to demonstrate that the Liquor Control Act's discrimination "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," Defendants fall far short of meeting their heavy burden. Under well-established

constitutional jurisprudence, including *Granholm* and a host of other cases involving discriminatory alcohol beverage laws, Defendants' arguments are insufficient as a matter of law to meet the standard that the Supreme Court has described as "so heavy that facial discrimination by itself may be a fatal defect."[10]

As an initial matter, Defendants' reliance on the affidavit of Pamela Erickson to support portions of their arguments is unavailing. The thrust of Ms. Erickson's affidavit is that permitting *any* brewers to distribute beer, especially *any* large brewer, undermines the three-tier system. Ms. Erickson's opinions, consequently, do not explain the need for Illinois to bar *only out-of-state* brewers from distributing beer, which constitutes the discrimination actually at issue in this case. To the extent that Ms. Erickson's affidavit touches on the type of discrimination present here, her views consist of unsupported generalizations and speculation, such as purporting to opine on what "lawmakers" would do in reaction to this Court's summary judgment ruling.[11]

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[10] The arguments that Defendants present are identical to those that have been presented and rejected over and over in other alcohol beverage discrimination cases. *See e.g.*, *Granholm*, 544 U.S. at 490-93; *Beskind v. Easley*, 325 F.3d 506, 516-18 (4th Cir. 2003); *Costco*, 407 F. Supp. 2d at 1255. Moreover, Defendants do not distinguish this case from the legion of cases in which the state failed to meet its burden, or dispute that there is only *one case* in which the Supreme Court has ever found that a state met its burden under the *per se* standard. *See Maine v. Taylor*, 477 U.S. 131 (1986).

[11] Ms. Erickson does not even demonstrate an understanding of the law that is at issue here, discussing instead laws that "some states" enact. (Defs'. App. Ex. F at 12.) To the contrary, her affidavit betrays a fundamental *misunderstanding* of the law at issue, stating "[a]pparently, Illinois has allowed two very small brewers to 'self-distribute.'" (Defs'. App. Ex. F at 12.) As described *infra*, the law at issue here permits *all* in-state brewers to distribute beer and does not distinguish between large and small breweries. Moreover, Ms. Erickson is unable to discuss Illinois-related issues, or for that matter, any other issues, with any greater specificity, instead making statements about liquor regulations in general such as "[m]ost regulatory agencies don't have large legal budgets and their justice departments have other priorities" and "[u]sually, things just get dropped," without explaining the source or basis for her statement. (Defs'. App. Ex. F at 11.) In short, to the extent that it bears on the questions of discrimination that are at issue here, Ms. Erickson's affidavit contains only conclusory assertions. If the Court sees fit to hold an evidentiary hearing in this case, Plaintiffs reserve their right to move to strike Ms. Erickson's opinions, file a *Daubert* motion, and contest the admissibility of any other evidence that Defendants may present.

Defendants' first argument is that the in-state brewers that currently distribute beer "are so small, and produce such a limited volume of beer [that] permitting them to self-distribute does not jeopardize the Act's goal of promoting temperance and competition." (Defs'. Resp. at 8.) On the other hand, AB Inc.'s "size and significant market presence . . . would be a fundamental alteration to the three-tier system." (*Id*.) Defendants are attempting to justify a law different from the one at issue: the Liquor Control Act permits *all* in-state brewers to hold Distributor's and Importing Distributor's Licenses, not just small in-state brewers, and prohibits *all* out-of-state brewers from holding Distributor's and Importing Distributor's Licenses, not just large ones. (*See* Defs'. LR 56.1 Resp. ¶¶ 13-15; 235 ILCS 5/5-1(a).) With respect to the actual Liquor Control Act provisions at issue, Defendants' argument falls flat. It does not attempt to legitimize the need to permit all in-state brewers to distribute beer and bar all out-of-state producers from doing the same in order to further the State's purported goal of temperance and competition, let alone present concrete evidence to that effect.[12]

Defendants' second argument, that "it is more difficult for state regulatory agencies with limited budgets and resources to exert control over out-of-state licensees" and that "there is an increased risk of tax evasion when a producer and distributor affiliate," fares no better. As an

[12] Even if the need to promote temperance and competition were related to the need to bar all out-of-state brewers from distributing beer, while permitting in-state brewers to do so, this argument would be insufficient because Defendants do not attempt to prove that non-discriminatory means would be unworkable to accomplish the State's objectives. Defendants do not address any non-discriminatory alternatives, much less establish that they would not be effective. *Cf. 44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 507 (1996) (explaining that higher prices to promote the goal of temperance can be "maintained by direct regulation or taxation" and educational campaigns might also prove effective). Defendants also do not provide basic information to raise their goals of "temperance" and "competition" above the speculative level, such as, for example, the price at which liquor sales would lead to greater alcohol consumption or why AB Inc.'s presence in the distributor market would result in reduced competition. Moreover, the goal of temperance is inconsistent with the goal of competition, as Defendants maintain that temperance is promoted by *higher* prices (Defs.' Resp. at 9), but competition is beneficial to consumers because it leads to *lower* prices. These inconsistencies and unexplained vagaries demonstrate that Defendants' showing is insufficient to satisfy the rigorous analysis necessary under the rule of *per se* invalidity.

initial matter, this argument does not justify the discrimination against out-of-state producers because Defendants admit that the purported tax collection problem would apply to *all* producers that act as distributors, regardless of where they are located. Defendants, however, state that the purported tax collection problem would be compounded by the fact that AB Inc. is an out-of-state producer. Defendants do not cite to *any* record evidence for this proposition, let alone record evidence of enough substance to meet the rigorous analysis Courts apply. *See generally*, *Granholm*, 544 U.S. at 490-93 ("[T]he States provide little concrete evidence . . . . Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods."); *Chemical Waste*, 504 U.S. at 343 ("[O]nly rhetoric, and not explanation, emerges as to why Alabama targets *only* interstate hazardous waste to meet these goals.") (emphasis in original); *New Energy*, 486 U.S. at 280. Indeed, as explained in more detail *infra*, Arg. III.A., Defendants have had an ample opportunity to build a record of tax fraud or tax collection issues during the more than 25 years that the ILCC issued Distributor's and Importing Distributor's Licenses to AB Inc. or its affiliates, as well as other out-of-state brewers. (Defs'. LR 56.1 Resp. ¶ 10; Plfs'. Op. Mem. at 20-21; Plfs'. App. Tab B4 – Memorandum of R. Haymaker dated March 1, 2010 ("Haymaker Memo.") at 5.) Defendants offered no such evidence.[13]

Moreover, this tax collection justification fails for the same reason that it failed in *Granholm* and in every other case in which it has been presented—Defendants do not establish

[13] The argument is also flawed because Defendants admit that post-acquisition CITY Beverage would remain subject to local regulatory control as an in-state operation (Defs'. LR 56.1 Resp. ¶ 29), and thus Illinois' regulatory control over CITY Beverage would not change. In any case, *Granholm* found it to be of particular importance that the Twenty-first Amendment Enforcement Act gives state attorneys general the power to sue alcohol producers in federal court to enjoin violations of state law. *Granholm*, 544 U.S. at 492; 27 U.S.C. § 122a(b). Defendants do not address this statute or explain why it would be ineffective to exert regulatory control over entities that are not local.

that this regulatory objective cannot be achieved through reasonable non-discriminatory means. *See Granholm*, 544 U.S. at 491-93 (holding that the tax collection objectives could "be achieved without discriminating against interstate commerce" because states did not establish that alternative means would be "unworkable"); *see also, e.g.*, *Costco*, 407 F. Supp. 2d at 1254 (holding that Defendants' argument on tax collection was 'speculative and conclusory at best"); *Cf. Baude*, 538 F.3d at 612 (rejecting tax collection justification even under lower *Pike* standard and stating "[a]ll the [defendants] can muster in support of the statute is that the three-tier system may help a state collect taxes and monitor the distribution of alcoholic beverages").[14]

Defendants have failed to show a genuine issue for trial on their burden of establishing that the explicit discrimination against out-of-state brewers "advanc[es] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." This Court must grant summary judgment for Plaintiffs.

III. THE APPROPRIATE REMEDY FOR DEFENDANTS' COMMERCE CLAUSE VIOLATION IS EXTENSION OF THE IN-STATE BENEFITS TO AB INC., RATHER THAN NULLIFICATION OR DELAY PENDING GENERAL ASSEMBLY ACTION.

This Court should exercise its discretion to extend the in-state benefit to AB Inc. and WEDCO. *See Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 434-35 (6th Cir. 2008) (subjecting extension of in-state benefit remedy to abuse of discretion review); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("The decision to grant or deny permanent

[14] For example, Defendants fail to explain what series of "cross checks" it normally uses to guard against collusion, why these normal "cross checks" are unavailable when a brewer is located outside the state, and why alternative methods of cross checking are "unworkable."

injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.").

A. Extension of the in-state benefits to AB Inc., rather than nullification of those benefits, is the only appropriate remedy here.

Plaintiffs' opening brief set forth specific evidence of the Illinois General Assembly's intent and preference for extension of the in-state benefit to out-of-state producers and the lack of disruption to the current statutory scheme that would result from such extension. Defendants fail to respond to any of that evidence. Although Defendants acknowledge that the Supreme Court in *Heckler v. Matthews* cautioned that courts must "consider the intent of the legislature and the degree of potential disruption of the statutory scheme" (Defs'. Resp. at 22-23), Defendants do not set forth their own analysis of these considerations to any degree of substance.[15]

Instead, Defendants devote the majority of their response to trying to convince this Court how drastically it will alter the "three-tier system" to permit out-of-state brewer AB Inc. to distribute beer in Illinois and the severe consequences to Illinois consumers that will follow. But in doing so, Defendants rely on generalizations regarding the characteristics of a purported "traditional" three-tier system, and ignore the actual three-tier system in Illinois and the role that AB Inc. and other brewers have played as a licensed distributor in that system for decades.

As an initial matter, Defendants generalized characterizations about a "three-tier" system are unsupported. The phrase "three-tier system" is a general label used to describe a regulatory system with separate licensing required for each of the three functions in the production,

[15] Defendants' brief discussion of the Illinois Beer Industry Fair Dealing Act is inapposite. (Defs'. Resp. at 24.) The provisions that Defendants cite govern the legal relationship between producers and distributors that are *in fact* separately owned, and is entirely neutral as to whether a producer may also be licensed to perform the distribution function.

distribution, and retail sale of liquor. There is not, however, a uniform three-tier act or model code, and thus there is no particular legal significance to the term. Instead, each state creates its own regulatory system. While many states, like Illinois, have created a three-tier structure, the language of each particular state's law controls how the regulatory system functions. Defendants' characterization of a "traditional" three-tier system as mandating a "strict separation between liquor producers, distributors, and retailers" and a "'vertical quarantine' such that 'no layer in the vertical hierarchy [may] act in the capacity of another'" (Defs'. Resp. at 4), is overbroad, and certainly so as to Illinois.[16] The Liquor Control Act does not contain any such "strict" affirmative prohibition against brewers also performing the distributor function, unlike it does for winemakers and distillers. *See* 235 ILCS 5/6-4(a) ("No person licensed . . . as a distiller, or a wine manufacturer . . . shall be issued an importing distributor's or distributor's license . . . .). Indeed, the central issue in this case is that the Liquor Control Act affirmatively permits in-state brewers to act "in the capacity of" a distributor and transcend the "vertical quarantine."[17] Thus, as to brewers, the purported strict separation between producer and distributor is simply illusory.

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[16] Although it is true that many states have some restrictions with respect to licensure in multiple tiers, the idea that these prohibitions are absolute is incorrect, particularly with respect to distributors. As a historical matter, Defendants describe the prohibition against vertical integration as addressing the problem of the "tied house" and note the concern associated with producers "control[ling] the *entire* distribution process down to the final sale." (Defs'. Resp. at 4-5 (emphasis added).) *See also* 27 U.S.C. § 205 ("Tied house" provision of the Federal Alcohol Administration Act prohibiting producers and distributors from owning, or offering anything of value to, "*any* retailer"). Thus, it is common for state law to prohibit manufacturers and distributors from operating retail establishments (saloons or "houses"), and so it is true that generally (although not always) manufacturers and distributors cannot act as a retailer. (*See* 235 ILCS 5/6-4(e) (setting forth certain prohibitions against ownership of retailers by producers and distributors).)

[17] Illinois is far from alone in licensing a brewer to perform the distribution function in the three-tier system. As Defendants explain, AB Inc. relies on a network of eleven company-owned distributors in other states, (Defs'. LR 56.1 Stmt. ¶ 10.) In fact, there are more than 20 states that permit AB Inc. to be a licensed distributor (or be affiliated with a distributor), all of which consider themselves "three-tier." (*See* Kamp Aff. (Ex. 1 hereto) ¶¶ 5-6.) Also, the federal government licenses brewers to perform the distributor function and AB Inc. in fact performs both the brewer and distributor functions under applicable federal regulations, including pursuant to a federal Wholesaler Basic Permit. (*See id.* ¶ 7.)

Moreover, Defendants fail to acknowledge the overwhelming evidence that Plaintiffs submitted in their opening brief as to the long-standing practice in Illinois of permitting out-of-state brewers to perform both the production and distribution functions, which demonstrates that a "strict separation" of tiers as to brewers has not, and does not, exist in reality. As explained in Plaintiffs' opening brief, AB Inc. or its affiliates have continuously held Distributor's and Importing Distributor's Licenses from at least 1982 through the present. (*See* Plfs'. Op. Mem. at 20-21.) Specifically, each year from 1982 through 2005, the ILCC issued to AB Inc. in its own name one or more Distributor's and Importing Distributor's Licenses (Defs'. LR 56.1 Resp. ¶ 10), and during much of that period, one or more affiliates of AB Inc. also held one or more Distributor's and Importing Distributor's Licenses. (*Id.*) During much of the period from 1982 through 2005 other out-of-state brewers also were permitted to hold Distributor's and Importing Distributor's Licenses. (Plfs.' App. Tab B4 –Haymaker Memo. at 5.) Moreover, WEDCO has owned from 2005 through the present a 30 percent stake in CITY Beverage and the Declaratory Ruling specifically permits WEDCO to retain its current minority interest in CITY Beverage due to the "history and facts surrounding this case." (Defs'. LR 56.1 Resp. ¶¶ 5, 26.) Consistent with that exception, on April 1, 2010, the ILCC issued its annual renewal of CITY Bloomington's Distributor's and Importing Distributor's Licenses. (*Id.* ¶ 27.) Thus, extending the in-state benefit of distribution rights to out-of-state brewers will not violate a "strict separation" of the tiers, and would be entirely consistent with the historical practice in Illinois of permitting out-of-state brewers to hold Distributor's and Importing Distributor's Licenses.[18]

[18] In a footnote, Defendants contend that Plaintiffs are attempting to do more than is permitted of in-state brewers by distributing products other than their own. (Defs'. Resp. at 20 n.13.) Defendants, however, are merely seeking a remedy that reflects the opportunity available to in-state brewers. The plain language of the Liquor Control Act does not contain a prohibition against brewers distributing products other than their own and, in fact, permits in-state brewers to hold *Importing* Distributor's Licenses, which would be unnecessary if they *(cont'd)*

Plaintiffs' evidence also demonstrates that Defendants' contention that the extension of the in-state benefit would "undermine the State's interest in temperance, regulatory control, and tax collection" is, at best, speculative. Defendants' theories have been continuously tested in Illinois over the course of the more than 25 years while out-of-state brewers (including AB Inc. and its affiliates) have performed both the producer and distributor functions under Illinois' "three-tier system." Yet Defendants have failed to come forward with a shred of evidence to support their concerns. Indeed, from 1982 through the present when AB Inc., its affiliates, or other brewers distributed beer in Illinois, the three-tier system obviously did not "collapse . . . and cripple the State's ability to promote temperance." (*See* Defs'. Resp. at 8.) If out-of-state producers performing the distribution function in the last few decades actually led to the problems that Defendants insist will now materialize, Defendants would have presented evidence of that fact to this Court. Instead, Defendants proffer the affidavit of Ms. Erickson, who in offering her opinions does not address in any respect the fact that out-of-state brewers have *actually owned* Illinois distributors over the past three decades, but rather presents vague or second-hand anecdotes about problems in Oregon and the United Kingdom.

On the other hand, nullifying the right of in-state brewers to distribute beer would negate a right that the General Assembly has afforded since 1947. Despite admitting that three in-state brewers currently hold Distributor's Licenses and that two of those three actively distribute their

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were only permitted to distribute their own beer brewed in-state. *See* 235 ILCS 5/5-1(a). Under *Healy*, it is irrelevant that Argus and Big Muddy only seek to distribute their own beer because a law that mandates discriminatory treatment by its terms is invalid even if there are *no in-state businesses* that take advantage of the law. *Healy*, 491 U.S. at 326 n.2, 340-41. As Justice Scalia noted, "[i]t would make little sense to require a showing that an in state business in fact exists" and concluded that there was "no reason to impose such a burden in order to strike down a statute that is facially discriminatory under the Commerce Clause, any more than we would require the person challenging under the Fourteenth Amendment a state law permitting only Aleuts to vote by mail to show that there are in fact Aleut citizens of the State capable of benefiting from that discrimination." *Id.* at 344 n.*.

products, Defendants urge this Court to specifically nullify those brewers' distributing rights.[19] Given that none of these in-state brewers is a party to this action, it would be inequitable and raise serious due process concerns to nullify the in-state benefit and thus deprive in-state brewers of their current licenses or the opportunity in the future to hold such licenses. *Pro's Sports Bar & Grill v. City of Country Club Hills*, Inc. 589 F.3d 865, 870 (7th Cir. 2009) ("[A]n Illinois liquor license is a form of property within the meaning of the due process clause.") (citing *Club Misty, Inc. v. Laski*, 208 F.3d 615, 617-20 (7th Cir. 2000)); *see also See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("We have described 'the root requirement' of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.") (emphasis, quote marks, and citation omitted); *Wainscott v. Henry*, 315 F.3d 844, 852 (7th Cir. 2003) ("The Due Process Clause requires that individuals have an opportunity to be heard at a meaningful time and in a meaningful manner regarding the deprivation of life, liberty, or property.") (quote marks and citation omitted).[20] Defendants' request that this Court countermand the express will of the General Assembly to permit in-state brewers to distribute beer should be declined.

Moreover, permitting out-of-state brewers to distribute beer is also consistent with the intent of the General Assembly. In their opening brief, Plaintiffs demonstrated that the Liquor

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[19] Defendants identify Argus, Big Muddy, and Goose Island as three in-state brewers that distribute beer and note that Argus and Big Muddy actually distribute beer, while Goose Island does not. (Defs'. LR 56.1 Stmt. ¶¶ 5-7; Plfs'. LR 56.1 Resp. ¶¶ 5-7.) Defendants also correctly note that AB Inc. possesses a minority ownership interest in Goose Island and that AB Inc. mistakenly asserted that Goose Island actually distributes beer. Nonetheless, Argus and Big Muddy currently hold Distributor's Licenses and distribute beer, as Defendants admit.

[20] Similarly, nullifying the in-state preference would have the effect of criminalizing the act of distribution by in-state brewers. See, e.g., 235 ILCS 5/10-1(a) & (d). (See Ans. ¶ 46.)

Control Act unambiguously permits brewers that hold a Brewer's license to hold Distributor's and Importing Distributor's Licenses:

> A Brewer may make sales and deliveries of beer . . . to retailers provided the brewer obtains an importing distributor's license or distributor's license in accordance with the provisions of this Act.

See 235 ILCS 5/5-1(a). (Plfs.' LR 56.1 Stmt. ¶ 14.) *See also* Op. Ill. Att'y Gen. S-1462 at 127-28 (1979) (formal opinion of Attorney General stating a brewer may hold Distributor's and Importing Distributor's Licenses, attached hereto as Ex. 2) (Defs'. Resp. at 6 n.3.). Beyond this, for a comprehensive explanation of why the Liquor Control Act evidences the intent of the General Assembly to permit all Brewers, in-state and out-of-state, to be licensed to distribute beer, we respectfully refer the Court to pages 12-22 of Plaintiffs' submission to the ILCC in connection with the Special Session, which is included at Tab A5 of Plaintiffs' Appendix.[21]

Defendants also fail to address Plaintiffs' evidence that the Illinois General Assembly is apparently well aware of *Granholm* and already has expressed a clear preference for extension of the in-state benefit to out-of-state interests under that decision. After the Supreme Court decided *Granholm*, the Illinois General Assembly amended Section 5/6-29 of the Liquor Control Act to "authorize direct shipment of wine by an out-of-state maker of wine *on the same basis permitted an in-state maker of wine*. . . ." 235 ILCS 5/6-29 (a)(1) (2007) (emphasis added). This is powerful evidence that the best alternative for this Court is to extend the in-state benefit to out-of-state brewers.

[21] Defendants criticize Plaintiffs for setting forth, as one component to their evidence of the General Assembly's intent, this parsing of the Liquor Control Act's relevant provisions and related legislative and enforcement history. Plaintiffs agree that this Court must accept Defendants' interpretation of the Liquor Control Act for purposes of determining whether the Liquor Control Act violates the Commerce Clause. This does not mean, however, that this Court should turn a blind eye to the General Assembly's intent and the history of the Liquor Control Act when deciding between extension and nullification. This is important evidence under *Heckler*'s requirement that courts consider "the intent of the legislature."

Defendants cite to *Beskind*, 325 F.3d 506; *Costco*, 407 F. Supp. 2d 1247; and *Action Wholesale Liquors v. Oklahoma Alcoholic Beverages Law Enforcement Commission*, 463 F. Supp. 2d 1294 (W.D. Okla. 2006), in support of their argument that this court should nullify the in-state benefit, or at least provide the General Assembly time to act. These courts, however, all arrived at a remedy *after* analyzing "the intent of the legislature and the degree of potential disruption of the statutory scheme," as *Heckler* requires. Defendants have not undertaken such an analysis in this case. Moreover, as Plaintiffs explained in their opening brief, the requisite analysis is fact-specific and thus comparison to these cases, which involved different statutory schemes and different circumstances, is unhelpful.

For example, *Beskind* and *Action Wholesale* each involved long-standing non-discriminatory provisions that would be affected by extension of a recently enacted in-state benefit. *Beskind*, 325 F.3d 506 at 519 (noting that "North Carolina has maintained its ABC laws in implementation of the Twenty-first Amendment since 1937, shortly after the end of Prohibition, *but only added the preference for local wineries over 40 years later . . . .*") (emphasis added); *Action Wholesale*, 463 F. Supp. 2d at 1305-06 (involving recently enacted law intended to aid the fledgling local wine industry).[22] The reverse is true here because the Liquor Control Act has expressed a preference for brewers to enjoy the right to distribute beer since 1947. (Plfs'. App. Tab G.) With respect to *Costco*, plaintiffs' proposed remedy would have required the amendment of six statutory provisions, and "more significant changes in the State's licensing, enforcement, and tax collection efforts for beer and wine than withdrawing the privilege from in-state producers." *Costco*, 407 F. Supp. 2d at 1255-56. Here, Plaintiffs'

[22] *Action Wholesale* also involved wholesalers suing to invalidate self-distribution privileges of wineries and thus seeking to nullify the in-state privilege for their own economic benefit at the expense of in-state wineries. *Action Wholesale*, 463 F. Supp. 2d at 1305-06.

proposed remedy would not involve *any* modifications to the Liquor Control Act, given that the plain language of the Liquor Control Act would support Plaintiffs' right to distribute. (*See* Ex. A to Plfs'. Mot.)[23] Plaintiffs' proposed remedy thus does not present the same concerns as in *Costco*, and in fact, is less disruptive to the statutory scheme than Defendants' remedy, which proposes striking a clause of 235 ILCS 5/5-1 in order to eliminate discrimination. (Defs'. Resp. at 23 n.15.)[24]

B. This Court need not afford the General Assembly additional time to amend the Liquor Control Act.

After the Supreme Court decided *Granholm*, the Illinois General Assembly recognized the import of the decision and amended Illinois law in conformance. (*See* Plfs'. Op. Mem. at 18-19.) If the General Assembly believed that the Liquor Control Act discriminated against out-of-state brewers, it logically would have acted at that time to remedy the discrimination. This Court, therefore, should not wait for the General Assembly to take action that it does not intend to take.

This point also shows comparison to *Costco* and *Action Wholesale* to be inapt. The courts in those cases, decided in 2005 and 2006 respectively, were giving the Washington and Oklahoma legislatures a limited opportunity to react to the then very recent decision in *Granholm* (decided May 16, 2005). The *Granholm* decision is now five years old. Not only has

[23] Plaintiffs do not seek to modify any provisions of the Liquor Control Act. The phrase "other than a manufacturer or non-resident dealer" in the definition of "Distributor" would not require a change because it merely clarifies that manufacturers and non-resident dealers are not automatically Distributors simply because they engage in some of the same conduct that is used to *define* a Distributor. For example, warehousing of alcohol liquor for resale is a function performed at multiple tiers of the system, 235 ILCS 5/5-1(m), 5/1-3.15, and thus the definition of Distributor would be overinclusive without the qualifier that excludes manufacturers and non-resident dealers that warehouse beer in connection with their functions. (*See also* Plfs'. App. Tab A5 at 14-16.)

[24] Defendants' proposed remedy would require striking a second provision in the Liquor Control Act. Section 5/6-4(a) provides that an Importing Distributor or Distributor that was owned by a brewer on January 1, 1985 may own a wine manufacturer. 235 ILCS 5/6-4(a). The Court would thus also have to excise this provision from the Liquor Control Act if it nullifies brewers' distribution rights.

the General Assembly had ample time to enact and amend laws in response to *Granholm*, but it already used that opportunity to take the action that it believed necessary in response to *Granholm*, as it amended the wine-shipper provision.

It is particularly important to avoid needless delay because it is of the utmost urgency to Plaintiffs that this case be resolved quickly. Defendants admit that the result of their ongoing constitutional violation is to suspend an extremely important transaction for Plaintiffs and that Plaintiffs will continue to suffer great harm until final adjudication of their Commerce Clause claim. (Defs'. LR 56.1 Resp. ¶ 28.) If this case is not concluded soon, the opportunities presented to all of the parties in this transaction could be lost. Thus, the harm to Plaintiffs of waiting for the General Assembly to act is irreparable. *See also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm"). In contrast to this harm, Defendants can only muster speculative and generalized possibilities of what may result from WEDCO acquiring CITY Beverage.

The balance of the equities thus weighs against staying judgment until the General Assembly has an opportunity to act on this matter. *See Baude v. Heath*, No. 05-cv-0735, 2007 U.S. Dist. LEXIS 64444 at *97-98 (S.D. Ind. 2007) (emphasizing that "a stay of judgment would perpetuate economic protectionism and harm to the Plaintiffs for additional months . . . while providing the State with limited, or at least uncertain, benefit"). This is particularly so because Plaintiffs' proposed remedy would not involve *any* modifications to the Liquor Control Act. (*See* Ex. A to Plfs'. Mot.),[25] but rather would have the effect of enjoining Defendants from a discriminatory interpretation of the Liquor Control Act. This lack of disruption to the current

[25] A WordPerfect version of this proposed order is submitted by e-mail concurrently herewith.

statutory scheme, combined with the specific evidence of the Illinois General Assembly's intent and preference for extension of the in-state benefit to out-of-state producers, demonstrate that this court should not wait for the General Assembly to act.

CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiff's motion for summary judgment on their Commerce Clause claim and enter a declaratory judgment as described herein.

Dated: May 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

Edward M. Crane, an attorney, hereby certifies that on May 14, 2010, he caused true and correct copies of the foregoing Plaintiffs' Reply In Support Of Their Motion For Summary Judgment On Their Commerce Clause Claim, to be served via the Court's ECF filing system on Defendants' counsel of record:

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