

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

ANHEUSER-BUSCH, INC. et al.,)	
)	
Plaintiffs,)	
)	Case No.: 10-CV-01601
vs.)	
)	Hon. Robert M. Dow, Jr.
)	
STEPHEN B. SCHNORF, et al.,)	
)	
Defendants.)	

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION TO EXTEND THE
STAY OF ENFORCEMENT OF SEPTEMBER 3, 2010 ORDER THROUGH THE
DISPOSITION OF THEIR APPEAL**

1. Because the Illinois Liquor Control Commission has no direct stake in the outcome of plaintiffs’ motion for a stay pending their appeal, defendants take no position on the motion. Defendants respectfully request, however, that the Court postpone ruling on the motion until after the legislative session ends on May 31, 2011. This would ensure that the Court’s ruling does not interfere with the ongoing legislative process, which is exactly what plaintiffs want.

The Current Status of the Pending Legislation

2. The Illinois General Assembly will soon vote on legislation amending the Liquor Control Act to permit small producers to self-distribute regardless of their location. On March 8, 2011, SB 754 passed the Senate (48-1-3) with overwhelming support. Two days ago, the bill passed unanimously (11-0) out of the House’s Executive Committee. SB 754 currently has *seventy-two* sponsors in the House, and the number continues to grow. It has been read twice already, has been moved for a third reading, and should go to a vote sometime next week.

3. Exhibit A hereto is a copy of SB 754. The bill permits “craft brewers” who manufacture up to 465,000 gallons of beer per year to apply to the Commission for a self-distribution exemption. (Ex. A at 1-2)¹ The exemption, if granted, allows for the sale of up to 232,500 gallons per year of its beer to retail licensees. (*Id.* at 14-17) The bill is intended to “promote and continue orderly markets,” and recognizes that “in order to preserve Illinois’ distribution system, it is necessary to create an exception for smaller manufacturers in order to afford and allow such smaller manufacturers of beer access to the marketplace in order to develop a customer base without impairing the integrity of the 3-tier system.” (*Id.* at 16-17)

Anheuser-Busch’s Efforts to Block the Pending Legislation

4. SB 754 eliminates the discrimination that provided the basis for Anheuser-Busch’s commerce clause claim. If the proposed legislation passes, it will moot plaintiffs’ appeal and their motion for a stay pending appeal. Nevertheless, Anheuser-Busch has hired eleven high-powered lobbyists in an effort to kill the legislation. Exhibit B hereto is a letter from Anheuser-Busch’s lobbyists to Senator Munoz. In the letter, Anheuser-Busch requests that “**no action be taken on the bill**” unless this Court denies its request for a stay. (Ex. B) Notwithstanding this Court’s order maintaining the stay “to and including May 31,” the company falsely represents that “the judge stayed his remedy until May 27.” (*Id.*) Then, proceeding from this incorrect premise, the company asserts (without any basis) that this Court will decide plaintiffs’ motion for a stay “before the scheduled May 31 adjournment and with sufficient time for the legislature to act if necessary.” (*Id.*)

¹ The applicant must disclose the volume of beer it produced each year since its establishment, describe its efforts to establish distributor relationships, and certify that a self-distribution exemption is necessary to facilitate the marketing of its beer. (*Id.* at 14-15)

5. Anheuser-Busch's strategy is transparent. It wants to secure an early ruling on its motion for stay, so that if the motion is granted, it can try to block SB 754 by arguing that the legislation is not urgent. It wants to take its chances on appeal. Exhibit C hereto is a handout to City Beverage employees urging them to contact their legislators and ask them to "wait on acting on these two bills² to allow the judicial process to run its course." (Ex. C at 2) Even though this Court specifically concluded that the issues presented here are best-resolved by the legislature,³ the handout suggests telling the legislators that "a remedy is in process in the federal court system and passage of these bills will interfere with the process." (*Id.* at 3) To avoid playing into Anheuser-Busch's strategic maneuvering, this Court should hold off on deciding plaintiffs' motion for a stay until after May 31, 2011, when the legislative session ends.

The Illinois Liquor Control Commission's Decision to Support the Pending Legislation and Take No Position on Plaintiffs' Motion for a Stay

6. By taking no position on plaintiffs' motion for a stay, defendants do *not* mean to imply that the pending legislation is not necessary or urgent. To the contrary, the Illinois Liquor Control Commission supports SB 754. In a recent letter to Representative Mautino (attached as D hereto), the Commission's Executive Director explains why it is important for the legislature to act now. (Ex. D) The Commission has already received multiple inquiries from small brewers seeking to self-distribute, but cannot process these requests because of the Court's ruling. (*Id.*)

² This refers to Senate Bill 88/House Bill 205, the predecessors to SB 754.

³ This Court stayed its order "to provide the Illinois General Assembly with an opportunity to act." (Dkt. No. 118 at 37) The Court recognized that "the regulation of the distribution of liquor is a matter of public policy and a quintessential legislative function," that state regulation of the liquor industry "involves legislative judgments with respect to temperance, public safety, taxation, licensing, and consumer protection, which courts are not well-equipped to make," and that "the legislative process offers more flexibility for solving the constitutional deficiency than is available judicially." (*Id.* at 35-38)

7. Defendants take no position on the motion for a stay simply because the Commission has no direct stake in its outcome. In their motion, plaintiffs emphasize the potential harm to themselves if they are forced to relinquish their 30% interest in City Beverage. (Dkt. No. 165 at 6-7) But Anheuser-Busch's profit margins are not the Commission's concern. Under the Court's September 3, 2011 order, plaintiffs cannot legally hold an interest in an Illinois distributor.⁴ The Commission will work with plaintiffs to implement the Court's ruling once it takes effect.

8. Plaintiffs also emphasize that several small brewers may be harmed if the stay is lifted and they lose their self-distribution rights. But to be clear, the Commission has no interest in seeing this happen. Unlike Anheuser-Busch, the Commission *supports* SB 754. Earlier in this case, defendants said: "Because these companies are so small, and produce such a limited volume of beer, permitting them to self-distribute does not jeopardize the Act's goal of promoting temperance and competition." (Dkt. No. 65 at 8) Defendants preferred "nullification" over "extension" for a remedy, but they stand behind their statement that small brewers can self-distribute without negatively impacting the State's three-tier system.

9. Still, defendants cannot affirmatively support plaintiffs' motion for a stay. Defendants accept the Court's ruling that the Act's distinction between in-state and out-of-state producers is unconstitutional, and are prepared to begin implementing the Court's remedy immediately. Plaintiffs, in contrast, are requesting a stay that would perpetuate the very discrimination they challenged. Defendants are aware of no case supporting this type of request, and plaintiffs cite no such case.

⁴ Last year, the Commission renewed City Beverage's distributor's license based on "the history and facts surrounding this case," but cautioned that its decision would have "no bearing on future legal declarations or rulings of the Illinois Commerce Commission."

The Two Brothers Brewing Company/Windy City Distribution Company Situation

10. Finally, defendants wish to briefly address plaintiffs' claim that they "failed to disclose" that a third Illinois brewer (in addition to Argus and Big Muddy) "has been operating a distributorship business in Illinois." (Dkt. No. 178 at 8)⁵ Plaintiffs state that Two Brothers Brewing Company holds a brewer's license, Windy City Distribution Company holds a distributor's license, and they share common family ownership. (*Id.*) But this is not a situation where a single entity holds a brewer's and distributor's license in the same name, like Argus and Big Muddy currently do. As the attached affidavit from Richard R. Haymaker confirms, in connection with this litigation the Commission conducted a search of its databases for all entities holding both a brewer's license and a distributor's license, and the search did not reveal that Two Brothers held a distributor's license. (Ex. E at ¶¶ 2-3)

11. During the course of the negotiations relating to SB 754, multiple sources made references in the presence of Commission staff that Two Brothers was commonly owned by Windy City. (*Id.* at ¶ 4) The Commission reviewed their license records in late March 2011. (*Id.* at ¶ 5) On April 5, 2011, Mr. Haymaker and Commission staff met with representatives of Two Brothers and Windy City; confirmed that they are commonly owned; and informed them, based on the Court's ruling prohibiting a brewer from being a distributor, that the Commission would require the common ownership to be divested. (*Id.* at ¶¶ 6-8)

⁵ In their response to plaintiffs' motion for summary judgment, defendants stated that two small in-state brewers "currently hold distribution rights, and they are limited to distributing their own products." (Dkt. No. 65 at 7) Plaintiffs admitted as much in their response to defendants' LR 56.1 statement. (Dkt. No. 86 at ¶ 5)

12. In sum, defendants take no position on plaintiffs' motion for a stay, but respectfully request that this Court defer ruling on the motion until after May 31, 2011, when the legislative session ends, to avoid interfering with the legislative process. Any other approach would reward plaintiffs' gamesmanship. The Commission represents that it will not take any action to implement the Court's decision on the merits until the Court decides whether to extend the stay.

Dated: May 20, 2011

LISA MADIGAN
Attorney General of Illinois

Respectfully submitted,

/s/ Michael T. Dierkes

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on May 20, 2011, he caused copies of the foregoing **Defendants' Response to Plaintiffs' Motion to Extend Stay of Enforcement of September 3, 2010 Order** to be served on all registered counsel via the Northern District of Illinois Electronic Filing System.

/s/ Michael T. Dierkes _____
Michael T. Dierkes