IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MILLERCOORS LLC, **Plaintiff,** **v.** **CHESBAY DISTRIBUTING CO., INC.,** **Defendant.**	**Civil Action No. 2:12-CV-00530-MSD-LRL**

MEMORANDUM IN SUPPORT OF REYES HOLDINGS, L.L.C.'s MOTION TO INTERVENE UNDER RULE 24

Reyes Holdings, L.L.C. (including itself and its subsidiaries, inclusive of the entities comprising the Reyes Beverage Group division, collectively referred to below as "Reyes"), by and through its undersigned counsel, respectfully submits this Memorandum in Support of its Motion to Intervene in the above-captioned action pursuant to Rule 24 of the Federal Rules of Civil Procedure.

In this case, MillerCoors L.L.C. ("MillerCoors") mounts an assault on the "unquestionably legitimate" three-tier system of alcohol distribution in the Commonwealth of Virginia, and throughout the United States. *Granholm v. Heald*, 544 U.S. 460, 489 (2005). It does so to seize control over, and convert the value from, its vast nationwide distribution network. To get there, MillerCoors asks this Court to ignore Virginia law (enacted pursuant to the 21st Amendment) and create new federal law under the guise of federal trademark protection. MillerCoors' untenable legal position would effectively dismantle the three-tier system in Virginia and elsewhere. Reyes is the largest MillerCoors distributor in the country, an existing Virginia MillerCoors distributor, and the purchaser whom MillerCoors seeks to block, on purported grounds of preemption, from purchasing Chesbay Distributing Co., Inc.'s

("Chesbay's") distribution rights. As a result, this case directly and substantially impacts Reyes' unique business and legal interests. Reyes has no choice but to intervene to protect those interests.

The facts behind this case are straightforward. Defendant Chesbay has distributed malt based alcoholic beverage products, including MillerCoors products, in Virginia for many years and, earlier this year, decided to get out of the business. For months, Chesbay attempted to negotiate a sale of its assets with several entities handpicked by MillerCoors. Those negotiations all failed. In late August, Chesbay reached an agreement to sell its assets to Reyes, the largest MillerCoors distributor in the United States. MillerCoors now strenuously objects to the sale of Chesbay's business to Reyes, without any reasonable basis to do so under Virginia law. MillerCoors brought this suit against Chesbay, claiming that Chesbay's sale to Reyes violates federal trademark law and further violates Chesbay's distributor contract with MillerCoors. Meanwhile, another potential buyer, which was picked by MillerCoors and is partially owned by MillerCoors, has offered to purchase Chesbay's distribution business on terms similar to those Reyes spent substantial time and resources negotiating.

The Court should grant Reyes' motion to intervene in this case. Having negotiated the challenged purchase of Chesbay's assets, which will result in a substantial expansion of Reyes' business in Virginia, Reyes has a direct stake in the outcome of this case, and its interests are not adequately represented by any existing parties. Reyes thus has a right to intervene. In addition, as the largest MillerCoors distributor in the United States (and the largest already in Virginia), Reyes has a strong interest in defending against MillerCoors' unprecedented efforts to overturn the three-tier system in Virginia and elsewhere, making permissive intervention appropriate.

FACTUAL BACKGROUND

A. The MillerCoors Joint Venture, New Distribution Agreement, and Subsequent Regulatory Scrutiny.

MillerCoors was founded in late 2007 as a joint venture between SABMiller and Molson Coors Brewing Company. In 2008, MillerCoors asked its distributors across the country to sign a new distribution agreement, which included an array of onerous, one-sided terms. Facing regulatory scrutiny and a tidal wave of industry criticism over the new distribution agreement, MillerCoors promised Virginia regulators and distributors, and state agencies and all distributors across the country, that it did not intend to, and would not, violate or ignore state laws. Declaration of Raymond M. Guerin ("Guerin Decl.") ¶ 13 (Ex. 1). To the contrary, MillerCoors repeatedly represented (under oath, in some states) that any state law would prevail in the event of a conflict with any contract. In fact, Section 13.2 of the agreement defers to state law in areas of conflict.

For example, in April 2009, the Virginia Department of Alcoholic Beverage Control ("VA ABC") identified the contract provisions at issue in this case, among others, as conflicting with Virginia law. The VA ABC sought MillerCoors' express assurance that it "will not seek to enforce [certain] provisions of the Distributor Agreement . . . with respect to Virginia wholesalers." Declaration of Bryan M. Killian ("Killian Decl.") ¶ 3, Ex. 15. In response, MillerCoors promised that Virginia state law controls and guaranteed wholesalers "the full protection of the law of their home state:"

> Where there is a conflict [with Virginia law], Section 13.2 comes into play. As you note in your letter and as MillerCoors has repeatedly acknowledged, in the event of any conflict Section 13.2 of the MC Agreement expressly gives wholesalers the full protection of the law of their home state. Under Section 13.2, as in the legacy Miller and Coors agreements, ***if any provision of the MillerCoors agreement conflicts with Virginia law, Virginia law supersedes the agreement and controls***.

Id. Ex. 4 (emphasis supplied).

Months earlier, MillerCoors made the same promise to the Nevada Attorney General, Bureau of Consumer Protection, in response to the Nevada Attorney General Office's written opinion that the distribution agreement may give rise to conduct violating Nevada law. The Nevada Attorney General's Office requested that MillerCoors reply and address "the steps MillerCoors is taking to ensure compliance with those statutes . . . ." MillerCoors responded:

> Section 13.2 expressly states that if any provision conflicts with state law, state law controls. We have also reiterated that point repeated in clarifications and communications with our distributors. ***If Nevada state law specifically prohibits particular conduct which would then be inconsistent with a provision of the Agreement, then such provision would have no effect in Nevada as a result of Section 13.2***.

Id. Ex. 9 (emphasis supplied).

MillerCoors made the same promise in a letter to the Michigan Liquor Control Commission in October 2008:

> However, we recognize that different states have different laws and regulations relating to the interactions between suppliers and wholesalers. Therefore, in order to ensure that all relevant state laws, including all "Tied House" laws, are taken into consideration, Section 13.2 of the Agreement expressly states that if any provision conflicts with state law, state law controls. We have also reiterated that point in subsequent clarifications to our wholesalers . . . Thus, due to this conflict provision, ***any provision of the Agreement that would be prohibited under MCL436.1403; MCL436.1603; MCL436.1609; and Rule 436.1651(3) continues to be prohibited and is not valid for Michigan wholesalers***. Therefore, the "signing" of the Agreement does not cause any violations.

Id. Ex. 13 (emphasis supplied). In a statement to the Michigan Liquor Control Commission during a hearing on these topics, MillerCoors' Associate General Counsel repeated the promise:

> MS. GREBE: Exactly and that is why we have a provision, Section 13.2, which provides that the laws and rules of the particular jurisdiction control. They supersede . . . I even provided that in a letter to you, Madam Chair, that said we acknowledge that Michigan law controls and ***if there is a situation where a particular enforcement would be in violation, Michigan law would control, notwithstanding the language in the contract***.

Tr. at 27:24-28:8 (Dec. 30, 2008) (Killian Decl. ¶3, Ex. 10) (emphasis supplied). Ms. Grebe could not have been more clear: "[W]e have included the provision which we call the savings

clause, 13.2, that states that if you have specific provisions in your law that are going to conflict with these provisions, your law prevails and ***we will abide by your law***." *Id.* at 28:19-23.

MillerCoors also repeated this promise to California's Department of Alcoholic Beverage Control. In a letter to California's beer distributor trade association, the California Department of Alcoholic Beverage Control stated its understanding that MillerCoors' "position, as expressed to us, is that paragraph 13.2 of the agreement acts as a restriction against ***implementation or enforcement*** of any provision of the agreement that would be in conflict with California law." Killian Decl. ¶ 3, Ex. 11 (emphasis supplied); *see also* E-mail from Beer Marketers INSIGHTS, Vol. 10, No. 96, (Nov. 12, 2008) (Killian Decl. ¶ 3, Ex. 14) (MillerCoors CEO Tom Long "'repeatedly' assur[ed] [California state association executives and regulators] that state law applies 'in all aspects governing the agreement'").

Based on these representations (and many others like them), Reyes, other distributors, and state regulators across the country detrimentally relied on MillerCoors' promises to comply with state law. The acquisition at issue in this case illustrates this reliance, as explained next.

B. Reyes Holdings.

Founded in 1976, Reyes Holdings, L.L.C., including but not limited to its subsidiaries comprising the Reyes Beverage Group division, is a family owned and operated beverage and foodservice distribution company. Guerin Decl. ¶ 4 (Ex. 1). It began as a small beer distribution business in Spartanburg, South Carolina. *Id.* Three decades later, Reyes is one of the largest privately held companies in the country, with annual sales in excess of $19 billion. *Id.* ¶ 8. Protecting and growing high quality brands is the lifeblood of Reyes' business. *Id.* ¶ 16. As the largest MillerCoors distributor in the United States, Reyes is licensed to use, and required by contract to protect, the MillerCoors trademarks in six different states, including Virginia, and the District of Columbia. *Id.* ¶ 10. Since 2000, Reyes has expanded its distribution of MillerCoors

products in California, Florida, Illinois, Maryland, South Carolina—and on six different occasions in Virginia—each with the consent of MillerCoors or its predecessor entities. *Id.* ¶ 7. During that time, MillerCoors has recognized Reyes for its outstanding performance (as have many other suppliers) on multiple occasions. *Id.* ¶¶ 5, 12. For example, since 2000, Reyes has received, among other awards, the MillerCoors High Life Achievement Award, the Outstanding Performance Award for Volume Increase, the Coors Brewing & St. Jude's Hospital Appreciation Award, the Coors Brewing Company President's Award, and the Miller Brewing Company Mid-Atlantic Distributor of the Year Award. *Id.* ¶ 12.

Reyes has distributed beer in Virginia since 1988. *Id.* ¶ 6. It operates Premium Distributors of Virginia, L.L.C. ("Premium"), which distributes MillerCoors and other brands in 26 counties and 7 independent cities, all within the Commonwealth. *Id.* ¶ 5. At the MillerCoors National Convention in March 2012, Premium received the Bill Coors Award for obtaining the best quality assurance score of any MillerCoors distributor in the country. *Id.*; *see also* Memorandum in Support of Complaint of Chesbay Distributing Company, filed before the Virginia Alcoholic Beverage Control Department in *Chesbay Distributing Company v. MillerCoors LLC*, dated Sept. 18, 2012 ("Chesbay Mem.") ¶ 6 (Killian Decl. ¶ 3, Ex. 2). In the last 12 months alone, Reyes has distributed the equivalent of 47.5 million 24-unit cases of 12-ounce cans of MillerCoors product, including over 6 million in Virginia. Guerin Decl. ¶ 9 (Ex. 1). In not one instance—in the last year, ***or ever***—has MillerCoors so much as suggested that Reyes did not adequately protect the MillerCoors trademarks. *Id.* ¶ 11.

Over the past decade, the beer industry has experienced a trend of consolidation, with the consolidation of major beer brands into foreign-owned mega-brewers, such as Anheuser-Busch InBev and MillerCoors. Brewers have sought to consolidate their distribution network and,

consistent with this trend, Reyes steadily and carefully has expanded its operations in Virginia and throughout the United States. MillerCoors' Virginia import license was conditioned on MillerCoors' agreement that its sale of products into Virginia were pursuant to, and in compliance with, the relevant statutes and regulations of the Commonwealth governing beer importer licenses. In reliance on MillerCoors' promise to comply with those state laws and regulations (the same ones MillerCoors now says are unenforceable), Reyes has invested substantial financial and other resources to expand its business, taking on significant risk along the way. Guerin Decl. ¶ 15 (Ex. 1). MillerCoors' actions now threaten to devalue those investments, at the expense of state laws.

C. The Distributor Agreement, Purchase Agreement, and Subsequent Litigation.

Pursuant to a 2009 agreement with MillerCoors (the "Distributor Agreement"), Chesbay currently holds an exclusive license to use MillerCoors trademarks in connection with the wholesale distribution of MillerCoors products in a portion of Virginia—specifically, in Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Virginia Beach, Williamsburg, and James City and York Counties. *See* Compl. ¶¶ 1, 14. Pursuant to the Distributor Agreement, Chesbay delivered to MillerCoors a notice of its intent to sell its MillerCoors distributorship in May 2012. *See* Chesbay Mem. ¶ 3 (Killian Decl. ¶ 3, Ex. 2). MillerCoors then decided to exercise its purported contractual right to negotiate for the purchase of the distributorship. *Id.* Solely out of loyalty to MillerCoors, and not based on any enforceable contractual obligations, Chesbay agreed to negotiate in good faith. After 90 days of unsuccessful negotiations with a potential purchaser handpicked by MillerCoors—which had no experience in the beer industry—Chesbay commenced negotiations with Reyes. *Id.* ¶¶ 4-6. Throughout these negotiations, MillerCoors continued to direct other potential purchasers to Chesbay. *Id.* ¶ 7.

Chesbay chose Reyes' offer as the best. *Id.* Accordingly, on August 28, 2012, Reyes entered into a binding Asset Purchase Agreement ("Purchase Agreement") with Chesbay to purchase Chesbay's wholesale beer distribution business, inclusive of distribution rights for brands produced and/or supplied by MillerCoors, Heineken U.S.A., Crown Imports, L.L.C., D.G. Yuengling & Son, Inc., Boston Beer Corporation, Pabst Brewing Company, and others. *Id.* ¶ 8; Guerin Decl. ¶ 14 (Ex. 1). Chesbay informed MillerCoors that it had executed the Purchase Agreement two days later. Chesbay Mem. ¶ 8 (Killian Decl. ¶ 3, Ex. 2).

In response, MillerCoors advised Chesbay that the sale to Reyes breached the Distribution Agreement, in that it violated MillerCoors' "right of first refusal" to purchase the distributorship.[1] *Id.* ¶ 9; Compl. ¶¶ 40-42. Shortly thereafter, MillerCoors informed Chesbay that it intended to exercise its right of first refusal; later, MillerCoors assigned its purchase right to another party, OHMC L.L.C. Chesbay Mem. ¶ 9 (Killian Decl. ¶ 3, Ex. 2); Compl. ¶ 43. The sale of the distributorship to OHMC would, of course, necessarily block the sale to Reyes under the binding Purchase Agreement and place Chesbay in breach of the purchase Agreement with Reyes.

On September 18, 2012, Chesbay filed a complaint against MillerCoors before the Virginia Alcoholic Beverage Control Department, alleging that MillerCoors' efforts to enforce the Distribution Agreement "blatantly disregarded the existence and applicability of the Virginia Beer Franchise Act," which limits the extent to which a brewer may object to the sale of a distributor's business. Complaint of Chesbay Distributing Company ("Chesbay Compl.") ¶ 1

[1] The so-called "right of first refusal" provision is at the heart of the instant suit. Chesbay is expected to argue that such a provision is fundamentally at odds with Virginia franchise law (*see, e.g.*, Chesbay Mem. ¶ 3 ("various control devices in Article 8 [of the Distributor Agreement] . . . conflict with Virginia law") (Killian Decl. ¶ 3, Ex. 2))—a law that MillerCoors alleges is preempted by the Lanham Act, as discussed further, *infra*. *See* Compl. ¶ 52.

(Killian Decl. ¶ 3, Ex. 2);[2] *see* VA. CODE § 4.1-507. On the heels of Chesbay's administrative filing, MillerCoors filed its First Amended Complaint ("Complaint") against Chesbay seeking to block the sale to Reyes. The Complaint alleges that the sale to Reyes would render MillerCoors' registered trademarks subject to infringement. The Complaint further alleges that the federal Lanham Act preempts the Virginia Beer Franchise Act, to the extent it would allow Chesbay to sell to Reyes over MillerCoors' objection. *See* Compl. ¶¶ 44-52. The Complaint also alleges that the sale to Reyes will breach Chesbay's Distributor Agreement. *Id.* ¶¶ 53-66.

Peculiarly, MillerCoors did not name Reyes—the very party that MillerCoors alleges "would be engaged in trademark infringement" upon the consummation of the Purchase Agreement—in its Complaint. *Id.* ¶ 45. As the largest MillerCoors distributor in the United States, Reyes must, by contract and good business practice, protect the MillerCoors trademark. And as the awards Reyes has received make clear, Reyes is a highly qualified distributor often recognized as one of the finest in the MillerCoors network. Reyes is, without question, the largest protector of MillerCoors trademarks in the country. Because Reyes' purchase of Chesbay's MillerCoors distributorship would pose no threat whatsoever to MillerCoors' trademarks, MillerCoors' implicit Lanham Act claims against Reyes lack merit.

To the contrary, it is MillerCoors' conduct that violates applicable law. In late 2008 and early 2009, soon after it consummated the MillerCoors joint venture, MillerCoors released a new distributor agreement that drew industry-wide scorn and almost instantly devalued MillerCoors and its vast distributor network. Facing regulatory scrutiny and distributor revolt over the agreement, MillerCoors promised state agencies and its distributors across the country that it would honor state laws. *See* pp. 3-5, *supra*. MillerCoors has now proven, through this lawsuit,

[2] The Chesbay administrative complaint and memorandum in support are attached together as Ex. 2 to the Killian Decl.

that it never intended to honor those representations. It made them simply to get the regulators off its back, quell its distributor uprising, and implement its onerous agreement as a Trojan Horse that it could later use to seize control over its wholesalers. MillerCoors' misrepresentations induced Reyes to invest substantial financial and other resources into the acquisition of Chesbay, among many other acquisitions. Guerin Decl. ¶¶ 13, 15 (Ex. 1). MillerCoors' unsupported rejection of Reyes, and its efforts in this lawsuit to upend Virginia law, will unlawfully interfere with the Chesbay-Reyes contract and the resulting economic benefits.

GROUNDS FOR INTERVENTION

A. Reyes may intervene as of right.

Federal Rule of Civil Procedure 24(a)(2) provides that upon timely motion, a court "must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Fourth Circuit has acknowledged that "liberal intervention is desirable . . . ." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986); *see also South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 785 (8th Cir. 2003) ("Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.") (citation omitted). A party seeking to intervene as of right must satisfy four requirements:

> First, the intervenor must submit a timely motion to intervene in the . . . proceeding. Second, he must demonstrate a "direct and substantial interest" in the property or transaction. Third, he has to prove that the interest would be impaired if intervention was not allowed. Finally, he must establish that the interest is inadequately represented by existing parties.

In re Richman v. First Woman's Bank, 104 F.3d 654, 659 (4th Cir. 1997) (citing FED. R. CIV. P. 24(a)(2)). Reyes' motion meets each of these requirements.

1. Reyes' request for intervention is timely.

MillerCoors just filed the Complaint on September 21, 2012. The case remains in its initial pleadings stage. Indeed, no other pleadings have been filed yet, other than the motion to dismiss filed on October 5, 2012 by defendant Chesbay (Reyes seeks leave to file a motion to dismiss of its own, which is attached to this motion as Ex. A). The parties suffer no prejudice by Reyes' intervention at this juncture. *See Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989). Thus, Reyes' request is timely.

2. Reyes has a "direct and substantial interest" in the transaction at the heart of this case.

"To be protectable, the putative intervenor's claim must bear a close relationship to the dispute between the existing litigants and therefore must be direct, rather than remote or contingent." *Dairy Maid Dairy, Inc. v. United States*, 147 F.R.D. 109, 111 (E.D. Va. 1993) (citation omitted). Reyes' interest falls well within this rubric. As the purchaser of the Chesbay distribution business under the Purchase Agreement—a binding contract made through fair arms-length negotiations, after the investment of substantial resources in the negotiation process—Reyes has an undeniable direct and substantial interest in acquiring the distributorship, for which Reyes agreed to pay valuable consideration. *See Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970) ("Interests in property are the most elementary type of right that Rule 24(a) is designed to protect.") (citing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 122, 129 (1967), and *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 826 (5th Cir. 1967)).

MillerCoors deliberately assigned its alleged purchase right to OHMC *after* it became aware of the execution of the Purchase Agreement between Chesbay and Reyes. In doing so, MillerCoors signaled its intent to deprive Reyes of the benefit of its bargain by interfering with

the Purchase Agreement (to which MillerCoors is not a party). Indeed, through Count II of its Complaint—a misguided allegation that the Lanham Act preempts Virginia state law invalidating restrictions imposed in the Distributor Agreement—MillerCoors seeks to block Reyes' acquisition of the distributorship and invalidate or induce the breach of the Purchase Agreement. Thus, Reyes has an unequivocal interest in this case.

Similarly, Count I of the Complaint makes direct accusations against Reyes without identifying Reyes by name. MillerCoors alleges that the "*Purchaser* named in the Purchase Agreement"—that is, *Reyes*—"would be engaged in trademark infringement" under the Lanham Act if the Purchase Agreement were consummated. Compl. ¶ 45 (emphasis supplied); *see also id.* ¶ 48 ("Any attempt by the *Purchaser* to distribute the MillerCoors Brands and use the MillerCoors Trademarks in the Licensed Territory without the prior written consent of MillerCoors would constitute unfair competition . . . .") (emphasis supplied). MillerCoors' allegation that Chesbay's "transfer and attempted transfer of its license" to Reyes "causes and threatens to cause irreparable harm to MillerCoors" also directly implicates Reyes, in that it implies that Reyes would infringe MillerCoors' trademarks upon purchasing Chesbay's distributorship. *Id.* ¶ 50. Given that Reyes is the largest *protector* of the MillerCoors trademark in the country, and a longtime distributor of MillerCoors products in numerous major metropolitan areas across the country, having been approved as a successor distributor over 20 times since 2000 by MillerCoors or its predecessor entities, Reyes has a direct and substantial interest in countering MillerCoors' offensive implications to protect both its right to purchase the distributorship and its good name. *If MillerCoors could establish Reyes as an infringer, it could injure Reyes' distributorship interests elsewhere in Virginia and around the country.*

3. Given its direct and substantial interests in this suit, Reyes' interests undoubtedly would be impaired if the Court did not allow intervention.

Reyes easily meets the third *Richman* requirement for intervention as of right. MillerCoors' Prayer for Relief specifically requests that this Court declare that "the *Purchaser* [*i.e. Reyes*] has no right to use the MillerCoors Trademarks . . . and that any requirement of state law that would deprive MillerCoors of its rights under the Lanham Act would be preempted." Compl. Prayer for Relief ¶ (a) (emphasis supplied). The Complaint further asks the Court to "award MillerCoors specific performance of the Distributor Agreement . . . ." *Id.* ¶ (b). The declaratory judgment requested, by its plain language, would directly impair Reyes' right to use MillerCoors trademarks. Further, an award of specific performance of the Distributor Agreement, together with a declaration that the Lanham Act preempts Virginia state law barring such performance, would thwart Reyes' ability to acquire Chesbay's distribution business and consummate the Purchase Agreement—a fully executed and binding contract for which Reyes expended considerable resources during negotiations, and pursuant to which Reyes has agreed to pay significant consideration upon closing. *See* Guerin Decl. ¶ 15 (Ex. 1).

4. The current parties to the litigation cannot adequately protect Reyes' interests.

While Chesbay and Reyes have "similar" interests, in that both wish to enforce the Purchase Agreement, their interests are "not identical." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). Reyes has suffered, and will continue to suffer, unique and significant harm to its business by virtue of MillerCoors' conduct. Should MillerCoors succeed in interfering with the executed Chesbay-Reyes contract, Reyes' resulting injuries will be separate and distinct from Chesbay, requiring different relief. In fact, MillerCoors demands that Chesbay sell its business to an alternative purchaser, OHMC, and allegedly has assigned Reyes'

right to acquire Chesbay's distribution rights to that entity. Compl. ¶ 58. As a result, Chesbay cannot adequately protect Reyes' interest in acquiring the Chesbay distributorship. *Trbovich*, 404 U.S. at 538 n.10 ("The requirement of [Rule 24] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.") (citation omitted). Accordingly, Reyes is entitled to intervene as of right. *See* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1909 (3d ed. 2007) ("[A]ll reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party, to intervene so that the absentee may be heard in his own behalf.") (citing *Trbovich*, 404 U.S. 528).

B. At a minimum, this Court should grant Reyes permission to intervene.

Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Courts have acknowledged that "[p]ermissive intervention may be permitted when the intervenor has an economic interest in the outcome of the suit." WRIGHT ET AL. § 1911 (citing *Textile Workers Union of Am., CIO v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955)). Reyes unquestionably has a substantial economic interest in the outcome of this litigation. If MillerCoors succeeds with its claims, Reyes will lose the profit-expanding opportunity presented by the Chesbay deal, in addition to losing the resources it invested in negotiating the Purchase Agreement with Chesbay.

This case also raises substantial questions of law and fact, which have ramifications in every state where Reyes distributes alcohol (for MillerCoors and others) through a three-tier system. Like Reyes, beer distributors across the country and longtime industry experts view MillerCoors' claims as a gross reading of MillerCoors' form distributor agreement and as part of

an effort by MillerCoors to regulate and micromanage distributors.[3] In attempting to enforce the contract provisions at issue, MillerCoors effectively seeks to violate the laws of numerous states, including the Virginia Beer Franchise Act. The provisions have been scrutinized and criticized in the past, and MillerCoors publicly responded that the distribution agreements did *not* violate state franchise laws. Now, MillerCoors alleges that federal trademark law trumps those same state franchise laws. *See* E-mail from Beer Business Daily, "MillerCoors Uses Nuclear Option; Reyes Responds" (Sept. 25, 2012) (Killian Decl. ¶ 3, Ex. 5). Reyes has a strong interest in upholding the beer franchise laws of Virginia and other states, and in seeing MillerCoors held to its prior representations that state law governs where, as here, the contract is inconsistent with it.

MillerCoors' theories also endanger the widespread three-tier system for distributing beer and other alcohol. Among many other benefits, this system has helped to prevent deaths from counterfeit alcohol and overconsumption. *Beer Distributors Unite to Support Sale of Chesbay Distributing to Reyes Holdings, Oppose Online Alcohol Sales*, PR NEWSWIRE, *available at* http://www.prnewswire.com/news-releases/beer-distributors-unite-to-support-sale-of-chesbay-distributing-to-reyes-holdings-oppose-online-alcohol-sales-171590621.html (Sept. 27, 2012) (Killian Decl. ¶ 3, Ex. 8). The three-tier system is constitutionally protected; states have primary control over it. *See Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (describing the three-tier system as "unquestionably legitimate"). Granting beer manufacturing giants like MillerCoors the power to negotiate the sales of beer distributorships would severely curtail wholesale

[3] *See, e.g.*, E-mail from Keith Strama, General Counsel, Wholesale Beer Distributors of Texas, "WBDT Response to Miller/Coors" (Sept. 28, 2012) (Killian Decl. ¶ 3, Ex. 3) ("Texas Distributors are extremely disappointed that MillerCoors has filed a legal challenge to the validity of state franchise laws . . . It is time for MillerCoors to prove that it truly values its relationship with its brand distributors and unequivocally acknowledge the validity of state franchise laws. The Wholesale Beer Distributors of Texas call on MillerCoors to immediately withdraw its challenge to the Virginia franchise law.").

distributors' rights to contract, depress the value of the wholesalers, and potentially put an incalculable number of family-owned American wholesalers out of business. *See* Killian Decl. ¶ 3, Ex. 3; E-mail from National Beer Wholesalers Association, "Confidential Member Update" (Sept. 28, 2012) (Killian Decl. ¶ 3, Ex. 7) (MillerCoors' preemption argument, "if eventually proven successful, could be very detrimental to the independent beer distribution system"). As Reyes is a key player in the three-tier systems of many states, it has a strong interest in rejecting MillerCoors' attack on the system.[4]

CONCLUSION

WHEREFORE, Reyes Holdings respectfully requests that this Court grant its Motion to Intervene as of right, or, in the alternative, exercise its discretion to grant permissive intervention.

In support of this Motion, Reyes Holdings concurrently submits its Motion to Dismiss under Rule 12(b)(6) and, alternatively, Rule 12(c) as Ex. A, and respectfully requests that this Court permit Reyes to file the Motion to Dismiss. *United States v. Virginia*, 282 F.R.D. 403, 406 (E.D. Va. 2012).

---

[4] Other industry experts agree. They have echoed calls for MillerCoors to drop the instant suit. Eric Criss, the President of the Beer Industry of Florida, called the state-based three-tier distribution system "acclaimed by public health experts worldwide" and deemed state franchise laws a "critical component of the three tier-system," which protects local, family-owned beer distributors against the large foreign brewers that now control 80 percent of the international beer market. E-mail from Beer Business Daily, "Distributor State Association Comes Out Blasting Against Lawsuit" (Sept. 28, 2012) (Killian Decl. ¶ 3, Ex. 6). Accordingly, Mr. Criss "call[ed] on MillerCoors to drop its lawsuit against Chesbay Distributing and end its unwarranted attack on family-owned distributorships." *Id.* The California Beer and Beverage Distributors ("CBBD") are in accord: "CBBD strongly urges MillerCoors to withdraw its challenge to Virginia's franchise law, which will serve the best interests of the beer industry, and help preserve an orderly market for the sale and distribution of alcoholic beverages." Press Release, California Beer and Beverage Distributors (Oct. 1, 2012) (Killian Decl. ¶ 3, Ex. 12).

Dated: October 8, 2012

Respectfully submitted,

BINGHAM MCCUTCHEN LLP

/s/ *Ky E. Booth Kirby*___________________

Ky E. Booth Kirby
Virginia Bar No. 25353
David B. Salmons
Bryan M. Killian
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006-1806
Telephone: 202.373.6000
Facsimile: 202.373.6001
ky.kirby@bingham.com
david.salmons@bingham.com
bryan.killian@bingham.com

Geoffrey M. Howard
(*pro hac vice* application pending)
Brian C. Rocca
(*pro hac vice* application pending)
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2285
geoff.howard@bingham.com
brian.rocca@bingham.com

Morton Siegel
Siegel Moses & Schoenstadt PC
444 North Michigan Avenue, Suite 2600
Chicago, IL 60611-3903
Telephone: 312.658.2000
Facsimile: 312.658.2022
ms@smslaw.com

Counsel for Reyes Holdings, L.L.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October 2012, a true and accurate copy of the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Michael J. Lockerby
Foley & Lardner LLP
3000 K Street NW, Suite 600
Washington, DC 20007-5143
Telephone: 202.672.5300
Facsimile: 202.672.5399
mlockerby@foley.com

Michael Wilson Youtt
King & Spalding LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002
Telephone: 713.751.3220
Facsimile: 713.751.3290
myoutt@kslaw.com

Myrna Salinas Baumann
King & Spalding LLP
401 Congress Avenue, Suite 3200
Austin, TX 78701
Telephone: 512.457.2015
Facsimile: 512.457.2100
mbaumann@kslaw.com

Counsel for Plaintiff MillerCoors L.L.C.

William Franklin Devine
Adam Casagrande
Williams Mullen (Norfolk)
1700 Dominion Tower
999 Waterside Drive
Norfolk, VA 23510
Telephone: 757.622.3366
Facsimile: 757.629.0660
bdevine@williamsmullen.com
acasagrande@williamsmullen.com

Robert Charles Van Arnam
Williams Mullen (NC-NA)
P.O. Box 1000
Raleigh, NC 27602-1000
Telephone: 919.981.4000
Facsimile: 919.981.4300
rvanarnam@williamsmullen.com

Sarah Kate McConaughy
Williams Mullen (Virginia Beach)
222 Central Park Avenue, Suite 1700
Virginia Beach, VA 23462
Telephone: 757.499.8800
Facsimile: 757.473.0395
smcconaughy@williamsmullen.com

Counsel for Defendant Chesbay Distributing Co., Inc.

/s/ *Ky E. Booth Kirby*___________________
Ky E. Booth Kirby
Virginia Bar No. 25353
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006-1806
Telephone: 202.373.6000
Facsimile: 202.373.6001
ky.kirby@bingham.com

Counsel for Reyes Holdings, L.L.C.