

**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	)	Case No. 10 CV 01601
BEVERAGE L.L.C., CITY BEVERAGE –	)	
MARKHAM L.L.C., CHICAGO DISTRIBUTING	)	
L.L.C., SD OF ILLINOIS, INC., And DOUBLE	)	Hon. Robert M. Dow, Jr.
EAGLE DISTRIBUTING COMPANY	)	
	)	Hon. Michael T. Mason
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.	)	

**PLAINTIFFS’ RESPONSE TO THE AMICUS BRIEFS OF THE  
ASSOCIATED BEER DISTRIBUTORS OF ILLINOIS AND  
THE WINE & SPIRITS DISTRIBUTORS ASSOCIATION**

John J. O’Shea  
FALLUCCA & O’SHEA, P.L.C.  
3400 E. Lafayette  
Detroit, MI 48207

Counsel for Plaintiffs CITY Beverage –  
Illinois L.L.C., CITY Beverage L.L.C.,  
Chicago Distributing L.L.C., CITY Beverage  
– Markham L.L.C., SD of Illinois, Inc., and  
Double Eagle Distributing Company

Edward M. Crane  
Albert L. Hogan, III  
Mark E. Rakoczy  
Andrew J. Fuchs  
Nathan A. Shev  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
155 N. Wacker Drive  
Chicago, Illinois 60606

Counsel for Plaintiffs Anheuser-Busch, Inc. and  
WEDCO

This case seeks to remedy the ongoing unconstitutional discrimination against Plaintiffs by Defendants, all of whom are state actors acting under color of the Liquor Control Act. Like Defendants' opposition brief, the *amicus* briefs filed by the Associated Beer Distributors of Illinois ("ABDI") and the Wine & Spirits Distributors Association ("Wine & Spirits") (together, the "*Amici*") focus on the merits of the three-tier licensing system in Illinois in an attempt to divert the Court's attention from the discrimination that defines this case. This unconstitutional *discrimination* against out-of-state brewers is at issue here, not the merits or constitutionality of the three-tier system, as the *Amici* would have this Court believe. *Granholm v. Heald*, 544 U.S. 460 (2005).

In further attempts to distract this Court from the discrimination at issue in this case, the *Amici* proffer several novel legal theories and arguments, all of which miss the mark. First, in an argument joined by neither ABDI nor Defendants, Wine & Spirits contends that this Court lacks subject matter jurisdiction, even though Defendants acknowledge that they discriminate against out-of-state brewers, and would hold Plaintiffs in violation of the law were their transaction concluded. The *Amici* then attempt to obscure *Granholm's* clear mandate by arguing (albeit for different reasons) that *Granholm* really does not apply. Further, the *Amici* encourage the Court to ignore altogether the *actual discrimination* against out-of-state brewers that Defendants acknowledge and perpetuate, and instead to decide this case as if their hypothetical—and obviously self-motivated—construction of the Liquor Control Act were really the law. Finally, the *Amici* repeat Defendants' unsupported generalizations about "the" three-tier system in the hope that the Court will overlook the actual provisions of the Liquor Control Act and what brewers, including AB Inc., have been allowed to do in Illinois for decades. As all of these

arguments lack merit, this Court's attention should not be diverted from Defendants' ongoing constitutional violation. The swift justice needed here should not be delayed.

**A. Wine & Spirits' jurisdictional argument is meritless.**

A case or controversy exists in a declaratory judgment action so long as the dispute is "definite and concrete, touching the legal relations of parties having adverse legal interests" and is "real and substantial." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted). Stated differently, there must be a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127 (citation omitted). Whatever the outer boundaries of establishing such a controversy, it is well-settled that a party need not violate the law and risk adverse action to have standing to challenge the constitutionality of a statute. *Id.* at 128-29 ("Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat--for example, the constitutionality of a law threatened to be enforced.") (emphasis in original).

The dispute at the heart of this case is "definite and concrete" and "real and substantial," regardless of whether the Declaratory Ruling is void, as Wine & Spirits contends. As of February 11, 2010, the parties to the CITY Beverage transaction had completed virtually all preconditions to closing and were within 24 hours of concluding the deal. (*See* Defs'. LR 56.1 Resp. (Docket No. 69) ¶¶ 22-23.)<sup>1</sup> On the evening of February 11, 2010, Defendant Haymaker stated in a letter

---

<sup>1</sup> Indeed, the material closing documents had been prepared and the necessary funds had been transferred from various accounts to a particular WEDCO account to facilitate wiring the purchase price to the Soave Entities. (Plfs'. SJ App. Tab A (Docket No. 31-1) ¶ 10.) AB Inc. and WEDCO had taken other substantial steps in preparation for the imminent closing, such as already enrolling the CITY Beverage employees in AB Inc. benefit plans and making a significant capital investment in IT infrastructure to transition the business to AB Inc.'s IT systems, including arranging for computers and servers to be installed immediately after the closing. (cont'd)

that, based on the “current ILCC interpretation of the Liquor Control Act,” it would be unlawful for WEDCO to consummate the acquisition of CITY Beverage. (*Id.* ¶ 23; Plfs’ . SJ App. Tab B-1 (Docket No. 31-3) at 1.) The ILCC and its staff have repeatedly expressed and confirmed this view, making clear their intent to consider the transaction illegal and to enforce the Liquor Control Act should the transaction be consummated. (*See, e.g.,* Defs’ . LR 56.1 Resp. (Docket No. 69) ¶¶ 13-16.) The threat of purchasing a business in violation of the law reasonably precluded WEDCO and AB Inc. from closing the acquisition on February 12, 2010, as it would subject Plaintiffs to administrative, civil, and criminal penalties, and also potentially render the value of the acquired business worthless. (*Id.* ¶¶ 13-16, 18, 23, 25.) Defendants’ continued adherence to their position remains a barrier to closing the transaction. (*See, e.g., id.* ¶¶ 13-16.)

At bottom, Wine & Spirits is arguing that Plaintiffs must close the transaction in violation of the law in order to demonstrate the injury necessary to bring this lawsuit. This argument fails in light of well-established jurisprudence that renders it unnecessary for Plaintiffs to take such reckless action before seeking redress in court. *See MedImmune*, 549 U.S. at 128-29 & n.8.<sup>2,3</sup>

**B. *Granholm’s per se* invalidity test applies to the discrimination at issue.**

A law that discriminates explicitly against interstate commerce is subject to a rule of virtual *per se* invalidity. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994)

---

(*cont’d from previous page*)

(*Id.*) CITY Beverage’s beer shipments were even cancelled to accommodate an audit of the inventory scheduled to occur immediately after the closing. (*Id.*)

<sup>2</sup> Wine & Spirits also observes that Plaintiffs could bring a state court action to vindicate its rights. (Wine & Spirits Amicus Br. (Docket No. 90) at 9.) There is no requirement, however, that a party exhaust state court remedies before bringing a Section 1983 suit. *See, e.g., Loubser v. Thacker*, 440 F.3d 439, 442 (7th Cir. 2006).

<sup>3</sup> Wine & Spirits also appears to argue that this Court lacks subject matter jurisdiction over this action because no Commerce Clause violation exists (because, according to Wine & Spirits, the Liquor Control Act permits no brewer to distribute beer). This argument is not truly a challenge to this Court’s jurisdiction, but rather to the merits of Plaintiffs’ claim. In any event, this argument fails because it ignores the *actual* discrimination at issue in this case and the actual provisions of the Liquor Control Act. *See* Sections B, C, & D, *infra*.

(“If a restriction on commerce is discriminatory, it is virtually *per se* invalid”); *Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995) (same). The Supreme Court has stated that under the standard of *per se* invalidity, “[t]he State’s burden of justification is so heavy that facial discrimination by itself may be a fatal defect.” *Or. Waste Sys.*, 511 U.S. at 101. Neither Defendants nor the *Amici* dispute that on only *one* occasion has the high court ever upheld an explicitly discriminatory law under this standard. *See Maine v. Taylor*, 477 U.S. 131 (1986). On the other hand, a law that regulates evenhandedly with only incidental effects on interstate commerce is valid unless the challenger satisfies the *Pike* balancing test. *Or. Waste Sys.*, 511 U.S. at 99 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Defendants here admit that under their interpretation and enforcement, the Liquor Control Act treats in-state and out-of-state brewers differently. (Defs.’ LR 56.1 Resp. (Docket No. 69) ¶ 13-16.) Thus, this case is about explicit discrimination, and the *per se* standard of invalidity applies.

Wine & Spirits (but, here again, neither Defendants nor ABDI) attempts to avoid the obvious consequences of the rule of virtual *per se* invalidity by arguing that, instead, the *Pike* standard should apply because the discrimination against out-of-state interests at issue here results from a state’s interpretation of the law, rather than a literal reading of the statute. As an initial matter, Wine & Spirits does not cite any authority for this novel spin on Commerce Clause jurisprudence, nor does it attempt to explain why a less rigorous Commerce Clause standard should apply to explicit discrimination achieved through interpretation and enforcement by the state.

Moreover, Wine & Spirits is plainly incorrect because an explicitly discriminatory law is subject to the *per se* rule of invalidity regardless of how that discrimination is achieved. *Granholm and Healy v. The Beer Institute*, 491 U.S. 324 (1989), affirmatively demonstrate that

Wine & Spirits' proposed carve out to the *per se* invalidity standard is wrong. In *Granholm*, the Michigan law at issue discriminated against out-of-state wine producers only after reading together a number of provisions of the State's liquor control code that permitted in-state wineries to sell wine directly to retailers and consumers, and then juxtaposing that treatment against the Michigan Liquor Control Commission's interpretation of the act which prohibited out-of-state wineries from doing the same. *Heald v. Engler*, 342 F.3d 517, 521 (6th Cir. 2003). *See also* Brief of Plaintiffs-Appellants at \*7 n.1, *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), 2002 WL 34200812 (noting that the Michigan liquor control code was "extremely difficult to decipher" and the discrimination against out-of-state wineries was "achieved by the combined effect of four statutory provisions and *the practice of the Liquor Control Commission*" (emphasis added)). Although the discriminatory nature of the Michigan law only manifested itself through interpretation by the Michigan Liquor Control Commission, the Sixth Circuit and Supreme Court did not hesitate in treating the Michigan law as explicitly discriminatory and subject to the rule of *per se* invalidity. *See Granholm*, 544 U.S. at 467 ("The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce"); *Heald*, 342 F.3d at 525 (noting the provision to be "facially discriminatory"). Similarly, in *Healy* the Supreme Court held that a law was explicitly discriminatory despite that the terms of the discrimination resulted in part from the state liquor control authority's interpretation of the statute. 491 U.S. at 329, 330-341 (noting that the terms of the law at issue were the result of the state liquor control authority's interpretative declaratory ruling and holding that the law as interpreted was explicitly discriminatory). Wine & Spirits' attempt to remove the discrimination at issue in this case from the *per se* invalidity standard thus has no basis in law.<sup>4,5</sup>

---

<sup>4</sup> Wine & Spirits attempts to further confuse the issue by asserting that Plaintiffs are making an "as applied" (cont'd)

**C. This case arises from actual and ongoing discrimination by state actors, and thus the *Amici*'s alternative statutory construction argument is irrelevant.**

Wine & Spirits, joined by ABDI, also argues that under an alternative interpretation of the Liquor Control Act, there is no discrimination for this Court to remedy. The *Amici*'s proffered interpretation is irrelevant, however, because it is in material conflict with the undisputed actual operation of the Liquor Control Act under the ILCC's interpretation and enforcement, with which brewers must comply and that is actually discriminating against and injuring Plaintiffs. (*See* Defs'. LR 56.1 Resp. (Docket No. 69) ¶¶ 13-16.)

Indeed, there is no dispute that under the Liquor Control Act, Defendants treat brewers differently depending on where they brew their beer—an out-of-state brewer must distribute its beer through an unaffiliated distributor simply because it brews its beer out-of-state, while an in-state brewer may perform the distribution function itself. (*Id.*) Defendants further admit that in-state beer producers that currently hold Distributor's Licenses include Argus Brewery, Big Muddy, and Goose Island Beer Co., and that Argus and Big Muddy actually distribute beer.

---

(*cont'd from previous page*)

challenge; its apparent basis for this contention is that the discrimination against out-of-state interests here results from the ILCC's interpretation of the Liquor Control Act. Wine & Spirits, however, fails to grasp that it is conflating the Commerce Clause analysis with the entirely separate and distinct question of whether a challenger seeks to invalidate a law in all respects because it never can be applied constitutionally (a "facial" challenge) or only with regard to a particular situation in which it is applied unconstitutionally (an "as applied" challenge). *United States v. Salerno*, 481 U.S. 739, 745 (1987). Wine & Spirits' confusion appears to be due to the fact that the word "facial" is common to both doctrines, without realizing that it has distinct meanings in each context. Simply put, whether a claimant brings a "facial" or "as applied" challenge" is irrelevant to the Commerce Clause question when the law is explicitly discriminatory.

<sup>5</sup> Wine & Spirits also parrots Defendants' argument (and even cites it in their brief) that the *per se* invalidity standard does not apply because Plaintiffs have not demonstrated discriminatory purpose or effect. Similarly, ABDI argues in its brief that *Granholm* does not control because Plaintiffs do not establish that they are "barred from the in-state market or [have] their access [] severely limited," and that as a result nullification of the in-state benefit is the appropriate remedy. In their reply in support of their motion for summary judgment, Plaintiffs demonstrate that there is no merit to either of these arguments because it is unnecessary to establish that a law that discriminates explicitly has a discriminatory purpose or effect. (Plfs'. Reply Br. (Docket No. 85) at 6-9; 14-22.)

(Plfs'. LR 56.1 Resp. (Docket No. 86) ¶¶ 5-7; Defs'. LR 56.1 Resp. (Docket No. 69) ¶ 17; *see also* Wine & Spirits' Am. Br. (Docket No. 91) at 14.)

Nonetheless, the *Amici* ask this Court to ignore reality based on their own hypothetical statutory construction and enforcement regime. According to the *Amici*, because they have invented a non-discriminatory interpretation of the Liquor Control Act—which of course bars all brewers from distributing and thus furthers the *Amici*'s own perceived economic interests—this Court should conclude that there is no Commerce Clause issue in this case.<sup>6</sup>

The discrimination by Defendants under the Liquor Control Act that is occurring here cannot be simply wished away. The interpretation and enforcement regime that matters to Plaintiffs' Commerce Clause claim is that which the ILCC has adopted and is resulting in differential treatment between in-state and out-of-state brewers. To hold otherwise would result in a decision (or, perhaps more appropriately, a non-decision) on Plaintiffs' Commerce Clause claim that would not address the explicit discrimination under the Liquor Control Act that is actually taking place in Illinois.

ABDI's invocation of the constitutional avoidance doctrine is just another gloss on this invitation to avoid reality, and thus fails for the same reason. There is no need to engage in the type of statutory interpretation that triggers the constitutional avoidance doctrine because Defendants admit that they discriminate against out-of-state brewers. (*See* Defs'. LR 56.1 Resp. (Docket No. 69) ¶¶ 13-16.) Moreover, the lone case cited by ABDI in support of its argument involves a federal court applying a federal canon of interpretation that required that court to select between alternative constructions of a *federal* statute. (*See* ABDI Br. (Docket No. 91) at 7

---

<sup>6</sup> The *Amici*'s proposed interpretation of the Liquor Control Act is not even plausible, and relies exclusively on selective quotations of portions of the statute. For a comprehensive discussion of why this alternative interpretation lacks merit, Plaintiffs respectfully refer the Court to pages 16-18 of their response to Wine & Spirits' motion to intervene (Docket No. 53). (*See also* Plfs'. SJ App. Tab B5 (Docket No. 31-7) at 12-22.)

(citing *Harris v. United States*, 536 U.S. 545 (2002)).) The canon of statutory interpretation that ABDI cites “rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts” and “is thus a means of giving effect to congressional intent.” *See also, e.g., Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). This canon of federal interpretation does not apply here because the instant action, brought pursuant to Section 1983, involves a federal court reviewing the conduct of state actors acting under color of state statutes, rather than a federal statute. A federal court cannot invoke the constitutional avoidance principle here to re-interpret state law because under the Eleventh Amendment a federal court in a Section 1983 action cannot instruct a state actor how to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). This, however, is exactly what ABDI proposes this Court should do. (*See* Tr. May 19, 2010 Hearing attached hereto as Ex. A, at 8) (“[A]nd we feel the case should appropriately be decided on [statutory interpretation] grounds.”) (statement of counsel for ABDI.) ABDI’s proposed “resolution” is barred by the Eleventh Amendment.

Unlike a case involving a federal statute in which a federal court can instruct parties how to comply with federal law, it would make no sense to apply the constitutional avoidance doctrine in this Section 1983 action because it would leave the *actual* constitutional violation unresolved. Not surprisingly, ABDI fails to explain how its cited authority applies to this case, or otherwise cite to any case suggesting that a federal court should apply the constitutional avoidance doctrine to a Section 1983 claim challenging a state’s *own* interpretation and enforcement of a state statute that results in actual discrimination.<sup>7</sup>

---

<sup>7</sup> Indeed, in *Granholm*, the Supreme Court never attempted to apply the constitutional avoidance principle, despite that the discrimination resulted in part from the Michigan Liquor Control Commission’s interpretation of the act. According to ABDI, instead of deciding the case based on the law as interpreted and applied by the States in those cases, the Court should have attempted to interpret the state law to avoid its invalidation. *Heald*, 342 F.3d at 521. Moreover, under ABDI’s approach, third-parties in Commerce Clause cases could always seek to avoid adjudication in federal court of the claim against state defendants by identifying a hypothetical non-

(cont'd)

**D. ABDI's discussion of Illinois' three-tier system is misleading.**

Like Defendants' response brief, ABDI's brief contains broad assertions about Illinois' three-tier system. Indeed, the first section of ABDI's argument is entitled "[t]he three-tier system constitutes the backbone of effective alcohol regulation in Illinois and in the vast majority of states in the country." It is clear, however, that this case challenges the constitutionality of Defendants' *discrimination* against out-of-state brewers, not the ability of Illinois to separately license and regulate various functions of the production, distribution, and sale of alcohol in the State. ABDI thus never explains the legal significance of its "argument" to the central issue in this case: Defendants' violation of the Commerce Clause by allowing in-state brewers to distribute beer, while prohibiting out-of-state brewers from doing the same.

The reality is that ABDI, like Defendants, is apparently seeking to influence this Court's views about the appropriate remedy for Defendants' unconstitutional discrimination. To that end, ABDI presents as dogma its perspective that three-tier systems uniformly require strict separation between the manufacturer and distributor tiers, hoping that this Court might then view extension of the in-state benefit as a significant and risky departure from "the" three-tier system. (*See* ABDI Br. (Docket No. 91) at 2-6.)<sup>8</sup> As set forth in Plaintiffs' reply to Defendant's opposition brief, such generalized assertions about the strict separation between the tiers are unsupported, are contrary to the actual three-tier system in Illinois, and ignore the role that AB

---

(*cont'd from previous page*)

discriminatory interpretation of the statute different from the state defendants' interpretation, thus permitting the *actual* discrimination to continue.

<sup>8</sup> Wine & Spirits makes similarly sweeping, yet unsupported, assertions about the nature of Illinois' licensing structure for brewers. (*See e.g.*, Wine & Spirits' Amicus Br. (Docket No. 90) at 4 ("The Act is fashioned to maintain the three-tier system of separating Manufacturers (and therefore Brewers) from Distributors to further the public policy concern of protecting against vertical integration and hence monopolistic control.").)

Inc. and other brewers have played as licensed distributors in that system for decades. (Plfs.' SJ Reply (Docket No. 85) at 15-20.)

Indeed, the history of the Liquor Control Act demonstrates that Illinois' three-tier licensing system is one that, as to brewers, has never mandated any strict separation between the producer and distributor licensing categories. The Liquor Control Act as initially enacted in 1934 affirmatively permitted any liquor manufacturer to act as a distributor of alcohol. *See* Liquor Control Act of 1934, ch. 235, 1934 Ill. Laws 58, 66 (attached hereto as Ex. B) ("A manufacturers license shall allow the manufacture, storage, *and wholesale distribution* and sale of alcoholic liquors to licensees in this State . . . ." (emphasis added)). In 1947, the Liquor Control Act was amended to expressly prohibit wine and spirits manufacturers from acting as distributors, but contained no similar prohibition as to brewers. *See* Act of July 24, 1947, ch. 235, 1947 Ill. Laws 19, 24-25 (attached hereto as Ex. C). Also in 1947, at the same time that the General Assembly expressly prohibited wine and spirits manufacturers from acting as distributors, it amended the Liquor Control Act to create the Class 3 Brewer's License category, which affirmatively maintained the existing distribution right for brewers, by providing that "a Brewer may make sales and deliveries of beer to . . . retailers . . . in accordance with the provisions of th[e] Act." *Id.* at 23. In 1994, the General Assembly reaffirmed brewers' ability to distribute beer by amending 235 ILCS 5/5-1(a) to make clear that 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." Act of Jan. 26, 1994, §§ 5-1, 6-8, 1994 Ill. Laws 26, 79 (attached hereto as Ex. D). Thus, although Illinois' three-tier system certainly requires separate licensing for brewers and distributors, the notion that the Liquor Control Act requires

ownership separation between these functions is nothing more than a myth perpetuated by *Amici* and those with similar economic interests.

Moreover, the central issue in this case is that the Liquor Control Act, as Defendants concede, affirmatively permits at least in-state brewers to be licensed to perform the distributor function. Thus, as to brewers, the purported strict separation between producers and distributors is illusory. In an attempt to blunt the force of this fact, ABDI and Wine & Spirits argue that the Liquor Control Act prohibits all brewers from distributing beer. Neither *Amicus*, however, truly believes in this argument.

Indeed, ABDI's argument is at odds with its past recognition that the Liquor Control Act permits brewers to hold Distributor's and Importing Distributor's Licenses. William Olson, president of the ABDI, testified during the March 2, 2010 Special Session of the ILCC that in 1999, the ABDI itself caused the introduction of Senate Bill 781 in an attempt to *change* Illinois law to *restrict brewers and non-resident dealers from being distributors*. (See Plfs'. App. (Docket No. 31) Tab E at 69-74.) Specifically, the ABDI Bill attempted to amend Section 5/6-4(a) of the Liquor Control Act, which prohibits all winemakers and distillers, but notably not brewers, from holding Distributor's and Importing Distributor's Licenses. The ABDI amendment would have added brewers and non-resident dealers to the section that actually specifies a separation between the manufacturer and distributor tier under Illinois' system. In other words, ABDI itself recognized, in 1999, that the law as it existed allowed brewers and non-resident dealers to be distributors. As Mr. Olson confirmed, the ABDI withdrew that legislation and so to

this day the purported “strict separation” between manufacturers and distributors actually set out in the Liquor Control Act does *not* include brewers.<sup>9</sup>

At the March 2, 2010 Special Session of the ILCC, Mr. Olson also testified regarding an ABDI bylaw that was enacted in 1999, after ABDI withdrew Senate Bill 781, that permits one of its distributor members to remain a member of ABDI for a limited period of time if purchased by a brewer. (Plfs’ App. Tab E (Docket No. 31-11) at 69-74; *see also id.* at 67-69 (testimony of former ABDI president, Mike Rinella).) Specifically, this bylaw provides “*a manufacturer or supplier licensed by the [ILCC] as a distributor or importing distributor* and who acquires or succeeds or obtains a controlling interest in the business of a Regular Member shall be eligible to continue the membership . . . for a period up to six (6) months.” (Ex. E at 2 (emphasis added).) However limited the purpose of this bylaw, ABDI’s clear recognition that brewers may be “licensed by the [ILCC] as a distributor or importing distributor” and may acquire a member of ABDI demonstrates that the separation of the manufacturer and distributor functions is anything but the strict “vertical quarantine” that ABDI now portrays in this Court.

Similarly, despite now arguing that “the Act’s provisions [] clearly prohibit the issuance of a Distributor’s license to a Brewer,” Wine & Spirits’ counsel took a contradictory position at the March 2, 2010 Special Session of the ILCC when appearing for a wine and spirits wholesaler. James Webster, who is a signatory to Wine & Spirits’ *amicus* brief, confirmed that Brewers (as opposed to non-resident dealers) may hold Distributor’s Licenses:

---

<sup>9</sup> Illinois is thus similar to many other states that license a brewer to perform the distribution function in the three-tier system. As Plaintiffs explain in their summary judgment reply, 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* Plfs’ SJ Reply Ex. 1 (Docket No. 85-2) ¶¶ 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.)

There is a difference between a nonresident dealer and a brewer. And the question that was posed to the industry, which is may a holder of a nonresident dealer's license hold a distributor's license, our position is, no, they can't. I think it's very clear under the statute that they can't. *It's different for a brewer -- there's no question about that . . . .*

(Plfs'. SJ App. Tab E (Docket No. 31-11) at 50 (Statement of J. Webster) (emphasis added).)<sup>10</sup>

The *Amici's* prior recognition that the Liquor Control Act contains no strict "vertical quarantine" as to brewers thoroughly undermines their current self-serving proclamations about the three-tier system. Accordingly, this Court should reject their insincere assertions and proceed to remedy the ongoing constitutional violation by Defendants.

### CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiff's motion for summary judgment on their Commerce Clause claim.

Dated: June 8, 2010

Respectfully submitted,

John J. O'Shea  
FALLUCCA & O'SHEA, P.L.C  
3400 E. Lafayette  
Detroit, MI 48207  
(313) 567-7004 (Telephone)

**Counsel for Plaintiffs CITY Beverage –  
Illinois L.L.C., CITY Beverage L.L.C.,  
Chicago Distributing L.L.C., CITY  
Beverage – Markham L.L.C., SD of Illinois,  
Inc., and Double Eagle Distributing  
Company**

/s/ Edward M. Crane  
Edward M. Crane  
Albert L. Hogan, III  
Mark E. Rakoczy  
Andrew J. Fuchs  
Nathan A. Shev  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
155 N. Wacker Drive  
Chicago, Illinois 60606  
312-407-0700 (Telephone)

**Counsel for Plaintiffs Anheuser-Busch, Inc.  
and WEDCO**

---

<sup>10</sup> In their response to Wine & Spirits' motion to intervene, Plaintiffs pointed out the inconsistency of Mr. Webster's statement. In its reply brief, however, Wine & Spirits provided no response or explanation for this switch in position. They also were silent on this point in their opposition to Plaintiff's motion for summary judgment, which is now serving as their amicus brief to this Court.

**CERTIFICATE OF SERVICE**

Edward M. Crane, an attorney, hereby certifies that on June 8, 2010, he caused true and correct copies of the foregoing Plaintiffs' Response to the Amicus Briefs of the Associated Beer Distributors of Illinois and the Wine & Spirits Distributors Association, to be served via the Court's ECF filing system on all counsel of record, including the following counsel for Defendants:

Michael Dierkes, Esq.  
Office of the Illinois Attorney General  
100 West Randolph Street  
Chicago, Illinois 60601

Ann Walls, Esq.  
Office of the Illinois Attorney General  
100 West Randolph Street  
Chicago, Illinois 60601

/s/ Edward M. Crane  
Edward M. Crane