

STATE OF ILLINOIS
LIQUOR CONTROL COMMISSION

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ILCC LEGAL

In the Matter of:)
)
City Beverage – Markham, LLC)
d/b/a City Beverage Markham)
2064 W. 167th St.)
Markham, IL 60428)

In the Matter of:)
)
City Beverage – Markham, LLC)
d/b/a City Beverage – Arlington Heights)
1401 E. Algonquin Rd.)
Arlington Heights, IL 60005)

Case No. 12-CCH-01

(Consolidated Case Nos. 12 C 100216,
100217, 100218, 100219, 100220, 100221,
100222 and 100223)

In the Matter of:)
)
Chicago Distributing LLC)
d/b/a City Beverage - Chicago)
4841 S. California Ave.)
Chicago, IL 60632)

In the Matter of:)
)
City Beverage, LLC)
d/b/a City Beverage)
1105 E. Lafayette Ave.)
Bloomington, IL 61701)

ARGUMENT OF THE
ASSOCIATED BEER DISTRIBUTORS OF ILLINOIS

The Associated Beer Distributors of Illinois (ABDI), pursuant to Notice of Intent to submit an Amicus Curiae Brief, submits herein its Argument in support of the Legal Division of the Illinois Liquor Control Commission.

For the purposes of this Argument, City Beverage – Markham, LLC, d/b/a City Beverage Markham; City Beverage – Markham, LLC, d/b/a City Beverage Arlington Heights; Chicago

Distributing, LLC, d/b/a City Beverage – Chicago; and City Beverage, LLC, d/b/a City Beverage, are collectively referred herein as the “City Beverage Entities.”

For the purpose of this Argument, Wholesaler Equity Development Corporation (“WEDCO”), Anheuser-Busch, LLC and Anheuser-Busch InBev, are collectively referred herein as “ABI.”

**Interest of the
Associated Beer Distributors of Illinois (ABDI)**

Since 1939, ABDI has served as the organization for the beer wholesaling industry in the State of Illinois, representing more than 60 licensed Illinois distributors/importing distributors.

The issues before the Illinois Liquor Control Commission (the “Commission”) relate to the essential interests of ABDI and its licensed distributor members. The Respondents’ efforts to continue the ownership interest (including control) by WEDCO in an Illinois licensed distributor is an attempt to weaken the Illinois three-tier system.

The Commission’s action in issuing its Citation is consistent with the Illinois Liquor Control Act and preserves the integrity of the State of Illinois’ three-tier system.

I.

**The Liquor Control Act (the “Act”) is denoted as an
“Authorization” Law, thus prohibiting what is not expressly authorized**

The “Scope of Act” provision of the Act provides as follows: “No person shall manufacture, bottle, blend, sell, barter, transport, transfer into this State from a point outside this State, deliver, furnish or possess any alcoholic liquor for beverage purposes, unless such person has been issued a license by the Commission . . .” (235 ILCS 5/2-1).

The following is a summary of the relevant licensing provisions under the Act authorizing and defining the activity for suppliers and distributors:

1. A non-resident dealer's license authorizes an out-of-state manufacturer and foreign U.S. importer to ship alcoholic products into the State and to sell the alcoholic products to foreign importers and importing distributors (235 ILCS 5/1-3.29 and 5/5-1(m)).
2. A brewer's license authorizes a brewer to sell and deliver beer to distributors (235 ILCS 5/5-1(a)).
3. A holder of a distributor license is authorized to sell alcoholic product to retailers, but such license cannot be held by a manufacturer (breweries, wineries and distillers) or non-resident dealer (235 ILCS 5/1-3.15/16 and 5/5-1(b)(c)).
4. A holder of a foreign importer license is authorized to sell to importing distributors (235 ILCS 5/1-3.27 and 5/5-1(k)).

The Act does not contain a single provision authorizing manufacturers, brewers and non-resident dealers to hold or have an interest in a distributor or its license or to sell to retailers (except craft brewers).

The Act sets forth a *de minimus* exception for wineries and distillers to own up to a 5% interest in a distributor. This *de minimus* ownership authorization granted to wineries and distillers was not extended to brewers (235 ILCS 5/6-4) (Emphasis added).

Any doubts concerning the interpretation of the Act as an "Authorization Law" have been consistently dispelled by the courts. In the most recent decision in *People of the State of Illinois vs. Select Specialties, Ltd., et al.*, 317 Ill.App.3d 538, 740 N.E.2d 543, 251 Ill.Dec. 462, the Court, after carefully reviewing a series of statutory construction decisions, stated as follows: "The State argues the Act prohibits what it does not permit. We agree. The Act must expressly permit the actions of the defendants in this case or they are in violation of the Act."

The Court in relying upon the Supreme Court decision of *Daley vs. Berzanskis*, 47 Ill.2d 395 (398); 269 N.E.2d 716, 718 and the decision in *Carrigan's Tavern vs. Liquor Control Commission*, 19 Ill.2d 230, 236; 166 N.E.2d 574, 577-78, summarized the decision as follows: "If the Act is to have any meaning, it must be interpreted as starting from a point of prohibition.

The Act then provides exceptions where persons may conduct certain activities involving alcohol as long as they have a valid liquor license.” *People of the State of Illinois vs. Select Specialties, Ltd., et al.*, 317 Ill.App.3d 538, 740 N.E.2d 543, 251 Ill.Dec. 462.

WEDCO, at page 23 of its Memorandum to its Motion to Dismiss asserts: “Nothing has changed – either factually or legally – since March 10, 2010 with respect to WEDCO’s interest in City Beverage.” Not only did Judge Dow answer this question adversely to WEDCO (Memorandum Opinion and Order dated September 3, 2010, 738 F. Supp. 2d 793; 2010 U.S. Dist. LEXIS 91732), but the Illinois General Assembly responded in a nearly unanimous vote, both in the Illinois Senate and the Illinois House of Representatives with the passage of Senate Bill 754. ABDI further submits that Judge Dow’s latest Memorandum (See copy of March 29, 2012 Memorandum Opinion and Order attached) clearly identifies and summarizes the factual and legal changes occurring since March 10, 2010.¹

II.

The licensing provisions of the Act Identifies the persons authorized To receive a license

Section 6-2 of the Act (235 ILCS 5/6-2) identifies those persons prohibited from or otherwise unauthorized to receive a license. Paragraph (10) of the aforementioned provision

¹ Judge Dow recognized the broad public policy authority of the Illinois General Assembly: “Finally, Defendants contend that the Court should stay the enforcement of its order at least temporarily to provide an opportunity for the General Assembly to act on this matter if it so desires. The Court agrees. To begin with, the regulation of the distribution of liquor is a matter of public policy and a quintessential legislative function. State regulation of the alcoholic beverage industry involves legislative judgments with respect to temperance, public safety, taxation, licensing, and consumer protection, which courts are not as well equipped to make. In addition, legislative consideration of a remedy in this case need not be confined to the binary choice that this Court is called upon to make if it selects a remedy. As noted above, the legislative process offers more flexibility for solving the constitutional deficiency that is available judicially. For example, the legislative process could address the constitutional deficiency while simultaneously enacting other measures (not preferences) that would protect Illinois’ small brewers. See *Action Wholesale Liquors*, 463 F.Supp. 2d at 1305-07. That flexibility, and the fact that these issues present policy questions rather than legal questions, suggests that a legislative solution, if one is forthcoming, may be preferable to a judicially-crafted one.” (Memorandum Opinion and Order, September 3, 2010, pp. 35-36, 738 F. Supp. 2d 793; 2010 U.S. Dist. LEXIS 91732).

expressly describes those corporations and limited liability companies who are neither qualified nor authorized to receive a license. The provision is as follows:

“(10) A corporation or limited liability company, if any member, officer, manager or director thereof, or any stockholder or stockholders owning in the aggregate more than 5% of the stock of such corporation, would not be eligible to receive a license hereunder for any reason other than citizenship and residence within the political subdivision.”

The City Beverage Entities are identified as limited liability companies with ABI (WEDCO), a member owning 30% member interest. The plain reading of Paragraph (10) of Section 6-2 prevents the City Beverage Entities from being qualified or authorized to receive a license from the Commission while ABI (WEDCO) holds its current ownership interest.

There is absent any other statutory authority contained in the Act permitting City Beverage to retain ABI as a member while holding or otherwise being issued a distributor's license.

III.

The three-tier system constitutes the core of effective alcohol regulation in the State of Illinois similar to the vast majority of states

Illinois' three-tier system mandates separation of the alcoholic beverage into separate regulatory and ownership tiers, namely the supplier tier, the distributor/importing distributor tier, and a retailer tier.² The United States Supreme Court in the landmark case of *Granholm vs. Heald*, 544 U.S. 460; 544 U.S. 460; 125 S. Ct. 1885; 161 L. Ed. 2d 796, endorsed the three-tier

² For an in-depth review of the three-tier system see *Manuel vs. State of Louisiana*, 982 So. 2d 316, 322-324 and 329-331 (2008).

The Illinois Beer Industry Fair Dealing Act (BIFDA) is a comprehensive distribution law that defines in great detail the relationship between a brewer and independent distributor/importing distributors (815 ILCS 721, et seq.) BIFDA recites as one of its core purposes of “insuring the beer wholesaler is free to manage its business enterprise including the wholesaler's right to independently establish its selling price.” Insuring the distributor tier's independence, BIFDA supports the three-tier system and safeguards the distributor's role as a buffer between brewer and retailer.

system by stating as follows: “We have held previously that states can mandate a three-tier distribution scheme in the exercise of their authority under the 21st Amendment.

The Court further stated: “We have previously recognized that the three-tier system is ‘unquestionably legitimate’.” *North Dakota vs. United States*, 495 U.S. 423, 432, 110 S. Ct. 1986, 109 L. Ed. 2d 420. (The United States Supreme Court sustained the North Dakota law that required all liquor sold for use in the state be purchased from a licensed in-state wholesaler.)

This Commission, if it permits ABI to retain an ownership interest in the City Beverage Entities, will effectively authorize special accommodations for a single brewer, the nation’s largest, and in so doing will not only decimate the three-tier system, but effectively create a discriminatory alcohol regulatory system in the State of Illinois.

Judge Dow, in his Memorandum Opinion and Order entered March 29, 2012 in rejecting ABI’s attorney fees summarized his earlier Order (Memorandum Opinion and Order, September 3, 2010 (738 F. Supp. 2d 793; 2010 U.S. Dist. LEXIS 91732) which rejected extending directly and indirectly distribution rights to ABI, stated at page 5 as follows:

“However, it was (and is) readily apparent that Plaintiffs (Anheuser-Busch) did not retain counsel (and pay them handsomely) to establish Commerce Clause precedent. Rather, as the timing of this lawsuit and the content of most, if not all, of the court filings confirm, Plaintiffs’ ‘ultimate goal’ was to pave the way for their acquisition of the remaining 70% interest in distributor City Beverage – or, as Plaintiffs themselves put it, to close ‘an extremely important business transaction for Plaintiffs. And in this respect, Plaintiffs’ failed . . . Plaintiffs sought an extension of self-distribution rights to all producers, but the Court’s ruling (which was stayed to give the General Assembly time to act) would have barred any producers from self-distributing, which not only precluded Plaintiffs’ from acquiring the remaining 70% interest in City Beverage, but also put Plaintiffs’ existing 30% interest in jeopardy.” (Emphasis added)

At page 9 of the Order, the Court further stated as follows:

“Plaintiffs did not seek to reaffirm the rigid three-tier distribution system, but rather sought to weaken, or collapse, the distribution system such that all manufacturers – in-state or out-of-state – could sell directly to retailers. And finally, Plaintiffs made clear throughout the lawsuit that their ultimate goal was to close “an extremely important business transaction for Plaintiffs. (Emphasis added)

The legislative debates supporting Senate Bill 754 (Public Act 97-0005) is a strong confirmation of the three-tier system. Representative Frank Mautino, as sponsor of the legislation, stated: “. . . all brewers, in-state and out-of-state, manufacturing beer above the craft brewer limits may not self-distribute or own a distributorship in Illinois.”

The recently disclosed documents by the Legal Division in support of its Motion for Summary Judgment display a cynical disregard for the three-tier system. Paragraph 1.C. to the Motion for Summary Judgment reflects ABI, in addition to the 30% ownership interest, maintains a 75% management control of City Beverage. The Affidavit of Dusanka Marijan discloses ABI’s contractual right to appoint board members of City Beverage, and control over purchasing distribution rights, territories, brands, etc.

IV.

A liquor license issued by the State of Illinois Is a privilege and not a property right

The Act specifies that licenses issued under the Act:

“[S]hall be purely a personal privilege, good for not to exceed one year after issuance . . . , and shall not constitute property, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable, transferable, voluntary or involuntary, or subject to being encumbered or hypothecated.” (235 ILCS 5/6-1)

Illinois courts have long held that a liquor license is not a property right, but a privilege.³ *Two Kats, Inc. vs. Village of Chicago Ridge*, 147 Ill.App.3d 440, 443, 497 N.E.2d 1314, 101 Ill.Dec. 1 (1st Dist. 1986); *Blue Cat Lounge vs. License Appeal Commission*, 281 Ill.App.3d 643, 647, 667 N.E.2d 554, 217 Ill.Dec. 465; *Black Knight Restaurant, Inc., vs. City of Oak Forest*, 159 Ill.App.3d 1016, 513 N.E.2d 109, 111 Ill.Dec. 863. The courts have further rejected arguments that the loss of a liquor license constitutes deprivation of a Constitutionally protected right. *Ross vs. Kozubowski*, 182 Ill.App.3d 687, 691-692, 538 N.E.2d 1093, 131 Ill.Dec. 248. With respect to renewal of a license, Illinois courts have also held that no vested interest exists in the renewal of a liquor license, thus non-renewal of a license or the denial of a new license is not subject to due process. *Las Fuentes, Inc. vs. Chicago*, 209 Ill.App.3d 766, 770, 567 N.E.2d 1093, 153 Ill.Dec. 866; *Black Knight Restaurant, Inc., vs. City of Oak Forest*, 159 Ill.App.3d 1016, 513 N.E.2d 109, 111 Ill.Dec. 863; *City of Wyoming vs. Illinois Liquor Control Commission*, 48 Ill.App.3d 404 362 N.E.2d 1080, 6 Ill.Dec. 258; and *Two Kats, Inc. vs. Village of Chicago Ridge*, 147 Ill.App.3d 440 497 N.E.2d 1314, 101 Ill.Dec. 1. Nevertheless, the Commission has been careful in affording ABI and the City Beverage Entities appropriate notice and opportunity for a hearing.⁴

Since the enactment of Senate Bill 754 (Public Act 97-0005), effective June 1, 2011, the Commission has afforded the City Beverage Entities ample opportunity to divest WEDCO's 30% ownership interest. The City Beverage Entities, however, have elected to continue to allow

³ Illinois is not the only state holding a liquor license as a privilege. See *Fuchs vs. State of Idaho*, 272 P.3d 1257; 2012 Ida. LEXIS 52 (February 2012).

⁴ Illinois courts have declined to follow the holding of the Federal Court in *Reed vs. Village of Sherwood*, 704 F.2d 943, on the basis that the decision contradicts Illinois law. *Black Knight Restaurant, Inc., vs. City of Oak Forest*, 159 Ill.App.3d 1016, 513 N.E.2d 109, 111 Ill.Dec. 863; *Occhino vs. Illinois Liquor Control Commission*, 28 Ill.App.3d 967, 329 N.E.2d 353 (Citing *Corbett vs. Devon Bank*, 12 Ill.App.3d 559, 299 N.E.2d 521).

the participation of a non-qualified person as an owner with full knowledge of the Act's requirements.

With respect to liquor licenses, the courts have consistently held that a person accepting a license assents to the conditions imposed by statute and rule applicable to such license. *Daley vs. Berzanskis*, 47 Ill.2d 395 (398); 269 N.E.2d 716; *Vintage '76, Inc. vs. Illinois Liquor Control Commission*, 78 Ill.App.3d 463, 397 N.E.2d 166, 33 Ill.Dec. 833. The City Beverage Entities cannot assert a grandfather right.

ABI's comments before the Commission identified potential reliance on the Equitable Estoppel Doctrine in support of ABI retaining its interest in the City Beverage Entities (the "Doctrine of Equitable Estoppel"). The Doctrine of Equitable Estoppel is neither applicable to the facts of the instant matter nor the issues raised therein.

Anheuser-Busch's right to acquire a 30% interest in the City Beverage Entities, purportedly authorized by an agent of the Commission in 2005, triggered action by the Commission on March 20, 2010 whereby the Commission in a divided vote issued a declaratory ruling permitting continuation of ABI's interest in the City Beverage Entities. However, before the United States Federal District Court the Commission acknowledged the action was in derogation of statutory provisions as summarized by the Court: "At oral argument counsel for Defendants (the Commission) candidly characterized the Commission's prior treatment of licensing of those companies as a 'mistake' and involved some sort of fact of 'grandfathering in' of the situation that existed prior to the 1982 amendment." (The Memorandum Opinion and Order of Judge Dow dated September 3, 2010, 738 F. Supp. 2d 793; 2010 U.S. Dist. LEXIS 91732).

The Commission is a public body and as such the courts have held that: "Generally a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." *Gorgees vs. Richard M. Daley*, 256 Ill. App.3d 143; 628 N.E.2d 721, 195 Ill. Dec. 257 (Cited by the court were the following cases: *Lindahl v. City of Des Plaines*, 210 Ill. App.3d 281, 295, 568 N.E.2d 1306; *Bank of Pawnee v. Joslin*, 166 Ill. App.3d 927, 938, 521 N.E.2d 1177; *Rose v. Rosewell*, 163 Ill. App.3d 646, 651, 516 N.E.2d 885). The Illinois courts have further held the purpose of equitable estoppel is to prevent fraud or injustice. *Baldwin vs. Wolff*, 294 Ill.App.3d 373, 690 N.E.2d 632. 228 Ill.Dec. 873.

A long line of Appellate Court cases identified six elements for equitable estoppel, namely (1) misrepresentation or concealment of material facts, (2) knowledge that the representations were not true, (3) lack of knowledge of the true facts by the innocent party, (4) reasonable expectation that the innocent party would act on the misrepresentation, (5) a detrimental change of position, and (6) prejudice to the affected party. *Humble vs. Paul O'Connor*, 291 Ill.App.3d 974, 684 N.E.2d 816, 225 Ill.Dec. 825. In the instant case there is no evidence, directly or indirectly, of misrepresentation or concealment of material facts.

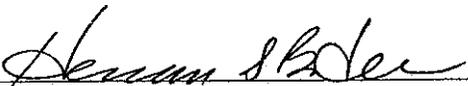
The Doctrine of Equitable Estoppel has been held not to apply to the unauthorized renewal of an applicant's liquor license. *Bank of Pawnee v. Joslin*, 166 Ill. App.3d 927, 521 N.E.2d 1177.

Conclusion

The City Beverage Entities are not qualified under the Act to hold a distributor's license.

Respectfully submitted,

THE ASSOCIATED BEER
DISTRIBUTORS OF ILLINOIS

By 
Herman G. Bodewes, Its Attorney

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PROOF OF SERVICE

Service of the foregoing instrument was made by e-mailing a copy thereof, addressed to:

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from the office of the undersigned on this 7th day of September, 2012, and the original of which was hand delivered for filing on the 7th day of September, 2012 as follows:

Illinois Liquor Control Commission
Attn: Stephen B. Schnorf, Chairman
100 West Randolph St., Suite 7-801
Chicago, IL 60601



Herman G. Bodewes

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

ANHEUSER-BUSCH, INC., ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Case No.: 10-cv-1601
)	
STEPHEN B. SCHNORF, ET AL.,)	Judge Robert M. Dow, Jr.
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Pursuant to 42 U.S.C. § 1988 and Local Rule 54.3, Plaintiffs Anheuser-Busch, Inc. (“AB Inc.”) and Wholesaler Equity Development Corporation (“WEDCO”) have moved for their attorneys’ fees incurred in this litigation. In support of their motion, Plaintiffs rely on the Court’s September 3, 2010 order granting Plaintiffs’ partial motion for summary judgment on their Commerce Clause claim. AB Inc. and WEDCO seek the sum of \$1,605,154.22 in attorneys’ fees from Defendants, plus pre-judgment interest.

In response, Defendants¹ (hereinafter referred to as the Illinois Liquor Control Commission, “ILCC,” or the “Commission”) contend that Plaintiffs failed to achieve their stated goal in bringing the lawsuit and, in any event, that Plaintiffs’ request for \$1.6 million in attorneys’ fees far exceeds what is reasonable or appropriate in a case which Plaintiffs dubbed “straightforward” and “clear cut.” Having considered all of the arguments presented as well as the relevant Supreme Court and Seventh Circuit case law, the Court concludes that Plaintiffs did

¹ Defendants in this case are affiliated with the Commission. Stephen Schnorf is the Acting Chair and a Commissioner of the ILCC and Defendants John Aguilar, Daniel Downes, Sam Esteban, Michael McMahon, Martin Mulcahey, and Donald O’Connell are Commissioners of the ILCC. Defendant Richard Haymaker is Chief Legal Counsel of the ILCC. Defendants were named in this suit in their official capacities. See *Ex parte Young*, 209 U.S. 123, 157-60 (1908); *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 644-45 (7th Cir. 2006).

not achieve their objective in bringing this lawsuit and thus have failed to demonstrate that they are entitled to an award of attorneys' fees. Accordingly, Plaintiffs' motion for attorneys' fees [167] is denied.

I. Background

On March 10, 2010, the Illinois Liquor Control Commission ruled that the State's Liquor Control Act precludes beer producer Anheuser-Busch, Inc. from acquiring, through its affiliate WEDCO, a 100% ownership interest in distributor CITY Beverage.² The Commission explained that "[p]reserving Illinois' three-tier distribution system of alcoholic liquor is a fundamental objective of the Liquor Control Act and the Illinois legislature for reasons of public policy." Plaintiffs Anheuser-Busch, WEDCO, and CITY Beverage filed this lawsuit on the same day challenging the Commission's interpretation on various federal constitutional grounds. They alleged that the Commission's ruling "threaten[ed] to scuttle a unique and important acquisition," denied them "the benefits of the transaction and its synergies," and prevented them from "compet[ing] on equal footing" with two small, in-state beer producers (Argus and Big Muddy) that exercised self-distribution rights.³ In addition to requesting a declaration that the Commission's interpretation was unconstitutional, Plaintiffs asked the Court to use its discretion in fashioning a remedy that would extend self-distribution rights to all beer producers regardless of their location, so that Anheuser-Busch could proceed with its acquisition of WEDCO.

² The ILCC issued a two-part declaratory ruling. First, the Commission unanimously ruled that the Act "prohibits an Illinois license Non-resident dealer from possessing an ownership interest in a licensed Illinois distributor," and that Anheuser-Busch would be in violation of the Act if it or any affiliate "purchased any additional interest in CITY." Second, the Commission ruled, in a four-to-three decision, that in light of the "history and facts surrounding this case," including WEDCO's ownership of a 30% interest in CITY since 2005, the Commission would renew CITY's distributor's licenses "as currently owned," "absent any other disqualifying factors."

³ The third in-state brewer that held a distributor's license, but did not self-distribute at the time of the summary judgment briefing, was Goose Island Beer Co. During summary judgment briefing, Plaintiff Anheuser-Busch held a small ownership interest in Goose Island and subsequently acquired the remaining interest in Goose Island.

On September 3, 2010, after three months of expedited proceedings following the filing of the complaint in this case and two and a half additional months in which the Court crafted its opinion, the Court granted Plaintiffs' motion for partial summary judgment, holding that Defendants' enforcement of the Illinois Liquor Control Act of 1934 (the "Liquor Control Act") violated the Commerce Clause of the United States Constitution insofar as it permits in-state, but not out-of-state, producers to self-distribute. However, the Court declined Plaintiffs' request to remedy the unconstitutionality of Illinois' system by extending the self-distribution privilege to out-of-state brewers, concluding that Plaintiffs' proposed remedy would be more disruptive to the existing statutory and regulatory scheme than the alternative remedy of withdrawing the self-distribution privilege from in-state brewers. The Court stayed its order until March 31, 2011, to give the Illinois General Assembly an opportunity to amend the Liquor Control Act if it chose to do so and then extended the stay at the parties' request [see 162, 187]. The General Assembly did in fact enact remedial legislation, and on June 1, 2011, Governor Quinn signed into law SB 754. The new law creates a "craft brewer's license" for in-state and out-of-state beer producers whose annual production is less than 15,000 barrels (465,000 gallons) and who may then obtain approval from the ILCC to self-distribute up to 7,500 barrels of that production in Illinois.

On October 29, 2010, after Plaintiffs dismissed their other remaining claims, the Court entered final judgment against Defendants and in favor of Plaintiffs. On November 3, 2010, AB Inc. and WEDCO filed a notice of appeal from this Court's September 3 opinion and October 29 final judgment on the sole issue of the proper remedy for Defendants' violation of the Commerce Clause. Defendants did not cross-appeal. Thus, the only issue on appeal was whether the Court's determination that nullification, rather than extension, of the self-distribution right utilized by a few small, in-state brewers was the proper remedy for Defendants' constitutional

violation. Once Governor Quinn signed SB 754 into law, the Seventh Circuit dismissed Plaintiffs' appeal as moot, noting that the new law "eliminates the geographically disparate treatment of beer distributors." See *Anheuser Busch Co., Inc. v. Schnorf, et al.*, Nos. 10-3298 & 10-3570, Order (7th Cir. July 8, 2011).

II. Analysis

This case presents an interesting question on the issue of attorneys' fees. As the Court previously noted in addressing Defendants' stay motion, Plaintiffs' clearly won on the issue of whether Defendants' were violating the Commerce Clause, and Defendants' did not appeal. Defendants took the position that *Granholm* did not supply the relevant standard for this case—Defendants argued that the *per se* invalidity standard did not apply—and also maintained that the Twenty-first Amendment permits states "virtually complete control" over how to structure a distribution system. The Court, following *Granholm* and its progeny, disagreed and found that Defendants failed to articulate a legitimate local purpose that justified their discrimination against out-of-state brewers.

As Defendants note, the constitutional claim was resolved on summary judgment without discovery and turned on a straightforward application of *Granholm* and its progeny to the Commission's construction of state law. Plaintiffs themselves characterized the case as "straightforward" and "clear cut," noting that it turned on a "a single, well-defined question of law" calling for a "simple" application of a single case (*Granholm*). See DE 18 at 2, 4; DE 53 at 18. Defendants admitted "all of Plaintiffs' material facts and [did] not set out additional facts showing a genuine issue for trial." The focus was solely on a legal issue for which recent Supreme Court precedent paved a clear path. If that were the sum and substance of the case, Defendants would not have a leg to stand on in opposing a reasonable fee request and the

reasonable fee would be a tiny fraction of the \$1.6 million sum sought by Plaintiffs in their fee petition.

However, it was (and is) readily apparent that Plaintiffs did not retain counsel (and pay them handsomely) to establish Commerce Clause precedent. Rather, as the timing of this lawsuit and the content of most, if not all, of the court filings confirm, Plaintiffs' "ultimate goal" was to pave the way for their acquisition of the remaining 70% interest in distributor City Beverage—or, as Plaintiffs themselves put it, to close "an extremely important business transaction for Plaintiffs." Pl. S.J. Reply at 23. And in this respect, Plaintiffs' failed. Their transaction cannot proceed, and their "opportunity for profit maximization" will not follow on the heels of this lawsuit. Furthermore, despite their victory on the constitutional issue, the end result of Plaintiffs' litigation strategy has left them worse-off. Plaintiffs sought an extension of self-distribution rights to all producers, but the Court's ruling (which was stayed to give the General Assembly time to act) would have barred any producers from self-distributing, which not only precluded Plaintiffs' from acquiring the remaining 70% interest in City Beverage, but also put Plaintiffs' existing 30% interest in jeopardy. The General Assembly acted while the stay was in place, and its amendment was even less favorable to Plaintiffs than the Court's ruling would have been—the new statute not only barred Plaintiffs from self-distributing (and hence blocked Plaintiffs' acquisition of City Beverage), but the General Assembly also extended self-distribution rights to small brewers across the nation, creating more competition for Plaintiffs beyond the two small, in-state brewers who self-distributed prior to this lawsuit.

The battle lines are well defined: Plaintiffs contend that they are entitled to all of their reasonable fees because they won a complete victory on the constitutional claim (in that the Court granted partial summary judgment to Plaintiffs on its commerce clause claim); Defendants

counter that Plaintiffs are entitled to little or no attorneys' fees because they achieved, at best, a very modest (and "Pyrrhic") victory that fell well short of their aim in bringing the litigation. That leaves the Court with the interesting question of whether (or how) to award fees to a party that wins on a straightforward, threshold issue, but gains little or nothing (and eventually loses ground) as a result of the litigation. With this background, the Court turns to the issue at hand.

A. General standards

In order to entice competent attorneys to prosecute civil rights cases, Congress enacted 42 U.S.C. § 1988, pursuant to which a "prevailing party" in a § 1983 action is entitled to "reasonable" attorneys' fees. See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Under the Supreme Court's self-termed "generous formulation" of the phrase, a civil rights plaintiff is considered to be a "prevailing party" if he or she succeeds on "any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (citing *Hensley*, 461 U.S. at 429); see also *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989).

The Supreme Court elaborated on the definition of prevailing party in three cases in the late 1980s, and then synthesized those rulings in *Farrar v. Hobby*. See *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (observing that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail" and requiring the plaintiff to prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff"); *Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (explained that "nothing in [*Hewitt*] suggested that the entry of [a declaratory] judgment in a party's favor automatically renders that party prevailing under § 1988" and reaffirming that a judgment—declaratory or otherwise—"will constitute relief, for purposes of § 1988, if, and only if, it affects

the behavior of the defendant toward the plaintiff”); *Texas State Teachers Assn.*, 489 U.S. at 792 (emphasizing that “[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties”). In *Farrar*, the Supreme Court summed it up by stating that a plaintiff “prevails” when “actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” 506 U.S. at 111-12.

In deciding the specific amount that is reasonable in the circumstances, the Supreme Court has directed district courts to consider as a “starting point” (or “lodestar”) the number of hours expended in the litigation multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433. The Court has stressed that the “most critical factor” in determining the reasonableness of a fee award is “the degree of success obtained” by the prevailing party. *Id.* at 436. As both parties here acknowledge, courts frequently attempt to measure success by viewing three factors: (i) the difference between the actual judgment and the recovery sought, (ii) the significance of the legal issues on which the plaintiff prevailed, and (iii) the public interest at stake in the litigation. See, e.g., *Connolly v. Nat’l Sch. Bus. Serv., Inc.*, 177 F.3d 593, 597 (7th Cir. 1999).

The Supreme Court expressly has stated that when litigation of a § 1983 case leads to “excellent results” for the prevailing party, the plaintiff’s attorney “should recover a fully compensatory fee.” *Hensley*, 461 U.S. at 435. As the Court further explained, “[n]ormally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.” *Id.* Both the Supreme Court and the Seventh Circuit have stressed that a fee award “should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.” *Hensley*, 461 U.S. at 435; see also *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 873 (7th Cir. 1995). As the court of

appeals summarized, “*Hensley* makes clear that when claims are interrelated, as is often the case in civil rights litigation, time spent pursuant to an unsuccessful claim may be compensable if it also contributed to the success of other claims.” *Jaffee v. Redmond*, 142 F.3d 409, 413 (7th Cir. 1998).

B. Prevailing Party

As set forth above, “a plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar*, 506 U.S. at 111-12. The Seventh Circuit has identified the “‘key inquiry’ as whether [plaintiff] attained his objective in bring the suit, or stated differently, whether the [defendant’s conduct] redressed [plaintiff’s] grievances and directed benefitted him.” *Cady v. City of Chicago*, 43 F.3d 326, 329 (7th Cir. 1994). Whether Plaintiffs obtained their objective in bringing this lawsuit is a factual determination. *Id.* (“This is a factual determination which we review only for clear error.”)⁴

Plaintiffs advanced a tripartite objective in this lawsuit. First, Plaintiffs sought “declaratory and injunctive relief to remedy the irreparable and substantial harm that will continue to result from Defendants’ violation of the Commerce and Contracts Clauses of the United States Constitution.” Compl. at ¶ 1. Without proving that Defendants were violating the

⁴ There is no “rule or principle that will unerringly distinguish a factual finding from a legal conclusion.” *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982); See also *Gekas v. Attorney Registration and Disciplinary Com’n of Supreme Court of Illinois*, 793 F.2d 846, 849-50 (7th Cir. 1986). Nevertheless, “the decision to label an issue a ‘question of law,’ a ‘question of fact,’ or a ‘mixed question of law and fact’ is sometimes as much a matter of allocation [of authority between the primary and the secondary decision-makers] as it is of analysis.” *Miller v. Fenton*, 474 U.S. 104 (1985). In *Gekas*, the Seventh Circuit concluded that, “[i]n the context of fee disputes, the district court, given its familiarity with the parties and the proceedings, is better positioned than the court of appeals to decide whether a plaintiff’s lawsuit is causally linked to the relief obtained.” *Gekas*, 793 F.2d at 849-50; see also *Ekanem v. Health and Hospital Corp. of Marion County*, 778 F.2d 1254, 1258 (7th Cir. 1985) (clearly erroneous standard of review applied). It seems to follow that determining whether Plaintiffs obtained their objective is a factual determination, while determining whether a party meets the definition of a “prevailing party” remains a legal question. See *Dupuy v. Samuels*, 423 F.3d 714, 718 (7th Cir. 2005).

Commerce Clause, Plaintiffs could not upset the ILCC's ruling that Plaintiffs' acquisition of City Beverage was contrary to Illinois law. Second, Plaintiffs asked the Court to remedy the constitutional violations by allowing all brewers (out-of-state and in-state) to self-distribute—in Plaintiffs' words, they sought a remedy which would allow them “to compete on equal footing with the in-state producers who are permitted to distribute beer to retailers.” *Id.* at ¶ 2. Plaintiffs did not seek to reaffirm the rigid three-tier distribution system, but rather sought to weaken, or collapse, the distribution system such that all manufacturers – in-state or out-of-state – could sell directly to retailers. And finally, Plaintiffs made clear throughout the lawsuit that their ultimate goal was to close “an extremely important business transaction for Plaintiffs.” Pl. S.J. Reply at 23. Plaintiffs, beginning with paragraph 3 of their complaint, repeatedly stressed the urgency of this lawsuit in the face of an impending business transaction:

Defendants' actions threaten to scuttle a unique and important acquisition by WEDCO of the remaining 70 percent of CITY Beverage. Prior to Defendants' unconstitutional actions, WEDCO and CITY Beverage's majority owners had agreed to this transaction. The parties now face a State-decreed prohibition to closing this sale. Unless Plaintiffs receive immediate injunctive and declaratory relief, the prospect of WEDCO purchasing the remaining 70 percent ownership of CITY Beverage could vanish, which would cause extreme economic harm to Plaintiffs.

Compl. at ¶ 3.

A “fair inference” from Plaintiffs' complaint is that Plaintiffs were not concerned that two small in-state brewers (one of which had produced, at the time of summary judgment briefing, only 2,211.2 gallons of beer compared to AB's 77.6 million reported gallons in fiscal year 2010) were cutting into AB's market share. See *Cady*, 43 F.3d at 329 (“It is useful to look to the relief requested in *Cady*'s complaint as a starting point”). Rather, Plaintiffs were upfront about their ultimate objective—they wanted to clear the path to closing on the City Beverage transaction. See Compl. at ¶¶ 3, 32; Pls.' Mot. to Schedule Decl. Judg. Hearing at ¶¶ 3-10, 19

(describing how WEDCO's attempts to purchase the remaining interest in City Beverage were thwarted by the ILCC's declaratory ruling); ("A substantial transaction involving a large business with hundreds of employees already has been put on hold because of Defendants' Declaratory Ruling regarding Liquor Control Act and, thus, is at great risk."); (discussing how the ILCC's ruling denies AB "the same opportunity for profit maximization and the ability to leverage the competitiveness of their brands through their control and focus of distribution function"). And the only way to even begin to achieve that objective in this litigation was to obtain the declaratory judgment that they requested in their proposed order:

Upon Plaintiffs' motion for summary judgment on Count I of Plaintiffs' complaint, that Defendants' actions violate the Commerce Clause, it is hereby adjudged and ordered that:

Declaratory Judgment

Defendants violate the Commerce Clause of the United States Constitution by prohibiting out-of-state brewer AB Inc. from holding or acquiring Illinois Distributor's or Importing Distributor's Licenses or from holding, acquiring an interest in, or being affiliated with an entity that holds Illinois Distributor's or Importing Distributor's Licenses.

See Plaintiffs' Text of Proposed Order at 1, Ex. A to Pls.' S.J. Mot. The requested "Injunctive Relief" hewed to the same line, asking that Defendants be permanently enjoined from the following:

1. Denying, refusing to issue, refusing to renew, or revoking a license, or taking any other action against AB Inc. or any other entity, on the grounds that AB Inc. or its affiliates holds or acquires, or is affiliated with an entity that holds or acquires, Illinois Distributor's or Importing Distributor's Licenses.
2. Denying, refusing to issue, refusing to renew, or revoking the Distributor's or Importing Distributor's Licenses requested by or held by AB Inc., CITY Beverage – Illinois, L.L.C., CITY Beverage L.L.C., CITY Beverage – Markham L.L.C., Chicago Distributing L.L.C., or any of their affiliates on the grounds of AB Inc.'s affiliation with an entity that holds a Distributor's or Importing Distributor's License.

3. Denying, refusing to issue, refusing to renew, or revoking AB Inc.'s Non-Resident Dealer's license on the grounds that it holds a Distributor's or Importing Distributor's License or is affiliated with an entity that holds a Distributor's or Importing Distributor's License
4. Taking any other action against AB Inc., CITY Beverage – Illinois, L.L.C., CITY Beverage L.L.C., CITY Beverage – Markham L.L.C., Chicago Distributing L.L.C., or any of their affiliates based on any affiliation between AB Inc. and the CITY Beverage entities.

Id. at 2.

Turning to the ruling, the Court determined that the Commission's interpretation of the Act was unconstitutional insofar as it permitted in-state, but not out-of-state, producers to self-distribute. The Court then concluded, from a judicial standpoint, that withdrawing self-distribution rights from in-state producers was the more appropriate remedy than the ruling requested by Plaintiffs because it would eliminate the constitutional infirmity "while keeping intact most of the current three-tier system." The Court recognized that its remedy would "not materially advance Plaintiffs' ultimate goal in this litigation—clearing the path to closing on the City Beverage transaction" but later explained that its decision on the remedy "tracked both the governing principles and the actual dispositions of the only closely analogous cases cited by the parties." See Docket Entry 150 at 6-7. The Court also stayed enforcement of the order to give the General Assembly time to act on the matter if it so desired. In support of its decision to stay enforcement, the Court noted that the regulation of the distribution of liquor is a matter of public policy and a quintessential legislative function, and that state regulation of the alcoholic beverage industry involves legislative judgments with respect to temperance, public safety, taxation, licensing, and consumer protection, which courts are not as well equipped to make.

The circumstances in this case closely resemble those found in *Cady v. City of Chicago*. Cady sought a declaration that the manner in which defendants regulated access to a literature

rack “amount[ed] to an unconstitutional prior restraint and content-based censorship of the rights to freedom of religion and expression as guaranteed to Cady and others by the first and fourteenth amendments.” 43 F.3d at 329. He also asked the court to temporarily and permanently enjoin the defendants from refusing to allow Cady to (i) display religious literature on the O’Hare Chapel literature rack and (ii) gratuitously distribute such literature, without insisting upon prior review or approval of that literature. *Id.* The Seventh Circuit noted that a “fair inference” from the complaint was that Cady wanted unfettered use of the literature rack and thus the district court, in assessing whether attorneys’ fees were warranted, did not clearly err in finding that Cady’s goal was to obtain “the ability to exercise his own First Amendment rights—to get an uncensored forum for distribution of his own religious literature.” *Id.*

In *Cady*, the City removed the forum (the rack) to which Cady sought access, and thus Cady’s actual grievances were not redressed—he still had no access to the rack in order to exercise his First Amendment rights. The fact that Defendants’ behavior changed and no one else had access to the forum did not persuade the Seventh Circuit to award fees. Plaintiffs’ situation here is similar to Cady’s and distinguishable from those cases where the plaintiffs became “prevailing parties” when the defendants, either unilaterally, through settlement, or by court order, ceased the precise conduct that the plaintiffs sought to enjoin. *Cf. Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989); *Gekas*, 793 F.2d 846; *Lovell v. City of Kankakee*, 783 F.2d 95 (7th Cir. 1986). Here, Plaintiffs wanted everyone to be allowed to self-distribute, but the Court’s order foreclosed that relief, at least until the General Assembly chose to act. And when the legislature acted, Plaintiffs were left in an even worse position—they still could not self-distribute or close their transaction, yet small brewers across the nation could sell directly to retailers.

To be sure, to have prevailed for purposes of § 1988, a party “need not obtain relief identical to the relief [that it] specifically demanded, as long as the relief obtained is of the same general type,” such as may occur when the result of the litigation shifts the status quo toward that which the plaintiff hoped to obtain. *Cady*, 43 F.3d at 329 (internal quotations omitted). But before they may be deemed prevailing parties, Plaintiffs must show that the litigation in some way redressed their grievances and directly benefitted them. *Hewitt*, 482 U.S. at 760-61; *Farrar*, 506 U.S. at 111-12. Here, the relief ordered (but stayed) by the Court and ultimately imposed by the General Assembly’s new law was the opposite of what Plaintiffs wanted: Plaintiffs wanted direct access to the retailers, but the Court’s ruling and the General Assembly’s actions closed that avenue to Plaintiffs. Thus, while Defendants’ conduct changed, it did not do so in a way that benefitted Plaintiffs. In other words, based on the reasoning in *Cady*, 43 F.3d at 329, it is hard to see how Plaintiffs “attained [their] objective” in this litigation.

Plaintiffs maintain that they won a “significant constitutional victory” and that they “caus[ed] an injunction to be entered against enforcement of the discriminatory law, establish[ed] meaningful precedent, and vindicate[ed] important federal rights and interests through declaratory and injunctive relief.” Much like the Seventh Circuit’s assessment in *Cady*, when the Court compares the relief requested by Plaintiffs in their complaint and proposed order with Plaintiffs’ current posture, Plaintiffs’ emphasis on the vindication of important federal rights appears to be “a post-hoc attempt to re-characterize [their] claims.” *Cady*, 43 F.3d at 330. Plaintiffs have never been shy about what they sought to achieve in this lawsuit and why they wanted to litigate on an expedited basis. This lawsuit was filed on the same day that the ILCC issued its declaratory ruling, which in essence barred Plaintiffs’ acquisition of City Beverage, and proceeded on an expedited basis to accommodate Plaintiffs’ economic interests. The

litigation never supplied a strong flavor of vindicating constitutional rights or establishing “meaningful precedent”; rather, it always has been about saving an important commercial transaction.

Further, to the extent that the Court may have misread Plaintiffs’ objectives in this litigation, “moral satisfaction” alone would not bestow “prevailing party” status on Plaintiffs in any event. See *Farrar*, 506 U.S. at 112; *Hewitt*, 482 U.S. at 762 (noting that “the moral satisfaction [that] results from any favorable statement of law” cannot bestow prevailing party status); *Cady*, 43 F.3d at 329. Where a plaintiff obtains a declaratory judgment but is not benefitted by any change in the defendants’ behavior toward him, he normally does not qualify as a prevailing party. See *Farrar*, 506 U.S. at 111-12; see also *Martinez v. Wilson*, 32 F.3d 1415, 1422 (9th Cir. 1994) (where plaintiffs’ injunctive relief vindicated only a “generalized interest in having the government obey the law” and plaintiffs “derived no direct benefit,” they were not “prevailing parties”). If Plaintiffs had brought this lawsuit solely to minimize competition from the in-state brewers who were given distributor’s licenses—in other words, to level the playing field for all brewers such that none could act as distributors—then arguably the Court’s ruling (had it gone into effect prior to the legislature’s actions) would have given them nominal relief, as it would have prevented the two small in-state brewers from utilizing their distributor’s licenses (and precluded additional licenses from being granted to in-state distributors). However, throughout this litigation and specifically in their proposed order, Plaintiffs made clear that they wanted all brewers to be able to act as distributors. That relief was never accorded, either in court or through the legislature. Moreover, the Court’s judgment, to the extent it gave Plaintiffs some nominal relief pending legislative action, was stayed—and the General Assembly’s action mooted even that small “victory.”

The Court does not wish to minimize the constitutional infirmity created by Defendants' interpretation of the prior law, or Plaintiffs' role in bringing it to light. But an honest assessment of Plaintiffs' complaint and litigation strategy makes clear that they failed to attain the only thing they actually wanted in this litigation—to be able to acquire the remaining interest in City Beverage. Plaintiffs' post-ruling actions support this view in several respects.

First, Plaintiffs, not Defendants, appealed the Court's ruling on the Commerce Clause issue. See Notice of Appeal (seeking to appeal that portion of the order “denying plaintiffs’ request to enter an injunction that would have permitted AB Inc. and its affiliates to distribute beer and to continue owning and be affiliated with an entity that distributes beer in Illinois, and that instead enjoins enforcement of certain provisions under the Illinois Liquor Control Act of 1934, such that no brewer may distribute beer in Illinois”). Shortly after the Notice of Appeal was filed, Plaintiffs stipulated to the dismissal with prejudice of their two remaining counts, which alleged violations of the Due Process Clause of the Fourteenth Amendment and the Contracts Clause. The Court then entered final judgment on all of Plaintiffs' claims.⁵ On appeal, Plaintiffs sought reversal of “the court’s imposition of the nullification remedy and extend (‘reinstate’) to out-of-state brewers the same right to own or operate an Illinois beer

⁵ The Court notes that the issues presented by *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), and *Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008), do not figure heavily into the Court's analysis. *Buckhannon* holds that a suit's role as a catalyst in inducing the defendant to change its policies does not support an award of attorneys' fees; “a plaintiff ‘prevails’ only by obtaining a judicial order altering its legal status *vis-à-vis* its adversary.” *National Rifle Ass'n of America, Inc. v. City of Chicago, Ill.*, 646 F.3d 992, 993 (7th Cir. 2011). *Zessar* applies *Buckhannon* to a case that became moot when the statute being contested was materially amended between a district court's opinion and its judgment. Here, although the Court stayed its order to give the legislature time to act, the Court entered judgment on Count I and the parties stipulated to the dismissal of the remaining counts in order to facilitate Plaintiffs' appeal. Because there was a final judgment on the merits, resolution of the attorneys' fees issue turns on whether Plaintiffs are prevailing parties because they achieved their objectives in bringing the lawsuit, not on whether they received a decision which bears “the necessary judicial imprimatur.” *Buckhannon*, 532 U.S. at 605.

distributor afforded to in-state brewers under the Liquor Control Act.” In short, Plaintiffs were wholly unsatisfied with the consequences of their “significant constitutional victory.”

The Seventh Circuit has cautioned courts to examine “the practical impact of the judgment.” *Peterson v. Gibson*, 372 F.3d 862, 865 (7th Cir. 2004). Here, the practical impact of the judgment, which was stayed to give the General Assembly time to act, is that Plaintiffs are worse off than when they started. Plaintiffs wanted all brewers to be able to hold distributor’s licenses so that Plaintiffs in turn could acquire the remaining interest in City Beverage. Instead, Plaintiffs received a stayed judgment that did not allow them to close their transaction, and eventually the legislature passed a new law, creating a “craft brewer’s license” for in-state and out-of-state beer producers whose annual production is less than 15,000 barrels (465,000 gallons) and who may then obtain approval the ILCC to self distribute up to 7,500 barrels of that production in Illinois. While the law eliminates any offending distinction between the distribution rights of in-state and out-of-state beer producers, it also allows all small brewers to self distribute – and not just the few who were self-distributing at the time that Plaintiffs filed this lawsuit. The Court cannot discern any direct benefit to Plaintiff from this result, nor do Plaintiffs claim a benefit beyond a “significant constitutional victory” and the vindication of important federal rights.

But even if the constitutional victory alone were enough to convey prevailing party status despite Plaintiffs’ failure to (1) secure the remedy they wanted or (2) close their commercial transaction, the nominal success resulting from the constitutional victory amounts to a “Pyrrhic victory.” Plaintiffs aimed to acquire 100% of a distributor and effectively collapse Illinois’ three-tier system, and instead the 30% interest that they already own is in jeopardy and the marketplace is now more hospitable to their smaller competitors. In the Seventh Circuit’s words,

Plaintiffs aimed “high and fell far short.” *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997). This is particularly true here, where in all of the factually similar cases that were decided prior to this litigation, the district courts nullified the offending portion of the statute rather than extending it, as urged by Plaintiffs. In a sense, Plaintiffs took a calculated risk that the facts of this case would cause the Court to depart from the weight of authority holding that nullification, rather than extension, was appropriate in these circumstances. The facts presented did not move the Court in that direction, and Plaintiffs did not receive the result they hoped for, yet Plaintiffs seek to shift on to Defendants—and ultimately Illinois tax payers—the \$1.6 million bill for their expedited litigation. Compare *id.* at 585 (“When the civil rights plaintiff aims small, and obtains an amount that is significant in relation to that aim (it need not reach the target), he is prima facie entitled to an award of fees even if the case establishes no precedent.”). Simply put, under pertinent Supreme Court and Seventh Circuit authorities, there is no basis for fee shifting on the facts of this case.

In sum, the Court concludes that this case presents one of those relatively rare instances in which a party “formally prevails” on at least a portion of its lawsuit, but “should receive no attorney’s fees at all.” *Farrar*, 506 U.S. at 115. The Seventh Circuit’s decision in *Cady* provides the best guidance, and under that decision, having fallen short of achieving their tripartite objective, Plaintiffs are not prevailing parties. Moreover, even if Plaintiffs could be termed “prevailing parties,” they obtained, at best, a “technical victory [that is] so insignificant * * * as to be insufficient” to support an award of attorney’s fees, especially when viewed in light of Plaintiffs’ stated objectives. *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989); see also *Farrar v. Hobby*, 506 U.S. at 117 (noting that the reasonable fee award for a prevailing plaintiff who obtains only a “Pyrrhic victory” is zero); *Linda T. ex rel. William*

A. v. Rick Lake Area School Dist., 417 F.3d 704, 708 (7th Cir. 2005). Or, put another way, even if the litigation could be said to have “alter[ed] the legal relationship between the parties” in a way that (briefly and marginally) benefited Plaintiffs (see *Farrar*, 506 U.S. at 111-12), Plaintiffs’ overall lack of success in achieving their stated goal was so apparent that the only reasonable fee is zero.

III. Conclusion

For these reasons, Plaintiffs’ motion for attorneys’ fees [167] is denied.



Dated: March 29, 2012

Robert M. Dow, Jr.
United States District Judge