

STATE OF ILLINOIS
LIQUOR CONTROL COMMISSION

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AUG 1 2012

ILCC LEGAL

In the Matter of:) No. 12 C 100220
) No. 12 C 100221
City Beverage – Markham, LLC)
d/b/a/ City Beverage Markham) LIC: 12-2A-102035; 12-2B-69574
2064 W. 167th St.) Exp: 9/30/2012
Markham, IL 60428) IBT: 5524-4025

In the Matter of:) No. 12 C 100222
) No. 12 C 100223
City Beverage – Markham, LLC)
d/b/a/ City Beverage –Arlington Heights) LIC: 12-2A-102034; 12-2B-69575
1401 E. Algonquin Rd.) Exp: 9/30/2012
Arlington Heights, IL 60005) IBT: 3665-2202

In the Matter of:) No. 12 C 100218
) No. 12 C 100219
Chicago Distributing LLC)
d/b/a/ City Beverage - Chicago) LIC: 12-2A-96603; 12-2B-64729
4841 S. California Ave.) Exp: 10/31/2012
Chicago, IL 60632) IBT: 5515-9060

In the Matter of:) No. 12 C 100216
) No. 12 C 100217
City Beverage LLC)
d/b/a/ City Beverage) LIC: 12-2A-98399; 12-2B-61392
1105 E. Lafayette Ave.) Exp: 3/31/2013
Bloomington, IL 61701) IBT: 5509-8851

**RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS ALL CLAIMS AGAINST RESPONDENTS**

1. On July 18, 2012, WEDCO filed a motion to dismiss all claims against Respondents and supporting memorandum of law.¹ On July 23, 2012, WEDCO notified the ILCC and Legal Division that the motion to dismiss was renewed against the Amended Citation,

¹ City Beverage joined and adopted WEDCO's motion to dismiss all claims against Respondents.

filed on July 18, 2012. On July 27, 2012, the Legal Division filed its response to the motion to dismiss.

2. WEDCO respectfully seeks leave to file this reply in support of its motion to dismiss the Amended Citation, based on certain arguments the Legal Division raises in Paragraph 6 of its response but that were not addressed in WEDCO's motion.

3. This reply is limited to five pages and will not prejudice the Legal Division.

WHEREFORE, for the foregoing reasons, the ILCC should grant this motion for leave to file the attached reply.

August 1, 2012

/s/ Thomas J. Verticchio
Dale G. Wills
Thomas J. Verticchio
SWANSON, MARTIN & BELL, LLP
330 N. Wabash, Suite 3300
Chicago, IL 60611
312-321-9100 (Telephone)
312-321-0990 (Facsimile)

Counsel for CITY Beverage—Illinois, LLC

/s/ Irene F. Bahr
Irene F. Bahr
LAW OFFICE OF IRENE F. BAHR
1751 S Naperville Rd., Ste. 209
Wheaton, IL 60189
630-462-1113 (Telephone)
630-462-1273 (Facsimile)

Edward M. Crane
Albert L. Hogan, III
Andrew J. Fuchs
Nathan A. Shev
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, Illinois 60606
312-407-0700 (Telephone)
312-407-0411 (Facsimile)
Counsel for WEDCO

Proof of Service

Now comes the undersigned, an attorney, and does hereby state that the above motion was served on August 1, 2012, and was served via e-mail and hand delivery on Stephen B. Schnorf, Michael V. Casey, and Richard Haymaker, Illinois Liquor Control Commission, at 100 W. Randolph St., Room 7-801, Chicago, IL 60601.

/s/ Edward M. Crane
Edward M. Crane

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**RESPONDENTS'² REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS ALL CLAIMS AGAINST RESPONDENTS**

Respondents' motion to dismiss explains that the Craft Brewer's Act eliminated only a right of *self-distribution* in Section 5-1(a) that had previously existed for *in-state brewers* who held a brewer's license, and thus had no effect on WEDCO's right to own a distributor. This point is important because, according to the Legal Division, the Craft Brewer's Act was a change

² City Beverage joined and adopted WEDCO's motion to dismiss all claims against Respondents.

in the law that should cause this Commission to deviate from its prior ruling allowing WEDCO to maintain its 30% interest in CITY Beverage, which was based on all of the facts and circumstances of this case and the law as it existed in 2010. (Declaratory Ruling, March 10, 2010, Declaration B.) The Legal Division is wrong, however, because the Craft Brewer's Act addressed self-distribution, rather than ownership and operation of a validly licensed distributor like CITY Beverage.

The entire basis for the discrimination at issue in the federal court case was that the ILCC interpreted Section 5-1(a) to mean that a "brewer's license [was] an in-state license only." (Haymaker Memo to ILCC, dated March 1, 2010, at 1-2.) The ILCC further represented to the United States Court of Appeals for the Seventh Circuit that Section 5-1(a) provided a "limited allowance for a licensed 'brewer' to sell *directly* to retailers," which "is not the same activity of a 'distributor' who . . . engages in the '*resale or reselling* at wholesale' of alcoholic beverages." (Brief of Defendants-Appellees at 20-21, *Anheuser-Busch v. Schnorf*, Appeal Nos. 10-3298 and 10-3570, (7th Cir. May 25, 2011).) So, when the federal court nullified the in-state privileges, it made clear that it was "withdrawing the self-distribution privilege from in-state brewers" and eliminating their ability "to distribute their products directly to retailers." *Anheuser-Busch, Inc.*, 738 F. Supp. 2d at 817. The General Assembly's enactment of the Craft Brewer's Act codified the elimination of the in-state self-distribution privilege, and created a craft brewer exemption. Even after the enactment of the Craft Brewer's Act, the Legal Division re-emphasized the distinction between distribution and self-distribution, stating that distribution privileges "allow a brewer to sell their own beer directly to retailers. . . . Having distribution privileges, however, is much different than holding a distributor license." (Haymaker Memo, dated October 12, 2011, at 4.) Thus, it is abundantly clear—especially because of the Legal Division's prior admissions—

that the Craft Brewer's Act did not affect WEDCO's right to own a distributor, such as CITY Beverage.

Apparently recognizing the importance of the distinction between self distribution and ownership of a distributor previously explained in detail to the federal courts, the Legal Division now attempts to distance itself from these representations. In its opposition to the motion to dismiss, the Legal Division asserts that the it and the ILCC did not mean to represent to the federal appeals court that Section 5-1(a) permitted only self-distribution. (Legal Division Response at 7 n.21.) Rather, the Legal Division asserts that under Section 5-1(a), "if these brewers had chosen to distribute another brewer's products, they were legally authorized to do so by virtue of possessing a Distributors license and an Importing Distributors license." (*Id.*) This, however, is directly contrary to another representation that the ILCC made to the federal district court. In its opposition to plaintiffs' motion for summary judgment, the ILCC expressly stated that "[t]he Commission interprets the Act to permit only in-state producers to distribute their own product." (Defendants' Response to Plaintiffs' Motion for Summary Judgment on Their Commerce Clause Claim, Case No. 10-cv-1601 (Docket No. 65) at 1.) The ILCC further argued that "[t]o the extent that Anheuser-Busch intends to distribute *other* producers' beer, its proposed relief should be denied because the Commission permits in-state brewers to distribute only their own product." (*Id.* at 30 n.13 (emphasis in original).) This demonstrates that the Legal Division has all along understood that the in-state rights affected by the Craft Brewer's Act are simply not the same thing as WEDCO's ownership of a distributor. Thus, the Craft Brewer's Act does not affect WEDCO's rights.

The Legal Division also argues that Respondents have stated that in-state brewers could "own and operate" a distributor under Section 5-1(a) before the enactment of the Craft Brewers'

Act. This is misleading because, as the ILCC recognized in Finding B of its findings from the December 7, 2011 meeting, for purposes of the Commerce Clause claim, “[t]he federal court was obligated to accept our interpretation of state law,” without deciding whether that interpretation is correct. “A federal judge . . . must assume that the state officials’ interpretation is right – not necessarily because it *is* correct . . . but because errors in the interpretation of state law do not supply a basis for federal relief. . . . [T]he only construction of the Act that matters for purposes of the Commerce Clause claim on which Plaintiffs have sought partial summary judgment is the Commission’s.” *Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793, 801 (N.D. Ill. 2010) (quoting *Burgess v. Ryan*, 996 F.2d 180, 184-85 (7th Cir. 1993)) (noting “any interpretation other than the Commission’s – is ‘irrelevant’” to the case).

Given as much, the statutory interpretation relevant in the federal case was the ILCC’s interpretation that “allow[ed] a person holding a brewers license to sell liquor to retailers if they also [held] Illinois distributor licenses. (234 ILCS 5/5-1). . . . [After 1982], an out-of-state beer manufacturer could no longer hold a brewers license which became an in-state license only.” (Haymaker Memo to ILCC, dated March 1, 2010, at 1-2.) Accordingly, AB Inc. cited this interpretation of Section 5-1(a) as the basis for the unlawful discrimination. In other words, if the ILCC permitted in-state brewers to distribute, let alone self-distribute, then it violated the Commerce Clause to deny out-of-state brewers the same right. Thus, because the distinction between distribution and self-distribution was simply not relevant to whether there was unconstitutional discrimination, WEDCO used the phrase “own or operate” as a convenient short-hand reference to the right it was actually seeking in the federal litigation.

There is also no merit to the Legal Division’s argument that the Seventh Circuit’s dismissal of the appeal from Judge Dow’s remedy as moot demonstrates that the Craft Brewer’s

Act had an effect beyond self-distribution. The Craft Brewer's Act mooted the appeal because the Commerce Clause case and Judge Dow's remedy were based on the ILCC permitting in-state brewers to act differently than out-of-state brewers under Section 5/5-1(a). Once the ILCC stated that the Craft Brewer's Act eliminated that right, the discrimination ceased. Indeed, the ILCC moved to dismiss the appeal by stating that it no longer would permit the discrimination that was the basis for the case: "This litigation related to Illinois' policy – which Public Act 97-005 has now superseded – of allowing in-state brewers, but not out-of-state brewers, to be licensed beer distributors and to distribute beer in Illinois. (Appellants' Motion, *Anheuser-Busch v. Schnorf*, Appeal Nos. 10-3298 and 10-3570, (7th Cir. June 7, 2011) (Docket No. 26).) Thus, the ILCC's interpretation of the Craft Brewer's Act to end discrimination mooted the litigation rather than the actual terms of the legislation.

In March 2010, the ILCC carefully considered whether WEDCO could retain its 30% interest in CITY Beverage in light of the law and facts of this case and, as a result, issued Declaration B of the Declaratory Ruling. Although the Legal Division is now asking the ILCC to reconsider Declaration B, it cannot point to a change in the relevant facts and circumstances of this case (as a result of the Craft Brewer's Act or otherwise), and thus Declaration B should remain in force.³

³ It is also remarkable that the Legal Division no longer asserts that the Liquor Control Act, as amended, unambiguously precludes brewers from owning distributors. Rather, its new position is that "[t]he Legal Division recognizes the legitimacy of the ambiguity of the Act and the Commission must answer the question of whether or not an NRD/brewer can be Distributor." (Response to Motion to Dismiss at 4-5.) Respondents address this further in pages 1-2 of their proposed reply in support of their motion for discovery.

August 1, 2012

/s/ Thomas J. Verticchio

Dale G. Wills
Thomas J. Verticchio
SWANSON, MARTIN & BELL, LLP
330 N. Wabash, Suite 3300
Chicago, IL 60611
312-321-9100 (Telephone)
312-321-0990 (Facsimile)

Counsel for CITY Beverage –Illinois, LLC

/s/ Irene F. Bahr

Irene F. Bahr
LAW OFFICE OF IRENE F. BAHR
1751 S Naperville Rd., Ste. 209
Wheaton, IL 60189
630-462-1113 (Telephone)
630-462-1273 (Facsimile)

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**RESPONDENTS' MOTION FOR LEAVE TO FILE A
REPLY IN SUPPORT OF THEIR MOTION FOR DISCOVERY**

1. On July 18, 2012, Respondents filed a motion for discovery and supporting memorandum of law. On July 27, 2012, the Legal Division filed its response.
2. Respondents respectfully seek leave to file the attached reply to certain arguments the Legal Division makes in its response that were not addressed in Respondents' opening brief.
3. This reply is limited to five pages and will not prejudice the Legal Division.

WHEREFORE, for the foregoing reasons, the ILCC should grant this motion for leave to file the attached reply.

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312-321-9100 (Telephone)
312-321-0990 (Facsimile)

Counsel for CITY Beverage –Illinois, LLC

/s/ Irene F. Bahr

Irene F. Bahr
LAW OFFICE OF IRENE F. BAHR
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630-462-1113 (Telephone)
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RESPONDENTS’ REPLY IN SUPPORT OF THEIR MOTION FOR DISCOVERY

As set forth in Respondents’ motion for discovery, the ILCC must produce evidence that “might be useful” to Respondents to comply with constitutional due process requirements. *Lyon v. Dep’t of Children and Family Servs.*, 335 Ill. App. 3d 376, 384 (4th Dist. 2002) (quoting *McCabe v. Dep’t of Registration and Ed.*, 90 Ill. App. 3d 1123, 1131 (1st Dist. 1980)). This reply addresses arguments the Legal Division makes in its response that disregard this constitutional mandate.

Since CITY Beverage was formed in 2005, Anheuser Busch affiliate WEDCO has owned 30% of the company. Prior to that time, Anheuser Busch affiliates owned and operated distributors in Illinois in their own names for nearly thirty years, and, in fact, Anheuser Busch has had a distributor presence in Illinois for decades prior, even before prohibition. (WEDCO's Motion to Dismiss at 8-9.) It is simply not credible to suggest that over that expanse of time Anheuser Busch owned a distributor contrary to the Liquor Control Act.

But, in 2010 when WEDCO sought to purchase the remaining 70% interest in CITY Beverage, that in essence is what the Legal Division said. The Legal Division convinced the ILCC to block WEDCO's acquisition on the grounds that the law was clear that WEDCO could not own an interest in a distributor. They have repeated the mantra that the Liquor Control Act is plain, and that it unambiguously required the ILCC to block the WEDCO deal in court pleadings, filings, special sessions, and public meetings. For example, the Legal Division told the ILCC that "[i]t is the opinion of the ILCC legal staff that the Liquor Control Act and the recent statutory amendments to the Act make it clear that a brewer cannot hold an interest in a distributor." (Haymaker Memo, dated October 12, 2011, at 3.) In urging the ILCC to block the WEDCO transaction in March 2010, the Legal Divisions stated that a "*plain reading* of the Illinois Liquor Control Act specifically states that a distributor cannot also be a non-resident dealer." (Haymaker Memo, dated March 1, 2010, at 2 (emphasis added).) When referring to its argument regarding the definition of distributor, the Legal Division stated "[t]hese definitions *unambiguously* establish the rule that no person holding an Illinois distributors license can also be a non-resident dealer." (Haymaker Memo, dated March 1, 2010, at 2 (emphasis added).) The Legal Division's

advice to the ILCC was that they understood the law, and that there was no question of what it meant.¹

Given everything that has occurred based on the Legal Division's prior pronouncements about what the law says, it is stunning that the Legal Division now asserts that the Liquor Control Act is "ambiguous" and that the ILCC "plays a critical role in interpreting some of the Act's ambiguities." (Response to Motion to Dismiss at 3-4; Discovery Response at 5.) Where once there was clarity when advocating to block the WEDCO deal, the Legal Division now states that "[t]he Legal Division *recognizes the legitimacy of the ambiguity* of the Act and the Commission must answer the question of whether or not an NRD/brewer can be Distributor." (Response to Motion to Dismiss at 4-5 (emphasis added).)

This fundamental shift in the Legal Division's position reveals many things about this case. Procedurally, however, it highlights the need for discovery into the ILCC's previous interpretations of the statute, the reason for the change, and the Legal Division's theories. Because the Legal Division now acknowledges that it believes the law is unclear, and that the ILCC must determine the law in light of this ambiguity, it is critical that all the evidence be brought to bear on the question.

Indeed, the Legal Division itself specifically refers to the "evidence" the ILCC should use in determining the proper interpretation of the statute. (Response to Motion to Dismiss at 5 "in the face of the wide array of evidence that would suggest . . . there is a legitimate debate about the intent of the Legislature which must be answered by the Commission"); *id.* ("There is too much evidence that an NRD/brewer cannot be a distributor to ignore the presence of a legitimate debate . . .").) In its response to Respondents' motion to dismiss, the Legal Division cites

¹ The Legal Division also incorrectly advised the ILCC that its interpretation of the law was consistent with the Federal Constitution.

evidence such as “past Commission pronouncements and interpretations” (*id.*), which is precisely the category of evidence that Respondents seek to support their case and the Legal Division refuses to provide.

Likewise, in its discovery reply brief, under the guise of “correct[ing] Respondents’ mischaracterization of the past interpretations,” the Legal Division attaches documents to its discovery response which it says supports its position. It also comments at length about the ILCC’s actions in 2001 and 2003, including what it calls the “Stanton doctrine.” (Discovery Response at 4-6.) The Legal Division is thus gathering and using documents it contends support its position but then prejudicially declines to locate relevant documents for Respondents.²

The Legal Division asserts that it is “receptive to reviewing any new stipulations,” but Respondents’ discovery requests otherwise would “force the already understaffed Commission licensing personnel to search file archives for a ‘needle in a haystack’ licensing document.” (Discovery Response at 10.) As to the stipulations, the Legal Division puts the cart before the horse because it denies Respondents the ability to discover facts helpful to their case, which would form the basis of stipulations. Moreover, the undisputed facts that the Legal Division suggests it may stipulate are not the focus of discovery. The primary focus of discovery is on the questions of why the interpretation of the Liquor Control Act changed, the basis of that change,

² Respondents contend that the statute *unambiguously* does not prohibit WEDCO’s 30% interest in CITY Beverage. Indeed, Section 5/6-4(a), the “Prohibited Transactions and Interests” provision of the Liquor Control Act, is very specific in its prohibition of certain manufacturers, such as wine manufacturers and distillers, and their affiliates and shareholders owning more than a certain percentage of a distributor. The ILCC and Illinois Attorney General have historically recognized that brewers may own a distributor because brewers are not included in the prohibition in Section 5/6-4(a) (or any where else in the act). To the extent that the ILCC does not dismiss the Amended Citation, however, the Legal Division’s ambiguity theory emphasizes the relevance of discovery into the ILCC’s previous interpretations of the statute, the reason for the change, and the Legal Division’s theories. Under the Legal Division’s contention that the statute is ambiguous, it is precisely this history that would guide the ILCC in its interpretation of the statute.

and who was responsible. Respondents are entitled to discovery of information on these points, to which the Legal Division does not, and cannot offer stipulations.

Importantly, the Legal Division did not find it overly burdensome to gather documents and information in support of its own position, given that it attached such materials to its response briefs and otherwise appears to have conducted an inquiry into ILCC policy over the past 30 years. (Discovery Response at 4-6; Motion to Dismiss Response Brief at 6.) The Legal Division has demonstrated that relevant documents and information do exist and that it is capable of searching for and gathering the same. Respondents are entitled to all relevant documents, not just those the Legal Division chooses to use in support of its position.³

In any event, to eliminate any burden and expense to the ILCC and its staff, Respondents will review the ILCC's files for relevant documents (as defined in their document requests) at their own expense. Respondents will provide their own reviewer and cover any other necessary costs. Respondents will also work according to a schedule compatible with the Legal Division's schedule and enter into any other arrangements that would make the review feasible.

Finally, the Legal Division asserts that Respondents are not entitled to responses to their discovery requests because "the Legal Division is not planning any tactical surprise." (Discovery Response at 3.) The Legal Division's bare assurance does not satisfy due process, particularly in light of the Legal Division's history of changing its legal theories throughout this case (in a vain search for a basis to support its position). The discovery Respondents seek is reasonable and necessary for them to respond to the Legal Division's factual and legal assertions.

³ The Legal Division has not explained why the discovery requests are burdensome, *e.g.*, specified the volume of files. The Legal Division also argues that the discovery requests are unreasonably cumulative and duplicative, and suggests that these materials can be obtained more easily from another source. (Discovery Response at 1-2.) These discovery requests cannot be cumulative or duplicative because the Legal Division has never produced relevant documents or provided the requested information. In addition, the Legal Division identified no alternative source for this discovery. Thus, the Legal Division has not satisfied minimum due process standards.

August 1, 2012

/s/ Thomas J. Verticchio

Dale G. Wills
Thomas J. Verticchio
SWANSON, MARTIN & BELL, LLP
330 N. Wabash, Suite 3300
Chicago, IL 60611
312-321-9100 (Telephone)
312-321-0990 (Facsimile)

Counsel for CITY Beverage –Illinois, LLC

/s/ Irene F. Bahr

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LAW OFFICE OF IRENE F. BAHR
1751 S Naperville Rd., Ste. 209
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Counsel for WEDCO