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## **DUNCAN LIQUOR LAW LETTER**

**May, 2016**

A monthly newsletter for the clients of R.E. "Tuck" Duncan, Attorney at Law  
*Please forward as you deem appropriate.*

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HAPPY MEMORIAL DAY !



No. 114,170 IN THE COURT OF APPEALS OF THE STATE OF KANSAS  
CLAY DEAN CULLISON, Appellant, v. KANSAS DEPARTMENT OF  
REVENUE, Appellee. SYLLABUS BY THE COURT

1. The legislature has made a distinction regarding a law enforcement officer's breath test certification based on whether the driver fails the test or refuses the test. If the driver fails the test, the officer must certify that the driver was operating the vehicle before the Kansas Department of Revenue can suspend the person's driver's license. If the driver refuses the test, the officer must certify that the driver was either operating or attempting to operate the vehicle before the division can suspend a person's driver's license. K.S.A. 2015 Supp. 8-1002(a)(1)(A), (a)(2)(A), (f).

2. If a driver who fails a requested breath test establishes by a preponderance of the evidence that he or she was not operating a vehicle at the time he or she was stopped but merely attempting to operate it, the driver would fall outside the reach of K.S.A. 2015 Supp. 8-1002(a)(2)(A) and the Kansas Department of Revenue would not be statutorily permitted to suspend the person's driver's license.

Appeal from Seward District Court; LINDA P. GILMORE, judge. Opinion filed May 13, 2016. Reversed.

full decision at:

<http://www.kscourts.org/Cases-and-Opinions/opinions/CtApp/2016/20160513/114170.pdf>

## **RNDC Indicted On Federal Smuggling Charges, But CEO Proclaims Company's Innocence**

May 25, 2016

Republic National Distributing Co. (RNDC), the country's second-largest spirits and wine wholesaler, has been indicted on federal liquor smuggling charges, but RNDC president and CEO Tom Cole insists the company-and the three employees who were also indicted-are innocent.

Yesterday, the U.S. Attorney for the District of Maryland charged RNDC and three of its employees-Eugene Gerzsenyi, Jason Lockerman and Lisa Robbins-in what prosecutors say was a scheme to transport liquor to New York from Maryland in order to take advantage of the huge tax disparity. Liquor taxes in New York are roughly five times as high as Maryland's.

According to WBAL-1090 in Baltimore, the 23-count indictment alleges that, from 2009 to 2012, several New York liquor stores made contact with establishments in Maryland's Cecil County, who then passed the New York retailers' orders to RNDC, which operates in Maryland-but is not registered as a distributor in New York.

The indictment maintains that RNDC and Robbins, Gerzsenyi and Lockerman "facilitated the payment to RNDC for liquor that was moved from RNDC, through the Cecil County retailers to the New York retailers and their agents. Specifically, RNDC submitted invoices to the Cecil County retailers that included the amounts owed to RNDC for the liquor that had been delivered to the New York retailers and their agents. The New York retailers paid the Cecil County retailers in cash, which the Cecil County retailers deposited into their business accounts. The Cecil County retailers then paid RNDC by check." The indictment says that New York liquor taxes weren't paid by RNDC or retailers. Additionally, prosecutors charge that the distributor filed false reports with the Maryland State Comptroller's Office that claimed the liquor sold to the Cecil County retailers was intended to be sold in Maryland.

"RNDC is extremely disappointed to learn that the U.S. Attorney for the District of Maryland has chosen to take this action," said Cole in a statement. "We have worked diligently with the U.S. Attorney's office since first learning about the investigation in 2012, and have seen no evidence to support their version of the facts. RNDC emphatically denies these allegations and looks forward to our day in court where we will demonstrate that the prosecutors' accusations are based on erroneous assumptions, unsubstantiated theories, and represent an unprecedented attempt at federal government overreach."

The indictment seeks forfeiture of all proceeds related to the scheme, which prosecutors say is more than \$9 million. Additionally, if convicted, RNDC and Robbins, Gerzsenyi and Lockerman face a \$250,000 fine, while the individual defendants also face a maximum sentence of 20 years in prison, for several counts of wire fraud and wire fraud conspiracy.

But Cole is confident RNDC will prevail in court. "With over 100 years of exemplary business on our side, we expect complete exoneration," he said.

**FROM TTB  
LIQUOR WHOLESALER AND THREE EMPLOYEES INDICTED FOR  
\$9 MILLION SCHEME TO SMUGGLE LIQUOR**

On May 24, 2016, a federal grand jury indicted Republic National Distribution Company, LLC, and its employees, Eugene Gerzsenyi of Glen Burnie, Maryland; Jason Lockerman of Bel Air, Maryland; and Lisa Robbins of Woodbine, Maryland, on charges arising from a scheme to defraud the state and city of New York, and registered New York liquor wholesalers. Specifically, the indictment alleges that the defendants transferred and moved liquor from Maryland, where the state excise tax rate for liquor was approximately \$1.50 per gallon, to New York, where the state excise tax for liquor was approximately \$7.44 per gallon, for retail sale.

- Read the full report: [Liquor Wholesaler and Three Employees Indicted for \\$9 Million Scheme to Smuggle Liquor from Maryland to New York](https://www.ttb.gov/news/liquor-wholesaler-indicted.shtml)

<https://www.ttb.gov/news/liquor-wholesaler-indicted.shtml>

**FROM WINE AND SPIRITS DAILY**

More Color on RNDC Indictment in Maryland

Following the announcement that a federal grand jury in Maryland had indicted RNDC and three of its employees on charges for an alleged alcohol smuggling scheme [see WSD 05-24-2016], your editors began sifting through the relevant court documents for more info.

What we found is that RNDC's trouble is wrapped up with another case we've reported on recently. Recall, late last year two Cecil County liquor store operators pled guilty to smuggling alcohol to New York. Dilip Patel, Chesapeake Wine and Spirits operator, pled guilty to wire fraud and admitted to evading New York excise taxes [see WSD 09-30-2015]. About a month later, Northside Liquors operator Tushar Patel pled guilty to operating an illegal wholesale

alcohol business [see WSD 10-23-2015].

It turns out RNDC was one of their wholesalers during the period and has been implicated along with them, per the US Attorney's Office in Maryland.

**BACKDOOR SALES.** As we first reported, the formal indictment documents allege the parties involved failed to: register as liquor wholesalers or distributors in the state of New York; provide monthly reports of the quantities of liquor shipped into New York for retail sale; and pay New York excise taxes.

In addition, the court docs include testimony from a representative of Northside Liquors, giving specifics on what the RNDC employees told the retailer. According to the rep, RNDC employees discussed liquor sales that were going "out the back door" of Northside Liquors to New York, adding that agents of the TTB were scrutinizing Northside Liquors. Moreover, an RNDC salesman also allegedly told a manager at Northside to "use the cash proceeds from the New York smugglers to buy a cashier's check to pay to RNDC."

The state is seeking forfeiture of all proceeds traceable to the scheme, including a money judgment of at least \$9 million. In addition, if convicted of the money laundering counts, Maryland could seek up to \$188 million in fines from RNDC. Though, it's unlikely they will pay that much.

### **FDA EXTENDING AUTHORITIES TO ALL TOBACCO PRODUCTS, INCLUDING E-CIGARETTES, CIGARS, AND HOOKAH**

The U.S. Food and Drug Administration (FDA) recently issued a final rule deeming certain products to be tobacco products subject to the FDA's authorities under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). The Tobacco Control Act provides FDA with authority to regulate certain products specified in the FD&C Act, including "cigarettes," "roll-your-own tobacco," and "smokeless tobacco."

With this final rule, FDA extends its authority under the FD&C Act to all other categories of products that meet the statutory definition of "tobacco product" in the FD&C Act, except accessories of such newly deemed tobacco products. FDA's final rule was published in the Federal Register on May 10, 2016, at 81 FR 28973.

- Read the final rule: Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family

Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products.

<https://www.federalregister.gov/articles/2016/05/10/2016-10685/deeming-tobacco-products-to-be-subject-to-the-federal-food-drug-and-cosmetic-act-as-amended-by-the>

Additional Information: FDA Tobacco Products Versus TTB Tobacco Products  
FDA's authority under the FD&C Act is separate and independent from TTB's authority under the Internal Revenue Code (IRC), and the definition of "tobacco products" or of any specific tobacco product may differ between the FD&C Act and the IRC.

FDA's deeming rule has no effect on TTB's jurisdiction over tobacco products, and FDA's deeming of certain products to be tobacco products under the FD&C Act does not imply that those products would meet the definition of a tobacco product under the IRC.

## **U.S. Officials Are Investigating Anheuser-Busch InBev**

Source: Fortune  
by Reuters  
May 25, 2016

U.S. antitrust officials are investigating Anheuser-Busch InBev AHBIF 1.85% over its new incentives that encourage independent distributors to sell more of its own beer brands at the expense of competing craft brews, two people with knowledge of the matter said.

Budweiser owner AB InBev has 45.8 percent of the U.S. beer market but has seen sales dwindle at least partially because of rising craft beer sales.

The U.S. Department of Justice last year probed AB InBev's plan to buy distributors in response to craft brewers' complaints that it aimed to curb competition. The purchases of two distributors in California, two in Colorado and one in New York have since closed.

The beer giant introduced the new incentive program at a distributors' meeting in

late 2015, and the U.S. authorities are looking into it as part of its antitrust review of AB InBev's planned more than \$100 billion takeover of global rival SABMiller PLC, the two people said.

AB InBev has offered to divest all of SABMiller's U.S. assets, so there is little expectation that the deal could stumble over craft brewers' complaints.

There is a precedent, however, for the Justice Department to put limits on incentive programs. When AB InBev bought Grupo Modelo in 2013, it required the Modelo beers in the United States to be divested and required AB InBev to refrain from offering incentives to distributors that would hurt Modelo for three years.

Investigators at the Justice Department have contacted beer distributors and craft brewers, asking about the incentive plan as well as AB InBev's other steps aimed at curbing craft promotion by distributors, those people said.

The Justice Department declined to comment.

The independent distributors aligned with AB InBev are contractually required to spend a certain amount each year to advertise AB InBev beers. Those include products of breweries such as Blue Point or Goose Island, which used to be craft brewers, but are now part of AB InBev group.

Under the new incentive plan, AB InBev refunds 75 percent of this money if its beers make up 98 percent of the distributor's sales, according to documents provided to lawmakers by AB InBev.

The greater the share of rival beers in a distributor's sales, the less money it receives, according to the document.

Even if a distributor raised sales of AB InBev beers, it would still receive less money if craft sales rise faster.

That makes the incentives appear designed primarily to suppress craft sales rather than boost AB InBev sales, several people familiar with the plan told Reuters. They spoke on condition of anonymity to protect business relationships.

A distributor that would want to promote a craft beer would be also required to run an equal promotion for Budweiser, which becomes prohibitively expensive, the people said.

AB InBev said it continued to "cooperate fully" with the Justice Department's review of the merger with SABMiller, which this week got cleared by the European authorities and which the group expected to complete in the second half of 2016.

Gemma Hart, an Anheuser-Bush spokesperson, defended the incentive program as a "reflection of just how competitive the U.S. beer industry has become."

"Our voluntary incentive program clearly does not prevent or inhibit other brands from getting to market," she said, noting that nearly all Anheuser-Busch distributors carried other brands.

Of the estimated 3,000 U.S. distributors, about 1,100 are aligned with legacy brewers like AB InBev or MillerCoors and serve big retailers and restaurant chains as well as small stores. The remaining distributors are much smaller and do not provide as much access to large-scale retailers.

AB InBev's practices are not outright illegal, but could be deemed as such if AB InBev is found to be dominant and aiming primarily at shutting out rivals rather than building up their own sales, antitrust experts said.

Unlike most industries, which may have several distribution channels, beer in many states must be sold through independent distributors. Most cities have a distributor aligned with AB InBev, another with MillerCoors and may have a third that specializes in craft beer.

#### BIG BEER MARKET STAGNATING

AB InBev, the product of a 2008 merger between Anheuser-Bush and Belgian-Brazilian brewer InBev, tops the U.S. beer market followed by MillerCoors, with a 26 percent share.

But the two groups have been challenged by craft brewers, defined as independent operations make no more than 6 millions barrels a year. They offer everything from classics to oddball brews like Funky Buddha Brewery's Banana Split Ale and captured 12.2 percent of the U.S. market last year compared with just 5 percent in 2010.

Antitrust experts said paying distributors to suppress craft sales could run afoul of antitrust law. "It's the large manufacturers that are trying to narrow the channel

of distribution that is most cost effective," said Andrew Gavil, who teaches at the Howard University School of Law. "That's the big story here."

Gavil said that AB InBev would likely defend itself by saying its market share was hardly dominant.

Andre Barlow, an antitrust expert with the law firm Doyle, Barlow and Mazard PLLC, said, however, the group had enough of a clout to raise concerns.

"ABI has the power to limit the distributors' ability to distribute the craft brews."

It can be sometimes hard to prove in court that practices such as incentives that aim at reducing rivals' sales violate antitrust law because a company could argue that the practices are good for consumers, other antitrust experts said.

### **McLane Determined to Distribute Alcohol in TX**

The Texas alcohol landscape could be in for some major changes in the next few years. In addition to Walmart's push for alcohol in grocery and the Southern-Glazer's merger, WSD has learned Warren Buffet's food distribution business, McLane Company, is getting serious about its desire to handle alcohol in the state.

Neftali Garcia, McLane Co.'s vp of government affairs and corporate comms, tells WSD the Texas Alcohol Beverage Commission (TABC) denied McLane an alcohol distribution permit in 2012 because it is owned by Berkshire Hathaway, which also owns a small (less than 5%) interest in a retailer that sells alcohol. TABC's primary reason for denying the application was that Texas has a "One Share Rule," meaning "'even one overlapping share' of stock ownership between tiers is against the law regardless of whether it is direct or--in our case--indirect," says Nef.

As a result of the decision, McLane began investigating the One Share Rule and TABC licensing practices "in order to better understand its rationale for denying our permit application, and to assist in determining whether we should re-apply," he continues. "We were particularly concerned with the application of the One Share Rule -- as it appeared that the TABC only enforced such a rule against

certain companies while allowing other companies to maintain small cross-tier ownership stakes."

In the course of its research, McLane sent a series of Public Information Act (PIA) requests to the TABC a little over a year ago, many of which are now the subject of three separate lawsuits. Per McLane's initial complaint against the TABC filed in the Travis County District Court in January, some of the specific requests included:

- Current policies, procedures and/or guidelines in any way related to interpretation, implementation and/or application of tied house laws.
- Whether the TABC actively and strictly enforces its "any overlapping ownership" standard.
- All direct or indirect owners of licensees of any tier (retail, wholesaler, or manufacturer) as of December 31, 2014, utilized in reviewing cross-tier ownership by the TABC.
- Any and all documentation of any kind or types indicating Sam Glazer or any "interest" holder of Glazer's, Inc. is related in any manner, employment, contractually or otherwise, with any Diageo entity in New York or any other location.
- All correspondence generated by or received by any member of the TABC Licensing Division from or to any Licensee in any tier, or employee or consultant of any licensee, trade association of any kind, or any registered lobbyist with the state of Texas.
- The internal policies or discussions regarding potential or actual conflicts of interest between the TABC and certain individuals and licensees.
- All enforcement actions taken against any licensed wholesaler/distributor in any category including but not limited to persons and/or entities holding Agent's Permits and/or Agent's Beer Licenses.

[SIDEBAR. PIA requests are first sent to a government agency (TABC in this case), which then must write a letter to the Attorney General to determine whether the information sought should be made public. The Attorney General can order TABC to provide information or not, or require them to make a case as to why the information should not be released if the TABC feels it should be kept private.]

After McLane's first round of PIA requests, the TABC filed suit against the Attorney General in October 2, 2015 because the Attorney General required the agency to turn over certain documents to McLane, says Nef. McLane intervened in the lawsuit in support of the Attorney General and subsequently filed two of its own lawsuits against TABC.

McLane claims "despite some of the PIA requests being outstanding nearly a year, the TABC has, for certain requested items, produced no documents, or, for others produced only a small amount of documents, while failing to produce the vast majority of responsive documents."

McLane is asking the courts for a writ of mandamus in each suit, i.e., to order TABC to fulfill its official duties; a jury trial for all issues triable; and monetary relief of \$100,000 or less and non-monetary relief. Though McLane anticipates seeking monetary relief request could get as high as \$1 million should the suits go to trial.

"Although the lawsuits have prompted the TABC to produce more documents, to this day we have not received many of the documents we requested over a year ago," says Nef.

We'll have more on what this development could mean for Texas and the industry at large in tomorrow's issue. In the meantime, if you have any thoughts on the bigger picture, ping us [atemily@winespiritsdaily.com](mailto:atemily@winespiritsdaily.com) or on our confidential hotline.

### **More on What McLane Move Could Mean**

from Wine & Spirits Daily

Yesterday, we reported that Berkshire Hathaway subsidiary McLane Company, a huge distributor of food products, cigarettes, candy and sundries, has taken the Texas Alcoholic Beverage Commission to court over the state's tied house laws and the frequency of enforcement [see WSD 05-24-2016].

It's been a few years since we reported on any big moves from McLane, so today we want to share a brief primer on who McLane Co. is and why it matters if they want to expand their footprint in alcohol distribution.

WHO IS MCLANE? McLane Company is a \$48 billion supply chain services

company with one of the nation's largest fleet of trucks. It primarily delivers non-alcohol consumer products, except in Georgia, North Carolina, Tennessee and Colorado where it distributes alcohol via its Kahn Ventures company.

It has 18 foodservice distribution centers across the country including: New York, Texas, Georgia, New Jersey, North Carolina, Kentucky, Colorado, Virginia, Tennessee, Wisconsin, Florida, Arizona, Michigan, Oregon, California, and Kansas.

**INDUSTRY BACKGROUND.** Years ago there was speculation that McLane (and therefore Buffett) was looking to break into the beer distribution business since its parent company Berkshire Hathaway owned a significant stake in Anheuser-Busch.

However, its first move into alcohol distribution was in wine and spirits with the acquisition of Empire Distributors in Georgia and North Carolina in the spring of 2010. That was followed by an acquisition of Horizon Wine and Spirits in Tennessee in the fall, and then in 2012 it expanded its presence in Tennessee by acquiring Delta Wine & Spirits. In 2013, Kahn formed a joint-venture with Wirtz Beverage in Missouri to take a minority stake in Missouri Beverage in 2013--which they sold to Major Brands in 2014-- and in 2015 Kahn solidified its statewide presence in Tennessee with the acquisition of B&T Distributing.

**BIGGER PICTURE.** McLane's alcohol distribution business is run by subsidiary Kahn Ventures, which is expected to bring in approximately \$850 million in revenue in 2016. Furthermore, Nef Garcia, McLane's vp government affairs and corporate communications, confirmed to WSD McLane now has alcohol distribution licenses in California, Arizona, Colorado, Florida, Georgia, Illinois, Kentucky, North Carolina, Tennessee Virginia, and Washington.

It's still not clear whether the Buffet empire wants to become a major force in the alcohol distribution business or if it is merely hedging its bets by securing a number of distribution licenses. But Nef did confirm: "McLane wants to distribute alcohol in Texas, the state in which we were founded in 1894, employ over 3,500 teammates, and continue to call home today."

McLane certainly has the resources to make a broader push into alcohol distribution, barring state regulations that prevent it from doing so, but what's more important is who might join them? If they can recruit some of the bigger suppliers, it would drastically change what the second tier looks like in the US.

MAY 24, 2016 1 COMMENTS

***Wines being sold with misleading ratings***

***A survey of 30 liquor stores in Connecticut found 90 percent were mislabeling wine ratings.***

An investigation of 30 liquor stores throughout Connecticut found that nearly 90 percent are misrepresenting the ratings of the wines they sell.

Madison-based Truth in Advertising (TINA.org) said most liquor stores selling wine, including independent neighborhood stores and major chains, displayed wine ratings for bottles or vintages other than those for sale. The organization said it found numerous instances where wines were rated lower than what the sign posted near it indicated and many that were not rated at all.

In letters to each of the 26 stores where a misrepresentation was found, TINA.org said that the marketing was deceptive and "lures consumers into buying a wine that is different from what they believe they are purchasing." The letters urged owners to correct the problem immediately. Yesterday, TINA.org also alerted the state Department of Consumer Protection about its findings.

A Consumer Protection spokesperson said DCP had received the complaint and is reviewing the information. She said consumers should read information, ratings and labels carefully while shopping. Any questions about ratings should be directed to store staff before making a purchase.

"The deceptive signage found in the sampling of stores may be indicative of a widespread issue," said TINA.org Executive Director Bonnie Patten in a statement. "Liquor stores need to review their in-store marketing practices to make sure that shoppers are getting accurate information about the actual wine bottles on their shelves."

A wine's rating can vary from year to year depending on shifting climate and the philosophy of the winemaker, said Cheryl Stanley, a Cornell University professor who teaches a course on wine appreciation. "Hail at harvest or wet moldy conditions within the vines will cause a year to be different than another," said Stanley in a release provided by TINA.org. "That is why vintages on labels mean something."

Meiomi's Pinot Noir, the group said, is a good example of how a wine's rating can fluctuate in the span of a single year. From 2013 to 2014, the wine dropped four points on Wine Spectator's 100-point scale, from 92 ("Outstanding: a wine of superior character and style") to 88 ("Very good: a wine with special

qualities"). Nevertheless, TINA.org found the 2014 vintage in a package store in Fairfield accompanied by a wine ratings sign touting the 2013 vintage.

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## **Wine-store signs often deceptive, group says**

Source: The Day  
By Lee Howard  
May 23, 2016

A Connecticut-based consumer group said Monday it has alerted the state Department of Consumer Protection about what it called the widespread deceptive marketing tactics of liquor stores that post signs rating wines that they do not actually sell.

TruthInAdvertising.org, also known as TINA, urged liquor stores to remove deceptive signs from their premises immediately.

"The deceptive signage found in the sampling of stores may be indicative of a widespread issue," said Bonnie Patten, executive director of TINA, in a statement. "Liquor stores need to review their in-store marketing practices to make sure that shoppers are getting accurate information about the actual wine bottles on their shelves."

TINA said that in its investigation of 30 stores in Connecticut, 26 were found to have deceptive signs. This means nearly 90 percent of stores had signage promoting wine ratings for bottles containing vintages not actually for sale. In some cases, the vintage had not yet been rated so an older rating had been displayed.

"TINA.org found numerous instances where wines were rated lower than what the sign posted near it indicated and many that were not rated at all," the consumer group said.

TINA sent warning letters to each of the 26 stores found to have misrepresented which vintages were for sale, with most of them clustered in the Branford-New Haven area. None from southeastern Connecticut was included.

"The Department of Consumer Protection has received the complaint from TINA.org regarding wine ratings displayed next to bottles on store shelves. We are in the process of reviewing the information sent to us in accordance with

our complaint process. We always encourage consumers to read information, ratings, and labels carefully while shopping. If consumers have questions about ratings or labels, we encourage having a conversation with store staff before making a purchase."

A spokeswoman for the Consumer Protection department said staff there is reviewing TINA's complaint.

"We always encourage consumers to read information, ratings, and labels carefully while shopping," said spokeswoman Lora Rae Anderson in an email response to The Day seeking comment. "If consumers have questions about ratings or labels, we encourage having a conversation with store staff before making a purchase."

A spokesperson for the Connecticut Package Stores Association could not immediately be reached for comment.

Cheryl Stanley, a wine aficionado who teaches at Cornell University, was quoted by TINA as saying wine ratings shift from year to year even for the same wineries based on climatic conditions and changing growing tactics.

"Vintages on labels mean something," she said in a story written by TINA.

TINA cited a pinot noire whose rating went from a 92 (outstanding) to an 88 (very good) in just one season. Yet the high rating in 2013 was used to promote a 2014 vintage at a store in Fairfield, the organization said.

But TINA said some wine stores, such as The Cork Shop in Branford, seem to get it. Co-owner Sapan Patel, who bought the store late last year, told the organization that he initially found about a quarter of the former owners' signs were for bottles not on the shelves, TINA said, so he removed virtually all signs to start afresh.

"We don't want the customer confused," Patel told TINA.

But TINA found sometimes the signs were causing more than confusion; they did not reflect tasting notes actually written by experts published by Wine Spectator, Wine Enthusiast, Wine & Spirits and Beverage Dynamics, among other sites cited in stores.

Even larger wine sellers such as Costco and BJ's were not immune from

problems, according to TINA, which cited the two for having signs rating recent vintages rather than wines actually for sale.

TINA suggested that consumers always check the vintages listed on store signs to ensure they are buying the wine they expected.

In a letter to Consumer Protection Commissioner Jonathan A. Harris, Laura Smith, TINA's law director, and Patten, the organization's executive director, urged action to protect buyers from being misled.

"This deceptive marketing tactic is widespread and must be addressed on a state-wide basis," the letter said.

**\*Total Wine & More and delivery provider Instacart have extended their alliance to the Boston market. The two companies first partnered in Miami Beach last fall, and also linked in the Texas market this spring. Total Wine's delivery area in the Boston area will initially include parts of Cambridge, Charlestown, Somerville and downtown Boston.**

### **Reuters: Justice Department Investigating A-B Distributor Incentives**

from W&S Daily

One of the main sticking points for Anheuser-Busch InBev in the U.S. authorities' antitrust review of MegaBrew has been their branches or WODs here in the states. Now, Anheuser-Busch InBev may have an additional hurdle: its incentive program. ABI's VAIP program has reportedly come under scrutiny from U.S. antitrust officials, per two anonymous Reuters sources.

"Investigators at the Justice Department have contacted beer distributors and craft brewers, asking about the incentive plan as well as AB InBev's other steps aimed at curbing craft promotion by distributors, those people said," per story. Justice Department has provided no official comment.

By now you're quite familiar with the incentive program: ABI refunds 75% of this money if its beers make up 98% of the distributor's sales, according to documents provided to lawmakers by ABI.

And that incentive plan "sticking point" has precedence with the Justice Department: Recall the stipulation it levied in 2013 after ABI's Grupo Modelo purchase, requiring divestiture of Modelo in the U.S., and more importantly for the matter at hand, necessitating that "A-B refrain from offering incentives to distributors that would hurt Modelo for three years."

Back to today: Sources familiar with A-B's incentive program have reportedly shared with the Justice Department details like how wholesalers aligned with A-B are required to spend "x" amount of dollars to advertise their beers. "The greater the share of rival beers in a distributor's sales, the less money it receives, according to the document," too. And "even if a distributor raised sales of ABI beers, it would still receive less money if craft sales rise faster," which sources suggest seems designed to punish non-A-B craft brands rather than simply boost A-B sales.

"A distributor that would want to promote a craft beer would be also required to run an equal promotion for Budweiser, which becomes prohibitively expensive, the people said."

A-B'S RESPONSE. "Our Voluntary Anheuser-Busch Incentive for Performance Program (VAIP) is a reflection of just how competitive the U.S. beer industry has become," A-B told BBD in a statement. "The program, versions of which have been in existence for 15 years, incentivizes wholesalers to sell Anheuser-Busch products while providing them even more flexibility than prior iterations to sell non-Anheuser-Busch products and still gain rewards under VAIP. Our voluntary incentive program clearly does not prevent or inhibit other brands from getting to market. There are more than 3,000 distributors across the U.S., only 467 of which are Anheuser-Busch distributors. Nearly all Anheuser-Busch distributors carry other brands."

### **Bourbon Maker Says It Didn't Abandon 'Stitzel' Trademark**

Source: Law360  
By Kevin Penton

May 23, 2016

Distiller Allied Lomar Inc. hit back on Friday at Diageo North America's move to toss an infringement suit over the "Stitzel" trademark for bourbon products in California federal court, alleging that a shortage of quality aged liquor was the reason it did not sell the products for years.

Allied alleges that now that it has been able to acquire bourbon that meets its standards, the only thing standing in its way from selling the liquor is Diageo North America Inc.'s willful infringement of the trademark, according to a response it filed Friday to Diageo's motion to dismiss the case.

Allied countered assertions by Diageo - whose parent company's brands include Johnny Walker, Smirnoff and Tanqueray - that it abandoned the mark, itemizing its various efforts over the years to secure bourbon to sell and to promote future sales of the liquor, according to its brief.

"Diageo has not - and cannot - prove that Allied intended to abandon the Stitzel trademark," the brief reads. "If Allied intended to abandon the trademark, what would explain the fact that Allied continued to offer 'Stitzel'-branded bourbon for sale for years while Allied worked for more years to obtain supply for quality aged bourbon."

Diageo, which owns the Stitzel-Weller Distillery in Louisville, Kentucky, was sued by Allied in July for allegedly infringing the Stitzel trademark by using the Stitzel-Weller mark on its products, including Blade and Bow Whiskey.

Allied claims it registered the Stitzel mark and logo in 2004. Its lawsuit argued that the company is unable to compete in the market because its distributors refuse to help it sell a Stitzel-branded liquor while Diageo is selling competing products with a similar name.

But Diageo, which also makes Bulleit bourbon, said in its May 6 motion to dismiss that the California-based Allied has no protectible ownership interest in the mark due to nonuse and that, in any case, it has abandoned the right since the only evidence of Stitzel bourbon sales it can present are "token" shipments to Japan and Germany for a limited time in the 1990s.

"In other words, by its own admission, Allied has not used Stitzel since the 1990s (if at all)," Diageo argued. "This means that before Allied even applied for a trademark registration for Stitzel in 2004, it had prima facie abandoned the

mark without intent to resume or continue use."

Counsel for the parties could not be reached for comment Monday.

Allied Lomar is represented by Robert P. Andris and Michael D. Kanach of Gordon & Rees LLP.

Diageo is represented by Brendan J. O'Rourke and Lee Popkin of Proskauer Rose LLP, and Rochelle D. Alpert and Sharon R. Smith of Morgan Lewis & Bockius LLP.

The case is Allied Lomar Inc. v. Diageo North America Inc., case number 3:15-cv-03087, in the U.S. District Court for the Northern District of California.

## **Why Alcohol Companies Oppose Legal Pot in Arizona, but Support it in Nevada**

### **Are alcohol distributors just waiting to get a cut?**

Source: US News and World Report

By Steven Nelson

May 23, 2016

An alcohol industry group is funding a campaign against Arizona legalizing and regulating recreational marijuana sales. But across Lake Mead, alcohol companies in Nevada are among the largest financial supporters of an effort to legalize pot there.

The reason for the divergence and whether the donations are motivated by greed, high-minded altruism or good business sense depends on whom you ask.

The difference between the Arizona and Nevada initiatives may offer an explanation. In Nevada, the initiative would require that licensed distributors act as middlemen between cultivators and retailers, with licenses going for the first 18 months to alcohol distributors. There's no such requirement in the Arizona initiative likely to qualify for the ballot.

But getting that answer directly from parties involved isn't easy, and while shared

financial interest presumably guides trade groups, they're not inclined to say so in the context of a hot social policy debate.

The Arizona Wine and Spirits Wholesale Association provided comical excuses as to why they could not comment on a large contribution in a timely manner amid jeers of hypocrisy from backers of marijuana legalization.

Association president David Bart of wine and liquor-distributing Young's Market Company told U.S. News the group's \$10,000 donation to the anti-legalization campaign was approved by "all the principals" but referred questions to Executive Director Karie Dozer.

Dozer spoke briefly with U.S. News on Wednesday, after the donation was first reported by the Phoenix New Times, and promised "a quick call back" as soon as a meeting was over.

Two days and several attempts to re-establish contact later, Dozer called on Friday, saying her phone had gone down a waterslide and that she would supply a statement as soon as the three association principals signed off on a draft.

On Monday, Dozer did not respond to a voicemail regarding the three-company group's motivation.

Arizona's most prominent pro-legalization campaign sees something sinister: an effort to prevent a rival intoxicant from being made legal for adults 21 and older, and the explanation lends itself to an easy line of attack from legalization supporters.

"It is simply inappropriate and objectionable for those who profit from the sale of alcohol to use those profits to prohibit adults from using a less harmful substance," said the chairman of the Arizona pro-legalization campaign, J.P. Holyoak, in a press release last week urging the money be returned.

Holyoak leads Arizona's Campaign to Regulate Marijuana Like Alcohol, which appears more likely to put the matter before voters in November than a less well-financed effort.

But there are other potential explanations. Though some research suggests users may simply choose one substance over the other - threatening the alcohol industry - other research suggests pot legalization may have no effect on alcohol use, and tax data from Colorado appears to indicate alcohol sales increased along

with the opening of state-legal pot stores.

Citing the apparent increase in Colorado alcohol sales, a spokeswoman for the anti-legalization Arizonans for Responsible Drug Policy, Melissa DeLaney, casts the association's donation as purely benevolent and self-sacrificial, guided by concern about societal ills and the state chamber of commerce's stance.

"It should come as no surprise that a member of the Arizona Chamber of Commerce and Industry - which supports ARDP's position on legalizing recreational marijuana - has contributed to our cause," she says in an emailed statement. "And given how much the alcohol industry potentially stands to gain, as seen in Colorado, their support speaks volumes about how poorly written this initiative is for hardworking Arizonans, as well as potential societal costs."

Business interests aside, legalization generally is backed by a group that includes libertarians, anti-racism advocates, opponents of gang violence and the large number of Americans who consume the drug or support unpunished use by those who do, while opponents generally discuss concern about mental health, various public safety issues and the potential effect on young people.

University of California scientists appear to have figured out how to quantify THC on the breath of recent smokers.

Barrett Marson, spokesman for the pro-legalization Arizona campaign, says it appears no alcohol companies have donated to them. But in neighboring Nevada, alcohol businesses are among the largest financial donors to the pro-legalization campaign.

The Nevada pro-legalization campaign collected \$12,500 from Morrey Distributing Co., \$12,500 from the Nevada Beverage Co., \$12,500 from Crown Beverages, \$12,500 from Bonanza Beverage Co. and \$12,500 from Capitol Beverages Inc.

None of the company leaders were available to discuss their stance with U.S. News, but all five are members of the Nevada Beer Wholesalers Association, which does not itself have a stance but whose representative, Alfredo Alonso, said the companies approved of the draft regulations.

"Those that have supported the petition process have done so as individual companies and only in an effort to ensure a regulatory system that is similar to the three-tier system in the liquor industry, as their goal is to safeguard regulatory

integrity," he says.

In addition to the Nevada measure, mandatory distributor licensing is included in the leading California initiative this year after a 2010 measure there lacked mandatory middlemen, eliciting alcohol industry opposition.

The California Beer and Beverage Distributors in 2010 donated \$10,000 to help defeat the pot legalization Proposition 19. Spokeswoman Rhonda Stevenson said at the time the group did not oppose legalization per se, but objected to "a poorly written initiative" and said when alcohol prohibition ended "there was already a regulatory system in place to deal with the distribution or sale of alcohol."

Stevenson did not respond to a request for comment, and it's unclear if the group will back this year's prominent California initiative, bankrolled by the Napster-founding billionaire Sean Parker, now that the newer proposal has a distributor requirement.

Derek Peterson, president and CEO of Terra Tech Corp., which grows non-intoxicating crops on the East Coast and is building out eight medical marijuana cultivation, processing and retail locations in Nevada while operating a successful cultivation-dispensary location in California, says Nevada's experience with effectively and tightly regulating gambling may play some role in the local alcohol industry's support, but says distributors are acting according to obvious self-interest.

"With 50 million people coming into a few square miles on an annual basis, they get the numbers involved, because they see the alcohol consumption numbers," he says. "It's a rocket ship from a business perspective to have recreational pass in Nevada with the transitory population that comes through."

Advocates and experts say it's only a matter of time after the Liberal Party's election romp.

Peterson says the mandated distribution in this year's proposed California initiative is very controversial among fellow growers, as established medical marijuana growers are used to selling their own product or selling directly to dispensaries. But in Nevada, he says, cannabis entrepreneurs are willing to accept it as a trade-off that he concedes allows for easier auditing and testing by state officials.

"The distribution model is usually a 20 to 30 percent haircut," he says. "Nobody

loves that profit being eroded out of their business, but recreational may not pass in the state without that lobbying support from a big industry like the alcohol industry."

Kevin Sabet, leader of the national anti-legalization group Smart Approaches to Marijuana, which is struggling to stem the tide of states going green this November after cannabis breakthroughs in Colorado and Washington in 2012 followed by Oregon and Alaska in 2014, says he believes the alcohol industry is "much more interested in legalizing than not, but there will always be some exceptions, of which this case seems to be."

Sabet points to research that shows marijuana users are more likely to have alcohol problems as reason for them to do so and says his group does not accept money from alcohol companies.

Mason Tvert, a spokesman for the Marijuana Policy Project, a national group that backs state legalization campaigns, says alcohol industry contributions are rarely seen in the legalization ballot fights to date. He helped lead Colorado's successful Amendment 64 in 2012 and says he can't recall alcohol industry donations flying in that campaign or the successful state efforts in Washington, Alaska and Oregon.

Although the Arizona association's donation lends itself to a simple narrative, the alcohol industry does not speak with one voice, even in Arizona.

David Delos, president of the Arizona Licensed Beverage Association that represents retailers and bars, says the prospect of legal pot hasn't been a big issue among members. The 11-company Beer and Wine Distributors of Arizona also has not taken a side, executive director Steven Barclay says. The Arizona Craft Brewers Guild did not respond to a request for comment.

Still, Tvert says he believes the Arizona association's donation is a valid target for criticism.

"I think it's a big deal for the opposition campaign that is galavanting around Arizona claiming they are concerned about public health, yet they are taking money from purveyors of a more dangerous substance," he says. "We aren't opposed to alcohol but we are opposed to hypocrisy."

## **Legislation:**

### **New York: Cuomo proposes modernized alcohol laws**

Source: ROCHESTER DEMOCRAT AND CHRONICLE

Will Cleveland

May 18, 2016

Gov. Andrew Cuomo called himself a "Rochestafarian."

Citing the name of Three Heads Brewing's hoppy Scotch ale, most of the crowd, which included representatives from many of Rochester's craft breweries, chuckled. Admittedly, he hasn't tried the beer. But he promised to remedy that.

Cuomo visited the massive soon-to-open craft brewery in Rochester's Neighborhood of the Arts Wednesday to unveil plans to modernize New York's 80-year-old Alcoholic Beverage Control Law.

Under his proposed legislation, restaurants and bars could start Sunday alcohol sales at 8 a.m. The State Liquor Authority would have the authority to allow full liquor licenses within 200 feet of a school or place of worship.

The legislation would also reduce paperwork for craft manufacturers, allowing producers to combine licenses into one application. Like breweries can already do, legislation would allow wineries to sell wine by the growler (reusable 32- or 64-ounce containers). Customers could also take home partially finished bottles of wine.

The legislation includes provisions to reduce fees for craft beverage salespeople and small wholesalers.

Cuomo frequently mentioned, "entrepreneurial government" and said, "You have an idea, you want to start a wine/beer distillery? We want to be with you. What do you need? How do we help? And certainly how do we remove the obstacles?"

Cuomo said he took the recommendations from the Alcoholic Beverage Control Law Working Group to fashion this proposed legislation. He noted that there are about five weeks left in the legislative session and hopes to see it passed and enacted in the near future.

He added, "This is one of the bills that has to be taken up. These laws should

have been reformed 80 years ago. They should definitely be reformed this year. There's no excuse for the Legislature to leave Albany without changing this law."

Paul Leone, executive director of the Rochester-based New York State Brewers Association, said Cuomo's previous legislation, including the 2012 Farm Brewery Act and the 2014 Craft New York Act, have helped the state grow by over 150 breweries in the past three years.

"The whole idea behind this is to make business grow, make this brewing business grow," Leone said. "It's really unprecedented to have all the leaders from the craft beverage industry meeting in Albany to simplify things. This new brewery is a result of those efforts."

The Craft New York Act allowed breweries to sell beer by the pint in their own tasting rooms, provided they had snacks, and eased restrictions on serving food. Three Heads' new 19,500-square-foot facility at 186 Atlantic Ave. is expected to open to the public next month. Three Heads co-founder Dan Nothnagle said the brewery hopes to be open for Rochester Real Beer Week, which kicks off on June 10. They expect to mash in their first batch on the expanded 30-barrel system later this week.

"Sitting next to the governor and to be able to personally thank him for what he's done for the brewing industry in New York, it's a total mind-blown feeling right now," Nothnagle said. "This is surreal. He really gave us the green light to just produce and sell beer, so we didn't have to pursue an additional tavern license or apply to be a farm brewery."

Once completed, the new facility will cost about \$4 million. Three Heads has brewed its beer under contract at Honeoye Falls' CB Craft Brewers for the past five years. The new facility, which includes about 1,500 square feet of brewing space, will allow the microbrewery to ramp up production, package in six packs, and focus on smaller taproom-only releases.

"On a scale of 1 to 10, this is like a 52," said Three Heads co-founder Geoff Dale, still beaming over when Cuomo asked Dale if he was the bearded inspiration for the brewery's flagship, The Kind India Pale Ale. "This is the craziest thing I've ever been involved with. To hear the governor call you out by name, it's pretty surreal. I'm just a dude who likes beer. I've got a high-school education. And now I'm sitting front row at the governor's press conference in my brewery."

## Ohio: Bill approved by Ohio House will appeal to beer lovers

Source: The Columbus Dispatch

By Jim Siegel

May 18, 2016

Beer fans got a legislative two-fer from the Statehouse on Wednesday.

A bill allowing North Market customers to not only buy alcohol, but also drink it while visiting vendors or eating a meal there, got final House passage Wednesday. And, thanks to a Senate amendment, the bill also eliminates Ohio's 12 percent limit on alcohol in beer, opening the state's craft brewery market to new options.

Ohio's 12 percent limit alcohol in beer was set in 2002, when craft breweries were scarce. Today, roughly 2,500 Ohioans work at about 190 craft breweries, a number that has tripled since 2012.

BrewDog, a Scotland-based craft brewery that is building a \$30 million brewery and U.S. headquarters in Canal Winchester, sells 26 high-alcohol beers overseas.

"That is where a lot of the innovation and creativity comes from, with the high-ABV (alcohol by volume) stuff," said Jason Davis, BrewDog vice president of sales, who attended the House session with a few other craft brewers. "This is awfully exciting to be able to produce these beers."

Davis, who said he counted 263 high-alcohol beers being sold at a liquor store across the state line in Kentucky, expects a high-alcohol beer to be among the "cast of characters" produced in Canal Winchester. Brewdog's most popular high-alcohol beer, he said, is Tokyo, an American double imperial stout with 18.2 percent alcohol.

The brewery is expected to open in late summer or early fall. BrewDog also is planning restaurants in Canal Winchester and near Downtown.

"For years, we've been restrained by the ability to make these items," Davis said. The state has "been losing revenue and taxes for a long, long time."

Indiana, Kentucky, Michigan and Pennsylvania have no alcohol limits on beer.

Producing a high-alcohol beer takes time, and it could be three to five months before Ohio craft breweries start putting such beers on the shelf, said Eric Bean, owner and brew master of the Columbus Brewing Co. and president of the Ohio Craft Brewers Association.

"These beers need aging. Those flavors, when they're raw, they're ugly," Ward said, noting that some breweries in Cincinnati are already brewing the beers to sell in Kentucky. "You're going to see over the next two years that this will be a building segment."

Brewers said they are looking forward to taking a crack at high-volume beer when they find time and capacity. They are fun and flavorful options that, Bean said, are "like the cornerstone of craft beer when you think about the flavor profiles."

"We're too busy making our cores and our seasonals," added Tim Ward, co-founder of North High Brewing. "It's going to be four months after I brew it for it to be released."

House Bill 37, which passed 80-8 and is headed to Gov. John Kasich for his signature, also includes a so-called "sip and stroll" provision that Rep. Kristin Boggs, D-Columbus, said will give North Market customers the same ability to enjoy an alcoholic beverage as they currently can at Whole Foods or a Giant Eagle Market District.

Under current law, North Market customers can buy alcohol at the Barrel and Bottle but are not allowed to open and consume it while inside.

### ***Anheuser-Busch gets \$150,000 fine for liquor law violations in Seattle***

By washingtonbeerblog on May 17, 2016 at 3:30 PM

Story by Kendall Jones, via Washington Beer Blog.

The Washington State Liquor and Cannabis Board (WSLCB) recently handed down a violation notice to Anheuser-Busch that promises to set the beer behemoth back \$150,000. The WSLCB issued the administrative violation in response to an elaborate investigation that revealed that Anheuser-Busch had entered into an illegal agreement of exclusivity with two concert venues in Seattle, the Showbox and the Showbox SoDo.

According to the WSLCB Narrative and Evidence Report, the investigating officers determined that the two venues only sell beer available through the Anheuser-Busch distributor. That alone is not illegal. Suspicious, perhaps, but not illegal.

Also according to the report, a manager at the Showbox SoDo told two undercover WSLCB agents that the venue had "an exclusive agreement with Budweiser" and is only able to offer products supplied by the "Budweiser" distributor. Investigators uncovered evidence substantiating the statement and issued an administrative violation. As in many other states, in Washington such an agreement is prohibited by state law. These types of laws are often referred to as tied-house laws.

The Showbox and Showbox SoDo are operated by AEG Live NW, the regional subsidiary of Anschutz Entertainment Group (AEG), an international sporting and music entertainment presenter. Another AEG venue, Marymoor, was also mentioned in the WSLCB Narrative and Evidence Report, referring to the venue for the summer concert series at Marymoor Park in Redmond, WA. Also named, Wolfgang Puck Catering, which provides catering services to those venues.

At the core of the investigation, two WSLCB officers utilized a ruse. The two agents posed as customers interested in renting Showbox SoDo for an event. "As Officer Reschan and I were continuing to gather information required for the booking of an event, I casually inquired of [the manager] as to what type and brands of beer [the] establishment offered," said officer Kraig Seltzer in the WSLCB Narrative and Evidence Report. "[The manager] replied by indicating several brands of beer, all of what appeared to be distributed by [the Anheuser-Busch distributor]."

"It was at this point in the conversation that I asked if it were possible to obtain a keg of Coors Light beer. [The manager] immediately and abruptly countered that they were unable to supply Coors Light beer as the event center and their caterer (Wolfgang Puck Catering) maintained an "exclusive" agreement with "Budweiser". They are only able to offer for sale only products solely supplied by the "Budweiser" distributor."

Washington State laws prohibit beer manufacturers and distributors from engaging in quid-pro-quo exclusivity agreements. That is, a brewery or its distributor cannot exchange goods, services or money for the exclusive right to sell beer at a licensed premises.

In the course of the investigation, the WSLCB obtained a copy of a sponsorship agreement between Anheuser-Busch and AEG Live NW covering the Marymoor Park entertainment venue. The contract was dated April 5, 2015 and covered the period March 1, 2015 through December 31, 2016. The contract also included both The Showbox and Showbox Sodo venues.

The agreement showed that A-B was the "Official Beer Sponsor" at the

aforementioned AEG Live NW venues. According to that agreement, "AEG may not allow any public promotion of any other beer supplier/distributor at events, private or otherwise held at the venues unless the performing artist has a national beer sponsor."

In short, AEG Live NW guaranteed this exclusivity in exchange for A-B signing on as the venues' official beer sponsor, though the financial terms of that deal were not disclosed.

Allegations of such wink-wink, nudge-nudge deals between large, licensed venues and big beer companies are not unusual. At the very least, it is believed to be common in the industry. Virtually everyone working in the beer sales industry has anecdotes about such illegal practices. The Washington Liquor and Cannabis Board invites the public to report liquor law violations of any type via the agency's website at <http://www.liq.wa.gov/enforcement/report-violation>. Anecdotes and allegations are one thing, but in order for the WSLCB to act, more is required and a legitimate case must be built.

When Washington legalized marijuana the WSLCB was given the task of managing and enforcing a new set of laws in addition to the existing liquor laws. Hence the name change from Liquor Control Board to Liquor and Cannabis Board. Given that, it's easy to imagine WSLCB agents being overwhelmed. For the enforcement agency, and the states 300-plus comparatively small breweries, this must be considered a win.

It is likely that if the Washington State Liquor and Cannabis Board had unlimited financial and human resources, we would hear about these kinds of violations on a weekly basis. The fact that it happened is not news. The fact that someone got caught, and that the WSLCB was able to build a viable case against the violators, makes this newsworthy.

The actual violation: Undue Influence/Providing Money or Money's Worth: Goods or Services Over \$1,500.

The actual penalty: \$150,000 and three-day suspension, or \$150,000 plus \$1,000 in lieu of suspension.

See the WSLCB Narrative and Evidence Report and the corresponding violations here.

<http://www.washingtonbeerblog.com/wp-content/uploads/2016/05/352200-Anheuser-Busch-Violation-Records.pdf>

## **What to expect from the federal overtime rules**

## **Industry expert Joe Kefauver gives insight on the forthcoming rules**

**Source: NRN  
Joe Kefauver  
May 17, 2016**

**The long-awaited changes to federal overtime rule will be unveiled on Wednesday at an event in Columbus, Ohio, headlined by Vice-President Joe Biden, Labor Secretary Thomas Perez and Democratic Sen. Sherrod Brown of Ohio. The most notable change is a nearly doubling of the current salary threshold from its current \$23,360 to \$47,500 under which virtually all workers will be eligible for time-and-a-half pay. The dramatic change would make nearly five million currently exempt employees nationwide eligible and could go into effect as soon as 30 to 60 days.**

**Additionally, the Department of Labor considered changing the "duties test" which, based on the type of tasks an employee is responsible for, may make some employees over the threshold eligible for overtime pay as well. It appears that, after significant reaction from the business community, the duties test will stay largely unchanged. Under the new rule, states are still empowered to enact their own statutes that differ from the new federal regulations, however, businesses are subject to whichever requirements are more generous to employees.**

**Clearly, the significant changes to the salary threshold will force employers to reexamine their labor models, especially with regard to managers and supervisors and the nature of the work they perform.**

**Although a long shot, numerous pro-business and free market groups in Washington sent a letter to Members of Congress yesterday urging lawmakers to use whatever means necessary to prevent enactment of the regulation. While this will not stop the rule from going into effect, it likely means that revising the new regs will be a top legislative priority for the business community going forward.**

**Historic brewing names Pabst, MillerCoors locked in legal battle**

Source: Journal Sentinel

By Bruce Vielmetti

May 05, 2016

Early last year, Pabst Brewing Co. was flirting with a return to its roots, exploring launching a microbrewery at the historic Pabst plant in 2016.

Instead, Pabst has come back to Milwaukee to wage a high-stakes legal battle against hometown heavy hitter MillerCoors LLC.

Pabst and its owner, Los Angeles-based Blue Ribbon Intermediate Holdings LLC, claim in a lawsuit filed in circuit court that MillerCoors has breached without warning a long-term agreement to brew Pabst products, after repeated assurances that MillerCoors had sufficient capacity to honor the deal into the next decade.

The lawsuit characterized MillerCoors' moves "an improper attempt to frustrate Pabst's contract rights, sabotage Pabst's ability to compete and consolidate MillerCoors' already large market share."

Losing the chance to extend the agreement, Pabst says, will cost the company some \$400 million in damages.

"We expect this issue to be resolved in our favor, and that it will not affect Pabst's long-term ability to brew," Pabst spokeswoman Alya Wilhelm said.

"The innovation brewery is still slated to open as planned and is unaffected by this suit," referring to Pabst's plans to open a microbrewery and tasting room at the old Pabst plant in Milwaukee.

The future microbrewery and tasting room, as well as a restaurant, will be in a building at 1037 W. Juneau Ave. that was initially built as a church. Pabst later used it as an employee conference center.

The building was sold in December to an affiliate of Blue Ribbon Management LLC, which will lease that space to Pabst. Blue Ribbon in April received several city building permits to proceed with the redevelopment project.

MillerCoors spokesman Jonathan Stern said the company has attempted to work fairly and collaboratively with Pabst regarding the extension of their agreement to no avail.

"It is disappointing that they have chosen to let a court resolve this issue. However, we are highly confident that we have acted properly and in good faith in this matter and we believe the court will agree."

According to the lawsuit, current Pabst CEO Eugene Kashper relied on MillerCoors' assurances about the viability of its deal to brew and package Pabst products when he and another company formed Blue Ribbon Intermediate Holdings and bought Pabst in November 2014.

It says talks on extending the 2007 agreement five years beyond 2020 began normally last year. But during the negotiations, MillerCoors announced it would be closing its Eden, N.C., brewery, which Pabst says is the main MillerCoors facility for brewing Pabst products, and told Pabst it would no longer have sufficient beer production capacity to meet the agreement.

The only way to continue the deal, Pabst claims it was told, was if the fee paid to MillerCoors after 2020 nearly tripled. Pabst's suit calls the offer a poison pill meant to "effect the premature termination of the agreement."

MillerCoors experienced a change of leadership last summer, when Gavin Hattersley replaced Tom Long as CEO. In September, Pabst claims, Hattersley began backtracking on claims about capacity and his company's willingness to extend the agreement, and then announced the North Carolina closure.

MillerCoors, which has been brewing Pabst products since 1999, suddenly claimed it makes no profit on the endeavor, which Pabst calls "facially false and made in bad faith."

The lawsuit makes seven claims, including breach of good faith and fair dealing, strict liability for misrepresentation, fraud and negligence.

Pabst tried to keep the nature of the lawsuit secret. Its lawyers initially filed the action under seal, citing the fact that the 2007 brewing agreement between the companies, attached as an exhibit, is confidential.

But the judge who drew the case, Milwaukee County Circuit Judge David Borowski, never granted the motion to keep the complaint under seal. Late last month, MillerCoors sought to have the case moved to a different judge.

Pabst traces its history to 1848, when Jacob Best opened the brewery with the

capacity to brew 18 barrels per batch. Today, the Pabst umbrella covers everything from Old Milwaukee, Old Style and Old Tankard Ale to Schmidt's, Stag and Schaefer.

MillerCoors's footprint in Milwaukee began in 1855, when Frederick Miller settled in Milwaukee, leased and later purchased the Plank Road Brewery. Today, 99 beers fall under MillerCoors, including all the beers under the Miller, Leinenkugels, Coors, Blue Moon, Henry Weinhard's and Molsen labels.

### **MillerCoors Comes Out Swinging Against Pabst Allegations**

MillerCoors filed a Motion for Stay and to Compel Mediation in response to Pabst sweeping lawsuit filed last week in Wisconsin circuit court, and it has some whammies in it just as Pabst had in its initial suit [see BBD 05-13-2016]. Here are the deets:

-MillerCoors maintains that it was surprised by Pabst's lawsuit because according to their agreement it "expressly requires [mediation] before any litigation may commence." MC also wants the court to "stay all discovery and all deadlines" until a "proper forum" is identified. MC says Pabst has "skipped all these steps" which is averse to their 2007 agreement (which we note is in effect until 2020, unless terminated early, which it hasn't been). So MC maintains Pabst "is not entitled to the relief it seeks" and MC "would be within its rights to seek outright dismissal of this litigation for improper venue."

-In answer to the Pabst's allegations that MC is screwing Pabst because it will lack capacity (after disposal of the Eden plant) is "baseless." The agreement allows for MC must determine whether "at its sole discretion" whether it will have sufficient capacity to brew Pabst's brands "over and above MillerCoors' other production." MC has determined "it will not have sufficient capacity" to product Pabst's brands "between 2020 and 2025" and the agreement provides that in this case the parties "shall discuss possible solutions to address the potential capacity constraints." Part of those solutions may require Pabst to participate financially.

So both parties met in September last year, but even prior to that meeting, MC says it had notified Pabst it would not have sufficient capacity. At that meeting it notified Pabst and proposed solutions. In the ensuing months, "Pabst repeatedly asserted unreasonable interpretations of the Agreement that were

inconsistent with its express terms and began threatening MillerCoors with litigation." (Even if the agreement is terminated, it calls for a two year "wind down" period of two years, so MC would brew for Pabst until June 30, 2022).

-MillerCoors currently produces 45 brands and over 200 SKUs. MC says Pabst isn't a "legal partner" of Pabst's but rather Pabst is a customer of MC and is "not required to maintain or create capacity to produce, package, store and ship Pabst's brands during either the term of the Agreement or any optional extension thereof."

And here's the deal: MC says its volumes have dropped 15% since 2008 and "its production needs are best met with a re-sized brewing network", which is why it made the "difficult decision" to close Eden. MC also denies that Eden was "one of the main facilities that MillerCoors uses to" make Pabst products, as Pabst's suit alleges.

-On the allegation that MillerCoors hasn't provided Pabst with the information it needs, MC says it doesn't have a contractual obligation to, but it did provide information on their capacity analysis, recent volume figures and Pabst's own estimated 2015 volumes. Also MC says it offered to allow an independent Big 4 accounting firm to review its capacity needs, but it says Pabst "ignored this proposal, continued to assert unreasonable interpretations of the of the Agreement, and threatened litigation."

-On the Eden plant, MillerCoors says it offered to lease or sell the Eden brewery "if it made financial sense to do so." Here was Pabst's alleged response: "Pabst hinted at (but never formally proposed) paying \$100 million over an indeterminate number of years for a facility worth many multiples of that amount-and then only subject to a procurement requirement extending through 2030."

In October, MillerCoors provided Pabst with information in order for Pabst to "formulate a serious proposal to lease or buy the Eden Facility. In response, Pabst again threatened litigation and requested even more information regarding the Eden Facility, which MillerCoors provided in December."

-Regarding the proposed big price increase after 2020, MC says that "after years of brewing Pabst products at below-market rates, it proposed a possible Solution that contemplated Pabst's financial participation commensurate with MillerCoors' level of return on its own brands." While Pabst said MillerCoors wanted its fixed charge from \$18.30 a barrel to \$45 (a 146% increase), MC says

it also offered to lower the increase to \$22 per barrel in a "good faith attempt to reach a solution" but Pabst "refused to offer any reasonable Solutions of its own."

-What about Pabst's claim that MillerCoors made verbal assurances to extend the contract? MC denies this and that it would've been "irresponsible of MillerCoors to do so and unreasonable for anyone to rely on such promises."

## **Main Tito's Case Dismissed**

Source: Lehrman Beverage Law  
by Robert C. Lehrman  
May 12, 2016

The main Tito's Handmade Vodka case has been dismissed, after 19 months of heated litigation. Details are not available so far.

The main case was Hofmann v. Fifth Dimension, Inc. (first filed in state court in September of 2014 then removed to federal court in San Diego a month later). A second and similar case, Cabrera v. Fifth Generation, Inc., also got dismissed on the same day.

On April 22, 2016, both sides in both cases filed joint motions to dismiss. On May 3, Judge Miller of the U.S. District Court for the Southern District of California issued an order in each case, granting the parties' joint motions.

There are no signs of any label changes, and Google says this has not been in the press to date.

## **Outback Assistant Managers Seek OT In FLSA Class Action**

Source: Law360

By Braden Campbell  
May 6, 2016

Two former Outback Steakhouse assistant managers hit the casual dining chain with a Fair Labor Standards Act class action Wednesday in Florida federal court alleging the company unfairly denies such workers overtime pay even though they perform similar duties to non-overtime-exempt employees.

Lead plaintiffs David Sears and Elizabeth Thomas claim they routinely worked 50 hours or more a week but were only paid for 40 despite spending most of their working time performing tasks - such as greeting customers and serving food - that don't merit an exemption for overtime under federal law.

The suit names restaurant operator OS Restaurant Services LLC and Outback brand owner Bloomin' Brands, Inc., collectively doing business as Outback Steakhouse.

According to the complaint, which includes in its class allegations both front-of-house and back-of-house managers, such workers are paid between \$34,500 and \$50,000 per year for work similar to that performed by other, non-exempt workers. It was not clear from the complaint whether such employees are tipped.

Other common duties include expediting and cooking food, cleaning the restaurant and clearing and setting tables, they said. Conversely, Sears and Thomas say they did not perform duties that can exempt managers from overtime including hiring, firing, scheduling, disciplining employees or "the exercise of discretion or independent judgment regarding matters of significance."

Sears, who was a back-of-house manager at a Michigan franchise from June 2013 to December 2014, and Thomas, who was a front-of-house manager at a Texas location from October 2012 to June 2013, claim such misclassification is common across all 650 Bloomin' Brands-owned restaurants and 105 franchises in the U.S. The chain brought in \$4.3 billion in revenue last year, according to the complaint.

Sears and Thomas aim to represent a class of all current and former assistant managers who have worked at Outback locations after January 16, 2013, when the parties entered into an agreement to toll the statute of limitations for FLSA or state wage and hour claims. They seek unspecified damages including unpaid overtime, prejudgment and post-judgment interests, fees and costs.

A representative for Outback declined to comment on the suit but said its managers "play a key leadership role and are vital to the success of our restaurants."

A Nevada federal judge last month approved a \$3 million settlement in a yearslong class and collective action alleging Outback regularly made its employees show up early for unpaid pre-shift work called "Outback Time."

Other restaurants currently battling FLSA class actions include fast food chain Burger King and casual dining chain TGI Friday's.

An attorney for the managers did not immediately respond Friday to a request for comment.

The employees are represented by Gregg I. Shavitz of the Shavitz Law Group PA.

Attorney information for Outback was not available Friday.

The case is *Sears et al v. OS Restaurant Services LLC et al.*, case number 8:16-cv-01115, in the U.S. District Court for the Middle District of Florida.

### **ABI-SABMiller Deal Gets EU Approval, But Is Delayed In U.S. Amid Distribution Concerns May 25, 2016**

Anheuser-Busch InBev (ABI) has gained approval from European regulators to proceed with its \$107 billion acquisition of top rival SABMiller, but as part of the pending deal's review in the U.S., regulators are reportedly questioning some of the brewing behemoth's incentive policies for distributors. According to Reuters, U.S. antitrust officials are investigating a plan ABI launched late last year that incentivizes independent distributors to make up 98% of their sales with ABI brands. Under the plan, ABI reimburses distributors for 75% of their advertising spend on ABI products if the distributor meets that 98% threshold. Reuters' sources said the arrangement appears designed more to suppress craft beer as a percentage of wholesalers' business than an incentive to grow ABI sales. ABI countered that the program is voluntary and reflective of the highly competitive conditions in the U.S. beer market.

**FROM FOUNDATION FOR ADVANCING ALCOHOL  
RESPONSIBILITY \*(formerly Century Council)**

Before we rush off to summer, let's stop to remember that Memorial Day offers all of us an opportunity to remember those who have given their lives to protect the values we cherish. Our freedom is a privilege we should all enjoy, but it comes with a shared responsibility to our fellow Americans. As we hit the road to summer destinations, let's remember that responsibility for road safety starts with each and every one of us.

Summer is traditionally a time when car crashes increase as more people are out on the roads. Here are some simple tips to make sure you arrive safely and maintain the safety of others:

1. Educate yourself on how alcohol affects your body and your BAC through our Virtual Bar app (free for download on iTunes). Most Americans don't know the legal limit (hint: it's .08 BAC) or how their drinking equates to their BAC.
2. Don't drive drunk or after using drugs. With mass transit, Uber, Lyft, cabs and designated drivers, it's easier than ever to make the right choice.
3. Don't get distracted. Put your smartphone down and focus on the road. All you should be doing while driving is DRIVING.
4. Don't drive while you are tired. It's tempting to push forward on road trips but it's not safe.
5. Stick to the speed limit. One-third of traffic deaths involve speeding.
6. If you're a new driver, be extra careful as you get used to the complex task of driving. Less experience behind the wheel increases risk.
7. Watch out for pedestrians, bicyclists and motorcyclists. Deaths increased in all of these categories last year.

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