No. 23-35010

In the

United States Court of Appeals

for the

Ninth Circuit

CITY BEVERAGES, LLC,
Plaintiff-Appellee,
v.

CROWN IMPORTS, LLC, ET AL.,
Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Civ. No. 3:22-CV-0756-DGE
Hon. David G. Estudillo

BRIEF OF *AMICUS CURIAE* NATIONAL BEER WHOLESALERS ASSOCIATION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), the National Beer Wholesalers Association is a Virginia non-profit corporation. It does not have any parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

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INTERESTS OF AMICUS CURIAE[1]

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer distributing industry, representing over 3,000 family-owned independent licensed beverage distribution entities. Its members reside in all fifty states, including in Washington, and employ over 130,000 individuals.

The typical NBWA member markets, promotes, sells, and distributes both malt beverages and nonalcoholic beverages. The typical member represents several suppliers and enters into franchise agreements with those beverage franchisors. Each of those franchisors typically award exclusive distribution rights and require the franchisees to invest in the necessary infrastructure to

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[1] Pursuant to Fed. R. App. P. 29(a)(2), Ninth Circuit Rule 29-3, and the Advisory Committee Notes thereto, all parties have consented to the NBWA participating in this action as *amicus*. This brief was not authored, in whole or in part, by either party's counsel. No party or party's counsel contributed money to fund its preparation or submission. No person other than the NBWA, its members, and its counsel contributed money for preparation or submission of this brief.

sell and distribute the products and build recognition and sales of the brands in their territory. This investment ordinarily entails millions of dollars for the construction or acquisition of refrigerated warehouses; the acquisition or lease of a fleet of trucks or other vehicles; the acquisition of racking systems and sophisticated computer software systems and hardware; employment of a sales and delivery forces; and paying for the promotion, advertising, and marketing of the products.

Forty-four states have enacted beer franchise laws. *See, e.g.* RCW 19.126.010 et. seq. (Washington Wholesale Distributors and Suppliers Act) ("Beer Franchise Law"); 815 ILCS 720 et seq. (Illinois Beer Industry Fair Dealing Act).[2] Olympic Eagle is located in Washington State and Constellation's Beer Division is located in Illinois. 2-ER-39.

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[2] Of the remaining states without a beer franchise law, some, like California, have a general franchise law with similar protections. Cal. Bus. & Prof. Code 25000 et seq.; HI Code 482E, et seq.

Similar to general franchise laws, beer franchise laws ensure that franchisors, after inducing this substantial investment, cannot inequitably usurp that value by terminating the agreement without notice, an opportunity to cure any alleged deficiency, and good cause. In recognition of past abuses and a disparity in bargaining power, they also ensure a modicum of fairness in business dealings between the franchisor and franchisee.

Beer franchise laws serve additional purposes, however. *See, e.g.,* RCW 19.126.010. They constitute a foundational element of alcohol regulations by supporting three-tier and tied-house laws, thereby inhibiting vertical integration. Together, these laws serve the regulatory purpose of creating transparent, accountable, and orderly distribution systems while safeguarding robust competition, consumer safety, and consumer choice and variety.[3] In

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[3] For instance, the Illinois Beer Industry Fair Dealing Act (815 ILCS 720/2) states that "[t]his Act is promulgated pursuant to authority of the State under the provisions of the Twenty-First Amendment to the United States Constitution to promote the public's interest in fair, efficient and competitive distribution of

order to ensure that their provisions are enforced, beer franchise laws embody nonwaiver provisions preempting any conflicting provisions in a franchise agreement. RCW 19.126.040; *see, e.g*. 815 ILCS 720/5(9).

When franchisees and their counsel review proposed agreements, they do so against the backdrop of these franchise laws and with the expectation that if a specific contractual provision conflicts with these laws, the laws prevail under the "no waiver" clauses. The franchisees sign these agreements based upon that assumption. Franchise laws therefore largely determine the expectation of the parties regarding their relationship and respective duties and obligations.

This case directly implicates the substantial interests of NBWA members and raises significant national policy concerns. For the reasons set forth below, NBWA supports Appellee and urges the Court to affirm the decision of the District Court.

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malt beverage products . . . ." The Beer Franchise Law has similar language. *See* RCW 19.126.010 (2)

FACTUAL & PROCEDURAL BACKGROUND

This case arises out of the threatened termination of a distribution agreement ("Distribution Agreement") between Appellants (hereinafter collectively referred to as "Constellation") and Appellee (hereinafter referred to as "Olympic Eagle"). For the preceding twenty years, Olympic Eagle served as the exclusive and highly successful distributor of Constellation beer brands in its territory.

As set forth in greater detail in Olympic Eagle's Answering Brief, Olympic Eagle was required to invest in the distribution infrastructure necessary to grow sales, promote the Constellation brand, and deliver Constellation's products in its exclusive territory. In pertinent part, Olympic Eagle was required to:

(1) Periodically contribute to Constellation's national advertising plan. 3-ER-30 ¶¶ 60-61 and 3-ER-35 ¶119;

(2) Carry out its "sales, advertising and marketing programs and policies," including "contributing to the cost, of media . . . sales incentive and promotions programs." Distribution Agreement ¶ 3.5,

4-ER-681-82;

(3) Create at its expense brand identified point-of-sale materials and vigorously advertise and promote Constellation brands through in-store and other advertising, *id.*; and

(4) Submit to Constellation for approval an annual marketing plan, which embodied sales goals and investments in marketing and promoting Constellation products for the next year, Distribution Agreement ¶ 3.3 (a), 4-ER-680;

Constellation exercised control over Olympic Eagle's (1) promotional pricing programs with product discounts; (2) sales and merchandising plans, including shelf space plans and point-of-sale promotional material; (3) methods for selling products, including holiday themed activities; (4) required training provided by Constellation to its employees; and (5) requiring compliance with operational and financial mandates. 4-ER-635.

The financial commitments and other investments undertaken by Olympic Eagle at Constellation's direction totaled many millions of dollars. In return for these commitments,

Constellation granted Olympic Eagle exclusive distribution rights and the right and obligation to use its trademarks, brand names, labels, and designs "in connection with the distribution, advertising, display and sale" of Constellation products. Distribution Agreement ¶ 8(c), 4-ER-689-90.

Constellation provided Olympic Eagle with a notice of termination. It did not specify any alleged deficiency in performance, did not provide any opportunity to cure an alleged deficiency, and did not assert a right to terminate Olympic Eagle's distribution rights based upon a failure to perform. Indeed, Constellation offered no reason for the termination of the twenty-year relationship and referenced no part of the Distribution Agreement itself. 4-ER-654. The notice simply stated that Constellation intended to terminate the Distribution Agreement effective November 8. 2-ER-129 ¶ 6.

Olympic Eagle brought suit alleging a violation of the Washington Franchise Investment Protection Act ("FIPA"), the Washington Wholesale Distributor/Supplier Equity Agreement Act

("Beer Franchise Law"),[4] and the Distribution Agreement. Olympic Eagle filed a motion for a Temporary Restraining Order on November 4. 2-ER-162-67. The District Court held that Olympic Eagle would be irreparably harmed if it was terminated by Constellation, including by the loss of customer goodwill. It found the "parties agree that the present version of [the Beer Franchise Law] applies to the dispute and that the parties cannot contract around the protection of the Act." ER-7, 16. It then held that it was more likely than not that Olympic Eagle would prevail on its argument that Constellation's purported termination violated the Beer Franchise Law, RCW 19.126.040; 1-ER-17. The District Court therefore granted Olympic Eagle's preliminary injunction motion. 1-ER-2-16. This appeal followed.

[4] The parties do not dispute that the Beer Franchise Law governs the relationship between them, but they interpret that Law in a dramatically different manner.

ARGUMENT & AUTHORITY

NBWA submits this Amicus Brief in support of Olympic Eagle's Answering Brief, which urges this Court to affirm the issuance of injunctive relief. To avoid repetition of arguments made persuasively by Appellee, NBWA focuses its arguments on the policies that underlie franchise laws generally and beer franchise laws specifically, the interpretation of the Beer Franchise Law and FIPA, the applicability of the specific provisions of those statutes to the relationship between Constellation and Olympic Eagle, the importance of non-waiver provisions, and the reasons why the District Court's issuance of injunctive relief should be affirmed.

I. Policies Underlying the Washington Wholesale Distributor/Supplier Equity Agreement Act

Beer franchise laws serve several compelling public policies. They ensure that franchisors cannot inequitably usurp the investments that they have required franchisees to make on their behalf by terminating the agreement without notice, an opportunity to cure any alleged deficiency, and good cause. They also promote competition by leveling the playing field between franchisors and

franchisees to ensure a modicum of fairness in business dealings between them.

In addition to the two policies which underlie all franchise laws, beer franchise laws serve additional purposes related to the effective regulation of alcohol.[5] All state alcohol regulatory systems strive to balance competition with control, create a transparent and accountable distribution system, and ultimately achieve moderation in both the consumption and sale of intoxicating liquor. Three-tier and tied-house laws are the keystones of American alcohol regulation. Pursuant to their plenary authority under the Twenty-first Amendment, with narrow exceptions, states regulate alcohol within their respective borders through a three-tier system with licensed and structurally separate producers, wholesalers, and retailers. Tied-house laws support a three-tier system by

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[5] 44 states have beer franchise laws similar to Washington's. To NBWA's knowledge, no court has interpreted any of those state beer franchise laws in the manner suggested by Constellation, entirely ignoring an express "for cause" termination prohibition, a nonwaiver provision, and an injunction provision.

prohibiting suppliers and wholesalers, with narrow exceptions, from providing items of value to or exercising control over or ownership in retailers.[6] *See, e.g.* RCW 66.28.305; WA Admin. Code 314-12-140. The purpose of the system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting these market participants to their respective service functions.[7]

The American historical experience has proven that vertical integration and "tied houses" lead to excessive retail capacity, cutthroat competition for market share, and overstimulated sales which ultimately leads to intemperate consumption. It is widely recognized that prior to prohibition, "tied houses" were a root cause of alcohol abuse and related problems because retailers were

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[6] Tied-house laws prohibit a supplier or distributor from giving items of value to retailers such as paying slotting fees. This avoids the pay-to-play environment that dominates other markets, like soft drinks. See note 10, *infra*, and accompanying text.

[7] As illustrated by the D.C. Circuit, concerns about vertical integration and supplier activities with distributors remain very relevant today. *U.S. v. Anheuser-Busch InBev SA/NV, et al.*, 2018 WL 6684721 (D.D.C. October 22, 2018) (requiring divestiture of certain assets and imposition of safeguards protecting wholesaler independence).

pressured to sell product by any means including selling to minors, selling after hours, and overselling to intoxicated customers.[8] The Supreme Court has expressly recognized that the three-tier system is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005).

In addition to promoting temperance, State regulatory systems have achieved many other benefits for the American public, including unprecedented choice and variety of distilled spirits, wines, and beers.[9] The industry remains one of the last

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[8] The leading treatise for studying alcohol regulation noted "The 'tied house' and every device calculated to place the retail establishment under obligation to a particular distiller or brewer, should be prevented by all available means." Raymond Fosdick and Albert Scott, *Toward Liquor Control*, p. 29 Republished by Center for Alcohol Policy 2011). Overstimulated sales remain a concern of policymakers. *See*, for example, *Preventing Excessive Alcohol Consumption*, The Community Guide, CDC, http://www.thecommunityguide.org/alcohol.

[9] In pertinent part, RCW § 19.126.010 that "both suppliers and wholesale distributors of malt beverages and spirits are interested in the goal of best serving the public interest through the fair, efficient, and competitive distribution of such beverages. . . . by: (a) Assuring the wholesale distributor's freedom to manage the business enterprise, including the wholesale distributor's right to independently establish its selling prices[.]"

mainstays of family-owned businesses. As a result, alcohol vendors are rooted in their community, more likely to be sensitive to local norms and standards, more likely to be compliant with existing regulations, and more vulnerable to effective enforcement. *See Southern Wine & Spirits, Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Circ. 2013).

Beer franchise laws play a key role in these state regulatory systems because they safeguard the independence of beer distributors, inhibiting the vertical integration of the industry and enabling them to serve as a buffer between suppliers and retailers. This independence not only serves the goals of effective alcohol regulation and the protection of public health and safety, but also promotes competition with unprecedented choice and variety for consumers.

For instance, RCW 19.126.050(2) provides that no supplier may "[r]equire a wholesale distributor to assent to any unreasonable requirement, condition, understanding, or term of an agreement which prohibits a wholesaler from selling the product of

any other supplier or suppliers." This provision is consistent with a majority of beer franchise laws which prohibit a supplier from limiting a distributor's right to carry a competitor's products. *See, e.g.*, 815 ILCS 720/5(2); Minn. Stat. § 325B.04; TX Stat. Title 4, 102.75(a)(2). As evidenced by the explosion of craft distilleries, wineries, breweries, and the existence of a strong, independent middle tier, the system nurtures small, entrepreneurial businesses. This regulatory structure similarly affords consumers great choice and variety. Put another way, all market participants (producers, distributors, and retailers) operate on a level playing field on which they can fairly compete.[10]

[10]Contrast the nearly overwhelming number of beers available to consumers with the limited variety of sodas. This is largely due to the absence of a prohibition on vertical integration and slotting fees in the soft drink industry, which allows two global companies to control distribution, buy retail shelf space, and thereby exclude competitors from the market.

II. The Washington Wholesale Distributor/Supplier Equity Agreement Act prohibits a Supplier from terminating a distributor without notice, an opportunity to cure and good cause. It provides an aggrieved distributor with the right to contest an unlawful termination in court, seek an injunction, and recover attorneys' fees it if prevails in the action.

In pertinent part, the Beer Franchise Law section entitled "Distributors' Protections" provides as follows:

> Wholesale distributors are entitled to the following protections **which are deemed to be incorporated into every agreement of distributorship**:
>
> (1) Agreements between wholesale distributors and suppliers must be in writing;
>
> (2) A supplier must give the wholesale distributor at least sixty days prior written notice of the supplier's intent to cancel or otherwise terminate the agreement, unless such termination is based on a reason set forth in RCW 19.126.030(5) or results from a supplier acquiring the right to manufacture or distribute a particular brand and electing to have that brand handled by a different distributor. **The notice must state all the reasons for the intended termination or cancellation.**

> **Upon receipt of notice, the wholesale distributor has sixty days in which to rectify any claimed deficiency. If the deficiency is rectified within this sixty-day period, the proposed termination or cancellation is null and void and without legal effect**[.]

RCW 19.126.040 (emphasis added).

Elsewhere in the statute, the Legislature has provided:

> A person injured by a violation of this chapter, other than a person seeking only a determination of the compensation due to a terminated distributor under RCW 19.126.040(4), **may bring a civil action in a court of competent jurisdiction to enjoin further violations**. Injunctive relief may be granted in an action brought under this chapter without the injured party being required to post bond if, in the opinion of the court, there exists a likelihood that the injured party will prevail on the merits.

RCW 19.126.080 (emphasis added).

Another provision states:

> In any action or arbitration brought by a wholesale distributor or a supplier pursuant to this chapter, other than an arbitration to determine the compensation due to a terminated distributor under RCW

> 19.126.040(4), the prevailing party shall be awarded its reasonable attorney's fees and costs.

RCW 19.126.060.

Pursuant to the language above, a supplier cannot terminate a distribution agreement except upon sixty days' notice, specifying the alleged deficiencies, providing the distributor with an opportunity to cure the alleged deficiencies, and then only upon good cause. If the deficiency is cured or if no deficiency exists, the proposed termination is "null and void and without legal effect." If a supplier wrongly terminates an agreement, the distributor can sue the supplier, seek an injunction, and, if successful, recover reasonable attorneys' fees and costs.

Nonetheless, Constellation advances an interpretation that ignores and effectively negates these statutory provisions. Relying on § 19.126.040(4), Constellation argues that it is entitled terminate Olympic Eagle's distribution rights without cause because the subsection provides the terminated distributor and successor distributor with the option to arbitrate damages **if** the

only issue disputed by the parties concerns the calculation of damage. Constellation asserts that this is the sole remedy for a supplier's violation of the Law.[11]

If true, one subsection of one provision of the Beer Franchise Law would effectively negate the "Distributor Protections"

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[11] Several Washington courts have either expressly or impliedly rejected the argument asserted by Constellation here. In *Stein Distributing, Inc. v. Pabst Brewing Co.*, 2017 WL 2313489 (W.D.Wa. May 5, 2017), Judge Leighton held:

> Pabst incorrectly asserts that the Act's acknowledgment of without-cause terminations in RCW 19.126.040(4) is synonymous with its authorization of them. It is not. Had the Legislature intended to permit suppliers to cancel a distributor's rights without cause, it would not have mandated that in most circumstances, a distributor must have an opportunity to cure the cause leading to its potential termination.

See also Birkenwald Distributing Co. v. Heublein, Inc., 55 Wash. App. 1, 776 P.2d 721, (1989) (acknowledging that the Beer Franchise Law required notice, an opportunity to cure and good cause but declined to retroactively apply the Law to a distribution agreement entered into prior to the effective date).

embodied in all other provisions of the statute. This argument makes a Trojan horse of Subsection (4), investing by tortured interpretation a hidden meaning in the statute that contravenes the Legislature's express language and substantive "Distributors' Protections."

If this argument had merit, there would have been no reason why the Legislature would have included the introductory clause of § 19.126.040 mandating that each of the section's provisions "are deemed to be incorporated into every agreement of distributorship." There would have been no reason why the Legislature would have included Subsection (2) prohibiting terminations without cause and mandating that suppliers provide distributors with an opportunity to cure alleged deficiencies. There would have been no reason why the Legislature would have included § 19.126.080 providing distributors with the right to seek injunctions such as that granted by the District Court.

Significantly, § 19.126.080 provides that the right to seek an injunction for a violation of the Law is available to anyone "other

than a person seeking **only** a determination of the compensation due to a terminated distributor under RCW 19.126.040(4)" (emphasis added). Here, Olympic Eagle seeks to permanently enjoin the unlawful termination of its agreement and declare the purported termination to be "null and void and without legal effect."

As stated by this Court: "It is a fundamental principle of statutory interpretation that courts must give effect, if possible, to every clause and word of a statute, so that no part will be inoperative or superfluous, void or insignificant[.]" *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 673 (9th Cir. 2018) (citations and quotations omitted). If Constellation's crabbed interpretation of the law were to be adopted, the Court would not merely be ignoring a clause or word, it would be negating entire substantive provisions of the statute.

Sections 19.126.040(2), 19.126.060 & 19.126.080 are clear and unambiguous. As such, their plain meaning controls and certainly cannot be ignored. *Price v. Comm'r*, 887 F.2d 959, 963–64 (9th Cir.

1989) (quoting *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 826 (9th Cir. 1989)).

Both FIPA[12] and the Beer Franchise Law[13] are remedial legislation. To the extent that any ambiguity exists, these franchise

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[12] As stated in *Department of Labor & Industries v. Lyons Enterprises,* 374 P2d 1097, 1102 (Wash. 2016).

> When the legislature enacted FIPA, it created a comprehensive scheme for regulating franchising in Washington, and did so with the aim of protecting franchisees. . . . . "The provisions of FIPA reflect a fundamental policy of this state to protect its citizens from oppressive practices historically associated with the sale of franchises." *Rutter v. BX of Tri–Cities, Inc.,* 60 Wn.App. 743, *748,* 806 P.2d 1266 (1991).

See also Coast to Coast Stores, Inc. v. Gruschus, 667 P.2d 619, 621 (Wash. 1983) ("The franchisor normally occupies an overwhelmingly stronger bargaining position and drafts the franchise agreement so as to maximize his power to control the franchisee. Franchisors have used this power to terminate franchises arbitrarily, to coerce franchisees under threat of termination, and to force franchisees to purchase supplies from the franchisor or approved suppliers at unreasonable prices, to carry excessive inventories, to operate long, unprofitable hours, and to employ other unprofitable practices." (Quotation omitted.)).

[13] *See* RCW 19.126.010; *see also United States v. Bacto-Unidisk*, 394 U.S. 784, 798 (1969) (holding that a similar franchise law, the Petroleum Marketing Practices Act, § 101 et seq., 15 U.S.C.A. §

laws must be interpreted in light of their underlying remedial purposes. *See* RCW 19.100.220(3); *Rutter v. BX of Tri-Cities, Inc.,* 60 Wash. App. 743, 748, 806 P.2d 1266, 1268 (1991) (finding FIPA to be a "fundamental policy of [Washington] to protect its citizens from oppressive practices historically associated with the sale of franchises"); *see also, State v. Douty,* 92 Wash. 2d 930, 936, 603 P.2d 373, 376 (1979) (recognizing that remedial legislation is construed liberally in order to accomplish the purpose for which it is enacted) (citation omitted). The remedial character and purposes of the Beer Franchise Law are even more compelling than FIPA for the reasons previously mentioned.[14]

2801 et seq., was remedial legislation which "must be given a liberal construction consistent with its goal of protecting franchisees"); *Hilo v. Exxon*, 997 F.2d 641, 643 (9th Cir. 1993) ("As we recently observed, 'the overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship.'"); *Ellis v. Mobil Oil,* 969 F.2d 784, 788 (9th Cir.1992) (quoting *Slatky v. Amoco Oil Co.,* 830 F.2d 476, 484 (3d Cir.1987)); *Humboldt Oil Co. v. Exxon*, 695 F. 2d 386, 389 (9th Cir. 1982) ("[a]s remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees.").

[14] Promulgated pursuant to their authority under the Twenty-first Amendment of the U.S. Constitution, states have passed beer

As noted by the Washington Supreme Court, "[w]hen interpreting statutory language, the goal of the court is to carry out the intent of the Legislature." *Ellerman v. Centerpoint Prepress, Inc.,* 143 Wash. 2d 514, 519, 22 P.3d 795 (2001) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wash. 2d 1, 6, 721 P.2d 1 (1986)). "In ascertaining this intent, the language at issue must be evaluated in the context of the entire statute." *Id.* (citations omitted). The liberal construction given should seek to "suppress the evil and advance the remedy" which is the focus of the statute. *Kittilson v. Ford,* 23 Wash. App. 402, 407, 595 P.2d 944, 946-47 (1979), *affirmed,* 93 Wash. 2d 223, 608 P. 2d 264 (1980).

Allowing the termination of distribution agreements without cause would severely undermine several of the primary purposes of the Beer Franchise Law. For instance, § 19.126.050(1)&(2) prohibits suppliers from inducing distributors to engage in an

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franchise laws which have far broader remedial purposes and are supported by even stronger underlying public policy considerations than general franchise laws.

illegal act or limiting a distributor's right to carry competing products. If a supplier could unilaterally terminate distribution agreements without cause, that power would prove to be a Damocles' sword hanging over each Washington distributor enabling the supplier to do indirectly what they are prohibited from doing directly. For instance, if a supplier unsuccessfully pressured a distributor to drop competing brands or engage in an illegal course of conduct, it would merely have to terminate the agreement and solicit a more compliant successor distributor to pay for the rights and assume distribution in that territory. This would substantially erode the substantive provisions of the Beer Franchise Law and would economically penalize suppliers and distributors who complied with its provisions. Clearly the Washington Legislature did not intend that result when it specifically identified "Supplier Prohibited Acts" in § 19.126.050, the "Distributors Protections" in § 19.126.040(2), and the right to seek "Injunctive Relief" in § 19.126.080.

Section 19.126.040(2) provides that "[i]f the deficiency is rectified within this sixty day period, the proposed termination or cancellation is **null and void and without legal effect**" (emphasis added). How could nullity be effectuated except through the exercise of the court's equitable powers to grant declaratory and injunctive relief? The Legislature mandated that distributors have an opportunity to cure alleged deficiencies and prohibited suppliers from terminating agreements without cause. In the event that a supplier violates either of those mandates, a distributor has available two alternative remedies. It can initiate a civil action under § 19.126.080, seek declaratory and injunctive relief, and nullify the termination or it can avail itself of the remedy afforded by § 19.126.040(4) and seek the fair market value of the terminated brand from the successor distributor.

Subsection (4), however, limits a terminated distributor to recover from the successor distributor only the fair market value of the terminated brand. That remedy may not make the distributor whole. If the loss of sales of the wrongfully terminated brand

threatens to cause the entire business to fail (as here),[15] the distributor (and its terminated employees) will suffer damage far beyond the fair market value of the terminated brand. It will have lost the profit realized from the sale of the products of its other suppliers and will have lost the fair market value of those distribution rights. If Constellation's interpretation of the Beer Franchise Law prevails, a terminated distributor in that context will effectively have no means to recover that element of its damage. In light of subsection (4), injunctive relief is the only means of addressing those damages.

III. The provisions of the Washington Wholesale Distributor/Supplier Equity Agreement Act cannot be waived.

In its Opening Brief, Constellation argues that termination without cause is entirely consistent with the Act if the parties' written agreement allows for termination without cause.

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[15] Olympic Eagle told its bankers that the termination would be a "Hindenburg" type disaster for the company because Constellation is its fastest growing brand and represented more than 20 percent of its sales and 70-80 percent of its profit growth. *See* 11; 3-ER-393-406.

Constellation's Brief at 45. Constellation relies on the language in § 19.126.040(4) as evidence of the legislature's intent to permit without cause terminations because of the inclusion of the "any reason other than for cause" clause of this section and the provision of a statutory remedy to recover fair market value. *Id.* at 47.

However, the introductory clause of § 19.126.040 ("Wholesale distributors are entitled to the following protections **which are deemed to be incorporated into every agreement of distributorship**"), coupled with Subsection (2), readily disposes of Constellation's argument. Section 19.126.040 mandates that the sixty-day notice of termination provision, the opportunity to cure provision, and the good cause provision must be "incorporated" into every distribution agreement. The Legislature did not create an exception to this mandate if a contrary provision existed in a distribution agreement. In light of that express language, those provisions cannot be waived by any arguably conflicting provisions

in the agreement,[16] nor should they be ignored by the Court in interpreting the statute.

Consistent with that conclusion, FIPA incorporates a similar non-waiver provision in § 19.100.184 which states, in pertinent part, that FIPA "does not preclude negotiation of the terms and conditions of a franchise at the initiative of the franchisee, **provided that such negotiated terms and conditions do not violate any provision of this chapter**" (emphasis added). Like the Beer Franchise Law, FIPA mandates that a franchisor provide a

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[16] Forty state beer franchise laws embody a similar non-waiver requirement. For instance, the Illinois Beer Industry Fair Dealing Act provides that

> "This Act shall be incorporated into and shall be deemed a part of every agreement between brewers and wholesalers and shall govern all relations between brewers and their wholesalers to the full extent consistent with the constitutions and laws of this State and the United States and any provision of this Act shall supersede any conflicting provision of the agreement."

815 ILCS 720/2 (B).

Without such a provision, suppliers like Constellation would exercise of their superior bargaining power and include provisions in their franchise agreements which purport to preempt and negate the substantive provisions of franchise laws.

franchisee with notice of termination and an opportunity to cure an alleged deficiency. *See* RCW 19.100.184(j). The franchisor may only terminate the franchisee for "good cause" as defined by § 19.100.184(j).

These non-waiver requirements are consistent with and, in fact, compelled by the underlying purposes of both franchise statutes. If suppliers could force the waiver of the "Distributors' Protections" embodied in the statutes, not only would they be able to usurp the investments that they have induced their distributors to make, but they would also be able to undermine effective alcohol regulation, reduce competition, and restrict consumer choice and variety.

Perhaps most importantly, when franchisees and their counsel review proposed agreements, they do with the expectation that if a specific contractual provision conflicts with franchise laws, the laws prevail. In that respect, the provisions of these franchise laws therefore largely determine the expectation of the parties regarding their relationship, respective duties, and obligations.

IV. Policies Underlying the Washington Franchise Investment Protection Act

The fundamental policies underlying FIPA are two-fold. First, as reflected by the title of the Act, protecting Washington franchisees from inequitable usurpation of the substantial investment those franchisees are induced to make on a franchisor's behalf.[17] This is accomplished through a provision prohibiting termination of franchise rights without notice, an opportunity to cure, and good cause. RCW 19.100.180(2)(j). Second, in recognition of past abuses and a disparity in bargaining power, ensuring a

[17] Washington courts have routinely found that legislative intent can be discerned through the title of a legislative act. *See State v. Weaver,* 161 Wash. App. 58, 64, 248 P.3d 1116, 1119 (2011); *State v. T.A.W.,* 144 Wash. App. 22, 26, 186 P.3d 1076, 1077 (2008); *Shoop v. Kittitas Cnty.,* 108 Wash. App. 388, 392, 30 P.3d 529, 531 (2001), *aff'd on other grounds,* 149 Wash. 2d 29, 65 P.3d 1194 (2003). There is a distinction made between captions generated by the code reviser or a title that is codified within the statutory scheme itself, with the latter being utilized to discern legislative intent. *Shoop,* 108 Wash. App. at 392, 30 P.3d at 531. Here, the title of FIPA has been codified in RCW 19.100.940 and, as such, the legislative title provides insight into the legislature's intent and further support for the inherent purpose of FIPA, which is to protect a franchisee's investment in a franchise.

modicum of fairness in business dealings between the franchisor and franchisee. This is accomplished through other provisions of the Act which regulate the relationship between franchisor and franchisee. RCW § 19.100.180.

As recently reaffirmed by the Washington Supreme Court: "When the legislature enacted FIPA, it created a comprehensive scheme for regulating franchising in Washington, and it did so with the aim of protecting franchisees."*Dep't of Labor & Indus. of State v. Lyons Enterprises*, 185 Wash. 2d 721, 732, 374 P.3d 1097, 1102 (2016), *as amended* (July 13, 2016) (citations omitted), *reconsideration denied* (July 14, 2016); *see also East Wind Exp., Inc. vs. Airborne Freight Corp,* 974 P.2d 369, 372 (1999); *Morris v. Int'l Yogurt Co.*, 729 P.2d 33, 35 (1986) (citing Donald S. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash. L. Rev. 291, 334–90 (1973)); *Lobdell v. Sugar 'N Spice, Inc.*, 658 P.2d 1267, 1271 (1983) ("The State legislature enacted the [FIPA] in 1972 in order to correct [a] maldistribution of information

and power." (Citations omitted.)), *rev. denied*, 99 Wash. 2d 1016 (1983).

This Court has acknowledged that FIPA is one of "the most comprehensive franchise statutes of its kind." *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1218 (9th Cir. 1983) (citing 67 A.L.R. 3d 1299, 1302-03) (1975); *see 1-800-Got-Junk? LLC v. Sup. Ctl,* 189 Cal. App. 4th 500, 518, 116 Cal. Rptr. 3d 923, 936 (2010), *as modified* (Nov. 19, 2010) (finding that Washington's FIPA "affords a franchisee far greater protection from summary termination of a franchise" than the California franchise law).

V. The Washington Franchise Investment Protection Act provides an alternative basis for upholding the District Court's issuance of injunctive relief.

While concluding that Olympic Eagle had demonstrated the likelihood that it would prevail on its claim that Constellation's threatened termination violates the Beer Franchise Law, the District Court declined to issue the injunction under the authority conferred by FIPA. The Court held that "[a]t this time . . . the Court cannot conclude Olympic has a high likelihood of success on the

merits" on its claim that FIPA prohibited Constellation's termination without cause. Dkt. 8-2 p. 12 of 23. Specifically, the District Court expressed doubt that the relationship had met the "substantial association" element of a franchise under FIPA. Dkt. 8-2 p. 22 of 23.

FIPA defines a "franchise" as follows:

> An agreement, express or implied, oral or written, by which:
>
> > (i) A person is granted the right to engage in the **business of** offering, selling, or **distributing goods or services** under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;
> >
> > (ii) **The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol** designating, owned by, or licensed by the grantor or its affiliate; and
> >
> > (iii) The person pays, agrees to pay, or is **required to pay, directly or indirectly, a franchise fee**.

RCW § 19.100.010 (6)(a) (emphasis added).

The Distribution Agreement granted Olympic Eagle the right to sell Constellation products under a marketing plan prescribed by Constellation, satisfying the first component of the definition. In addition, it required Olympic Eagle to pay Constellation a marketing and promotion fee and contribute to its national advertising fund, as well as make other payments on its behalf and for its benefit, satisfying the third component of the definition.

Regarding the second component of the definition, however, the District Court found that on the limited record before it, Olympic Eagle did not show that the operation of the business is substantially associated with Constellation's trademark. The District Court relied on an unreported California case interpreting the California Franchise Relations Act, noting that Olympic Eagle "has thus far presented no evidence that its customers associated it with the Constellation trademark." (citing *Gabana Gulf Distribution, Ltd. v. GAP Int'l Sales, Inc.*, No. C 06- 02584 CRB, 2008 WL 111223, at *5 (N.D. Cal. Jan. 9, 2008), *aff'd*, 343 F. App'x 258 (9th Cir. 2009); *see also Atchley v. Pepperidge Farm, Inc.*, 2012

WL 6057130, at *9 (E.D.Wa. Dec. 6, 2012) (noting that plaintiffs use of their supplier's trademarks did not "rise to the level of a 'substantial association' because Plaintiffs did not prove that any other person believed or could believe that Plaintiffs were associated with" their supplier in a capacity beyond distributorship) (emphasis added))[18].

The *Gabana* decision, however, is clearly distinguishable from the case at bar. First, Gabana did not establish the most important element of a franchise, namely that it paid a "franchise fee," as distinguished from a mere purchase of product at fair market value. Second, Gabana was expressly prohibited by contract from associating itself with Gap's trademarks beyond selling its merchandise. Third, perhaps most importantly, the ISP Agreement between Gabana and Gap expressly forbade Gabana from "adopt[ing] any trademark, service mark, trade name, trade dress or any element thereof" that might be considered the [sic] carry the

[18] The *Atchley* case is distinguishable on grounds similar to *Gabana*.

risk of association with Gap. *Gabana Gulf Distribution, Ltd. v. GAP Int'l Sales, Inc.*, No. C 06- 02584 CRB, 2008 WL 111223, at *5 (N.D. Cal. Jan. 9, 2008). Finally, Gabana was a non-exclusive distributor of "first-line" Gap merchandise.

Respectfully, the District Court viewed the "substantially associated" requirement through the wrong prism. The issue is not whether customers subjectively associate the business of a franchisee with the franchisor's trademarks (if indeed that could ever be accurately assessed). Such perceptions may serve as evidence of association but are certainly not the determinative factor. Rather, the central issue is whether the financial relationship, agreement, and shared interest between the parties evidences a substantial association with the supplier's brand.

The term "business" is not specifically defined by FIPA, but it clearly includes distributors such as Olympic Eagle. It is first referred to in Section 19.100.010(6)(a)(i) ("A person is granted the right to engage in the business of offering, selling, or **distributing** goods or services under a marketing plan"). The term "business"

clearly refers to the **specific** business of selling the **franchisor's** goods or services. In other words, the business of selling Constellation's products. *See Coast to Coast Stores, Inc.,* 667 P.2d at 623 ("The franchise, therefore, is the agreement between the parties, and not the business operated by the franchisee.").

Understood in this context, the appropriate inquiry is whether Olympic Eagle's operation of the business of selling Constellation's products is substantially associated with Constellation's trademarks or adverting or expressed another way, with the Constellation brand.

In that regard, Olympic Eagle was granted the exclusive right to sell and advertise Constellation's products in its territory. No other distributor was granted that right and retailers in the territory could not buy Constellation products from any party other than Olympic Eagle. Thus, no distributor, other than Olympic Eagle, was associated, substantially or otherwise, with the Constellation brand in that territory.

Olympic Eagle was granted the right and, in fact was required, to use Constellation trademarks in the exercise of its exclusive right to sell Constellation products in the territory. Olympic Eagle was not a convenience store, grocery or other ordinary retail outlet selling Constellation products. Such a vendor has no right or obligation to promote the Constellation brand, has no right to use the Constellation trademarks, and clearly does not satisfy the requirement embodied in Section 19.100.010(6)(a)(ii). Those vendors are not required to invest in the Constellation brand by paying it a marketing, promotion or coop advertising fee and are not required to otherwise brand their business facilities, equipment, or marketing materials with the Constellation trademarks.

In contrast, Olympic Eagle was the exclusive representative of Constellation products in its territory, was contractually required to invest in the “brand” by paying marketing and promotion fees to Constellation and by contributing to Constellation’s national coop-advertising program. It was required

to brand identify at least some of its vehicles. It was required to create at its expense point-of-sale materials with Constellation trademarks and logos and to place those materials for display in the retail market.[19]

Olympic Eagle's marketing, sales, and advertising programs utilized these trademarks extensively. It was contractually prohibited from doing any "acts or things contesting or in any way impairing or tending to impair" the trademarks. Accordingly, there can be little doubt that its exercise of exclusive distribution rights and its investment in the marketing, promotion, and growth of the Constellation brand in the territory evidenced a substantial

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[19] If the three elements of a "franchise" are met, there is no minimum sales threshold nor an exemption for allegedly "sophisticated" franchises. *See Dep't of Labor & Indus. of State v. Lyons Enterprises*, 374 P.3d 1097, 1102 (2016), *as amended* (July 13, 2016) (citations omitted), *reconsideration denied* (July 14, 2016) ("Although subsequent commentary has questioned the validity of these fears, especially in light of the sophisticated franchisees operating today, the legislature enacted FIPA with the purpose of protecting franchisees, and it is through that lens that we continue to view its provisions." (Citation omitted.)).

association between Olympic Eagle and the Constellation brand, satisfying the second element of FIPA's definition of a franchise.

Even assuming arguendo that the phrase "operation of the business is substantially associated with a trademark" is ambiguous, it must be liberally construed with reference to FIPA's remedial purposes. The primary goal of FIPA is to identify and protect franchisees who were induced to make investments on a franchisor's behalf and to prohibit that franchisor from inequitably usurping that investment. The requirement that a franchisee's business must be "substantially associated with the trademarks" must be understood in that context. In other words, there must be a relationship between the franchisee's investments (i.e. the franchise fee) and the franchisor's brand (i.e. trademark).

The "substantially associated" requirement is designed to distinguish franchisees from other alternative business relationships, like ordinary retailers or other vendors of the franchisor's products or services who are merely acquiring the products for resale to consumers. By definition, businesses which

pay the supplier, directly or indirectly, for the privilege of selling their products and are contractually obligated to invest in and grow a supplier's brand (i.e. "trademarks") are "substantially associated" with that supplier and its trademarks, particularly those businesses like Olympic Eagle which have been awarded exclusive distribution rights within a defined territory.

Retailers, on the other hand, may sell a supplier's products but, beyond paying the purchase price, they do not pay a supplier for the privilege of representing them in the marketplace nor are they required by agreement to invest in the supplier's brand. Most importantly, they are prohibited from using the marks.

Accordingly, in the interest of justice and avoiding continued misinterpretation of this Court's prior rulings, Amici respectfully requests this Court to clarify the standards under which the "substantially associated" requirement under FIPA is to be assessed and applied.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the Court affirm the issuance of injunctive relief and permit the parties to proceed to trial protecting the status quo in the interim.

Respectfully Submitted,

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FOR THE NINTH CIRCUIT

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