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
No. 3:22-cv-05756-DGE
Hon. David G. Estudillo

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants provide the following information.

As to Appellant Crown Imports LLC, d/b/a Constellation Brands Beer Division, the following entities are owners of Defendant Crown Imports LLC, d/b/a Constellation Brands Beer Division:

(i) Constellation Beers Ltd., which is incorporated and maintains its principal place of business in Maryland; and

(ii) Constellation Brands Beach Holdings, Inc., which is incorporated and maintains its principal place of business in Delaware.

As to Appellant Constellation Brands, Inc., which is a publicly-traded company, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Date: February 1, 2023

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INTRODUCTION

Since the end of prohibition, Washington has employed a three-tiered structure for the sale of alcoholic beverages to the public: suppliers (manufacturers and importers) sell their products to distributors who in turn sell the products to retailers and restaurants for direct sale to consumers. For decades, suppliers were able to exact disproportionate power over distributors by terminating distribution relationships at any time without cause, notice, or compensation. To correct this imbalance, in 1984 the Washington Legislature enacted the Wholesale Distributorship/Supplier Equity Agreement Act, RCW Chapter 19.126. Among the protections offered to distributors in this Act was the right to 60 days' notice of termination and, in the event of a termination without cause, monetary compensation for the terminated distribution rights. In 2009, the Washington Legislature amended the Act to, among other things, require a successor distributor to pay the terminated distributor fair market value for those rights.

Although the Act limits the common law right of suppliers to terminate without cause, it does not eliminate the right altogether. To the contrary, the current version of the Act contains five detailed provisions outlining how, when, and how much a terminated distributor will be compensated in the event of a without cause termination. Without cause terminations occur in Washington on a

regular basis, and the parties simply follow the statutory guidelines for notice, valuation, and dispute resolution.

Consistent with industry practice and Washington law, in early September 2022, Constellation—the exclusive United States brewer and marketer of popular imported beer brands such as Corona, Modelo, Pacifico, and Victoria—notified Olympic Eagle, one of its Washington distributors, that it would be terminating its distribution agreement. Shortly thereafter, the intended successor distributor contacted Olympic Eagle to offer 7 times its 12-months' trailing gross profits (approximately $70 million) as the fair market value for the distribution rights. After trying to shop around for a better deal, and instead of trying to negotiate the fair market value of the distribution rights, Olympic Eagle filed suit and moved for a preliminary injunction to stop the transfer, relying on vague and unsupported allegations that the termination of the distribution rights would pose an "existential threat" to its ongoing business operations.

The district court granted the motion based on an erroneous reading of the Act and held that, despite the numerous provisions devoted to compensation in the event of terminations without cause, the Legislature actually intended to prohibit terminations without cause. This conclusion, which ignored critical rules of statutory interpretation, undermines the entire purpose of the statute: to promote the "fair, efficient, and competitive" distribution of beer without disproportionate

distribution of power between suppliers and distributors. Under the district court's flawed interpretation, suppliers can never change distributors in the absence of a material deficiency in the distributor's performance. The court effectively locked the industry in Washington, holding suppliers hostage to their current distributors even if they have good reasons for wanting a change.

The Act does not prohibit without cause terminations either explicitly or implicitly and provides an adequate remedy at law in the event that distribution rights are terminated without cause: monetary compensation for the fair market value of the distribution rights, plus compensation for the laid-in cost of any inventory. The district court's issuance of a preliminary injunction was premised on an erroneous reading of Washington law and was therefore an abuse of discretion. This Court should therefore reverse and vacate the district court's preliminary injunction order and allow Constellation to proceed with termination of Olympic Eagle's distribution rights.

JURISDICTIONAL STATEMENT

This district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because it arises out of an order granting a preliminary injunction on December 12, 2022. 1-ER-2–16. Constellation timely filed its notice of appeal on January 4, 2023, within 30 days of entry of the injunction. Fed. R. App. P. 4(a)(1)(A); 4-ER-827.

STATUTORY AUTHORITIES

All relevant statutory authorities, specifically the full text of the Washington Wholesale Distributorship/Supplier Equity Agreement Act, RCW Chapter 19.126, including the prior 1984 version appear in the Addendum to this brief.

ISSUES PRESENTED

1. Whether the District Court erred in interpreting the Washington Wholesale Distributor/Supplier Equity Agreement Act, RCW Chapter 19.126 (the "Act") to prohibit termination of a distributor without cause.

2. Whether the Barton Beers, Ltd. Distributor's Agreement, which incorporates the Act, permits termination of the distributor without cause.

3. Whether the district court erred in granting Olympic Eagle's request for preliminary injunction based on an erroneous interpretation of Washington law.

4. Whether the district court erred in granting Olympic Eagle's request for preliminary injunction when the Act provides for monetary relief as the exclusive remedy for termination of a distributorship agreement without cause.

STATEMENT OF THE CASE

Crown Imports LLC d/b/a Constellation Brands Beer Division and Constellation Brands, Inc. (collectively "Constellation") are the exclusive brewers, marketers, and suppliers of a portfolio of popular high-end, imported beer brands in the United States, including the Corona, Modelo, Pacifico, and Victoria beer

brands. 3-ER-336, 4-ER-782–83. Constellation contracts with third-party distributors for exclusive distribution rights for its beer portfolio within designated service territories. 3-ER-336. These distributors are responsible for selling and delivering Constellation's beer products to retailers for sale to the public. *Id*.

In 2003, City Beverages, LLC d/b/a Olympic Eagle Distributing ("Olympic Eagle") acquired the exclusive right to distribute Constellation brands in a defined territory within Washington state. 3-ER-336, 4-ER-782, 798–813. Olympic Eagle signed a Distributor's Agreement with Barton Beers, Crown Import's predecessor in interest, dated October 22, 2003 (the "Distribution Agreement"). *Id.* As is typical in the industry, the Distribution Agreement did not have a fixed termination date because Suppliers, such as Constellation, could terminate distribution agreements without cause, provided that the distributor was adequately compensated pursuant to the terms of their distribution agreement and state law. *Id*. Indeed, Constellation would not have entered into a distributorship agreement that could not be terminated without cause as it would otherwise be perpetual; Constellation requires flexibility in determining who serves as the distributor of its product to account for changes in business plans, market areas, and products. 3-ER-336.

Distributors, however, are not without protection from without cause terminations. In 1984, Washington enacted legislation to balance the power

between beer and wine suppliers and distributors, the Wholesale Distributor/ Supplier Equity Agreement Act, RCW Chapter 19.126 (the "Act"). *See* 3-ER-319. Prior to 1984, beer wholesalers had no protection from unfair treatment by breweries or suppliers, and distribution contracts could be and were terminated at any time, without cause—and importantly, without compensation to the distributor. *Id*. Despite the fact that without-cause terminations were permitted and common in the industry, the Legislature did not expressly prohibit them. 3-ER-319–20. Instead, it passed legislation that allowed a supplier to terminate a distributor for cause, in which case the distributor was to be advised of the reasons for the termination and provided a right to cure. Further, if there was a without-cause termination, the legislation entitled that a distributor to just compensation from the supplier, measured as "the fair market price of the business as provided in the agreement for any termination of the agreement" for the cancelled brands. *Id.*; RCW 19.26.040(3) (1984) ("The wholesale distributor is entitled to compensation for the laid-in cost of inventory and liquidated damages measured on the fair market price of the business as provided for in the agreement for any termination of the agreement by the supplier other than termination for cause, for failure to live up to the terms and conditions of the agreement, or any reason set forth in RCW 19.126.030(5)"). Consistent with common law, if a distributor was terminated *with* cause, it would not be entitled to any compensation. 3-ER-319–20.

In 2009, the Legislature revised the Act to address changes in the beer industry, including the growth of craft beer and international imports; it also sought to address the situation where a supplier no longer had the right to sell the product, but the product was still distributed within the state by a different distributor. 3-ER-320. The 2009 amendments made no changes to the for-cause termination provisions of the Act. With respect to without-cause terminations, the changes to the Act in 2009 included that the successor distributor, instead of the supplier, became responsible for compensating the terminated distributor "for the laid-in cost of inventory and for the fair market value of the terminated distribution rights." 3-ER-320–22; RCW 19.126.040(4). This amendment provided distributors with protection and compensation for their investments in brands if the distribution rights to those brands were transferred under any circumstances leading to without-cause termination where the brands continued to be distributed within their territory. 3-ER-322. These changes were made by substantially expanding Section .040 of the Act. In the 1984 version of the Act, Section .040 had four subsections; the 2009 version has nine. The first two subsections, including the for-cause termination provision, are identical between the 1984 and 2009 versions of the statute, but former subsection 3 was expanded into six new subsections (3–8) to provide additional, more detailed protections and to change the compensation structure, as noted above.

For-cause terminations are virtually unheard of in the industry. The Act identifies specific scenarios that would support a for-cause termination without notice, such as revocation of the distributor's license to distribute and filing bankruptcy. RCW 19.126.030. A supplier may also terminate with cause if the distributor fails to "live up to the terms and conditions of the agreement" such as a failure to meet performance and marketing guidelines. RCW 19.126.040(4). If there is a failure to meet contractual obligations of performance, there is a right to notice of the deficiency and an opportunity to cure. RCW 19.126.040(2). In practice, for-cause terminations for failure to meet performance standards are inherently factual and the reality is that distributors are not terminated for cause; instead, all terminations are without cause and distributors are compensated for the fair market value of the terminated brands by the successor distributor. 3-ER-324. The typical procedure after a termination without cause is for the terminated distributor and successor distributor to negotiate compensation to the terminated distributor. 3-ER-323–25. For decades the industry has established the compensation formula as a multiple of the trailing 12-months gross profit. 3-ER-325. If the parties cannot agree, then the Act sets forth the procedure for determining fair market value, and it requires the terminated distributor to file a notice of intent to arbitrate within 40 days after the terminated distributor receives the notice of termination. RCW 19.126.040(6)–(8).

The Distribution Agreement between Constellation and Olympic Eagle is consistent with Washington law, which is also incorporated into the agreement pursuant to RCW 19.126.040, and expressly authorizes terminations without cause. 4-ER-805–06. Specifically, Section 6.1 allows the distributor to terminate for any reason with 90-days' prior written notice to Constellation: "This Agreement may be terminated at any time by mutual agreement of the parties or by Distributor upon 90 days' prior written notice to [Constellation][1]. . . ." 4-ER-805. Likewise, the Agreement expressly authorizes Constellation to terminate Olympic Eagle without cause and provides the formula for calculating Olympic Eagle's compensation in the event of a without-cause termination:

> 6.2 The parties agree that due to the built-in uncertainties in the market for the Subject Beverages, including the valuation of good will, Distributor's profit margins and certain other factors, it would be difficult to determine the actual damages, if any that may result from [Constellation]'s termination of this Agreement. **Accordingly, in the event of the termination of this Agreement by [Constellation] without cause, [Constellation] shall give Distributor 30 days written notice of its intent to terminate on this basis, and Distributor during such 30 day period Distributor may transfer its rights to distribute the Subject Beverages to another distributor, subject to [Constellation's] approval.** If, at the end of such 30 day period, Distributor has not transferred its distribution rights to another distributor approved by [Constellation], **then [Constellation] shall pay to Distributor in full and complete satisfaction, waiver and discharge of all claims of whatever nature that Distributor may**

[1] All references to "Barton" as the original supplier in the Distribution Agreement shall be changed to "[Constellation]" to avoid confusion.

> **have against [Constellation] and its affiliates, arising out of or with respect to the termination, as liquidated damages and not a penalty, a sum equal to (a) two times Distributor's Net Effective Profit (as defined in Section 5.6 above) attributable to the sale of the Subject Beverages that are Modelo brands to retailers in Distributor's territory for the most recent 12-month period, plus (b) Distributor's Net Effective Profit attributable to the sale of the Subject Beverages other than the Modelo brands to retailers in Distributor's territory for the most recent 12-month period.** All credits and debits incurred in the normal course of business up to the date of termination will be settled between [Constellation] and Distributor. These include promotional allowances resulting from authorized programs, outstanding pre-approved credits, deposits on kegs and pallets, etc. These amounts will be treated separately from the Net Effective Profit calculation. These payments shall be in addition to any amounts payable for inventories under Section 7.3 hereof.

4-ER-805 (emphasis added). Although the Agreement has been amended over the years, this provision has not changed. 4-ER-656–95. Likewise, nowhere does the Agreement state that application of this specific provision is contingent upon an express statutory endorsement from a particular state authorizing terminations without cause. Only "if any part of this Agreement is construed or held to be invalid or in violation of any [state] law . . . such part shall be deemed to be and shall be eliminated from this Agreement without affecting the enforceability of the remainder thereof." 4-ER-811 (¶ 12.1).

In early September 2022, Constellation contacted Olympic Eagle to inform it that Constellation would be terminating the Distribution Agreement, effective November 8, 2022, consistent with the statutorily-required 60-days' notice provision. The reason for this termination was not any failure by Olympic Eagle,

but was made after looking at shifts in the beer industry in terms of service models, route-to-market capabilities, retailer expectations, and Constellation's determination that its long-term interests would be best served by a change in distributors. 3-ER-339. On September 6, Constellation's Vice President for its Western Business Unit contacted Steve Knight, Olympic Eagle's CEO and president, by phone to discuss a matter of critical importance. 3-ER-338; *see also* 4-ER-715. During this call, Knight deduced that Constellation would be terminating the Agreement. 3-ER-338. Constellation sent a formal notice letter on September 8, 2022. *Id.*; 4-ER-654.

Several days after receiving notice of the impending termination, Olympic Eagle received a call from non-party Columbia Distributing, the intended successor distributor, offering 7 times Olympic Eagle's trailing 12-months gross profits (approximately $70 million) for the distribution rights. 4-ER-717, 778, 785.[2] Columbia has been a distributor for Constellation in portions of Oregon and Washington since 1988. 3-ER-342. Olympic Eagle did not accept this offer, but instead it shopped around for other potential distributors to purchase its distribution rights. 4-ER-718. In emails to those other distributors, Olympic Eagle

[2] Although Olympic Eagle pleaded that the offer was made, 4-ER-778, 785, it later back-tracked and claimed that no offer was made and seven-times trailing was only discussed. 2-ER-105–106, 174–75, 201.

acknowledged that its remedy under Washington law for termination of its distribution rights would be the fair market value of those rights. 4-ER-647–52.

Olympic Eagle apparently did not find another distributor willing to make an offer to purchase its distribution rights and instead filed suit and moved for a preliminary injunction against Constellation on October 6, 2022. 4-ER-719, 776. It did not, however, reach out to Constellation to determine whether Constellation intended to move forward with the termination and transfer of its distribution rights while the lawsuit was pending or request that Constellation defer termination. 2-ER-129.

On November 1, 2022, consistent with its termination notice to Olympic Eagle, Constellation prepared a letter providing notice to retailers that Columbia would assume the distribution rights, with sales and service to begin on November 9, 2022. 2-ER-129. Despite having fully briefed its motion for preliminary injunction, which did not include a request for a temporary restraining order, Olympic Eagle moved again for injunctive relief, seeking a temporary restraining order on November 4, 2022. *Compare* 2-ER-162 *with* 4-ER-719.

In its complaint, motion for preliminary injunction, and motion for temporary restraining order, Olympic Eagle never disputed that compensation for the fair market value of its distribution rights was the available remedy for termination without cause under Washington law. 4-ER-218 (“Under Washington

States Beer Wholesaler distribution law, any successor distributor is responsible to pay Olympic Eagle the 'fair market value' of its distribution rights"); 4-ER-649). Nor did Olympic Eagle argue that the Act would override a contractual provision permitting without-cause terminations—instead, Olympic Eagle argued that the parties' contract was ambiguous, and that because there was no *separate* statutory right to termination, Constellation was not permitted to terminate the parties' agreement without cause. *See* 2-ER-164–65, 4-ER-736–37. In other words, Olympic Eagle argued that the specific terms of its Distribution Agreement prohibited termination without cause unless terminations without cause were expressly authorized by state statute.[3] 4-ER-736–37, 788. It also alleged that $70 million did not accurately represent the fair market value of the distribution rights, even though it had contractually agreed that 2-times its trailing 12-months profits would be adequate compensation in the event of such termination. 4-ER- 778, 805–06.

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[3] Olympic Eagle also argued under a novel theory that it was entitled to injunctive relief because the Washington Franchise Investment Protection Act ("FIPA") protects against without-cause terminations. 4-ER-779–80. The district court, however, declined to grant a preliminary injunction based on FIPA and concluded that Olympic Eagle had not established likelihood of success on the merits of its contention that it met the required elements of a franchise under Washington law. 2-ER-114–15. Olympic Eagle has not filed a cross-appeal, and all arguments regarding FIPA are thus irrelevant to this appeal.

The district court held a hearing on the motion for temporary restraining order on November 8, 2022, at which the district court granted the motion. 4-ER-836 (Dkt. 41). At the hearing, the district court reached a conclusion that neither party had argued in their briefing: the Act's notice and cure provision required an opportunity to cure in all cases, and therefore implicitly barred all terminations without cause for which no cure would be possible. 2-ER-115–18. The district court directed the parties to draft an order memorializing the court's oral ruling given at the hearing. 4-ER-836. The district court issued a written Order Granting Plaintiff's Motion for Temporary Restraining Order (Dkt. No. 28) on November 18, 2022. 1-ER-17. In its Order, the district court granted the motion because it determined that "Olympic Eagle has demonstrated a likelihood of success on the merits that Constellation is prohibited from terminating their distribution agreement without cause. The Court finds that the [Act] contains certain protections which are incorporated into every agreement of distributorship that prohibit Constellation from terminating the distribution agreement between Olympic and Constellation without cause." 1-ER-18.

On November 22, 2022, Constellation filed a motion for reconsideration of the district's order, raising its arguments that the Act does permit terminations without cause. 2-ER-54. Plaintiff filed a response to the motion for reconsideration with the district court's permission on December 5, 2022. 2-ER-44. The district

court denied the motion for reconsideration and granted Olympic Eagle's request for a preliminary injunction on December 12, 2022. 1-ER-2. Constellation timely filed its notice of appeal on January 4, 2023. 4-ER-827.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in granting a preliminary injunction preventing Constellation from terminating its Distribution Agreement with Olympic Eagle and transferring its distribution rights. The district court abused its discretion in finding that Olympic Eagle was likely to prevail on the merits of its claim based on an incorrect interpretation of the Washington Wholesale Distributor/Supplier Equity Agreement Act, RCW 19.126 *et seq.* The district court likewise abused its discretion in finding that Olympic Eagle would suffer irreparable harm when the same statute provides that monetary compensation for the fair market value of the terminated distribution rights is an adequate and appropriate remedy in the event of a without-cause termination.

1. First, the district court erroneously interpreted the Act and failed to apply governing principles of statutory construction. At the time that the Act was enacted, Washington common law permitted termination of distribution agreements without cause upon reasonable notice to the distributor, but without compensation. The Legislature's intent to abrogate common law, however, must be clear and explicit. The Act clearly expresses the Legislature's intent to abrogate the

common law right to terminate upon only reasonable notice by requiring 60 days' notice of most terminations. Likewise, the Legislature clearly intended to abrogate the common law right to terminate without compensation by requiring that the terminated distributor be compensated in the event of a without cause termination. Absent from the Act, however, is any clear or explicit intent by the Legislature to abrogate the common law right to terminate without cause generally. The district court erred in holding that the Act prohibits without cause terminations.

Indeed, the Act contains detailed provisions in RCW 19.126.040(4)–(8) outlining what happens in the event of a without-cause termination. The district court failed to give meaning to these statutory terms, contrary to well-established principles of statutory construction. The district court failed to explain why the Legislature would include provisions for compensation in the event of a without-cause termination if it intended to prohibit such terminations altogether. If the district court was correct, the majority of RCW 19.126.040 would be surplusage. The only rationale the district court could supply is that there are certain scenarios where termination without cause would be permissible and that is why the Legislature included language addressing what would happen in those limited circumstances. But if this was the case, why did the Legislature not specify when such terminations would be allowed, instead of leaving massive ambiguities to be resolved by parties in the industry and the courts?

The district court's reading of RCW 19.126.040 also failed to acknowledge the Legislature's use of different words, and instead conflated the Act's use of "reason," "deficiency," and "cause" to mean the same thing. When the Legislature uses certain language in one place, but different language in another, the terms must be read to mean different things. Here, the Legislature provided that a supplier must provide 60 days' written notice of termination of distribution rights. RCW 19.126.040(2). In this notice, the supplier must state the "reason" for the termination; if the notice identifies "any deficiency," the distributor must be given the right to cure within 60 days. By using different words for "reason" and "deficiency," the Legislature intended that the reason for the termination need not include a curable deficiency. A without-cause termination would not include a curable deficiency. The Legislature then used different language—"reason other than for cause"—to describe when the compensation for termination provisions would apply. In other words, the "reason" for the termination need not be a curable deficiency and could include without-cause terminations.

The district court further erred in holding that if the Legislature intended to permit without-cause terminations, it could have and should have expressly authorized without cause terminations. But this analysis completely ignores pre-existing Washington common law, which allowed for without-cause terminations of distributorship agreements and was premised on an incomplete reading of

Colorado's statute, which provided the sole bases on which a termination could occur and then later re-authorized without cause terminations under a different notice period. There was no reason for the Washington Legislature to expressly authorize without cause terminations when they were already permitted.

The district court's erroneous reading of the Act upends its stated purpose and—contrary to providing equity between suppliers and distributors—grants disproportionate power to distributors by prohibiting suppliers from changing their product distribution strategies for reasons other than distributor incompetence. Because the injunction was issued based on an error of law, the district court abused its discretion, and the injunction must be reversed.

2. Second, the district court failed to consider the effect of the parties' Distribution Agreement, which not only contemplated without-cause termination, but expressly provides for the compensation that would be owed if one occurred. Even if the Act does not independently authorize without-cause terminations for all agreements, it does not prohibit the parties from contracting to include specific terms allowing the supplier to terminate without cause. Indeed, Olympic Eagle agreed that parties to a distribution agreement could contract for without-cause terminations, but disputed only that the subject Distribution Agreement includes such a provision. Section 6.2 of the Distribution Agreement expressly addresses what happens in the event of a termination without cause. Olympic Eagle does not

dispute this either; instead, it claims that because Section 12.1 of the agreement renders ineffective any section that contradicts state law, Section 6.2 is ambiguous and unenforceable because Washington law does not independently authorize terminations without cause. This circular reasoning, however, does not change what Section 6.2 says, and nothing in the Agreement makes any portion contingent upon express authorization by state statute. The Agreement is clear and unambiguous: termination without cause is allowed.

3. Third, because the district court based its determination that Olympic Eagle was likely to succeed on the merits on an erroneous interpretation of Washington law, the court abused its discretion in granting the preliminary injunction.

4. Finally, the district court abused its discretion in finding that Olympic Eagle would suffer irreparable injury in the absence of preliminary injunctive relief. It is well established that monetary injury is not irreparable. Only in very rare circumstances where the absence of an injunction would drive a party out of business before monetary relief would be available will a preliminary injunction be appropriate. Merely sustaining losses is legally insufficient to establish the threat of extinction. Yet this is all that Olympic Eagle presented to the district court: unsupported claims that it would become unprofitable.

But the district court did not even base its finding of irreparable harm on the threat that Olympic Eagle may go out of business. Instead, it was premised on speculation that termination of its distributorship rights would cause it to lose goodwill from its *other* suppliers whose products might have less representation in Olympic Eagle's territory if it does not also have the right to distribute Constellation's products. But again, the district court abused its discretion in finding impairment of goodwill sufficient to establish irreparable harm. Irreparable harm must be determined by reference to the purpose of the statute being enforced. Here, the purpose of the Act is to promote the fair, efficient, and competitive distribution of malt beverages. Nothing in the Act protects any distributor's right to have the widest selection of brands or protects a distributor's ability to hold on to the distribution rights of one supplier to ensure the increased sales of other suppliers' products. Instead, the interests the Act protects are exclusively monetary: the fair market value of the rights. Moreover, Olympic Eagle contractually agreed to monetary compensation—including for any valuation of good will—in the event of a without-cause termination, and it is therefore estopped from obtaining an injunction on that basis. Constellation does not dispute that Olympic Eagle is entitled to compensation for the termination of the distribution rights. The Legislature has determined that this is an adequate remedy at law in the

event of a without-cause termination, and the district court abused its discretion in expanding the statute to protect additional interests.

The district court abused its discretion in finding that Olympic Eagle was likely to succeed on the merits and that it would suffer irreparable harm in the absence of an injunction. The district court's preliminary injunction order must therefore be reversed and vacated.

STANDARD OF REVIEW

This Court reviews a "district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *Id.*

ARGUMENT

I. The District Court Abused Its Discretion in Granting the Injunction Based on an Incorrect Interpretation of the Washington Wholesale Distributor/Supplier Equity Agreement Act.

A. The Act Governs the Relationship Between Suppliers and Distributors.

The Wholesale Distributor/Supplier Equity Agreement Act (the "Act") is the exclusive legislation governing the relationships between beer and spirits manufacturers and importers (the "suppliers") and wholesale distributors, who sell and distribute such beverages to retailers. RCW 19.126.010(2). The Act

acknowledges that its purpose is to "best serve the public interest through the fair, efficient, and competitive distribution of [malt beverages and spirits[4]]." *Id*. at 19.126.010(1).

Pursuant to the Act, agreements between suppliers and distributors must be in writing. RCW 19.126.030(1); 19.126.040(1). The Act provides protections to both suppliers and distributors that are "deemed to be incorporated into every agreement of distributorship." RCW 19.126.030; 19.126.040. The supplier protections include, for example, that distributors maintain financial and competitive capabilities, maintain the quality and integrity of the supplier's product, and exert their best efforts to sell the supplier's products. RCW 19.126.030. Distributors are also provided with enumerated protections, primarily related to terminations. RCW 19.126.040. The Act expressly distinguishes between for-cause terminations—which distributors shall be entitled to cure within 60 days to avoid termination of their distribution rights, *see* RCW 19.126.040(2)—and terminations without cause, which entitle the terminated distributor to specific minimum compensation based on fair market value, *see* RCW 19.126.040(4)–(8). Indeed, the Act expressly and unequivocally references and implicitly permits without cause terminations:

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[4] Spirits were added into the Act in 2011.

> (4) If an agreement of distributorship is terminated, canceled, or not renewed *for any reason other than for cause*, failure to live up to the terms and conditions of the agreement, or a reason set forth in RCW 19.126.030(5), the wholesale distributor is entitled to compensation from the successor distributor for the laid-in cost of inventory and for the fair market value of the terminated distribution rights. For purposes of this section, termination, cancellation, or nonrenewal of a distributor's right to distribute a particular brand constitutes termination, cancellation, or nonrenewal of an agreement of distributorship whether or not the distributor retains the right to continue distribution of other brands for the supplier. In the case of terminated distribution rights resulting 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 affected distribution rights will not transfer until such time as the compensation to be paid to the terminated distributor has been finally determined by agreement or arbitration;
>
> (5) When a terminated distributor is entitled to compensation under subsection (4) of this section, a successor distributor must compensate the terminated distributor for the fair market value of the terminated distributor's rights to distribute the brand, less any amount paid to the terminated distributor by a supplier or other person with respect to the terminated distribution rights for the brand. If the terminated distributor's distribution rights to a brand of spirits or malt beverages are divided among two or more successor distributors, each successor distributor must compensate the terminated distributor for the fair market value of the distribution rights assumed by that successor distributor, less any amount paid to the terminated distributor by a supplier or other person with respect to the terminated distribution rights assumed by the successor distributor. A terminated distributor may not receive total compensation under this subsection that exceeds the fair market value of the terminated distributor's distribution rights with respect to the affected brand. Nothing in this section may be construed to require any supplier or other third person to make any payment to a terminated distributor[.]

RCW 19.126.040(4)–(5) (emphasis added). Moreover, the Act expressly prohibits certain conduct by suppliers, none of which include cancellation of distributorship agreements without cause or other limitations on the rights of

suppliers and distributors to incorporate contract provisions that do not expressly contradict the Act. RCW 19.126.050.

B. There is Limited Authority Interpreting the Act.

Few courts have had the opportunity to interpret the Act. Indeed, there are only two reported cases interpreting it, and one unpublished district court case: *Birkenwald Distributing Co. v. Heublein, Inc.*, 55 Wn. App. 1, 776 P.2d 721 (1989), *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 63 P.3d 779 (2003), and *Stein Distrib. Inc. v. Pabst Brewing Co.*, LLC, 2017 WL 2313489 (W.D. Wash. May 26, 2017). None of these cases is directly on point, and none address a situation where a supplier has a contractual right to terminate without cause, provides notice, and the successor distributor has offered compensation for the fair market value.

In *Birkenwald*, the Washington Court of Appeals, Division One considered whether the Act applied retroactively to distributorship agreements that pre-dated the Act and concluded that it did not. *Birkenwald Distr. Co.*, 55 Wn. App. at 10. In that case, the wine supplier, Heublein, cancelled its oral distribution agreement with the distributor, Birkenwald. *Id.* at 3. Neither the length of the agreement nor the terms for termination had been discussed by the parties. *Id.* at 4. In 1985, Birkenwald notified Heublein that it intended to sell its assets, at which point Heublein informed Birkenwald that it would need to approve a subsequent

distributor if Birkenwald intended to sell its distribution rights. *Id.* Heublein refused to approve a prospective purchaser and instead terminated the distributor agreement, effective in 60 days. *Id.* The reason given for the decision was that it "was made 'after reviewing the market' and the purchaser's potential.'" *Id.* Because Birkenwald sought damages of $200,000 resulting from the cancellation and no other mention of compensation is mentioned, the only reasonable inference is that Heublein cancelled the distribution agreement without compensation for the terminated rights. *Id*.

Heublein argued that it had and relied on a right to terminate the parties' agreement at will and that retroactive application of the Act would impermissibly impair its existing contractual obligations as protected by the United States and Washington Constitutions' Contract Clauses. *Id.* at 4–6 (citing Wash. Const. art 1, § 23; U.S. Const. art 1, § 10). The court acknowledged that prior to the Act, Heublein had an implied contractual right to terminate "for any reason" with "reasonable notice" that was protected by the Contract Clause. *Id.* at 6 (quoting *Mayflower Air-Conditioners, Inc. v. West Coast Heating Supply, Inc.*, 54 Wash.2d 211, 215, 339 P.2d 89 (1959). The court further noted that because the parties understood that Birkenwald had to "satisfy Heublein's expectations to maintain the distributorship" and because Heublein had the right to approve any transferee, this indicated "that Heublein had an *express*, albeit unwritten, right to terminate

Birkenwald at will." *Id.* at 8. Therefore, because the Act implicated implied and express rights to terminate, retroactive effect would violate the Contract Clause. *Id.* at 6–8.

Although *Birkenwald* implicitly acknowledges that the Act impairs the ability of suppliers to terminate distributorship agreements without cause, it does not stand for the proposition that the Act prohibits without-cause terminations. Indeed, because the court concluded that the Act was irrelevant to the termination dispute, it could not and never did reach the question of whether all without-cause terminations are prohibited or whether *that* termination would have been ineffective because it did not provide the statutorily required compensation to the distributor.

Over a decade later, the Washington Supreme Court addressed whether the Act violated the commerce clause and dormant commerce clause in *Mt. Hood Beverage Company v. Constellation Brands, Inc.*, 149 Wash.2d 98, 63 P.3d 779 (2003). This decision consolidated two cases, *Mt. Hood* and *Alaska Distributors*, challenging the constitutionality of the Act with respect to distribution of wines. In the 1984 version of the Act, in-state wineries were excluded from the definition of "supplier" and were therefore exempt from the termination restrictions imposed in RCW 19.126.040. *Id*. at 104–05. In the *Alaska Distributors* case, Alaska had an oral agreement with Sebastiani Vineyards, an out-of-state wine supplier, to

distribute its products, including its "TRV" brand of wine products. *Id.* at 105–06. Without prior notice, Sebastiani sold the TRV brand to Constellation Brands, Inc. d/b/a Canandaigua Wine Company (CWC) without imposing Sebastiani's obligations to its TRV distributors on CWC. *Id*. at 106. Alaska sued claiming that Sebastiani terminated without good cause and without proper compensation. *Id*. Sebastiani argued, *inter alia*, that the Act was unconstitutional because it discriminated against out-of-state wine suppliers. *Id.* In the underlying *Mt. Hood* case, the plaintiffs included other Washington wine distributors for the TRV brand, some of whom had received notice of termination from CWC and others who did not. *Id.* at 107–08. The distributors sued CWC alleging violations of the Act based on CWC's failure to provide cause for the termination and constructive termination without notice. *Id*. CWC moved for and was granted summary judgment on the unconstitutionality of the Act. *Id.* The Supreme Court ultimately concluded that the Act was unconstitutional because it gave in-state suppliers "more flexibility than out-of-state suppliers" to contract for the distribution of their products by exempting them from the Act. *Id*. at 111.

Again, the Court acknowledged that the Act imposed restrictions on a suppliers' ability to unilaterally terminate a distribution agreement without cause, but based on the unconstitutionality finding, did not reach the question of whether, how, or to what extent the defendants were liable for violations of the Act.

Although it noted that the Act "enhances the contractual rights and responsibilities that suppliers and distributors have to one another, generally prohibiting suppliers from terminating contracts with distributors without cause or notice," it did not address whether the act barred any without cause terminations—including those explicitly permitted in the distributorship agreement or those in which the distributor[5] paid adequate compensation pursuant to the Act. *Mt. Hood Beverage Co.*, 149 Wash. 2d at 104.

Finally, in a trilogy of cases filed against Pabst Brewing Company, Judge Ronald B. Leighton reviewed the language of the Act. *See Stein Distrib. Inc. v. Pabst Brewing Co., LLC*, 2017 WL 2313489 (W.D. Wash. May 26, 2017); *Odom Corp. v. Pabst Brewing Co., LLC*, 2017 WL 2313491 (W.D. Wash. May 26, 2017); *Marine View Beverage, Inc. v. Pabst Brewing Co., LLC*, 2017 WL 2313490 (W.D. Wash. May 26, 2017). Each of these cases involved Pabst's termination of a distributorship without cause. *Id.* As the district court noted in its preliminary injunction order, the analysis of the Act is identical in each of these cases and accordingly, citation to *Stein* alone is appropriate. 1-ER-6 at n.2.

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[5] At the time and under the 1984 version of the Act, the terminating supplier, not the successor distributor, was responsible for compensating the terminating distributor.

In the *Pabst* cases, the court considered whether the Act permitted without cause terminations and concluded that it did not. Importantly, the Pabst distribution agreement did not contain any provisions that allowed Pabst to terminate without cause. 2-ER-300–01. The question thus posed to the court was whether, in the absence of such a clause, "the Act authorizes suppliers to terminate distributorships without cause." *Stein*, 2017 WL 2313489, at *2–3. The *Stein* court reviewed the statutory language in RCW 19.126.040(2) and compared it to RCW 19.126.040(4). *Id.* It held that because the 60-day notice provision in for termination in Section (2) expressly required that the notice "state all the reasons for the intended termination or cancellation" and allow the distributor 60-days "to rectify any claimed deficiency" that "cause" was required to terminate any agreement. *Id*. It reasoned that because the "Legislature fully knew that suppliers sometimes terminate a distributor's rights without cause, and in fact used this language only two paragraphs later," that the omission of without-cause terminations from the situations exempt from the notice and cure requirements in Section .020(2) was significant. *Id.* It further concluded that although the Legislature explicitly provided a remedy in the event of a without cause termination, it was not an authorization of them because otherwise, "it would not have mandated that in most circumstances, a distributor must have an opportunity to cure the cause leading to its potential termination." *Id.* Instead, it held, if the Legislature intended to

authorize without cause terminations, it should have explicitly said so, like the Colorado Legislature. *Id.* (citing Colo. Rev. Stat. Ann. § 12-47-406.3(3)). Critically, the *Pabst* cases involved the termination of distributors operating under agreements that provided a limited and express list of reasons that would authorize Pabst to terminate and which did not include provisions allowing for a right to terminate without cause. At most, the decision held that the common law right to terminate without cause was superseded by the Act; it did not hold that *all* without cause terminations were prohibited. The *Pabst* cases settled out of court and accordingly, were not appealed.

C. The District Court Erred in Interpreting the Act to Prohibit Terminations Without Cause.

In granting Plaintiff's motions for temporary and preliminary injunctive relief, the district court abused its discretion in basing its decision on an erroneous interpretation of the Act. In its order on the temporary injunction, the district court held that the Act "contains certain protects which are incorporated into every agreement of distributorship that prohibit Constellation from terminating the distribution agreement between Olympic Eagle and Constellation without cause." 1-ER-18 (citing *Stein*, 2017 WL 2313489, at *3). In its order denying Constellation's motion for reconsideration and issuing Olympic Eagle's request preliminary injunction, the Court reiterated its reliance on the *Stein* decision. 1-ER-

6–7. But *Stein* was also decided incorrectly, was settled out of court and therefore not subject to appellate review; it has no precedential value.

1. *The district court erred by failing to consider whether the Legislature clearly intended to supersede existing common law authorizing at will terminations or if it merely sought to ensure adequate compensation when such terminations were made.*

Washington common law permits a party to an indefinite distributorship agreement to terminate "for any reason" upon "reasonable notice"—i.e., without cause. *See Mayflower Air–Conditioners, Inc. v. West Coast Heating Supply, Inc.*, 54 Wash.2d 211, 215, 339 P.2d 89 (1959) (interpreting contract to allow for such termination); *Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co.*, 135 Wash. App. 760, 766, 145 P.3d 1253 (2006) ("When a contract for a continuing performance fails to specify the intended duration, we construe it to be terminable-at-will by either party after a reasonable time."). Of course, "the legislature has the power to supersede, abrogate, or modify the common law." *Potter v. Washington State Patrol*, 165 Wash. 2d 67, 76, 196 P.3d 691 (2008). The courts, however, will not "recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law. 'It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose." *Id*. (quoting *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35–36 (1983) (internal alterations and

citations omitted)).

Judge Leighton in *Stein* and the district court below failed to adhere to this foundational principle of statutory interpretation. Because the common law authorizes without-cause terminations, analysis of the Legislature's intent in the Act required the district court to find that the Legislature clearly and explicitly intended to terminate that right. This was not done. Indeed, the statute is far from clear that the Legislature intended to completely revoke the right to terminate without cause. To the contrary, in 1984 the Legislature expressly acknowledged the existence of without cause terminations, and instead of prohibiting them altogether, it superseded any common law rights to implement such a termination without compensation to the distributor. The stated purpose of the Act was to promote "the fair, efficient, and competitive distribution of" malt beverages and spirits. RCW 19.126.010(1). A statute that perpetually binds suppliers to a distributor can hardly be said to promote competition. Instead, by ensuring that terminated distributors are compensated for the fair market value of the distribution rights, the Act prevents a supplier from taking undue advantage of the distributor. The 2009 Act expanded the protections for without-cause termination and added four additional subsections implementing those protections—but again, did not prohibit without cause terminations.

Likewise, the district court ignored RCW 19.126.050, which provides a list of prohibited acts by a supplier. Notably absent from this list is a prohibition that a supplier may not "terminate a distributor without cause." The first three items listed are either prohibitions on contractual requirements that would be illegal or a restraint on trade. RCW 19.126.050(1)–(3). The last item prohibits a supplier from failing or refusing to enter into a distributorship agreement with a distributor handling its products. RCW 19.126.050(4). This is important because the statute requires distributors and suppliers to have a written agreement in prior sections. RCW 19.126.030(1); RCW 19.126.040(1). Oral agreements had previously been authorized under Washington common law. By prohibiting suppliers from refusing to enter into agreements with its distributors, the Legislature emphasized that it had changed common law. Had it intended to change the common law to prohibit all terminations without cause, it would and should have done so by explicitly prohibiting them in RCW 19.126.050.

Moreover, even if the Act did abrogate the common law right to terminate without cause, the *Stein* case was decided in the context of a dispute regarding the cancellation of an agreement that did not independently provide for without cause terminations. *See Stein*, 2017 WL 2313489, at *3–4 (discussing Pabst's argument that its contract permitted at will terminations under common law). *Stein* says nothing about how the Act would apply in this situation, where the Distribution

Agreement expressly allows or contemplates without cause terminations. Indeed, in *Stein*, the court proceeded to analyze the contract and noted that it "explicitly sets forth when Pabst may cancel it" and held that it "does not allow Pabst to terminate Stein's distribution rights without cause." *Id*. at *4. The district court therefore erred in applying the *Stein* analysis to a presumed right to terminate at will under common law to an express contractual term—accepted by Olympic Eagle—allowing for without cause termination.

Even if the Act eliminated a suppliers' common law right to terminate at will—which it does not—it does not preclude a party from contracting in a manner that is not inconsistent with the Act's terms. The Act requires parties to memorialize their agreement in writing and does not expressly prohibit such agreement from including provisions authorizing a without-cause termination. The parties would be precluded only from contracting around the minimum 60-days' notice and successor supplier compensation protections laid out in the statute.

2. The district court erred in failing to give meaning to the provisions in the Act referencing without-cause terminations.

The district court's interpretation of the Act as prohibiting *any* without-cause terminations fails to give meaning to every word in the statute. In Washington, "[w]hen interpreting a statutory provision, courts must give meaning to every word in a statute." *Smith v. Washington State Dep't of Lab. & Indus.*, 22 Wash. App. 2d 500, 511, 512 P.3d 566, *review denied*, 200 Wash. 2d 1013, 519 P.3d 588 (2022)

(internal citations omitted). Pursuant to the Statute, "[w]holesale distributors are entitled to . . . protections which are deemed to be incorporated into every agreement of distributorship." RCW 19.126.040. Certain of those protections include providing for compensation in cases in which a distributor is terminated "for any reason other than for cause." *See* RCW 19.126.040(4)–(8). Under RCW 19.126.040(4), every contract provides that "[i]f an agreement of distributorship is terminated, canceled, or not renewed for any reason other than for cause, failure to live up to the terms and conditions of the agreement, or a reason set forth in RCW 19.126.030(5), the wholesale distributor is entitled to compensation from the successor distributor for the laid-in cost of inventory and for the fair market value of the terminated distribution rights." If the Statute prohibited terminations without cause, this subsection (and the three that follow) would be meaningless. Why would the Legislature provide for a detailed and explicit compensation procedure for terminations without cause if it intended to prohibit them? And if it so intended, why did it not explicitly say so?

The district court's explanation that the Legislature acknowledged that there are certain scenarios of permissible without-cause terminations is unavailing. As the district court noted, subsection 2 identifies a termination "result[ing] from a supplier acquiring the right to manufacture or distribute a particular brand and electing to have that brand handled by a different distributor' would be one such

example of a termination without cause." 1-ER-9. No other "example" of a permissible without-cause termination is provided in the Act. Accordingly, this is either the only permissible without-cause termination or without-cause terminations are otherwise permissible. If the latter, then the district court's decision is clearly erroneous. If the former, then the majority of subsection 4 is surplusage. RCW 19.126.040(4). Specifically, subsection 4 provides for compensation to the terminated distributor in the event of a termination "for any reason other than for cause, failure to live up to the terms and conditions of the agreement, or a reason set forth in RCW 19.126.030(5)." *Id*. It continues that "in the case of terminated distribution rights resulting 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 affected distribution rights will not transfer until such time as the compensation to be paid to the terminated distributor has been finally determined by agreement or arbitration." *Id*. If acquisition of manufacturing or distribution rights is the sole situation where termination without cause is permissible, then there would be no need to provide for different treatment in this situation. If the "legislature recognized that without cause terminations can happen" but intended to prohibit them except in specific situations, it could have and should have done so. It did not. Subsection 4 would be surplusage if only the acquisition of rights by a new supplier justified termination without cause; the

Legislature there implicitly authorized without cause terminations provided that 60-days' notice is provided under subsection 2.

The district court's decision is also erroneous because Judge Leighton, and the district court in his footsteps, read Section .040(2) too broadly by interpreting "reason" to mean "cause" and interpreting the provision to require both notice *and* opportunity to cure. The statute provides: "The notice must state all the reasons for the intended termination or cancellation. Upon receipt of the 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(2) (emphasis added).

Notably, the Legislature did not require that the supplier provide the *cause* for the termination in the notice, only the reason. Nothing in the statute requires that the reason be a "deficiency" or other grounds for a for-cause termination. The Legislature further provided that the distributor would have 60 days to rectify "any claimed deficiency." By using the word "any" to modify "claimed deficiency" instead of "the claimed deficiency," the Act acknowledges that the notice might not include a curable deficiency. Only *if* the reason for termination is a deficiency by the distributor, without any desire to otherwise terminate the relationship, then the distributor has the option to cure. Without-cause terminations are, by

definition, not curable; when the reason for the termination is not for-cause, there is nothing to cure. The district court therefore erred in concluding that subsection 2 *requires* both notice *and* opportunity to cure in all circumstances. 1-ER-8, n.3.[6]

By using three different terms—"reason" and "deficiency" in Section .040(2) and "for cause" in Section .040(4)—the Legislature must have intended for them to have different meanings. "It is elementary that when the legislature uses certain language in one instance, and different language in another, there is a difference in legislative intent." *State v. E.J.H.*, 65 Wash. App. 771, 775 (1992). Indeed, "different statutory language should not be read to mean the same thing: '[w]hen the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.'" *Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wash. 2d 342, 353, 340 P.3d 849 (2015) (quoting *In re Pers. Restraint of Dalluge*, 162 Wash.2d 814, 820, 177 P.3d 675 (2008) (Sanders, J., dissenting)). A "reason" for

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[6] In a footnote, the district court noted "that the legislature 'identified and listed five specific types of terminations' that were exempt from § 19.126.040(2)'s requirement of notice and cure" and pointed to the rule of statutory interpretation that "Expressio unius est exclusion alterius: the expression of one is the exclusion of the other." 1-ER-8, n.3. Constellation does not disagree that only these specifically identified bases would excuse a supplier from *any* notice or opportunity to cure. But the identification of these five terminations does not preclude a without-cause termination *with* 60-days' notice under subsection 2.

termination does not have to be "for cause" nor a curable "deficiency"; indeed, the Legislature expressly acknowledged that a termination could be for "a reason other than for cause." RCW 19.126.040(4).

It appears that Judge Leighton and the district court understandably, though incorrectly, conflated the two—a reason and a deficiency are not the same thing. *See Reason*, Black's Law Dictionary (11th ed. 2019) ("1. An expression or statement given by way of explanation or justification[.]"); *Deficiency*, Black's Law Dictionary (11th ed. 2019) ("1. A lack, shortage, or insufficiency of something that is necessary."). Not every reason to terminate an agreement is a deficiency. That is, a supplier could have a reason to terminate, but that reason might not necessarily be a deficiency. For example, a supplier might terminate a distributor when the supplier has decided not to continue distributing in a certain area, which does not speak to a deficiency. Under the district court's interpretation of the statute, a supplier who desired not to have its products distributed in a certain area could not cancel its distribution agreement because the decision would not provide an opportunity for the existing distributor to "cure."

The use of different words—in back-to-back sentences and clauses—evinces the Legislature's intent that they are, indeed, different. *See E.J.H.*, 65 Wash. App. at 775. The Legislature's distinction makes sense and is important: if a distributor is terminated for cause under the Act, it is entitled to no compensation.

If a distributor is terminated without cause, however, it is entitled to a monetary recovery, i.e., "the laid-in cost of inventory and for the fair market value of the terminated distribution rights" from the successor distributor. *See* RCW 19.126.040(4). Thus, the Legislature had an incentive to give an opportunity to cure a deficiency that would otherwise lead to a for-cause termination that could be avoided—without it, the distributor would collect nothing. But where the reason for termination is that it is without cause, there is no need to remedy anything, and the distributor is entitled to the compensation.

The district court also incorrectly determined that the 60-day notice period provided in subsection 2 indicates that an opportunity to cure is required. 1-ER-7–8. The 60-day notice period makes sense with respect to without cause terminations under the Act, even without cure. Indeed, the 60-day notice period coincides with the fair market value compensation procedure detailed in subsections 7 and 8 and provides the parties ample time to identify whether they can agree to a fair market valuation or whether they should institute arbitration proceedings within the statutory time frame to determine such value. The parties have "thirty days after the terminated distributor is given notice of termination" to agree on a fair market value, and if they cannot, "the matter must be submitted to binding arbitration," *see* RCW 19.126.040(7), with the "notice of intent to arbitrate" served within forty days after notice of termination, *see* RCW

19.126.040(8). The notice period in subsection 2 triggers the time within which the successor distributor and the terminated distributor must agree on the latter's compensation under subsection 4. Thus, subsection 2 requires a 60-day notice of *any* termination except for those specifically excluded, along with the reason (i.e., whether it is with or without cause), and if with cause, then the identification of any deficiencies with an opportunity to cure. It does not implicitly preclude without cause terminations.

The district court's conclusion that allowing without causes terminations would "let suppliers circumvent all the protections offered in § 19.126.040(2) by allowing a supplier to terminate without case" was also erroneous and fails to explain how a without-cause termination would evade subsection 2's protections. A supplier would still have to provide 60-days' notice to the distributor—a protection offered in subsection (2). And an opportunity to cure is a protection that is available only *if* there is something that needs to and can be cured. Only in the expressly enumerated situations, none of which the parties contend apply here, would notice not be required.

3. The district court erred in holding that the Washington Legislature was required to legislate in a particular way to preserve the existing right to terminate at will.

The district court also erred in holding that the Washington Legislature should have copied the Colorado statutory scheme if it wished to preserve a

supplier's right to terminate without cause. The district court's citation to the Colorado statute is unavailing because it is untethered to any analysis of the entire Colorado statutory scheme. The Colorado statute, which has since been amended and recodified, provided that "except as provided in subsections (2) to (4) of this section, no supplier shall terminate an agreement with a wholesaler unless all of the following occur: (I) [noncompliance with written agreement]; (II) [notice with at least 60 days to cure]; (III) [failure to cure] and [IV] [written notice of failure to comply and intent to terminate]." Colo. Stat. § 12-47-406.3(1)(a). Unlike the Washington statute, the Colorado statute expressly limits termination to for-cause terminations with a notice and cure provision and then provides specific exceptions, including without cause terminations with 90 days' notice. *Id.* at § 12-47-406.3(3). The Washington Legislature did not need to include an express authorization for without cause terminations because, unlike the Colorado Legislature, it had not otherwise expressly excluded them.

Similarly, the district court erred in holding that if the Legislature was concerned with or disagreed with Judge Leighton's ruling in the *Stein* case, it could have amended the Act to expressly allow without-cause terminations. 1-ER-9. But none of the *Pabst* cases were binding on Washington courts, and all involved distribution agreements that did not authorize without-cause terminations; there was no need for the Washington Legislature to act to protect without-cause

terminations that were contemplated and agreed to by contracting parties in their agreement. Moreover, the Legislature would also have been aware that without-cause terminations continued to occur in the aftermath of *Stein*—and have been the only basis for termination of distributor agreements in Washington for decades. 3-ER-324. As the industry recognized that *Stein* had limited relevance and only applied to bar without-cause terminations where a distributorship agreement expressly identified limited grounds for termination, which did not include a right to termination without cause, there was no need for the Legislature to intervene.

4. The district court erred because its interpretation of the Act disregards its stated purpose.

Finally, the district court's interpretation of the Act conflicts with the Act's stated purposes. The Act was first enacted to address the disproportionate power that suppliers had over distributors: namely, the ability to terminate contracts at will, without notice, and without compensation. The Act—named the "Wholesale Distributor/Supplier *Equity* Agreement Act"—intended to even the playing field between distributors and suppliers by requiring suppliers to provide notice of a termination, identify the reason for the termination, allow an opportunity to cure if the reason was a deficiency, and—if the termination was without cause—to ensure that the terminated distributor was compensated for its lost interests. RCW 19.126.900 (emphasis added); RCW 19.126.040; *see also* RCW 19.126.010. These purposes were reaffirmed when the Act was amended in 2009 and even greater

protection was provided to terminated distributors by requiring the successor distributor to pay for the rights. *Compare* RCW 19.126.040(4) (1984) *with* RCW 19.126.040(4).

That Act was not, however, intended to give the distributors disproportionate power over the suppliers. Yet that is precisely what the district court's interpretation of the Act does. In practice, all distribution agreements have indefinite durations, and all terminations of distributorship agreements are without cause. 3-ER-324, 336. Suppliers would never enter into an agreement without a fixed termination date unless they understood that the agreement could be terminated without cause; otherwise, it would be perpetual and subject to the whims of the distributor. 3-ER-336. By holding that suppliers are prohibited from terminating their agreements without cause, the district court has essentially bound all suppliers to their existing distributors—even if maintenance of that distributor is detrimental to the suppliers' business or the consuming public.

While distributors were at the mercy of suppliers prior to the Act, the district court's interpretation now holds suppliers hostage to distributors. A supplier could not, for example, switch to a distributor that offered better pricing to retailers—and distributors would have no incentive to keep their pricing reasonable because retailers in a particular territory would not be able to secure the same brands elsewhere. *See* RCW 19.126.010(1)(a) (granting distributor right to "independently

establish its selling prices"). Nor could a supplier switch to a distributor that had a better relationship with retailers, had better placement in stores, or to pivot in responses to changes and shifts in the industry. Another distributor could become a better fit for a supplier's brands and needs without the existing distributor being "deficient" in its performance.

By interpreting the Act to eliminate suppliers' flexibility, the district court effectively eviscerated the purpose of the Act to equalize the power between suppliers and distributors and committed error.

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The district court's interpretation of the Act was erroneous. Washington common law allows for termination of indefinite duration distribution agreements without case. The Act does not eliminate this right, but only requires that 60 days' notice be given and that the successor distributor fully compensates the terminated distributor at full market value plus the laid-in cost of the distributor's inventory.

II. The District Court Abused Its Discretion in Failing to Consider the Effect of The Parties' Agreement Allowing Without Cause Terminations.

The district court also abused its discretion in failing to consider whether the parties' contract independently provides a basis for termination without cause. The district court relied on analyses in prior cases that involved the termination of distribution agreements that did not separately contain an express provision

authorizing or contemplating termination without cause. At best, these authorities stand for the proposition that the Legislature did not preserve the common law right to terminate without cause that was presumed to exist in every contract of indefinite duration. While the Act does not expressly authorize without-cause terminations, it also does not expressly prohibit them, and as the district court agreed, does acknowledge that terminations without cause happen. 1-ER-9. Critically, the district court failed to consider whether terminations without cause can happen because the parties *agree* to it. Indeed, Olympic Eagle acknowledged that unambiguous terms that allow a supplier to terminate without cause would be enforceable. 4-ER-729.

Here, the Distributorship Agreement expressly provided that Constellation could terminate the agreement without cause provided that it pay Olympic Eagle (1) two times its Net Effective Profit attributable to the sale of Modelo brands for the most recent 12-month period, plus (2) its Net Effective Profit attributable to the sale of beverages other than Modelo brands, if the distribution rights were not transferred to another distributor within 30 days after notice. *See* 4-ER-805–06. The only portion of Section 6.2 that expressly contradicts the provisions of the Act is that it allows the Supplier to terminate with 30 days' notice as opposed to the statutory 60 days. But because the Act is incorporated into the contract by law, it

merely serves to supersede the required notice period—not the entire section. *See* 4-ER-811.

Before the district court, Olympic Eagle argued that Constellation could not terminate without cause *not* because without-cause termination was prohibited by the Act, but because the contractual provisions referring to termination without cause were ambiguous and therefore unenforceable. 4-ER-736–38. The district court made no rulings on these arguments, and they did not form the basis of its decision to grant the injunction. Regardless, the Distribution Agreement is not ambiguous; it contains a lengthy provision covering what happens if Constellation terminates without cause.

Olympic Eagle completely ignores Section 6.2, which contemplates termination without cause and provides a limited contractual remedy in the event of a termination without cause. 4-ER-805–06. Instead, Olympic Eagle argues that Section 6.2 does not authorize termination without cause because it is ambiguous—not because anything about Section 6.2 is unclear, but because Section 12.1 acknowledges that the contract "will be used in and must be interpreted through the statutes of many different states." 2-ER-201, 203. Olympic Eagle thus claims that in the absence of express language (e.g., "Constellation may terminate without cause") that Section 6.2 applies only if the authority for the right to terminate without cause comes from outside the contract (e.g., is expressly

authorized by the state statute). 2-ER-201, 203, 4-ER-736–38. This is a tortured reading that not only defies the rules of contract interpretation, but if accepted, renders the entire contract vulnerable to ambiguity objections—any term could be challenged by arguing that under Section 12.1 the term unfavorable to the distributor is only enforceable if independently authorized by state law.[7] But nothing in the Agreement provides that any portion of the Agreement is enforceable only if expressly authorized by state law. Olympic Eagle's attempt to rewrite the contract to include such provisions under the guise of "ambiguity" in order to invoke Section 12.1's excision of unlawful terms must be rejected.

Like interpretation of a statute, in interpreting a contract, the court must "read each contract in such a manner that every section is given effect." *Am. Agency Life Ins. Co. v. Russell*, 37 Wn. App. 110, 114 (1984); *see also Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 361 (2006) ("When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some or meaningless."). Olympic Eagle's proposed interpretation would read Section 6.2 out of the Distribution Agreement not because it conflicts with statutory law, but because the statute does not provide an

[7] Of course, if the majority of the Agreement is ambiguous, then it is entirely unenforceable and Olympic Eagle would not be entitled to enjoin the termination of a void agreement.

express independent basis to terminate without cause in the absence of a contractual right to do so. 2-ER-201–03, 4-ER-736–38. That circular approach makes no sense.

Olympic Eagle seeks to take advantage of Section 12.1, which provides that if a term is unlawful under state law such term is excised from the Agreement, by manufacturing an ambiguity in Section 6.2. Nothing in Section 6.2 states that it is contingent in any way on the existence of a state statute authorizing termination without cause. Nor does Section 12.1 state that application of any provision is contingent upon the existence of an independent right under state law. To the contrary, Section 12.1 recognizes that because the agreement was drafted from a form contract used in multiple states, it was possible that certain provisions may violate or be invalid under state law, in which case, those provisions are eliminated without affecting the enforceability of the other terms. 4-ER-811. Section 12.1 does not make Section 6.2 ambiguous. It merely means that *if* the Act does not allow without-cause terminations—which it does—then Section 6.2 is eliminated.

Because Washington law does allow for termination without cause, provided adequate notice and compensation is given to the terminated distributor, Olympic Eagle's attempt to manufacture an ambiguity in the contract does not preclude Constellation from exercising its contractual right to terminate without cause.

Olympic Eagle's ambiguity arguments therefore do not provide an alternative basis to uphold the district court's erroneous order granting the preliminary injunction.

III. The District Court Abused Its Discretion in Granting Injunctive Relief Based on Its Erroneous Interpretation of Applicable Legal Principles.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Preliminary injunctions cannot and should not be issued lightly. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Consistent with that high bar, a plaintiff seeking a preliminary injunction must prove: (1) a likelihood of success on the merits, (2) a likelihood that it will suffer "irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Id.* at 20.[8] "In each case, a court must balance the competing claims of

[8] This Court has recognized an alternative sliding scale test that allows a court to consider the first and third factors on a continuum if the second and fourth factors are met. *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017). Under this alternative test, the party seeking an injunction need not establish likelihood of success on the merits and instead must show "serious questions going

injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

Here, the district court abused its discretion in finding that Olympic Eagle was likely to succeed on the merits and that it would suffer irreparable harm if the termination and transfer of distribution rights were allowed to proceed.[9]

A. The District Court Abused its Discretion in Determining That Olympic Eagle Was Likely to Succeed on the Merits.

The district court's determination that Olympic Eagle was likely to prevail on the merits was based on an incorrect interpretation of the Act and the erroneous conclusion that without-cause terminations are prohibited in Washington. When a court grants a preliminary injunction based on an error of law, it is an abuse of discretion and is subject to reversal. *Shelley*, 344 F.3d at 918. As explained above,

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to the merits;" but in compromise, the balance of hardships must weight "sharply" in the movant's favor. *Id.* The district court, however, did not utilize this test and therefore it is not relevant to review of the preliminary injunction issued in this case.

[9] Constellation disagrees with the district court's conclusion that the balancing of equities favors a preliminary injunction or that maintenance of the status quo in the form of a preliminary injunction serves the public interest. *See* 1-ER-14–15. Constellation acknowledges, however, that the district court's rulings on these issues involve more discretionary assessments that may not rise to an abuse of discretion.

while the Act does limit a supplier's right to terminate without cause in the absence of notice and compensation from the successor distributor, it does not prohibit without-cause terminations altogether. To the contrary, it expressly acknowledges that such terminations can and will happen and provides a remedy: payment of the fair market value of the terminated rights by the successor distributor plus the laid-in cost of inventory. RCW 19.126.040(4). Moreover, even if the Act did prohibit terminations without cause in the absence of a contract allowing without cause termination, Olympic Eagle's distribution agreement with Constellation does provide for termination without cause.

On these grounds alone, the district court's order granting the preliminary injunction must be reversed.

B. The District Court Abused Its Discretion in Finding That Olympic Eagle Would Be Irreparably Harmed.

Even if the district court did not err in concluding that Olympic Eagle was likely to prevail on the merits, it also abused its discretion in granting an injunction when the Act and the parties' contract provide that monetary relief is the sole remedy. Because the Act provides that a money payment is an adequate remedy at law, and because Olympic Eagle contractually agreed that a monetary payment is an adequate remedy at law, the Court abused its discretion in granting injunctive relief to prohibit Constellation from transferring the distribution rights for its products.

"It is well established . . . that . . . monetary injury is not normally considered irreparable." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (denying injunction where plaintiff claimed loss of income). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). Only in rare circumstances where the absence of an injunction would drive a party out of business can business losses be considered irreparable harm. *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188–89 (9th Cir. 2022) (finding irreparable harm justifying injunction against LinkedIn precluding it from employing measures to prevent the plaintiff from scraping publicly available data from its website when LinkedIn's website was the only available source of such information); *see also Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of New York*, 749 F.2d 124, 126 (2d Cir. 1984) (issuing injunction staying termination of distributorship where "the two owners of Roso-Lino, on the other hand, stand to lose their business forever."). But while "the threat of being driven out of business is sufficient to establish irreparable harm," merely sustaining losses is "insufficient evidence" that the party is "threatened with extinction." *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985); *see also Los Angeles Mem'l Coliseum Comm'n*, 634 F.2d at 1203 (denying

request for injunction where plaintiff claimed loss of income, but did not "show that the loss . . . threatened to put it . . . out of business.").

Although Olympic Eagle claims that the loss of the Constellation distributorship would be catastrophic, that it would have to lay off employees, and that it would lose income, none of its allegations support the contention that it would indisputably go out of business entirely if it is not allowed to maintain the Constellation distributorship rights. At most, Olympic Eagle has provided unsupported claims that the loss of Constellation would "make it unprofitable" and that it will have "a $5.5. million annual loss"—tellingly, however, Constellation provides no financial analysis to back this up. 4-ER-715–16. But in reality, as Olympic Eagle also admits, the loss of the Constellation distribution rights would merely slow its profit growth. 4-ER-641. Constellation further speculates that cuts "*may* not be enough to save the company" based on hearsay that former Constellation distributors in California went out of business in 2018 when their distribution rights were terminated. 4-ER-716. In fact, Olympic Eagle admits that it can remain viable, even with the loss of Constellation, if it is able to obtain new brands in the future, even if it speculates that obtaining new brands may not be feasible. 4-ER-718. All of these claims, however, must be considered in light of the fact that Constellation was offered 7 times its trailing 12-month profits as compensation for the termination of its rights—a fact that Olympic Eagle never

pointed out to their lender or incorporated into *any* of the economic analysis provided to the district court. 4-ER-717, 778, 785. And Olympic Eagle's fears of extinction as a result of this termination are belied by the fact that Constellation's brands make up only 10% of Olympic Eagle's brand portfolio—which includes beer brands like Budweiser, Busch, Michelob, and other popular imported and local beers. 3-ER-337–38 (referencing https://products.vtinfo.com/brandbuilder/01778/brands/tab/1).

Indeed, the district court did not base its ruling that Olympic Eagle would suffer irreparable harm on Olympic Eagle's generic claims that the termination would cause it to go out of business. Instead, the district court found irreparable harm based on Olympic Eagle's claim that it might lose its role as "shelf set captain" for an undisclosed number of its retail customers, a role that allows it to determine where products are placed in the store, including some of its smaller brands. 1-ER-13–14. The court further concluded that as a result of losing the role as "shelf set captain," Olympic Eagle would lose additional revenue from decreased sales and goodwill amongst its remaining suppliers. *Id.*

Notwithstanding that Olympic Eagle's evidence failed to establish the likelihood that it would lose shelf set captain at any specific customer's store—let alone "many" of them—the district court erred as matter of law because loss of goodwill is typically considered irreparable harm in only trademark and unlawful

competition (e.g., non-competition, tortious interference) cases. *See e.g.*, *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 840 (9th Cir. 2001) (finding loss of goodwill constituted irreparable harm in a trademark dispute); *Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (finding district court abused its discretion in finding irreparable harm based on insufficient evidence of loss of goodwill in trademark dispute); *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 599 (9th Cir. 1991) (affirming preliminary injunction to enforce non-compete). This makes sense because trademark law and non-compete agreements are specifically designed to protect goodwill.[10] No such purpose is attached to the Act, which is intended to regulate the relationship between suppliers and wholesale distributors—not wholesale distributors and their customers.

When an injunction is sought to avoid an alleged violation of a statute, "[i]rreparable harm should be determined by reference to the purposes of the statute being enforced." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). Here, the Act's purpose is to promote the fair,

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[10] It has also been acknowledged as irreparable harm in copyright cases, which again makes sense because the purpose of copyright law is to allow creators to have control over their works. *See, e.g.*, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017).

efficient, and competitive distribution of malt beverages and spirits for the benefit of the public. RCW 19.126.010. The Act does not protect any specific distributor's right to have the widest selection of brands or to be a shelf set captain for its retail customers to better promote *other* suppliers' products. Olympic Eagle's claimed loss of goodwill that may result from the termination of its rights is simply not an injury recognized or protected under the Act. Goodwill is not even mentioned anywhere in the statute. Instead, the Act expressly acknowledges that the injury is monetary: "the laid-in cost of inventory and for the fair market value of the terminated distribution rights." RCW 19.126.040(4). In other words, the Washington Legislature has determined that the termination of distribution rights is subject to an adequate remedy at law and has provided for that remedy.[11] Accordingly, even if the district court was correct that the Act does not permit without cause terminations—which it was not—the district court committed a separate error of law in concluding that Olympic Eagle did not have an adequate remedy at law; the injunction must therefore be reversed.

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[11] The Act also provides for injunctive relief to prevent "further violations" and does not authorize a person seeking determination of compensation for without-cause termination to bring a claim for injunctive relief. RCW 19.126.080. The Act provides the sole remedy for termination without cause and prohibits injunctive relief when that remedy is available.

Further, Olympic Eagle agreed to monetary compensation in the event of a without cause termination—including for the loss of goodwill. Section 6.2 of the agreement provides that "the parties agree that due to the built-in uncertainties in the market for the Subject Beverages, including the valuation of good will, Distributor's profit margins and certain other factors, it would be difficult to determine the actual damages, if any that may result from Barton's termination of this Agreement." 4-ER-805. Olympic Eagle then agreed that "in the event of the termination of this Agreement by [Constellation] without cause," Barton would receive a liquidated damages payment "in full and complete satisfaction, waiver and discharge of all claims of whatever nature the Distributor may have against [Constellation] and its affiliates arising out of or with respect to the termination. *Id*. By way of this provision, Olympic Eagle agreed to accept liquidated damages for termination without cause; it cannot now claim irreparable harm contrary to the Agreement. *See Aznaran v. Church of Scientology of California, Inc.*, 937 F.2d 611 (9th Cir. 1991) (holding plaintiff not entitled to injunction where contract provided for liquidated damages for the specific violations at issue).

The district court erred in entering an injunction based on a finding of irreparable harm when the Act and Olympic Eagle's Distribution Agreement both provide that monetary relief is adequate in the event of a termination without cause.

CONCLUSION

For the foregoing reasons, the district court's order granting the preliminary injunction should be reversed and vacated, and the injunction dissolved.

Date: February 1, 2023

TOUSLEY BRAIN STEPHENS PLLC

/s/ Rebecca L. Solomon
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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9th Cir. Case Number(s) _____

The undersigned attorney or self-represented party states the following:

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Signature _*s/Rebecca L. Solomon*_____ **Date** February 1, 2023
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s): 23-35010

I am the attorney or self-represented party.

This brief contains 13,679 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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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
No. 3:22-cv-05756-DGE
Hon. David G. Estudillo

ADDENDUM

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Attorneys for Appellant
Crown Imports, LLC, et al.

obligated to repay directly or indirectly any obligation of the authority except to the extent of fair value for services actually received from the authority. No member may pledge its revenues to support the issuance of revenue bonds or other indebtedness of an authority.

Passed the Senate February 29, 1984.
Passed the House February 14, 1984.
Approved by the Governor March 8, 1984.
Filed in Office of Secretary of State March 8, 1984.

CHAPTER 169

[Engrossed Substitute Senate Bill No. 3901]

WINE AND MALT BEVERAGES——WHOLESALE DISTRIBUTORS AND SUPPLIERS——AGREEMENTS

AN ACT Relating to unfair business practices; and adding a new chapter to Title 19 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. (1) The legislature recognizes that both suppliers and wholesale distributors of malt beverages and wine are interested in the goal of best serving the public interest through the fair, efficient, and competitive distribution of such beverages. The legislature encourages them to achieve this goal 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; and

(b) Assuring the supplier and the public of service from wholesale distributors who will devote their best competitive efforts and resources to sales and distribution of the supplier's products which the wholesale distributor has been granted the right to sell and distribute.

(2) This chapter governs the relationship between suppliers of malt beverages and wine and their wholesale distributors to the full extent consistent with the Constitution and laws of this state and of the United States.

NEW SECTION. Sec. 2. The definitions set forth in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agreement of distributorship" means any contract, agreement, commercial relationship, license, association, or any other arrangement, for a definite or indefinite period, between a supplier and wholesale distributor.

(2) "Wholesale distributor" means any person, including but not limited to a component of a supplier's distribution system constituted as an independent business, importing or causing to be imported into this state, or purchasing or causing to be purchased within this state, any malt beverage or wine for sale or resale to retailers licensed under the laws of this state,

regardless of whether the business of such person is conducted under the terms of any agreement with a malt beverage or wine manufacturer.

(3) "Supplier" means any malt beverage or wine manufacturer or importer who enters into or is a party to any agreement of distributorship with a wholesale distributor. "Supplier" does not include: (a) Any domestic winery licensed pursuant to RCW 66.24.170; (b) any winery or manufacturer of wine producing less than three hundred thousand gallons of wine annually and holding a certificate of approval issued pursuant to RCW 66.24.206; (c) any brewer licensed under RCW 66.24.240 and producing less than fifty thousand barrels of malt liquor annually; or (d) any brewer or manufacturer of malt liquor producing less than fifty thousand barrels of malt liquor annually and holding a certificate of approval issued under RCW 66.24.270.

(4) "Malt beverage manufacturer" means every brewer, fermenter, processor, bottler, or packager of malt beverages located within or outside this state, or any other person, whether located within or outside this state, who enters into an agreement of distributorship for the resale of malt beverages in this state with any wholesale distributor doing business in the state of Washington.

(5) "Wine manufacturer" means every winery, processor, bottler, or packager of wine located within or outside this state, or any other person, whether located within or outside this state who enters into an agreement of distributorship for the resale of wine in this state with any wine wholesale distributor doing business in the state of Washington.

(6) "Importer" means any wholesale distributor importing beer or wine into this state for sale to retailer accounts or for sale to other wholesalers designated as "subjobbers" for resale.

(7) "Person" means any natural person, corporation, partnership, trust, agency, or other entity, as well as any individual officers, directors, or other persons in active control of the activities of such entity.

NEW SECTION. Sec. 3. Suppliers are entitled to the following protections which shall be incorporated in the agreement of distributorship:

(1) Agreements between suppliers and wholesale distributors shall be in writing;

(2) A wholesale distributor shall maintain the financial and competitive capability necessary to achieve efficient and effective distribution of the supplier's products;

(3) A wholesale distributor shall maintain the quality and integrity of the supplier's product in the manner set forth by the supplier;

(4) A wholesale distributor shall exert its best efforts to sell the product of the supplier and shall merchandise such products in the stores of its retail customers as agreed between the wholesale distributor and supplier;

(5) The supplier may cancel or otherwise terminate any agreement with a wholesale distributor immediately and without notice if the reason

for such termination is insolvency, the occurrence of an assignment for the benefit of creditors, bankruptcy, or suspension in excess of fourteen days or revocation of a license issued by the state liquor board;

(6) A wholesale distributor shall give the supplier prior written notice, of not less than ninety days, of any material change in its ownership or management and the supplier has the right to reasonable prior approval of any such change; and

(7) A wholesale distributor shall give the supplier prior written notice, of not less than ninety days, of the wholesale distributor's intent to cancel or otherwise terminate the distributorship agreement.

NEW SECTION. Sec. 4. Wholesale distributors are entitled to the following protections which shall be incorporated in the agreement of distributorship:

(1) Agreements between wholesale distributors and suppliers shall be in writing;

(2) A supplier shall 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 section 3(5) of this act. The notice shall state all the reasons for the intended termination or cancellation. Upon receipt of notice, the wholesale distributor shall have 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;

(3) The wholesale distributor is entitled to compensation for the laid-in cost of inventory and liquidated damages measured on the fair market price of the business as provided for in the agreement for any termination of the agreement by the supplier other than termination for cause, for failure to live up to the terms and conditions of the agreement, or any reason set forth in section 3(5) of this act; and

(4) The wholesale distributor may sell or transfer its business, or any portion thereof, including the agreement, to successors in interest upon prior approval of the transfer by the supplier. No supplier may unreasonably withhold or delay its approval of any transfer, including wholesaler's rights and obligations under the terms of the agreement, if the person or persons to be substituted meet reasonable standards imposed by the supplier.

NEW SECTION. Sec. 5. No supplier may:

(1) Coerce or induce, or attempt to induce or coerce, any wholesale distributor to engage in any illegal act or course of conduct;

(2) Require 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; or

(3) Require a wholesale distributor to accept delivery of any product or any other item or commodity which was not ordered by the wholesale distributor.

NEW SECTION. Sec. 6. In any action brought by a wholesale distributor or a supplier pursuant to this chapter, the prevailing party shall be awarded its reasonable attorney's fees and costs.

NEW SECTION. Sec. 7. This chapter may be known and cited as the wholesale distributor/supplier equity agreement act.

NEW SECTION. Sec. 8. Sections 1 through 7 of this act shall constitute a new chapter in Title 19 RCW.

NEW SECTION. Sec. 9. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the Senate March 1, 1984.
Passed the House February 26, 1984.
Approved by the Governor March 8, 1984.
Filed in Office of Secretary of State March 8, 1984.

CHAPTER 170

[Substitute Senate Bill No. 3984]

RECALL OF PUBLIC OFFICIALS

AN ACT Relating to the recall; amending section 29.82.010, chapter 9, Laws of 1965 as amended by section 1, chapter 47, Laws of 1975-'76 2nd ex. sess. and RCW 29.82.010; amending section 29.82.015, chapter 9, Laws of 1965 as amended by section 2, chapter 47, Laws of 1975-'76 2nd ex. sess. and RCW 29.82.015; amending section 2, chapter 205, Laws of 1971 ex. sess. and RCW 29.82.025; amending section 29.82.030, chapter 9, Laws of 1965 as amended by section 4, chapter 205, Laws of 1971 ex. sess. and RCW 29.82.030; amending section 29.82.090, chapter 9, Laws of 1965 as amended by section 107, chapter 361, Laws of 1977 ex. sess. and RCW 29.82.090; amending section 29.82.100, chapter 9, Laws of 1965 as last amended by section 108, chapter 361, Laws of 1977 ex. sess. and RCW 29.82.100; amending section 1, chapter 42, Laws of 1980 and RCW 29.82.105; amending section 29.82-.160, chapter 9, Laws of 1965 and RCW 29.82.160; amending section 29.82.170, chapter 9, Laws of 1965 and RCW 29.82.170; amending section 29.82.220, chapter 9, Laws of 1965 and RCW 29.82.220; adding new sections to chapter 29.82 RCW; repealing section 29.82.020, chapter 9, Laws of 1965, section 1, chapter 205, Laws of 1971 ex. sess., section 3, chapter 42, Laws of 1980 and RCW 29.82.020; repealing section 3, chapter 205, Laws of 1971 ex. sess. and RCW 29.82.026; repealing section 29.82.070, chapter 9, Laws of 1965 and RCW 29.82-.070; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 29.82.010, chapter 9, Laws of 1965 as amended by section 1, chapter 47, Laws of 1975-'76 2nd ex. sess. and RCW 29.82.010 are each amended to read as follows:

Whenever any legal voter ((~~or committee or organization of legal voters~~)) of the state or of any political subdivision thereof ((~~shall~~)), either individually or on behalf of an organization, desires to demand the recall and

PDF **RCW 66.24.620**

Sale of spirits by a holder of a spirits distributor or spirits retail license—State liquor store closure.

(1) The holder of a spirits distributor license or spirits retail license issued under this title may commence sale of spirits upon issuance thereof, but in no event earlier than March 1, 2012, for distributors, or June 1, 2012, for retailers. The board must complete application processing by those dates of all complete applications for spirits licenses on file with the board on or before sixty days from December 8, 2011.

(2) The board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by chapter 2, Laws of 2012.

(3) The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other assets of the state over which the board has power of disposition, including without limitation goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(4)(a) Disposition of any state liquor store or distribution center assets remaining after June 1, 2013, must be managed by the department of revenue.

(b) The board must obtain the maximum reasonable value for all asset sales made under this section.

(c) The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

(5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.

(6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

(b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

(c) Purchases by the federal government from any licensee of the board of spirits for resale through commissaries at military installations are exempt from sales tax based on selling price levied by RCW **82.08.150**.

[**2012 c 2 § 102** (Initiative Measure No. 1183, approved November 8, 2011).]

NOTES:

Finding—2012 c 2 (Initiative Measure No. 1183): "(1) The people of the state of Washington, in enacting this initiative measure, find that the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers. Therefore, the people wish to privatize and modernize both wholesale distribution and retail sales of liquor and remove outdated restrictions on the wholesale distribution of wine by enacting this initiative.

(2) This initiative will:

(a) Privatize and modernize wholesale distribution and retail sales of liquor in Washington state in a manner that will reduce state government costs and provide increased funding for state and local government services, while continuing to strictly regulate the distribution and sale of liquor;

(b) Get the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the state to focus on the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages;

(c) Authorize the state to auction off its existing state liquor distribution and state liquor store facilities and equipment;

(d) Allow a private distributor of alcohol to get a license to distribute liquor if that distributor meets the requirements set by the Washington state liquor control board and is approved for a license by the board and create provisions to promote investments by private distributors;

(e) Require private distributors who get licenses to distribute liquor to pay ten percent of their gross spirits revenues to the state during the first two years and five percent of their gross spirits revenues to the state after the first two years;

(f) Allow for a limited number of retail stores to sell liquor if they meet public safety requirements set by this initiative and the liquor control board;

(g) Require that a retail store must have ten thousand square feet or more of fully enclosed retail space within a single structure in order to get a license to sell liquor, with limited exceptions;

(h) Require a retail store to demonstrate to state regulators that it can effectively prevent sales of alcohol to minors in order to get a license to sell liquor;

(i) Ensure that local communities have input before a liquor license can be issued to a local retailer or distributor and maintain all local zoning requirements and authority related to the location of liquor stores;

(j) Require private retailers who get licenses to sell liquor to pay seventeen percent of their gross spirits revenues to the state;

(k) Maintain the current distribution of liquor revenues to local governments and dedicate a portion of the new revenues raised from liquor license fees to increase funding for local public safety programs, including police, fire, and emergency services in communities throughout the state;

(l) Make the standard fines and license suspension penalties for selling liquor to minors twice as strong as the existing fines and penalties for selling beer or wine to minors;

(m) Make requirements for training and supervision of employees selling spirits at retail more stringent than what is now required for sales of beer and wine;

(n) Update the current law on wine distribution to allow wine distributors and wineries to give volume discounts on the wholesale price of wine to retail stores and restaurants; and

(o) Allow retailers and restaurants to distribute wine to their own stores from a central warehouse." [**2012 c 2 § 101** (Initiative Measure No. 1183, approved November 8, 2011).]

Application—2012 c 2 (Initiative Measure No. 1183): "This act does not increase any tax, create any new tax, or eliminate any tax. Section 106 of this act applies to spirits licensees upon December 8, 2011, but all taxes presently imposed by RCW **82.08.150** on sales of spirits by or on behalf of the liquor control board continue to apply so long as the liquor control board makes any such sales." [**2012 c 2 § 301** (Initiative Measure No. 1183, approved November 8, 2011).]

Rules—2012 c 2 (Initiative Measure No. 1183): "The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act." [**2012 c 2 § 303** (Initiative Measure No. 1183, approved November 8, 2011).]

Effective date—Contingent effective date—2012 c 2 (Initiative Measure No. 1183): "This act takes effect upon approval by the voters. Section 216, subsections (1) and (2) of this act take effect if Engrossed Substitute House Bill No. 5942 is enacted by the legislature in 2011 and the bill, or any portion of it, becomes law. Section 216, subsection (3) of this act takes effect if any act or part of an act relating to the warehousing and distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, is adopted subsequent to May 25, 2011, in any 2011 special session." [**2012 c 2 § 305** (Initiative Measure No. 1183, approved November 8, 2011).]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Addendum

Signature *s/Christopher I. Brain* **Date** February 1, 2023
*(use "*s/[typed name]*" to sign electronically-filed documents)*