TESTIMONY BY MARC SORINI BEFORE
THE HOUSE GENERAL HOUSING AND MILITARY AFFAIRS COMMITTEE
ON VERMONT H.B. 710, FEBRUARY 7, 2018

Good morning Chairperson Head and distinguished members of the Committee. My name is Marc Sorini, and I present this testimony in favor of House Bill 710.

House Bill 710 aims to restore fairness to the relationships between beer wholesalers and small brewers. The bill amends Chapter 23 of Vermont Statutes' Title 7 (Alcoholic Beverages), which was enacted in 1976 to address the imbalance of bargaining power between the large beer suppliers of that day and the many independent wholesalers that existed at that time. I will refer to that 1976 enactment as the "beer franchise law."

In the 1970s, the beer industry had consolidated to a point where a handful of large, national brewers supplied the vast majority of the beer sold in Vermont and elsewhere in the U.S. And at that time, beer wholesalers were almost universally very small, closely-held businesses distributing beer in just a few counties of a single state. As a result, the brewers of the 1970s and 1980s had vastly greater economic, financial, and legal resources than the beer wholesalers that they sold to.

As a result of this imbalance of bargaining power, Vermont – like most other states in the 1970s and 1980s – enacted so-called "franchise laws" to protect beer wholesalers. Like most such laws, Vermont's beer franchise law permits a brewer to terminate a wholesaler only for "good cause." This requirement effectively dictates a fundamental term of the parties' relationship without reference to normal terms that parties bargain for in a commercial agreement. Indeed, the beer franchise law specifically overrides the parties' agreement in this respect.[1] And unless a brewer can prove to a court that "good cause" exists, the court will order the brewer to continue selling to the wholesaler.[2] Overriding the parties' contract made sense in the context of a relationship between a giant national brewer and a small "mom and pop" wholesaler that lacked the economic and legal resources to protect itself by ordinary contract law.

The beer franchise law gave wholesalers additional protections besides the good cause requirement.

- A brewer must give a beer wholesaler not less than 120 days written notice before terminating the relationship.[3]
- During the 120-day notice period, if a wholesaler "cures" the reason(s) given by the brewer for the termination, the termination notice is voided.
- Where a wholesaler desires to sell or transfer its interest in a franchise, if a brewer does not wish to do business with the successor selected by the wholesaler, then the brewer

[1] *See* 7 V.S.A. § 703 ("Notwithstanding the terms, provisions, or conditions of any agreement . . .").
[2] *See id.* at § 704(b).
[3] *See id.* at § 704(a).

must go to court to resist the sale or transfer.[4] In the case of a merger, a brewer's right to object is effectively limited to a showing of good cause.[5]

- The purchaser of a brewery or beer brand remains bound by the wholesaler appointments of the prior owners.[6]

Times have changed since the Legislature enacted the beer franchise law in 1976. Today just three, very large wholesalers distribute virtually all the beer in Vermont. One wholesaler (Farrell Distributing) controls the distribution of Anheuser-Busch brands statewide. Two others (Baker Distributing and Calmont Beverage Co.) distribute the MillerCoors portfolio and the brands of dozens of other breweries around the world. One other sizeable player (Craft Beer Guild of Vermont) distributes statewide and, although it lacks one of the two major domestics, is part of a network of 19 commonly-owned distributors serving 12 states and the District of Columbia. In short, these are hardly the sort of businesses that require special legal protection.

At the same time wholesalers have consolidated and grown, the number of small brewers has exploded in Vermont and throughout the country. In 1977 there were just 46 breweries left in the United States. Today that number has exploded to over 6,000, with 56 breweries operating in Vermont.[7] Most of these are small, mom-and-pop businesses. Treating them like they were a large multinational brewer like Anheuser-Busch or MillerCoors is perverse.

Indeed, under current market dynamics, the beer and wine franchise law's un-waivable "good cause" requirement makes it effectively impossible for a small brewer to terminate a wholesaler. What constitutes good cause is an inherently fact-based inquiry that cannot be determined by a judge prior to the expensive and time-consuming "discovery" process. As the Committee likely knows, discovery is one of the most expensive aspects of modern litigation. Litigation over good cause will cost at least several hundred thousand dollars, and fees and costs can exceed a million dollars. While Vermont's big wholesalers have the legal resources to engage sophisticated lawyers to engage in such litigation, this sort of expense is beyond the means of all but the very biggest brewers. In effect, the small brewer is trapped, regardless of what its contract says and regardless of how poorly its brands are faring with the wholesaler.

House Bill 710 would provide relief from this injustice for all brewers making less than 300,000 barrels of beer per year. (A barrel contains 31 U.S. gallons.) While that may sound like a big number, to put it into perspective 300,000 is less than two tenths of a percent of the U.S. beer market, and it is almost certainly less than the total amount of beer sold by each of Vermont's big three wholesalers.

Importantly, the 300,000 barrel limitation excludes, among others:

1. Anheuser-Busch and MillerCoors. These two brewers alone collectively supply more than 75% of the beer sold in the United States.
2. The big imported beer companies like Constellation Brands (Corona, Modelo Especial, etc.) and Heineken.

[4] *See id.* at § 707.
[5] *See id.* at § 708.
[6] *See id.* at §709.
[7] Per The Brewers Association's records.

3. Pabst.
4. The biggest craft brewers, including Boston Beer Company (Samuel Adam), Sierra Nevada, New Belgium, and others.

And to avoid gamesmanship by large brewing companies to avoid the beer and wine franchise law, the bill would include the aggregate amount of all brands of beer or wine sold by the supplier, both inside and outside Vermont.

The relief House Bill 710 would deliver is something most businesses take for granted: The ability to set the business terms of its relationship with a wholesaler via principles of contract law and without government interference. At the conclusion of a transition period, wholesalers and brewers producing less than 300,000 barrels of beer per year – regardless of where they are located – could enter into contracts that are enforceable by their terms without regard to the beer franchise law. We see no reason why the law should not permit this.

To address concerns raised by some wholesalers, House Bill 710 also includes a transition mechanism to give Vermont wholesalers and brewers three-years to adjust to the change in law. During that period, a brewer producing less than 300,000 barrels per year can cancel an agreement with a Vermont wholesaler but only if it, or a successor wholesaler, pays the terminated wholesaler reasonable compensation. The formula for reasonable compensation is taken from a longstanding Delaware regulation that establishes an exception to the usual "good cause" termination rule as long as the terminated wholesaler receives compensation when it loses a brand.

In short, times have changed and require a reform of the beer franchise law to match the modern marketplace. I am happy to entertain any questions from the Committee.

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