IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONNECTICUT FINE WINE & SPIRITS, LLC, d/b/a TOTAL WINE & MORE, Plaintiff, v. JONATHAN A. HARRIS, Commissioner Department of Consumer Protection and JOHN SUCHY, Director Division of Liquor Control Defendants.	Case No. 3:16-cv-01434-JCH OCTOBER 20, 2016

PLAINTIFF'S COMBINED OPPOSITION TO MOTIONS TO INTERVENE OF WINE & SPIRITS WHOLESALERS, CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC., CONNECTICUT RESTAURANT ASSOCIATION, and CONNECTICUT PACKAGE STORES ASSOCIATION

Plaintiff Connecticut Fine Wine & Spirits, LLC ("Total Wine"), by its undersigned attorneys, hereby opposes the separate motions to intervene filed by Wine & Spirits Wholesalers of Connecticut ("Wine & Spirits Wholesalers") (Dkt. No. 27), Connecticut Beer Wholesalers Association, Inc. ("Beer Wholesalers") (Dkt. No. 30), Connecticut Restaurant Association ("Restaurants") (Dkt. Nos. 39, 40), and Connecticut Package Stores Association ("Package Stores") (Dkt. No. 47). At least two of the movants are clearly working together, and because they present similar (and at times identical) arguments, Total Wine responds to the motions to intervene in a single opposition, consistent with the Court's order yesterday (Dkt. No. 50.)

I. FACTUAL BACKGROUND

In this case Total Wine claims that certain state laws and regulations governing the sale and distribution of wine and spirits in Connecticut are preempted by federal antitrust law. The challenged provisions have the intent and effect of allowing distributors, wholesalers, and

ORAL ARGUMENT REQUESTED

retailers to engage in price-fixing that raises the profit margins of industry participants, particularly inefficient retailers, and harms consumers throughout the state. The table below summarizes the laws and regulations at issue:

Law/Regulation	**General Topic**
Conn. Gen. Stat. § 30-63	Requiring manufacturers and wholesalers to post and maintain separate bottle and case prices ("post and hold law")
Conn. Adm. Code § 30-6-B12	Regulations governing post-and-hold law
Conn. Gen. Stat. § 30-68m	Prohibiting retailers from selling below retailers' cost, and defining cost using posted bottle prices from wholesaler
Conn. Gen. Stat. §§ 30-68k, 30-63(b), 30-94(b), 30-6-A29(a)	Prohibiting price discrimination by wholesalers
Conn. Gen. Stat. § 30-63(b)	Prohibiting volume and other discounts
Conn. Gen. Stat. § 30-94(b)	Relating to certain rebates and discounts

Although some of the referenced statutes address the sale and distribution of beer as well as wine and spirits, plaintiff only challenges those provisions to the extent they regulate the pricing of wine and spirits. *See* Compl. ¶¶ 12 ("state-licensed manufacturers (vintners, distillers and national and international distribution firms) and state-licensed wholesalers *of wine and spirits* must post with the Department of Consumer Affairs, on a monthly basis, a 'bottle price' and a 'case price' for goods sold to retailers in Connecticut") (emphasis added); *id.* ¶ 13 (referring to definition of "cost" for wine and spirits, but not beer) *id.* ¶ 18 (referring to study showing comparatively higher retail prices in Connecticut for prices for wine and spirits, but not beer); Compl. Tables 1 & 2 (showing comparative prices for popular wines and spirits, but not beer).

Total Wine named as defendants the two state officials responsible for enforcing the challenged provisions. Total Wine deliberately did <u>not</u> name any wholesaler or retailer as a

defendant. Relief from private industry participants would likely be unavailable because the challenged provisions effectively insulate those participants from antitrust liability.

Nevertheless, the Wine & Spirits Wholesalers claim an interest in this action because the challenged provisions protect their "profitability," as well as the profitability of "hundreds of their small retailer customers." W&S Whlslrs. Mem. at 3. The Restaurants and the Package Stores – presumably the "small retailer customers" of the Wine & Spirits Wholesalers – say the same thing with a bit less candor. Dkt. No. 40 (Restaurants Memorandum), at 2 ("the elimination of those statutes would have a significant impact on many restaurateurs' economic interests"); *see also* Dkt. 39-2 (affidavit of Restaurants official), at ¶ 6 (members "will be adversely affected if the State's regulatory scheme is eliminated"); *compare* Dkt. 27-2 (affidavit of official from Wine & Spirits Wholesalers), at ¶ 6 (making the same point in the same language); Dkt 47-1 (Package Stores' Memorandum), at 6 ("CPSA's members … have a direct and substantial economic interest in defending" the statutes); Dkt. 47-2 (affidavit of Package Stores official), at ¶ 5 ("CPSA believes that, if successful, the claims of Plaintiff … will negatively affect the financial well-being of its membership"). The Beer Wholesalers have more difficulty articulating an interest, presumably because Total Wine has not directly challenged the comparable provisions governing beer. *See* Dkt. 30-2 (affidavit of Beer Wholesalers' official), at ¶¶ 9-10 (stating that the invalidation of the challenged provisions "would substantially impact and alter the business conducted by CBWA members" and claiming that plaintiff "specifically alleges … that CBWA members have engaged in unlawful price fixing"). Doubtless the Beer Wholesalers are also worried about their excessive profit margins. But Total Wine has filed this action to protect Connecticut consumers, not sellers.

The question presented is whether movants may intervene to defend the challenged provisions under Rule 24 of the Federal Rules of Civil Procedure. As set forth below, intervention should be denied because movants failed to comply with the procedural requirements of Rule 24, and because their interests in this case, to the extent they express a cognizable basis for intervention, are adequately represented by the Attorney General of Connecticut, who has already filed a motion to dismiss the complaint.

II. ARGUMENT

A. The motions to intervene were not accompanied by the required pleading.

None of the movants has complied with the procedural requirement set forth in Rule 24(c), which provides that a motion to intervene "*must* state the grounds for intervention and be *accompanied by a pleading that sets out the claim or defense for which intervention is sought*." (Emphasis added.) Many courts have denied intervention on that basis alone. *E.g.*, *School Dist.* v. *Pennsylvania Milk Mktg. Bd.*, 160 F.R.D. 66, 67 (E.D. Pa. 1995); *Pikor* v. *Cinerama Prods. Corp.*, 25 F.R.D. 92, 95 (S.D.N.Y. 1960). Other courts, probably a majority, construe the "pleading" requirement liberally, notwithstanding its mandatory language. The liberal construction generally means that district judges have discretion to decide whether a nonconforming motion provides sufficient notice of the proposed intervenor's position. *See Providence Baptist Church* v. *Hillandale Comm. Ltd.*, 425 F.3d 309 (6th Cir. 2005). But the Second Circuit has been counted among the minority "tak[ing] a stricter approach." *Id.* at 314 (citing *Abramson* v. *Pennwood Inv. Corp.*, 392 F.2d 759, 761 (2d Cir. 1968)). In *Abramson*, the Court of Appeals for the Second Circuit affirmed a district court's decision to deny intervention because the movant's failure to file a pleading along with his motion papers "was fatal to his application."

Even if this Court were inclined to adopt a more liberal construction of Rule 24(c), movants' papers are insufficient to comply with the Rule. Movants presumably will argue that their papers indicate they intend to file motions to dismiss.[1] But not only did movants neglect to attach their proposed motions to dismiss (much less their proposed pleading), they never articulated the arguments they expect to make in those motions. Thus, movants have violated both the letter and spirit of Rule 24(c): they have failed to attach the required pleading, and they have failed to articulate the basis of the "pleading" they intend to file. As set forth below, that error infects the rest of the intervention analysis, because plaintiff and the Court must speculate about movants' intentions, and how their participation would affect the orderly progress of this case.

The Court should deny the motions to intervene for failure to follow the clear mandate of Rule 24(c).

B. Movants may not intervene as of right.

Rule 24(a) provides that courts must permit intervention when the movant, on "timely motion," (1) is given an unconditional right to intervene by statute, or (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Movants claim a right to intervene under subsection (a)(2).

> In order to intervene as of right pursuant to Rule 24(a)(2), the applicant must: (1) file a timely motion; (2) show an interest in the litigation; (3) show that its interest may be impaired by the disposition of the action; and (4) show that its interest is not

[1] A motion to dismiss is not a pleading, of course, but movants apparently believe it will substitute for the "pleading" required by Rule 24(c).

> adequately protected by the parties to the action. Failure to meet any one of these requirements suffices for a denial of the motion.

In re Holocaust Victim Assets Litig., 225 F.3d 191, 197-98 (2d Cir. 2000) (citations omitted).

The "putative intervenor has the burden of showing a right to intervene." *UPS of Am., Inc.* v. *Net, Inc.*, 225 F.R.D. 416, 421 (E.D.N.Y. 2005). Although courts typically accept well-pleaded allegations in a motion to intervene as true, the allegations must be "non-conclusory." *See id.* Again, movants' failure to include a pleading makes this rule difficult to apply here, because movants have not pleaded any allegations, well or poorly. And their intervention papers rely largely on conclusory statements about their own interests in the case. Nevertheless, plaintiff discusses each prong of the mandatory-intervention analysis below, based on plaintiff's best reading of movants' intervention papers.

1. The motions, if accepted as conforming to Rule 24(c), are timely.

If the Court takes a liberal view of Rule 24(c), then Total Wine will not contest the timeliness of the motions. As noted above, however, Total Wine contends that the motions do not comply with Rule 24(c), and therefore they cannot be timely.

2. Movants have no direct, substantial, and legally protectable interest relating to the property or transaction.

As the Court of Appeals for the Second Circuit has repeatedly explained, "for an interest to be 'cognizable' under Rule 24, it must be 'direct, substantial, and legally protectable.'" *Floyd* v. *City of New York*, 770 F.3d 1051, 1060 (2d Cir. 2014) (quoting *Bridgeport Guardians, Inc.* v. *Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010)). "In other words, [a]n interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Floyd*, 770 F.3d at 1060 (citations and quotations omitted). Thus, in *Floyd*, the Court of Appeals held that police officer unions had no cognizable interest in intervening in the "stop-and-frisk" litigation, even though a proposed

settlement contained provisions that arguably "brand[ed] them lawbreakers and unconstitutional actors" and "adversely affect[ed] [their] careers and lives." *Id.* at 1061 (internal quotations omitted).

As set forth below, none of the intervenors have articulated a direct, *substantial*, and legally protectable interest in the property or transaction.

(a) Wine & Spirits Wholesalers

The Wine & Spirit Wholesalers claim various interests in this litigation, but none is meaningfully supported. Initially they take issue with allegations that they are "engaged in horizontal and vertical price fixing and are violating federal law," Dkt. 27-1, at 1, but they make no argument for intervention on that ground – presumably because Total Wine has not sued them for engaging in price fixing or violating federal law. The very state-law provisions at issue in this case would provide a major obstacle to any such action, and Total Wine deliberately chose to challenge the lawfulness of the Connecticut *statutes*, rather than to seek damages from private participants whose conduct is impelled by those statutes.

More to the point is the Wine & Spirits Wholesalers' (conclusory) allegation that the state laws "protect their members' substantial economic interests." *Id.* at 2.[2] They also contend, again in conclusory terms, that the laws will affect "ongoing business relationships with state-licensed retailers," *id.* at 3, and that if the laws are invalidated "there will ensue significant changes in the business of alcohol beverage distribution in Connecticut and therefore in the way the members of WSWC conduct their business." *Id.* at 3. But the Wine & Spirits Wholesalers make no attempt to explain exactly how their profits might be harmed, or the magnitude of the harm, or how the elimination of the challenged provisions would affect their relationships with retailers, or any

[2] It is doubtful that this interest is legally protectable in light of *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987) (discussed *infra*).

other details. Instead, the Wine & Spirits Wholesalers leave the Court to guess at the significance of these interests. The Wholesalers' inability to support their arguments with evidence, or even to explain them in meaningful detail, diminishes their argument that they have a cognizable interest relating to the property or transaction.

(b) Beer Wholesalers

The Beer Wholesalers' attempt to articulate a cognizable interest is even more conclusory and vague than that of their colleagues from the Wine & Spirits Wholesalers. The Beer Wholesalers simply say they are "bound by the provisions of the Liquor Control Act … and have a distinct and long-standing economic interest in the 'challenged provisions' that are the subject of the plaintiff's action." Dkt. 30-1, at 9. They make no effort to explain to the Court why that interest is sufficient to permit intervention.

In any event, Total Wine has explained above that the complaint does not challenge the Connecticut laws governing the sale and distribution of beer. Although some of the "challenged provisions" encompass beer, Total Wine has limited its claims to challenging the pricing provisions relating to the sale of wine and spirits. The Beer Wholesalers simply have no cognizable interest in this matter.

(c) Restaurants

The Restaurants claim a "pronounced economic interest" on the ground that "many CRA members have ongoing business relationships with state-licensed wholesalers from whom they purchase many alcohol [sic] beverage products pursuant to the challenged statutes." Dkt. 39-1, at 6. The Restaurants' articulation of this "interest" is copied verbatim from the Wine & Spirits Wholesalers' motion, including the typographical error. Throughout their motion papers, the Restaurants simply changed "WSWC" to "CRA." *See* Dkt. No. 27-1, at 3. (This surely indicates that the Restaurants' interests are adequately protected by the Wholesalers, if not by the State

defendants.) The Restaurants fail to articulate any meaningful factual basis for their assertion that they have a pronounced economic interest in this action.

(d) Package Stores

The Package Stores also claim a financial interest in preserving the existing statutory regime, Dkt. 47-2, at ¶¶ 4-5, and they further claim that "Connecticut's Liquor Control Act" supports "over 3,000 retail full and part time jobs at 1,150 package stores, and wholesale salesmen, drivers and helpers to properly serve the stores." Dkt. 47-2, at ¶ 4. Like the other movants, the Package Stores make these claims in wholly conclusory terms. They provide no details or analysis of the nature or magnitude of the harm they "believe[]" they will incur if the price restraints at issue are invalidated. *See id.* at ¶ 5. Absent these details, the Court has no basis to assess the interests of the Package Stores' "350 members paying full or partial dues." *Id.* ¶ 3. It is not obvious that all or even most retailers would be harmed if alcoholic beverage sales in the State of Connecticut were permitted to adhere to the fundamental economic principles that govern other industries in a free-market economy, and that are enshrined in and enforced through the Sherman Act.

3. Movants have not demonstrated that their minimal interests will be impaired by the disposition of this action.

For the same reasons set forth in the preceding section, movants have not demonstrated by non-conclusory allegations that their interests will be impaired by the disposition of this action. To be sure, they all allege that the elimination of the challenged provisions will harm their profits, but they fail to explain how, or by how much.

4. Movants' interests are adequately represented by the defendants.

Movants do not appreciate that the adequate-representation prong is analyzed differently when a proposed intervenor has the same interest as a named defendant, and particularly when a

private litigant is challenging a state statute and the state is defending the statute. In these instances, adequate representation is generally presumed unless the proposed intervenor shows some special circumstance that rebuts the presumption. In *Butler, Fitzgerald & Potter* v. *Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001), for instance, the Court of Appeals explained that "we have demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." Moreover, "[w]here there is an identity of interest … the movant to intervene must rebut the presumption of adequate representation by the party already in the action." *Id.* at 179-80. "To overcome the presumption of adequate representation in the face of shared objectives, the would-be intervenor must demonstrate collusion, nonfeasance, adversity of interest, or incompetence on the part of the named party that shares the same interest." *A&P* v. *Town of E. Hampton*, 178 F.R.D. 39, 42-43 (E.D.N.Y. 1998).

Many other courts have further held that a private litigant has a substantially higher burden to show inadequate representation when the action challenges a statute and the government is defending the statute. *See* 7C C. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1909, at 402-13(3d ed. 2007) ("when a governmental body or officer is the named party," the "representation will be presumed adequate unless special circumstances are shown"). *See United States Postal Serv.* v. *Brennan*, 579 F.2d 188 (2d Cir. 1978) (affirming order denying postal workers' motion to intervene in an action by a private mail carrier seeking to invalidate statutes allowing U.S. Postal Service's monopoly on mail delivery, where the Postal Service was represented by the U.S. attorney and the case was "an obvious candidate for summary judgment"). The rule also applies "in actions involving a state or a local government," which is "presumed to adequately represent the interests of its citizens." FEDERAL PRACTICE, *supra* § 1909, at 421 (footnotes omitted); *see also Mumford Cove Ass'n Inc.* v. *Town of Groton, Conn.*,

786 F.2d 530 (2d Cir. 1986) (two Connecticut cities could not intervene as plaintiffs in environmental action against Connecticut town where state Department of Environmental Protection was a party and would be presumed to protect the cities' interests); *Allco Fin. Ltd.* v. *Etsy*, 300 F.R.D. 83 (D. Conn. 2014) (denying mandatory intervention to two movants who won bids to supply renewable energy to electric utilities even though plaintiff claimed legislation that created the bidding program was preempted by federal law)[3]; *A&P* v. *Town of E. Hampton*, 178 F.R.D. 39, 42-43 (E.D.N.Y. 1998) (denying environmental group's motion to intervene in grocery store's action to invalidate size restriction on retail stores; group's argument that its environmental expertise would give it an advantage over municipality defending the restriction was "speculative").

In *Natural Resources Defense Council, Inc.* v. *New York Dep't of Envtl. Conservation*, 834 F.2d 60 (2d Cir. 1987), the plaintiffs filed a "citizen suit" under the Clean Air Act seeking to compel state defendants to implement ozone pollution control measures contained in a so-called State Implementation Plan (SIP). One of the measures would have required the use of equipment to capture vapors that escape during gasoline-pumping at filling stations. The American Petroleum Initiative (API) sought to intervene on behalf of owners or suppliers of 3500 gasoline stations in New York City. API argued it would assert different defenses, including that the state's commitments in the SIP were not enforceable in a citizen suit. API claimed that its interest was "economic, whereas the State's interest is governmental." *Id.* at 61.

In affirming an order denying both mandatory and permissive intervention, the Court of Appeals for the Second Circuit distinguished *New York Pub. Interest Research Group, Inc.* v.

[3] In *Allco* the district court granted permissive intervention, but the movants' economic interests – the enforceability of their power-supply contracts – were much more concrete than movants' vague claims in this case that the legislation might affect their profitability.

Regents of the Univ. of the State of N.Y., 516 F.2d 350 (2d Cir. 1975) ("*NYPIRG*"), the lead precedent relied on by movants in this case:

> We think API misperceives the concept of an interest "adequately represented" within the meaning of Rule 24. A putative intervenor does not have an interest not adequately represented by a party to a lawsuit simply because it has a motive to litigate that is different from the motive of an existing party. So long as the party has demonstrated sufficient motivation to litigate vigorously and to present all colorable contentions, a district judge does not exceed the bounds of discretion by concluding that the interests of the intervenor are adequately represented.

Natural Resources Defense Council, 834 F.2d at 61-62.

As the Court of Appeals further explained, "*NYPIRG* presented a significantly different situation." There, the "pharmacists had not merely a motive to defend the challenged state statute that differed from that of New York; they had an interest that motivated them to assert a justification for the statute that was entirely different from the justification relied upon by the State." *Id.* at 62. The pharmacists sought to justify an advertising ban to help independent local drugstores from "destructive competition through advertising," whereas the Regents "were seeking to justify the ban primarily because of the health interests of the consumers in not being deflected from high quality medicine by the prospect of low prices." *Id.* The Regents "acknowledged that their interests may differ from those of the pharmacists," and the Court concluded that "the pharmacists would make a more vigorous presentation of the economic side of the argument than would the Board of Regents that promulgated the ban." *Id.* In the *Natural Resources* case, by contrast,

> API may be motivated to defend the plaintiffs' suit because of economic interests not necessarily shared by the state and federal defendants, but there has been no showing that the nature of those economic interests is related to colorable legal defenses that the public defendants would be less able to assert. The fact that API wishes to advance contentions the existing defendants apparently believe are unavailing does not require API's intervention where

> no nexus exists between the interest asserted and the contentions sought to be put forth.

Natural Resources Defense Council, 834 F.2d at 62 (citations and internal quotations omitted).

This case is closer to *Natural Resources Defense Council* than *NYPIRG*. Movants make no showing that their distinct *motive* to litigate – maintenance of high profit margins – is related to "colorable legal defenses that the public defendants would be less able to assert." *If* the statute is intended to protect movants' economic interests, there is no reason to believe in this case that the state will not defend those interests. Indeed, in *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987), one of the two leading Supreme Court precedents on the merits question presented by this case, the State of New York defended a very similar statutory regime in part because it was intended to protect "the economic position of small liquor retailers." *Id.* at 348. Although the Court concluded that "the State's unsubstantiated interest in protecting small retailers simply [is] not of the same stature as the goals of the Sherman Act," *id.* at 350 (citations and internal quotations omitted), there was no suggestion that the state did not adequately represent the economic position of industry participants (some of whom filed *amicus* briefs). By contrast, in the second leading precedent, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), a trade-association intervenor prosecuted the appeal because the state declined to defend the statutory regime on appeal. The state attorney general did file an amicus brief in the Supreme Court in support of the legislative regime, but the Court noted the state had shown "less than an enthusiastic interest." 445 U.S. at 111 n.12.

If the Attorney General of Connecticut had responded like the state attorney general in *Midcal*, then movants in this case might have reason to intervene – although they likely would lack standing to defend the case on their own. *See Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2668 (2013) ("We have never before upheld the standing of a private party to defend the

constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."); *Floyd*, 770 F.3d at 1060 & n.26 ("we have serious reservations about the prospect of allowing a public-sector union to encroach upon a duly-elected government's discretion to settle a dispute against it," and citing *Hollingsworth*); *compare Cooper* v. *Texas Alcoholic Bev. Comm'n*, 820 F.3d 730, 737-38 (5th Cir. 2016) (upholding in 2-1 decision standing of trade association post-*Hollingsworth*). But Connecticut has manifested its intent to defend the claim, as did the New York attorney general in *324 Liquor*. Indeed, the Connecticut Attorney General has already filed a motion to dismiss, whose lead argument takes the bold position that the leading Supreme Court precedent is wrong. *See* Dkt. No. 38-1, at 7 n.6. None of the movants provides *any* evidence that the Attorney General will not defend the statutes vigorously, much less satisfy their burden to show "collusion, nonfeasance, adversity of interest, or incompetence."

To be sure, trade associations in a number of cases have been permitted to intervene in Sherman Act challenges to state liquor regulations. But the analysis in most of those cases is thin. The Package Stores observe, for instance, that they intervened in *Serlin Wine & Spirit Merchants, Inc.* v. *Healy*, 512 F. Supp. 936 (D. Conn.), *aff'd sub nom. Morgan* v. *Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), but neither the district court nor the appellate decisions discussed intervention at all. In *Massachusetts Food Ass'n* v. *Sullivan*, 184 F.R.D. 217 (D. Mass. 1999), *aff'd*, 197 F.3d 560 (1st Cir. 1999), by contrast, a group of supermarket chains and others filed a Sherman Act challenge to a Massachusetts law limiting the number of retail liquor stores to three per owner. Three trade associations (including the Wine & Spirits Wholesalers of Massachusetts) moved for mandatory and permissive intervention. The district court denied the motions on the ground that the trade associations' interests were adequately

represented by the state, which defended the statutes. The Court of Appeals for the First Circuit affirmed. As the court explained, "courts have been quite ready to presume that a government defendant will 'adequately represent' the interests of all private defenders of the statute or regulation unless there is a showing to the contrary." 197 F.3d at 567 (citing *Public Serv. Co.* v. *Patch*, 136 F.3d 197, 207 (1st Cir. 1998)).

In short, movants have failed to present nonconclusory allegations that show a substantial interest in this matter and, even if they had, their interests are adequately protected by the State defendants. For these reasons, movants have failed to carry their burden to show a right to interevene.

C. The Court should exercise its discretion by denying the request for permissive intervention.

Movants also seek permissive intervention. Rule 24(b)(1) permits but does not require a court to grant intervention to anyone who, on timely motion, "is given a conditional right to intervene by a federal statute;" or "has a claim or defense that shares with the main action a common question of law or fact." Under subsection (3), the court, in exercising its discretion, "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." District courts have "broad discretion to deny an applicant's motion for intervention under Rule 24(b)(2). In fact, a denial of permissive intervention has virtually never been reversed." *Catanzano ex rel. Catanzano* v. *Wing*, 103 F.3d 223, 234 (2d Cir. 1996) (citations and quotations omitted). District courts may deny intervention even when the requirements of Rule 24(b) are satisfied. FEDERAL PRACTICE, *supra* § 1913, at 476.

The following factors counsel against granting permissive intervention in this case.

1. Intervention will unduly delay and prejudice the adjudication of the rights of the original parties.

The "principal consideration" in permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See United States Postal Serv.* v. *Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). The Wine & Spirits Wholesalers rely on a district court decision that quotes the second edition of the Wright & Miller treatise for the proposition that "[a]dditional parties always take additional time which may result in delay, but this does not mean that intervention should be denied." *See* Dkt. 27-1, at 12. The third edition of the treatise states: "Additional parties always take additional time that may result in delay *and that thus may support the denial of intervention*. But this delay in and of itself does not mean that intervention should be denied." FEDERAL PRACTICE, supra § 1913, at 481-82 (emphasis added; footnote omitted). This distinction is critical: the *expected* delay inevitably caused by the addition of new parties can be a sufficient basis to deny permissive intervention.

In this case, we already have *four* proposed intervenors, each of whom itself is a trade association consisting of numerous constituents. The intervenors *all* want to file motions to dismiss, but they have not articulated the grounds for the motions, much less why the case should be delayed so plaintiff can respond to numerous motions that will likely be repetitive. Five defendants means 125 interrogatories rather than 25; innumerable additional document requests, depositions, and deposition hours; multiple motions for summary judgment; and countless other complexities that are not foreseeable at this time. It transforms the straightforward case Total Wine chose to file (a constitutional challenge to specific statutes) into a proxy for the complex action Total Wine chose not to file (antitrust claims for damages against industry participants). Plaintiff is the master of its own complaint, and plaintiff's complaint seeks declaratory and injunctive relief barring the enforceability of certain statutes. Allowing virtually the entire

Connecticut alcoholic beverage industry to intervene in this action would be unduly prejudicial to the original parties.

2. The state defendants will adequately represent movants' interests.

Adequate representation by an existing party is also a basis for denying permissive intervention. *Brennan*, 579 F.2d at 191-92. As set forth above, movants have not articulated a substantial reason why the Attorney General of Connecticut will not adequately defend statutes enacted by the Connecticut legislature and rules promulgated by Connecticut agencies. For that additional reason, the Court should exercise its discretion to deny intervention by private industry participants.

3. The intervenors have failed to articulate substantial interests in intervention.

The nature and extent of a proposed intervenor's interests is also a factor in permissive intervention, and for the reasons stated above, the movants in this case have failed to articulate substantial interests that would warrant intervention.

4. The intervenors' interests are adequately represented by the other parties.

If the Court were inclined to grant permissive intervention to anyone, it should not grant more than one motion. As set forth above, the Restaurants have copied the bulk of their arguments from the Wine & Spirits Wholesalers, and they have not stated any reason why they have a separate interest that needs protecting. The Beer Wholesalers have misread the complaint, which is not intended to displace the existing beer-distribution regime, and in any event they have articulated no interest meaningfully different from the Wine & Spirits Wholesalers. To be clear, plaintiff contends that the Wine & Spirits Wholesalers' interests (as well as the other movants' interests) are more than adequately represented by the State defendants, but surely there is no reason to grant intervention to four separate industry trade groups, none of whom has

articulated any unique or substantial interest in the outcome of this matter, and all of whom seem poised to parrot the same arguments advanced by the named defendants (and/or one another). Such likely redundancy counsels against intervention.

5. To the extent the intervenors need to contribute to the full development of the underlying factual issues, they can be given leave to file amicus briefs.

Finally, although movants claim they will contribute to the full development of the underlying factual issues, their failure to include a pleading or otherwise articulate their intended arguments makes that claim impossible to assess. In these circumstances, the most appropriate outcome would be to deny the motions to intervene without prejudice to the putative intervenors' right to petition the court for leave to file briefs as an amicus, as many courts in this Circuit have suggested. *E.g.*, *Mumford Cove Ass'n*, 786 F.2d at 535.

In sum, the Court should exercise its discretion by denying movants' requests for permissive intervention under Rule 24(b).

D. If the Court grants leave for one or more of the movants to intervene, the court should impose conditions on participation in the litigation.

Plaintiff reiterates its position that intervention is not warranted for any movant in this matter. If the Court disagrees, however, plaintiff requests that the order of intervention impose restrictions or conditions on the intervenors' participation.

A district court has discretion to impose conditions on both mandatory and permissive intervention, *e.g.*, *Bridgeport Guardians* v. *Delmonte*, 227 F.R.D. 32, 34-35 (D. Conn. 2005), and setting conditions is a "well-established practice" in this circuit. *Id.* at 35 (quoting *Shore* v. *Parklane Hosiery Co. Inc.*, 606 F.2d 354, 356 (2d Cir. 1979)). These conditions are "responsive among other things to the requirements of efficient conduct of the proceedings." *McBean* v. *City*

of New York, 260 F.R.D. 120, 140 (S.D.N.Y. 2009) (quoting Fed. R. Civ. Pro. 24, Notes of Advisory Committee on Rules, 1966 Amendment).

A district court in the District of Columbia, confronted with a comparable case in which multiple parties wanted to intervene in an action against a governmental defendant, granted intervention but imposed a thoughtful set of conditions on the intervenors to ensure the "fair, efficacious, and prompt resolution of the litigation." *Wildearth Guardians* v. *Salazar*, 272 F.R.D. 4, 21 (D.D.C.). The court in that case required the intervenors to:

- "meet and confer prior to the filing of any motion, responsive filing, or brief to determine whether their positions may be set forth in a consolidated fashion — separate filings by the Intervenors shall include a certificate of compliance with this requirement and briefly describe the need for separate filings," *id.*;
- "confine their arguments to the existing claims in this action and shall not interject new claims or stray into collateral issues," *id.*;
- Limit the length of their memoranda in support of motions, *see id.*; and
- File a joint statement of facts in support of any motion for summary judgment. *See id.*

In this case, the proposed intervenors are already citing collateral or irrelevant issues. Several point out that their members pay a lot of taxes and employ a lot of people. The Package Stores inexplicably complain that Total Wine "offers much by way of self-promotion and 'advertising-speak.'" Dkt. 47-1, at 2. They further state – in a motion to intervene – that

> Upon information and belief, as part of a coordinated, multi-platform attack on the Liquor Control Act, Total Wine has also positioned itself as a vocal and public adversary of [the Package Stores], including through comments in the media and through lobbying efforts in the General Assembly.

Dkt. 47-1, at 6-7. These statements suggest that movants will use the litigation to present irrelevant (if not vexatious) grousing about Total Wine.

Moreover, all four proposed intervenors state that they intend to file motions to dismiss. It is not at all clear that Rule 24(c) permits an intervenor to file a motion to dismiss. It is also difficult to imagine that each proposed intervenor has a distinct argument to make on a motion to dismiss, or that any of their arguments would meaningfully diverge from the arguments presented by the state officials who are actively defending the statutes at issue. For these reasons, plaintiff requests that the Court, if it permits intervention, require the intervenors to file answers to the complaint rather than motions to dismiss, and that the Court further impose the conditions from the *Wildearth* case set forth above.

III. CONCLUSION

For the reasons stated, plaintiff Connecticut Fine Wine & Spirits, LLC respectfully requests that the motions to intervene be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2016, a copy of the foregoing was filed electronically and also sent by e-mail to the following parties and movants:

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