IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Texas Association of Business; McLane Company, Inc.; and McLane Beverage Distribution, Inc., **Plaintiffs,** **v.** **Texas Alcoholic Beverage Commission; Sherry Cook, in her official capacity; José Cuevas, Jr., in his official capacity; Steven M. Weinberg, in his official capacity; and Ida Clement Steen, in her official capacity,** **Defendants.**	**Civil Action No. 1:16-cv-789**

COMPLAINT

1. The State of Texas regulates the alcoholic beverage industry under what is commonly known as the "three-tier system." Properly understood, the three-tier system rightfully forbids any person or entity from *controlling or influencing* businesses that operate in two different tiers of the industry—manufacturing, wholesale distributing, and retailing.

2. But the Texas Alcoholic Beverage Commission (the "TABC") has recently taken the three-tier system to an absurd and unlawful extreme. In the course of defending a lawsuit that is now pending before the Texas Supreme Court, the TABC took the position that it is illegal for a person or business that operates in one tier to own *even a single share of stock* in a company that operates in another tier—even in the absence of any control or influence over the other company.

3. This so-called One Share Rule, if consistently and faithfully applied, would usher

in an era of *de facto* Prohibition in the State of Texas by endangering virtually every TABC licensee. This includes licensees whose shares are publicly owned, for example, by any mutual fund or pension fund in America. It also includes licensees that are not publicly traded, but that provide pension funds for their own employees. Indeed, many state and federal public officials violate the One Share Rule—as do *all* TABC employees themselves, through their retirement investments. The TABC cannot seriously maintain and defend a legal theory that is violated by every single employee and officer of its own agency.

4. The One Share Rule is absurd. It serves no perceptible governmental or societal interest of any kind. Nor has the TABC ever offered any rational basis to support the One Share Rule. To the contrary, the TABC has previously admitted that such a "broad policy of banning overlapping ownership . . . among the tiers" is "[a]t least arguably . . . unnecessary in light of public welfare interests." Ex. 1 at 152.

5. Not surprisingly, the TABC does not actually apply this absurd theory consistently across all licensees. But that only makes the TABC's behavior more indefensible. The TABC is engaged in a blatant policy of selective licensing: denying licenses to new applicants who seek only the opportunity to compete equally in the marketplace, while renewing licenses for incumbents with similar (and indeed greater) purportedly disqualifying interests in other tiers, in blatant violation of the TABC's One Share Rule.

6. There is no discernible, principled reason behind the TABC's policy of selective licensing. Nor has the TABC ever bothered to offer any, despite repeated requests and inquiries. It appears, by all indications, to be nothing more than preferential treatment of politically favored incumbent licensees.

7. McLane recently requested that the TABC abandon its One Share Rule and issue

licenses in an equitable and consistent manner. But the TABC refused. Accordingly, Plaintiffs have no choice but to ask this Court to declare the TABC's One Share Rule and its licensing practices unconstitutional under the Equal Protection Clause, the Due Process Clause, and the Dormant Commerce Clause of the United States Constitution.

PARTIES

8. Plaintiff Texas Association of Business, an organization headquartered at 1209 Nueces Street, Austin, Texas 78701, is the leading employer organization in Texas. It is the State's chamber of commerce. Representing companies from large multi-national corporations to small businesses in nearly every community of Texas, Texas Association of Business works to improve the Texas business climate and to help make the state's economy the strongest in the world. For more than 85 years, Texas Association of Business has fought for issues that impact business to ensure that employers' opinions are heard. Texas Association of Business has members, like McLane, who have suffered, and will continue to suffer, injury from the TABC licensing practices challenged by this Complaint.

9. Plaintiff McLane Company, Inc. is a Texas corporation with its principal place of business at 4747 McLane Parkway, Temple, Texas 76504. McLane was founded in Cameron, Texas, in 1894.

10. Plaintiff McLane Beverage Distribution, Inc. is a Texas corporation wholly owned by McLane Beverage Holding, Inc., a Texas corporation wholly owned by McLane Company, Inc. Plaintiff McLane Beverage Distribution, Inc.'s principal place of business is at 4747 McLane Parkway, Temple, Texas 76504.

11. McLane, through its subsidiaries, operates 80 distribution centers across the United States and one of the nation's largest private trucking fleets. Through its more than 20,000

teammates nationwide, McLane buys, sells and delivers more than 50,000 different consumer products to nearly 90,000 locations. In doing so, McLane provides grocery and foodservice solutions to many of the nation's largest convenience stores, mass merchants and chain restaurants. Today, McLane is headquartered in Temple, Texas, and employs over 3,500 Texans. McLane is directly and wholly owned by Berkshire Hathaway Inc.

12. Although McLane distributes billions of dollars of products in the United States and Texas, and distributes alcohol in many states (such as Georgia, North Carolina, Tennessee, Colorado and Florida), the TABC will not approve McLane's application for an alcohol wholesaler permit because McLane's parent company—Berkshire Hathaway Inc.—owns a small percentage (about 2%) of Wal-Mart Stores, Inc.'s stock. Because Berkshire Hathaway owns McLane and a small percentage of Wal-Mart stock, the TABC's One Share Rule dooms McLane's permit application.

13. Defendant TABC is a state agency with its primary office located in Austin, Texas. The TABC may be served through Sherry Cook, the TABC's Executive Director, at the TABC's headquarters at 5806 Mesa Drive, Austin, Texas 78731.

14. Defendant Sherry Cook is the Executive Director of the TABC. She may be served at 5806 Mesa Drive, Austin, Texas 78731, or wherever she may be found. The TABC has delegated certain powers to the Executive Director, including the power to grant and refuse permits and licenses. Cook is sued only in her official capacity.

15. Defendant José Cuevas, Jr. is a TABC Commissioner. He may be served at 5806 Mesa Drive, Austin, Texas 78731, or wherever he may be found. Cuevas is sued only in his official capacity.

16. Defendant Steven M. Weinberg is a TABC Commissioner. He may be served at

5806 Mesa Drive, Austin, Texas 78731, or wherever he may be found. Weinberg is sued only in his official capacity.

17. Defendant Ida Clement Steen is a TABC Commissioner. She may be served at 5806 Mesa Drive, Austin, Texas 78731, or wherever she may be found. Steen is sued only in her official capacity.

JURISDICTION AND VENUE

18. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this action arises under the United States Constitution and the laws of the United States. Plaintiffs assert their constitutional claims under 42 U.S.C. § 1983, which provides for a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *See also* 28 U.S.C. § 1343(a)(3). This Court may grant declaratory and other relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202.

19. As an organization, Texas Association of Business has standing to challenge the TABC's One Share Rule and actions complained of herein. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977). Texas Association of Business' members would otherwise have standing to sue in their own right. The interests Texas Association of Business seeks to protect in this case are germane to its purpose. And neither the claims asserted nor the relief requested require the participation of its members in this lawsuit. *See id.* at 343; *see also United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996); *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010).

20. McLane has standing to bring this lawsuit. As explained herein, McLane has suf-

fered an injury in fact; that injury is fairly traceable to Defendants' conduct at issue in this suit; and the injury would be redressed by a favorable decision. *Cooper v. TABC*, 820 F.3d 730, 737 (5th Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

21. Personal jurisdiction exists over Defendants because they are all citizens and residents of Texas, where they are domiciled.

22. Venue is proper in this District because Plaintiffs reside in this District, many Defendants reside in this District, and all Defendants are citizens and residents of Texas. *See* 28 U.S.C. § 1391(b)(1). Venue is also independently proper in this District because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District. *See* 28 U.S.C. § 1391(b)(2).

FACTS

A. The Texas Alcoholic Beverage Code's Tied-House Provisions

23. The alcoholic beverage industry in Texas is generally divided into three levels or tiers: (i) the manufacturer tier (i.e., those companies that make alcohol and sell it to wholesalers); (ii) the wholesaler/distributor tier (i.e., those companies that purchase alcoholic beverages from manufacturers, and transport and sell the alcohol to retailers); and (iii) the retailer tier (i.e., those companies that purchase alcohol from the wholesalers/distributors and sell alcohol to the consuming public). *See, e.g.*, *Authentic Beverages Co. v. TABC*, 835 F. Supp. 2d 227, 232 (W.D. Tex. 2011).

24. "[A]n entity engaged in the alcoholic beverage industry in Texas generally must choose a single level on which to operate, and cannot operate on either of the other two levels. Thus, for instance, a manufacturer generally cannot also act as a wholesaler or retailer." *Authentic Beverages*, 835 F. Supp. 2d at 232. Specifically, Texas generally forbids "tied houses," which

are defined as "any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer." Tex. Alco. Bev. Code § 102.01(a).

25. Texas tied-house laws prevent businesses operating in one tier of the alcoholic beverage industry from *controlling or influencing* business operations in another tier. *See, e.g., Neel v. Tex. Liquor Control Bd.*, 259 S.W.2d 312, 316-17 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.) ("The liquor control legislation enacted in the several states since the repeal of the Eighteenth Amendment to the Federal Constitution has uniformly attempted to prevent a recurrence of the evils that were prevalent before prohibition when the large liquor interests *controlled, through vertical and horizontal integration*, the productive and distributive channels of the industry.") (quotations omitted, emphasis added); *S.A. Discount Liquor, Inc. v. TABC*, 709 F.2d 291, 293 (5th Cir. 1983) (explaining that the purpose of the prohibition on tied houses is to "prevent[] companies with monopolistic tendencies from dominating all levels of the alcoholic beverage community"); *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 703 (S.D. Tex. 2000) ("A 'tied house' arrangement, common during Prohibition, involved manufacturers who *controlled* the distribution and sale of their products in a vertical monopoly . . . .") (emphasis added), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

26. Texas law forbids anyone who violates tied-house provisions of the Code from obtaining alcoholic beverage permits and licenses to operate at any tier. *See, e.g.*, Tex. Alco. Bev. Code § 102.01(j). Texas law further criminalizes violations of the tied-house provisions. *See, e.g.*, Tex. Alco. Bev. Code §§ 11.01(c) ("An act done by a person which is not permitted by this code is unlawful."); 5.42 ("A person who violates a valid rule of the commission is guilty of a misdemeanor and on conviction is punishable by the penalty prescribed in Section 1.05 of this

code."); 1.05(a) ("A person who violates a provision of this code for which a specific penalty is not provided is guilty of a misdemeanor and on conviction is punishable by a fine of not less than $100 nor more than $1,000 or by confinement in the county jail for not more than one year or by both.").

B. The TABC's One Share Rule

27. The TABC has taken the three-tier system to an absurd and unlawful extreme. For example, in a recent lawsuit that is now pending before the Texas Supreme Court, the TABC took the position that "even one overlapping share of stock ownership, whether direct or indirect, would violate the statutory tied-house prohibitions." *Cadena Comercial USA Corp. v. TABC*, 449 S.W.3d 154, 159 (Tex. App.—Austin 2014, pet. granted).

28. In *Cadena*, the TABC's Director of Licensing, Amy Harrison, testified about the Commission's One Share Rule within the specific context of discussing FEMSA (a publicly-traded company affiliated with Heineken, a manufacturer permittee), Whole Foods and Wal-Mart (publicly-traded retailer permittees):

> Q. And if one of those shareholders in FEMSA who has bought his shares on the New York Stock Exchange, let's say it's about ten shares of FEMSA, if he also owns ten shares of stock in a publicly traded retail company that has a TABC license, meaning Walmart, Whole Foods, would that create a three-tier violation ownership by that stockholder of ten shares in FEMSA and ten shares in a TABC-licensed retailer?
>
> A. Yes, sir.

Ex. 2 at 58:7-15.

29. The TABC's Director of Licensing testified that even "one share of [overlapping] stock" would be sufficient to violate the tied-house laws. *Id.* at 69:12-15.

C. The TABC Applies Its One Share Rule Against McLane

30. McLane wants to become an alcohol wholesaler in Texas. To become a Texas

wholesaler, a company must obtain a license or permit from the TABC. Tex. Alco. Bev. Code § 6.01(a).

31. On March 3, 2011, McLane, via its wholly-owned indirect subsidiary McLane Beverage Distribution, Inc., applied for a wholesaler's permit and a private carrier's permit. A wholesaler's permit would allow McLane to purchase and import liquor for sale to in-state retailers, while a private carrier's permit would allow McLane to transport that liquor. *See* Tex. Alco. Bev. Code §§ 19.01, 42.01.

32. McLane cooperated with the TABC in the application process, and responded to multiple TABC requests for further information. For example, McLane provided the TABC with ownership information for its then-affiliated companies: GEICO Corp. (which owned 100% of McLane), National Indemnity Co. (which owned 100% of GEICO), and Berkshire Hathaway Inc. (which owned 100% of National Indemnity).[1]

33. The TABC severely delayed processing McLane's application. Eventually, on August 9, 2012, the TABC advised McLane that the TABC would protest McLane's application. *See* Ex. 3. The Notice of Protest "allege[d] that the application reflects information that would constitute violations of the Code Sections 102.01(a), (b), (c), (h), and/or 102.07(a)(1), 102.09 and/or 102.15(1), (2)." *Id.* at 1. The Notice of Protest further advised that, "[i]n accordance with the [sic] Sec. 5.43(a) of the Code, the matter will be referred to the State Office of Administrative Hearings for hearing and consideration wherein the [TABC] will request that the Court refuse the application pursuant to Section 11.46(a)(8)." *Id.* at 2. The Notice of Protest is functionally identical to the outright denial of a permit.

34. The Notice of Protest did not set forth any reason why the application "would

[1] Today, McLane is 100% directly and wholly owned by Berkshire Hathaway.

constitute violations" of the Code. But McLane came to learn that the TABC based its decision on its One Share Rule.

35. As noted above, at the time, McLane was wholly-owned indirectly by Berkshire Hathaway. And Berkshire Hathaway owned (and still owns today) a small percentage of Wal-Mart's stock. Wal-Mart, under the TABC's reading of the Code, is an alcohol retailer and McLane, if granted a permit, would be an alcohol wholesaler. Thus, the TABC determined that, if it granted McLane's application, Berkshire Hathaway would be in violation of the tied-house provisions of the Code, because Berkshire Hathaway would own shares in both McLane (a would-be wholesaler) and Wal-Mart (a retailer).

36. On November 28, 2012, in light of the TABC's Notice of Protest, McLane withdrew its application.[2]

37. McLane still desires a wholesaler permit and license. But Berkshire Hathaway continues to hold a small percentage of Wal-Mart's stock (i.e., about two percent). Berkshire Hathaway also owns a small percentage of Costco's stock (less than one percent). Accordingly, it is futile for McLane to submit an application for a permit or license, because the TABC continues to apply its One Share Rule selectively to new applicants, as evidenced by, for example, *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Com'n*, 449 S.W.3d 154 (Tex. App.—Austin 2014, pet. granted), discussed in more detail below.

D. The TABC Applies Its One Share Rule Selectively, For No Rational Reason, In Blatant Violation Of The Equal Protection Clause

38. The TABC does not apply the One Share Rule equally amongst industry participants. To the contrary, the TABC is by all indications engaged in a practice of selective licens-

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[2] To the extent that the TABC objected to McLane's permit application for any reason other than Berkshire Hathaway's stock investments, McLane would have taken action to eliminate such objections.

ing, applying the One Share Rule to new applicants only, and not to incumbent licensees.

39. Dr. William Charlton, Ph.D., CFA, a Senior Lecturer in the Department of Finance at the McCombs School of Business at the University of Texas and Associate Director of the Hicks, Muse, Tate, and Furst Center for Private Equity Finance, recently authored an expert report in the *Cadena* case that examined "the overlapping ownership of companies that are licensed by Texas to manufacture, wholesale, or retail alcoholic beverages." Ex. 4, ¶ 1.

40. His report included an analysis of four Texas public pension funds—the Permanent University Fund, the Employees Retirement System of Texas, the Teacher Retirement System and the Texas Permanent School Fund. *Id.* ¶ 19. In Dr. Charlton's expert opinion, "there is significant overlapping ownership between the alcoholic beverage manufacturing and retail tiers in the[se] four Texas public pension funds." *Id.* ¶ 9. "All four funds held equity positions in companies licensed to manufacture alcoholic beverages by Texas, companies licensed to retail alcoholic beverages by Texas as well as companies that owned premises on which franchisees held licenses to retail alcoholic beverages." *Id.* Further, in his opinion,

> there is significant overlapping ownership between companies licensed to manufacture alcoholic beverages by Texas, companies licensed to retail alcoholic beverages by Texas, and companies that owned premises on which franchisees held licenses to retail alcoholic beverages. The source of the overlapping ownership that we were able to document is through the defined contribution and defined benefit employee retirement plans of the respective companies. The overlapping indirect ownership is through mutual funds that often own substantial amounts of equity in the underlying alcohol-related companies. The overlapping direct ownership is most commonly through the ownership of common equity, principally in the defined benefit retirement plans. Additionally, it is our opinion that our results are likely an underestimate of the actual level of overlapping ownership between the alcoholic beverages manufacturing and retail tiers licensed by the state of Texas.

Id. ¶ 10.

41. At the time of Dr. Charlton's report, the Texas public pension funds owned "over

$486 million in alcoholic beverage manufacturers and over $5.3 billion in alcoholic beverage retailers or companies who own premises on which others retail alcoholic beverages." *Id.* ¶ 20. Yet the TABC has not applied its One Share Rule to these Texas public pension funds, or to the licensees in which the funds hold stock.

42. In addition, for companies that offer employee retirement plans, Dr. Charlton found that "it would be almost impossible . . . to avoid the overlapping ownership that we have documented. It may be a violation of the retirement plan's fiduciary duty to attempt to limit the investment strategy of the plan." *Id.* ¶ 12.

43. Finally, Dr. Charlton opined that, "[g]iven the commonality and complexity of corporate and individual equity ownership in today's investment environment, it is [his] opinion that it would be effectively impossible to develop a system to enforce an interpretation that any direct or indirect public equity ownership constitutes a violation of the three-tier system in Texas." *Id.* ¶ 14.

44. If the TABC actually applied the One Share Rule consistently across all licensees, few, if any, publicly-traded companies would be able to manufacture, distribute, or retail alcoholic beverages in Texas. After all, virtually all publicly-traded companies with interests in Texas alcohol licenses and permits have one or more investors who hold "cross tier" investments in other companies operating in Texas' alcoholic beverage industry.

45. To take one example, San Francisco-based Core-Mark Holding Company, Inc.—a wholesale and supply-chain company like McLane and one of McLane's main competitors—violates the One Share Rule.

46. Core-Mark has many investors who also hold shares in alcohol retailers and manufacturers. Publicly available filings with the U.S. Securities and Exchange Commission show,

for instance, that:

- Vanguard Group Inc. owns 7.2% of Core-Mark (wholesaler), 8.4% of Bed Bath & Beyond (retailer), and 9.3% of Molson Coors (manufacturer);
- State Street Corp. owns 1.8% of Core-Mark (wholesaler), 5.1% of Bed Bath & Beyond (retailer), and 4.6% of Molson Coors (manufacturer); and
- JP Morgan Chase & Co. owns 0.9% of Core-Mark (wholesaler), 5% of Bed Bath & Beyond (retailer), and 8.8% of Molson Coors (manufacturer).

47. Notably, Vanguard and State Street—two of the largest investors in Core-Mark—hold *more* Wal-Mart shares than Berkshire Hathaway does. Yet TABC has denied a license to McLane, while continuing to license Core-Mark.

48. On May 19, 2016, McLane submitted a Protest to the TABC relating to the renewal of two permits held by Core-Mark. Ex. 5. McLane's Protest demonstrated that Core-Mark violated the TABC's One Share Rule and requested the TABC to either abandon the One Share Rule or revoke Core-Mark's permits. To date, the TABC has neither abandoned the One Share Rule, nor refused to re-license Core-Mark.

49. Previously, on February 5, 2016, McLane submitted a Protest to the TABC relating to the renewal of four permits held by World Market. Ex. 6. The Protest demonstrated how World Market's parent company's shareholders violate the TABC's One Share Rule by owning stock in companies operating in all three tiers and requested that the TABC either change its erroneous interpretation of the law or refuse to renew World Market's protests. To date, the TABC has done neither.

50. On March 18, 2016, McLane met with the TABC concerning the World Market Protest, and the TABC refused to indicate what, if anything, it intended to do with respect to the Protest. Instead, despite the demonstrable violation of the One Share Rule, as evidenced in publicly available SEC filings, the TABC stated that its investigation "might take 6 months or even

longer." Ex. 7, TABC's March 29, 2016 Letter to McLane at 1.

51. The TABC is engaged in a blatant policy of selective licensing, favoring incumbents that demonstrably violate the One Share Rule, while rejecting new entrants under that same rule. The TABC has offered no rationale to support its selective licensing practice, and none is apparent, other than naked economic protectionism. The conclusion is unavoidable: the TABC wants to pick "winners" and "losers" in the Texas market for alcoholic beverages.

E. The TABC's One Share Rule Is Absurd And Irrational, In Violation Of The Due Process Clause

52. The One Share Rule is absurd and irrational.

53. If consistently and faithfully applied to all licensees, the One Share Rule would result in a state of *de facto* Prohibition in Texas.

54. All TABC employees openly violate the One Share Rule, by virtue of their participation in the Texas Employees Retirement System. *See, e.g.*, Tex. Const. art. XVI, § 67(b)(2)-(3); Tex. Gov't Code § 812.003(a), (c). The Texas Employees Retirement System presently holds over $1 billion in cross-tier investments—including, but not limited to, investments in retailers such as Chevron, Kroger, Safeway; and manufacturers such as Brown-Forman and Molson Coors. *See* Ex. 8. The TABC cannot seriously maintain and defend a legal theory that is violated by every single one of its own employees.

55. The State of Texas openly violates the One Share Rule. As noted above, the Texas Employees Retirement System holds over $1 billion in cross-tier investments. Similarly, other Texas agencies have significant investments across multiple tiers. For example, the Texas Education Agency has over $600 million invested across the tiers, and the Texas Teachers Retirement System has another $1.7 billion in cross-tier investments. *See* Exs. 9-10.

56. The State of Texas itself is an alcohol retailer, including through its sale of alco-

hol at University of Texas football games. In fact, University of Texas related entities alone hold four permits to sell mixed beverages. Given its status as a retailer, the State violates the One Share Rule by investing in alcohol manufacturers and wholesalers.

57. Many notable United States and Texas public officials have openly violated the One Share Rule. For example, a United States Cabinet Member has invested in Costco (a retailer) and Constellation Brands (a manufacturer). A United States Congressman from Texas holds stock in Chevron, Kroger, and ConocoPhillips (retailers) and Molson Coors (a manufacturer). Another owns shares in AmBev, Diageo and Constellation Brands (manufacturers); Core-Mark (a wholesaler); and Costco, Exxon Mobil and Darden Restaurants (retailers).

58. Under the One Share Rule, the TABC's own employees are criminals.

59. There is no rational basis for the TABC's One Share Rule. Nor has the TABC offered any.

60. To the contrary, the TABC has previously admitted that such a "broad policy of banning overlapping ownership . . . among the tiers" is "[a]t least arguably . . . unnecessary in light of public welfare interests." Ex. 1 at 152.

61. The One Share Rule also contradicts the TABC's past practice. The TABC previously employed a "5% rule" whereby stockholder information concerning a publicly-held corporation need not be disclosed unless the stockholder held 5% or more of the applicant's stock. *See* Ex. 11. Further, the TABC's *Application Guide for Retailers* provides that "[a]n applicant or license/permit holder may have an interest, directly or indirectly, in only one level of the alcoholic beverage industry, i.e., manufacturing, wholesaling or retailing (see TABC code, section 102)", and that applicants therefore "cannot *control*, in any fashion, the interests of a licensee/permittee at a different level." Ex. 12 at 42 (emphasis omitted and added). On its license application form

for new businesses, the TABC states that the applicant "cannot *control* in any fashion the interests of a licensee/permittee at a different level." Ex. 13, TABC, Form L-B, at 2, June 2012 (emphasis added).

F. The One Share Rule Impermissibly Burdens Interstate Commerce

62. The TABC has granted permits to many public companies. Because the TABC granted permits to these companies (and only because the TABC chose to grant those permits), the tied-house statutes require the TABC to regulate the ownership of those companies to ensure that a person with "an ownership interest in the . . . corporate stocks . . . [in a] business of a permittee" does not have an interest in an alcohol permit of a different tier. Tex. Alco. Bev. Code § 102.01(c).

63. The TABC's conditioning of Texas alcohol permits and licenses on holdings of various companies, individuals, and investors in the securities markets of the United States has a pronounced adverse effect on interstate commerce. For example, companies wishing to obtain, keep, or renew alcohol permits and licenses must constantly ensure (or attempt to ensure) that all of their investors, including out-of-state investors, do not purchase any shares on the interstate securities markets of entities that have Texas permits or licenses in any other tier. And, of course, a Texas-licensed publicly-traded entity has no practical way to control what other stock its investors purchase, and limited (if any) control over who purchases its own stock on the publicly-traded markets.

64. Texas' regulation of the interstate securities markets significantly and harmfully affects investors nationwide. Investors must be cognizant—no matter where in the nation they are located—of Texas' tied-house provisions, to ensure that they do not violate the law in such a manner as to subject themselves to the possibility of criminal sanction and cause the companies

they invest in to lose their Texas alcohol permits.

65. The dormant Commerce Clause precludes states from impermissibly burdening interstate commerce with regulations that provide little or no local benefit. For example, stock in the public companies licensed by the TABC is widely traded nationwide and across the world. The TABC nevertheless conditions the ability to do certain business in Texas on out-of-state stock transactions. The TABC is thus regulating and chilling the transfer of public-company stock, even when those transfers are between wholly out-of-state entities, in violation of the dormant Commerce Clause.

66. In an August 2003 "Self-Evaluation Report," even the TABC itself recognized that "certain aspects" of Texas' tied-house policies unnecessarily restrict interstate commerce:

> Texas follows a broad policy of banning overlapping ownership and exchanges of goods, benefits, and services among the tiers. While in general this policy commands broad support within the state and among other states, certain aspects of the policy no longer conform to widely accepted business forms and practices. At least arguably, these aspects of Texas law place restrictions on commerce which are unnecessary in light of public welfare interests.

Ex. 1 at 152; *see also* Ex. 14, TABC Today (Fall 2012) at 3 (Defendant Cook acknowledging the "potential conflicts between the Alcoholic Beverage Code . . . and the Interstate Commerce Clause").

67. Here, by refusing to grant McLane a permit, the TABC penalized McLane for Berkshire Hathaway's stock holdings. In other words, the TABC found that, because a Nebraska-based public company (Berkshire Hathaway) held stock in an Arkansas-based public company (Wal-Mart), a Texas-based company (McLane) could not distribute alcohol in Texas. Through the tied-house statutes, the TABC is thus regulating the out-of-state stock transactions and holdings of public companies, including (at least) Wal-Mart and Berkshire Hathaway, in violation of the dormant Commerce Clause.

68. The TABC's treatment of McLane is not an outlier. In April 2011, Cadena Comercial USA Corp. applied for a wine and beer retailer's off-premise permit. The TABC denied the permit because Cadena's parent company (FEMSA, a public company listed on the Mexican Stock Exchange) owned stock in Heineken N.V. (a public company traded on the Amsterdam Stock Exchange), and a Heineken subsidiary held a Texas manufacturer permit. Again, the TABC regulated the out-of-state sale of public Heineken stock by penalizing Cadena for FEMSA's ownership of Heineken stock, in violation of the dormant Commerce Clause. *See generally Cadena*, 449 S.W.3d 154.

69. Berkshire Hathaway, which directly owns 100% of McLane, owns stock in Wal-Mart and Costco, public companies with interests in retailer-tier permits.

70. As long as the TABC continues to irrationally regulate the stock ownership of public companies, McLane will not apply for (and the TABC will not grant McLane) a wholesaler alcohol license and permit—i.e., it is futile for McLane to apply in light of the TABC's actions and the One Share Rule. If the TABC ceases irrationally regulating the stock ownership of public companies or abandons its One Share Rule, McLane would again seek a permit and license.

COUNT I
(VIOLATION OF EQUAL PROTECTION)

71. Plaintiffs incorporate the foregoing paragraphs by reference as if fully set forth herein.

72. The Equal Protection Clause of the United States Constitution forbids government officials from treating similarly situated persons differently for no rational reason. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims . . . where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.");

see also Lindquist v. City of Pasadena, Tex., 525 F.3d 383, 386 (5th Cir. 2008) (holding city's refusal to grant license to operate car dealership where city granted licenses to similarly situated individuals gave rise to claim for an equal protection violation).

73. The TABC has attempted to defend its selective application of the One Share Rule by invoking the principle of prosecutorial discretion. But this is not a case of prosecutorial discretion, because it is not a case of prosecution. It is a case of licensing. And selective licensing is fundamentally different from selective prosecution or enforcement.

74. As a matter of equal protection doctrine, it is far easier to establish a case of unconstitutional selective licensing than unconstitutional selective prosecution or enforcement. *See Lindquist*, 525 F.3d at 387 (selective enforcement claim subject to 'higher evidentiary burden" than selective licensing claim) (quoting *Mikeska v. City of Galveston*, 451 F.3d 376, 381 n.4 (5th Cir. 2006)).

75. To prove unconstitutional selective licensing, a plaintiff only needs to prove a lack of a rational basis—whereas, to show unconstitutional selective prosecution or enforcement, a plaintiff must prove improper motive. *Lindquist*, 525 F.3d at 386 (to bring "an equal protection claim for denial" of a permit, the plaintiff "must show that the difference in treatment with others similarly situated was irrational"); *Bryan v. City of Madison,* 213 F.3d 267, 277 (5th Cir. 2000) ("[T]o successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right.").

76. Moreover, discriminatory treatment grounded in economic protectionism gives rise to special equal protection concerns. It is well established that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate govern-

mental purpose." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *see also Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review . . . . [E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest."); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

77. The TABC has intentionally refused to grant McLane a permit, while granting and renewing permits for similarly-situated companies, without providing any basis for the differential treatment. Specifically, it refused to grant McLane a permit, while at the same time granting alcohol permits and licenses to numerous other companies, such as Core-Mark, Cost Plus of Texas, Molson Coors, Brown Forman Corp., and many others, who are similarly situated to McLane.

78. This conduct amounts to naked protectionism. The only difference between McLane and those many similarly-situated companies that have been granted licenses is that McLane is a would-be new entrant and competitor, rather than a favored incumbent.

79. No reasonable or rational basis exists for the discriminatory treatment of McLane. No logical connection exists between the State's interest in preventing cross-influence or control of tiers of the system of alcohol distribution in Texas and the One Share Rule.

COUNT II
(VIOLATION OF DUE PROCESS)

80. Plaintiffs incorporate the foregoing paragraphs by reference as if fully set forth herein.

81. The Due Process Clause forbids government officials from engaging in arbitrary and unreasonable government actions that bear no rational relationship to a legitimate government interest. To survive a Due Process challenge, the government action must have a "rational basis." *Shelton v. City of Coll. Station*, 780 F.2d 475, 477 (5th Cir. 1986); *see also Yur-Mar, L.L.C. v. Jefferson Par. Council*, 451 F. App'x 397, 401 (5th Cir. 2011).

82. Among the liberty interests protected by the right to Due Process is the right to engage in economic activity and to pursue a chosen profession. *Martin v. Mem'l Hosp. at Gulfport*, 130 F.3d 1143, 1148 (5th Cir. 1997) ("freedom to work and earn a living" are liberty interests protected by the 14th Amendment). The denial of a license or permit to practice one's chosen profession can work a deprivation of that liberty interest if the reasons for the denial offend due process. *Id.* at 1148-49.

83. Federal courts across the country, including this Court, have recognized that irrational economic regulations that prevent individuals and businesses from entering into a particular market or profession are unconstitutional under the Due Process Clause. *See*, *e.g.*, *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 886 (W.D. Tex. 2015); *Collins v. Battle*, No. 1:14-CV-03824-LMM, 2015 WL 10550927, at *13 (N.D. Ga. July 28, 2015); *Speed's Auto Servs. Grp., Inc. v. City of Portland, Or.*, No. 3:12-CV-738-AC, 2013 WL 1826141, at *7 (D. Or. Apr. 30, 2013); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Bokhari v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:11-00088, 2012 WL 162372, at *4 (M.D. Tenn. Jan. 19, 2012).

84. Mere economic protectionism is not a rational basis under the Due Process Clause, just as it is not a rational basis under the Equal Protection Clause. *See* ¶ 76, *supra*.

85. The One Share Rule is arbitrary, unreasonable, and has no rational relationship to a legitimate governmental interest. No logical connection exists between the State's interest in

preventing cross-influence or control of tiers of the system of alcohol distribution in Texas and the One Share Rule.

COUNT III
(VIOLATION OF DORMANT COMMERCE CLAUSE)

86. Plaintiffs incorporate the foregoing paragraphs by reference as if fully set forth herein.

87. Under the Constitution, "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3. The Supreme Court "long has recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 344 n.1 (1989); *see also Maine v. Taylor*, 477 U.S. 131, 151 (1986) ("The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce[.]").

88. A state's regulation of commercial activity violates the dormant Commerce Clause if "the burden imposed on interstate commerce is 'clearly excessive' in relation to the putative local benefits." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

89. The One Share Rule imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits. It imposes substantial costs on interstate commerce without any commensurate local benefit. Accordingly, the One Share Rule violates the dormant Commerce Clause. *See, e.g.*, *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) ("Regulations designed [to promote public health or safety] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid

under the Commerce Clause."); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447 (1978) ("On this record, we are persuaded that the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety."); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (holding that "clear burden on commerce" balanced against "far too inconclusive" showing that law would make transportation safer meant such law violated the dormant Commerce Clause).

90. Moreover, state regulation of interstate stock transactions may even present potential extraterritoriality concerns under the dormant Commerce Clause. *See Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (opinion of four Justices) (regulation of "interstate commerce in securities transactions" that has a "sweeping extraterritorial effect" is unconstitutional). Such concerns would not be implicated by a control or influence standard, which furthers legitimate governmental interests in preventing vertical integration in the alcoholic beverage industry. But the One Share Rule serves no legitimate governmental interests of any kind, and is therefore unconstitutional under *Edgar* and *Pike*.

COUNT IV
(DECLARATORY JUDGMENT)

91. Plaintiffs incorporate the foregoing paragraphs by reference as if fully set forth herein.

92. The Court should exercise its discretion to declare Defendants' actions unconstitutional under the Equal Protection Clause, the Due Process Clause, and the dormant Commerce Clause.

JURY DEMAND

93. Plaintiffs demand a jury trial on all issues so triable.

PRAYER FOR RELIEF

94. Plaintiffs request that the Court enter judgment in Plaintiffs' favor as follows:

A. Enter an Order forbidding Defendants from engaging in selective licensing in violation of the Equal Protection Clause, and requiring Defendants to review, grant and renew licenses and permits on a non-discriminatory basis;

B. Enter an Order declaring the One Share Rule irrational and unconstitutional under the Due Process Clause;

C. Enter an Order declaring the One Share Rule unconstitutional under the dormant Commerce Clause;

D. Enter an Order that Plaintiffs shall have and recover from Defendants Plaintiffs' reasonable and necessary attorney's fees, expenses and court costs, including as permitted by 42 U.S.C. § 1988; and

E. Enter an Order that Plaintiffs shall have and recover from Defendants any and all such other and further relief, general and special, at law or in equity, to which Plaintiffs may be justly entitled.

Dated: June 27, 2016

Respectfully submitted,

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*Moving for admission