

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

EMPIRE WINE & SPIRITS LLC and
BRADLEY A. JUNCO,

Plaintiffs-Petitioners,

-against-

NEW YORK STATE LIQUOR AUTHORITY,

Defendant-Respondent.

**MEMORANDUM OF LAW IN SUPPORT OF
VERIFIED PETITION AND COMPLAINT**

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PRELIMINARY STATEMENT

Plaintiffs-Petitioners Empire Wine & Spirits, LLC and Bradley A. Junco (together, “Empire”) submit this memorandum of law in support of their verified petition and complaint in this combined CPLR Article 78 proceeding and declaratory judgment action.

Defendant-Respondent New York State Liquor Authority (“SLA”) is currently engaged in an unauthorized and unlawful campaign to suspend or revoke Empire’s liquor license for shipping wine to retail customers in other states. As SLA is well aware, Empire’s out-of-state shipping practices are no different than those employed by hundreds of large wine retailers throughout the State of New York. Nor are they any different from the practices of hundreds of *out-of-state* wine retailers that ship wine *into* the State of New York on a daily basis without any interference from SLA whatsoever. Instead of using its resources to prevent out-of-state wine retailers from shipping wine into the State of New York, which would protect New York retailers and benefit New York’s wine business substantially, SLA is misapplying those resources to prevent Empire from exporting wine, including New York State wines, to customers outside the State. Not only does SLA lack any local State interest in interfering with Empire’s out-of-state shipments, it also lacks both constitutional and statutory authority to regulate such shipments.

The United States Supreme Court has already once prohibited SLA from regulating the sale of alcoholic beverages destined for consumption and distribution outside the State of New York, as such regulation is beyond the State’s authority and violates the Commerce Clause of the United States Constitution (*Brown–Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 US 573 [1986]). Although SLA is well aware of the constitutional limitations on its own

authority, it has willfully ignored those limitations in its interactions with Empire by charging it with “improper conduct” for allegedly shipping wine to out-of-state customers.

Even if it were constitutionally permissible for the State of New York to regulate shipments of alcohol destined for distribution and consumption outside the State, the State Legislature has never granted SLA authority to regulate such shipments. There is no New York statute that prohibits retailers like Empire from shipping wine to customers outside the State of New York. Thus, any attempt by SLA to regulate such shipments is tantamount to legislation by administrative fiat and is improper as a matter of law.

Indeed, the self-promulgated regulation under which SLA is acting, 9 NYCRR 53.1(n), is devoid of any language related to shipping practices, let alone out-of-state shipping practices. The regulation loosely provides that SLA may revoke, cancel, or suspend a liquor license for so-called “improper conduct by the licensee . . . which conduct is of such nature that if known to the authority, the authority, *in its discretion*, could properly deny the issuance of a permit or license or any renewal thereof because of the unsatisfactory character and/or fitness of such person” (9 NYCRR 53.1[n] [emphasis added]). To comply with this regulation, licensees like Empire must guess at: (1) what specific conduct SLA might consider “improper;” as there is no definition of improper conduct in the regulation; (2) whether SLA, in its discretion, might determine that such conduct reflects on the licensee as having “unsatisfactory character and/or fitness,” whatever that means; and (3) whether SLA, in its discretion, would deny the issuance of a permit or license to sell alcohol based on its exercise of such discretion. No reasonable licensee subject to this regulatory standard could possibly comprehend what conduct is prohibited thereunder, as there is no objective statement of law articulated by the regulation, and

there is no way for a licensee to determine how SLA might exercise its own discretion. Therefore, 9 NYCRR 53.1(n) is unconstitutionally vague.

Seizing on this vagueness, SLA has adopted a tortured and previously unutilized construction of 9 NYCRR 53.1(n) to launch a selective enforcement campaign against Empire, even though SLA's own guidance permits shipments to consumers in other states. The issue is specifically addressed in the "frequently asked questions" section of SLA's website, which asks: "Can a package store licensee ship wine: (1) Out of State, (2) In NYS, (3) Over the Internet?"¹ In response, SLA informs retailers that:

A package store may only deliver liquor and wine they sell:

- to homes and offices not to be resold by the purchaser.
- by messenger afoot.
- by trucking and delivery companies who hold a trucking permit issued by the Authority.
- in a vehicle owned and operated, or hired and operated by the package store licensee.²

SLA has published this guidance on its website since at least 2009. Instead of advising retailers of its newfound position that out-of-state shipments constitute "improper conduct," SLA seemingly condones out-of-state shipments using any of the delivery methods listed above. Justifiably, Empire and other retailers have relied on this guidance in making out-of-state shipments. Nevertheless, and notwithstanding SLA's clear lack of authority over shipments destined for out-of-state consumers, SLA has summarily reversed its official position in a stunning about-face.

¹ <http://www.sla.ny.gov/frequently-asked-questions>, last accessed September 15, 2014.

² *Id.*

For these reasons, which are set forth more specifically in the argument points below, Empire is entitled to a writ of prohibition enjoining SLA from proceeding with enforcement proceedings against Empire. Empire is also entitled to a declaration that SLA has exceeded its authority and jurisdiction in attempting to regulate interstate shipments of wine, a declaration that 9 NYCRR 53.1(n) is void for vagueness, and such other relief as this Court deems just and proper.

STATEMENT OF FACTS

Plaintiff-Petitioner Bradley Junco holds an active license to sell wine and spirits through Plaintiff-Petitioner Empire Wine & Spirits, LLC. As a substantial part of its business, Empire sells wine over the internet to customers outside of the State of New York. These customers elect to have the wine they purchase from Empire shipped to them directly (Verified Petition and Complaint, dated September 22, 2014 [“Petition and Complaint”] ¶ 15).

On or about August 1, 2014, SLA served Empire with a Notice of Pleading alleging sixteen violations of 9 NYCRR 53.1(n) for shipments of wine to Alabama, Arizona, Arkansas, Delaware, Maine, Mississippi, Pennsylvania, Vermont, Ohio, Louisiana, Virginia, California, Georgia, Illinois, Washington, and Massachusetts (Petition and Complaint, Ex. B). Empire does not dispute that it shipped wine to one or more retail customers in each of these states (Petition and Complaint ¶ 24). Empire does dispute, however, SLA’s claim of jurisdiction and authority to regulate shipments of wine into other states (*id.* at ¶ 25).

By letter to SLA’s General Counsel, dated August 11, 2014, Empire notified SLA that it lacked authority over Empire’s out-of-state shipments and requested that it withdraw the Notice of Pleading (Petition and Complaint ¶ 31, Ex. C). SLA’s General Counsel verbally responded to

Empire's letter by indicating that, in SLA's view, it has the authority to regulate Empire's shipments and that it would not withdraw the Notice of Pleading (*id.* ¶ 32). Accordingly, Empire was compelled to commence this proceeding to prevent SLA from continuing to pursue unauthorized charges against Empire for alleged conduct that SLA does not have the power or jurisdiction to regulate.

ARGUMENT

POINT I

THE STATE IS CONSTITUTIONALLY PROHIBITED FROM REGULATING THE SALE AND SHIPMENT OF WINE TO CUSTOMERS IN OTHER JURISDICTIONS

The only authority cited by SLA in its attempt to regulate Empire's alleged interstate shipments of wine is its own, self-promulgated regulation, 9 NYCRR 53.1(n). This regulation makes no mention whatsoever of shipments to out-of-state residents. Rather, it merely provides that SLA may revoke, cancel, or suspend a liquor license for so-called "improper conduct by the licensee . . . which conduct is of such nature that if known to the authority, the authority, in its discretion, could properly deny the issuance of a permit or license or any renewal thereof because of the unsatisfactory character and/or fitness of such person" (9 NYCRR 53.1[n]). SLA contends that, in its view, the shipment of wine to customers in sixteen other states constitutes "improper conduct" for which Empire's license may be revoked (Petition and Complaint, Ex. B). SLA's position fails, however, because the Commerce Clause of the United States Constitution expressly prohibits SLA from interfering with the distribution of alcohol destined for consumption in other states.

The Commerce Clause provides that "Congress shall have [the] Power . . . to regulate Commerce . . . among the several States" (U.S. Const. art. I, § 3, cl. 3). This affirmative grant of

authority to Congress encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce” (*Healy v The Beer Institute*, 491 US 324, 326 n.1 [1989]). Thus, when a state law “directly regulates or discriminates against interstate commerce . . . [the Court] ha[s] generally struck down the statute without further inquiry” (*Granholm v Heald*, 544 US 406, 487 [2005] [internal citation and punctuation omitted]).

In the case of alcoholic beverages, courts have considered whether the regulation is “saved” by the Twenty-first Amendment, which enables individual states to regulate the sale and distribution of alcoholic beverages within their borders (*see Granholm*, 544 US at 489; *see also Brown-Forman Distillers Corp.*, 476 US at 584; *Bacchus Imports, Ltd. v Dias*, 468 US 263, 274 [1984]). Section 2 of the Twenty-first Amendment provides: “The transportation or importation into any State, Territory, or possession of the United States for delivery of use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited” (US Const, 21st Amend, § 2).

While this provision allows each state to restrict “the *importation* of intoxicants destined for use, distribution, or consumption *within its borders*” (*Hostetter*, 377 US at 333-334 [emphasis added]), it does “not abrogate Congress’ Commerce Clause powers with regard to liquor” (*Granholm*, 544 US at 487). Indeed, a state’s regulation of interstate commerce in alcohol “is not automatically saved by the Twenty-first Amendment simply by virtue of the special nature of the product regulated. Rather, if the court finds the law discriminatory, it may only be upheld if it reasonably advances legitimate state interests ‘that cannot be adequately

served by reasonable nondiscriminatory alternatives” (*Arnold’s Wines, Inc. v Boyce*, 571 F3d 185 [2d Cir 2009]),³ quoting *Granholm*, 544 US at 489).

Applying this standard here, SLA’s construction and application of 9 NYCRR 53.1(n) is invalid because New York has no legitimate state interest in regulating the use and consumption of alcohol in other states, which exceeds New York’s authority under the Twenty-first Amendment. As the Supreme Court held in *Brown–Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 US 573 (1986), the Amendment does not permit the State, through SLA, to regulate shipments of alcoholic beverages to customers in other states. In striking down a New York price affirmation statute that required producers to limit the price of liquor based on the lowest price they offered to customers out of state, the *Brown-Forman* Court concluded:

New York has a valid constitutional interest in regulating sales of liquor *within* the territory of New York. Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the “transportation or importation *into* any State ... for delivery or use therein” of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. *The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in . . . another State.*

(*Id.* at 585) (emphasis supplied).

The Supreme Court’s determination in *Brown-Forman* is consistent with its prior precedents holding that a State may restrict “the *importation* of intoxicants destined for use, distribution, or consumption *within its borders*,” but does not permit States to regulate sales of

³ The facts of *Arnold’s Wines* are essentially the converse of those presented here. In that case, an out-of-state wine retailer and consumers challenged New York’s ban on direct shipments of wine to New York consumers (*Arnold’s Wines*, 571 F3d at 187). Because, unlike here, the ban regulated the use and consumption of alcohol *within* New York, the Second Circuit upheld the ban under the Commerce Clause and the Twenty-first Amendment (*id.* at 192).

alcoholic beverages “destined for use in another jurisdiction” (*Hostetter*, 377 US at 330, 333 [prohibiting SLA from regulating liquor sold at an airport to departing passengers where such sales did not jeopardize New York’s internal liquor market; the liquor’s ultimate destination was outside of New York, and the SLA lacked authority to regulate such sales]; *Johnson v Yellow Cab Transit Co.*, 321 US 383, 386-387 [1944] [holding that Oklahoma had no justification for seizing alcohol destined for use and consumption on a federal military reservation within the state]; *Collins v Yosemite Park & Curry Co.*, 304 US 518, 538 [1938] [holding that a State may only regulate the transportation of alcohol “for delivery or use” within the State]).

The rationale underlying these decisions is that the Amendment only allows a State to regulate interstate commerce to the extent necessary prevent the “unlawful diversion” of alcohol within its own borders (*Hostetter*, 377 US at 333; *see also Johnson*, 321 US at 386). Where the challenged regulation is not intended to protect the State from such unlawful diversion, it cannot be sustained under the Amendment (*see Hostetter*, 377 US at 333-334). For example, in *Hostetter*, a retailer that sold alcohol to departing international travelers at JFK Airport challenged SLA’s determination that it was “unlicensed and unlicensable” under the ABC Law (*id.* at 326). The retailer argued that SLA’s application of the ABC Law violated the Commerce Clause because SLA sought to regulate the use of alcohol beyond the State of New York (*see id.* at 329). Holding that SLA’s regulation was barred by the Commerce Clause, the Court stated:

Here, ultimate delivery and use is not in New York, but in a foreign country. The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve “measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.”

(*id.* at 333-334).

Similarly, in *Johnson v Yellow Cab Transit Co.*, (321 US 383 [1944]), the State of Oklahoma (at that time, a dry state) seized a shipment of alcohol destined for Fort Sill, a federal military enclave within the State (*id.* at 385-386). In rejecting the State's argument that it had authority to regulate the transportation of alcohol destined for Fort Sill, the Court recognized that Oklahoma, like other states, may regulate commerce in alcohol only when it attempts to "protect itself from illegal liquor diversions within the area which Oklahoma has power to govern" (*id.* at 386). Because Oklahoma "has no power to directly regulate" alcohol beyond its borders, the Court held that the seizure was "plainly unlawful" (*id.* at 386, 393).

Applying these precedents here, SLA cannot regulate shipments intended for distribution and consumption in other states because SLA's regulation does not protect the State from the "unlawful diversion" of alcohol within its borders. Instead, SLA's regulation appears to be intended to prevent the shipment of alcohol to consumers in other states. While these other states have authority to regulate alcohol destined for use and consumption within their borders, New York does not. Accordingly, because SLA is "attempt[ing] to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in . . . another State," it cannot be sustained under the Commerce Clause or the Twenty-first Amendment (*Brown-Forman*, 476 US at 585; *see also Hostetter*, 377 US at 333; *Johnson*, 321 US at 386-387; *Collins*, 304 US at 538).

Furthermore, even if the Amendment did authorize New York to regulate extraterritorial shipments of alcohol, SLA would still be required to demonstrate that its construction of the "improper conduct" regulation advances a legitimate local interest "that cannot be adequately served by reasonable nondiscriminatory alternatives" (*Granholm*, 544 US at 489; *see also Arnold's Wines, Inc.*, 572 F3d at 189). In this regard, SLA bears a heavy burden because courts

“invoke the strictest scrutiny of any purported legitimate local purpose and the absence of nondiscriminatory alternatives” (*Hughes v Oklahoma*, 441 US 322, 337 [1979]).

SLA cannot meet its burden because New York has no legitimate local interest in regulating the use of alcohol in other states. As discussed above, in the case of alcohol regulations, the only legitimate local interests are those intended to prevent the “unlawful diversion [of alcohol] into the internal commerce of the State” (*Hostetter*, 377 US at 333). Here, however, this interest is not present. In fact, New York already permits retailers to ship wine directly to in-state consumers. Wine shipped out-of-state is no more likely to be unlawfully diverted than wine shipped within the State. This simple fact undermines any contention that SLA’s regulation of out-of-state shipments is intended to prevent their unlawful diversion within New York.

SLA has not even attempted articulate what it believes to be New York’s local interest in regulating shipments of wine destined for out-of-state consumers. While the Notice of Pleading alleges that Empire’s shipment to Alabama was “in violation of Alabama’s laws,” none of the remaining allegations alleges that Empire’s shipments were in violation of other destination states’ laws.⁴ Although it may be true that Alabama prohibits its residents from receiving direct shipments, this is certainly not a “local” interest of the State of New York. Rather, if it is a legitimate “interest” at all, it belongs to Alabama’s enforcement authorities, not SLA (*see Wayte v United States*, 470 US 598, 607 [1985] [decision to enforce laws is entirely discretionary]). In fact, at least one of the states listed in the Notice of Pleading has expressly stated that it will not enforce a law prohibiting its residents from receiving direct shipments of wine from out-of-state

⁴ The ninth allegation confusingly states that Empire’s shipment “to a customer in Ohio [was] in violation of Alabama’s laws” (Petition and Complaint, Ex. B, at 2).

retailers (Petition and Complaint ¶ 8). Specifically, the State of California stipulated that it “will continue to exercise its prosecutorial discretion not to pursue enforcement action of any type . . . against retail licensees in other States for selling and shipping wine for personal use and not for resale directly to adult California residents” (*id.* at ¶ 8, Ex. A). On this point, it is important to emphasize that by prohibiting SLA from regulating Empire’s out-of-state shipments, a state such as Alabama is not left without a remedy. Should Alabama, or another state, determine that it has an interest in barring Empire from shipping directly to its residents, it maintains full jurisdiction and authority over Empire to enforce its own laws.

Accordingly, because SLA’s conduct directly regulates interstate commerce in a manner that is not authorized by the Twenty-first Amendment, and SLA has no legitimate local purpose for regulating Empire’s extraterritorial shipments, SLA is proceeding in excess of its jurisdiction and in violation of the Commerce Clause.

POINT II

EVEN IF THE STATE COULD CONSTITUTIONALLY REGULATE THE INTERSTATE SHIPMENT OF WINE, THE STATE LEGISLATURE HAS NOT AUTHORIZED SLA TO DO SO

As an administrative agency of the State, SLA “can only promulgate rules to further the implementation of the law as it exists” and has “no authority to create a rule out of harmony” with its enabling legislation (*Jones v Berman*, 37 NY2d 42, 53 [1975]; *Freitas v. Geddes Savings and Loan Association*, 63 NY2d 254, 264 [1984] [“an administrative agency may not by its rules expand the grant of authority from the Legislature, but must function within its mandate”]; *Matter of Zalenski v Crucible Steel, Inc.*, 91 AD2d 807 [3d Dept 1982] [striking down rule of Workers Compensation Board that was out of harmony with and not expressly authorized by

Workers Compensation Law]). SLA cannot extend its statutory mandate, as assigned by the Legislature, to apply to situations not embraced by its enabling legislation (*see Trump Equitable Fifth Avenue Co. v. Gliedman*, 57 NY2d 588, 595 [1982]). “Such action would be tantamount to legislation by administrative fiat and, by definition, irrational” (*Matter of Bates v. Toia*, 45 NY2d 460, 464 [1978]; *see also Gross v. New York City Alcoholic Bev. Control Bd.*, 7 NY2d 531, 540 [1960] [rejecting State Liquor Authority’s “gross usurpation of legislative authority” in enacting Authority’s former Rule 45, which was unauthorized by statute]).

In this case, there is no statute granting SLA authority over *out-of-state* shipments of wine, and for good reason. The express function of SLA, as declared and limited by the State Legislature, is “to regulate and control the manufacture, sale and distribution *within the state* of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law” (ABC Law § 2 [emphasis supplied]; *see also People v. De Jesus*, 54 NY2d 465, 470 [expressly recognizing ABC Law § 2 as articulating the very policy of the ABC Law, and noting that the policy “is not left to the imagination.”]). While the ABC Law extensively regulates retail sales of wine within New York, it does not even come close to authorizing SLA to regulate shipments of wine destined for other states. For example, as it pertains to retailers, the ABC Law governs:

- a. The locations at which a retailer may sell wine and liquor (ABC Law § 105[1])
- b. The number of doors and parking spaces required for liquor stores (*id.* at § 105[2])
- c. The proximity of liquor stores to nearby schools and houses of worship (*id.* at § 105[3][a])
- d. The labels and containers of alcohol that may be sold (*id.* at § 105[5])
- e. Signage (*id.* at § 105[6], [7])

- f. Delivery vehicles (*id.* at § 105[8], [9])
- g. Price displays (*id.* at § 105[10][a])
- h. Business hours (*id.* at § 105[14])
- i. Recordkeeping (*id.* at § 105[15])
- j. Licensees' ownership interests in liquor manufacturers, wholesalers, and other retailers (*id.* at § 105[16])

Each of these detailed provisions at least appears to be connected to the State's interest in preventing the unlawful diversion of alcohol within its borders. Notably absent, however, is any provision purporting to empower SLA to regulate shipments of wine destined for out-of-state consumers.

In the absence of statutory authority to regulate out-of-state shipments, SLA has created its own authority by administrative fiat. Notwithstanding SLA's edict, it lacks the power to unilaterally appropriate authority over interstate shipments of wine destined for out-of-state customers (*see e.g. Jones*, 37 NY2d at 53 ["Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute."]). Accordingly, SLA's interpretation of 9 NYCRR 53.1(n) is invalid and may not be enforced against Empire (*see id.* at 51; *Zalenski*, 91 AD2d at 807).

POINT III

SLA'S REGULATION IS IMPERMISSIBLY VAGUE

The judicial policy against vague laws, also known as the "void for vagueness doctrine," is the "first essential of due process of law" (*Connally v. General Const. Co.*, 269 US 385, 391 [1926]). It is designed to ensure that laws are informative on their face so that citizens can conform their conduct to the requirements of the law, and to prevent arbitrary and discriminatory

decision-making by law enforcement officials (*People v. New York Trap Rock Corp.*, 57 NY2d 371, 378 (1982); *see also Grayned v City of Rockford*, 408 US 104, 108 [1972] [“Vague laws may trap the innocent by not providing fair warning . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”])).

To that end, “[a] vagueness challenge to an administrative regulation raises the question of whether a reasonable person subject to the regulatory standard would comprehend what conduct was being prohibited” (*Choe v Axelrod*, 141 AD2d 235, 239 [3d Dept 1988]). While the vagueness doctrine “does not require impossible standards of specificity . . . regulations must give sufficiently definite warning when measured by common understanding and practices and articulate an objective standard” (*Slocum v Berman*, 81 AD2d 1014, 1015 [4th Dept 1981]).

Following this standard, New York Courts, including the Court of Appeals, have repeatedly invalidated laws and regulations that fail to define prohibited conduct in such a way as to provide citizens with a clear warning that such conduct is unlawful (*see, e.g., People v New York Trap Rock Corp.*, 57 NY2d 371, 378 [1982] [striking down town noise control ordinance as impermissibly vague]; *People v Scott*, 26 NY2d 286, 292 [1970] [striking down law prohibiting storage of any “inoperable” vehicle as impermissibly vague]; *Adventures in Cinema, Inc. v Congdon*, 59 AD2d 52, 55 [3d Dep’t 1977] [striking law requiring fencing for drive-in movies “that persons under seventeen years of age would not be permitted to attend”]; *People v Gabriel*, 37 Misc 3d 621 [Co Ct Sullivan County 2012] [holding that DEC regulation relating to feeding deer was unconstitutionally vague]; *People v Spadaro*, 104 Misc2d 997 [Dist Ct Suffolk County 1980] [holding that ordinance requiring permit for any “air park” was impermissibly vague]; *People v. Sposito*, 126 Misc2d 185, 186-87 [Dist Ct Suffolk County 1984] [striking down

regulation prohibiting maintenance of “dead storage”]; *People v. Mazzochetti*, 181 Misc2d 701, 706 [NY Just Ct 1998] [striking down ordinance regulating fences, walls, and “other similar construction”]).

Here, 9 NYCRR 53.1(n) is impermissibly vague because it fails to give a reasonable person notice of what it prohibits. Instead, the regulation merely provides that SLA may revoke a license for “improper conduct” that “is of such nature that if known to the authority, the authority, in its discretion, could properly deny the issuance of a permit or license or any renewal thereof because of the unsatisfactory character and/or fitness of such person” (9 NYCRR 53.1[n]). Framed as such, the regulation is void for vagueness in two respects. *First*, the regulation does not define the general phrase “improper conduct.” *Second*, it does not define the terms “unsatisfactory character” or “fitness.” By failing to define these broad, yet essential terms, the regulation does not provide an objective standard for its application, making it “a ready candidate for ad hoc and discriminatory enforcement” (*People v. New York Trap Rock Corp.*, 57 NY2d 371, 381 [1982] [holding that noise ordinance was unconstitutionally vague because the definitions of the conduct prohibited failed to provide adequate warning of what the law required]).

As an example of such discriminatory enforcement, the Court need look no further than SLA’s pursuit of Empire. Until now, neither Empire nor any other New York retailer had notice of SLA’s position on out-of-state shipments. In fact, SLA’s own guidance condones out-of-state shipments. Based on this guidance, and the language of the regulation—which does not even mention out-of-state shipments—Empire had no reason to suspect that its interstate business would result in a revocation of its license. In the absence of any express (or implied, for that matter) prohibition of out-of-state shipments, SLA has exploited the vagueness of 9 NYCRR

53.1(n) to fabricate authority where it does not otherwise exist. This sort of arbitrary and discriminatory enforcement is exactly what the void for vagueness doctrine is designed to prevent (*see Grayned*, 408 US at 108). Accordingly, because no reasonable person could understand the conduct prohibited by 9 NYCRR 53.1(n), this Court should hold that it is impermissibly vague.

POINT IV

THIS COURT SHOULD GRANT A WRIT OF PROHIBITION ENJOINING SLA FROM PROCEEDING IN EXCESS OF ITS JURISDICTION

Under CPLR 7803(2) a petitioner may bring an Article 78 proceeding in the nature of prohibition to challenge a body or officer that “is proceeding or is about to proceed without or in excess of jurisdiction.” To obtain a writ of prohibition, the petitioner “must demonstrate that: (1) a body or officer is acting in a judicial or quasi-judicial capacity, (2) that body or officer is proceeding or threatening to proceed in excess of its jurisdiction and (3) petitioner has a clear legal right to the relief requested” (*Garner v New York State Dept. of Corr. Services*, 10 NY3d 358, 362 [2008] [overruled on other grounds]). In addition, a court may consider, in its discretion, whether prohibition is warranted by weighing several factors, including “the gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether prohibition would furnish a more complete and efficacious remedy even though other methods of redress are technically available” (*Rush v Mordue*, 68 NY2d 348, 354 [1986] [internal citation and punctuation omitted]; *see also Garner*, 10 NY3d at 362).

As set forth below, Empire satisfies these requirements because SLA lacks express authority over extraterritorial shipments of wine and, more importantly, the Commerce Clause precludes SLA from regulating interstate commerce in wine destined for out-of-state consumers.

A. SLA is Acting in a Quasi-Judicial Capacity

An agency acts in a quasi-judicial capacity when it makes a discretionary determination affecting the rights of a party (*see Garner*, 10 NY3d at 362 [finding that the Department of Corrections was acting in a judicial capacity by administratively adding a term of post-release supervision to an inmate's sentence]; *Nicholson v State Commn. on Jud. Conduct*, 50 NY2d 597, 606 [1980] [finding that State Commission on Judicial Conduct's investigation was properly the subject of a prohibition proceeding]; *Rottkamp v Young*, 21 AD2d 373, 376 [2d Dept 1964] [finding that town building inspector's determination not to issue a permit was quasi-judicial], *aff'd* 15 NY2d 831 [1965]). By contrast, an agency does not act in a quasi-judicial capacity when it performs "legislative, executive or ministerial action" (*Jay Alexander Manor Inc. v Novello*, 285 AD2d 951, 952 [3d Dept 2001]).

For example, in *Nicholson*, the petitioners brought a prohibition proceeding alleging constitutional violations stemming from an investigation of the Commission on Judicial Conduct ("CJC") into allegedly improper campaign contributions (*Nicholson*, 50 NY2d at 603). Specifically, the petitioners alleged that CJC's investigation created a chilling effect on free speech in violation of the First Amendment (*id.* at 606). While the Court ultimately held that CJC's investigation did not violate the petitioners' constitutional rights, it first found that prohibition was an appropriate remedy (*id.* at 607). Implicit in this finding is that an agency acts in a quasi-judicial capacity when it conducts an investigation that may result in disciplinary

action (*see id.* at 607 [“If indeed the investigation impermissibly chills the exercise of these rights, the commission would be acting in excess of power and prohibition would be the appropriate remedy.”]). Similarly, in *City of Albany v Helsby*, the City brought a prohibition proceeding seeking to enjoin the Public Employment Relations Board (“PERB”) from holding a hearing pursuant to an order to show cause issued by PERB related to a collective bargaining dispute (65 Misc2d 28, 29 [Sup Ct Albany County 1971]). The City argued that prohibition was appropriate because PERB lacked statutory authority to compel it to appear at a public hearing (*id.*). In granting the City’s petition, the court held that prohibition was appropriate, demonstrating that an agency acts in a quasi-judicial capacity when it seeks to subject a person or entity to a proceeding in excess of its jurisdiction (*see id.* at 31).

Similarly, here, SLA is acting in a quasi-judicial capacity by seeking to subject Empire to a hearing at which it may impose a penalty. As in *Nicholson* and *City of Albany*, SLA’s investigation exceeds its jurisdiction and may result in disciplinary action against Empire in the form of a license revocation. As such, SLA is undeniably acting in a quasi-judicial capacity and prohibition is an appropriate remedy (*see Nicholson*, 50 NY2d at 607; *City of Albany*, 65 Misc2d at 31).

B. SLA is Exceeding its Jurisdiction and Empire Has a Clear Legal Right to a Writ of Prohibition

Under the second and third elements of the prohibition analysis, the petitioner must show that the agency is proceeding or threatening to proceed in excess of its jurisdiction and a clear legal right to relief (*Garner*, 10 NY3d at 362). To establish a clear legal right to relief, courts consider whether the agency “exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding” (*Rush*, 68 NY2d at 353 [emphasis added]; *see*

also Brown v Blumenfeld, 296 AD2d 405 [2d Dept 2002]; *Garner*, 10 NY3d at 362 [holding that the petitioner established a clear legal right to relief by showing that the agency had exceeded its authority]). As such, because a petitioner demonstrates a clear legal right to relief by showing that the agency is acting in excess of its jurisdiction, the second and third elements are necessarily intertwined.

As set forth above in Points I and II, SLA lacks constitutional and statutory authority to regulate Empire's out-of-state shipments. As such, SLA is proceeding in excess of its jurisdiction and may be enjoined from doing so in this prohibition proceeding (*Premo v Breslin*, 89 NY2d 995, 997 [1997] [holding that prohibition proceeding was an appropriate challenge to a sanction imposed by a judge because "there is no legislation or court rule authorizing the sanction"]; *Nicholson*, 50 NY2d at 606-607 [prohibition is an appropriate remedy when a body or officer exceeds its jurisdiction in violation of the Constitution]).

C. The Factors Weigh In Favor of Granting A Writ of Prohibition

Before granting a writ of prohibition, a court may consider, in its discretion, whether prohibition is warranted by weighing the following factors: "[1]the gravity of the harm caused by the act sought to be performed by the official; [2] whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and [3] whether prohibition would furnish a more complete and efficacious remedy even though other methods of redress are technically available" (*Rush v Mordue*, 68 NY2d 348, 354 [1986] [internal citation and punctuation omitted]; *see also Garner*, 10 NY3d at 362; *Soares v Herrick*, 20 NY3d 139, 145 [2012]).

Here, these factors weigh in favor of this Court granting a writ of prohibition. First, the gravity of the harm is substantial. If allowed to proceed, SLA will undertake a hearing at which it will revoke Empire's license to sell wine and liquor in any capacity (Petition and Complaint, Ex. B). This action will effectively put Empire out of business because it cannot operate as a liquor retailer without a license. As such, the gravity of the harm factor weighs heavily in favor of granting the writ.

Second, the harm cannot be adequately corrected by recourse to ordinary proceedings at law or equity because any other form of relief will come too late. Even if Empire is ultimately successful in challenging SLA's actions through "ordinary proceedings," the time it will take to obtain relief will jeopardize Empire's continued viability as a business. In the interim, Empire will be forced to lay off employees, delay payment to creditors, and sit on thousands of dollars' worth of inventory. It is unlikely that Empire could ever recover from these impacts. As such, ordinary proceedings are insufficient to afford Empire adequate relief.

Finally, for similar reasons, a writ of prohibition will furnish a more complete and efficacious remedy than other proceedings because it will immediately enjoin SLA from proceeding in excess of its jurisdiction *before* SLA revokes Empire's license. Any other proceeding will be more lengthy and will require Empire to suffer the consequences of a license revocation long before it receives any relief.

POINT V

ALTERNATIVELY, EMPIRE WOULD BE ENTITLED TO A DECLARATORY JUDGMENT

In the alternative, if this Court declines to issue a writ of prohibition, Empire is entitled to a declaratory judgment. Under CPLR 3001, this Court "may render a declaratory judgment

having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” As such, a declaratory judgment action “requires an actual controversy between genuine disputants with a stake in the outcome” (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006] [internal citation and quotation marks omitted]).

Here, an actual controversy exists between Empire and SLA over SLA’s authority to regulate interstate shipments of wine. Specifically, SLA issued Empire a Notice of Pleading charging it with sixteen separate violations of 9 NYCRR 53.1(n). For each of the sixteen alleged violations of this regulation, SLA contends that Empire engaged in “improper conduct” because it “sold and shipped wine directly to a customer” in another state (Petition and Complaint, Ex. B).

Empire does not dispute that it sold and shipped wine directly to customers in each of these states (Petition and Complaint ¶ 24). Empire does dispute, however, whether SLA has jurisdiction and authority to regulate interstate shipments of wine or to classify such shipments as “improper conduct” under 9 NYCRR 53.1(n) (Petition and Complaint ¶ 25). Thus, an actual controversy exists between Empire and SLA that may be properly resolved through this declaratory judgment action.

As set forth above in Points I and II, SLA has clearly exceeded its jurisdiction, under the ABC Law and the Commerce Clause, in attempting to regulate Empire’s extraterritorial shipments of wine. Accordingly, this Court should issue a judgment declaring that SLA’s application of 9 NYCRR 53.1(n) exceeds the scope of its statutory authority and, even if it were authorized by the legislature, would be unconstitutional under the Commerce Clause.

CONCLUSION

For the foregoing reasons, Empire respectfully requests that this Court issue a writ of prohibition enjoining SLA from proceeding with the license revocation hearing against Empire. In the alternative, Empire seeks a declaration that SLA has exceeded its authority and jurisdiction in seeking to regulate interstate shipments of wine, a declaration that 9 NYCRR 53.1(n) is void for vagueness, and such other relief as this Court deems just and proper.

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