STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
JOHN O. PASTORE COMPLEX, BLDG 68-69
1511 PONTIAC AVENUE
CRANSTON, RI 02920

IN THE MATTER OF:	:	
Champs Liquors for Keyway, Inc.,[1]	:	**DBR No.: 15LQ010**
Respondent.	:	

DECISION

I. INTRODUCTION

This matter arose pursuant to an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer ("Order to Show Cause") issued to Champs Liquors for Keyway, Inc. ("Respondent") by the Department of Business Regulation ("Department") on March 25, 2014. The Respondent holds a Class A liquor license. A hearing was held on August 25, 2015. The parties were represented by counsel and rested on the record.

II. JURISDICTION

The administrative hearing was held pursuant to R.I. Gen. Laws § 42-14-1 *et seq.*, R.I. Gen. Laws § 3-1-1 *et seq.*, and R.I. Gen. Laws § 42-35-1 *et seq.*

III. ISSUE

Whether the Respondent is in violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi) and the Department's Bulletin 2005-2.

[1] It should be noted that the initial case caption referred to the Respondent as Champ's Liquor of Keyway, Inc., but the actual name as reflected in later case captions is Champs Liquors for Keyway, Inc.

IV. TESTIMONY AND MATERIAL FACTS

Jason Deschamps ("Deschamps") testified on behalf of the Department. He testified that he is a corporate officer in Champs Discount Liquors Inc. d/b/a Champs Discount Liquors which owns a Class A liquor store. See Respondent's Exhibit Nine (9) (secretary of state filing). He testified he is a corporate officer along with his mother and brother, Elizabeth and Steven Deschamps, and the store opened in 1995 and has been operating under that name since 1995. He testified he filed a complaint with the Department against the Respondent because if he and his mother or brother had a falling out and wanted to open separate stores, they would not be able to use the word "Champs Liquors" so why should other people be able to use that name. He testified that the Respondent uses the name "Champs Liquors" without the "Keyway." He testified that his store have received invoices and State tax documents that are meant for the Respondent. He testified that a beer distributor used his company's logo for the Respondent's opening. On cross-examination, Deschamps testified he is not affiliated with the Respondent. On re-direct examination, he testified that he has seen advertisements in the Valley Breeze newspaper for the Respondent with "Champs Liquors" in large letters and "Keyway" in smaller letters. He testified that Respondent's Facebook page only says "Champs Liquors" and does not include "Keyway."

John Mancone, Inspector, testified on behalf of the Department. He testified that he inspected both stores. He testified that he telephoned the Respondent twice this year and both times the telephone was answered as "Champs Liquor." See Respondent's Exhibits Three (3) and Four (4). On cross-examination, he testified that he did not call Deschamps' store to see how the telephone was answered.

Keith Beauchamp ("Beauchamp") testified on behalf of the Respondent. He testified that he is president of the Respondent corporation and that his brother, Wayne, is also an officer and

that Keyway is a combination of his and his brother Wayne's name. See Respondent's Exhibit Eight (8) (secretary of state filing). He testified that they also use a combination of their names for a storage company and a realty company. He testified that the Respondent is located in Woonsocket across from a softball field and along with the word Champs being part of their name, they also felt the name was sports related. He testified he never met Deschamps before the Department hearing and has never collaborated on billing, marketing, management, ordering, or warehousing with him. He testified that he has never discussed any business practices with Deschamps and he has never tried to deceive the public. He testified that he is not affiliated with Deschamps and neither he nor his brother hold any interest in any other Class A liquor store(s). He testified that the store's advertising includes advertising twice a day on a local radio station, a Facebook page, and signage on the store. He testified that he has never collaborated with Champs Discount Liquors. He testified that the Respondent's store sign has "Champs Liquors Keyway" all in the same size and font. See Respondent's Exhibit One (1) (photograph of sign). On cross-examination, he testified that the Respondent opened in May, 2013.[2]

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The

[2] The parties also filed a Joint Stipulation (Joint Exhibit One (1)) in which the parties agreed the Respondent is located in Woonsocket, opened in May, 2013, the corporate stock is owned by Wayne and Keith Beauchamp, and the Respondent has not violated R.I. Gen. Laws § 3-5-11(b)(1)(i) through (v).

Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Standard of Review for an Administrative Hearing

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, the initial burdens of production and persuasion rest with the moving party. 2 Richard J. Pierce, Administrative Law Treatise § 10.7 (2002). Unless otherwise specified, a preponderance of the evidence is generally required in order to prevail. *Id.* See *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases). This means that for each element to be proven, the fact-finder must believe that the facts asserted by the proponent are more probably true than false. *Id.* When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. *Narragansett Electric Co. v. Carbone*, 898 A.2d 87 (R.I. 2006).

C. Statute

R.I. Gen. Laws § 3-5-11 provides in part as follows:

> Licensing of chain stores. – (a) Licenses, except retailer's Class E, Class B, Class B-H, Class B-L, Class B-M, and Class B-V licenses, authorized by this title shall not be granted, issued, or transferred to or for the use of any "chain store organization," which term shall consist of any chain of retail or wholesale business or business organizations, and more specifically defined herein, including, without limitation, grocery stores, markets, department stores, and convenience stores, as well as retailers

of alcoholic beverages, and which include chains in which one or more stores are located outside of the state.

(b) The term "chain store organization" is defined to include, but not limited to:

(1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices:

(i) Common, group, centralized or coordinated purchases of wholesale merchandise.

(ii) Common billing or utilization of the services of the same person or the same entity in the management or operation of more than one liquor licensed business.

(iii) Participation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media.

(iv) Coordinated or common planning or implementation of marketing strategies.

(v) Participation in agreed upon or common pricing of products.

(vi) Any term or name identified as a chain or common entity.

The Department's bulletin, # 2005-2 provides in part as follows:

This bulletin serves to address four (4) key questions relating to the types of practices prohibited by the recent amendments to R.I.G.L. §§3-5-11 and 11.1. These statutory changes eliminate any chain store and alcoholic beverage franchisor/franchisee relationships. This Bulletin is not meant to be an exhaustive list of prohibited practices as set forth in the law, but rather will serve to provide an overview of certain prohibited practices for which enforcement action will be taken. Accordingly, pursuant to the prohibitions set forth in R.I.G.L. §§3-5-11 and 11.1, the following practices are hereby prohibited:

1. common, group, joint or coordinated purchases of wholesale merchandise by more than one (1) licensee or volume discounts granted by wholesalers from orders generated by more than one (1) retail licensee;

2. participation in coordinated or common advertising with one or more licensed Class A alcoholic beverage licensees. Two (2) licensees should not be mentioned in any manner in any advertisement, nor should there be references to the ability to purchase items at more than one (1) store.

3. the placing of orders of product with wholesalers by individuals not a manager, officer or owner of the licensed premises. A Class A licensee cannot have a third party with no managerial or ownership status control the flow of products, promotions and marketing activity for a given store;

4. existence of Class A licensees with the same or materially similar names. By April 1, 2006, each retail licensee will be required to operate under a name totally dissimilar from other Class A licensees with the exception that a full proper legal name may be used as a business name. For example, if there is more than one licensee operating under the name "Smith's Liquors" the name should be changed to a totally dissimilar name or, if the owner is named Smith, the name may be changed to the full legal name of the owner such as "Joe Smith's Liquors," to demonstrate

appropriate differentiation. Accordingly, two (2) or more stores currently named in a manner such as "Hank's Liquors of Smithfield" and "Hank's Liquors of Newport" will not be considered a sufficient differentiation of name. Under Separate cover, the Department will soon be notifying all Class A licensees with same or similar names to submit proposed name changes to the Department to secure prior approval of proposed name changes by December 31, 2005, which approval shall not be unreasonably withheld.

The Department encourages all licensee to call with any further questions they may have about operating under R.I.G.L. §§3-5-11 and 11.1. The Department also encourages all licensees to report any violations of R.I.G.L. §§3-5-11 and 11.1.

D. Arguments

The Department argued that R.I. Gen. Laws § 3-5-11(1) to (6) prohibits chain stores and defines chain stores to include one or more factors and that definition includes any term or name identified as a chain or common entity. The Department relied on its statutory interpretation of said statute in its Bulletin 2005-2 and in the Department case *People's Liquor* prohibiting similar names. The Department argued that its *People's Liquor's* decision demonstrates the rationale of the prohibiting similar names: to prevent misconception of common ownership and prevent confusion in the marketplace. The Department argued that the bulletin explains that the Respondent's name should include Wayne and Keith Beauchamp's full names. The Department seeks an order to Respondent to cease and desist using its name and to order the Respondent to change its name to a dissimilar name or to use their full names (Keith and Wayne Beauchamp).

The Respondent argued pursuant to R.I. Gen. Laws § 3-5-11, the Department's *People's Liquor* decision, and Superior Court decision upholding the Department's decision the licensees need to be identified as a chain or common entity before applying the six (6) factors contained in the statute. The Respondent argued that the testimony shows that the two (2) licensees are not identified as a chain or a common entity. The Respondent argued that *People's Liquor* Superior Court decision does not prevent Class A licensees from using any names they choose as long as they do not identify as a chain store or common identity and the statute is targeting collaboration

among licensees. The Respondent argued that the threshold is whether licensees are acting as a chain store organization so that paragraph four (4) of said bulletin is well meaning but beyond the scope of the statute since the statute does not mandate that entities that are not affiliated with each other have to operate with totally dissimilar names to other entities.

E. The History of the Statute

Since 1933, Rhode Island has statutorily prohibited retail sale of alcoholic beverages by "chain store organizations." R.I. Gen. Laws § 3-5-11. Initially the Department was charged with defining a "chain store" but in 2004, the statute was amended to include the type of activities that would cause a business to be classified as a "chain store organization" and to prohibit the retail sale of alcoholic beverages by franchise operations. See R.I. Gen. Laws § 3-5-11.1 (franchise prohibition).[3]

On May 24, 2006, the Department issued a decision in *People's Liquor Warehouse-Hopkinton, Inc. d/b/a People's Liquor Warehouse et al.*, DBR Nos. 06-L-007 through 06-017. The Department's *People's Liquor Warehouse* decision involved ten (10) respondents. Seven (7) of the ten (10) respondents used the name Wine & Spirits with a geographical addition. The other three (3) respondents used a variation of the name People's Liquor. The Department's decision noted that the respondents had a franchise agreement with Wine and Spirits Retailer, Inc. ("W&S").[4] The Department's decision found as follows:

> a business entity name (without reference to an individual's full proper name) is more likely to be deemed a chain or common entity. The Respondents' current names

[3] R.I. Gen. Laws § 3-5-11.1 provides in part as follows:

> Liquor franchises prohibited. – (a) To promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing. Class A liquor license authorized by this title shall not be granted, issued, renewed or transferred to or for the use of any liquor franchisor or franchisee. Class A liquor license holders are expressly prohibited from utilizing the provisions of the Franchise Investor Act, § 19-28-1 *et seq.*

[4] W&S's franchise agreements allowed the franchisee to use either the Douglas or People's trade name. See *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 43 (1st Cir. 2005).

> clearly exemplify the rationale for requiring distinguishable names in order to prevent the misperception of a chain store or common entity. The names used by Respondents are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi). Decision at 16.

The Superior Court upheld the Department's decision on May 21, 2007. See *Peoples* (sic) *Liquor Warehouse-Hopkinton et al. v. Department of Business Regulation*, 2007 WL 1654395 (5/21/2007). The Superior Court found that the "statutory scheme, coupled with the statutory definition of 'chain store organization' under R.I. Gen. Laws § 3-5-11(b)(1(vi), provides the legislative basis for (sic) Department to regulate the sale of liquor by limiting the names or other terms by licensees identified as a chain or common identity."

In addition to the Department's action regarding the Douglas and the People's Liquor stores, there was concurrently Federal Court litigation regarding the constitutionality of R.I. Gen. Laws § 3-5-11 and R.I. Gen. Laws § 3-5-11.1. The United States District Court in *Wines and Spirits Retailers, Inc. v. State of Rhode Island, et al.*, 364 F.Supp.2d 172 (D.R.I. 2005) denied W&S' (franchisor) motion for preliminary injunction prohibiting the State from enforcing R.I. Gen. Laws § 3-5-11. The First Circuit affirmed the denial of the preliminary injunction in *Wine and Spirits Retailers, Inc. V. Rhode Island*, 418 F.3d 36 (1st Cir. 2005). On remand, following a bench trial, the District Court entered judgment in favor of the State which was upheld by the First Circuit in *Wine and Spirits Retailers, Inc. v. State of Rhode Island*, 481 F.3d 1 (1st Cir. 2007). The First Circuit found that R.I. Gen. Laws § 3-5-11 was constitutional.[5]

In the case before the Department and the litigation in Federal Court, there was no question that the original respondents in the Department matter and the plaintiffs in Federal Court had been

[5] The First Circuit decision was decided on March 20, 2007 and a rehearing and rehearing in banc was denied on April 19, 2007. W&S filed a *petition of certiorari* to the United States Supreme Court which was denied. See *Wine & Spirits Retailers, Inc. v. Rhode Island*, 128 S.Ct. 274 (2007).

franchisors. Indeed, the franchisor sought to invalidate the statutes on constitutional grounds. In upholding the constitutionality of the statues, the First Circuit found as follows:

> Even assuming, for argument's sake, that the *Ibanez* dichotomy applies here, the State's concern about the misleading nature of chain-associated trade names, when used by independent package stores, is readily supportable. The district court, in its preliminary injunction ruling, refused to enjoin the enforcement of the 'no franchise' provisions contained in the statutory scheme but temporarily blocked the enforcement of the prohibition against the use of a shared trade name. *See Wine & Spirits,* 418 F.3d at 44. In conformity with those rulings, the Retail Stores relinquished their franchise agreements and claimed, from that point forward, to be acting as independent businesses. They nonetheless continued to use the Douglas name. Although we subsequently allowed the injunction against enforcement of the 'trade name' restriction to lapse, *see id.,* the Retail Stores apparently persisted in using a shared trade name.
>
> At trial, the district court, as the finder of the facts, examined the Retail Stores' actual use of the shared trade name during the period when they professed to be operating independently. It determined that each of the former franchisees had simply appended the name of the municipality in which its shop was located to the Douglas name. The court received evidence that newspaper advertisements purportedly placed by individual stores on a rotating basis featured the Douglas name in large letters and bold font, while reporting the store's location information in much smaller print that was 'far less likely to be noticed by the reader'; that participating stores prominently displayed exact replicas of these advertisements and offered for sale the same products (both advertised and non-advertised) for the same prices; and that the Retail Stores continued to receive suggested store layouts and employee dress codes from W & S. Citing this evidence, the court found as a fact that the Retail Stores' shared use of the Douglas name 'conveys and, obviously, is intended to convey to consumers the impression that all of the stores are part of a single entity and operate in concert.' Given the Retail Stores' assurances that they had been operating independently from and after the effective date of the 2004 amendments, the court concluded that the impression conveyed by the use of the shared trade name was 'untrue and, therefore, misleading.'
>
> These findings are not clearly erroneous (indeed, the plaintiffs do not contest them). They graphically illustrate why the use of a shared trade name in the retail liquor market by supposedly independent package stores poses an area of legitimate concern for a state that has abolished franchise and chain-store arrangements in that market. The findings, therefore, comprise a showing sufficient to underpin the restriction enacted by the Rhode Island General Assembly.
>
> ***
>
> That ends this chapter of the tale. As the district court supportably found, the Retail Stores' actual usage of the shared trade name tends, in a misleading fashion, to identify the users as part of a chain or entity under common control. For that reason, the restriction imposed by the State is constitutionally permissible. (footnote omitted). *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 9-10 (1st Cir. 2007).

The evidence at trial was that while claiming to be independent, the stores were still acting in concert in terms of advertising, products, and layout. Thus, the First Circuit's finding that the plaintiffs had used a shared trade name is premised on the fact that those stores were still collaborating and were not independent. The fact that they were using the same name was not the basis for the finding; rather the finding was that the names were misleading since they were using a shared name to convey to consumers they "operate in concert" (*Id.* at 9 (quoted above)) and were indeed acting in concert despite professing to be independent.

Various courts have weighed in on the intent and purpose of this statute. At the same time the chain store statute was amended, the anti-liquor franchise statute was enacted. In 2005, the First Circuit found that the goal of those two (2) statutes was to maintain a competitive retail liquor industry. *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 54 (1st Cir. 2005). In 2007, the First Circuit found that its purpose was, "[h]ere, the hoped-for local benefits consist primarily of regulating and safeguarding against anticompetitive behavior in the retail liquor market." *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007).

In upholding the Department's *People's Liquor Warehouse* decision, the Superior Court found that the statute:

> does not prevent Class A licensees from using any name that they choose as long as it does not identify them as a chain store entity, since the statute does not restrict the message that may be conveyed by the stores. The statute solely targets the licensees' collaboration in setting products and prices-the precursor to any common advertising. As noted by the Federal District Court,
>
> > [t]here is no other reason to use a common name unless that's the case. Indeed, the evidence shows that this is precisely the means that the plaintiffs have used in order to circumvent the statutory prohibition against chain stores or franchise operations. (Federal District Court Decision at 13-14.)[6]
>
> The Federal District Court also noted that the use of a common name did not constitute protected commercial speech.

[6] The Superior Court cites to the Federal District decision that apparently is to the Federal District Court bench trial that was upheld by the second First Circuit decision rather than the reported Federal District Court decision on the preliminary injunction issue.

> [C]ommon advertising or the use of a common name, which has no independent expressive significance and amounts to nothing more than a means for carrying out the concerted activity, ... is prohibited by statute. To put it another way, common advertising and the use of a common name not only concerns unlawful activity, it is part and parcel of the unlawful activity. (Tr. District Court Decision at 17.)
>
> Thus, the Federal District Court held the use of that name would unlawfully mislead consumers, because a common name conveys the message that the licensees' stores are members of a chain.

The name provision falls under the chain store part of the statute. The legislature in enacting the anti-franchise statute – at the same time it amended the chain store provision to define chain stores - indicated that liquor franchises were prohibited to protect consumer choice and ensure equitable pricing. Finally in 2008, the First Circuit in another case discussed the purpose of the statutes in the Wine and Spirits cases. While that First Circuit case was abrogated by the United States Supreme Court, the First Circuit discussion of the intent of Rhode Island's statutory scheme was not. The First Circuit found as follows:

> Thus, the *Wine & Spirits* prohibition was against an acting-in-concert business approach—not against the message the liquor stores were seeking to disseminate. (footnote omitted) . . . But the statute's objective was to regulate business methods, *see supra* n. 35, and, as we observed in *Wine & Spirits I,* "the First Amendment does not safeguard against changes in commercial regulation that render previously profitable information valueless." 418 F.3d at 48. *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 83 (1st Cir. 2008) abrogated by *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011).

The statute prohibits the use of names that identify stores as chain or common entity. The purpose of the statute is to prevent collaboration between licensees. The Superior Court found that the statute targeted price-setting and collaboration and engaging in that behavior would be the only reason to use a common name The Federal Court has found that the intent of the statute is to prevent anticompetitive behavior.

F. The Applicability of the Statute

Under the statute only one of the six factors needs to be established to find that an entity is acting as a "chain store organization." The Department's bulletin seeks to advise Class A liquor licensees about the Department's interpretation of R.I. Gen. Laws § 3-5-11 and R.I. Gen. Laws § 3-5-11.1. However, it is not a regulation which "are legislative rules that carry the force and effect of law and enjoy a presumption of validity." *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289, 1293 (R.I. 1997). Rather the bulletin is an interpretative rule. The Rhode Island Supreme Court has described the difference between the two as follows:

> To resolve this dispute, we feel it is helpful to turn to 2 Davis, *Administrative Law Treatise,* § 7:8 at 36 (2d ed. 1979), where a distinction is drawn between an interpretive rule and a legislative rule. A legislative rule is the product of an exercise of delegated legislative power to make laws through rules whereas an interpretive rule is any rule an agency issues without exercising the delegated legislative power to make law through rules. The validity of a legislative rule depends upon whether it is within the power granted by the Legislature, issued pursuant to proper procedure, and reasonable as a matter of due process. Once the validity of such a rule is established, it is as binding on a court as a valid statute. Interpretive rules, on the other hand, do not have the force of law. Courts may substitute their judgment for that of the administrative agency in deciding whether or not to enforce an interpretive rule. Although a court may choose to defer to an agency's judgment, it is not required to do so. (citation omitted). *Lerner v. Gill*, 463 A.2d 1352, 1358 (R.I. 1983).

Thus, the issue in this matter is not what the bulletin discusses, but what the statute requires so that the determination of whether the Respondent falls under the sixth factor is a question of statutory interpretation.

First the term "chain store organization" is defined to include but is not limited to one of the six factors. In other words, other factors could demonstrate an entity is a chain store organization but a finding of one of the six will demonstrate an entity is a chain store organization.

To fall under one of those six factors, there must be a group of one or more Class A liquor licensees engaging in one of more of those practices with respect to business conducted under such

licenses, either directly or indirectly, or to have any direct or indirect beneficial interest in those practices. This is the crux of the Respondent's argument: before there can be a finding of a chain store, there must be a showing that licensees are working together. The Department argued that showing one of the six demonstrates that the licensees are working together so are a chain store. Factors (i) to (v) easily fall under the Department's argument: common purchases, common billing, common advertising, coordinating strategy, and common pricing all easily show licensees working together. In other words, if licensee Smith and licensee Jones own separate Class A stores, but buy products together and agree on prices for those products that would clearly be a group of one or more Class A licensees engaging in two of the six factors (common or coordinated purchases and common pricing of products). For factors (1) to (v), there is no issue of which comes first – licensees working together or one of the factors – because as soon as there is common billing (or another factor) by two (2) licensees, they are working together and one of the factors applies so there in essence a simultaneous finding of a factor and of licensees working together.

The legislature is presumed to know how to amend, repeal, and enact legislation. *Brennan v. Kirby*, 529 A.2d 633 (R.I. 1987).[7] The Department's position is that the similar names of these two (2) licensees mean that there is a chain store or common entity. However, the legislature chose not to enact a blanket prohibition against the use of common or similar names. In preventing anticompetitive collaboration that would constitute a chain store, the licensee(s) must be "engaged in one of more of the following practices with respect to the business conducted" – either directly

[7] *Brennan* found as follows:

> The Legislature must be presumed to know how to amend and repeal statutes. Therefore, the Legislature must also be presumed to have known what it was doing when it enacted article 64. Consequently, it must follow that if the Legislature had intended merely to limit the remedies available for violations of § 30–21–3 to prospective-injunctive relief, it would have done so by simply leaving the existing statute intact and adding the second paragraph of section 1 of article 64 to § 30–21–3. Otherwise, to suggest as plaintiffs have that article 64 does not repeal § 30–21–3 but merely attempts to limit liability renders the repeal language in article 64 meaningless. *Brennan v. Kirby*, 529 A.2d 633, 637-38 (R.I. 1987).

or indirectly – or "to have any direct or indirect beneficial interest in" . . . "[a]ny term or name identified as a chain store or common entity." Thus, the group of one (1) or more holders of a Class A licensee must be using a name identified as a chain store. Thus, factor (vi) is not necessarily so obvious as the first five factors in its applicability.

With the Wine and Spirit cases, the stores all used the similar names or same names with geographical additions and were engaged in common advertising and sold the same products, so there was evidence that the licensees were engaged in business using a name identified as a chain. Thus, it is no surprise that the Department found that the Wine and Spirit stores needed to use distinguishable names in order to prevent the misperception of a chain store or common entity since they were continuing to act as a chain store even in light of the statutory prohibition on chain stores and the use of common names. As the 2007 First Circuit found regarding those same franchisors, the stores "actual usage of the shared name tends, in a misleading fashion, to identify the users as part of a chain or entity under common control." *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 10 (1st Cir. 2007).

The statute provides that only one (1) factor needs to be proved to show that licensees are acting as a chain store. Usually the proof of a chain or common entity name would also be shown by licensees like Wine and Spirits where the licensees are acting on concert in terms of purchasing, billing, marketing, and pricing. However, if Mary Doe owns a liquor store called Doe's Liquors and then her mother Jane Doe opens a liquor store called Doe's Liquors, such names would raise the issue as the holders of the licensees might be conducting business indirectly or have direct beneficial or indirect beneficial interest in any term or name identified as chain or common entity. The conducting business indirectly or the indirect or direct beneficial interest would be family members using the same name so that it could be identified as a chain or common entity.

It may be easier to distinguish Class A liquor licensees when they have distinct names. However, the Superior Court found that the statute does not prevent Class A licensees from using any name as long as "it does not identify them as a chain store entity." 2007 WL 1654395. The Court discussed that that the bulletin speaks of using individual names as those are distinguished from a business entity and prevent consumer misperception. And certainly that makes sense in the *People's Liquor* cases where the stores all changed their names to their full business names (rather than individual names) to make them sound more alike and like a chain. *Id.*

All the cases involving this statute arise from the *People's Liquor* matters where there was no doubt those stores were working in concert in violation of the statutory purpose to prevent licensees from collaborating on pricing, advertising, purchasing (etc.) in order to prevent anticompetitive business practices. Up to the sixth factor, the statute is clear and unambiguous in what types of practices are forbidden. For the sixth factor, there needs to be a finding that the name being used is **identified** as a chain or common entity. As the 2007 First Circuit found, the use of the Douglas names was intended to convey to consumers that the stores "operate in concert."

The statute does not explain exactly who or what is identifying the term or name as a chain or common entity. The *People's Liquor* cases spoke of the public's misperception so arguably "identified" could turn on whether the public might believe the use of name connotes a chain. On the other hand, "identified" could refer to once the finding is made that the group of licensees are acting together the "terms" are now identified as being a chain or common entity. Clearly, in the *People's Liquor* cases, the similar names were being used on purpose by the licensees – to indicate they operated in concert - so that identified them as a chain or common entity. However, the cases

also discussed that the public could have the misperception that the various stores were a chain when they were not to be a chain.[8]

At the same time, the purpose of the statute is to prevent anticompetitive business strategies. The anti-liquor franchise statute speaks of protecting consumer choice and ensuring equitable pricing. The Courts speak of the purpose of R.I. Gen. Laws § 3-5-11 as safeguarding against anticompetitive behavior, solely targeting licensees collaboration in setting products and prices, and prohibiting acting-in-concert. Thus, the statute is directed as prohibiting certain business practices so that there is equitable pricing and better choice for the consumer.

If the legislature wanted to, it could have imposed a blanket prohibition on the use of similar names. It chose not to. The statute targets business practices. The public misperception is not targeted in the statute; rather that concern is a by-product of cases related to franchises that acted together and were implying they were operating in concert despite the fact that they were no longer allowed to act together.[9] The Department has not promulgated regulations regarding the use of names. It has issued an advisory bulletin. The statute does not charge the Department with making a finding of a common name or entity based solely on the stores' actual names but rather if the names are identified as a chain. Thus, a determination regarding the sixth factor requires more than just a similarity in names, but rather is a fact finding exercise regarding whether the actual usage of names identifies the users as part of a chain.

---

[8] Presumably it is for this reason the Department took the step in its bulletin to indicate that a licensee should use his or her full name rather than the last name. The bulletin stated that if there were more than one licensee operating by a last name that was the same as another store, it should be changed to the full name. Thus, instead of Smith's Liquor where the licensee was named Smith, the licensee should be "Joe Smith's Liquors" so that there would not be many licensees operating as Smith's Liquors.

[9] For example, as cited to above, the Department's decision on the franchisors use of names indicated that a business entity name is more likely to be deemed a chain or common entity and that the respondents – all former franchisors – were not easily distinguishable and appeared to be a common chain or entity. The Department raised the issue of public misperception. However, in that situation, the franchisors all had been acting together and the Department was trying to ensure that they were divested of any *indicia* that indicated to the public they were still a common entity.

In this situation, there are two (2) Class A licensees that do not operate in concert in regard to each other. There are no familial relationships between the licensees. The licensees do not have any business relationships. They happen to have the similar sounding store names derived from their similar last names. One store is Champs Discount Liquor and the other is Champs Liquors for Keyway. Perhaps it would be less confusing if one was Deschamps Discount Liquors and the other was Beauchamp Liquors for Keyway even if first names were not used.[10]

However, the statute does not require the names to be "less confusing," but rather the names are not to be identified as a chain or common entity. The statute does not prohibit similar names nor does it prohibit similar names that might confuse the public. Instead, it speaks of licensees working together directly or indirectly and/or benefiting directly or indirectly from a term or name identified as a chain or common entity. To find that these two (2) licensees' names are identified as chain or a common entity would render the statutory interpretation unreasonable. The purpose of the statute is to prevent anticompetitive collaboration between licensees; there is no collaboration between these two (2) licensees. They are not buying products together. They are not setting prices together. They are not advertising together. They are not billing together. A group of one of more licensees need to be working in concert. By their very nature, when factors one to five are shown, there is no doubt that the licensees are working in concert. Factor six requires a showing of some kind of proof of business being conducted together directly or indirectly or that there is direct or indirect beneficial interest in a term or common name.[11]

---

[10] While it is not relevant to a finding in this matter, there was no evidence of public confusion regarding the two (2) licensees except for some misdirected invoices and mail by the Division of Taxation and an error in the sign by a beer distributor.

[11] Thus, there could be a finding based solely on factor six if an individual owned many Class A licensees and named them all similar sounding names as that licensee would be a holder of Class A licenses directly engaged in business and having a direct or indirect beneficial interest in a common name.

Without there being licensees directly or indirectly engaged in business or directly or indirectly benefitting from a name identified as a chain or common entity, factor six cannot be found. In this matter, there are two (2) stores – Champs Discount Liquors and Champs Liquors for Keyway – whose only relation is having the term "Champs" in their names; however, the fact that both use the name Champs does not identify them as a chain or common entity under the statute as they are not indirectly or indirectly engaging in business or directly or indirectly benefitting from each other's use of the name.[12]

In light of the purpose of the statute – prevent anticompetitive market strategies like coordinated purchasing, billing, marketing, and pricing – it would be unreasonable to find that the statute prevents these two similar names when there was no evidence that the two licensees are directly or indirectly working together or directly or indirectly benefiting from their similar names.

VI. FINDINGS OF FACT

1. On or about March 25, 2014, an Order to Show Cause, Notice of Hearing and Appointment of Hearing Officer was issued to the Respondent by the Department

2. A hearing was held on August 25, 2015. The parties were represented by counsel and rested on the record.

3. The Respondent holds a Class A liquor license.

4. The facts contained in Section IV and V are reincorporated by reference herein.

[12] It should be noted that both entities are not named Champs Liquors, but rather are Champs Discount Liquors and Champs Liquors for Keyway and do not use identical names. A hypothetical could be posited that a fact finding exercise could – though perhaps unlikely - find a Class A licensee copied another Class A licensee's name in order to identify as a "chain" so that the copying licensee is the group of one or more holders of a license indirectly working together or having an indirect benefit in a name identified as chain.

VII. CONCLUSIONS OF LAW

Based on the forgoing, the undersigned recommends that this matter be dismissed.

Entered this day 15th October, 2015.

Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

✓ ADOPT
_____ REJECT
_____ MODIFY

Dated: 10/19/15

Macky McCleary
Director

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on this 19th day of October, 2015, that a copy of the within decision was sent by first class mail, postage prepaid and electronic delivery to Thomas H. DiPrete, Esquire, 2 Stafford Court, Cranston, RI 02920 thomasd@dipretelaw.com and by electronic delivery to Jenna Algee, Esquire, and Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue. Cranston, RI.