

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

LEGATO VAPORS, LLC, JET SETTER)
JUICE LLC, ROCKY MOUNTAIN)
ECIGS LLC, AND DERB E CIGS)
INDIANA LLC)

Petitioners,)

v.)

DAVID COOK, DAVID COLEMAN,)
DALE GRUBB, AND MARJORIE MAGINN,)
IN THEIR OFFICIAL CAPACITIES FOR)
THE INDIANA ALCOHOL AND TOBACCO)
COMMISSION, MATT STRITTMATTER, IN)
HIS OFFICIAL CAPACITY AS THE)
SUPERINTENDENT OF THE INDIANA)
EXCISE POLICE, AND THE STATE OF)
INDIANA,)

CASE NO. 1:15-CV-00761-SEB/TAB

Respondents,)

and)

RIGHT TO BE SMOKE-FREE)
COALITION, INC.)

Intervenor-Petitioners.)

_____)

**RIGHT TO BE SMOKE-FREE COALITION, INC.'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO INTERVENE**

The Right To Be Smoke-Free Coalition, Inc. (“Coalition”) submits the following points and authorities in support of its Motion To Intervene in the above-captioned matter. As discussed below, the Coalition satisfies all of the requirements for permissive intervention under Fed. R. Civ. P. 24(b), as well as the factors necessary to establish associational standing.¹

I. BACKGROUND

The Indiana General Assembly recently passed legislation, HEA 1432, as amended by SEA 463 (collectively referred to as the “statute”), that will have a substantial impact on the electronic vapor (“e-vapor”) industry in Indiana and across the country. Specifically, the statute selectively regulates only one segment of the e-vapor industry – the manufacture, distribution, and sale of e-liquids that are used in “open system” refillable e-vapor devices. The Coalition’s members consist of e-vapor companies, including e-liquid producers, wholesalers, and retailers that do business with entities and consumers in Indiana. The Coalition was founded to advocate for reasonable and responsible laws governing the e-vapor industry. While the Coalition’s members are committed to the safe production and use of e-vapor products and would be able to comply with much of the Indiana statute’s provisions, there are several statutory obligations that have raised significant concerns within the e-vapor industry. These requirements are subject to various challenges in the proposed Petition on several constitutional grounds.

A. E-Liquids and E-Vapor Devices

E-vapor devices (also commonly referred to as electronic cigarettes or e-cigarettes) come in various sizes and shapes, and contain a heating coil (called an atomizer) that vaporizes the e-liquid solution. The vapor is inhaled by the user through a mouthpiece, with the aerosol

¹ Neither the original Petitioners nor the Respondents oppose this motion. Counsel for the Coalition (Eric Gotting) and the Respondents (David Arthur and Johnathan Nagy) discussed the motion to intervene during a September 17, 2015 telephone conference. Counsel for Petitioners (Greg Troutman) and Mr. Gotting corresponded via email along similar lines on the same date.

providing a flavor and physical sensation similar to that of smoking a traditional cigarette. It is important to note, however, that e-vapor devices are not traditional cigarettes; they do not use tobacco and there is no combustion or smoke. In fact, recent studies show that “vaping” is substantially less risky than smoking cigarettes, with millions of individuals in the United States turning to e-vapor devices to reduce or completely eliminate smoking from their lives.

Further, the Indiana statute imposes extensive regulations on only a certain type of e-liquid. In particular, it only applies to e-liquids that are used in what are called “open systems” – e-vapor devices that can be reused and refilled with e-liquids based on the particular consumer’s tastes (*e.g.*, e-liquids come in thousands of different flavors). What the statute does not regulate are disposable “closed systems” – devices that look more like traditional cigarettes and come with an enclosed, prefilled e-liquid container. The statute regulates only open systems despite the fact that the same e-liquids, made out of the same ingredients, are used in both types of devices. There are literally hundreds, if not thousands, of e-liquid manufacturers in the United States, with some selling their products for use in *both* open and closed systems.

B. The Indiana Statute

HEA 1432, as amended by SEA 463 (both codified at IC 7.1-7), regulates activities up and down the e-liquid supply chain, including production, distribution, and retailing. While at first blush the statute appears to only govern activities occurring in Indiana, a closer look reveals that this is not the case. For example, the statute defines “Manufacturer” to include both in-state and out-of-state producers (IC 7.1-7-2-16). As such, the statute’s extensive provisions obligating these manufacturers to obtain a permit from Indiana and to comply with provisions governing production specifications and processes will apply to manufacturers located beyond Indiana and across the country and, more importantly, regulate the production of products, most of which are

never sold in Indiana. Moreover, retailers, whether operating in Indiana or not, are prohibited from selling any e-liquid into the state that was not produced by a permitted manufacturer in compliance with the manufacturing protocols (IC 7.1-7-6-2). Finally, e-liquid retailers and distributors selling into the state are required to obtain special licenses and certifications under Indiana's general tobacco laws even though e-liquids do not contain tobacco (IC 7.1-7-5-1(c)).

As articulated by the Indiana General Assembly, the statute's stated purposes for regulating e-liquids used in open systems are basically to ensure the safety and security of the e-liquids, and to protect against adulteration or contamination. As noted above, there are provisions in the statute that help achieve these goals which the Coalition members do not challenge in the Petition. For example, Indiana will require manufacturers to: (i) bottle e-liquids with child-proof and tamper-resistant packaging (IC 7.1-7-4-6(b)(1)-(2)); (ii) use only certain e-liquid ingredients unless otherwise approved by the state (IC 7.1-7-5-1); and (iii) employ a batch numbering and scanning system that will allow manufacturers to track the distribution and sale of products (IC 7.1-7-4-6(b)(5)-(6)). For the Coalition's members, these types of requirements constitute reasonable oversight of the e-vapor industry and, in fact, have been implemented in many other states.

The statute, unfortunately, also contains other more troublesome requirements. Specifically, the Coalition challenges three provisions as unconstitutional: (i) the application of the Indiana commercial kitchen code to the production of e-liquid, even though e-liquids are not manufactured using food and it is unlikely that they could become contaminated with a foodborne illness (IC 7.1-7-2-4); (ii) the requirement that manufacturers hire an independent security firm that satisfies rigid certification and qualification standards where, upon information and belief, either no such firm exists or there are no firms that provide the geographical footprint

necessary for all manufacturers to comply (IC 7.1-7-4-1); and (iii) the granting of authority to state officials to conduct random audits of production facilities across the United States (IC7.1-7-4-6(b)(16)-(17)).

The Coalition does not consider this type of regulation to be reasonable on any level. This holds particularly true as they not only apply to e-liquid products that are produced outside of Indiana and that will never be sold in the state, but also appear to be, at least in some instances, literally unattainable. When coupled with Indiana's efforts to regulate e-liquid distributors and retailers as if they are marketing and selling tobacco products even though e-liquids contain no tobacco, the Coalition's members were left with no choice but to file this lawsuit and challenge the provisions as being unconstitutional. It is the Coalition's hope that, in the event that these regulations are declared void and enjoined from enforcement, the e-vapor industry and the State of Indiana can then work together on fashioning a sensible approach to regulating e-liquids to be used in all types of e-vaping devices.

C. The Current Litigation

The Coalition seeks to intervene in litigation that was initially filed by three individual e-liquid manufacturers and an in-state retailer. *See* First Am. Pet. (Dkt. #9). Like the proposed Petition, that lawsuit also challenges many of the same provisions found in the statute as unconstitutional. In fact, the proposed Petition includes the same four causes of action raised in the pending litigation. These include challenges based on extraterritorial regulation (Commerce Clause), arbitrary distinctions drawn between e-liquids used in open and closed devices (Equal Protection and Due Process), and the application of Indiana's general tobacco laws to the e-vapor industry (Due Process). That said, there are also some differences between the initial and proposed Petitions. As discussed below, while both Petitions arise out of the same issues of law

and fact, the proposed Petition brings additional constitutional claims, including causes of action that focus specifically on the questionable provisions involving commercial kitchen, security, and audit requirements, and seeks relief for a broader range of e-vapor companies. Accordingly, this Court should grant the Coalition's request to permissively intervene.

II. ARGUMENT

A. **The Court Should Allow The Coalition To Permissively Intervene**

Under rule 24(b), a court may permit anyone to intervene in an action who has a claim that shares with the initial lawsuit a common question of law or fact. The court must also, in exercising its discretion, consider whether such intervention would unduly delay or prejudice the adjudication of the original parties' rights. *See In re Discovery Zone Litigation*, 181 F.R.D. 582, 594 (N.D. Ill. 1998). Permissive intervention should be more liberally granted than a request for intervention as of right under Rule 24(a). *Id.* at 598 n.9. As demonstrated below, the Coalition's proposed Petition meets the standard for permissive intervention.

1. *Multiple Common Questions of Law or Fact Exist*

While the rule, on its face, states a simple requirement, it is notable that, in the Seventh Circuit, "all that is required" by Rule 24(b)(1) is that an applicant's claim and the main action have a common question of law or fact. *Flying J Inc. v. Hollen*, 578 F.3d 569, 573 (7th Cir. 2009) (emphasis added). In *Flying J*, the court first analyzed the requirements for intervention by right under Rule 24(a), including whether the movant was "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." *Id.* at 572. The court ultimately concluded that it was not necessary to evaluate the applicant's motion to intervene under Rule 24(a) when the standard for permissive intervention only inquires as to whether there is a common question of law or fact. *Id.* at 573.

Such is the case here. Both the original Petitioners and the Coalition are challenging the same statute, HEA 1432, as amended by SEA 463. They also name the same Respondents – individuals serving in their official capacity at the Indiana Alcohol and Tobacco Commission (“Commission”) and the Indiana Excise Police, which are the agencies charged with enforcing the statute. And they seek the same relief – a declaratory judgment that various provisions of the statute violate the U.S. Constitution and, thus, Respondents should be enjoined from enforcing the statutory regime. Indeed, both Petitions are based on the Commerce, Due Process, and Equal Protection Clauses. In fact, as noted above, both the current lawsuit and the Coalition’s proposed Petition bring the same federal causes of action.² Accordingly, the Coalition’s lawsuit is necessarily based on the same law and identical facts as the pending litigation.

While the Coalition also brings several additional constitutional claims, these are also based on the same three constitutional theories as the original Petition. In particular, the Coalition brings a parallel Equal Protection claim under the Indiana Constitution, that not surprisingly is based on the same facts as the federal claim (Count Five). The Coalition also asserts a Due Process cause of action that focus exclusively on the security requirements (Count Two). The original Petition seeks to invalidate these provisions on Equal Protection grounds; the Coalition simply offers another constitutional theory that requires the Court to use the same level of scrutiny (*i.e.*, rational basis) as the Equal Protection claim. Finally, the proposed Petition brings, as an alternative to the Commerce Clause extraterritoriality claim, a *Pike* balancing cause of action that will likewise consider adverse impacts on interstate commerce (Count Three).

² Using the original Petitioners’ First Amended Complaint as a reference, the Coalition’s proposed causes of action match-up as follows: (i) Count I – Equal Protection (Manufacturers and Products) (Count Four of proposed Complaint); (ii) Count II – Commerce Clause (Extraterritoriality) (Count One); (iii) Count III – Due Process and Equal Protection (Definition of “Tobacco Product”) (Count Six); and (iv) Equal Protection – (Retailers) (Count Six).

Accordingly, there are issues of law and fact that both Petitions share. Permitting the Coalition to intervene in this action will therefore promote judicial economy to the benefit of the Court, the original Petitioners, the Coalition, and the Respondents as well.

2. *The Unopposed Motion to Intervene is Timely*

As the Coalition is proposing to intervene at the early pleadings stage of the litigation, timeliness should not be a concern. First and foremost, the Court recently entered a case management plan agreed-to by the parties. Case Mgt. Plan (Dkt. # 19). Therein, the parties stipulated to a September 18, 2015, deadline for all motions to intervene by a third party. The Coalition's unopposed motion and proposed Petition have been filed within this deadline.

Moreover, none of the litigation activities that typically give rise to timeliness concerns have occurred in this case. The original parties have exchanged pleadings, but have yet to propound any discovery. Neither side has identified expert witnesses or submitted expert reports. And certainly, no dispositive motions have been filed to date.

Finally, the Coalition is willing to adopt the terms of the current case management plan. As such, counsel for the original Petitioners and the Coalition have already agreed to coordinate on factual discovery and expert reports to the extent practicable so as to minimize any duplication or burdens on the Respondents.

3. *There Will Be No Prejudice to the Petitioners or Respondents*

Should the Court grant the Coalition's motion to intervene, no prejudice will ensue to any of the original parties. Because the relief sought by the Petitioners and the Coalition is identical – a declaration that the statute (or portions thereof) is unconstitutional and that the state should be enjoined from enforcing its provisions – the Respondents do not risk suffering any losses other than those that they would experience under the current Petition. Likewise, the same form

of declaratory and injunctive relief will inure to the benefit of the Petitioners under the proposed Petition, as they are similarly situated to the Coalition members (*e.g.*, e-liquid manufacturers and retailers), even if the motion to intervene is granted. In short, the Coalition's proposed Petition does not materially change what is at stake in this litigation.

Further, as already discussed above, the Coalition is willing to abide by the terms of the case management order and coordinate its efforts with those of the Petitioners. As the original action has only yielded an exchange of pleadings, the Respondents will also be able to combine discovery requests and otherwise avoid duplicative efforts as the case moves forward. In other words, the parties and this Court should have no trouble integrating the proposed Petition and causes of action into the instant case. Indeed, none of the original parties oppose this motion.

4. *The Coalition Will Be Prejudiced if the Motion is Not Granted*

The Coalition, on the other hand, would suffer prejudice if it is not permitted to intervene in this case. First, the original Petitioners will not be able to adequately represent the Coalition's interests. Although the Petitioners and Coalition generally bring the same types of constitutional claims, the Coalition is seeking relief on additional causes of action that do not appear in the original Petition. For instance, the Coalition seeks to specifically address concerns regarding the commercial kitchen standards and security requirements. Second, if the motion is not granted and the Coalition is forced to file a separate action, there is a risk of conflicting decisions even though the same statute and constitutional issues are involved.

Finally, the Coalition represents a broader spectrum of the e-vapor community than the current Petitioners. While Petitioner Rocky Mountain ECigs is a relatively large e-liquid outfit, the two remaining Petitioner manufacturers are start-ups, and the Petitioner retailer (Derb E Cigs) owns a single shop in Indiana. The Coalition members, by contrast, include some of the

largest e-liquid manufacturers in the country, who also operate as nationwide distributors and retailers. As a result, we believe that the Court and this litigation will benefit from the industry-wide perspective that these larger companies bring to the table, whether that perspective regards industry standards in manufacturing, compliance challenges faced throughout the supply chain, or the economic costs that will be brought to bear on e-liquid companies.

III. ASSOCIATIONAL STANDING

The Coalition also has “associational standing” to intervene in this case on behalf of its members.³ The Seventh Circuit and this Court follow the familiar three-pronged test for associational standing as set forth by the Supreme Court in *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 342 (1977). Specifically, the Coalition must show that: (i) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Retired Chicago Police Ass’n v. Krislov*, 76 F.3d 856, 862-63 (7th Cir. 1996); *Greater Indianapolis Chapter of the NAACP v. Ballard*, 741 F. Supp. 2d. 925, 931 (S.D. Ind. 2010). The first two prongs flow from Article III constitutional requirements, while the last prong is prudential in nature. *Indiana Protection and Advocacy Serv. Comm’n*, 642 F. Supp. 2d 872, 878 (S.D. Ind. 2009). As discussed below, the Coalition satisfies each of these required elements.

A. The Coalition Members Have Standing To Sue Individually

As to the first prong, the Coalition is comprised of members who would have standing to sue in their own right. To demonstrate individual standing, this Court requires an association to meet three requirements: (a) a member must have suffered an “injury-in-fact” that is both

³ The Coalition is not proceeding under a theory of “organizational standing” – *i.e.*, it is not seeking to intervene on its own behalf or claiming that it has suffered any injury to itself.

concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; (b) the injury must be fairly traceable to the challenged action; and (c) it must be likely that a favorable decision will redress the injury. *Perdue v. Individual Members of the Indiana State Bd. of Law Examiners*, 266 F.R.D. 215, 221 (S.D. Ind. 2010). Attached to this motion are several declarations submitted by members of the Coalition – Mt. Baker Vapor and Vapor Shark – showing that they would have standing to sue individually.

1. The Members Have Suffered An Injury-In-Fact

In its Petition, the Coalition alleges that its members have suffered and/or will suffer an injury-in-fact. The Indiana General Assembly passed HEA 1432, as amended by SEA 463, in May 2015. Intervenor Pet. at ¶ 5. The law is now on the books. As such, Coalition members, including Mt. Baker Vapor and Vapor Shark, are subject to the statute's provisions governing e-liquid manufacturers, distributors, and retailers. For example, each declarant produces its own premium e-liquids and currently sells those products into Indiana. Specifically, they each sell e-liquids to individual customers and retailers in the state. Vapor Shark also sells e-liquids manufactured by other companies into Indiana, while Mt. Baker Vapor markets its products to Indiana wholesalers. Each company intends to continue selling e-liquids into Indiana pending the outcome of this litigation. Davis Decl. at ¶¶ 4-5; Walters Decl. at ¶¶ 4-5.

Although the Commission is not authorized to begin enforcing the statute until July 1, 2016, Coalition members have already begun reviewing the statute to determine how to comply. Davis Decl. at ¶ 5; Walters Decl. at ¶ 5. Prior to that date, members will be required to take numerous actions so that they are not subject to an enforcement action. In particular, they must submit a permit application to the Commission before June 30, 2016 (IC 7.1-7-4-1). That application must show, among other things, that the applicant: (a) can retrofit or build a new

facility that complies with the Indiana commercial kitchen standards for cleanliness and sanitization; (b) has hired an independent security firm with specified certifications and qualifications to install and operate a high level security system at the manufacturing facility; (c) authorizes the Commission to conduct “random” on-site inspections of its production plant; and (d) can meet numerous other manufacturing requirements (*e.g.*, selling e-liquid bottles that have child proof caps and tamper-resistant packaging). *Id.*

The Coalition members, however, have become increasingly concerned based on their review of the statute that they will not be able to comply with some of the requirements and that various provisions are, in fact, unconstitutional. Davis Decl. at ¶ 5; Walters Decl. at ¶ 5. As discussed above, the proposed Petition challenges the commercial kitchen, security, and audit requirements on various constitutional grounds. *See, e.g.*, Intervenor Pet. at ¶¶ 32-41.

Moreover, Coalition members who act as wholesalers or retailers selling e-liquids into Indiana may also have to obtain, under Indiana’s regulations governing “tobacco products,” a tobacco distributor license or sales certificate (IC 7.1-7-5-1(c)). *See, e.g.*, Walters Decl. at ¶ 5. But as previously noted, e-liquid does not contain tobacco. While many e-liquids are made with nicotine, that substance is chemically and materially distinct from tobacco itself. *See, e.g.*, Intervenor Pet. at ¶ 44. As a result, it violates the Due Process Clause to define e-liquids as “tobacco products” under Indiana law or otherwise regulate e-liquid distributors and retailers under the state’s tobacco regulations.

Accordingly, the Coalition’s members, including Mt. Baker Vapor and Vapor Shark, meet the injury-in-fact element of standing.

2. *The Alleged Constitutional Injuries Arise From the Statute's Provisions*

The Coalition's injuries are also directly traceable to the Indiana statute. Manufacturers, distributors, and retailers will be required to comply with various provisions that have been alleged in the proposed Petition to violate both the U.S. and Indiana Constitutions. It should go without saying that infringing on one's constitutional rights unquestionably results in an injury-in-fact. Indeed, that is precisely what has transpired as the Coalition members have been forced to start meeting these obligations under the Indiana statute. Further, as a practical matter, once the July 2016 date passes, the Coalition members will either have to exit the Indiana e-liquid market or risk being targeted in an enforcement action for alleged non-compliance. Under either scenario, the Coalition members will have suffered a cognizable injury.

3. *A Favorable Decision will Address the Coalition's Injuries*

Finally, the relief sought by the Coalition members in its proposed Petition will address the alleged constitutional harms. In particular, the Coalition has requested a declaratory judgment that the challenged regulations – *i.e.*, the commercial kitchen, security, and audit requirements, as well as the definition of “tobacco product” – be found unconstitutional and that an injunction be issued prohibiting Respondents from enforcing those provisions. Indeed, if this Court grants the Coalition's request for relief, many of its members expect that they will be able to comply with the remaining parts of the statute and continue selling e-liquids into Indiana.

B. The Lawsuit is Germane to the Coalition's Organizational Purposes

With respect to the second prong of associational standing, the proposed Petition seeks to advance the very interests that the Coalition was formed to promote. The Coalition's members include not only some of the largest e-liquid companies in the United States, but also smaller e-vapor businesses. While they all agree that the e-vapor industry should be subject to some

government oversight, any such laws and regulations should be reasonable, equally applied to similarly situated persons, and appropriately tailored to the product types and based on sound science. The Coalition was, therefore, established to advocate for the safe use of e-vapor products through sensible and responsible statutes and regulations. The Coalition, including Board of Directors members Mt. Baker Vapor and Vapor Shark, intends to carry out this charge by engaging governmental and civic organizations, including state and federal courts. Davis Decl. at ¶ 2; Walters Decl. at ¶ 2.

The Indiana statute is a perfect example of a state law that goes beyond a reasonable regulation of the e-vapor industry. It imposes expensive and unduly burdensome requirements on out-of-state e-liquid manufacturers, some of which may be unattainable, while at the same time linking the right of e-liquid retailers to do business in Indiana on whether their suppliers are able to comply with an untenable statute. Even more concerning, Indiana has chosen to regulate the e-vapor industry, including retailers and distributors, through unconstitutional provisions that will leave Coalition members little choice but to pull out of the Indiana e-liquid market. The proposed Petition is, therefore, an attempt to avoid this unfortunate outcome and, instead, refocus efforts toward a regulatory scheme that is tailored to safety concerns that are genuinely shared by the e-vapor industry, the public, and the State of Indiana.

C. Individual Coalition Members will not be Required to Participate

Finally, with regard to the last prong of associational standing, the Coalition does not assert any claims nor request any relief that requires the participation of individual Coalition members in the lawsuit. Courts routinely hold that this element is satisfied where the association does not seek damages on behalf of its members, but instead only asks for declaratory and injunctive relief. *See, e.g., Perdue*, 266 F.R.D. at 221. In the instant case, the Coalition only

requests declaratory relief and an injunction. It seeks to have the Court declare invalid and enjoin certain requirements set forth in the statute as unconstitutional. No damages are sought.

IV. CONCLUSION

For the foregoing reasons, the Coalition respectfully moves this Court to grant it intervenor status under Fed. R. Civ. P. 24(b).

Dated: September 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015 a copy of the foregoing document was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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