Testimony for the Regulatory Fairness Board Public Hearing
June 29th, 2012

My name is Darcie Couture, and I am currently the Lead Scientist and Principal of Resource Access International in Brunswick, Maine. I started this company in March of this year, after resigning my position with the state of Maine Department of Marine Resources, where I worked for seven years as the Director of the Biotoxin Monitoring ("Red Tide") Program. I was responsible for developing an innovative Red Tide program that became recognized by the shellfish industry, as well as the research community and federal agencies, as a benchmark of excellence at a national level. I left my position when it became clear to me that the personnel and infrastructure of state government were limiting any further progress, and I realized that if I wanted to continue to achieve greater things, I would need to move on to the private sector to do so.

In the three months since I left state government, I have become the only private lab in the entire country that has been inspected and certified by the FDA to run Red Tide testing that may be used to make regulatory decisions. With the invoices I will be sending out tomorrow, I will have grossed just over $100,000 in revenue, every penny of which has come from clients in other states (New Hampshire, Massachusetts and New Jersey). I have recently hired a full-time employee, and I expect to hire another full-time employee by the end of the summer. My projected gross for 2012 is around $300,000. While I am very pleased to bring in money "from away" and pay my share of that money as taxes and staff salary right here in my home state of Maine, it is noteworthy that the Department of Marine Resources in my own state does not yet seem to be interested in discussing the possibility of using my services to replace what they are currently doing in the state program. I expect that part of the reason is some sour grapes over my departure this spring, and a sense that they want to show that they can go on just fine without me, but in the strictest business sense, I have lab services available right now that could replace all of the work being done in two separate facilities being fully staffed and maintained by the DMR, and while we should certainly do the math, it is generally true that the most expensive way to do any job is to let the state do it, with the inefficiencies that arise due to union contracts and other government operational issues.

As I understand it, the mission of this Board is to identify specific state rules and regulations that may unreasonably impede business sustainability and growth; I would submit that the current structure of many programs within state government, by their very existence, are impeding the sustainability and growth of many businesses in the private sector who are able to perform the same services and deliver a better quality product at a lower cost, if they were given the opportunity to perform the work. Although the Governor has made some very encouraging statements regarding this issue, essentially stating that “if you can find it in the Yellow Pages, then the state shouldn’t be doing it”, the reality is that if the state were to take an honest look at all of the services that could be transitioned to the private sector, it would mean the loss of operating budgets and precious state positions, which is historically intolerable to any state Department head. One example that I experienced first-hand during my tenure with the state was a "private lab meeting" back in the fall of 2011, which the legislature had directed the Department to orchestrate, after a few companies complained that they would like the opportunity to participate in some of the lab work that the state was doing, but had been denied the chance to do so. The mood at the meeting was clearly tense and awkward for some, with crossed arms and glares across the table, and although there was some information sharing that occurred, the general sense at the DMR was that it was all very nice that these private labs are interested in doing what we do, but they could never do it any cheaper, and besides, they could never pass the FDA inspection to become certified. Since I have managed to pass the FDA inspection and become certified in the private sector, this is clearly not an insurmountable issue. As to "doing it cheaper", a government agency does have an advantage of getting slightly better prices on consumable goods, but this savings cannot outweigh the carrying costs associated with maintaining facilities at the state level, which occupy large portions of several buildings, and of course the elephant in the middle of the room that no one wants to discuss is the fact that state employee salaries and benefits are significantly higher than their counterparts in the private sector, especially in this particular field. Also, private companies are not bound by the expensive, inefficient operating criteria that are an unavoidable part of the union contract for state workers, which limits work schedules, availability, and even expertise levels, all highly significant factors in a field of environmental science that often requires an innovative response to dynamic environmental conditions, and being available seven days a week, in order to provide the best service. And, quite frankly, my personal experience has shown me that although there

are some excellent staff in state government, there are also plenty of not-so-excellent staff, and I could easily hire one outstanding employee in the private sector who could do the work of two or three mediocre employees in state government.

I am not alone; there are several private labs and other companies who would all be interested in working on a plan to transition government work to the private sector, and I believe even more would surface if they realized that there was finally an opportunity to gain access to work that has otherwise been the exclusive territory of the state. I may be the only one who is speaking up about it at the moment, which I believe is partly because these folks are all too busy to continue to fight what they see as a losing battle, but also because there is an undercurrent in the marine industry that if you speak out against the Department, there will be retaliation in the form of delayed permits, or license requests denied, or any other number of business-unfriendly actions. Personally, I don't have any such concern, because I'm doing just fine with my out-of-state clients fully supporting my business, and have nothing to lose by taking this issue on full-force, and I also believe in moving ahead with what is the right thing to do, which is how I ended up here in my own company anyway.

I hope the Board will consider this impediment to Maine business which is essentially hidden in plain sight, and might consider looking into a serious, independent review of basic activities which the state is currently holding tight to itself, but which could mean significant job growth and an improvement upon the services being provided, if the private sector were given a reasonable chance to compete for the work.

Respectfully submitted,

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To: Sec. of State, Charles Summers, and Members of the Regulatory Fairness Board

From: Eric Mihan, CEO Bombadil LLC, Owner of Bangor Wine and Cheese Co.

I am here today seeking reconciliation on a matter that I've placed before the Dept. Of Public Health, Liquor Licensing Division. Having been denied my original proposal, I sought to find a resolution through several official channels, including the Secretary of State's Small Business Advocate, however all efforts to this point have been stymied by a seemingly uncaring Department Head who dismisses what I see as very relevant arguments with little more than a casual passing of the buck.

The following was Bangor Wine's original proposal, which shows that the existing language in Title 28-A allows for an off-premise licensee to resell liquor (specifically a fraction of a keg of beer) in sealed containers for consumption off the premises where sold.

Overview: Bombadil, LLC proposes to begin filling and selling 64 oz. "growlers," the refillable glass bottles used for tap-drawn beer, at our location at 86 Hammond Street, Bangor, ME.
These growlers will be filled by our staff from a custom-built tap unit that we will build, which will be capable of holding 1 full barrel of beer at one time (in 1/2, 1/4, or 1/6 Barrel units) and sealed for off-premise retail sale.

Bombadil, LLC has researched the legality of this proposal, and due to the following stipulations in Title 28-A, we believe it to be within the realm of Maine's statutes.

1) This proposal is for off-premise sale ONLY. Maine allows a licensed "retailer" to resell liquor "in the original container *or by the drink*, for the consumption on or *off premises where sold*" (28-A.2.27)
2) As an off-premise retailer, I am licensed "to sell liquor in *sealed bottles*, containers, *or* original packages *to be consumed off the premises where sold.*" (28-A.2.27A)
3) Per 28-A.714.2, "the bureau *may not deny* the wholesale and retail sale of malt liquor in a keg or *any fraction of a keg* to a purchaser entitled to purchase malt liquor.

In order to ensure we meet with state mandates, as well as to ensure quality standards for our product, we have created an adhesive seal to be placed across the top of every growler filled (see example attached.) This seal will have the signature of the responsible employee, as well as a date of when the growler was filled.

Title 28-A.724.2 clearly states the Department may NOT deny Bangor Wine's ability to do this, and yet this is precisely what has happened.

The original proposal was met with a letter from the Liquor Licensing division stating Bangor Wine could not proceed because we could only "sell the original containers which (we) receive from (our) wholesaler. (You) are not allowed to tap into a keg and dispense into smaller containers for resale. The law only allows small breweries to fill containers and on-premise establishments on the site of the brewery to sell these containers."

I immediately responded to Mr. Austin, via phone, stating that the law certainly seemed to allow for an off-premise licensee to do exactly what I proposed. Austin then attempted to pass the buck by citing "federal statute" as being the driving force behind his refusal. Once Mr. Austin finally cited the specific statute (27 U.S.C. 5412) I read the law thoroughly and found this law is NOT, in fact, to prohibit a retailer from reselling beer in refillable containers, but to prohibit a beer PRODUCER from reselling someone ELSE's beer as their own. It is a consumer protection law, with *Bangor Wine* being the consumer in question. It does not, in any way, prohibit Bangor Wine's proposal.

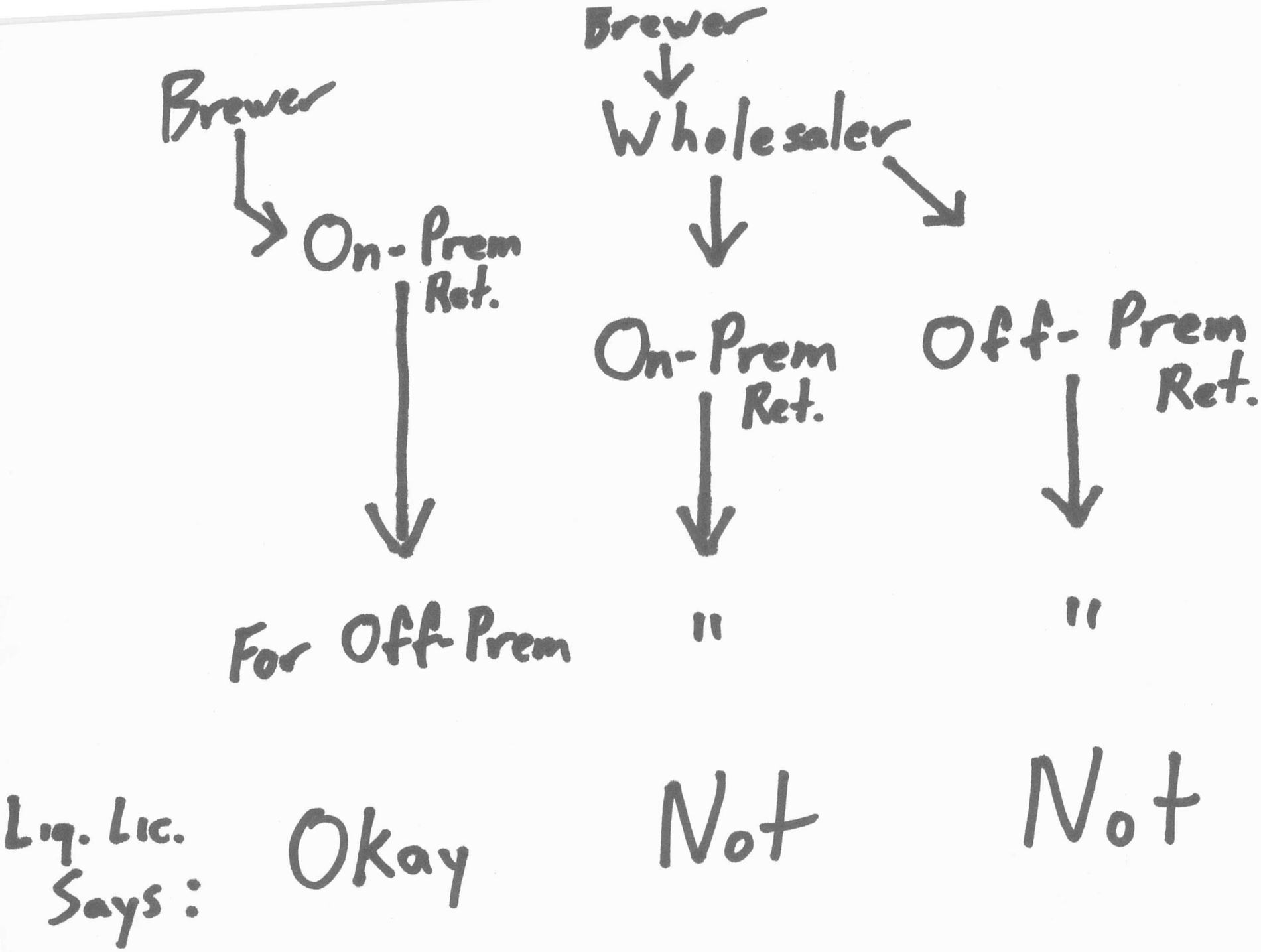
In addition, MANY other states in the union allow this form of retail, so how would the Department respond to that, if it is indeed illegal on a federal level?

Once I (through the Office of the Small Business Advocate) pointed this out, the Department reverted to their original refusal, that of: Title 28-A only allows small brewer licensees to sell beer in these re-fillable containers. When asked about the seeming dichotomy, the response was that the language that allows the practice for brewers is "explicit" in its description.

This is the ACTUAL language of Title 28-A, 1355, 2b:
"A holder of a small brewery license may sell, on the premises during regular business hours, malt liquor produced at the brewery by the bottle, by the case, or in bulk."

It also says, "a brewery or small brewery...may sell from the establishment at the site of the brewery, licensed for sale of alcoholic beverages to be consumed on the premises, malt liquor to be consumed off the premises..." In other words, a brewery's retail licensee establishment (on-premise) can sell growlers for consumption off-premises, but an ACTUAL off-premise retail licensee like Bangor Wine cannot? That is blatant discrimination, especially in light of the language allowing both on and off-premise licensees to do this cited earlier.

In summation, I find the language allowing retail licensees to sell these re-fillable containers to clear and concise. Refusal to allow one type of retail licensee the rights given to all under Title 28-A.2.27 is unlawful. Further, as the proposal falls into an important nationwide trend of specialized sale of alcoholic beverages, I recommend allowance of the practice to further Maine's business interests.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MAINE STATE SENATE
State House Station 3
Augusta, Maine 04333

Courtesy of
Senator Nichi S. Farnham
District # 32

June 26, 2012

Jeff Austin, Director
Dept. of Public Safety, Liquor Licensing Division
45 Commerce Drive, Suite 1
Augusta, ME 04333

Dear Mr. Austin,

The Bangor-area legislative delegation has been contacted by one of our business constituents, Eric Mihan, Bangor Wine & Cheese (Bombadil, LLC) in order to follow up on a business idea that he is pursuing with your department. As you may recall, Eric Mihan would like to be able to fill growler sized sealable containers for retail sale from his store. Bangor Wine & Cheese currently holds an off-premise license and is a successful business interested in exploring new ways to improve upon what they already do well.

The following is an overview of the Bangor Wine & Cheese proposal as an off-premise licensee to resell liquor (specifically a fraction of a keg of beer) in sealed containers for consumption off the premises where sold.

Overview: Bombadil, LLC proposes to begin filling and selling 64 oz. "growlers," the refillable glass bottles used for tap-drawn beer, at their current location at 86 Hammond Street, Bangor, ME.

These growlers will be filled by Bangor Wine & Cheese employees, from a custom-built tap unit capable of holding 1 full barrel of beer at one time (in 1/2, 1/4, or 1/6 Barrel units), and sealed for off-premise retail sale.

An adhesive seal will be placed across the top of every growler filled. This seal will have the signature of the responsible employee, a date of when the growler was filled, and the type manufacturer of the beer.

We ask that you continue to explore this proposal with Eric Mihan (Bangor Wine & Cheese) in order to find a way to make this idea a reality.

Sincerely,

Adam Goode
State Representative

Sara Stevens
State Representative

Douglas Damon
State Representative

Jim Parker
State Representative

Nichi Farnham
State Senator

Testimony for the Regulatory Fairness Board
June 29, 2012

My name is Bruce Chamberlain, and I currently work as a consultant to several Maine shellfish dealers, after recently retiring from my position with the state of Maine Department of Marine Resources, where I worked as a head of the shellfish plant sanitation program for 35 years.

I am speaking before you today on behalf of several Maine shellfish dealers, who wish to remain anonymous due to fear of retaliation from the Department of Marine Resources. The issue that is impacting them all is one that is specific to dealers with closed wet storage systems, which are used to purge shellfish to enhance product quality and reduce the presence of bacteria. It is currently acceptable to openly harvest shellfish in Maine from areas with up to 14 fecal coliforms (sourced from sewage, disease-causing bacteria) per 100 mls of seawater; these clams may go directly to the consumer, without any further treatment or processing. The current standard for wet storage systems requires a level of less than 1 total coliform (naturally occurring, non-disease) per 100 mls of seawater. The issue now is that during the spring of 2012, the Department of Marine Resources Water Quality Labs changed the test methods used for this procedure, which resulted in a more sensitive test, but the Department did not take into account, or attempt to accommodate for, a new critical range of values to go along with the more sensitive test. In essence, dealers who had hundreds of pristine scores under the "old" method (multi-tube), were now failing the tests using the "new" method (membrane filtration). Under the federal guidelines in the National Shellfish Sanitation Program Model Ordinance, this situation creates a critical deficiency at these wet storage plants, which requires immediate correction or a closing of the plant area that is affected by this deficiency. These dealers are now at risk of the loss of hundreds of thousands of dollars worth of product, until the situation is addressed.

There are two remedies available to fix the problem; first, in the immediate term, the Department needs to revert to the "old" testing method temporarily, which is still approved at the national level for use, in order to avoid massive economic damage to our shellfish industry. Second, this issue of a more sensitive test method without an appropriately scaled correction factor needs to be further developed, and submitted as a new issue before the next biennial meeting of the Interstate Shellfish Sanitation Conference in the fall of 2013.

This new, more sensitive test was proposed and implemented by the Maine DMR because it was easier for the staff to run; the unintended and completely overlooked consequences of this new test method being employed by the Maine DMR are that 5 of Maine's major shellfish dealers, who easily handle 25% of the soft-shell clams produced in the state, are now in jeopardy of being shut down until they can successfully meet these new, stricter standards that are associated with the "new" test method, which is only being used in Maine, and which consequently places our

Maine dealers at an economic disadvantage on the national level with their counterparts from other states and countries.

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