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No. 53341-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BLUE SPIRITS DISTILLING LLC,
Plaintiff/Appellant,

v.

WASHINGTON STATE LIQUOR & CANNABIS BOARD,
Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. ASSIGNMENTS OF ERROR.....	2
III. ISSUES PRESENTED.....	2
IV. STATEMENT OF THE CASE.....	2
A. Factual Background	2
B. Procedural Background.....	3
V. ARGUMENT.....	5
A. Standard of Review.....	5
B. The Distribution and Sale of Spirits in Washington Is Regulated by the State.....	6
C. The Appellate Courts Address the Limits of the Board’s Authority to Impose Fees	9
D. The Board Lacked Authority to Impose a 17 Percent Fee on Blue Spirits’ Gross Revenues from Retail Sales to Consumers.....	12
E. Blue Spirits Pled a Cognizable Claim for a Refund	13
1. To obtain a refund, Blue Spirits was not required to bring, and could not bring, an APA claim.....	14
2. An APA claim is not a mechanism that can provide Blue Spirits with the relief it has requested	16
3. Blue Spirits is excused from exhausting administrative remedies	17
F. Blue Spirits Was Entitled to Summary Judgment on Its Refund Claim.....	22
G. Blue Spirits Is Entitled to an Award of Reasonable Attorney Fees.....	22
VI. CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page
Cases	
<i>Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd., 182 Wn.2d 342, 340 P.3d 849 (2015)</i>	7, 9, 10
<i>Cost Mgmt. Servs., Inc. v. City of Lakewood, 178 Wn.2d 635, 310 P.3d 804 (2013)</i>	21
<i>Credit Gen. Ins. Co. v. Zewdu, 82 Wn. App. 620, 919 P.2d 93 (1996)</i>	21
<i>Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 881 P.2d 216 (1994)</i>	5
<i>Dioxin/Organochlorine Ctr. v. Dep't of Ecology, 119 Wn.2d 761, 837 P.2d 1007 (1992)</i>	20
<i>Hart v. Clark Cty., 52 Wn. App. 113, 758 P.2d 515 (1988)</i>	14
<i>Judd v. Am. Tel. & Tel. Co., 152 Wn.2d 195, 95 P.3d 337 (2004)</i>	17
<i>Ledgerwood v. Lansdowne, 120 Wn. App. 414, 85 P.3d 950 (2004)</i>	14
<i>Probst v. Dep't of Ret. Sys., 185 Wn. App. 1015, No. 45128-0-II, 2014 WL 7462567 (Wash. Ct. App. Dec. 30, 2014) (unpublished)</i>	17
<i>Reid v. Pierce Cty., 136 Wn.2d 195, 961 P.2d 333 (1998)</i>	5
<i>Retail Store Emps. Union, Local 1001 Chartered by Retail Clerks Int'l Ass'n, AFL-CIO v. Wash. Surveying & Rating Bureau, Wash. Bureau, 87 Wn.2d 887, 558 P.2d 215 (1976)</i>	21

TABLE OF AUTHORITIES
(continued)

	Page
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992).....	14
<i>Ruvalcaba v. Kwang Ho Baek</i> , 175 Wn.2d 1, 282 P.3d 1083 (2012).....	5
<i>Smoke v. City of Seattle</i> , 132 Wn.2d 214, 937 P.2d 186 (1997).....	18
<i>State v. Barbee</i> , 187 Wn.2d 375, 386 P.3d 729 (2017), <i>as amended</i> (Jan. 26, 2017)	20
<i>Stevedoring Serv. of Am., Inc. v. Eggert</i> , 129 Wn.2d 17, 914 P.2d 737 (1996).....	18
<i>Washington Restaurant Association v. Washington State Liquor Board</i> , 200 Wn. App. 119, 401 P.3d 428 (2017).....	passim
<i>Wells Fargo Bank, N.A. v. Dep't of Revenue</i> , 166 Wn. App. 342, 271 P.3d 268 (2012).....	16
 Statutes	
Administrative Procedures Act	passim
Equal Access to Justice Act	22
RCW 4.84.340(5).....	22
RCW 4.84.350(1).....	22
RCW 34.05.510	14, 17
RCW 34.05.510(1).....	15, 16, 17, 19
RCW 34.05.534(3).....	20

TABLE OF AUTHORITIES
(continued)

	Page
RCW 34.05.574(1).....	16
RCW 34.05.574(3).....	16
RCW 43.01.072	19
RCW 43.88.170	19
RCW 66	passim
RCW 66.04.010(42).....	6
RCW 66.08.030	8
RCW 66.08.030(4).....	10, 11
RCW 66.08.050	15, 18
RCW 66.24.055	8
RCW 66.24.055(1).....	7
RCW 66.24.055(3).....	7, 9
RCW 66.24.055(3)(a)	7, 9
RCW 66.24.055(3)(c)	7, 9, 10
RCW 66.24.055(4).....	7
RCW 66.24.140	passim
RCW 66.24.140(1).....	6
RCW 66.24.160	8
RCW 66.24.630	8
RCW 66.24.630(1).....	7

TABLE OF AUTHORITIES
(continued)

	Page
RCW 66.24.630(3)(a)	8
RCW 66.24.630(4).....	9
RCW 66.24.630(4)(a)	8, 12
RCW 66.24.630(4)(b)	8
RCW 66.24.630(5).....	8
RCW 66.24.640	passim
RCW 66.28.330(4).....	9
RCW 82.32.060	15
RCW 82.32.170	15
RCW 82.32.180	15
Rules	
CR 12(b)(6).....	5
Regulations	
WAC 314-28-070.....	8
WAC 314-28-070(3).....	passim
WAC 314-28-070(3)(a)	12
Constitutional Provisions	
Wash. Const. art. IV, § 6.....	14
Other Authorities	
<i>Compensation, Black's Law Dictionary</i> (11th ed. 2019).....	15

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington Supreme Court and this Court have addressed the scope of the license fees that in-state distillers are required to pay to blend, rectify, and bottle their own spirits, and then distribute and sell those spirits to other retailers and to consumers. The Washington State Liquor and Cannabis Board (the “Board”) is authorized to collect from distillers the fees allowed by the applicable statutes and no more. Because the applicable statutes require that licensed distillers pay a \$2,000 annual fee, but do not also require payment of any revenue-based fees, the Board exceeded its authority when it imposed revenue-based fees on licensed distillers’ sales of their spirits to consumers for off-premises consumption. Appellant Blue Spirits Distilling LLC (“Blue Spirits”) is entitled to a refund of the revenue-based fees unlawfully collected by the Board.

This action is the proper and only procedural mechanism available to Blue Spirits to obtain a refund. The Board cannot be compelled under the Administrative Procedures Act to refund to Blue Spirits the fees the Board collected unlawfully. And under the circumstances, exhaustion of administrative remedies is not required. The Court should reverse the dismissal of Blue Spirits’ refund action and remand this matter with instructions that judgment be entered in Blue Spirits’ favor.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Blue Spirits' refund claim. CP 352–53.
2. The trial court erred in denying Blue Spirits' motion for summary judgment on its refund claim. CP 318–20.

III. ISSUES PRESENTED

1. Whether the trial court erred when it refused to grant Blue Spirits' claim for a refund of fees unlawfully collected by the Board.
(Assignment of Error No. 1.)
2. Whether the trial court erred when it ruled that Blue Spirits' refund claim was not properly before the trial court. (Assignment of Error Nos. 1 and 2.)

IV. STATEMENT OF THE CASE

A. Factual Background

Blue Spirits is a Washington spirits distiller. CP 2 ¶ 5. It obtained its distiller's license in 2012. CP 2 ¶ 8. Under the authority granted to it by that license, Blue Spirits sells its spirits to retailers selling for on- and off-premises consumption, and to consumers for on-premises sampling and off-premises consumption. CP 2 ¶¶ 5–7; *see generally* CP 19–34. Blue Spirits has never possessed a spirits distributor's license or a spirits retailer's license, and the Board has not required it to do so.

Since 2012, Blue Spirits has paid to the Board the \$2,000 annual license fee imposed on distillers. CP 19 ¶ 2. As required by WAC 314-28-070(3) and (3)(a), it also has paid 17 percent of its gross revenues from sales to customers for off-premises consumption and, until recently, 10 percent of its gross spirits revenue on sales to licensees allowed to sell spirits for on- or off-premises consumption.¹ CP 19–347. By January 2018, Blue Spirits had paid to the Board fees totaling more than \$250,000. CP 2 ¶ 9; CP 19–247; CP 298 ¶ 9.

B. Procedural Background

In 2017, this Court issued its opinion in *Washington Restaurant Association v. Washington State Liquor Board*, 200 Wn. App. 119, 401 P.3d 428 (2017), holding that the Board overstepped its statutory authority in promulgating a regulation that required holders of distiller’s licenses to pay, in addition to their \$2,000 annual license fee, a fee of 10 percent of gross spirits revenues if the distillers distributed their own spirits. The regulation was based on a statute requiring that spirits distributor licensees pay a revenue-based fee. There is no comparable statutory requirement for distiller licensees. This court held the Board was not authorized to impose on licensed distillers *any* licensing fee in addition to the \$2,000 annual license fee. *See* 200 Wn. App. at 131, 401 P.3d 428.

¹ After the first 27 months of licensure, the 10 percent fee dropped to five percent. *See* WAC 314-28-070(3).

Shortly after this court issued its *Washington Restaurant Association* ruling, Blue Spirits sent a letter to the Board requesting a refund of the license fees collected pursuant to WAC 314-28-070(3) and (3)(a). CP 297–305. The Board at that time was conducting an audit of Blue Spirits at its two business locations. CP 297–98. When it did not receive a response to its letter, Blue Spirits initiated this action. CP 1–3; CP 298 ¶¶ 6–7.

Blue Spirits asserted one cause of action in its complaint – a claim for a refund of the fees it had paid pursuant to WAC 314-28-070(3) and (3)(a). CP 1–3. Shortly after filing suit, Blue Spirits moved for summary judgment. *See* CP 9–11; CP 12–18. Without reaching the merits, the court denied Blue Spirits’ motion, stating in a letter opinion it was “not persuaded that it can compel any refund of fees through this judicial process.” CP 317.

One month after the trial court rendered its opinion, the Board issued audit results to Blue Spirits. CP 321–26. In a cover letter, the Board’s Chief Financial Officer reported the audit had been delayed because the Board “underst[oo]d that the validity of applying [the 17 percent retail sales] fee to distillers is being questioned and the delay in issuing the audit has been due to waiting for a possible resolution to this question.” *Id.* Despite the clear language in this Court’s *Washington*

Restaurant Association ruling, the Board said it would not “alter the audit results” (*i.e.*, issue any refund) “based on speculation about the potential for the rules to be invalidated.” *Id.*

The court entered an order consistent with its letter ruling denying Blue Spirits’ summary judgment motion. CP 318–20. Blue Spirits unsuccessfully sought discretionary review. *See* Ruling Denying Review, Case No. 52093-1-II, issued September 13, 2018. The Board thereafter filed a CR 12(b)(6) motion to dismiss, which the court granted on February 8, 2019. CP 352–53. This appeal followed.

V. ARGUMENT

A. Standard of Review

Dismissal of a claim under CR 12(b)(6) is reviewed *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Dismissal is appropriate only if “it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *Id.*, 881 P.2d 216. When analyzing the trial court’s ruling, the Court must accept as true the allegations in the complaint and any reasonable inferences therefrom. *See Reid v. Pierce Cty.*, 136 Wn.2d 195, 200–01, 961 P.2d 333 (1998).

An order denying a motion for summary judgment also is reviewed *de novo*. *See Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

B. The Distribution and Sale of Spirits in Washington Is Regulated by the State

Until a few years ago, spirits² were sold in Washington only through state-owned liquor stores and distribution centers. *See Wash. Rest. Ass'n*, 200 Wn. App. at 123, 401 P.3d 428. With the passage of Initiative 1183 (the “Initiative”) in November 2011, voters in Washington privatized the distribution, sale, and promotion of spirits in the state. *See id.*, 401 P.3d 428. The Initiative is codified in Title 66 RCW. Under that title, there now are several different types of licenses addressing the terms and conditions on which spirits may be distributed and sold in the state.

First, with a distiller’s license, a licensee is permitted to blend, rectify, and bottle its own spirits, “[s]ell spirits of its own production for consumption off the premises,” and provide free, or for a charge, samples of its spirits to persons on the distillery’s premises. RCW 66.24.140. A person holding a distiller’s license also “may act as a retailer and/or distributor to retailers selling for consumption on or off the licensed premises of spirits of its own production.” RCW 66.24.640. To obtain and hold a distiller’s license, a licensee must pay a fee of \$2,000 per year. RCW 66.24.140(1).

² The term “spirits” refers to “any beverage which contains alcohol obtained by distillation, except flavored malt beverages, but including wines exceeding twenty-four percent of alcohol by volume.” RCW 66.04.010(42).

Second, with a spirits distributor license, a licensee is permitted to purchase spirits from manufacturers, distillers, or other suppliers and then resell the spirits to a variety of establishments. RCW 66.24.055(1); see *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 347, 340 P.3d 849 (2015). To obtain and hold a spirits distributor license, a licensee must pay annually a fee of \$1,320 for each licensed location, RCW 66.24.055(4), and pay monthly a fee based on total revenue from the licensee's sale of spirits, RCW 66.24.055(3). During the first 27 months of licensure, the fee is 10 percent of spirits sales revenues; thereafter, the fee drops to five percent. RCW 66.24.055(3)(a). Holders of spirits distributor licenses also were required to pay a "shortfall fee" if the collective payment of spirits distributor license fees failed to total \$150 million by March 31, 2013. See RCW 66.24.055(3)(c). The "shortfall fee" and the 10 percent fee were "designed to replace the revenue that the State lost when spirits distribution was privatized." *Ass'n of Wash. Spirits & Wine Distribs.*, 182 Wn.2d at 348, 340 P.3d 849.

Third, with a spirits retail license, a licensee is permitted to sell spirits to consumers for consumption off the licensed premises and to sell spirits to retailers licensed to sell spirits for consumption on the premises. RCW 66.24.630(1). This license can be issued "only for premises

comprising at least ten thousand square feet of fully enclosed retail space within a single structure.” RCW 66.24.630(3)(a). To obtain and hold a spirits retail license, a licensee must pay an annual fee of \$166 and, except for craft distilleries, pay quarterly a fee of 17 percent of spirits sales revenues. RCW 66.24.630(5), (4)(a), (b).

Acting under its statutory authority to promulgate regulations prescribing the fees payable in respect of licenses issued under Title 66, the Board adopted WAC 314-28-070. In pertinent part, the regulation provides as follows:

A distillery or craft distillery must pay ten percent of their gross spirits revenue to the board on sales to a licensee allowed to sell spirits for on- or off-premises consumption during the first twenty-seven months of licensure and five percent of their gross spirits revenues to the board in the twenty-eighth month and thereafter.

(a) A distillery must pay seventeen percent of their gross spirits revenue to the board on sales to customers for off-premises consumption.

WAC 314-28-070(3). For this regulation, the Board cited as statutory authority RCW 66.08.030 (the grant of general rule-making authority), RCW 66.24.055 (“Spirits distributor license”), RCW 66.24.160 (“Spirits importer’s license—Fee”), RCW 66.24.630 (“Spirits retail license”), and RCW 66.24.640 (“Licensed distillers operating as spirits retailers/distributors”). Notably, although the Board applies this

regulation to licensed distilleries, the Board omitted any reference to RCW 66.24.140 (“Distiller’s license—Fee”).

The statutory references show that the fee established under subsection (3) of the regulation (*i.e.*, the “10 percent fee”) was drawn from RCW 66.24.055(3)(a),³ and the fee established under subsection (3)(a) of the regulation (*i.e.*, the “17 percent fee”) was drawn from RCW 66.24.630(4). These are the statutes addressing spirits distributor licenses and spirits retail licenses. Neither statute mentions distiller’s licenses. In the statute addressing distiller’s licenses, there is no mention of a 10 percent fee or a 17 percent fee. *See* RCW 66.24.140.

C. The Appellate Courts Address the Limits of the Board’s Authority to Impose Fees

In *Association of Washington Spirits & Wine Distributors*, the Washington Supreme Court held that the Board properly did not require licensed distillers to contribute to the “shortfall fee” statutorily imposed on spirits distributor licensees even though distillers can act as their own distributors. 182 Wn.2d at 358, 340 P.3d 849. Although RCW 66.24.640 and RCW 66.28.330(4) provide generally that a distillery must comply with the applicable statutes and regulations relating to distributors if it chooses to act as a distributor of its own products, neither statute requires

³ The Board imposed on distillers the 10 percent fee from RCW 66.24.055(3)(a), but did not impose the “shortfall fee” from RCW 66.24.055(3)(c).

a licensed distiller also to obtain a spirits distributor license in order to distribute its own spirits. Ruling that those general statutes “must yield to a more specific statutory provision,” the court held the specific language of RCW 66.24.055(3)(c), which assigned liability for the shortfall fee to “persons holding spirits distributor licenses on or before March 31, 2013,” was controlling. *Id.* at 356–58, 340 P.3d 849. Licensed distillers therefore were not required to pay the shortfall fee. *Id.*, 340 P.3d 849.

Following the guidance set forth in the *Association of Washington Spirits & Wine Distributors* ruling, this court held in the *Washington Restaurant Association* case that the Board exceeded its statutory rule-making authority in adopting a regulation, *i.e.*, WAC 314-28-070(3), that imposed on distillers a 10 percent license fee that, by statute, is to be paid by spirits distributor licensees. 200 Wn. App. at 126–31, 401 P.3d 428.

The court explained that Title 66 “creates licenses permitting the distribution of spirits and establishes the fees associated with each license.” *Id.* at 127, 401 P.3d 428. After acknowledging the Board is authorized to make regulations “[p]rescribing the fees payable in respect of permits and licenses issued under [Title 66] for which no fees are prescribed in [Title 66],” and make regulations “prescribing the fees for anything done or permitted to be done under the regulations,” *id.* at 128, 401 P.3d 428 (quoting RCW 66.08.030(4) (brackets in original)), the court

pointed out that RCW 66.24.140 requires a licensed in-state distiller to pay an annual licensing fee of \$2,000, and RCW 66.24.640 permits a distiller to “act as a retailer and/or distributor to retailers selling for consumption on or off the licensed premises of spirits of its own production,” *id.*, 401 P.3d 428 (quoting RCW 66.24.640). Reading the two statutes together, the court concluded that “a distiller that obtains a license at a rate of only \$2,000 per year is permitted to distribute its own spirits under that license.” *Id.* at 129, 401 P.3d 428. “RCW 66.24.640 does not require a licensed distiller to obtain a spirits distributor license or pay an additional fee to distribute its own spirits.” *Id.*, 401 P.3d 428.

Rejecting the argument that RCW 66.08.030(4) and RCW 66.24.640 authorized the Board to require distillers to pay the 10 percent fee statutorily imposed on spirits distributor licensees, the court explained that the general rule-making authority granted to the Board did not prevail over RCW 66.24.140, which “specifically provides the scope and fees associated with a distiller’s license.” *Id.* at 131, 401 P.3d 428.

Moreover, although RCW 66.08.030(4) permits the Board to require a fee where no fee is prescribed in Title 66, RCW 66.24.140 imposes a \$2,000 license fee for distillers and it does not require any additional licensing fees. ***As a result, the Board is not authorized to impose an additional fee on licensed distillers.***

Id., 401 P.3d 428 (emphasis added; citation omitted).

D. The Board Lacked Authority to Impose a 17 Percent Fee on Blue Spirits' Gross Revenues from Retail Sales to Consumers

For the reasons stated in *Washington Restaurant Association*, the 17 percent fee established under WAC 314-28-070(3)(a) is just as invalid and unenforceable as the 10 percent fee established under WAC 314-28-070(3). The same unambiguous statutes that authorize a distiller to act as a distributor of spirits of its own production also authorize a distiller to act as a retailer of its own spirits. *See* RCW 66.24.140; RCW 66.24.640. And just as those statutes do not require a licensed distiller to obtain a spirits distributor license to distribute its own spirits, they also do not require a licensed distiller to obtain a spirits retail license to sell spirits of its own production to consumers for off-premises consumption.

Because WAC 314-28-070(3)(a) is based on a statute applicable only to “spirits retail licensees,” *see* RCW 66.24.630(4)(a), and because RCW 66.24.140 imposes a \$2,000 license fee for distillers and does not require any additional licensing fees, the Board acted outside its authority in mandating that Blue Spirits pay a fee of 17 percent of its gross spirits revenues on sales to consumers for off-premises consumption. Blue Spirits therefore is entitled to a refund of the 17 percent fees it has paid to the Board. Blue Spirits’ payment of those fees is undisputed.

E. Blue Spirits Pled a Cognizable Claim for a Refund

When it denied Blue Spirits' motion for summary judgment, the trial court stated Blue Spirits had not demonstrated "a procedural mechanism" by which the court could grant the requested relief. CP 319. The court suggested there "may be procedural mechanisms" to obtain relief (*e.g.*, a claim under the Administrative Procedures Act), but noted questions also had been raised about exhaustion of administrative remedies, and ultimately ruled it could not "compel any refund of fees through this judicial process." CP 317. Later, when dismissing Blue Spirits' complaint, the court based its ruling in part on its prior denial of Blue Spirits' motion for summary judgment and stated it "believes that a challenge to the rule at issue here can be properly brought, but has not been brought in this particular action." RP 17 (2/08/2019/Shackell Vol I).

The trial court erred. As explained below, not only was Blue Spirits' claim properly before the trial court, the Administrative Procedures Act ("APA") was inapplicable and exhaustion of administrative remedies was not required. The dismissal entered in favor of the Board should be reversed.

1. To obtain a refund, Blue Spirits was not required to bring, and could not bring, an APA claim

Blue Spirits' refund claim is a hybrid "based partly on an implied liability to repay money unlawfully received, and partly upon a theory of unjust enrichment." *Robinson v. City of Seattle*, 119 Wn.2d 34, 83, 830 P.2d 318 (1992). Plaintiffs commonly bring refund actions seeking monies invalidly collected by government entities. *See, e.g., Hart v. Clark Cty.*, 52 Wn. App. 113, 114–16, 118, 758 P.2d 515 (1988). Plaintiffs who bring refund claims pursuant to prior case holdings striking down invalid fees are "merely asserting a right that the Court has told them is theirs in law." *Robinson*, 119 Wn.2d at 79, 758 P.2d 515 (internal quotation marks and citation omitted). Indeed, "such plaintiffs' remedies lie solely in refund relief." *Id.* at 80, 758 P.2d 515.

It was error for the trial court to rule that the APA foreclosed judicial review of Blue Spirits' action. Superior courts retain original jurisdiction in all cases and over all proceedings unless the legislature vests *exclusive* jurisdiction elsewhere. Wash. Const. art. IV, § 6; *Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 419–20, 85 P.3d 950 (2004). While the APA "establishes the exclusive means of judicial review of agency action," RCW 34.05.510, the statute explicitly preserves original jurisdiction of Washington courts for "litigation in which the sole

issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim,” RCW 34.05.510(1). Blue Spirits’ refund claim for all spirits license fees paid to the Board falls squarely within the judicial review exception of RCW 34.05.510(1).

Blue Spirits’ claim is exactly the type of claim the Legislature intended be carved out from APA procedures. First, “compensation” means “[p]ayment of damages, or any other act that a court orders to be done by a person who has caused injury to another.” *Compensation, Black’s Law Dictionary* (11th ed. 2019). “Compensation” thus encompasses a court-ordered refund where the Board injured Blue Spirits economically by requiring the payment of fees the Board lacked authority to collect. CP 19–247; CP 297–98 ¶ 9.

Second, the Board lacks the statutory authority to determine Blue Spirits’ refund claim. Issuance or determination of a refund for excess spirits license fees paid is not among the statutory powers delegated to the Board. *See generally* RCW 66.08.050. The Board admitted as much. *See, e.g.*, CP 335 (“[T]here is no specific authority within Title 66 RCW that requires the Board to refund excess spirits fees it collected.”).⁴ Thus,

⁴ By way of comparison, the Court might look to the statutes giving the Department of Revenue authority to determine refunds when a taxpayer claims an overpayment. *See, e.g.*, RCW 82.32.060 (excess payment of tax, penalty, or interest–

under RCW 34.05.510(1), there is no requirement that Blue Spirits pursue its claim under the APA.

2. An APA claim is not a mechanism that can provide Blue Spirits with the relief it has requested

Under the APA, a court may either (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. RCW 34.05.574(1). In so doing, a court may award damages or compensation “only to the extent expressly authorized by another provision of law.” RCW 34.05.574(3). In the instant case, there is no provision of law expressly authorizing the refund of distillers’ license fees paid under an invalid regulation promulgated by the Board. Thus, under the APA, Blue Spirits could only obtain declaratory or injunctive relief. It could not obtain the *refund* relief it seeks.

Further, if Blue Spirits were to bring an APA claim in addition to its common law refund claim, it would be foreclosed from obtaining relief via the APA’s judicial review exception. *See* RCW 34.05.510(1); *Wells Fargo Bank, N.A. v. Dep’t of Revenue*, 166 Wn. App. 342, 349–53, 271 P.3d 268 (2012), *as corrected* (Apr. 18, 2012) (Wells Fargo’s amended

Credit or refund); RCW 82.32.170 (Reduction of tax after payment–Petition–Conference–Determination by department); RCW 82.32.180 (Court appeal–Procedure).

complaint contained both a request for a declaratory judgment and a claim for a refund and thus did not fit within the APA's exception for suits limited to money damages or compensation); *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204–05, 95 P.3d 337 (2004) (Judd's complaint contained both a request for injunctive relief and a claim for money damages and thus did not fit within the APA's exception for suits limited to money damages or compensation); *Probst v. Dep't of Ret. Sys.*, 185 Wn. App. 1015, No. 45128-0-II, 2014 WL 7462567, at *5 (Wash. Ct. App. Dec. 30, 2014) (unpublished) (plaintiffs foreclosed from seeking monetary relief under RCW 34.05.510(1) because they also sought declaratory relief and enforcement of the court's prior mandate pursuant to the APA).

3. Blue Spirits is excused from exhausting administrative remedies

The trial court also suggested that Blue Spirits was required to exhaust administrative remedies by seeking from the Board “an administrative decision . . . on the refund request.” CP 317. As an initial matter, because Blue Spirits' refund claim is proper, there is no exhaustion requirement. *See* RCW 34.05.510 (“[t]his chapter establishes the exclusive means of judicial review of agency action, *except* [t]he provisions of this chapter . . . do not apply” to a claim for money damages or compensation (emphasis added)). But even if the APA's exhaustion

requirement were applicable (it is not), Blue Spirits was excused from the exhaustion requirement on the following grounds.

a. The Board lacks the institutional competence to resolve Blue Spirits' refund claim and cannot provide the relief requested

When an agency lacks clearly defined mechanisms for resolving a claim, courts excuse plaintiffs from exhausting administrative remedies. *See Smoke v. City of Seattle*, 132 Wn.2d 214, 224, 937 P.2d 186 (1997); *see also Stevedoring Serv. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 43, 914 P.2d 737 (1996) (plaintiff not required to exhaust administrative remedies where administrative law judge lacked statutory authority to order reimbursement). A court may also excuse exhaustion if the agency is competent to adjudicate the issue presented, but the agency cannot grant the type of relief requested. *Smoke*, 132 Wn.2d at 224–25, 937 P.2d 186.

Here, the Board lacks the clearly defined mechanisms to resolve Blue Spirits' claim for a refund. There is no statutory, regulatory, or other grievance procedure available to licensees for collecting such a refund. *See generally* RCW 66.08.050. Moreover, issuance of a refund for excess spirits license fees paid is not among the Board's statutory powers. *See generally id.* Because the Board is unable to resolve the issue presented or provide the relief sought, Blue Spirits is excused from exhaustion.

The Board pointed to RCW 43.01.072 and RCW 43.88.170 when it argued that it had statutory authority to resolve the claim or grant a refund to Blue Spirits. *See, e.g.*, CP 261. The statutes authorize a state agency to issue refunds “[w]henver any law which provides for the collection of fees or other payments by a state agency does not authorize the refund of erroneous or excessive payments.” RCW 43.01.072; RCW 43.88.170. These statutes are inapposite because they only authorize agencies to make refunds when a statute provides for the collection of fees in the first place. Here, Title 66 *does not* permit the Board to collect any revenue-based fees from distillers. *See Wash. Rest. Ass’n*, 200 Wn. App. at 131, 401 P.3d 428.

Further, the Court should decline to adopt a reading of RCW 43.01.072 and/or RCW 43.88.170 as creating statutory authority for the Board to determine the refund claim. Such a reading would render RCW 34.05.510(1)’s APA exception meaningless. The exception applies when the “agency whose action is at issue does not have statutory authority to determine the claim.” RCW 34.05.510(1). But if an administrative agency “whose action is at issue” can just point to RCW 43.01.072 and/or RCW 43.88.170 as their “judicial authority” to determine the claim, they will always avoid the judicial review exception. The Court must avoid an interpretation that, like the Board’s argument, leads to an “unlikely,

absurd or strained consequence.” *State v. Barbee*, 187 Wn.2d 375, 389, 386 P.3d 729 (2017) (citation omitted), *as amended* (Jan. 26, 2017).

b. Exhaustion of administrative remedies would be futile

In the alternative, the Court may excuse Blue Spirits from exhausting administrative remedies because it would be futile. RCW 34.05.534(3); *Dioxin/Organochlorine Ctr. v. Dep’t of Ecology*, 119 Wn.2d 761, 776, 837 P.2d 1007 (1992). Blue Spirits made a direct request to the Board for a refund. CP 301–03. The Board never responded to this letter. *See generally* CP 321–26. Instead, the Board issued audit results to Blue Spirits that demonstrated the Board’s decision to ignore this Court’s ruling in *Washington Restaurant Association* and choose inaction in response to Blue Spirits’ claim for a refund.

In the cover letter to the audit results, the Board’s Chief Financial Officer stated he “underst[oo]d that the validity of applying [the 17 percent] fee to distillers is being questioned” and the Board cannot “alter the audit results” (*i.e.*, issue any refund) “based on speculation about the potential for the rules to be invalidated.” CP 325–26.

The Board’s implicit rejection (through its silence) of Blue Spirits’ claim for a refund, and its continued collection of invalid fees, excused Blue Spirits from any further effort to exhaust administrative remedies.

An agency's inaction in response to a claim for a refund ends the claimant's obligation to continue pursuing a remedy in that forum. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 643–44, 310 P.3d 804 (2013).

Moreover, “[i]f a lawsuit presents only issues of law, the court may excuse exhaustion because the agency’s usual fact finding task is not implicated, and, in any event, the courts have ultimate authority to interpret statutes.” *Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 628–29, 919 P.2d 93 (1996); *see also Retail Store Emps. Union, Local 1001 Chartered by Retail Clerks Int’l Ass’n, AFL-CIO v. Wash. Surveying & Rating Bureau, Wash. Bureau*, 87 Wn.2d 887, 907 n.7, 558 P.2d 215 (1976) (“Since the question of whether the trustees had a duty or right to administer or operate the Bureau was purely one of law rather than fact, we have chosen to resolve it, and failure to exhaust administrative remedies does not necessarily preclude such resolution.”). Adjudication of the instant dispute simply requires the application of the most recent legal authority and does not require the Board to exercise its fact-finding function, thus rendering administrative proceedings unnecessary.

F. Blue Spirits Was Entitled to Summary Judgment on Its Refund Claim

Blue Spirits was entitled to summary judgment in its favor. The undisputed evidence showed that Blue Spirits paid fees to the Board pursuant to WAC 314-28-070(3) and (3)(a). By January 2018, Blue Spirits had paid to the Board fees totaling more than \$250,000. CP 2 ¶ 9; CP 19–247; CP 298 ¶ 9. The revenue-based fees are unlawful. Therefore, the trial court should have granted Blue Spirits’ motion for summary judgment on its refund claim.

G. Blue Spirits Is Entitled to an Award of Reasonable Attorney Fees

Pursuant to the Equal Access to Justice Act, “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.” RCW 4.84.350(1). “Qualified parties” include “corporation[s] . . . whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed.” RCW 4.84.340(5). Blue Spirits falls within this category. CP 298. Blue Spirits respectfully submits that an award of attorneys’ fees and costs is warranted under these circumstances.

VI. CONCLUSION

For the reasons stated, the Court should (a) reverse the trial court's dismissal of Blue Spirits' action, (b) rule that Blue Spirits is entitled to (i) a refund of all the fees the Board collected from it without authority to do so, (ii) prejudgment interest on the refund amount, and (iii) an award of reasonable attorneys' fees and costs, and (c) direct the trial court to enter a judgment in favor of Blue Spirits consistent with the Court's ruling.

Dated this 3rd day of July, 2019.

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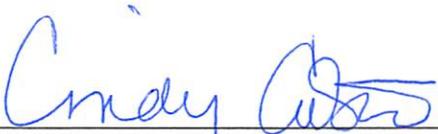
CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed with the Court of Appeals, a true and correct copy of the foregoing **Appellant's Opening Brief** and to be served on the following counsel of record in the manner specified below:

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