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NO. 53341-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BLUE SPIRITS DISTILLING LLC,

Plaintiff,

vs.

WASHINGTON STATE LIQUOR & CANNABIS BOARD,

Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Blue Spirits, LLC, is a Washington licensed spirits distiller. In 2017, this Court invalidated WAC 314-28-070(3)—the rule that imposed on distillers a 10 percent fee based on the sales distillers make when they act as distributors (“10 percent distributor fee”). *Wash. Rest. Ass’n v. Liquor Control Bd.*, 200 Wn. App. 119, 131, 401 P.3d 428 (2017). Shortly thereafter, Blue Spirits filed in superior court a “Complaint for Refund of Spirits Licensing Fees,” seeking to recoup from the Liquor and Cannabis Board all fees it paid pursuant to that rule. During summary judgment proceedings, Blue Spirits also asked for a refund of fees it paid pursuant to WAC 314-28-070(3)(a)—a separate rule that imposes on distillers a 17 percent fee based on the sales distillers make when they act as retailers (“17 percent retail fee”). Since Blue Spirits had merely filed a “Complaint for Refund” and not an action under the Administrative Procedure Act (APA), the superior court properly declined to order a refund of the 17 percent retail fees or extend this Court’s *Washington Restaurant* decision to invalidate that rule. The court later dismissed the complaint without prejudice.

On appeal, Blue Spirits asks this Court to invalidate the 17 percent retail fee rule. It argues that this Court’s *Washington Restaurant Association* decision *already* invalidated the 17 percent retail fee or that, by logical

extension, the 17 percent retail fee *should* be invalidated under the same reasoning. Either way, Blue Spirits has not brought a proper cause of action by which a court can invalidate an administrative rule. The APA provides the exclusive means to seek judicial review of an agency rule or other agency action, and Blue Spirits does not show that any of the exceptions to the “exclusive means” provision apply here. RCW 34.05.510. The Court should affirm the superior court’s denial of summary judgment and dismissal of the complaint.

II. COUNTERSTATEMENT OF THE ISSUES

1. The APA establishes the “exclusive means” of seeking judicial review of “agency action,” which includes “the adoption or application of an agency rule.” RCW 34.05.510(1), .010(3). Must Blue Spirits pursue the invalidation of the 17 percent retailer fee rule only under the APA?

2. Under RCW 34.05.510(1), the APA will not apply when 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.” Where Blue Spirits seeks both a refund of fees *and* the invalidation of an agency rule, and the Board is statutorily authorized to issue refunds, does Blue Spirits fail to establish an exception to the APA’s “exclusive means” provision?

3. The Equal Access to Justice Act applies when a party prevails in a “judicial review of an agency action” under the APA. RCW 4.84.350(1), .340(2), (4). Where Blue Spirits has been explicit that it has not pursued this action under the APA, should its request for fees under the Equal Access to Justice Act be denied even if it were to prevail?

III. STATEMENT OF THE CASE

A. Initiative 1183 Authorized Licensed Spirits Distillers to Sell Their Own Products

Blue Spirits is a Washington licensed spirits distiller. CP 1. Prior to the passage of Initiative 1183, the Board could license distillers to blend, rectify, and bottle spirits, but distillers could not sell spirits directly to wholesale and retail customers; that had to be done through the Board. RCW 66.24.140; *see, e.g.*, former RCW 66.16.010 (2001), WAC 314-28-050 (2010), WAC 314-28-030 (effective Jul. 6, 2012) (allowing distillers to sell directly to distributors and retailers). The distiller’s license fee for blending, rectifying, and bottling spirits is \$2,000 annually. RCW 66.24.140(1).¹ It has been that amount since 1981. Laws of 1981, 1st Ex. Sess., ch. 5, § 28.

¹ For distillers that produce 150,000 gallons or less of spirits, using at least half of its raw materials grown in Washington, the fee is reduced to \$100 per year. RCW 66.24.140(1)(a).

In privatizing the sale of liquor, the initiative created private spirits distributor and retail licensees. For the new distributor and retail licenses, the initiative imposed license fees based on sales. Laws of 2012, ch. 2, §§ 103, 105 (*codified as* RCW 66.24.630, .055). The distributor license fee is a monthly fee, calculated as 10 percent of the total revenue from the licensee's sales of spirits for each of the first 27 months of licensure, dropping to 5 percent thereafter. RCW 66.24.055(3)(a). The retail license fee also is paid monthly, calculated as 17 percent of all spirits sales revenue. RCW 66.24.630(4)(a).²

Initiative 1183 also granted other types of liquor licensees new authority. Relevant here, the law authorizes distillers to act as distributors, selling their product directly to retailers, and as retailers, selling their product directly to consumers.³ Laws of 2012, ch. 2, § 206 (*codified at* RCW 66.24.640).

² RCW 66.24.630(4)(b) specifically exempts craft distilleries from paying the 17 percent retail spirits fee, but not other licensed distillers. Blue Spirits is not a craft distiller that is exempt from paying this fee.

³ Importers and out-of-state spirits distillers may also act as distributors by obtaining one of three "certificate of approval." RCW 66.24.640; WAC 314-23-030(2); *Ass'n of Wash. Spirits and Wine Distribs. v. Liquor Control Bd.*, 182 Wn.2d 342, 347-48, 340 P.3d 849 (2015).

B. The Board Adopted Rules

After filing emergency rules in December 2011, the Board undertook a comprehensive rulemaking process to implement I-1183, ultimately adopting two sets of rules in 2012.

Among the rules the Board adopted were those imposing a fee on sales made by distillers when exercising their new distribution authority. By rule, the Board required distillers to pay the same fees distributors and retailers pay when making distribution and retail sales. WAC 314-28-070(3); WAC 314-28-070(3)(a). The Board imposed a 10 percent fee on the sales distillers make when exercising their new distribution authority, dropping to 5 percent after the first two years of sales. WAC 314-28-070(3) (distillers); WAC 314-23-030(3)(b) (certificate of approval holders). This fee matched the fee imposed on licensed distributors in I-1183. Laws of 2012, ch. 2, § 105(3)(a); RCW 66.24.055(3)(a). The Board also adopted a rule imposing a fee on sales made by distillers when exercising their new retail authority. That rule requires distillers to pay to the Board 17 percent of their gross revenue on retail sales to customers for off-premises consumption. WAC 314-28-070(3)(a). This matches the fee imposed on licensed retailers in I-1183. Laws of 2012, ch. 2, § 103(4); RCW 66.24.630(4)(a).

C. The *Washington Restaurant Association* Decision

Following the adoption of these rules, a group of retailers filed a petition for judicial review under the APA in superior court, challenging WAC 314-28-070(3) and WAC 314-23-030(3)(b), the rules applying the 10 percent distributor fee to distillers. *Wash. Rest. Ass'n v. Liquor Control Bd.*, 200 Wn. App. 119, 125-31, 401 P.3d 428 (2017). The plaintiffs did not challenge WAC 314-28-070(3)(a), the rule that applies the 17 percent retail fee to distillers.⁴

In an August 2017 opinion, this Court invalidated the 10 percent distributor fee rules as “inconsistent with their implementing statutes.” *Wash. Rest. Ass'n*, 200 Wn. App. at 131. The Court did not consider the validity of the 17 percent fee rule; it did not mention this fee anywhere in its opinion.

D. The Board Audited Blue Spirits, and Blue Spirits Demanded a Refund of License Fees

During the spring and summer of 2017, the Board audited Blue Spirits for the fees it had paid for its two licensed locations during past years. On September 20, 2017, before the audit was complete, Blue Spirits sent a letter to the Board demanding a refund of *all* fees it paid pursuant to

⁴ Although WAC 314-28-070 rule is drafted poorly, the retailers’ challenge was only to the portion of the rule imposing the 10 percent distributor fee on distillers, and, accordingly, the Court’s decision only invalidated that fee.

WAC 314-28-070(3) and (3)(a)—both the 10 percent distributor fee invalidated by the Court of Appeals and the 17 percent retail license fees paid pursuant to WAC 314-28-070(3)(a). CP 294-96. That same day—before the Board could respond—Blue Spirits filed a complaint in Thurston County Superior Court seeking a refund of the fees.⁵ CP 1-3.

E. Blue Spirits Filed a “Complaint for Refund” in Superior Court and Moved for Summary Judgment, Which Was Denied

Blue Spirits captioned its complaint as a “Complaint for Refund of Spirits Licensing Fees.” CP 1-3. It sought a refund of all fees it had paid pursuant to WAC 314-28-070(3)—the 10 percent distributor fee that this Court had invalidated the month prior. CP 2. The complaint did not identify WAC 314-28-070(3)(a)—the rule imposing the 17 percent retail fee on distillers when acting as retailers—as a basis for a refund. CP 1-3.

Blue Spirits then moved for summary judgment. CP 9-10. It argued that under the Court’s *Washington Restaurant Association* decision, it was “entitled to a refund of all spirits license fees paid to the Board as erroneously required by WAC 314-28-070(3).” CP 13. As in the complaint,

⁵ Blue Spirits erroneously claims that it initiated this action “[w]hen it did not receive a response to its letter.” Appellant’s Opening Br. 4. Because Blue Spirits filed the complaint the same day it sent the letter, the Board had no opportunity to consider or evaluate the request before Blue Spirits filed the complaint. The Board pointed out this misstatement of fact in its reply in support of its motion to convert this appeal to discretionary review. Reply in Support of Mot. to Convert 2.

Blue Spirits did not mention WAC 314-28-070(3)(a) in the summary judgment motion. CP 12-17.

In its response, the Board argued that: 1) Blue Spirits had not filed a proper cause of action because there was no statute authorizing a complaint for refund of fees against the State; 2) the only fees of which Blue Spirits was entitled to a refund were the 10 percent distributor fees invalidated by this Court, not the 17 percent retail fees; 3) any refund of the 10 percent distributor fees should be limited to the three years prior to the Court of Appeals' August 2017 *Washington Restaurant Association* decision, and should exclude pre- and post-judgment interest; 4) any refund was within the Board's discretion; and 5) Blue Spirits had failed to exhaust its administrative remedies to seek a refund directly from the Board. CP 251-60. The Board further stated that it was willing to refund to Blue Spirits the 10 percent distributor fees it had paid in the three years prior to this Court's August 2017 opinion invalidating that fee, but asked the Court to declare that Blue Spirits had no right to a refund of the 17 percent retail fee. CP 14.

Blue Spirits replied that exhausting its administrative remedies would have been futile because its September 20, 2017, letter requesting a refund "was met with radio silence," failing to acknowledge that it filed its complaint the same day it sent the letter. CP 307 (citing Decl. of Jeffrey

Soehren in Further Support of Plaintiff's Mot. for Summ. J., CP 297-98). It further argued that any refund should not be limited to a period of three years. CP 309-10. Finally, for the first time in its reply, Blue Spirits argued that this Court's *Washington Restaurant Association* decision applied to the 17 percent retail fee rule in addition to the 10 percent distributor fee rules. CP 310-11.

The superior court denied Blue Spirits' summary judgment motion. CP 318-20. The court noted that the Board intended to refund the 10 percent distributor fee for the three years preceding the Court of Appeals decision. CP 316. But beyond that, Blue Spirits had "not demonstrated a procedural mechanism by which the Court may grant the requested relief," and the court had "no power at this stage in the litigation to compel any refund." CP 319. The court further noted that no "administrative decision has been reached on the refund request, which raises questions about exhaustion of administrative remedies that need not be resolved in this procedural context." CP 317. Additionally, the complaint did "not identify the case as an Administrative Law Review or Administrative Procedures Act case; it does not state that this is a declaratory judgment action nor does it seek to invalidate an administrative rule." CP 316.

With respect to the 17 percent fee rule, the court declined to extend the reasoning of *Washington Restaurant Association* when Blue Spirits had

not brought a proper cause of action to challenge the validity of the rule. CP 316-17. Blue Spirits moved for reconsideration, which the court denied. CP 362.

F. Blue Spirits Sought Discretionary Review of the Superior Court's Denial of Summary Judgment, Which Was Denied

Blue Spirits sought this Court's discretionary review of the superior court's order denying summary judgment. This Court's Commissioner denied the motion. App. A (Ruling Denying Review). The Commissioner noted that Blue Spirits did not bring a declaratory judgment action under the APA and that RCW 43.01.072 authorizes a state agency to refund fees even where the agency-specific statutes do not provide for a refund. App. A, pp. 5-6. Accordingly, Blue Spirits had "fail[ed] to show that the Board is incapable of resolving its claim for a refund of fees," and thus the trial court had not committed obvious error in denying summary judgment. App. A, p. 6.

Further, the Commissioner agreed with the Board that the *Washington Restaurant Association* Court never considered the validity of the 17 percent retail fee rule. App. A, p. 2 ("The court did not consider whether the Board had authority to impose a 17 percent fee on a distillery's gross revenue from sales to customers for off-premises consumption under

WAC 314-28-070(3)(a).”). The case was remanded back to the superior court.

G. The Superior Court Dismissed Blue Spirits’ Complaint Without Prejudice

After discretionary review was denied, Blue Spirits moved for entry of final judgment in the superior court.⁶ But the superior court had issued no substantive ruling on the merits of Blue Spirits’ refund claim. Having issued no decision on which judgment could be entered, the court denied the motion.

The Board then moved to dismiss the complaint for Blue Spirits’ failure to bring an appropriate cause of action. CP 332-36. The Board moved for dismissal without prejudice, which would allow Blue Spirits to amend and re-file its complaint or seek relief by proper means. CP 336. The superior court granted the motion. CP 352-53. Blue Spirits appeals.

IV. STANDARD OF REVIEW

The Court reviews orders denying summary judgment and orders of dismissal under CR 12(b)(6) de novo. *Ruvalcaba v. Kwang Ho Baek*, 75 Wn.2d 1, 6, 282 P.3d 1083 (2012); *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal is appropriate where “the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the

⁶ The Board has filed a supplemental designation of Clerk’s Papers, designating Blue Spirits’ Motion for Entry of Final Judgment and the order denying that motion.

plaintiff to relief.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

V. ARGUMENT

Blue Spirits is not entitled to relief. The Board has already refunded to Blue Spirits three years of the 10 percent distributor fees that this Court invalidated in August 2017. Moreover, it appears Blue Spirits has abandoned its original claim for any additional refund of the 10 percent distributor fees beyond the three year statute of limitations, as it makes no argument about those fees in its Opening Brief. It now only seeks a refund of the 17 percent retail license fees it paid under WAC 314-28-070(3)(a). But that rule has never been invalidated by any Court, and Blue Spirits’ “Complaint for Refund” is not a proper action by which a court can invalidate the rule. Blue Spirits can pursue an action to invalidate an agency rule only under the APA. Accordingly, the Court should affirm the superior court’s denial of summary judgment and dismissal without prejudice.

A. **Blue Spirits Has Abandoned Its Request for a Refund of All of the 10 Percent Distributor Fees**

In its original complaint, Blue Spirits sought a “refund of all spirits license fees paid by Blue Spirits to [the Board] as erroneously required by WAC 314-28-070(3).” CP 3. And in its summary judgment motion and reply in support of that motion, Blue Spirits sought a return of *all* fees it

paid—not just the three year period for which the Board pledged to refund the 10 percent distributor fees under WAC 314-28-070. CP 309.

However, in its Opening Brief, Blue Spirits makes no argument about the validity of a refund request of the 10 percent distributor fee beyond the three years that the Board has already refunded. It only argues that it is entitled to a refund of the 17 percent retail fees it has paid under WAC 314-28-070(3)(a). The Court should consider the request for an additional refund of the 10 percent distributor fees abandoned.

B. Blue Spirits Is Not Entitled to a Court-Ordered Refund of the 17 Percent Retail Fees Unless and Until a Court Invalidates WAC 314-28-070(3)(a)

If Blue Spirits' argument is that it is entitled to a refund because the *Washington Restaurant* case *already* invalidated the 17 percent retail fee rule, it is wrong. Because no court has invalidated the 17 percent fee rule under WAC 314-28-070(3)(a), Blue Spirits is not entitled to a refund of fees paid pursuant to that rule. It must, therefore, first pursue the invalidation of the rule under the APA.

This Court's decision in *Washington Restaurant* did not address the validity of the 17 percent retail fee rule. Nor did it address the question of refunds of spirits fees paid by distillers. The plaintiffs in that case did not challenge the Board's rule imposing the 17 percent spirits retailer fees or request a refund of any fees. *Wash. Rest. Ass'n*, 200 Wn. App at 122, 123,

125, 129, 131, 136. The decision neither cites nor discusses the 17 percent fee rule, nor did it order any refund. This Court explicitly invalidated only the “10 percent license fee rules.” *Id.* at 131, 136. Both the superior court and this Court’s Commissioner correctly rejected Blue Spirits’ argument to the contrary in this case. CP 316-17 (“The [*Washington Restaurant*] Court did not assess the validity of the 17 percent retail sales fee.”); App. A, p. 2 (“The [*Washington Restaurant*] court did not consider whether the Board had authority to impose a 17 percent fee on a distillery’s gross revenue from sales to customers for off-premises consumption under WAC 314-28-070(3)(a).”).

The cases Blue Spirits relies on to circumvent the ordinary process for invalidating an agency rule are inapt. In those cases, plaintiffs sued for refunds only *after* a court of competent jurisdiction invalidated the laws under which monies were collected. In *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992), plaintiffs sued to recoup tenant relocation fees (and for compensatory and punitive damages under 42 U.S.C. § 1983) that the City of Seattle collected under its Housing Preservation Ordinance. *Robinson*, 119 Wn.2d at 41, 46. But the plaintiffs in that case filed suit *after* the Washington Supreme Court had *twice* declared the fee invalid. *Id.* at 44-46. That is why the Court described the suit as “a hybrid claim ‘based partly on an implied liability to repay money unlawfully received, and partly upon

a theory of unjust enrichment.” Appellant’s Opening Br. 14 (quoting *Robinson*, 119 Wn.2d at 83). The City had collected fees under an invalidated statute.

Similarly, in *Hart v. Clark County*, 52 Wn. App. 113, 758 P.2d 515 (1988), taxpayers filed a complaint seeking a refund of taxes that the County had collected under an already invalidated and repealed ordinance. *Hart*, 52 Wn. App. at 115. There too, the County had “an implied liability to repay the fees previously received *under the invalid ordinance*.” *Id.* at 116 (emphasis added).

Unlike the City in *Robinson* and the County in *Hart*, the Board here is not “improperly holding fees involuntarily paid under an invalid” regulation, because the regulation under which the Board collected the fees has not been invalidated by any court. *Robinson*, 119 Wn.2d at 83. Therefore, the Board has not “unlawfully received” money, and it has not been “unjustly enriched.” *See id.* Blue Spirits’ “Complaint for Refund” was improper, and the superior court properly denied summary judgment and dismissed the complaint without prejudice.

C. The APA Is the “Exclusive Means” for Obtaining Judicial Review of an Agency Rule

If Blue Spirits is asking the Court to apply the reasoning of *Washington Restaurant Association* to invalidate the 17 percent retail fee

rule, *see* Appellant's Opening Brief 12, then it has not brought a proper cause of action under the APA by which the court can do so. Accordingly, the superior court properly denied summary judgment and dismissed the complaint without prejudice.

The Administrative Procedure Act, chapter 34.05 RCW, "establishes the exclusive means of judicial review of an agency action[.]" RCW 34.05.510. "Agency action" means "licensing, the implementation or enforcement of a statute, *the adoption or application of an agency rule or order*, the imposition of sanctions, or the granting or withholding of benefits." RCW 34.05.010(3) (emphasis added). The Board's adoption of the rule requiring distillers to pay spirits retailer fees, and its collection of those fees pursuant to that rule, is the "adoption or application of an agency rule" and, therefore, "agency action" under the APA.⁷ *Id.* Moreover, RCW 34.05.570(2)(a) explicitly provides that a "rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection" Therefore, in order to challenge the adoption or application of the 17 percent retail fee rule, Blue Spirits must pursue a claim under the APA, just as the retailers did in *Washington Restaurant Association* to invalidate the 10 percent distributor fee rule.

⁷ The Board's action could also be interpreted as "the implementation or enforcement of a statute." RCW 34.05.010(3). Either way, it is "agency action" under the APA. *Id.*

Blue Spirits misreads *Wells Fargo Bank, N.A., v. Department of Revenue*, 166 Wn. App. 342, 271 P.3d 268 (2012), when it suggests that if it were to have sought a declaratory judgment action under the APA, it would be precluded from later seeking a refund. Appellant's Opening Br. 16-17. Rather, the Court held that Wells Fargo's lawsuit was improper because the action it challenged—a denial of a claim for interest on a tax refund—could *only* be challenged as “agency action” pursuant to the APA's judicial review provisions. *Wells Fargo*, 166 Wn. App. at 352-54. Because the APA was the exclusive means to appeal the Department of Revenue's denial of its request for interest on a tax refund—which amounted to “other agency action” under RCW 34.05.570(4)—Wells Fargo could not file a separate complaint outside of the APA.⁸ *Id.*

Wells Fargo thus perfectly illustrates that Blue Spirits can request a fee refund from the Board and, if that request is denied, appeal the denial as “other agency action” under RCW 34.05.570(4).⁹ Alternatively, it can file a petition for a declaratory judgment under RCW 34.05.570(2)(a) to

⁸ Because Wells Fargo failed to appeal the denial of its interest claim within 30 days, as the APA requires, it was ultimately denied any relief. *Wells Fargo*, 166 Wn. App. at 362-63.

⁹ Both the superior court and this Court's Commissioner explained that the “Board has discretion to refund fees that were erroneously paid under RCW 43.01.072 and RCW 43.88.170.” CP 317; App. A, p. 6 (“But RCW 43.01.072 explicitly authorizes a state agency to refund fees even where the specific ‘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.’ Blue Spirits fails to show that the Board is incapable of resolving its claim for a refund of fees.”).

challenge WAC 314-28-070(3)(a), just as the plaintiffs in the *Washington Restaurant Association* case did to challenge the distributor fee rules. Because the adoption and application of the 17 percent fee rule is “agency action” under the APA, Blue Spirits must pursue its case under the APA.

D. The Exceptions to the APA’s “Exclusive Means” Provision Do Not Apply

To defend the propriety of its “Complaint for Refund,” Blue Spirits relies on one of the limited exceptions to the “exclusive means” provision of the APA: where “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,” the APA’s judicial review provisions do not apply. RCW 34.05.510(1). Because the APA exception is in the conjunctive, Blue Spirits must show both that the sole issue is a claim for money damages *and* that the Board does not have statutory authority to determine the action. *See W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*, 110 Wn. App. 440, 452, 41 P.3d 510 (2002) (since the three requirements of exemption from unemployment tax are stated in the conjunctive, employer must prove all three parts). It cannot do that.

First, a claim for money damages is not Blue Spirits’ “sole issue.” Rather, Blue Spirits seeks—at least implicitly—the invalidation of an agency rule, WAC 314-28-070(3)(a). Second, the Board has statutory

authority to determine a claim for refund under RCW 43.01.072 and RCW 43.88.170. RCW 34.05.510(1). Accordingly, the exception does not apply, and Blue Spirits must pursue its claims under the APA.

1. Blue Spirits seeks the invalidation of an agency rule

The sole issue in this case is not a claim for money damages. RCW 34.05.510(1). Rather, Blue Spirits also seeks the invalidation of an agency rule, WAC 314-28-070(3)(a). *See* Appellant's Opening Br. 12. Accordingly, the exception to the requirement that Blue Spirits pursue its claim under the APA does not apply.

Blue Spirits' reliance on *Judd v. American Telephone and Telegraph Company*, 152 Wn.2d 195, 95 P.3d 337 (2004), is misplaced. *See* Appellant's Opening Br. 17. That case actually supports the Board. There, the plaintiffs sued telecommunications companies, alleging violations of the Washington Utilities and Transportation Commission's (WUTC) rate disclosure regulations. *Judd*, 152 Wn.2d at 200. Although the complaint did not specifically challenge the disclosure regulations themselves, the plaintiffs later argued that the complaint encompassed those claims too. *Id.* However, they did not bring an action under the APA, and they did not make the WUTC a party to the proceeding, as required under RCW 34.05.570(2)(a) when challenging the validity of an agency rule. The Washington Supreme Court held that because the plaintiffs made both

claims for monetary *and* injunctive relief in the same complaint, the exception for actions in which the sole issue is a claim for money damages did not apply. *Id.* at 205. Thus the plaintiffs were not foreclosed from seeking monetary relief *because* they also filed APA actions, as Blue Spirits suggests. Rather, the injunctive relief sought could *only* be pursued under the APA. *Id.*

Here, too, Blue Spirits' complaint implicitly challenges the validity of WAC 314-28-070(3)(a). Although it previously argued that the *Washington Restaurant Association* decision *already* invalidated that rule, that is not so, and Blue Spirits now directly challenges the validity of the rule in its opening brief. Appellant's Opening Br. 12. Thus even if a refund of license fees amounts to "money damages or compensation," Blue Spirits' lawsuit is not *solely* for money damages or compensation. RCW 34.05.510(1). It also seeks to invalidate a rule. Accordingly, it must pursue its claims under the APA. *Id.*; RCW 34.05.570(2)(a); *Judd*, 152 Wn.2d at 205.

2. The Board has statutory authority to consider a refund request

Blue Spirits cannot satisfy the second element of the APA's exception to the "exclusive means" provision, because the Board is

authorized to consider requests for refunds under RCW 43.01.072 and RCW 43.88.170.

Relying on Title 66 RCW, Blue Spirits argues that there is “no statutory, regulatory, or other grievance procedure available to licensees for collecting such a refund.”¹⁰ Appellant’s Opening Br. 18. It is mistaken. RCW 43.01.072 authorizes state agencies to issue refunds even when the specific law providing for the collection of those fees does not authorize a refund:

Whenever 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 thereof, refunds may be made or authorized by the state agency which collected the fees or payments of all such amounts received by the state agency in consequence of error, either of fact or of law as to: (1) The proper amount of such fee or payments; (2) The necessity of making or securing a permit, filing, examination or inspection; (3) The sufficiency of the credentials of an applicant; (4) The eligibility of an applicant for any other reason; (5) The necessity for the payment.

RCW 43.88.170 contains nearly identical language:

Whenever any law which provides for the collection of fees or other payment by an agency does not authorize the refund of erroneous or excessive payments thereof, refunds may be made or authorized by the agency which collected the fees or payments of all such amounts received by the agency in consequence of error, either of fact or of law. The regulations

¹⁰ Blue Spirits simultaneously complains that it was forced to file this lawsuit because the Board never responded to its refund request. Appellant’s Opening Br. 4. It continues to ignore the fact that it filed the complaint on the same day it requested a refund. CP 1-3 (complaint), 294-96 (letter requesting refund). *See* footnote 5, above.

issued by the governor pursuant to this chapter shall prescribe the procedure to be employed in making refunds.

While there is no published case law interpreting RCW 43.01.072, the Washington State Attorney General's Office issued a formal opinion interpreting RCW 43.88.170 in 1966. That Opinion concluded that RCW 43.88.170 "applies when there is not a specific provision for refunds in the particular statute authorizing the collection of the tax or fee." 1966 Op. Att'y Gen. No. 98, at 6. The Board thus acknowledges that it has authority to issue refunds of license fees that may have been collected in error. In the event the Board denies such a request, Blue Spirits would be entitled to appeal the denial as "other agency action" under the APA. RCW 34.05.570(4). Because of this statutory authority to issue refunds, and the right of a requester to petition for judicial review of a denial of such a request, the exception to the APA's "exclusive means" provision does not apply. Blue Spirits must pursue its claims under the provisions of the APA. The Court should affirm.

E. Blue Spirits Is Not Entitled to Attorney Fees Under the Equal Access to Justice Act

Only a party that "prevails in a judicial review of agency action" is entitled to fees and costs under the Equal Access to Justice Act (EAJA). RCW 4.84.350. Because the superior court properly denied summary judgment and dismissed the complaint, Blue Spirits should not prevail on

judicial review. Accordingly, Blue Spirits should not be awarded fees under the EAJA. *Olympic Healthcare Servs. II, LLC, v. Dep't of Soc. and Health Servs.*, 175 Wn. App. 174, 188, 304 P.3d 491 (2013).

Importantly, the EAJA does not even apply because there is no “agency action” on “judicial review” here. Under the EAJA, “agency action” means “agency action” under the APA, chapter 34.05 RCW. RCW 4.84.340(2). Similarly, “judicial review” means “judicial review” under the APA. RCW 4.84.340(4).¹¹ Blue Spirits has not sought “judicial review” of “agency action” under the APA. Indeed, its argument is that it *cannot* pursue its claims under the APA. Appellant’s Opening Br. 14. Accordingly, even if it were to prevail in this case, Blue Spirits would not be entitled to fees under the EAJA. *Cobra Roofing Servs., Inc. v. Dep't of Labor and Indus.*, 157 Wn.2d 90, 101, 135 P.3d 913 (2006) (holding that the EAJA specifically limits its coverage to judicial review authorized by the APA).

VI. CONCLUSION

For the foregoing reasons, the Board respectfully asks the Court to affirm the superior court’s orders denying summary judgment and dismissing Blue Spirits’ complaint without prejudice.

¹¹ Blue Spirits ignores these definitions when it argues it meets the definition of a “qualified party” under the same section of the RCW. Appellant’s Opening Br. 22 (relying on RCW 4.84.340(5)).

RESPECTFULLY SUBMITTED this 20th day of September,
2019.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in cursive script, appearing to read "Leah Harris".

LEAH HARRIS, WSBA #40815
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Jennifer Bancroft, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 20th day of September 2019, I caused to be served a true and correct copy of the **Brief of Respondent with Appendix A**, as follows via US Mail and email per agreement:

MAREN NORTON, CHAUNCEY MACLEAN,
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3. **Electronically Filed with the Court of Appeals, Division II**

DEREK BYRNE, CLERK, COURT OF APPEALS, DIVISION II
<https://ac.courts.wa.gov/>

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 20th day of September 2019, in Seattle, Washington.



JENNIFER BANCROFT
Legal Assistant

APPENDIX A

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DIVISION II

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STATE OF WASHINGTON

BY CPD
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BLUE SPIRITS DISTILLING, LLC,

Petitioner,

v.

WASHINGTON STATE LIQUOR &
CANNABIS BOARD,

Respondent.

No. 52093-1-II

RULING DENYING REVIEW

Blue Spirits Distilling, LLC (Blue Spirits), seeks discretionary review of the trial court's denial of its motion for summary judgment. Concluding that it does not demonstrate review is appropriate under RAP 2.3(b)(1), this court denies review.

FACTS

In 2011, voters approved Initiative 1183 (I-1183), which allowed private retailers and distilleries to sell and distribute spirits as long as they obtain a license. Blue Spirits is a licensed distiller of spirits in Washington State.

The Washington State Liquor and Cannabis Board (Board) promulgated WAC 314-28-070(3), which provides:

(3) 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.

In *Washington Restaurant Ass'n v. Washington State Liquor Control Board*, 200 Wn. App. 119, 401 P.3d 428 (2017) (*Washington Restaurant*), this court held that the Board did not have authority to adopt WAC 314-28-070(3), which imposing a fee on a distillery's gross spirits revenue from sales to a licensee. This court held that RCW 66.24.140, which prescribes "a license to distillers . . . fee two thousand dollars per annum," prevailed over the general provision in RCW 66.08.030(4), which permits the Board to prescribe "fees payable in respect of permits and licenses issued under [Title 66] for which no fees are prescribed in [Title 66]." *Washington Restaurant*, 200 Wn. App at 131. The court did not consider whether the Board had authority to impose a 17 percent fee on a distillery's gross revenue from sales to customers for off-premises consumption under WAC 314-28-070(3)(a). It does, however, state "RCW 66.24.140 imposes only one fee for licensed distillers." *Washington Restaurant*, 200 Wn. App at 131.

Blue Spirits brought a Complaint for Refund of Spirits Licensing Fees against the Board seeking the refund of all licensing fees it paid pursuant to WAC 314-28-070(3) and (3)(a).¹ It then moved for summary judgment, arguing that under *Washington Restaurant*,

¹ Blue Spirits alleged that it had paid \$254,933.60 in license fees under WAC 314-28-070.

it was entitled to the return of all fees it had paid under WAC 314-28-070(3), including the 17 percent retail sales fees it paid under WAC 314-28-070(3)(a). The trial court denied Blue Spirits' motion, ruling that "[Blue Spirits] has not demonstrated a procedural mechanism by which the Court may grant the requested relief," and that "[t]he Court has no power at this stage in the litigation to compel any refund." Mot. for Disc. Rev., Appendix at 3. In its letter ruling, the court stated that it did not have the authority to "extend" the decision in *Washington Restaurant* to include the 17 percent retail sales fees paid under WAC 314-28-070(3)(a). Mot. for Disc. Rev., Appendix at 6. The court later denied Blue Spirits' motion for reconsideration and motion to certify its decision for immediate appellate review. Blue Spirits seeks discretionary review the ruling denying its motion for summary judgment.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, review denied, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789, remanded, 146 Wn.2d 370 (2002), cert. denied sub nom., *Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure

by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Blue Spirits seeks review under RAP 2.3(b)(1).

Blue Spirits argues that under this court's decision in *Washington Restaurant*, the Board has no authority to collect any fee from it beyond the \$2,000 annual license fee prescribed in RCW 66.24.140, including the 17 percent retail sales fee prescribed in WAC 314-28-070(3)(a). It also argues that its civil complaint is the only way to recover fees because it cannot otherwise seek monetary damages from the Board and that it did not have to exhaust its administrative remedies under these circumstances.

Summary judgment is only appropriate if "there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

In response, the Board argues that Blue Spirits' claim is a rule challenge that must be brought under the Administrative Procedures Act (APA). The APA is "the exclusive means of judicial review of agency action," unless 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). The APA permits a party

to bring a petition for a declaratory judgment to the superior court "when it appears that the rule . . . interferes with or impairs . . . the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question." RCW 34.05.570(2)(b).

Here, Blue Spirits did not bring a declaratory judgment claim under the APA, but it nonetheless argues that the trial court had authority to grant relief because it only sought money damages. Putting aside whether a "refund" constitutes "damages," Blue Spirits only argues it is owed money because it believes the Board did not have authority to promulgate WAC 314-28-070(3)(a). Despite Blue Spirits' arguments to the contrary, this court was never presented with that issue in *Washington Restaurant*. And it appears that the trial court did not commit obvious error in declining to "extend" *Washington Restaurant* to the 17 retail sales fee. Blue Spirits fails to take into account RCW 66.24.140(2)(a), which provides that "[a] distillery selling spirits [of its own production for consumption off the premises] must comply with the applicable laws and rules relating to retailers." RCW 66.24.140(2)(a). And under RCW 66.24.630(4), spirits retailers (except craft distilleries, which Blue Spirits is not) must pay a fee of 17 percent on all spirits sales to retail customers. Thus, while RCW 66.24.140(1)(a) did not give the Board the authority to impose the 10 percent fee contained in WAC 314-28-070(3) for its sales to licensees as distiller *qua* distiller, RCW 66.24.140(2)(a) and RCW 66.44.630(4) appear to give it the authority to impose the 17 percent retail sales fee contained in WAC 314-28-070(3)(a) for its sales to customers for off-premises consumption as distiller *qua* spirits retailer. Thus,

the trial court did not commit obvious error in denying Blue Spirits' motion for summary judgment seeking the refund of fees paid under WAC 314-28-070(3)(a).

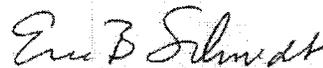
Blue Spirits argues that this action is the only mechanism by which it can obtain a refund for two reasons. First, it argues that the Board cannot authorize a refund because "issu[ing] . . . a refund for excess spirits license fees paid is not among the statutory powers delegated to the Board." Motion for Disc. Rev. at 12; see RCW 34.05.574(3) And as a result, it is not required to exhaust its administrative remedies. *Smoke v. City of Seattle*, 132 Wn.2d 214, 224, 937 P.2d 186 (1997) (courts may excuse exhaustion "where there [is] doubt as to whether the agency [is] empowered to grant effective relief."). Second, Blue Spirits believes that it could not receive relief in an action for declaratory relief because in a declaratory action a party can only seek damages "to the extent expressly authorized by another provision of law." RCW 34.05.574(3). And it argues that no provision of law "authoriz[es] the refund of distillers' license fees paid under an invalid regulation promulgated by the Board." Mot. for Disc. Rev. at 10. But RCW 43.01.072 explicitly authorizes a state agency to refund fees even where the specific "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." Blue Spirits fails to show that the Board is incapable of resolving its claim for a refund of fees. As such, it also fails to show that the trial court committed obvious error when it denied Blue Spirits' motion for summary judgment.

CONCLUSION

This court concludes that the trial court's decision denying Blue Spirits' motion for summary judgment was not obvious error. Blue Spirits therefore fails to demonstrate review is appropriate under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that Blue Spirits' motion for discretionary review is denied.

DATED this 13th day of September, 2018.



Eric B. Schmidt
Court Commissioner

cc: Maren Norton
Chauncey A. MacLean
Jill D. Bowman
Anne M. Dorshimer
Mary M. Tennyson
Hon. Carol Murphy

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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