

October 21, 2009

Telephone: (717) 783-9454

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Timothy Suprise  
Founder & President  
Arcadia Brewing Company  
**Re: Supplier Rights**

Dear Mr. Suprise:

ISSUE: This office is in receipt of your e-mail dated Monday, September 14, 2009, wherein you inquired about the brand rights and/or wholesaler franchise provisions that govern the manner and conditions in which a supplier is able to transfer its brand rights to another licensed wholesaler/distributor in Pennsylvania.

OPINION: For your general information, under the beer distribution system in Pennsylvania, out-of-state manufacturers whose products are sold and delivered in Pennsylvania are required to give distribution rights for their products to importing distributors for a specific geographical area within Pennsylvania. [47 P.S. § 4-431(b)]. Written territorial franchise agreements between the out-of-state manufacturer and its importing distributor regulate, among other things, the geographical area in which the importing distributor may sell the manufacturer's products. [Id.]. Importing distributors may then sell the products to other importing distributors, distributors and other licensees within their appointed territories. [Id.]. A distributor must purchase all out-of-state products from an importing distributor who has been appointed to the territory in which the distributor is located. [Id.].

The Liquor Code and the Board's Regulations provide that an importing distributor granted distribution rights by a manufacturer shall not sell or deliver malt or brewed beverages to another importing distributor without first having entered into a written agreement with the secondary importing distributor, setting forth the terms and conditions under which such products are to be resold within the territory granted to the primary importing distributor by the manufacturer. [47 P.S. § 4-431(b); 40 Pa. Code § 9.96].

An importing distributor may sell or deliver malt or brewed beverages anywhere within the Commonwealth of Pennsylvania, subject to its territorial agreement(s), which have been purchased from manufacturers or persons outside this Commonwealth, engaged in

the legal sale of malt or brewed beverages or from manufacturers or importing distributors licensed in Pennsylvania. [47 P.S. § 4-431].

Distributors, on the other hand, may sell or deliver malt or brewed beverages anywhere within the Commonwealth of Pennsylvania when such beverages have been purchased from persons licensed in Pennsylvania as manufacturers or importing distributors. [Id.]. Manufacturers are prohibited from entering into any agreements with more than one (1) distributor or importing distributor for the purpose of establishing more than one (1) agreement for a designated brand or brands of malt or brewed beverages in any one (1) territory.

Section 431(b.1)(1) of the Liquor Code states that a person purchasing or acquiring the rights to import, market or ship malt or brewed beverages into the Commonwealth or to distribute malt or brewed beverages shall be obligated to all terms of the manufacturer's franchise agreements in effect on the date of the purchase, acquisition or succession. [47 P.S. § 4-431(b.1)(1)]. Therefore, the manufacturer and the new importing distributor will be subject to the existing distribution rights agreements currently in place for the malt or brewed beverages.

Further, section 492(19) of the Liquor Code provides, *inter alia*, that it is unlawful for any manufacturer to modify, cancel, terminate, rescind or not renew a distributing rights agreement without good cause, and that the manufacturer must give the importing distributor ninety (90) days notice of same. [47 P.S. § 4-492(19); see also 47 P.S. § 4-431(d)(1)]. Section 431 defines "good cause":

"Good cause" shall mean the failure by any party to an agreement, without reasonable excuse or justification, to comply substantially with an essential, reasonable and commercially acceptable requirement imposed by the other party under the terms of an agreement.

[47 P.S. § 4-431(d)(1)]. Whether or not good cause exists is a determination made by the courts, not the Board. You are advised to consult private counsel for further advice regarding whether you have good cause to modify, cancel, terminate, or rescind a distributing rights agreement.

Please be further advised that it is unlawful for any manufacturer to interfere with or prevent any distributor or importing distributor from selling or transferring his license, business or franchise, whether before or after notice of modification, cancellation, termination, rescission, or nonrenewal has been given, provided the proposed purchaser of the business of the distributor or importing distributor meets the material qualifications

and standards required of the manufacturer's other distributors or importing distributors. [47 P.S. § 4-492(20)(i)].

In the event that you are able to negotiate changes to the distributing rights agreement, please note that the Board's Regulations require any change in brand ownership, franchise agreements, territorial agreements or the desire to offer, sell or deliver additional brands of malt or brewed beverages to be reported to the Board within thirty (30) days. [40 Pa. Code § 9.108(c)]. Please notify the Bureau of Licensing, (717) 783-8250, of the changes to take effect upon closing of the sale between the importing distributors and file all necessary documentation within thirty (30) days from the date of the closing. Distribution of the products may continue if these requirements are met within thirty (30) days of the closing date of the sale of the brand rights.

**THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.**

Very truly yours,

**FAITH S. DIEHL  
CHIEF COUNSEL**

cc: Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
Jerry W. Waters, Sr., Director, Bureau of Licensing  
Tisha Albert, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 09-410