March 31, 2014

Telephone: (717) 783-9454
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Tim Coe
Finch's Beer Company, LLC
4565 North Elston Avenue
Chicago, IL 60630-2415
Re: Buying Back Brand Rights

Dear Mr. Coe:

ISSUE: This is in response to your e-mail sent on February 27, 2014, wherein you inquire whether it is permissible for you, an out-of-state manufacturer of malt or brewed beverages, to buy brand distribution rights back from a wholesaler with whom you have previously entered into a territorial agreement, and to hold such rights prior to entering into a new territorial agreement with a different wholesaler. This would be instead of transferring rights directly from the wholesaler to another.

Records of the Pennsylvania Liquor Control Board ("Board") indicate that Finch's Beer Company, LLC, t/a Finch's Beer Company, holds Brand Registration License No. BC-924 (LID 66461) for the premises located at 4565 North Elston Avenue, Chicago, Illinois.

OPINION: Under the three (3)-tier 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 distributor ("ID") licensees 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 ID regulate, among other things, the geographical area in which the ID may sell the manufacturer's products. [Id.]. IDs may then sell the products to IDs, distributors ("D"), and other licensees within their appointed territories. [Id.]. A D licensee must purchase all out-of-state products from an ID who has been appointed to the territory in which the D licensee is located. [Id.].

Ds, 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 IDs. [Id.]. Please be advised that a D licensee must be located within the assigned territory in order to accept the delivery of the malt or brewed beverage because acceptance outside of an assigned territory will result in suspension of the D's license for at least thirty (30) days. [Id.]. Further, contractual obligations between the D and ID may limit the D's ability to sell outside of an assigned territory. A D may not engage in any transaction that violates the terms of its territorial agreement.

As to the distribution agreements themselves, section 492(19) of the Liquor Code makes it unlawful for a manufacturer to modify, cancel, terminate, rescind, or not renew without good cause any distribution agreement. [47 P.S. § 4-492(19)]. Further, prior to the modification, cancellation, termination, rescission, or non-renewal of such agreements written notice of such modification, cancellation, termination, rescission, or non-renewal must be provided to the affected party and the Board by certified mail. Such written notice must be provided at least ninety (90) days prior to the effective date of the proposed modification, cancellation, termination, rescission, or non-renewal. The notice should state all reasons for the proposed modification, cancellation, termination, rescission, or non-renewal of the distribution agreement.

If the D or ID who has been put on notice of the potential end of the distribution agreement rectifies the deficiencies noted in the letter, then the proposed modification, cancellation, termination, rescission, or non-renewal shall be null and void. Further, while this section states that the parties may choose to waive some or all of the requirements in section 492(19), if they do so in writing, it is unclear whether the waiver provision applies to the notice requirement or whether the parties may agree in writing to waive the "good cause" requirement.

The Liquor Code defines "good cause" as "the failure by any party to the 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)].

The Board does not have authority to adjudicate disputes regarding distribution rights agreements. The court of common pleas for the county in which the importing distributors are located would have jurisdiction over such agreements. [47 P.S. § 4-431(d)(4)]. Additionally, please be advised that if a manufacturer terminates an existing distribution agreement for good cause and enters into a new distribution agreement, the manufacturer must provide the Board's Bureau of Licensing ("Licensing") with copies of the termination and the new agreement.

Assuming that you either amicably acquire the brand or does so consistent with the aforementioned requirements concerning brand distribution agreement termination, the brand of malt or brewed beverages may end up losing its brand registration if there is no in Pennsylvania who has a territorial agreement to sell it. If there is someone left, it can only be sold in that territory. Please note that an out-of-state manufacturer cannot self-distribute while such territorial rights remain unassigned.

Please feel free to again contact this office if you have any further questions regarding this matter, the Liquor Code, or the Board's Regulations.

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, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 14-111