

March 26, 2015

Jordan Fetfatzes  
Bella Vista Beer Distributors Inc.

**Re: Franchise Rights**

Dear Mr. Fetfatzes:

ISSUE: This office is in receipt of your e-mail of February 26, 2015, in which you state that Midnight Sun Brewing Company (“MSBC”) of Anchorage, Alaska previously appointed Shangy, Inc. (“Shangy”) in Emmaus, Pennsylvania as the exclusive wholesaler of MSBC’s beer products in the Commonwealth of Pennsylvania. You state that Shangy does not list availability of MSBC’s beers and that MSBC has not been active in Pennsylvania in a decade.

You ask whether a Letter of Agreement dated December 7, 1998 between MSBC and Shangy is still effective. You ask further if only the six (6) brands listed on the Letter of Agreement are covered by that Agreement, *i.e.*, Kodiak Brown Ale, Sockeye Red Ale, Mammoth Extra Stout, Wolf Spirit Sparkling Ale, Fireweed Honey Wheat Beer, and Old Whiskers Hefeweizen. You would like to know if your importing distributorship may seek authority to carry other MSBC beer brands besides these six (6) listed brands.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Bella Vista Beer Distributors Inc. is the holder of Importing Distributor License No. ID-1178 (LID 4399) for premises located at 755-69 South 11<sup>th</sup> Street in Philadelphia, Pennsylvania.

OPINION: As you know, the distribution of malt beverages within Pennsylvania is governed primarily by section 431 of the Liquor Code [47 P.S. § 4-431]. Pursuant to section 431(d) of the Liquor Code, all out-of-state manufacturers whose products are sold and delivered in Pennsylvania are required to give distribution rights for their products to importing distributors (“IDs”), authorizing them to sell malt or brewed beverages (“beer”) in a specific geographic area within Pennsylvania. [47 P.S. § 4-431(b)].

ID licensees may then in turn sell the beer to other IDs within their assigned geographic territory, as long as the primary ID has entered into a written agreement with the secondary ID, setting forth the terms and conditions under which beer

may be resold. In addition, ID licensees may sell directly to other licensees of the Board, such as distributors (“D”), as well as to the public.

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 somewhat 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)].

Finally, section 431 of the Liquor Code, grants to the Court of Common Pleas of the county wherein the ID is located, the authority to enjoin the modification, rescission, cancellation or termination of a distribution agreement, at the request of the affected ID. Unlike section 492(19) of the Liquor Code, that section does not specifically reference the non-renewal of a distribution agreement.

Therefore, as to your question of whether the existing MSBC/Shangy Letter of Agreement is still valid, the Board has no information to suggest that it is not. It is further noted that the Letter of Agreement clearly states that Shangy is appointed as distributor of “MSBC’s beer product line” and that the product line “includes

but is not limited to the following beers,” following which are listed the six (6) brands you mentioned. Finally, the agreement notes that it automatically renews “with the intention of continuous extensions including review of performance.”

Please note that this is an area of the law that specifically allows an aggrieved D or ID to seek immediate redress in the Courts of Common Pleas and is outside the jurisdiction of the Board. This office’s interpretation of the Liquor Code, while binding on the Pennsylvania State Police, Bureau of Liquor Control Enforcement, is not binding on the Courts of Common Pleas. Therefore, in determining your rights as to any MSBC products, you may wish to consult private counsel experienced in Pennsylvania liquor law litigation.

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  
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