November 19, 2015

Joanne Davis
VIA E-MAIL:

RE: Issues Regarding the Availability and Pricing of Malt/Brewed Beverages

Dear Ms. Davis:

ISSUE: This is in response to your e-mail correspondence of October 21, 2015, wherein you inquire as to the legality of certain sales practices concerning the availability and pricing of malt/brewed beverages. You cite an example wherein a distributor introduced Lagunitas beer at Wegman's, but did not make it available to small bars until months later. You also mention that some distributors require you to purchase a certain number of their other products, citing that you are able to acquire only three (3) cases of Troeg's Mad Elf in comparison to Wegman's pallets of cases; Wegman's is able to return cases, but you are not. Lastly, you inquire as to the lower prices given to distributors with higher prices required of bars, citing your purchase of Corinitas.

Records of the Pennsylvania Liquor Control Board ("Board") indicate that Joanne M. Davis holds Restaurant Liquor License No. R-2786 (LID 23630) for use by it at 915 South Washington Avenue, Scranton, Pennsylvania.

OPINION: Please be advised that Pennsylvania beer sales are governed by a "three (3)-tier" distribution system, under which a manufacturer registers each brand of beer, then sells its products to importing distributor ("ID") licensees who have been assigned specific geographic territories by the manufacturer. No distributor ("D") licensees or ID licensees may purchase, receive, resell, or deliver any malt or brewed beverages except in strict compliance with the aforementioned territorial franchise agreements. [47 P.S. § 4-431].

Pursuant to section 431(b) of the Liquor Code, ID licensees granted territorial rights may then sell the products to D licensees and other licensees, such as restaurant liquor ("R") licensees, hotel liquor ("H") licensees, or eating place malt beverage ("E") licensees, but only within their appointed territories. [47 P.S. § 4-431(b)]. ID licensees who have been granted distribution rights for certain

products by a manufacturer for a particular geographical area may also sell to other ID licensees within that area, as long as the primary ID licensee has first entered into a written agreement with the secondary ID licensee setting forth the terms and conditions under which such products are to be resold within the territory granted to the primary ID licensee by the manufacturer. [Id].

However, neither the Liquor Code nor the Board's Regulations place limitations on the geographic locations in which D licensees may resell those malt or brewed beverage products. Thus, once a D licensee has lawfully purchased malt or brewed beverages from an ID licensee having distribution rights for the particular territory in which the D licensee's premises is located, the D licensee is generally free to sell those products anywhere within the Commonwealth of Pennsylvania, unless such licensee has voluntarily entered into an agreement with an ID licensee restricting the geographic area in which such products may be resold.

As to pricing, neither the Liquor Code nor the Board's Regulations regulate the manner in which distributors set or change the price they charge to customers. Please note that former section 447 of the Liquor Code previously regulated price changes of malt and brewed beverages. [47 P.S. § 4-447]. However, in 1999, a decision by the United States District Court for the Middle District of Pennsylvania found section 447 and the Board's Regulations implementing this section of the Liquor Code to be in violation of the Sherman Anti-Trust Act. [Beer and Pop Warehouse v. Jones, 41 F. Supp.2d 552 (M.D. Pa. 1999)]. As a result, distributors and importing distributors may charge whatever they wish for beer, and price reductions and incentives may be applied selectively, subject to unlawful inducement limitations [47 P.S. § 4-493(24)(i)]. Other practices as to purchase requirements or return policies are not set forth in the Liquor Code or Board Regulations.

If the practices that you enumerated are in compliance with the aforementioned, they are lawful.

Should you have any further questions or concerns regarding the Liquor Code or the Board's Regulations, please do not hesitate to again contact this office.

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,

RODRIGO J. DIAZ
EXECUTIVE DEPUTY 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. 15-467