

August 3, 1999

Telephone: 717-783-9454
FAX: 717-787-8820

Heap Lean Ngo
Willow Street Distributors, Inc.
2958 Willow Street Pike
Willow Street, PA 17684

RE: Distributing Rights Agreement

Dear Mr. Ngo:

ISSUE: This is a response to your facsimile dated June 7, 1999 and telephone conversations with this office on June 4 and 7, 1999. You seek our review and opinion as to the legality of certain contract provisions in a distributing rights agreement. Specifically, you request our review of the following provisions:

- 3) The Secondary Distributor/Purchaser herein agrees not to resell the products of the aforementioned Manufacturer or Brewery to any importing distributor.
- 5) The rights herein granted by the Importing Distributor/Seller to the Secondary Distributor/Purchaser may not be resold, transferred, assigned or conveyed in any fashion by the Secondary Distributor/Purchaser to any party without the prior written consent of the Importing Distributor/Seller. (The sale or transfer of the majority of stock or securities of the Secondary Distributor/Purchaser shall constitute a sale or assignment within the provisions of this paragraph).
- 7) The Secondary Distributor/Purchaser agrees to use its best efforts to promote and sell the aforementioned products it has agreed to purchase pursuant to this Agreement within the territory granted unto the Secondary Distributor/Purchaser pursuant to this Agreement.
- 8) The Importing Distributor/Seller reserves the right to alter, amend, revoke or terminate this Agreement in whole or in part for any reason at any time.

OPINION: Preliminarily, section 431(b) of the Liquor Code [47 P.S. Section 4-431(b)] authorizes the holder of a distributor license to sell or deliver legally-purchased malt or brewed beverages anywhere within the Commonwealth of Pennsylvania. Under the beer distribution system in the Pennsylvania Liquor Code, out-of-state manufacturers are required to give distributing rights for their products to importing distributors for specified geographical areas. [47 P.S. Section 4-431(d)].

Importing distributors may then sell to distributors and other licensees within their appointed territory. [47 P.S. Section 4-431(b)]. A distributor must purchase the product from an importing distributor who has been appointed for the territory in which the distributor is located.

Distributors must purchase malt or brewed beverages coming from out-of-state from importing distributors. However, the distributor is not restricted as to where it may sell, unless it has been restricted by an agreement with the importing distributor which supplies the product. Distributors may generally sell to retail licensees outside the importing distributor's geographic area if an agreement does not exist restricting the distributor's ability to do so. The terms of such agreements are up to the parties to negotiate. There is no requirement that distributors sign an agreement with an importing distributor if it does not wish to, but there is also no requirement that the importing distributor sell its products to the distributor under Pennsylvania law. Please note, however, that section 492(19) of the Liquor Code [47 P.S. Section 4-492(19)] permits the parties to a distributing rights agreement to agree in writing to terms of modification, cancellation, termination, rescission or nonrenewal in such an agreement. Therefore, you are advised to obtain advice from private counsel regarding negotiation of the specific provisions for which you seek our review. You may also wish to employ private counsel to examine the provisions for potential federal restraint of trade (antitrust) violations.

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: Bureau of Liquor Control Enforcement,
Pennsylvania State Police
Robert P. Kaskiel

Advisory Opinion No. 99-281