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October 11, 2018

Via Email (fawcetta@michigan.gov)

Anita Fawcett
Executive Secretary
Michigan Liquor Control Commission
Constitution Hall
525 W. Allegan Street
Lansing, MI 48933

RECEIVED

OCT 11 2018

MI LIQUOR CONTROL COMMISSION
OFFICE OF THE CHAIRPERSON

Re: Direct Wines, Inc.
20 Marshall Street
Norwalk, CT 06854

Dear Ms. Fawcett:

Enclosed on behalf of Direct Wines, Inc. please find the following:

1. Motion to Hold Enforcement in Abeyance Pending Final Resolution of Declaratory Ruling Request and for Immediate Consideration of the Motion to Hold in Abeyance;
2. Request for Declaratory Ruling with Exhibits; and,
3. Memorandum of Law Supporting Request for Declaratory Ruling.

Please feel free to contact me if you should have any questions.

Best regards,

DYKEMA GOSSETT PLLC

Sandra M. Cotter

Sandra M. Cotter

Attachments

California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.



Anita Fawcett
October 11, 2018
Page 2

cc: Chairman Andrew J. Deloney (*w/Attachments, via Email*)
Commissioner Teri L. Quimby (*w/Attachments, via Email*)
Commissioner Dennis Olshove (*w/Attachments, via Email*)
Mr. Mort Siegel (*w/Attachments, via Email*)
Mr. Neil Rhodes (*w/Attachments, via Email*)

California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN LIQUOR CONTROL COMMISSION**

In re: Direct Wines, Inc.
20 Marshall Street
Norwalk, CT 06854

**MOTION TO HOLD ENFORCEMENT IN ABEYANCE PENDING FINAL
RESOLUTION OF DECLARATORY RULING REQUEST AND FOR IMMEDIATE
CONSIDERATION OF THE MOTION TO HOLD IN ABEYANCE**

NOW COMES Direct Wines, Inc. (“DWI”), a Delaware corporation, and requests that enforcement of any alleged violations of law, rules or regulations administered by this agency be HELD IN ABEYANCE pending final resolution of the DWI Request for Declaratory Ruling filed contemporaneously with this Motion. DWI further requests that the Liquor Control Commission (“Commission”) give IMMEDIATE CONSIDERATION to this Motion and states in support as follows:

1. DWI adopts and incorporates by reference the Statement of Facts and law set forth in the accompanying Request for Declaratory Ruling.
2. On June 25, 2018 the Attorney General issued a letter to DWI demanding that it “Cease and Desist Unlicensed Direct Shipping of Alcoholic Liquor.”
3. The Attorney General contends that DWI must become licensed by the Commission as a third party facilitator service pursuant to 2016 PA 520 but as demonstrated in the attached Request for Declaratory Ruling, the letter is based on an erroneous understanding of

DWI's operations and activities and an incorrect interpretation of the statute sought to be enforced.¹

4. Therefore, the Cease and Desist Order was issued without an adequate factual and legal basis, as explained in the Declaratory Ruling Request. The disruption (and cessation) of DWI's business operations should not be mandated in reliance of the erroneous understanding of facts and law—especially while being considered by the Commission in the pending Declaratory Ruling Request.

5. While requests for Stay of Orders pending appeal may be granted in some circumstances under the standard of “when justice requires” [See, for example, MCR 7.209(E)] as opposed to the elements for a grant of preliminary injunction, DWI meets the requirements of a preliminary injunction:

Whether a preliminary injunction should issue is determined by a four-factor analysis: harm to the public interest if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. See GCR 1963, 705.7(1)(b)(i). This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant.

Michigan State Employees Ass'n v Dep't of Mental Health, 421 Mich 152, 157-158; 365 NW2d 93 (1984).

6. Any disruption in DWI's business, especially halting its activities is, by definition, irreparable harm in that DWI provides website and marketing support that allows Michigan consumers to order wine products from a licensed Michigan retailer, those orders will

¹ Noteworthy is that the US District Court for the Eastern District of Michigan recently held that the statute in question, 2016 PA 506, MCL 436.1203, is unconstitutional in certain regards. *Lebamoff Enterprises v Snyder*, Case No 17-10191, 9-28-2018.

continue to arrive, and if operations cease, the business plan and reputation of DWI will be irreparably harmed. (Affidavit of Neil Rhodes, ¶ 6 and ¶ 13).

7. In addition to the harm that will be suffered by DWI, the over 800 small volume wineries throughout the United States, western/eastern Europe, South Africa, and many other countries will be adversely impacted. (Affidavit of Neil Rhodes, ¶ 5).

8. DWI's services include, but are not limited to, marketing, advertising, promotions, e-commerce, creating and designing websites for retailers, recommendations to retailers of emerging industry trends, consumer preferences, and wine products. Any halt or disruption to these activities—even if quickly reinstated after a positive ruling on the Declaratory Ruling Request—will harm DWI and those, described above, with which it does business. The egg cannot be unscrambled. (Affidavit of Neil Rhodes, ¶ 13).

9. As demonstrated by the Declaratory Ruling Request, DWI has more than a substantial likelihood of prevailing on its view of the applicability of the law, rules and facts to DWI's business model.

10. Neither the Commission, other businesses, nor the people of the State of Michigan will be harmed if DWI is allowed to continue its operations until a final decision is rendered on the pending Request for Declaratory Ruling. Therefore, the harm to DWI far outweighs the harm to any other party or the public.

11. It is in the public interest to allow DWI to continue with its operations in that it benefits the entities described in Paragraphs 6-8, *infra*, and will not harm the public or any other party.

12. As demonstrated by the foregoing, time is of the essence so as to avoid the described adverse impact should the Cease and Desist Order be allowed to continue pending final resolution of the Declaratory Ruling Request.

WHEREFORE, DWI respectfully requests that this Commission give IMMEDIATE CONSIDERATION to its Motion to Hold Enforcement in Abeyance and STAY or HOLD IN ABEYANCE the Cease and Desist Order pending final ruling on its Declaratory Ruling Request.

Respectfully submitted,

Dykema Gossett PLLC

Siegel & Moses, P.C.

By: *Sandra M. Cotter*
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Dated: October 10, 2018

Dated: October __, 2018

12. As demonstrated by the foregoing, time is of the essence so as to avoid the described adverse impact should the Cease and Desist Order be allowed to continue pending final resolution of the Declaratory Ruling Request.

WHEREFORE, DWI respectfully requests that this Commission give IMMEDIATE CONSIDERATION to its Motion to Hold Enforcement in Abeyance and STAY or HOLD IN ABEYANCE the Cease and Desist Order pending final ruling on its Declaratory Ruling Request.

Respectfully submitted,

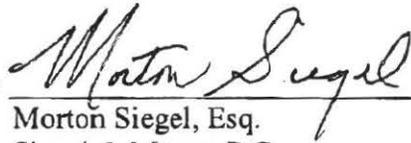
Dykema Gossett PLLC

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**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN LIQUOR CONTROL COMMISSION**

In re: Direct Wines, Inc.
20 Marshall Street
Norwalk, CT 06854

REQUEST FOR DECLARATORY RULING

NOW COMES Direct Wines, Inc. (“DWI”), a Delaware corporation, pursuant to Section 63 of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.263, and the applicable rules of the Michigan Liquor Control Commission (the “Commission”), Rules 436.1971 – 436.1975, and hereby requests a declaratory ruling as to the applicability of certain statutes administered by the Commission to the actual state of facts described herein.

I. INTRODUCTION

DWI brings this Request for Declaratory Ruling to the Commission because it has received from the Department of Attorney General a June 25, 2018 letter referenced Cease and Desist Unlicensed Direct Shipping of Alcoholic Liquor. (See Exhibit A, June 25, 2018 Letter.) The Attorney General contends that DWI must become licensed by the Commission as a third party facilitator service pursuant to 2016 PA 520. The letter is based on an erroneous understanding of DWI’s operations and activities and an incorrect interpretation of the statute sought to be enforced.¹ We request that the Commission correctly apply the law to the facts and determine that DWI need not be licensed by the Commission, that DWI’s business operations do not qualify for licensure by the Commission, and that the Cease and Desist letter be rescinded or struck.

II. STATEMENT OF FACTS

1. DWI is one of numerous national media and marketing entities providing a variety of services to the wine industry being utilized in over 40 states. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 3.)
2. DWI’s services are designed to accommodate new technology predominantly tied to the internet as well as emails, direct mail, social media, marketing and media expertise. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 4.)
3. DWI has created a market for over 800 small volume wineries throughout the United States, western/eastern Europe, South Africa, and many other countries. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 5.)

¹ Noteworthy is that the US District Court for the Eastern District of Michigan recently held that the statute in question, 2016 PA 506, MCL 436.1203, is unconstitutional in certain regards. *Lebamoff Enterprises v Snyder*, Case No 17-10191, 9-28-2018.

Michigan Liquor Control Commission
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Direct Wines, Inc.

4. DWI's services include but are not limited to marketing, advertising, promotions, e-commerce, universal customer service arrangements, creating, designing, and maintaining websites for retailers, recommendations of wines to retailers and wholesalers. Wine Dock Liquor & Fine Wine, Inc. ("Wine Dock"), a licensed SDM retailer in the State of Michigan, engages DWI to provide these services to assist their e-commerce wine business. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 6.)
5. DWI contracts for use of national trademarks (brands) owned or controlled by national and international corporations as a marketing tool for wine clubs. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 7.)
6. DWI works with internet based wine clubs including WSJwine, Virgin Wines, and Laithwaite's Wine that offer portals to Michigan consumers, giving them the the ability to purchase wines from Wine Dock that are not otherwise generally available in Michigan. DWI assists the platform by passing consumer information on to Wine Dock. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 8.)
7. DWI's services have helped Wine Dock reach approximately 70,000 Michigan consumers. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 9.)
8. DWI does none of the following:

- Hold a direct or indirect interest in Cornerstone Wine Distributors, LLC or Wine Dock Liquor & Fine Wine, Inc.
- Sell wine to wholesalers, retailers, or consumers;
- Ship wine products;
- Inventory wine products;
- Package wine products;
- Deliver wine products;
- Produce wine; or
- Purchase wines.

Further, DWI has:

- No office in Michigan;
- No employees in Michigan; and
- No control over the retailer or wholesaler's business decisions.

(See Exhibit B, Affidavit of Neil Rhodes, ¶ 10.)

9. DWI holds no alcoholic beverage licenses in Michigan or elsewhere in the United States issued by a federal, state, or local regulatory agency. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 11.)
10. Senate Bill 1088 was adopted by the Michigan Legislature on December 14, 2016. It became 2016 PA 520 and the law was effective on March 29, 2017.

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Direct Wines, Inc.

11. DWI and SLJ Group, Inc. d/b/a Lionstone International (“Lionstone”) met with Commission Chairman Deloney and Commission staff on April 18, 2017 to explain the business plan for marketing, ordering, fulfillment, and delivery of wine products. A similar meeting took place with Commissioners serving under the prior administration. No objections were raised at either meeting. (See Exhibit C, Supplemental Affidavit of Nicholas Lucca, ¶ 3.)
12. The Department of Attorney General issued to DWI a letter dated June 25, 2018 directing DWI to Cease and Desist Unlicensed Direct Shipping of Alcoholic Liquor and suggesting that DWI contact the Commission to obtain information on how to become a licensed entity. (See Exhibit A, June 25, 2018 Attorney General Letter.)
13. DWI responded on July 26, 2018 requesting a meeting to allow DWI to explain its business model and operations as had been done with the Commission at various times before and since the adoption of 2016 PA 520. (See Exhibit D, July 26, 2018 Dykema Letter.)
14. On September 11, 2018, DWI and SLJ Group, Inc. met with certain Assistants Attorney General and the Commission’s Business Manager to explain DWI’s business model and operations. (See Exhibit B, Affidavit of Neil Rhodes, ¶ 12 and Exhibit C, Supplemental Affidavit of Nicholas Lucca, ¶ 3.)
15. By letter dated September 26, 2018, the Department of Attorney General responded with another Cease and Desist letter and stated that the September 11, 2018 meeting “further confirmed that Direct Wines is unlicensed and facilitates the sale of wine to Michigan consumers on behalf of Wine Dock Liquor & Fine Wine, Inc., which is licensed to sell alcohol at retail in Michigan.” The letter also stated that “facilitation and sale of alcohol are broadly defined terms under the Code and involve more than just the delivery of same.” (See Exhibit E, September 26, 2018 Attorney General Letter.)

III. RELEVANT STATUTES AND RULES

1. Michigan Liquor Control Code of 1998 (the “Code”), 1998 PA 58, MCL 436.1001, *et seq.*, particularly Section 203, MCL 436.1203 and subsections (15), (17), and (25)(m) set forth below:

(15) A retailer that holds a specially designated merchant license located in this state may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer as provided in subsection (12) or this subsection, and a third party facilitator service may deliver beer or wine to a consumer on behalf of a retailer that holds a specially designated merchant license located in this state, if all of the following conditions are met:

Michigan Liquor Control Commission
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Direct Wines, Inc.

(a) If the third party facilitator service delivers beer or wine under this subsection, the third party facilitator service verifies that the individual accepting the delivery of the beer or wine is at least 21 years of age.

(b) A manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not have a direct or indirect interest in the third party facilitator service.

(c) A manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not aid or assist a third party facilitator service by gift, loan of money or property of any description, or other valuable thing as defined in section 609, and a third party facilitator service does not accept the same.

(d) The retailer or consumer pays the fees associated with deliveries provided for under this subsection.

(e) The third party facilitator service offers services for all brands available at the retail location.

* * *

(17) A third party facilitator service shall not deliver beer, wine, or spirits to a consumer under subsection (15) or (16), as applicable, and shall not facilitate the sale of beer, wine, or spirits under subsection (15) or (16), as applicable, unless it applies for and is granted a third party facilitator service license by the commission. The commission may charge a reasonable application fee, initial license fee, and annual license renewal fee. The commission shall establish a fee under this subsection by written order.

* * *

(25) As used in this section: . . .

(m) "Third party facilitator service" means a person licensed by the commission to do any of the following:

(i) Facilitate the sale of beer or wine to a consumer as provided in subsection (15) on behalf of a retailer that holds a specially designated merchant license located in this state.

(ii) Facilitate the sale of spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.

(iii) Deliver beer or wine to a consumer as provided in subsection (15) on behalf of a retailer that holds a specially designated merchant license located in this state.

Michigan Liquor Control Commission
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Direct Wines, Inc.

(iv) Deliver spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.

2. Michigan Administrative Procedures Act, 1969 PA 306, MCL 24.201, *et seq.*

IV. DECLARATORY RULING REQUEST

Upon the Statement of Facts set forth above and the attached memorandum of law, request is hereby made for a Declaratory Ruling that Direct Wines, Inc. is not subject to licensure by the Michigan Liquor Control Commission and that the services it provides to an SDM licensed retailer does not violate MCL 436.1203 or any other provision of the Code. Further, that the Cease and Desist letters issued by the Department of Attorney General erroneously seeking to enforce the Code be rescinded and/or struck.

Respectfully submitted,

Dykema Gossett PLLC

Siegel & Moses, P.C.

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Dated: October 10, 2018

Dated: October __, 2018

Michigan Liquor Control Commission
Request for Declaratory Ruling
Direct Wines, Inc.

(iv) Deliver spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.

2. Michigan Administrative Procedures Act, 1969 PA 306, MCL 24.201, *et seq.*

IV. DECLARATORY RULING REQUEST

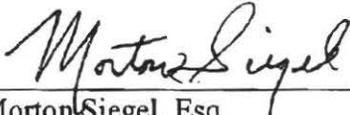
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Dated: October __, 2018

Dated: October 10, 2018

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



BILL SCHUETTE
ATTORNEY GENERAL

P.O. Box 30005
LANSING, MICHIGAN 48909

June 25, 2018

Direct Wines, Inc.
20 Marshall Street
Norwalk, CT 06854

RE: Cease and Desist Unlicensed Direct Shipping of Alcoholic Liquor

Dear Sir or Madam:

This office has confirmed that Direct Wines, Inc. at 20 Marshall Street, Norwalk, CT 06854, has facilitated the direct shipment of wine into the State of Michigan despite not possessing a license to engage in such activity, paid the fees associated with delivery of wine by a licensed retailer, and derived use and benefit from the licenses of several licensees. These conclusions arise from the business's ongoing practice of receiving money from customers in exchange for direct shipments of alcoholic liquor, contrary to the Michigan Liquor Control Code of 1998 (Liquor Code) and administrative rules. See MCL 436.1101, et seq. Accordingly, the business and anyone affiliated with its operation, as well as the building's owner and lessee, are ordered to cease this illegal activity or face possible criminal charges.

Specifically, the parties mentioned above must cease and desist their ongoing practice of facilitating the selling, furnishing, or shipment of alcoholic liquor to paying customers. This activity violates the Liquor Code and constitutes criminal activity. According to MCL 436.1909(3), any person who "performs any act for which a license is required under this act without first obtaining that license or who sells alcoholic liquor in a county that has prohibited the sale of alcoholic liquor . . . is guilty of a felony punishable by imprisonment for not more than 1 year or by a fine of not more than \$1,000.00 or both." Activities that constitute selling, delivering or importing in excess of 80,000 ml of alcoholic liquor constitute a felony punishable by imprisonment of not more than 4 years or a fine of not more than \$5,000.00 or both." MCL 436.1909(4)(a).

The U.S. Constitution, in the 21st amendment, reserves the right to control alcoholic beverages to the individual states and each state has their own system of licensing, taxation, and regulation to prevent unauthorized sales. See, U.S. Const Amend XXI, see also 1963 Const Art. IV, §40. The Michigan Legislature has

Direct Wines, Inc.

Page 2

June 25, 2018

established a system of licensing, taxation and enforcement standards, which the Michigan Liquor Control Commission (MLCC) is responsible for implementing. The essence of such a control system is the fact that alcoholic beverages, while legal, are controlled substances which are susceptible to misuse or abuse. Liquor licensees, who are authorized to sell alcoholic beverages, are directly accountable to the MLCC. If you wish to become licensed by the MLCC as a third party facilitator service so that you can legally facilitate the selling or furnishing of alcoholic liquor within the State of Michigan, please contact the MLCC to obtain information on how to become a licensed entity. But unless and until the above business becomes licensed, it is engaging in illegal activity.

Direct Wines, Inc. is also violating the Consumer Protection Act (CPA) by promoting and falsely representing to the public that its business is legal. Section 3 of the CPA, MCL 445.903(1)(a), prohibits representations that cause a probability of confusion or misunderstanding as to their approval. A persistent and knowing violation of this law may result in a court assessing a civil penalty of \$25,000, along with costs and attorney fees, in favor of the Attorney General. See MCL 445.905.

The statutes and possible legal actions stated in this letter are by no means exhaustive; this letter is intended only to place Direct Wines, Inc. and persons affiliated with its operation, including the owner and lessee of the premises where it is located, on notice that the business is violating the laws prohibiting unlicensed individuals from providing third party facilitation services. If this activity fails to cease within 14 days of your receipt of this letter, our office will take legal action to stop it. This may include filing criminal charges.

Sincerely yours,



Donald S. McGehee

Division Chief

Alcohol and Gambling Enforcement Division

(517) 241-0210

Fax: (517) 241-1074

AFFIDAVIT OF NEIL RHODES

RE: CEASE AND DESIST LETTER FILED BY THE DEPARTMENT OF THE
ATTORNEY GENERAL TO DIRECT WINES, INC.

I, NEIL RHODES, being first duly sworn upon oath, hereby depose and state as follows:

1. I am in excess of twenty-one (21) years of age, and I have personal knowledge of the facts set forth in this Affidavit and know same to be true. If sworn to testify, I would testify competently and under penalty of perjury as to the matters set forth hereinbelow.

2. I am the Chief Financial Officer of Direct Wines, Inc. (hereinafter "Direct Wines"), its principle offices located at 20 Marshall Street, South Norwalk, Connecticut 06854.

3. DWI is one of numerous national media and marketing entities providing a variety of services to the wine industry being utilized in over 40 states.

4. DWI services are designed to accommodate new technology predominantly tied to the internet as well as emails, direct mail, social media, marketing and media expertise.

5. Throughout the years, DWI has created a market for over 800 small volume wineries throughout the United States, Europe, South Africa, and many other countries.

6. DWI's services include but are not limited to marketing, advertising, promotions, e-commerce, universal customer service arrangements, creating, designing, and maintaining of websites for retailers, recommendations of wine for purchase by wholesalers and retailers such as Wine Dock, a retailer in the state of Michigan that holds a specially designated merchant license issued by the Commission. Wine Dock looks for these services to assist their e-commerce business.

7. DWI contracts for use of national trademarks (brands) owned or controlled by national and international corporations as a marketing tool for wine clubs.

8. DWI works with internet based wine clubs including WSJwine, Virgin Wines, and Laithwaite's Wine that offer portals to Wine Dock enabling Michigan consumers the ability to purchase through Wine Dock wines that are not otherwise generally available in Michigan. DWI assists the platform by passing consumer information on to Wine Dock.

9. Over the course of the years, DWI's services have helped Wine Dock reach approximately 70,000 Michigan consumers.

10. Directs Wines does none of the following:

- Hold a direct or indirect interest in Cornerstone Wine Distributors, LLC or Wine Dock Liquor and Fine Wine, Inc.
- Sell wine to wholesalers, retailers, or consumers
- Ship wine products;
- Inventory wine products;
- Package wine products;
- Deliver wine products;
- Produce wine; or
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Further, DWI has:

- No office in Michigan;
- No employees in Michigan; and
- No control over the retailer or wholesaler's business decisions.

11. DWI holds no alcoholic beverage licenses in Michigan or elsewhere in the United States issued by a federal, state, or local regulatory agency.

12. On September 11, 2018, DWI and SLJ Group, Inc. met with certain Assistants Attorney General and the Commission's Business Manager to explain DWI's business model and operations.

13. A disruption to DWI's business will cause irreparable harm to DWI's business and reputation.

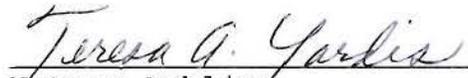
14. In addition to the harm suffered by DWI the small volume wineries will be adversely impacted.

FURTHER AFFIANT SAYETH NOT.



NEIL RHODES

SUBSCRIBED AND SWORN TO
before me this 10th day
of October 2018.



Notary Public

TERESA A. YARDIS
NOTARY PUBLIC
MY COMMISSION EXPIRES DEC. 31, 2020

SUPPLEMENTAL AFFIDAVIT OF NICHOLAS ANTHONY LUCCA

**RE: NOTICE OF HEARING ON COMPLAINT FILED BY THE MICHIGAN LIQUOR
CONTROL COMMISSION TO SLJ GROUP, INC. d/b/a LIONSTONE
INTERNATIONAL IDENTIFIED AS COMPLAINT #8-CV-501566**

This supplemental affidavit is provided for the purpose of explaining the business plan which is the subject of the Michigan Liquor Control Commission's above complaint.

I, **NICHOLAS ANTHONY LUCCA**, being first duly sworn upon oath, hereby depose and state as follows:

1. I am in excess of twenty-one (21) years of age, and I have personal knowledge of the facts set forth in this Affidavit and know same to be true. If sworn to testify, I would testify competently and under penalty of perjury as to the matters set forth hereinbelow.

2. I am President of SLJ Group, Inc. d/b/a Lionstone International (hereinafter "Lionstone").

3. The following business model has voluntarily been reviewed with current representatives of the Michigan Liquor Control Commission on April 18, 2017 and September 11, 2018.

4. Lionstone holds NRDs or Out of State Seller's permits for numerous states to sell and ship wines to wholesalers in states other than Illinois.

5. Lionstone as a wholesaler in Illinois only sells to retailers in Illinois. Lionstone only sells and ships wines to wholesalers in Michigan.

6. For the State of Michigan all wines sold to wholesalers in the state are registered prior to sale.

7. Lionstone offers its wines to wholesalers who issue a purchase order for the products that Lionstone has registered in Michigan.

8. Once the product is shipped to the Michigan wholesaler excise tax is paid as required.

9. The Michigan wholesaler receives a purchase order from a retailer and fulfills said PO.

10. The product is shipped to the retailer and payment is made as required by Michigan law.

11. The retailer accepts the shipment of wine and insures that state sales tax is paid.

12. The retailer forwards the consumer orders to the FedEx terminal for the last mile carrier delivery to the adult consumer.

13. FedEx follows the requirement to card the consumer at the time of delivery using the barcoded adult signature requirement. The label on the shipping container (box) indicates within the barcode that an adult must be present and carded. The label and box are also clearly marked in print that the product is wine and that an adult must be present to complete the delivery.

14. The retailer is responsible for FedEx following the delivery requirements and is also responsible for paying FedEx for the services FedEx provides.

15. If an adult is not available with proof of ID delivery of the product is attempted two more times using the same process as above. Failure to deliver the product results in the product being returned to the retailer and put back into the retailer's stock.

16. Prior to the retailer placing a purchase order with the Michigan wholesaler the retailer hires a marketing company to assist with numerous requested services the marketing company provides. The marketing company advises the retailer on such items as print and direct marketing ads, website enhancement, social media advertising, call center services, etc. for which the marketing company is paid for said services. The retailer is free to use as many marketing services as the retailer chooses as well as having complete control over hiring or firing the marketing company. In addition, all decisions related to the day to day operation of the business, including but not limited to product selection, pricing, promotions, advertising, etc., are under the complete control and supervision of the retailer. The retailer is responsible for all of the aforementioned services provided by marketing company, etc.

17. The adult consumer reacts to the retailer's advertising and determines if and when they may wish to place an order with the retailer.

18. The retailer has the ability to accept or reject the consumer's order.

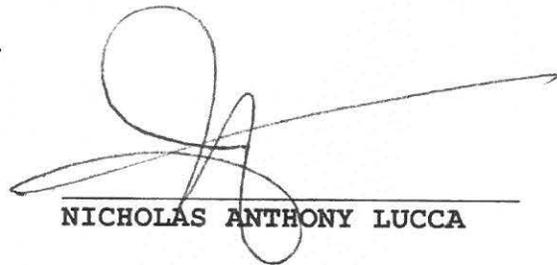
19. Once the retailer accepts the adult consumer's order, the consumer's credit card is charged and processed by the coordinating bank. Within 24 business hours the full amount of the customer's credit card charge is deposited in the retailer's bank account.

20. Once the funds are confirmed the retailer summarizes the orders for the day and places a purchase order to the wholesaler.

21. The wholesaler reviews the PO and accepts the order.

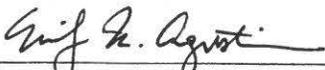
22. Documentation is auditable for registering the product, transportation, purchase orders, and tax payment.

FURTHER AFFIANT SAYETH NOT.



NICHOLAS ANTHONY LUCCA

SUBSCRIBED AND SWORN TO
before me this 2nd day
of October 2018.



Notary Public





Dykema Gossett PLLC
Capitol View
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Email: SCotter@dykema.com

July 26, 2018

Via Facsimile (517-241-1074)

Donald S. McGehee, Division Chief
Alcohol and Gambling Enforcement Division
Department of Attorney General
P.O. Box 30005
Lansing, MI 48909

Re: Cease and Desist Letter

Dear Mr. McGehee:

We have been retained by Direct Wines, Inc. to represent the company, together with their national counsel, Mort Siegel, with respect to your June 25, 2018 cease and desist letter. Mr. Siegel informs me that other parties who participate in this business model have received the same correspondence from your office.

As I discussed with Felepe Hall this afternoon, we understand that Kerry Krone is coordinating a meeting of your office, the Liquor Control Commission, and Direct Wines and its representatives for early September to address the allegations raised in your letter. My understanding is that Direct Wines discussed with the Commission its business model and operations at various times before and since the adoption of 2016 PA 520.

We respectfully request that your office refrain from taking any legal action at this time and allow the planned meeting to proceed in an effort to resolve this matter. Thank you for your consideration.

Sincerely,

DYKEMA GOSSETT PLLC

Sandra M. Cotter

cc: Mort Siegel
Felepe Hall

California | Illinois | Michigan | Minnesota | Texas | Washington, D.C.

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30005
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

September 26, 2018

Via First-Class Mail

Sandra M. Cotter, Esq.
Dykema Gossett PLLC
Capital View
201 Townsend Street, Ste. 900
Lansing, MI 48933

Re: *Cease and Desist Letter & Direct Wines Meeting*

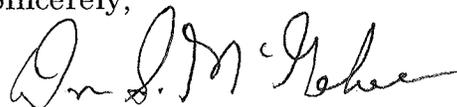
Dear Ms. Cotter:

Thank you for taking the time to meet with the Alcohol and Gambling Enforcement Division of the Michigan Attorney General's Office regarding the July 26, 2018 cease and desist letter that was sent to Direct Wines. In that letter, Direct Wines was advised that its unlicensed practice of facilitating the selling, furnishing, and shipment of wine to Michigan consumers is prohibited under state law.

During the meeting on September 11th, 2018, it was further confirmed that Direct Wines is unlicensed and facilitates the sale of wine to Michigan consumers on behalf of Wine Dock Liquor & Fine Wine, Inc., which is licensed to sell alcohol at retail in Michigan. However, you argued that the facilitation of the sale of wine to consumers in Michigan constitutes an action that does not require licensure by the Michigan Liquor Control Commission. Respectfully, we disagree with your position. Under MCL 436.1203, a person that facilitates the sale of wine to be delivered to the home or designated location of a consumer must first obtain a third-party facilitator license from the Commission. Failure to do so subjects that person to criminal and civil liability. Facilitation and sale of alcohol are broadly defined terms under the Code and involve more than just the delivery of same.

Therefore, in order for Direct Wines to continue to facilitate the sale of wine to Michigan consumers on behalf of Wine Dock, or any other similarly situated retailer, it must first obtain a third-party facilitator license from the Commission. We appreciate your agreement to cease and desist your activities in Michigan, unless and until the appropriate license is obtained.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald S. McGehee". The signature is fluid and cursive, with the first name "Donald" and last name "McGehee" clearly legible.

Donald S. McGehee
Division Chief
Alcohol and Gambling Enforcement
Department of Attorney General
5th Floor, G. Mennen Williams Bldg
525 West Ottawa Street
Lansing, MI 48933

DSM/klw

Cc: Andrew J. Deloney, Chairman
Kerry Krone, Business Manager
Mort Siegel, Esq.

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN LIQUOR CONTROL COMMISSION**

In re: Direct Wines, Inc.
20 Marshall Street
Norwalk, CT 06854

MEMORANDUM OF LAW
SUPPORTING REQUEST FOR DECLARATORY RULING

Introduction:

Direct Wines, Inc. (“DWI”), a Delaware corporation with an office in Connecticut, is one of numerous national media and marketing entities that provide a variety of services to the wine industry in over 40 states. The services include but are not limited to marketing; advertising; promotions; e-commerce; creating and designing websites for retailers; and recommendations to retailers of emerging industry trends and consumer preferences. DWI does not have a presence in Michigan.

DWI’s services are designed to accommodate new technology predominantly tied to the internet. These services have allowed DWI to create a market for over 800 small volume wineries throughout the United States, Europe, South Africa, and many other countries.

Wine Dock Liquor & Fine Wine, Inc. (“Wine Dock”) is a Michigan corporation that is licensed by the Michigan Liquor Control Commission (“Commission”) as a retailer. It holds SDD and SDM licenses and associated permits. Wine Dock operates a traditional “bricks and mortar” wine store located in St. Clair Shores, Michigan where it serves its customers in a customary format. Wine Dock also serves its customers through internet based commerce allowing a modern, convenient mode of purchasing wine legally over the internet, and shipping wine legally to customers with a common carrier such as UPS or FedEx. Under both business models, Michigan’s three-tier system of alcohol distribution is utilized. Wine Dock orders and purchases products from licensed wholesalers that order and purchase products from licensed suppliers/manufacturers. Wine Dock, as the licensed retailer, fulfills its customers purchases both in person at the St. Clair Shores store, and via the internet where payment is made to Wine Dock electronically. For internet purchases of wine, Wine Dock engages FedEx or UPS to provide delivery services paid for by Wine Dock.

DWI works with internet based wine clubs including WSJwine, Virgin Wines, and Laithwaite’s Wine that offer portals to Michigan consumers giving them the ability to purchase from Wine Dock wines that are not otherwise generally available in Michigan. DWI assists the platform by passing consumer information on to Wine Dock. These services have helped Wine Dock reach approximately 70,000 Michigan consumers.

The Michigan Legislature adopted a new “third party facilitator service” licensing scheme with 2016 PA 506, MCL 436.1203, which became effective on March 29, 2017. Under the statute, “third party facilitator service” is defined to cover persons licensed by the Commission to “facilitate,” through the “internet or mobile application,” the sale of beer or wine to a consumer on behalf of a retailer and to deliver beer or wine to a consumer on behalf of a retailer. The words “facilitate” and “facilitator” are never defined and are only used in this section and Section 906¹ of the Liquor Control Code of 1998.

On April 18, 2017 – shortly after the new law became effective – DWI met with Commission Chairman Deloney and Commission staff to explain and provide particulars of DWI’s business model. Earlier meetings with prior commissioners had also been conducted. A written outline was supplied at the April meeting and a walk through of the marketing platform, consumer experience with the website, and use of Michigan’s three tier distribution system was also provided. The third party facilitator service license statute was discussed and the delivery aspect of the statute was highlighted. At no time did the Commission suggest that DWI should seek licensure.

More than a year later, DWI received from the Department of Attorney General a June 25, 2018 Cease and Desist Unlicensed Direct Shipping of Alcoholic Liquor letter wherein it was suggested that DWI should become licensed as a third party facilitator service. DWI met with Commission staff and Assistants Attorney General on September 11, 2018 to again explain the business model, explain that DWI’s role relative to the retailer was to provide internet marketing services, and that DWI is not involved in the sale or delivery of wine on behalf of the retailer. The April 18, 2017 outline was provided again and a detailed PowerPoint Presentation was provided. DWI restated that its services include but are not limited to marketing, advertising, promotions, e-commerce, creating and designing websites for retailers, and recommending to retailers emerging industry trends, consumer preferences, and various wine products. DWI confirmed that the retailer accepted or declined customer orders and that the retailer contracted for delivery by common carriers such as FedEx and UPS. The Assistant Attorney General responded with a September 26, 2018 letter stating that “facilitation and sale of alcohol are broadly defined terms under the Code and involve more than just the delivery of same.” See September 26, 2018 Letter.

The Attorney General’s application of MCL 436.1203 to DWI is inappropriate. DWI is not subject to licensure by the Commission because: (i) the law at issue is unconstitutionally vague; (ii) the Commission has no legitimate regulatory authority over DWI’s business; and (iii) even if the Commission determines that the law at issue is not unconstitutionally vague, “facilitating” the sale of beer or wine requires at a minimum the delivery of the beer or wine by either the retailer under MCL 436.1203(12), or by the licensed third party facilitator under MCL 436.1203(15).

¹ MCL 436.1906 refers to server training programs for on-premises licensees.

MCL 436.1203 is Unconstitutionally Vague:

“Vague laws invite arbitrary power.” Sessions v Dimaya, 584 US ____ (2018). Justice Gorsuch concurrence.

A statute is unconstitutionally vague if it: (1) “is overbroad, impinging on First Amendment freedoms;” (2) “does not provide fair notice of the conduct proscribed;” or (3) “is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed.” *Woll v Attorney General*, 409 Mich 500, 533 (1980). Accord *Brang, Inc v Liquor Control Comm’n*, 320 Mich App 652, 663 (2017). Phrasing the third point another way, a statute is unconstitutionally vague if it vests the enforcing agency “with almost complete discretion” to determine to whom the statute applies. *People v Gasper*, 314 Mich App 528, 538 (2016). Here, MCL 436.1203 is clearly unconstitutionally vague under option (3).

To determine whether a term in controversy is unconstitutionally vague, it must be construed “with reference to the entire text of the statute.” *People v Bosca*, 310 Mich App 1, 74 (2015). In addition, consideration of relevant “judicial determinations, the common law, dictionaries, treatises, or [the term’s] generally accepted meaning” must be given. *People v Huffman*, 266 Mich App 354, 369 (2005).

Under MCL 436.1203(15), a retailer “that holds a [SDM] license . . . may use a third party facilitator service” via “the internet or mobile application” to “facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer.” The delivery of the product is a necessary part of the retailer’s transaction with the consumer and the retailer has the requisite license to do that. MCL 436.1203(25)(m) defines a “third party facilitator service” as, in relevant part, any “person licensed by the commission to . . . [f]acilitate the sale of beer or wine to a consumer as provided in subsection (15).” Section 203 is a shipping and delivery statute and it is this conduct that requires a license.

Taken together, MCL 436.1203(15) and (25)(m) allow a retailer to use a third party facilitator service to facilitate home delivery, and a third party facilitator service —i.e., one who facilitates home delivery—must obtain a license. Given this, determining whether a business needs to acquire a third party facilitator license depends entirely on what counts as facilitation.

Unfortunately, MCL 436.1203 neither defines facilitate nor explains how to determine whether an action facilitates a sale. To help determine what “facilitate” means, other sources must be considered. In the criminal law context, the Michigan Court of Appeals has defined facilitate simply as “to make easier.” *In re 1999 Ford Contour*, unpublished per curiam No. 300482. *Black’s Law Dictionary* (9th ed. 2009) roughly defines facilitate as to make something “easier,” or to “aid[] or help[.]” These definitions are remarkably broad—indeed, it is difficult to imagine more inclusive definitions. With respect to MCL 436.1203, a remarkably broad definition of the term is posited by the Attorney General as stated in the September 26, 2018 letter: “[F]acilitation and sale of alcohol are broadly defined terms under the Code and involve more than just the delivery of same.” (Unlike “facilitate,” at least the term “sale” is defined at MCL 436.1111(7).)

The problem with saying that “facilitate” is broadly defined is that there are innumerable entities that can get caught in the net depending on who or what the enforcement agency decides to go after because of the unfettered discretion. Take this scenario, for example: A Michigan customer uses her Verizon cellphone to browse the internet using the Google search engine and opens the *Wall Street Journal*. She comes across WSJwines and clicks on an offer. She is routed to Wine Dock, clearly identified as a Michigan licensed retailer, and places an online order with Wine Dock. Later, she calls to inquire about the order and speaks with a DWI contractor who is providing customer service support to Wine Dock.

So who in this scenario facilitated the sale and delivery of the wine? The Attorney General would say DWI, at the least. But what about Google, whose search platform the customer used to find the wine and Wine Dock? Or Verizon, whose data plan the customer used to access the internet? Or the owner of the servers, on which the website is housed? Or the *Wall Street Journal* where the wine offer appeared and portal for the consumer to connect with Wine Dock was provided? Or the contractor that provides DWI’s customer service team? Or Wine Dock’s electronics vendor, which leases to Wine Dock the equipment on which it receives orders? The list could go on and on. Each of these companies clearly helps, aids, or makes easier this internet sale of wine to the customer—in other words, they facilitate the sale. Are they third party facilitator services too?

The innumerable nature of these examples and the uncertainty demonstrates a critical point: MCL 436.1203’s use of facilitate is extremely indefinite. Indeed, MCL 436.1203 gives no indication of how the Commission or the Attorney General are to apply “facilitate”—it is entirely unstructured. This lack of structure and remarkable breadth vests the Commission and Attorney General with complete discretion to determine to whom the statute applies. Their decisions are bounded only by whatever metrics/rules/common (or uncommon) sense they choose to apply in that specific case.

Brang Inc v Liquor Control Comm’n, 320 Mich App 652 (2017), is a particularly pertinent example of how this unfettered discretion indicates an unconstitutionally vague statute. In *Brang Inc*, the court found the Commission rule at issue did not provide “parameters, guidance, standards, criteria, or quantifiers” for the enforcing agency to use in interpreting the phrase “narcotics paraphernalia.” *Brang Inc* at 667. This lack of structure, the court said, made the rule “susceptible to arbitrary and discriminatory enforcement” and, therefore, unconstitutionally vague. *Id.*

Here, MCL 436.1203, like the rule in *Brang Inc*, includes no parameters, guidance, standards, criteria, or qualifiers that constrain the application of “facilitate.” Businesses would have to guess as to whom this statute applies. The Commission, too, would need to guess. Is that a responsible manner of operation? Does it make sense to expend limited resources to find and license all these possible facilitators? This uncertainty makes MCL 436.1203 susceptible to arbitrary or discriminatory enforcement and, thus, unconstitutionally vague.

Of course, the enforcement agencies will provide assurances that our parade of horrors would never occur and that the Commission and Attorney General could conceivably craft specific policies or regulations that constrain and reasonably articulate what *they* think the Legislature

meant by “facilitate.” But such after-the-fact work by an executive department cannot save an unconstitutionally vague statute. What counts in an unconstitutional-vagueness analysis is the text in the statute—or in this case, the text not in the statute. Lest anyone think that this unconstitutional defect could be cured by simply interpreting “facilitate” reasonably, “no narrowing construction” of MCL 436.1203 could “render it constitutional.” *Gasper*, 314 Mich App at 540 (2016). See also *Brang Inc*, 320 Mich App at 669.

In sum, the point is not what the government will or is likely to do; rather, it is what, under the statute, the government could do. Given the statute’s lack of a definition of facilitate, the government could do practically whatever it pleases. And while this unlimited, unstructured discretion may be convenient from a regulatory perspective, it shows that MCL 436.1203 is unconstitutionally vague.

The Commission’s Regulatory Authority Has Limits:

The Twenty-first Amendment to the US Constitution bans the importation or possession of intoxicating liquors into a State “in violation of the laws thereof.” *US Const Am XXI*. Michigan’s Constitution and Legislature embraced the state’s role in alcohol regulation. Indeed, after a brief description of the applicant and the request pending before the Commission, *Licensing Approval Orders* issued now typically include the following language:

Article IV, Section 40, of the Michigan Constitution (1963), permits the legislature to establish a Liquor Control Commission, which shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof, subject to statutory limitations. MCL 436.1201(2) provides the Commission with the sole right, power, and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within this state, including the manufacture, importation, possession, transportation and sale thereof.

That control, however, is not without limits. “It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause.” *Brown-Forman v NY State Liq Auth*, 476 U.S. 573, 584 (1986). “The United States Supreme Court has ‘interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state.’” *Lebamoff Enterprises v Snyder*, Eastern District of Michigan, Case No 17-10191, Page 6 (9-28-2018) (quoting *C&A Carbone, Inc v Town of Clarkstown, NY*, 511 US 383, 390 (1994)).

DWI is a Delaware corporation that provides internet marketing services. It has no presence in Michigan and is not manufacturing, supplying, selling, or delivering alcoholic beverages in the state or anywhere else. In the case of Wine Dock and its internet customers residing in Michigan, those things are all being done by appropriately licensed entities. Extending the Commission’s licensing authority to an out-of-state marketing company is an inappropriate barrier to interstate commerce.

Assuming that MCL 436.1203 is not Unconstitutionally Vague, “Facilitating” Requires Delivery by the Retailer or the Third Party Facilitator

MCL 436.1203(15) states, in part:

A retailer that holds a specially designated merchant license located in this state may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer **as provided in subsection 12 or this subsection [i.e. subsection (15)].**

(emphasis added). Subsection (12) of MCL 436.1203 authorizes the delivery of beer and wine to the home or other designated location of a consumer provided that: (i) the beer or wine or both is delivered ***by the retailer’s employee***, (ii) the individual accepting delivery is at least 21 years of age, and (iii) the employee of the retailer delivering the beer or wine has received alcohol server training through a server training program approved by the commission. Subsection (15) of MCL 436.1203 authorizes the delivery of beer and wine to the home or other designated location of a consumer ***by a licensed third party facilitator service*** provided that (i) the third party facilitator service making the delivery verifies that the individual accepting delivery is at least 21 years of age, (ii) the retailer or consumer pays the fees associated with the delivery, and (iii) the third party facilitator provides services for all brands available for sale at the retailer’s retail location.

While the definition of “facilitate” is not contained in MCL 436.1203, one can reasonably conclude that “facilitation” **does not include** the facilitation of the sale of wine that is delivered by a common carrier such as FedEx or UPS. This assertion is based on the fact that MCL 425.1203(15) only authorizes a third party facilitator to facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer by a retailer’s employee under subsection (12) or by the third party facilitator service under subsection (15). Delivery of beer and wine to a consumer by a common carrier such as UPS or FedEx is not referenced in subsection (15), because delivery by a common carrier is already authorized in subsection (3), which states:

A retailer that holds a specially designated merchant license located in this state may use a common carrier to deliver wine to a consumer in this state. A retailer that uses a common carrier to deliver wine to a consumer under this subsection shall comply with all of the following:

- a) Pay any applicable taxes to the commission and pay any applicable taxes to the department of treasury as directed by the department of treasury. On the request of the department of treasury, a retailer shall furnish an affidavit to verify payment.
- (b) Comply with all laws of this state, including, but not limited to, the prohibition on sales to minors.

(c) Verify the age of the individual placing the order by obtaining from him or her a copy of a photo identification issued by this state, another state, or the federal government or by using an identification verification service. The person receiving and accepting the order on behalf of the retailer shall record the name, address, date of birth, and telephone number of the individual placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission and provide a duplicate to the commission.

(d) On request of the commission, make available to the commission any document used to verify the age of the individual ordering or receiving the wine from the retailer.

(e) Stamp, print, or label on the outside of the shipping container that the package "Contains Alcohol. Must be delivered to a person 21 years of age or older". The recipient at the time of the delivery shall provide identification verifying his or her age and sign for the delivery.

(f) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient if different from the name of the individual placing the order.

MCL 436.1203(3). The delivery of wine by a retailer through a common carrier such as UPS or FedEx under subsection (3) carries many more requirements than delivery by a retailer's employees under subsection (12) or by a third party facilitator service under subsection (15). There would be no need for the Commission to license, oversee or regulate a third party facilitator that "facilitates" the sale of wine in some fashion, but then turns over the delivery process to a common carrier such as UPS or FedEx, whose delivery practices are highly regulated under subsection (3). Accordingly, even assuming that MCL 436.1203 is not unconstitutionally vague, the act of "facilitating" the sale of wine by a Third Party Facilitator requires, *at a minimum*, the delivery of the wine by a retailer's employees under subsection (12), or by the third party facilitator under subsection (15).

For this reason, insofar as neither DWI nor the retailer's employees engage in the delivery of the wine products in question, DWI cannot be subject to licensure as a third party facilitator service, as all wine products ordered from the retailer through the DWI platform, are shipped by the retailer through a common carrier such as UPS or FedEx.

Conclusion:

Based on the facts and the application of the law to those facts, we respectfully request that the Commission declare and rule that Direct Wines, Inc. is not subject to licensure by the Michigan

Liquor Control Commission and that the services it provides to an SDM licensed retailer does not violate MCL 436.1203 or any other provision of the Code. Further, that the Cease and Desist letters issued by the Department of Attorney General erroneously seeking to enforce the Code be rescinded and/or struck and that no further enforcement action be sought against Direct Wines, Inc. or any of the Michigan licensees that have been swept into this debacle.