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October 29, 2018

VIA EMAIL AND HAND DELIVERY

Chairman Andrew J. Deloney
Commissioner Teri L. Quimby
Commissioner Dennis Olshove
Michigan Liquor Control Commission
Constitution Hall
525 W. Allegan
Lansing, MI 48933

RECEIVED

OCT 29 2018

MI LIQUOR CONTROL COMMISSION
OFFICE OF THE CHAIRPERSON

RE: Direct Wines, Inc. – Request for Declaratory Ruling

Dear Chairman Deloney and Commissioners Quimby and Olshove:

This office represents the Michigan Beer & Wine Wholesalers Association (“MB&WWA”). This letter is submitted in connection with the request for declaratory ruling dated October 10, 2018 from Direct Wines, Inc. (“DWI”).¹ MB&WWA’s members are an integral part of Michigan’s alcoholic beverage distribution system. As such, MB&WWA and its members have an interest in the interpretation of the Michigan Liquor Control Code since it is within that statutory framework that MB&WWA’s members conduct business.

Summary of Position

The Liquor Control Code provides that a “third party facilitator service” must be licensed by the Liquor Control Commission under MCL 436.1203(17) if it provides a retailer with services 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. DWI admits that it provides numerous internet and other related services for the benefit of a retailer. These internet services clearly assist this retailer in obtaining wine customers who order such wine over the internet for delivery.

¹ Since the DWI Request implicates the requests for declaratory ruling of SLJ Group, Inc., Cornerstone Wine Distributors, LLC, and Wine Dock Liquor & Fine Wine, Inc. d/b/a Wine Dock Liquor, this letter should be deemed applicable to all of these requests.

It is clear that DWI is a third party facilitator service that must be licensed. As a result, the Commission should either deny the request for issuance of a declaratory ruling or issue an order denying DWI's request.

Background

In a letter dated June 25, 2018 from the Alcohol and Gambling Enforcement Division of the Michigan Attorney General's Office ("Attorney General") to DWI, the Attorney General found that DWI is in violation of the Michigan Liquor Control Code ("Code") by facilitating the direct shipment of wine into the State of Michigan despite not possessing a license. Specifically, the Attorney General alleges that DWI has an "ongoing practice of facilitating the selling, furnishing, or shipment of alcoholic liquor to paying customers." In addition, the Attorney General alleged that DWI is also violating the Consumer Protection Act by promoting and falsely representing to the public that its business is legal. As a result, the Attorney General ordered that DWI cease and desist from conducting this illegal activity or face possible criminal charges.

On September 11, 2018, DWI and its counsel met with the Attorney General's Office to explain its operations in more detail with the intent of showing that no liquor license was necessary to operate its business. Pursuant to a letter dated September 26, 2018, the Attorney General indicated that "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." As a result, the Attorney General reaffirmed its position that DWI must cease and desist from its illegal activity of facilitating the sale of wine to consumers in Michigan. More specifically, the Attorney General stated that "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" pursuant to MCL 436.1203.

In connection with the cease and desist letters issued to DWI, the Liquor Control Commission ("Commission") also issued complaints dated July 10, 2018 against:

(1) Wine Dock Liquor & Fine Wine, Inc. d/b/a Wine Dock Liquor ("Wine Dock") (Complaint No. 8-CV-501565), which is a Michigan retailer. The Complaint alleges, among other things, that Wine Dock illegally utilized the services provided by DWI.

(2) SLJ Group, Inc. ("SLJ") (Complaint No. 8-CV-501566), which is a Michigan outstate seller of wine. The Complaint alleges, among other things, that SLJ illegally engaged in the direct sale of wine through various third party websites and allowed DWI to derive use or benefit from its license.

(3) Cornerstone Wine Distributors LLC ("Cornerstone") (Complaint No. 8-CV-501567), which is a Michigan wholesaler. The Complaint alleges that, among other things, Cornerstone illegally engaged in the direct sale of wine through various third party websites and allowed DWI to derive use or benefit from its license.

The Commission received a separate Request for Declaratory Ruling and Memorandum of Law Supporting Request for Declaratory Ruling from DWI, Wine Dock, SLJ, and Cornerstone, each dated October 10, 2018, which are date-stamped as received by the Commission on October 11, 2018.

This letter on behalf of MB&WWA focuses on the claims made against DWI by the Attorney General but each of the complaints issued against the other three parties are closely related, and the arguments made in this letter support all of the complaints issued by the Commission.

DWI states in its Request for Declaratory Ruling and Memorandum of Law ("Request") that it is not required to obtain a third party facilitator service license pursuant to MCL 436.1203 because it only provides services predominantly tied to the internet as well as emails, direct mail, social media, marketing, advertising, promotions, e-commerce, creating and designing websites for retailers, and recommendations to retailers related to emerging industry trends, consumer preferences and wine products. As provided in this letter, MB&WWA disagrees with DWI's claims. The Attorney General is correct: a third party facilitator service license is required.

Analysis

Following the adoption of the Twenty-first Amendment in 1933, the Michigan Constitution was amended to permit the creation of a Liquor Control Commission. Const 1963, Art. 4, § 40 provides, in pertinent part:

(t)he legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof.

The Constitutional grant of power to the Liquor Control Commission over liquor traffic in this state is expressly subject to statutory limitations, including the requirement that the Commission adopt rules and regulations in exercising its discretion in regard to licensing standards. *Mallchok v Liquor Control Com*, 72 Mich App 341 (1976).

MCL 436.1203 allows a specially designated merchant and/or a specially designated distributor to use a third party facilitator service by means of the internet or mobile application to facilitate the sale of beer, wine, or spirits to a consumer. The third party facilitator service *may* (but is not required to) also deliver beer and wine on behalf of a specially designated merchant or specially designated distributor. A third party facilitator service must be licensed by the Commission in order to provide its services to a retailer. MCL 436.1203 (15) provides, in pertinent 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, 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:

(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.

...

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

(Emphasis Added).

MCL 436.1203(25)(m) defines "third party facilitator service" as "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... (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...." (Emphasis Added).

MCL 436.1203(17) provides that:

A third party facilitator service... 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.

DWI claims that its services are "designed to accommodate new technology predominantly tied to the internet...to create a market for over 800 small volume wineries...." DWI provides its services to Wine Dock Liquor & Fine Wine, Inc. ("Wine Dock") so that Wine Dock can serve its customers "through internet based commerce allowing a modern, convenient mode of purchasing wine legally over the internet, and shipping wine" with a common carrier such as FedEx or UPS.

DWI admits that it works with wine clubs "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 also admits that it "assists the platform by passing consumer information on to Wine Dock" which "services have helped Wine Dock reach approximately 70,000 Michigan customers." More specifically, DWI states that it provides services predominantly tied to the internet as well as emails, direct mail,

social media, marketing, advertising, promotions, e-commerce, creating and designing websites for retailers, and recommendations to retailers related to emerging industry trends, consumer preferences and wine products. This clearly shows that DWI is being used (and compensated in some way) by Wine Dock as a means of driving internet sales to consumers. This falls directly within the purview of MCL 436.1203 (15) and requires DWI to obtain a third party facilitator service license.

DWI alleges that: (1) MCL 436.1203 is unconstitutionally vague; (2) the Commission has no legitimate regulatory authority over DWI's business; and (3) even if the Commission determines that the law 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).

A. MCL 436.1203 is Not Unconstitutionally Vague and, Regardless of this Allegation, the Commission Has No Jurisdiction to Declare a Statute Unconstitutional.

A large portion of DWI's argument focuses on the claim that MCL 436.1203(15) is vague and, therefore, unconstitutional. DWI claims that the term "facilitate" as used in this statute is so unclear that indefinite that the statute should not be enforced. DWI even goes so far as saying that facilitating the sale of beer and wine could be applied to Verizon or Google. DWI's arguments on this issue are illogical because they only look at the word "facilitate" without considering the remainder of the statute. MCL 436.1203(15) specifically states that it relates to facilitation "by means of the internet or mobile application to facilitate the sale of beer or wine." DWI is directly benefiting and being paid based on the sale of wine. Its business is centered around the sale of wine and helping its retailer customers achieve successful sales over the internet. Verizon and Google have nothing to do with the sale of beer or wine. To liken DWI's services to Verizon and Google is disingenuous. Although the statute is admittedly broad, the Legislature meant it to be broad in its application. There is a major difference between broad and vague. If a business is facilitating the sale of beer or wine by means of internet or mobile application, the statute applies.

In its request, DWI asks the Commission to do something it has no authority to do. The Liquor Control Commission is without jurisdiction to make determinations as to the constitutionality of MCL 436.1203, which was legally enacted into law by the Michigan Legislature. "[I]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16, 132 S. Ct. 2126, 2136, 183 L. Ed. 2d 1 (2012) (citations omitted).

The Michigan Attorney General has opined that the Commission has no authority to circumvent a statutory directive. See Attorney General Opinion No. 6381, August 18, 1986 where the Attorney General stated:

It is elementary that an administrative agency may not, through the adoption of a rule or entry of an order either extend the scope of, or grant exemptions to, a statute. Rather, such administrative determinations must be construed in connection with the statute itself and, where there is conflict, it is the statute which governs. *Michigan Sportservice, Inc. v Commissioner of the Dept. of Revenue*, 319 Mich 561; 30 NW2d 281 (1948). Further, where an order or determination of an administrative body is contrary to law, it is subject to being reversed on judicial review. *Gilliam v Chrysler Corporation*, 72 Mich App 538; 250 NW2d 123 (1976).

Attorney General Opinion No. 6381 is consistent with “black letter” law about the role of administrative agencies. As noted in Michigan Administrative Law, Don LeDuc, Chapter 1, Fundamental Context of Administrative Law, Section 1:07:

Every administrative law case starts at the same place – with the statute that empowers the agency to act in the matter in question. A statute commonly is called the underlying statute and it is the keystone on which all administrative analysis is built. The underlying statute gives the agency the authority to act, describes the nature of the actions in which the agency can engage, defines the extent of parameters of those actions, limits the outcomes allowed, and forms the basis for subsequent judicial review. Beginning with the delegation analysis and concluding with the method, form, and scope of judicial review, the legislatively granted limitations and powers contained in the underlying statute are controlling and of paramount importance in the analysis of an administrative law problem.

Michigan courts have always recognized that agencies are creatures of statutes and their powers are limited by the statutes which created the agency.

In *Kassab v Acho*, 150 Mich App 104 (1986), the Court stated:

As an agency, the [Liquor Control] commission has no inherent powers and, therefore, any authority must come from the Legislature. *Blue Cross & Blue Shield of Michigan v Insurance Commissioners*, 403 Mich 399, 424; 270 NW2d 845 (1978), *reh den* 405 Mich 1001 (1979); *Pharris v Secretary of State*, 117 Mich App 202; 323 NW2d 652 (1982). The commission’s plenary power to regulate liquor traffic is subject to statutory restraints. *Mallchok*, 72 Mich App 344. *** Manifest injustice is not a means by which the

[Liquor Control] commission may avoid legislative mandate as well as its own regulations.

As a result, the allegedly unconstitutional vagueness of the statute is not only without merit but the Commission lacks jurisdiction to further consider that claim.

B. The Commission Has Regulatory Authority Over DWI.

DWI claims that the Commission has no authority over its activities. However, it is clear that DWI, at a minimum, facilitates the sale of wine through “wine clubs” as well as Michigan outstate sellers, wholesalers, and retailers. It is directly involved in the trafficking of alcoholic beverages in this State. DWI seems to imply that there may be some sort of unconstitutional discrimination under the Commerce Clause. However, DWI makes no factual assertions to substantiate this claim and simply makes inapplicable statements of law. There is no discrimination and the Attorney General and Commission are enforcing the Legislature’s directives.

As discussed above, a third party facilitator service is required to be licensed pursuant to the clear and unambiguous provisions contained in MCL 436.1203(17). The Michigan Liquor Control Commission may not circumvent that legislative mandate by rule or order. The Michigan Liquor Control Commission is required to enforce MCL 436.1203 to ensure that only licensed entities act as third party facilitators and that retailers only use licensed third party facilitators.

C. MCL 436.1203(15) Does Not Require Wine to be Delivered by DWI or the Retailer to Apply.

DWI claims that “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). DWI’s interpretation of MCL 436.1203 as a whole is incorrect. MCL 436.1203(15) only applies when a retailer chooses to use a third party facilitator service to provide services to facilitate the sale of beer or wine by means of the internet or mobile application. Again, MCL 436.1203(15) states that a retailer holding a specially designated merchant license “*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....” (Emphasis Added). Simply because subsection (15) provides that the third party facilitator service or the retailer may deliver the product, this does not mean that a common carrier cannot.

Notably, subsection (15) applies to the sale of beer or wine. MCL 436.1203(3) always allows a specially designated merchant to use a “common carrier” to deliver **wine** even though that subsection does not apply to the delivery of beer. Therefore,

subsection (15) is completely consistent with the terms of MCL 436.1203(12) and MCL 436.1203(3).

DWI is correct that MCL 436.1203(15) provides for delivery of **beer or wine** by either a third party facilitator service (under MCL 436.1203(15)(a)) or the retailer's employees (under MCL 436.1203(12)) because it is a subsection that relates to the delivery of beer or wine. This does not somehow negate the provisions of MCL 436.1203(3), which allows a "common carrier" to deliver wine (and not beer) even if a third party facilitator service was involved in facilitating the sale by means of the internet or mobile application. In fact, if subsection (15) indicated that a "common carrier" could deliver under that section, it would be contrary to subsection (3), which only allows a common carrier to deliver wine.

DWI alleges that if FedEx or UPS delivers wine sold in a transaction in which a third party facilitator would otherwise have been subject to the statute, subsection (15) of the statute no longer applies. More simply, DWI claims that its actions would no longer be facilitating the sale of beer or wine for which it would need a license. DWI has twisted the meaning of the statute beyond all rational interpretation, which rises to the level of absurdity. This argument must simply be dismissed as an incorrect interpretation of MCL 436.1203.

D. The Three-Tier System Would be Put in Jeopardy if Entities Similar to DWI Are Permitted to Conduct Business Without a License.

DWI facilitates the sale of wine through Wine Dock and Cornerstone. Wine Dock has its physical licensed location in Saint Clair Shores, Michigan. In order for Wine Dock to obtain its product, it must receive it from a Michigan licensed wholesaler. DWI's operations are not set forth in detail in the Request and if the Commission were intending to issue a declaratory ruling, it should require DWI to provide much more detail of its operations (e.g. its customers, where it makes its money, the details of orders and shipments of wine, etc.). Although the factual scenario of the DWI and its various business associates is murky, it is clear that wine is being shipped into Michigan by various entities that are not the producers of those products. Apparently, products are being shipped to Cornerstone (a wholesaler), which then ships the product to Wine Dock (a retailer). Wine Dock then takes the orders from consumers and uses FedEx and UPS to ship them.

One problem is that DWI, the "wine clubs," and/or various other unlicensed entities could cause the shipment of wine to Cornerstone (or another wholesaler) and Cornerstone may not have the distribution rights for those brands. If Cornerstone is receiving wine brands for which it does not have distribution rights, it is violating MCL 436.1307, which provides that wholesalers shall have exclusive sales territories within which a wholesaler shall be a distributor of the specified brand or brands of the manufacturer or outstate seller of wine.

If entities such as DWI are not required to be licensed, the Commission will have a much more difficult time enforcing laws such as MCL 436.1307. Equally disturbing is the fact that a wholesaler that actually has the exclusive sales territory for the brands being illegally sold over the internet could be severely disadvantaged from a financial perspective. In addition, if beer and/or wine is being shipped into this State improperly without the knowledge or consent of the supplier or authorized outstate seller, this would cause complete chaos for the three-tier system and should not be permitted.

Conclusion

For all of the reasons stated above, the Commission should deny the request for a declaratory ruling and, if a declaratory ruling is issued, it should reject DWI's position as incorrect.

Respectfully submitted,

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