STATE OF MICHIGAN

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LIQUOR CONTROL COMMISSION

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In the matter of the request of)
SHORTS BREWING COMPANY)
for a declaratory ruling regarding the applicability of)
MCL 436.1609(11))
____)

At the Michigan Liquor Control Commission's ("Commission") February 13, 2018 meeting in Lansing, Michigan.

PRESENT: Andrew J. Deloney, Chairman
Teri L. Quimby, Commissioner
Dennis Olshove, Commissioner

DECLARATORY RULING

On November 21, 2017, the Commission received a request for declaratory ruling pursuant to Mich Admin Code, R 436.1971 from Short's Brewing Company, ("Short's"). On December 19, 2017 the Commission approved Short's request pursuant to Mich Admin Code, R 436.1973(1). The Commission made Short's request available for public inspection and asked the public to comment on the request. The Commission received comment to Short's request from Attorney Scott Breen on behalf of the Michigan Beer and Wine Wholesaler's Association. In accordance with Mich Admin Code, R 436.1973(f), the Commission issues the following declaratory ruling on Short's request.

I. QUESTION PRESENTED

Short's request for a declaratory ruling asks whether a retail licensee may

incorporate the Short’s Brewing Company logo or wordmark as part of its employee uniform. Specifically, the retailer has approached a non-licensed entity, Underground Printing, to provide an embroidered wordmark or logo on the retailer’s employee shirts. According to the request, Short’s does not have any affiliation with Underground Printing or the retail licensee. Short’s states that its involvement is limited to granting permission to Underground Printing to embroider the logo or wordmark on the retail licensee employee shirts. Short’s filed a request for declaratory ruling asking whether the logoed shirt qualifies as acceptable barware pursuant to MCL 436.1609(11).

II. APPLICABLE LAW

The State of Michigan’s alcoholic liquor industry adheres to a three-tier system of distribution, which includes manufacturers, distributors, and retailers. To preserve the three-tier distribution model, the Legislature has imposed several tied-house restrictions. MCL 436.1609. The purpose of these tied-house restrictions is to prevent a manufacturer, wholesaler/distributor, or retailer, from having an interest, direct or indirect, in a licensee in one of the other tiers. Preventing this type of conduct is necessary to ensure that no one licensee exerts control in the other two tiers thereby hampering efforts to regulate the industry. MCL 436.1609. In particular, MCL 436.1609 generally prohibits manufacturers, wholesalers, or retailers from rendering “aid or assist[ance] [to] any other vendor by gift, loan of money or property of any description, or other valuable thing.” MCL 436.1609(1). The term “other valuable thing” has been defined by the Legislature as a “good, service, or intangible good that is given, loaned, leased, or sold to another licensee that has value regardless of whether the value is nominal and includes . . . a good, service, or intangible good that provided a benefit, regardless of how nominal,

to the licensee other than advertising the brands and prices of alcoholic liquor produced by the manufacturer. . . ." MCL 436.1609(11)(e).

The Legislature provided limited exceptions to the general rule against rendering and accepting aid and assistance from another licensee. One such exception may be found in subsection (3), which allows a manufacturers and other licensees to provide certain goods and services to another licensee, including calendars, matchbooks, mirrors, napkin holders and other similar items. See MCL 436.1609(3). Another exception includes the ability of off-premises licensees to sell brand logoed merchandise if the item is contained within a value-added package. MCL 436.1609(4). Yet another exception allows for brand logoed merchandise to be provided to licensees if the items are part of a display promoting the product in question. See MCL 436.1609(6). Displays allowed pursuant to subsection (6) must conform to several conditions. See MCL 436.1609(6)(a)-(j). Aside from the exceptions identified in subsection (3), (4), and (6), retailers are generally prohibited from accepting "advertising items that have a use or value beyond the actual advertising of brands and prices of alcoholic liquor. MCL 436.1609(5). Subsection (5) allows the retail license to use and possess "brand logoed barware that advertises beer or wine if the items are purchased from a barware retailer." *Id.*

The Legislature has defined the term "barware" as one of the listed brand logoed merchandise items, including shirts. MCL 436.1609(11)(a)(iv). A "barware retailer" means "a person that offers brand logoed barware for sale to retailers, whether or not it is in their ordinary course of business, and that is not licensed as, or directly or indirectly affiliated with a manufacturer. . . ." MCL 436.1609(11)(b). The definition of "barware retailer" also notes that "a licensing agreement that authorizes use of a brand logo is not a direct or

indirect affiliation." *Id.* Finally, because barware involves items that advertise beer or wine, the definition of beer must be considered. "Beer" is defined in the Code as "means any beverage obtained by alcoholic fermentation of an infusion or decoction of barley, malt, hops, or other cereal in potable water." MCL 436.1105(6).

III. ANALYSIS

Short's inquiry turns on an interpretation of statutory language. To achieve this end, the Commission must consider the principles of statutory construction typically applied by Michigan Courts. The purpose of statutory construction is to "give effect to the intent of the Legislature." *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39 (2008), quoting *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202 (2007). "If the statute is unambiguous, the [Commission] must assume that the Legislature intended its plain meaning and that statute must be enforced as written." *Id.* The Commission may not "speculate regarding that intent beyond those words expressed in the statute." *Lash v Traverse City*, 479 Mich 180, 194 (2007). Rather, the Commission is required to "assign to every word or phrase its plain and ordinary meaning unless otherwise defined in the statute, or unless the Legislature has used 'technical words and phrases . . . [that] may have acquired a peculiar meaning in the law." *Alvan*, 281 Mich App at 40. Finally, the Commission cannot read "a word . . . of a statute in isolation; rather, each word or phrase and its placement must be read in context of the whole act." *Id.* citing *Mayor of Lansing v Public Service Comm'n*, 470 Mich 154, 167-68 (2004).

The question posed by Short's is whether the shirts bearing an embroidered Short's logo constitutes acceptable barware pursuant to MCL 436.1609(11). Shirts are included in the litany of items set forth in the barware definition of subsection (11). But the conditions

for acceptable barware are contained within MCL 436.1609(5). In particular, the statute provides that a "retailer may possess and use brand logoed barware that advertises beer or wine if the items are purchased from a barware dealer." MCL 436.1609(5). The Legislature's use of "beer" in subsection (5) of the statute cannot be ignored. As the principles of statutory construction require, the Commission must interpret the terms used in a statute by applying the plain and ordinary meaning of the term, *unless the word is otherwise defined in the statute.* As previously noted, the term "beer" has been defined as "any beverage obtained by alcoholic fermentation of an infusion or decoction of barley, malt, hops, or other cereal in potable water." MCL 436.1105(6). As a result, the barware in question must advertise a beer. But Short's Brewing Company, LLC is not a beer; rather, it is a licensed manufacturer. A manufacturer is defined by the Code as "a person engaged in the manufacture of alcoholic liquor, including, but not limited to, a distiller, a rectifier, a wine maker, and a brewer. MCL 436.1109(1). According to Commission records, Short's is licensed as a microbrewer. A "microbrewer" is defined as "a brewer that produces in total less than 60,000 barrels of beer per year and that may sell the beer produced to consumers at the licensed brewery premises for consumption on or off the licensed brewery premises and to retailers . . . ." MCL 436.1109(3).

Based on the information provided by Short's in its declaratory ruling request, the shirts in question would be embroidered with the Short's Brewing Company logo. As noted above, Short's Brewing Company, LLC is a licensed manufacturer and not a beer. Under these circumstances, the shirts worn by the third-party retailer would not qualify as acceptable barware pursuant to MCL 436.1609(11). The statute allowing for barware does not allow for the barware item to advertise a brewer, microbrewer, or any other

manufacturer for that matter. Such allowable items must advertise a beer, wine or spirit as those terms are defined by the Code. A reading to the contrary would improperly expand the intent of the Legislature.

Another tied-house restriction promulgated by the Commission to ensure the preservation of the three-tiered system of alcoholic distribution is the Commission's rule prohibiting conduct commonly referred to as cooperative advertising. Defined in Mich Admin Code, R 436.1001(1)(d), cooperative advertising is "a joint effort between licensees or vendors of spirits to advertise alcoholic liquor." Like statutes, administrative rules are to be read to ascertain the intent of the agency. See *City of Romulus v Dep't of Envtl Quality*, 260 Mich App 54, 65 (2003). Any provisions that are apparently inconsistent are interpreted to produce a harmonious, whole, if reasonably possible. See *Bailey v Oakwood Hosp and Medical Center*, 472 Mich 685, 693 (2005).

Mich Admin Code, R 436.1319, provides further clarification on what constitutes cooperative advertising. Specifically, the rule prohibits the act of cooperative advertising between a "manufacturer . . . and a retail licensee." Mich Admin Code, R 436.1319(1). Additionally, subsection (3) of the rule prohibits a retail licensee from appearing in the advertising of a manufacturer. Mich Admin Code, R 436.1319(3). Pursuant to the directive to read the rules together to produce a harmonious whole, the contemplated logoed shirts also violate the rules prohibiting cooperative advertising. Thus, even if the shirts were to qualify as barware, they constitute advertising materials for Short's Brewing Company. This is problematic given that Short's explanation that the retailer would have its own logo embroidered on the shirt bearing the Short's logo. This conduct violates subsection (3) of the rule. The Commission's rule prohibiting cooperative advertising is also consistent with

Mich Admin Code, R 436.1001(1)(d), which prohibits this very conduct between licensees.

IV. CONCLUSION

The Commission concludes that the shirts described in Short's declaratory ruling request do not constitute allowable barware pursuant to MCL 436.1609(5), (11) because the shirt would promote a brewery as opposed to a specific beer or wine as the statute allows. But even if changes were made to the proposed logo by including a specific beer name, this scenario still arises to conduct that constitutes a "joint effort between licensees . . . to advertise alcoholic liquor." Mich Admin Code, R 436.1001(1)(d). Further, the barware shirts would be an item advertising a Short's product that also included the name of the retail establishment – a violation of Mich Admin Code 436.1319(1) and (3).

MICHIGAN LIQUOR CONTROL COMMISSION

Andrew J. Deloney, Chairman

Dennis Olshove, Commissioner

By its action of February 13, 2018.