NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
SPEICAL MEETING OF APRIL 23, 2014
REFERRED FROM: COUNSEL'S OFFICE

2014-

REASON FOR REFERRAL
REQUEST FOR DIRECTION

INTERNET SALES OPERATION

(DECLARATORY RULING)

The Members of the Authority at their special meeting held at the Zone I New York City office on APRIL 23, 2014 determined:

ORRICK

ORRICK, HERRINGTON & SUTCLIFFE LLP
51 W 52ND STREET
NEW YORK, NEW YORK 10019-6142

tel +1-212-506-5000
fax +1-212-506-5151

WWW.ORRICK.COM

January 28, 2014

E. Joshua Rosenkranz
(212) 506-5380
jrosenkranz@orrick.com

VIA EMAIL AND UPS

Jacqueline Flug, Esq.
New York State Liquor Authority
317 Lenox Street
New York, NY 10027

Re: Petition for Declaratory Ruling

Dear Counsel Flug:

On behalf of Connoisseur Encounters Co., Inc., doing business as The Wine Cellar at Rye Ridge ("Wine Cellar"), we submit this request, pursuant to Section 204 of the State Administrative Procedure Act and Section 98.1 of the Rules of the State Liquor Authority, for a declaratory ruling on whether Wine Cellar's methods of operation violate the Alcohol Beverage Control Law ("ABC Law") and accompanying regulations and, specifically, to obtain guidance on the questions of law set forth below. In submitting this petition, we are relying on Exhibits 1 and 2, annexed hereto, as well as the materials previously submitted by Wine Cellar's counsel to SLA and its staff with respect to Wine Cellar's business model, and request that said materials be treated as part of the record submitted for SLA's consideration of this petition.

INTRODUCTION

After a year-long investigation, the State Liquor Authority issued a notice of pleading in June 2012 alleging that Wine Cellar (then doing business as Shermer Specialties) made its retail liquor license available to certain unlicensed third parties in violation of Section 111 of the ABC Law, namely, a wholesaler from which it buys wine for resale and a third-party service provider that facilitates its internet sales operations. After extensive negotiations with SLA's staff, Wine Cellar entered a no-contest plea and agreed to pay a $50,000 fine, which SLA accepted at a hearing held on March 12, 2013. As part of that settlement, Wine Cellar made substantial changes to its business model, as requested by SLA's staff, to ensure its ongoing compliance with New York law. Those changes included:

- Opening a more conventional brick-and-mortar retail store;
- Changing the fee structure for the internet retail operations so that it is not contingent upon the number of bottles sold or the volume of sales; and
- Executing a written third-party service provider agreement memorializing the services provided to the retailer and ensuring the retailer's control over the retail transactions.

To fulfill its agreement to open a more conventional brick-and-mortar store, Wine Cellar sought to relocate the licensed premises from Carmel, New York to a new storefront in Rye Brook, New York. To that end, Wine Cellar filed a petition to remove its existing retail license to the proposed Rye Brook premises. SLA voted at a June 5, 2013 hearing to approve the petition for removal.

At the same time, however, SLA purported to condition its approval on Wine Cellar's submission of: (1) a business plan outlining Wine Cellar's methods of operation; and (2) a petition for a declaratory ruling to enable SLA to opine on the business plan's compliance with the ABC Law. Since then, Wine Cellar has submitted substantial documentation and engaged in extended discussion with SLA's staff about its methods of operation—including the submission of a comprehensive business plan with supporting documentation, as well as the agreement governing its relationship with the third-party service provider.[1] Doing so fulfilled the first purported condition of the approval of the petition to remove the retail license.

Wine Cellar now submits this petition for a declaratory ruling to fulfill the second purported condition of approving the transfer of Wine Cellar's retail license to the new premises in Rye Brook. Wine Cellar makes this submission as part of its ongoing effort to address SLA's comments and concerns regarding Wine Cellar's methods of operation. Wine Cellar, however, submits this petition without waiver of its continuing objection that SLA's approval of its application for removal cannot be conditioned on submission of a declaratory ruling request and reserves all rights in that regard.

[1] Annexed to this petition as Exhibits 1 and 2, respectively, are copies of Wine Cellar's proposed business plan and the agreement between Wine Cellar and its third-party service provider.

ISSUES TO BE CONSIDERED

SLA staff's discussions with Wine Cellar and its attorneys have raised a number of fundamental questions about the proper application of the ABC Law and accompanying regulations to Wine Cellar's internet sales, which Wine Cellar requests that SLA address in its declaratory ruling. These questions, addressed more fully below, are as follows:

(1) Wine Cellar engages a third-party service provider to perform marketing, advertising, and technology services in connection with Wine Cellar's internet wine sales. The terms of Wine Cellar's relationship with this third party are set forth in an integrated services agreement, which states that Wine Cellar has the sole right to select products and pricing, accept or reject orders, and possess and control customers' funds. Wine Cellar pays the third party weekly on a flat-fee basis, irrespective of Wine Cellar's volume of sales, and reimburses the third party for incidental expenses such as shipping and advertising costs. Does Wine Cellar's business relationship with its third-party service provider violate Section 111 or any other provision of the ABC Law?

(2) While Wine Cellar purchases wines for its brick-and-mortar store from as many as eight different licensed wholesalers in New York, it purchases all of its wines for purposes of internet sales from a single wholesaler in New York. Wine Cellar, however, is not contractually, financially, or otherwise bound to do so and can choose to stop buying wine from this wholesaler at any time. Currently, Wine Cellar buys wine for internet resale from only one wholesaler for business reasons, namely, because the wholesaler specializes in distributing wines that appeal to Wine Cellar's internet retail customers. Does the ABC Law prohibit Wine Cellar, as a licensed retailer, from working exclusively with a single licensed wholesaler in connection with its internet sales?

(3) For wine that customers purchase from Wine Cellar over the internet, Wine Cellar pays for fulfillment services that are performed in Illinois. Wine Cellar pays the wholesaler fair-market value for these services on a per-bottle basis. Does the ABC Law prohibit Wine Cellar, as a licensed retailer, from paying for fulfillment services performed by a supplier or distributor outside the State of New York, the cost of which is passed along to Wine Cellar by a New York-licensed wholesaler?

(4) With respect to its internet wine business, Wine Cellar orders wines from its wholesaler only after a customer places an order or is scheduled to receive a recurring

order through a wine club membership. This allows Wine Cellar to efficiently tailor its purchases and inventory to respond almost instantaneously to customer demand. The cost savings of this efficient model are passed on to consumers. Does the ABC Law prohibit Wine Cellar, as a licensed retailer, from operating and maintaining some of its inventory on a "just-in-time" basis, by ordering and receiving products from the wholesaler as they are needed based on customer demand?

(5) Wine Cellar holds a New York retail license, and its premises are located in Rye Brook, New York. Its internet orders are shipped from its premises in New York and delivered to customers' homes throughout the state. The orders placed over the internet, including recurring orders made by wine club members, are reviewed and accepted in New York. Certain other business activities are conducted across state lines. In particular, suggestions for products and prices made by Wine Cellar's third-party service provider are reviewed by Connoisseur Encounters' President. In most instances, this review takes place in Illinois at Connoisseur Encounters' corporate headquarters for all of its nine retail operations. Does the ABC Law prohibit Wine Cellar from conducting these limited activities outside New York?

STATEMENT OF FACTS

Connoisseur Encounters is an Illinois corporation with its principal offices in Buffalo Grove, Illinois. It operates wine retail stores in nine states, with most—including the New York location—operating under the name "The Wine Cellar." Connoisseur Encounters holds direct-shipper permits in nine additional states.

Connoisseur Encounters is wholly owned by Clendinnen Holdings, Inc., a Delaware corporation. Thomas Hasler, a citizen of the United Kingdom, is the sole shareholder of Clendinnen Holdings. Mathew Booker serves as Connoisseur Encounters' President and oversees the operation of the nine retail locations. Clendinnen Holdings, Mr. Hasler, and Mr. Booker have no financial interest in or familial relationship to any wine wholesaler or manufacturer, or their parent companies, officers, or shareholders. Likewise, Connoisseur Encounters does not share common officers or directors with any wine manufacturer or wholesaler.

I. WINE CELLAR IS A LICENSED NEW YORK RETAILER THAT SELLS WINE IN-PERSON AND OVER THE INTERNET

Wine Cellar is a licensed retailer of wine products for off-premises consumption. Wine Cellar operates part of its retail business in the traditional manner, by selling wine to walk-in customers at its store in New York. Wine Cellar also offers wine for sale to consumers in New York over the internet.

Wine Cellar conducts its retail operations from a retail space located at 122 South Ridge Street in Rye Brook. The store is located in a high-end shopping center, which previously did not have a retail wine shop. Wine Cellar's store is approximately 1,600 square feet, of which roughly 1,300 square feet is used for product display while the remaining space is used for inventory storage. Wine Cellar also maintains approximately 2,500 square feet of warehouse space in Carmel. Wine Cellar uses that space primarily for storing returned or undelivered product and overflow inventory.

Wine Cellar's in-store product selection focuses on wines from smaller family-run wineries around the world, but the store also carries many major brands. Wine Cellar obtains its in-store inventory from at least eight different wholesalers in New York. The value of the inventory that Wine Cellar maintains at any one time in the Rye Brook premises and the Carmel warehouse ranges from $60,000 to $100,000.

Wine Cellar's store is open for business 72 hours each week, from 10:00 a.m. to 9:00 p.m. Monday through Saturday, and 12:00 p.m. to 6:00 p.m. on Sunday. The store has a full-time staff of employees, consisting of a store manager who oversees the daily retail operations and three employees who provide customer service and assistance with product selection. Additionally, Wine Cellar's warehouse in Carmel, which is staffed by two employees, provides remote storage for the retail store's inventory and receives and processes internet shipment returns. Wine Cellar promotes its store through various media, including advertisements in local publications, a Facebook page, and periodic promotional events such as in-store wine tastings.

Wine Cellar's Rye Brook retail store opened in September 2013. Within the first few months of operation, Wine Cellar already has experienced significant customer traffic at the store, with in-person sales approximating $30,000 in October, $43,000 in November, and $55,000 in December of last year.

Like many wine retailers in New York and across the nation, Wine Cellar also uses the internet to sell its wine products to consumers. Wine Cellar's internet sales model involves the

use of multiple online sales portals to feature and advertise Wine Cellar's wine selections. As explained in more detail below, these portals are hosted and maintained by a third-party service provider on behalf of, and under the control of, Wine Cellar.

A key feature of these online portals is that they are branded with well-known and properly licensed trademarks, namely those of Dow Jones & Company, Inc., Zagat Survey, LLC, Virgin Enterprises Limited, and Laithwaites Wines. Due to this marketing initiative, the website addresses for the sales portals bear the names of the trademarks rather than that of Wine Cellar.[2] Nevertheless, each website prominently identifies Wine Cellar as the licensed retailer fulfilling the online order to avoid any confusion as to the identity of the retail seller.

Another key feature of Wine Cellar's online business model is the use of "wine clubs," whereby consumers subscribe to receive shipments of wine assortments at regular intervals. Because Wine Cellar focuses on sourcing its wine assortments from small boutique wineries around the world, the wine club model has significant appeal to consumers who prefer to discover and sample wines they are unlikely to have encountered before. While the wine assortments are pre-selected, consumers may change the content of each upcoming wine shipment, skip a particular shipment, or cancel their subscription altogether without any penalty. In addition, visitors to the websites can place orders for single wines in cases, half-cases, and by the bottle. One-time orders constitute approximately 40% of Wine Cellar's internet wine sales, while the remaining 60% of the sales are made through the wine clubs.

For its internet sales, Wine Cellar buys wine for resale solely from SLJ Group, Inc., doing business as Lionstone International, which is a New York licensed wholesaler. Lionstone has differentiated itself in the wine industry by sourcing wines primarily from smaller wine manufacturers in the United States and internationally. This makes Lionstone particularly suited for supplying wines for Wine Cellar's internet retail operation, which as noted above, appeals to customers looking to discover and sample wines they likely cannot find at their local wine shop.[3] Wine Cellar's internet retail sales to New York customers are expected to generate revenue of approximately $20 million per year.

---

[2] The four websites through which Wine Cellar sells its products are WSJwine.com, Zagatwine.com, Virginwines.com and Laithwaiteswine.com.

[3] As required by law, Lionstone posts its wines and prices on SLA's website and makes its products available to all New York retailers, not just Wine Cellar.

II. WINE CELLAR USES A THIRD-PARTY SERVICE PROVIDER TO FACILITATE INTERNET RETAIL SALES

To streamline its internet sales, Wine Cellar employs a third-party service provider, Direct Wines, Inc., to assist with marketing, logistics, payment processing, and other administrative functions. Direct Wines provides similar marketing and logistics services across the nation to businesses at every tier of the wine and spirits industry and is universally recognized as one of the industry's leading third-party service providers. Direct Wines does not hold an alcoholic beverage license in New York or in any other jurisdiction.

Wine Cellar's business relationship with Direct Wines is governed by the Integrated Technology, Logistics, Marketing and Services Agreement (the "Integration Agreement"). The Integration Agreement enumerates the range of services that Direct Wines may provide to Wine Cellar and prescribes the flat-fee structure by which Wine Cellar compensates Direct Wines for those services. Wine Cellar pays Direct Wines a flat fee of $35,000 per week, or $1.82 million per year. *See* Ex. 2. at 6, Schedule of Fees. The fee does not vary based on the amount of wine sold by Wine Cellar. In addition, Wine Cellar reimburses Direct Wines for certain expenses such as carrier shipping costs and online advertising costs.

Direct Wines provides the following services to Wine Cellar in connection with the internet wine sales:

Marketing Services. Direct Wines has developed a national marketing strategy for promoting internet wine sales through the wine club method. This strategy is based on co-branding the online sales portals of licensed retailers with well-known trademarks. To that end, Direct Wines negotiated licensing arrangements with Dow Jones, Zagat, Virgin and Laithwaites Wines to use their marks in connection with the promotion and sales of wine products and paid the trademark owners a licensing fee for the use of their marks. Notably, Wine Cellar is not a party to any of those licensing agreements and, accordingly, is not bound by any of the terms set forth in those agreements.[4] The acquisition of the right to use the trademarks is still part of the marketing service that Direct Wines provides to Wine Cellar and is included in the flat fee that Wine Cellar pays to Direct Wines. *See* Ex. 2 at 1, 6 (Schedule of Fees).

---

[4] Connoisseur Encounters' President Mathew Booker previously confirmed that he has not had any contact with the trademark licensors and that those companies have not influenced (nor attempted to influence) the manner in which Wine Cellar operates its retail business. *See* Email from Mathew Booker, dated Nov. 1, 2013 (submitted to SLA counsel on November 12, 2013).

Additionally, on the basis of its extensive experience in the wine industry, Direct Wines advises Wine Cellar with respect to product selections and wine club packages that Wine Cellar may offer for sale. Direct Wines generates these suggestions with an eye toward the latest trends in the wine retail industry, customer demographics, and the like. All of Direct Wines' suggestions are reviewed by Connoisseur Encounters' President Mathew Booker. In particular, Mr. Booker reviews each product and pricing suggestion to determine whether it is economically sensible based on the expected profit margin and other pertinent factors.

Technology Services. Direct Wines designs, hosts, and maintains the online sales portals, where consumers can browse products, make selections, obtain wine club memberships, and pay for their purchases of wine from Wine Cellar. As part of this service, Direct Wines updates the product selections featured on the sales portals at Wine Cellar's direction.

Order Management and Fulfillment Services. Direct Wines facilitates Wine Cellar's web-based sales transactions. As part of that service, Direct Wines receives customers' online orders and transmits them to Wine Cellar for review. On a weekly basis, Direct Wines aggregates the customers' orders, sorts them by product name, and emails the sorted order lists to Wine Cellar. The store manager in Rye Brook, New York receives the lists, reviews the orders, and accepts or rejects them, as the case may be.

Direct Wines also assists with the order fulfillment process. Specifically, Direct Wines coordinates the packaging of customer orders at Lionstone's Illinois facility and works with common carriers to arrange shipments to Wine Cellar and from Wine Cellar to the customers. Wine Cellar reimburses Direct Wines for the costs it incurs in arranging carrier shipments of Wine Cellar's product.

Payment Processing Services. Working with another service provider, Direct Wines assists Wine Cellar with the processing of customer payments for online transactions. In that respect, Direct Wines acts as Wine Cellar's payment facilitator. At the time the customer places an online order, Direct Wines facilitates payment authorization from the customer's credit card. After Wine Cellar formally accepts the customer's order, Direct Wines coordinates the collection and remittance of payment into an account controlled by Wine Cellar. If Wine Cellar rejects a given order, Direct Wines coordinates the credit back to the customer's account.

Customer Support Services. Direct Wines provides Wine Cellar with a customer service call center. The actual service center is operated by American Customer Care, a company that provides outsourced customer care services. It operates under an agreement with Direct Wines,

and Wine Cellar reimburses Direct Wines for the cost of these outsourced customer care services.

III. A DETAILED DESCRIPTION OF WINE CELLAR'S INTERNET RETAIL SALES

The following step-by-step overview illustrates the key phases of an internet transaction that takes place under Wine Cellar's business model:

Step 1: Wine Cellar works with Direct Wines to put together a marketing program for the wines that Wine Cellar will offer for sale over the internet, including to wine club members. As part of that process, Direct Wines reaches out to Lionstone and goes over Lionstone's inventory to put together suggested product selections and wine club packages. Direct Wines compiles these product and pricing recommendations based on its marketing expertise and extensive experience in the wine industry. Prior to accepting Direct Wines' suggestions, Mr. Booker spends several hours reviewing each set of product and pricing recommendations to determine whether they make business sense for Wine Cellar.

Step 2: A customer visits one of Wine Cellar's sales portals, such as WSJwine.com. The website automatically determines, based on the computer's unique IP address, whether a customer is in New York, which the consumer is asked to verify, along with her age. Once the customer confirms New York as the delivery state, the website informs her that she is being "redirect[ed] to The Wine Cellar at Rye Ridge, a New York licensed retailer who can legally accept, fulfill and ship your order in the state of New York." The bottom of every page on each of the sales portals displays Wine Cellar's logo and states that "All orders are accepted and fulfilled by a New York licensed retailer The Wine Cellar at Rye Ridge, 122 S. Ridge Street, Rye Brook, NY 10573."

Step 3: The customer can either enroll in a wine club, through which she will receive recurring shipments of wines pre-selected by Wine Cellar, or choose specific wines offered by Wine Cellar to purchase in a one-time transaction. To do either, the customer must enter her shipping information and is again told that she is "redirect[ed] to The Wine Cellar at Rye Ridge, a New York licensed retailer who can legally accept, fulfill and ship your order in the state of New York." The customer must also enter her credit card information and re-certify her age before completing the one-time purchase or wine club enrollment.

Step 4: Direct Wines batches customers' one-time orders with wines to be sent to recurring wine club members and transmits this information to Wine Cellar. Direct Wines

assembles and sorts such information on a weekly basis and sends it to Wine Cellar's store manager in New York. Direct Wines also facilitates, on Wine Cellar's behalf, an authorization request to the customer's credit card bank.

Step 5: Wine Cellar's store manager in New York reviews the orders and communicates with Lionstone to confirm availability of the ordered products and wine club wines. Upon confirmation of availability, the store manager submits the purchase order to Lionstone in New York for the bottles of wine. At that point, Wine Cellar is committed to purchase the product from Lionstone at the wholesale price.

Step 6: After ordering the product from Lionstone, Wine Cellar's store manager in Rye Brook informs Direct Wines that it accepts the customers' orders or wine club shipments.

Step 7: The customer's shipment is packed at a Lionstone facility in Illinois. The cost of this packaging is included in the wholesale price that Wine Cellar pays for the product. The wine shipments packed in Illinois are sold to Lionstone in New York and, accordingly, arrive at Lionstone's warehouse facility in Carmel. Wine Cellar then receives the shipments from Lionstone at its adjoining warehouse facility in Carmel, where the shipments come to rest. Wine Cellar accepts the bill of lading and takes possession of the wine it receives from Lionstone. The shipments are then transported to a FedEx terminal in Newburgh, New York for delivery to customers' homes throughout the state. The FedEx driver is required to collect an adult signature at the time of delivery. Lionstone pays the appropriate New York excise taxes charged to wholesalers.

Step 8: Direct Wines facilitates the credit card settlement process on Wine Cellar's behalf. The credit card companies remit the payments into an account controlled by Wine Cellar, to which only Wine Cellar has the right to withdraw funds. Accordingly, every dollar charged to the customer's credit card, including shipping costs and taxes and fees, is turned over to Wine Cellar. Currently, Wine Cellar later withdraws the funds from this destination account and transfers them to its New York general operating funds. Wine Cellar pays Lionstone for the product and Direct Wines for its services. These costs are paid from Wine Cellar's general operating funds, which is also the source of Wine Cellar's payments to the other wholesalers with which it works. Wine Cellar remits the sales taxes collected from customers to the state revenue department.

Step 9: The customers receive their wines and the vast majority are completely satisfied. However, if a customer is unhappy with her shipment for any reason, she can call Wine Cellar's customer service center and request a return and refund. If the customer returns the shipment, or

there is no adult to sign for the package, it is returned to Wine Cellar, and Wine Cellar is left to recoup the loss. Notably, this business model produces a higher return rate than walk-in sales, and all of the returns are processed at Wine Cellar's warehouse in Carmel for restocking.

DISCUSSION

I. RETAILERS MAY ENGAGE THIRD-PARTY SERVICE PROVIDERS TO FACILITATE INTERNET RETAIL SALES

As part of its business, Wine Cellar makes retail wine sales through the internet and contracts with a third party to effectuate those retail sales. Nothing in the ABC Law prohibits either practice. Indeed, SLA has already acknowledged that a licensee conducting internet sales may engage third parties to provide marketing and advertising services and to handle logistics services, like maintaining websites and couriering the product to consumers' homes. *See* SLA Declaratory Rulings 2011-03527C (advising that advertising with internet-coupon providers is generally permissible); SLA Declaratory Ruling 2013-01006A (advising that it is generally permissible to advertise on a third party's website and for third parties to "host and maintain a licensee's website and/or provide related services"); 9 N.Y.C.R.R. § 67.1 (permitting the use of common carriers to deliver products). Thus, under SLA's own interpretation of the ABC Law, there is nothing impermissible about Wine Cellar's internet retail sales method of operation.

In examining Wine Cellar's arrangement with Direct Wines, however, SLA and its staff have expressed concern that this arrangement may violate the ABC Law's restrictions on allowing an unlicensed entity to make use of a retailer's license. The ABC Law specifically provides that a license "shall be available only to the person therein specified, and only for the premises licensed and no other except if authorized by the authority." ABC Law § 111. Allowing an unlicensed entity to "avail" itself of a retail license threatens the integrity of the licensing requirement by enabling the entity to "operat[e] a liquor business through another licensee as a 'blind.'" *Cleveland Place Neighborhood Ass'n v. N.Y. State Liquor Auth.*, 268 A.D.2d 6, 11 (1st Dept. 2000) (citation omitted).

In a recent declaratory ruling, SLA identified two lines of inquiry relevant to its assessment of whether a business relationship results in an unauthorized availment of the retailer's license in violation of Section 111: (1) whether the licensee maintains sufficient control over its retail business; and (2) whether the licensee continues to assume the ordinary risks of a retail liquor operation. *See* SLA Declaratory Ruling 2013-01006A. Here, Wine Cellar maintains both contractual and actual control over all aspects of its retail business and assumes the same business risks as any other retail licensee. Accordingly, Wine Cellar has not made its license

available to an unlicensed entity by enlisting a third-party service provider to facilitate the internet retail sales.

A. Wine Cellar Controls The Retail Sales

Wine Cellar is the only entity in this business model that sells wine at retail in New York. *See* ABC Law § 3(28) ("[T]o sell" means "to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."). When prospective customers visit any of Wine Cellar's online portals, they are repeatedly informed that all orders are "accepted and fulfilled" by Wine Cellar.[5] When the customer places his order, the entire amount charged to a customer's credit card (including all taxes and shipping fees) goes into Wine Cellar's bank accounts, and the descriptor on their credit card statements notes that Wine Cellar made the sale. Additionally, every communication with the customer about his order, including email order acknowledgements and shipping confirmations, identifies Wine Cellar and encourages customers to contact Wine Cellar with questions at the email address "customercare@wsjwine-WineCellarRyeRidge.com." Finally, when the wine arrives at the customer's home, via a FedEx delivery paid for by Wine Cellar, the return address on the shipping label is Wine Cellar's address, and the invoice packed into the shipment states that Wine Cellar processed and fulfilled the order.

In addition to actually making the internet retail sales, Wine Cellar controls all determinations with respect to those sales. The Integration Agreement between Wine Cellar and Direct Wines expressly provides that Wine Cellar has the sole right to: (i) accept or reject every order; (ii) select the products that will be offered for sale; (iii) determine prices; (iv) control fulfillment and shipment; and (v) receive and control the sales proceeds. In short, the agreement does not give Direct Wines the ability to conduct any activity that is not subject to Wine Cellar's total control. Furthermore, under the terms of the agreement, Wine Cellar can decide at any time, without any contractual or financial penalty, to terminate its agreement with Direct Wines on 30-days notice. *See* Ex. 2 at 3, ¶ 4.

---

[5] Customers receive this information in a pop-up window when they visit the sites for the first time and again before entering their credit card information. The statement also appears on every page of the online sales portals: the bottom of every page on each website displays Wine Cellar's logo and states that "All orders are accepted and fulfilled by a New York licensed retailer The Wine Cellar at Rye Ridge, 122 S. Ridge Street, Rye Brook, NY 10573."

The contractual control exercised by Wine Cellar is also evident in how the business actually operates, and the central and active role that Wine Cellar plays in every internet sale. For instance:

Acceptance and rejection of orders. No order placed through one of Wine Cellar's online sales portals is final unless and until Wine Cellar approves it. Direct Wines submits the orders to Wine Cellar for review. Wine Cellar then checks with the wholesaler to ensure it can source the inventory. If the wholesaler can provide the ordered products, Wine Cellar informs Direct Wines that it will accept the orders.

Possession and control of sales proceeds. Wine Cellar has exclusive possession and control over 100% of customers' funds transmitted through the internet, including taxes and shipping fees. After Wine Cellar accepts an order, the credit card bank deposits the entirety of the proceeds into a destination account controlled by Wine Cellar. Direct Wines has no access to or possession of any portion of the sales proceeds.

Product selection and pricing. Wine Cellar works with Direct Wines to put together a marketing program for the wines that Wine Cellar will offer for sale over the internet. Direct Wines sends Wine Cellar suggestions for products and product packages to sell, along with pricing suggestions for such products. These suggestions are made based on the marketing expertise Wine Cellar looks to Direct Wines to provide. But Wine Cellar does not blindly accept Direct Wines' suggestions. In the typical situation, Mr. Booker reviews each product and pricing suggestion to determine whether they make business sense for Wine Cellar. He spends several hours reviewing each set of product and pricing suggestions. In the end, Wine Cellar maintains the express right to disapprove of any product suggestions or pricing. *See* Ex. 2 at 2, ¶ 2.A.

B. Wine Cellar Assumes Substantial Business Risks

In addition to making and maintaining total control over its internet retail sales, Wine Cellar assumes substantial business risks under its business model, including a very real risk of financial losses. It pays a substantial flat fee to Direct Wines regardless of how much wine it ends up selling through the internet. This is in addition to the cost of buying the wine at wholesale, operating a brick-and-mortar store, and many other operational expenses, such as shipping fees, legal bills, insurance premiums, and costs of providing employee benefits. Because many of these expenses are not tied to the volume of sales—including the flat fee paid to Direct Wines—there is absolutely no guarantee that Wine Cellar will turn a profit.

Additionally, Wine Cellar owns all of the wine it buys at wholesale. Wine Cellar commits to buy the wine from the wholesaler before accepting customer orders and receiving any funds. Thus, if a customer rejects or returns the wine, Wine Cellar alone bears the loss. It cannot simply return the wine to the wholesaler. Instead, as noted, Wine Cellar undertakes a laborious and capital-intensive task of processing and restocking the returned orders at its warehouse premises. Wine Cellar bears the entire cost of returns processing, which remains fixed regardless of Wine Cellar's sales volume. Indeed, this is a significant financial risk for Wine Cellar given that the wine club model has a relatively high product return rate—customers often decide that they do not want the wine delivery once it arrives at their home, or the customer is not available to receive the delivery and provide an adult signature.

C. The Third-Party Licensing Agreements Do Not Alter Wine Cellar's Rights

SLA's staff also has suggested that the terms of the trademark licensing agreements may be viewed as enabling the trademark owners to engage in unauthorized retail sales using Wine Cellar's license. That concern is unfounded.

Wine Cellar is not a party to the licensing agreements. Therefore, these agreements cannot bind Wine Cellar in any way. *See Manhattan Real Estate Equities Grp. LLC v. Pine Equity NY, Inc.*, 27 A.D.3d 323, 323 (1st Dept. 2006) ("[T]he general rule [is] that nonparties to an agreement are not bound thereby."). Neither party to the licensing agreements may take or give away any of Wine Cellar's rights to exercise control over its retail business, unless Wine Cellar formally relinquished those rights through a separate contract, or otherwise. Insofar as the agreements purport to apportion any control or responsibility, that is merely the means of preserving the licensor's intellectual property. There is nothing unique about this sort of agreement. Federal trademark law actually requires that owners include these types of protections or else they risk a judicial finding that they have abandoned their intellectual property. *See Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 366 (2d Cir. 1959) (explaining that trademark owners must "take reasonable measures to detect and prevent misleading uses of his mark by his licensees or suffer cancellation of his federal registration").

SLA's staff has also expressed concern that the licensors are paid on a per-bottle-sold basis or as a percentage of net sale and suggested that SLA may view such compensation arrangements as evidence of licensors' control over the retail business. However, because Wine Cellar is not a party to the licensing agreements, it does not make any payments to the licensors. As noted, Wine Cellar obtains its right to use the trademarks in connection with wine sales from Direct Wines and pays a flat fee for that marketing service.

Finally, even if SLA could conclude that agreements among third parties could alienate Wine Cellar's right to control the business, any provisions purporting to do so are inoperative in light of the agreements' unambiguous state-law compliance clauses. These agreements are designed to implement a national marketing strategy in compliance with a patchwork of complex state regulations. Thus, they include clauses designed to ensure that the parties would be subject to the confines of applicable state law. These clauses make it impossible to conclude that the agreements violate ABC Law.

D. Concluding that Wine Cellar's Business Model Constitutes an "Availment" Would Be a Novel and Flawed Extension of Existing Law

Courts that have applied Section 111 in affirming SLA's findings of availment have only done so in cases where licensees ceded all control and responsibility for their businesses to a third party, often in a written contractual agreement, and then removed themselves from the retail operation entirely. For instance, in one recent case, the First Department upheld an availment finding because the licensee contracted away his right to oversee and control the business operations to an unlicensed third party. *See Teng K., Inc. v. N.Y. State Liquor Auth.*, 80 A.D.3d 480 (1st Dept. 2011). The licensee in *Teng K* had executed a written agreement with a third party in which he agreed not to "interfere in any way with the operation and management of the business." *Id.* at 481. Additionally, the sole shareholder testified that "he had nothing to do with the restaurant's day-to-day operations." *Id.* The First Department relied on similar evidence to uphold an availment finding in another recent case where the licensee "entered into a written agreement ceding control and promising profit to a third party." *Carthage Palace, Inc. v. N.Y. State Liquor Auth.*, 55 A.D.3d 504, 505 (1st Dept. 2008). In *Carthage Palace*, the court found that the "principal remained absent from the premises following the takeover," and in response, the licensee could point to "no evidence showing his continued involvement in the business, [or], at the very least, any indication that he continued to monitor the business." *Id.*

The Appellate Division has consistently held that availment under Section 111 is present where a licensee has ceded total control or allowed a third party to run the business. In *Happy Landing Lounge, Inc. v. State Liquor Auth.*, for example, the Third Department upheld an availment determination where a licensee left unlicensed persons in total, unsupervised control of the business. 219 A.D.2d 786 (3d Dept. 1995). The court noted that the licensee left his bar in a "turn-key state and the [unlicensed] individuals, who had not previously run or worked in the bar, were left in total control to operate the business on a cash basis without any accounting" to the licensee. *Id.* at 786. The licensee further "provided no direction, supervision or oversight of the business" and left "the affairs and finances of the bar in the unfettered discretion of" the unlicensed persons. *Id.* Likewise, in *Gabler v. N.Y. State Liquor Auth.*, the Fourth Department

upheld an availment determination where the unlicensed person was empowered to draw checks in the restaurant's bank account, paid personal expenses from the restaurant's accounts, held himself out as an owner of the restaurant, and generally managed the business's day-to-day affairs. 43 A.D.2d 803, 804 (4th Dept. 1973).

By contrast, Wine Cellar exercises complete control over every component of its retail business. The licensees in the cases above were entirely absent, turned control of the premises over to a third party, and played virtually no role in the operation of their businesses. Here, Wine Cellar has executed the Integration Agreement that expressly *preserves* its right of control. As such, Wine Cellar is completely different from the absent licensees described in the cases above. There is absolutely no authority for the notion that a business model in which a licensee contractually preserves its total right of control and continues to play a central role in the operation of its business somehow constitutes an availment. Indeed, drawing that conclusion here will signal a new and entirely novel application of Section 111 that has never been adopted—or even suggested—by a court.

II. RETAILERS MAY WORK EXCLUSIVELY WITH A SINGLE WHOLESALER, ABSENT EVIDENCE OF A CAPTIVE-HOUSE OR TIED-HOUSE ARRANGEMENT

Wine Cellar's business model is based on sourcing and providing its consumers with quality wines from small, lesser known wine manufacturers. These types of products are especially appealing to Wine Cellar's wine club customers who are looking for a discovery wine-buying experience. Consistent with that model, Wine Cellar purchases wines for its internet retail sales exclusively from Lionstone, primarily because Lionstone specializes in identifying and acquiring precisely the sort of unique wine products that Wine Cellar wants to offer to its customers. Indeed, many of the wines that Lionstone obtains and that Wine Cellar wishes to sell are sourced from small remote wineries, whose products are simply not available from other wholesalers in the country. Moreover, by dealing with a single wholesaler for purposes of internet sales, Wine Cellar is able to achieve considerable efficiencies and cost savings that are necessary to sustain the large-scale operation of Wine Cellar's internet business. In the end, Wine Cellar's prudent business decision to buy products from a single wholesaler for purposes of fulfilling its internet sales does not violate the ABC Law. Regardless of whether a retailer sells wine in person or over the internet, nothing in the ABC Law or in SLA's regulations prohibits a retailer from purchasing wines from as many or as few wholesalers as it pleases.

SLA's staff has suggested that Wine Cellar's business decision to work with a single wholesaler for this aspect of its retail sales may be viewed as evidence of an illegal "captured

house" arrangement. To be clear: Wine Cellar is not contractually, financially, or otherwise bound to do business solely with Lionstone. In fact, Wine Cellar buys product from eight other wholesalers in New York to fill its in-store inventory, in addition to Lionstone. There is no evidence or reason to believe that Wine Cellar is impermissibly tied to Lionstone—they simply have a mutually beneficial business relationship, which is hardly unique to Wine Cellar's business model. In fact, it is our understanding that many large suppliers of various brands of distilled spirits and wines appoint, pursuant to written agreement, a single wholesaler within the state of New York with whom they shall exclusively deal as to the sale and distribution of their brands of spirits and wine. All retailers in turn must deal exclusively with the suppliers' designated wholesaler for purposes of securing the suppliers' brands and their sale to consumers. Thus, it is in fact the practice that retailers deal exclusively with a single wholesaler for purposes of securing those products they wish to sell or offer to sell to consumers located within the state of New York.

There has also been a suggestion that Wine Cellar is a "tied-house" to the wholesaler. As SLA knows, to preserve the integrity of the three-tier system, New York prohibits manufacturers and wholesalers from having direct or indirect interests in retailers, and vice-versa. *See RIHGA Int'l USA v. N.Y. State Liquor Auth.*, 84 N.Y.2d 876, 878 (1994). Thus, a manufacturer or wholesaler may not "[b]e interested directly or indirectly . . . in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien on any personal or real property, or by any other means." ABC Law § 101(1)(a). The purpose behind these tied-house restrictions is "the prevention of monopolies and other undesirable influences within the alcoholic beverage industry." *RIHGA Int'l*, 84 N.Y.2d at 878.

As explained above, Wine Cellar is an independent business. No manufacturer, wholesaler, or third-party service provider has a direct or indirect financial interest in the business, nor do their parent companies or their shareholders. They do not have any common officers or directors. Thus, Wine Cellar's methods of operation do not offend the ABC Law's tied-house restrictions.[6]

SLA's staff has also previously suggested that Direct Wines may be a tied-house to Lionstone. Even if this were true, this has no bearing on Wine Cellar, which—as explained

---

[6] SLA's concern about a tied-house connection between Wine Cellar and Lionstone may stem from familial relationships that once existed between the entities' shareholders. Even if those relationships presented a tied-house issue then, that is certainly not the case today, nor has it been since 2010 when Clendinnen Holdings acquired Connoisseur Encounters.

above—has no ties to either of these companies. SLA certainly cannot revoke Wine Cellar's retail license based on tied-house allegations directed at entities unrelated to Wine Cellar. Further, as discussed above, Direct Wines and Lionstone do not share parent companies, directors, officers, or any other connection that would give one a direct or indirect interest in the other. And in any event, the tied-house restrictions involve interests *among* entities within the three-tier system. Direct Wines is an unlicensed entity and any interests it has in a licensed entity, or vice versa, cannot violate the tied-house prohibition. *See* ABC Law § 101(1)(a).

III. WINE CELLAR RECEIVES APPROPRIATE FULFILLMENT SERVICES IN CONNECTION WITH ITS INTERNET WINE SALES

SLA's staff has questioned Lionstone's ability, as a licensed wholesaler, to provide fulfillment services to Wine Cellar and has suggested that provision of such services may violate the "gifts and services" provision of the ABC Law. Specifically, Section 101(1)(c) of the ABC Law makes it unlawful for a manufacturer or wholesaler to "[m]ake any gift or render any service," directly or indirectly, to any licensee under the statute which may tend to influence such licensee to purchase the manufacturer's or wholesaler's product. ABC Law § 101(1)(c). SLA staff's concern regarding the provision of fulfillment services by Lionstone is unfounded for several reasons.

First, the very premise that Wine Cellar is improperly accepting fulfillment services from a wholesaler is factually incorrect. Wine Cellar buys its wine from Lionstone in its capacity as a New York-licensed wholesaler who, in turn, obtains the prepackaged product from the Lionstone facilities in Illinois. In that arrangement, Lionstone—as a New York wholesaler—does not perform any fulfillment services. Rather, in accordance with Wine Cellar's purchase orders, it orders and receives the requested products, which are packaged in Illinois by Lionstone, in its capacity as the supplier. The packaging costs that Lionstone incurs as the supplier are ultimately passed onto Wine Cellar in the form of the wholesale price that Wine Cellar pays Lionstone in New York. Because no services are being provided to Wine Cellar by a wholesaler in New York, the restrictions on wholesaler services set forth in Section 101(1)(c) are inapplicable here.

However, even if Section 101(1)(c) were to apply here, the services at issue would not violate the ABC Law because the "gifts and services" restrictions are not absolute. SLA previously has acknowledged that the purpose of the "'gifts and services' law[] is to prevent suppliers of alcoholic beverages from having an interest in, or undue influence over, retailers." *See* Declaratory Ruling 2012-00957D, dated Mar. 27, 2012. Accordingly, Section 101 does not cover wholesaler services that are not a major factor in the retailer's decision to transact business with a given wholesaler. *See In re Pennsylvania Whiskey Distrib. Corp.*, 256 A.D. 781, 784 (1st

Dept. 1939) *aff'd sub nom. Pennsylvania Whiskey Distrib. Corp. v. Bruckman*, 282 N.Y. 665 (1940) ("[The ABC Law] does not render illegal every gift but only such as 'in the judgment of the Liquor Authority' may tend to influence the retailer."). For that reason, courts have expressly held that Section 101 does not apply to gifts or services that are *de minimis* or are customary in the industry. *See, e.g.*, *Schenley Indus., Inc. v. State Liquor Auth.*, 25 A.D.2d 285, 287 (1st Dept. 1966) *aff'd sub nom. Schenley Indus., Inc v. State Liquor Auth.*, 32 N.Y.2d 638 (1973) ("[The ABC Law] does not interdict services or gifts which are either customary or *de minimis*); *Carmelo Bambace, Inc. v. State Liquor Auth.*, 48 A.D.2d 834 (1975) *aff'd sub nom. Bambace v. State Liquor Auth.*, 39 N.Y.2d 788, 350 N.E.2d 618 (1976) (holding that licensee's participation in a beer wholesaler's sales incentive program did not violate Section 101 of the ABC Law because, *inter alia*, such programs "are common in the beer industry, and the amounts involved . . . were minuscule in comparison with petitioners' sales volume").

Packaging of customer orders is a service that Lionstone provides, but it is not the primary reason behind Wine Cellar's decision to work with Lionstone. Furthermore, any suggestion that Lionstone's packing of customer orders constitutes an improper gift or service to Wine Cellar is belied by the fact that Wine Cellar pays a fair-market price for that service. In fact, Wine Cellar pays Lionstone approximately $300,000 per year for the packaging of its products.

Moreover, multiple Advisories issued by SLA evidence the agency's prior approval of suppliers' and distributors' involvement in the packaging of alcohol products sold by retailers. Specifically, in Advisory # 2013-1, dated February 27, 2013, SLA found it permissible for wine suppliers (or third parties on behalf of suppliers) to assemble and package containers of wine to be sold to retailers, where such containers are "clearly intended to be sold to the end consumer by the licensed retailer as a complete package and not to be disassembled by the licensed retailer prior to sale to the consumer." SLA Advisory # 2013-1, dated Feb. 27, 2013 at ¶ 7. In that same Advisory, SLA also concluded that licensed retailers could purchase pre-wrapped packages of wine where such packages are "assembled and packaged by the distributor of the supplier with the approval of the supplier." *Id.* (defining "distributor" to include "a licensed wholesaler"). In another advisory, SLA opined that "[c]ardboard or paper boxes for use in packing containers of alcoholic beverages may be furnished, given or sold to retailers by suppliers and distributors apart from the cases in which containers of alcoholic beverages were originally packed." SLA Advisory # 2012-5, dated Aug. 29, 2012 at 3. Accordingly, the suggestion by SLA's staff that wholesalers are prohibited from assisting with the packaging of customer orders is at odds with SLA's prior pronouncements on this matter.

SLA's staff further suggested that irrespective of who performs the fulfillment tasks, the ABC Law may require that such activities take place in New York. As explained further below, we are not aware of any legal authority for this proposition. *See infra* Part V.

IV. THE ABC LAW DOES NOT PROHIBIT RETAILERS FROM UTILIZING JUST-IN-TIME INVENTORY PRACTICES

SLA's staff indicated that Wine Cellar's purchase of its internet sales inventory on a "just-in-time" basis may violate the ABC Law. SLA's staff has offered no authority to support its position, though it has suggested that by operating in such manner Wine Cellar may reduce its business risk as a retailer and gain an advantage over other retailers that maintain substantial inventories on premises or in their warehouses. SLA's staff further suggested that absence of substantial inventory undermined the legitimacy of Wine Cellar's retail operations. Neither of SLA's concerns has any basis.

First, as noted, Wine Cellar maintains considerable inventory of wine products on its premises and in the Carmel warehouse. Wine Cellar acquires part of that inventory for its in-store sales; the other part results from the wine sold on the internet that comes back to Wine Cellar as returned or undelivered. In the end, at any one time, Wine Cellar keeps anywhere between $60,000 and $100,000 worth of inventory on-hand.

Second, no provision of the ABC Law prohibits Wine Cellar from acquiring part or all of its inventory on a "just-in-time" basis. Accordingly, like many other retailers involved in e-commerce, Wine Cellar has embraced this method of operation because it allows Wine Cellar to conduct its internet sales more efficiently. Given that demand for products sold on the internet is necessarily more dynamic and can change from day to day, the just-in-time inventory system allows Wine Cellar to ensure that the correct product is available to fill each customer's order. It also permits Wine Cellar to realize cost savings on expensive storage space, which allows Wine Cellar to sell wine to consumers at competitive prices. From an efficiency standpoint, the just-in-time model also guards against the risk of maintaining excessive amounts of product that may not sell well. To be clear, however, employment of this model does not entirely insulate Wine Cellar from the business risks of selling wine at retail. To the contrary, as noted above, Wine Cellar incurs a multitude of risks as a result of taking possession of the wine that it sells to consumers and being subject to the various overhead costs in operating the retail business.

V. THE ABC LAW DOES NOT REQUIRE THAT ALL PARTS OF A RETAIL TRANSACTION BE PERFORMED IN-STATE

SLA's staff has expressed a concern that certain parts of the transaction process for Wine Cellar's internet sales take place outside New York. In particular, Wine Cellar's customer orders are packaged at a facility in Illinois, and the product and pricing suggestions made by Direct Wines are frequently reviewed by Mr. Booker in Illinois, as well.

The key phases of Wine Cellar's internet sales transactions, however, are carried out at Wine Cellar's retail premises in New York. These include the receipt, review, and acceptance of customers' online orders as well as the placement of purchase orders with the wholesaler to fill customer requests. It appears that SLA's focus on the location of activities associated with Wine Cellar's retail sales stems from the agency's overall concern about Wine Cellar's alleged failure to exercise requisite control over its business. As demonstrated above, however, regardless of where certain portions of a given retail transaction may take place, Wine Cellar maintains legal and practical control over all retail transactions.

Furthermore, no provision of the ABC Law requires that every single step of a given retail transaction take place in New York. The absence of such a requirement is not surprising because mandating that the entirety of a retail transaction be carried out within the state would not advance any of the policies underlying the ABC Law and would run afoul of the dormant Commerce Clause of the United States Constitution. In striking down a New York law that prohibited out-of-state wineries from shipping wine directly to New York consumers, the Supreme Court noted its "particular suspicion" of laws that "requir[e] business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm v. Heald*, 544 U.S. 460, 475 (2005) (internal quotation marks omitted). Here, there is no justification for requiring such activities as reviewing product and pricing suggestions to be conducted within New York, particularly where it is more efficient for Wine Cellar to perform them out-of-state. And because the ABC Law does not clearly prohibit such out-of-state actions, a reviewing court would likely not infer such a prohibition because it would raise constitutional doubt. *See Courtesy Sandwich Shop v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 389 (1963) ("[W]here there are two possible interpretations the court will accept that which avoids constitutional doubts.").

VI. WINE CELLAR'S INTERNET RETAIL SALES COMPLY WITH SLA'S GUIDANCE AND ADVISORIES FROM OTHER JURISDICTIONS

A. Wine Cellar's Business Model Complies with SLA's Recent ShipCompliant Declaratory Ruling

SLA has previously issued guidance regarding the permissibility of various internet wine sales models, which indicate that Wine Cellar's current model is compliant with the ABC Law. For example, SLA issued a declaratory ruling in 2013 that addressed the legality of an internet sales model utilized by ShipCompliant. That model, identified as the "Marketplace Platform," allowed licensed retailers to use the services of third-party advertisers to conduct internet wine sales through online marketing portals and specialty websites. After examining the relevant agreements and actual operation of this model, SLA concluded that the arrangement was illegal because it allowed unlicensed advertisers to exercise virtually complete control over the retail business.

There are important distinctions between Wine Cellar's model and the model disapproved in the ShipCompliant ruling, as shown in the following chart.

Table 1: *Comparing the ShipCompliant and Wine Cellar Models*

ShipCompliant	Wine Cellar
Advertiser paid retailer a flat fee per bottle sold.	Retailer pays the third party a weekly flat fee that does not vary based on the bottles of wine sold.
Retailer was not involved in choosing the products or prices.	Retailer has total control over products and prices, and reviews them before posted to websites.

ShipCompliant	Wine Cellar
Retailer did not know the location of the warehouse to which the product to be sold was delivered.	Retailer knows exactly where the wine comes from, and the product is shipped to consumers' homes from the retailer's licensed premises.
Retailer's profits were predetermined in the advertising agreement.	Retailer's profit margins are not predetermined by any contractual agreement.
Retailer had no control over the distribution of the funds received from product sales.	Retailer has exclusive and total control over the funds received from product sales.
Advertiser received the predominant portion of the proceeds from the liquor sales.	Advertiser's compensation consists of the weekly flat fee, which amounts to less than 10% of retailer's net revenue.

B. Wine Cellar's Business Model Comports with Internet Business Models Previously Approved by SLA

SLA has approved several internet retail business models that are substantially similar to that of Wine Cellar in many key respects. In fact, SLA just recently approved a petition for a retail license filed by Lot18 after an investigation and several rounds of hearings regarding its proposed internet retail model. Lot18's internet sales share many key similarities with Wine Cellar's, including:

- both retailers operate conventional, brick-and-mortar stores, in addition to which they maintain websites where customers can purchase wines over the internet;
- customer orders placed on the internet are sent to the retailers' brick-and-mortar stores, where they are approved in batches;
- customer payments made on the internet are processed through a third-party service provider, which deposits 100% of proceeds into the retailers' accounts;
- the retailers retain the right to decide what products are offered; and
- similar to Wine Cellar, Lot18 pays a monthly flat fee to a public relations firm for marketing services.

In 2009, SLA also approved an internet retail business model for Chatham Wine & Liquors. There, SLA alleged that the retailer allowed its wholesaler and a marketing agent for internet sales to avail themselves of its retail license by soliciting, receiving, and accepting customer orders. SLA accepted a plea and penalty to resolve those charges, along with the parties' agreement to make certain changes to bring their business model into compliance with state law. Importantly, Wine Cellar's model already meets *or goes beyond* the corrective action required of the parties to the Chatham settlement, including:

- redirecting website visitors to pages identifying the New York retailer;
- the third-party service providers' submission of real-time order information to the retailer;
- the retailer's submission of an order to the wholesaler, as well as the retailer's acceptance and rejection of customer orders;
- the retailer's payment of all applicable state and local taxes; and
- the retailer's possession and control of sales proceeds.

Wine Cellar retains the control that SLA found absent in the ShipCompliant ruling and operates its business in a manner similar to the business models that have already been approved for Lot18 and Chatham. Thus, pursuant to prior SLA determinations, Wine Cellar's model complies with the ABC Law.

C. Wine Cellar's Business Model Complies with California's Guidelines

In October 2011, the California Department of Alcoholic Beverage Control issued an advisory that addressed the same issues that have been raised with respect to Wine Cellar's business model. Issued after a considered process that involved input from consumer and industry stakeholders, the Department's advisory clarified that licensees may use the services of third-party service providers to facilitate internet retail sales so long as the licensees retain sufficient control over the retail operation. The advisory explained that "licensees and Third Party Providers can form business relationships to facilitate lawful transactions for sales of alcoholic beverages," in which the third party provides services like placing advertisements, making recommendations to consumers, receiving orders and passing them to licensees, processing payments, and making shipping arrangements.

Recognizing the need to provide certainty to the industry, the Department articulated a series of detailed guidelines for licensees to ensure that they maintain the necessary control. As detailed by the chart below, Wine Cellar's business model strictly adheres to each of the California advisory's guidelines:

Table 1: ***Applying the California Advisory to Wine Cellar's Business Model***

California's Guidelines	Does Wine Cellar Comply?
Licensee controls product selection and pricing.	**Yes.** Wine Cellar has preserved control over product selection and pricing in the integration agreement, and it reviews every product package and price before they are ever posted to the websites.
Licensee controls acceptance and fulfillment.	**Yes.** Customer preferences are not final unless and until Wine Cellar approves them; the third party transmits every preference to Wine Cellar for review, and accepted orders are shipped to customers from Wine Cellar's Rye Brook premises.
Licensee is clearly identified as responsible for the sales.	**Yes.** Consumers are told on every page of the websites that Wine Cellar is the retailer, Wine Cellar is identified as the merchant on their credit cards, the invoice identifies Wine Cellar, the return shipping address is Wine Cellar's, and all customer communications bear Wine Cellar's branding.
Licensee controls the distribution of sales proceeds.	**Yes.** Wine Cellar has exclusive control and unilateral right to every dollar charged to customer's credit cards at all times, including all taxes and shipping fees.
Third-party's compensation structure does not give it control over the licensee's operations.	**Yes.** Wine Cellar pays the third-party service provider a flat weekly fee that does not vary based on the number of sales.
Trademark licensing agreements do not give excessive license fees or effective control over the retail business.	**Yes.** Wine Cellar is not a party to any of the trademark licensing agreements, has not ceded control over the retail sale, and does not pay the trademark owners directly. The licensing agreements also have state-law compliance clauses that ensure Wine Cellar is the true retailer at all times, as required by New York law.

CONCLUSION

This petition, along with the numerous submissions Wine Cellar has made to SLA over the past year, demonstrates that Wine Cellar's business model comports with New York law for the following reasons:

- Wine Cellar engages a third party to provide marketing and technology services to facilitate its internet wine sales, but its service agreement with this third party ensures that Wine Cellar maintains control over all aspects of such sales. Specifically, Wine Cellar has the sole authority to select product offerings and pricing, accept or reject orders, and possess and control sales proceeds. Further, Wine Cellar pays the third party on a flat-fee basis rather than in connection with Wine Cellar's volume of sales—meaning that Wine Cellar alone bears the risk of declining sales.

- Wine Cellar has no financial interest in or familial relationship to any wine wholesaler or manufacturer, or their parent companies, officer, or shareholders. While Wine Cellar purchases all of its wines for purposes of internet sales from a single wholesaler, it does so primarily because this is the only wholesaler that carries the niche wines that Wine Cellar's customers are interested in purchasing. Wine Cellar is not contractually, financially, or otherwise bound to continue doing business with this wholesaler, however, and can choose to stop doing so at any time.

- Wine Cellar pays a fair-market price for fulfillment services performed outside of New York, the entire cost of which is passed along by its New York-licensed wholesaler.

- While Wine Cellar maintains substantial inventory at any given time, Wine Cellar has developed efficient supply processes for purposes of its e-commerce operations. This allows Wine Cellar to respond in real-time to the constantly changing demand associated with internet wine sales and, in turn, pass along cost savings to New York consumers.

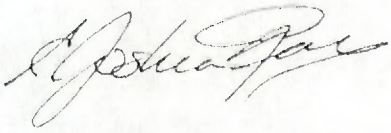
- Certain elements of Wine Cellar's business model occur out of state, but the key phases of Wine Cellar's internet sales transactions are carried out at Wine Cellar's retail premises in New York. These include the receipt, review, and acceptance of customers' online orders as well as the placement of purchase orders with the wholesaler to fill customer requests.

Nevertheless, the multitude of issues and concerns that SLA and its staff have raised in the course of examining Wine Cellar's methods of operation demonstrates a need for further regulatory clarity as to how modern businesses may sell alcoholic beverages, particularly in the context of internet sales. As SLA previously acknowledged during the June 5, 2013 hearing on Wine Cellar's removal application, it has yet to provide comprehensive guidance regarding the proper conduct of sales over the internet. Accordingly, Wine Cellar asks that SLA use this request for declaratory ruling as an opportunity to advance its formal process of formulating administrative guidelines with respect to internet sales.

***

Wine Cellar remains available to respond to any further questions SLA may have with respect to any matter described in this petition and to provide additional information that may assist SLA in its issuance of a declaratory ruling regarding Wine Cellar's methods of operation.

Respectfully submitted,



E. Joshua Rosenkranz

EXHIBIT 1

PROPOSED BUSINESS PLAN

FOR

CONNOISSEUR ENCOUNTERS, CO., INC. d/b/a
WINE CELLAR (WC)

BEFORE THE

NEW YORK STATE LIQUOR AUTHORITY

Dated: October 7, 2013

TABLE OF CONTENTS

	Page
INTRODUCTION	3
HISTORY	3
RECENT CHANGES	4
CEC d/b/a WC'S – TWO DIVISIONS	4
(1) Retail Wine Store to accommodate walk-in traffic	4 - 5
(2) Retail Internet Wine Sales	5 - 7
Level Playing Field	7
Wine Clubs	8
Conclusion	8
List of Exhibits	9

INTRODUCTION:

Now comes Connoisseur Encounters Company, Inc. (CEC) pursuant to an Application for Removal of its Retail License from 1214 Route 52, Carmel, New York 10512 to 122 South Ridge, Rye Brook, New York 10573. Said application was conditionally approved by the New York State Liquor Authority (SLA) on June 5th, 2013.

As part of said Approval process, Chairman Dennis Rosen and Commissioner Jeanique Greene requested that CEC file a document setting forth the various components of its Internet business operation, highlighting the changes in its method of operation since the SLA approved a No Contest Plea, entered into by CEC on March 12, 2013, disposing of alleged violations of the New York Alcoholic Beverage Control Law.

HISTORY

It has always been the practice of CEC and its predecessors to voluntarily submit its business plan to the SLA and other governmental agencies throughout the U.S.

CEC's Memorandum of Settlement, which accompanied the aforementioned Plea, requested approval of its business plan by the SLA. However, that request was not acted upon at the time. CEC's business plan in New York is essentially the same plan that has been operational since 1999. Minor changes have been made from time to time in consultation with representatives of the SLA.

Commencing in 1999, numerous personal meetings were held with Mr. Thomas McKeon, Counsel to the SLA, and significantly, correspondence was exchanged with Mr. McKeon in 2000, collectively attached as Exhibits 1 and 2.

In May 2008, Mr. Siegel was contacted by Robert Benedetto, Director of the SLA Wholesale Bureau. Mr. Benedetto requested certain minor changes to CEC's website, which were immediately put into place.

Subsequently, Mr. Benedetto revisited CEC's website and concluded that it was the same as the website of 1-800-Flowers (Chatham Wine & Liquors LLC – Case No. 47429 SLA Order of Disposition).

During the early years of the 2000s, Mr. Siegel worked with representatives of the New York State Assembly under the leadership of then Assemblyman, Randy Kuhl in developing Model Legislation to accommodate major changes in the retail processing of consumer wine transactions, i.e. internet, three-tier and direct shipments, on behalf of the National Conference of State Liquor Administrators and the National Conference of State Legislators. Said model legislation was specifically referenced in the landmark U.S. Supreme Court decision in Granholm v. Heald, 544 U.S. 460 (2005).

RECENT CHANGES

CEC agreed to all of the changes requested by the SLA counsel during the negotiating process related to the Notice of Pleading. These changes include:

Opening a more conventional "brick and mortar" wine shop.

CEC's fee structure relative to its third party service provider is in the process of being changed from a "per bottle fee" to a fee structure that will not be contingent upon the number of sales or the amount sold, or percentage of sales (which has otherwise become the most common method of compensating such providers).

Preparation of an Agreement between CEC and its third party service provider, Direct Wines, Inc., entitled Integrated Technology, Logistics, Marketing Service Agreement. See Exhibit 3. Said Agreement sets forth the extensive services that will be provided, as needed, such as:

Design, posting and maintenance of website;
Credit card and delivery information;
Solicitation of orders;
Logistics information;
Providing of customer services and marketing programs;
Handling of customer payments for purchases.

All of the above are under the supervision of CEC.

CEC d/b/a WINE CELLAR'S (WC) – TWO DIVISIONS:

(1) Retail Wine Store to accommodate walk-in traffic; and

(2) Retail Internet Wine Sales.

There will be similarity of product for both walk-in and internet sales including a selection of New York State wines as well as domestic and imported wines from throughout the world. WC's wine purchases will be implemented through New York wholesalers, identified on attached Exhibit 4.

(I) Retail Wine Store:

The WC store will be open from 10 a.m. - 10 p.m. Monday through Saturday. Sunday hours will be in accordance with local ordinance. Initially, management estimates that they will have five full-time employees including the Manager, Raul Nunez. Raul has worked in the wine industry in New York since 1986 at both retail and wholesale establishments. His experience is primarily in the retail sector with 20-years of experience working with a high end retailer (Wine and Spirits Emporium of Bronxville at both associate and management positions) and as a consultant to a wine store specializing in internet sales. Raul has an undergraduate and a master degree in business administration and has served as a United States Army Ranger. Additional hires will be dependent upon the growth of the business.

Consumer orders are filled from the WC store, its warehouse and supplemental packaging arrangements tied to purchase orders with licensed importers/distributors to accommodate its internet sales which are expected to be in excess of 100,000 orders a year. Such accommodation is compensated and included as part of the cost of product.

Promotions will include: advertising in local newspapers, e-mail blasts, support of local charities and events, periodic winetastings and a website.

When the WC store is open in Rye Brook, it will continue to operate out of its current warehouse location until management finds a more convenient location.

All invoices, sales records and cash receipts will be under the control of WC.

Product selection will be implemented by WC in consultation with various wholesalers, international brokers, service providers and importers. All wines will be in general distribution and can be purchased by other retailers from an appointed wholesaler or by consumers from licensed retailers.

WC will prepare weekly reports of all activities for management purposes.

(II) Internet Wine Sales:

The second component of the WC business plan is the sale of wines via its website. Order fulfillment is derived from its predecessor's business operation in New York which began 15 years ago.

The success of internet wine sales requires the services of experienced third party service providers. WC utilizes the services of Direct Wines, Inc. (DW). For details regarding WC's arrangement with DW, see the Integrated Technology, Logistics, Marketing and Services Agreement which was furnished to the SLA on May 22, 2013 and attached as Exhibit 3.

WC intends to use integrated technology, logistics and marketing methods for coordination of information. It will do so through the use of technology for accounting, marketing and sales functions of WC into a seamless service program.

DW is a provider of technology, logistics and marketing services for use by WC and both parties have agreed to the following:

A. DW, from an integrated technology standpoint, may, as requested and directed by WC from time to time, provide any of the following services:

1. Assist in the design, hosting and maintenance of WC's website, in accordance with the direction and control of WC, identifying on the site the products and collections of wine selected by WC to be offered for sale to consumers and the prices at which WC directs they are to be sold. The specific collections and the wines included therein, as well as the pricing, are entirely the decision and in the control of WC.

2. Obtain credit card and delivery information from consumers on behalf of WC for processing by and payment to WC for its sale and the delivery of orders it has accepted, it being understood that title to the wine purchased by consumers passes to those consumers at WC's premises. In this regard, DW may act only as an agent for the collection of information such as receiving delivery

and credit card information and securing payment authorization; all monies shall ultimately be paid to and collected by WC.

3. All potential orders for alcoholic beverages from consumers received by WC shall be subject to acceptance or rejection by WC. WC shall be solely responsible for the sale and control of each transaction, including any decisions concerning acceptance or rejection of such orders, the prices to be charged, fulfillment of orders, and the shipment of alcoholic beverages from WC's premises or other authorized shipping point. Title passes to the consumer upon receipt of payment.

B. DW, from an *integrated logistics and communications standpoint*, may, as requested by WC from time to time:

1. Ascertain and provide WC with up to date logistics information as status of WC's order fulfillment by wholesalers from whom WC has elected to purchase product, and logistics information as to delivery to WC and delivery to consumers by carrier services.

2. Assist in computer generated WC customer invoices and carrier labels, and provide data flow between WC and its wholesalers as may be warranted to insure timely delivery and fulfillment by WC. All fulfillment requirements will be specifically determined and instructed by WC.

C. DW, from an integrated marketing standpoint, may, as requested by WC:

1. Provide 1-800 customer service assistance so as to attempt to insure that WC's customers are satisfied with the products and services provided by WC.

2. Provide suggested wine marketing programs to be offered by WC, marketing analytics, and any other creative resources or surveys as may be requested by WC from time to time.

3. Provide from time to time, as specifically may be requested of DW by WC, suggested web, email, and social media platforms for additional advertising by WC at a cost to be determined by mutual agreement of the parties.

4. All advertisements and offers to sell alcoholic beverages by WC, whether through its website, print, billboard, radio, telemarketing or television advertisements, as well as all other types of permitted advertising, only become an integral part of a sale when the sale is completed by the transfer of title of an alcoholic beverage for consideration by WC to the consumer. The mere placement of an advertisement for an alcoholic beverage by DW at the direction of WC, and the consumer's furnishing of credit card information, shall not in any way constitute a transfer of title for consideration, directly or indirectly, and is not a sale nor a solicitation for sale by DW, let alone a completed sale, by DW.

None of the services, provided by DW, either individually or collectively, shall be deemed to have granted DW, directly or indirectly, any interest or control in the operation or management of WC directly or indirectly, its business or licenses, or its licensed premises, financially or administratively, or as to the products to be purchased and sold by WC or prices at which they are sold to consumers. DW, by providing the above services, has not been granted any ability to utilize WC's licenses or permits, nor has it been granted the ability to exercise any privileges granted to WC as the holder of any license or permit.

WC's website will feature various collections of wine and could result in multiple webpages. The retailer's identity will be disclosed on the website of each webpage as well as the checkout section. See Exhibit 5.

Customer order information is sent to WC. Once WC receives packages and forwards them to FedEx, thereafter, the customer receives the shipping information. See document attached as Exhibit 6, entitled **Customer Order Process/Documents** and Exhibit 7, **Order Acceptance Process**.

The ShipCompliant Declaratory Ruling holds that third parties may host, maintain and provide related website services for licensees.

As pointed out at the beginning of this report, consumers' orders are filled from WC's store, its warehouse and order placement with licensed importers/distributors inclusive of supplemental packaging arrangements. Some orders are packaged by WC but due to the volume of orders, most are prepackaged in special shipment boxes/containers to protect the product for shipment, ultimately to the consumer by licensed out-of-state suppliers of wine. Cost of the product includes shipping, packaging and labor. A similar arrangement is utilized by wineries that are direct shipping to consumers. Thus, the aforementioned arrangement has been established in New York for many years without objection. Said supplemental packaging will be carried out in conformance with **WC's Pro Forma Standards for Fulfillment.** See attached Exhibit 8. DW is hired to coordinate and oversee that this process is done correctly.

All control/decisions as to what is sold, pricing, acceptance or rejection of orders, payments from consumers, payments to service providers are supervised and controlled by WC. It should be noted that the shipping and packing cost is a normal expense that suppliers and distributors pass on to retailers/consumers.

CEC's business risk factors include but are not limited to the items set forth on Exhibit 9.

See Counsel Flug's Comments to Integrated Technology Agreement – Exhibit 10. and CEC's Responses to Counsel Flug's Comments – Exhibit 11.

Level Playing Field

During the May 7, 2013 Public Hearing in the Matter of CEC – Agenda Item 2013-01231, Chairman Rosen stated with reference to Internet Wine Sales Business Plans:

"And I have got retail industry, retail industry in New York State that I want to make sure is going to be able to use this and that is fair for everybody, I want to ensure that it's a level playing field for our retailers as well as accommodating your client, counsel. There will be – they will be competing with this gentleman and I want to make sure there is a level playing field."

CEC is supportive of the Chairman's concern regarding fairness and a level playing field. However, as Justice Kennedy noted in Granholm v. Heald, 544 U.S. 460 (2005), "the increasing winery to wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products". Thus, small wineries of necessity formed close working relationships with small independent wholesalers.

It has been the entrepreneur initiative of entities such as CEC and Lionstone, that has done a fair job of filling the void. CEC's business model is designed to be extremely fair in making the brands it promotes and provides through the internet available to other retailers through general distribution. Thus, other retailers can take advantage of CEC's success – "fairness". Similarly, the expectation of a level playing field would suggest that CEC's business model, using service providers such as DW be afforded the same support base as wineries that ship wine purchases direct to consumers. The "direct ship wineries" also use service providers for website maintenance, design, order process assistance, packing, shipping, etc.

Direct shipping authorization focuses on sales. However, use of service providers is applicable to three-tier and direct shipping.

The future of internet wine sales will undoubtedly benefit consumer choice for wine purchases, resulting in additional revenue for the state by way of excise and sales tax payments on wine products. See Chart entitled ORDER PROCESSING for New York Business Plan. See Exhibit 12.

Wine Clubs

Counsel's inquiry asks for an explanation of the relationship between Wine Clubs and DW. The Global Settlement Memorandum Case #72996 at P. 9 ¶ 3 on behalf of Connoisseur Encounters Co., Inc. d/b/a Shermer Specialties summarizes the role of third party service providers. DW's services include acquiring the right to use valuable trademarks in the formation of wine clubs. Wine clubs involve using trademarks as a branded style guide to enhance marketing and sales efforts. They have been used for years in New York and elsewhere. CEC has not entered into any agreement with owners of trademarks. Moreover, CEC counsel in this matter has not been involved in drafting or negotiating any Wine Club License Agreement for DW, WSJ, Zagat or Virgin Air, etc. Furthermore, licensors of trademarks are not involved in any way in the daily operation of CEC's business.

CEC is attaching a copy of the California Department of Alcoholic Beverage Control Industry Advisory pertaining to Service Providers. The Department approved the use of trademarks on the part of Third Party Service Providers, recognizing that trademarks have value and that a trademark holder may generally license the use of its trademark and receives compensation for such a use. These types of arrangements are being utilized by Amazon, Barclay Clubs, Clubs of America, Lot 18, Woot.com, Naked Wines, Vinesse, Winetasting.com, Global, Hawesko, Giordano and Wine.com. Other examples in New York would be label arrangements involving high end restaurants, hotels and wineries.

Conclusion

In the preparation of this Business Plan, CEC has relied upon the years of experience of its advisors in developing regulatory compliant business models for internet sales transactions.

The Plan reflects meetings and correspondence with SLA counsel, going back to the 1990s, legislative initiatives with members of the New York State Legislature, periodic discussions with the SLA Director of the Wholesale Bureau, incorporating changes negotiated with Counsel Paul Karamanol, negotiations with the California Department of Alcoholic Beverage Control in developing public policy to assist internet wine sales, seminars conducted for the National Conference of State Liquor Administrators, numerous written requests of the SLA for copies of all published letters, rulings, bulletins or other correspondence related to the subject of Internet Wine Sales.

In addition, a Freedom of Information Request was made, a review of the Chatham Wine & Liquor Settlement as well as the ShipCompliant Declaratory Ruling and attendance at a public hearing before the SLA on August 19, 2013.

Finally, the following List of Exhibits sets forth in detail the various steps that were taken in carrying out the essential elements of the proposed CEC Business Plan.

LIST OF EXHIBITS

Exhibit 1 & 2	Correspondence between Morton Siegel and Thomas McKeon, SLA Counsel – December 1999 through June 2000
Exhibit 3	Agreement between CEC and Direct Wines, Inc., entitled Integrated Technology, Logistics, Marketing Service Agreement
Exhibit 4	List of New York Wholesalers
Exhibit 5	Retailer's Identity on Website
Exhibit 6	Customer Order Process/ Documents
Exhibit 7	Order Acceptance Process
Exhibit 8	Wine Cellar Pro Forma Standards for Fulfillment at Lionstone's Licensed Warehouse
Exhibit 9	Internet Wine Retailer Risk Factors
Exhibit 10	Counsel Flug's Comments to Integrated Technology/Logistics/ Marketing/Services Agreement
Exhibit 11	CEC's Responses to Counsel Flug's Comments
Exhibit 12	Chart entitled ORDER PROCESSING for New York Business Plan

●●●●●●●●●●●●●●●●●●●●●●

Respectfully Presented By:

Morton Siegel, Esq.
Michael A. Moses, Esq.
Siegel & Moses, P.C.
444 North Michigan Avenue
Suite 2600
Chicago, Illinois 60611
Telephone: 312-658-2000
Facsimile: 312-658-2022

On Behalf of:

Connoisseur Encounters Company, Inc.
dba Wine Cellar
122 South Ridge Street
Rye Brook, New York 10573

EXHIBIT 2

Wine Cellar at Rye Ridge
Integrated Technology / Logistics / Marketing
Services Agreement

This Agreement is entered into effective October 1, 2013 by and between Direct Wines, Inc., with its principal place of business at 20 Marshall Street, Suite 320, Norwalk, Connecticut 06854 ("DWI"), and Connoisseur Encounters Company, Inc., d/b/a Wine Cellar at Rye Ridge, with its principal place of business at 122 South Ridge Street, Rye Brook, New York 10573 ("Wine Cellar").

Recitals

A. Wine Cellar is duly licensed and authorized to market, promote, and sell wine products to consumers within the state of New York.

B. Wine Cellar desires to employ integrated technology, logistics, and marketing methods with regards to the operation of its business. This consists of the coordination and bringing together of information through the use of technology for logistics, communications, marketing, and sales functions of Wine Cellar into a seamless service program.

C. DWI is a provider of technology, logistics, and marketing services for use by Wine Cellar allowing for lawful sales of alcoholic beverages by Wine Cellar within the state of New York.

Therefore, for good and valuable consideration, with the Recitals incorporated herein, Wine Cellar and DWI agree to the following:

1. Trade Name License.

A. DWI hereby grants to Wine Cellar nonexclusive, limited license to utilize the trade names "WSJ Wine", "Zagat Wine", "Four Seasons Wine", "Laithwaites Wine", and "Virgin Wine" including any of their associated service marks (collectively "Trade names") during the term of this Agreement for purposes of Wine Cellar identifying varying bottles and collections of wine products which Wine Cellar determines it wants to offer and sell to consumers which Wine Cellar reasonably believes are of a select nature and quality it would like to be associated with the specific Trade names.

B. Wine Cellar shall determine and control which wine products and the prices at which they are to be offered and sold to consumers in association with the Trade names. Wine Cellar shall be entitled under this license to disclose said use or proposed use of such name when applying for any liquor, tax or other governmental permits or licenses that Wine Cellar is required to obtain in connection with its operations. This license shall not be transferable by Wine Cellar without DWI's prior written consent and shall terminate upon the termination of this Agreement without further action or notice by Wine Cellar or DWI.

2. **Services.**

A. DWI, from an integrated technology standpoint, as directed and controlled by Wine Cellar shall:

(i) Assist in the design, hosting, and maintenance of Wine Cellar's websites utilizing the Trade Names licensed to Wine Cellar, in accordance with the direction and control of Wine Cellar, identifying on Wine Cellar's websites s the wine products which Wine Cellar and collections of wine selected by Wine Cellar to be offered for sale to consumers and the prices at which Wine Cellar directs they are to be sold. The specific collections and the wines included therein, as well as the pricing, are entirely the decision and in the control of Wine Cellar.

(ii) Obtain credit card and delivery information from consumers on behalf of Wine Cellar for processing by and payment to Wine Cellar for Wine Cellar's s sale and delivery of orders it has accepted, it being understood that title to the wine purchased by consumers passes to those consumers at Wine Cellar's premises. In this regard, DWI may act only as an agent for the collection of information such as receiving delivery and credit card information and securing payment authorization; all monies shall be paid to and collected by Wine Cellar.

(iii) All potential orders for alcoholic beverages from consumers solicited by Wine Cellar via its websites, shall be subject to acceptance or rejection by Wine Cellar. Wine Cellar shall be solely responsible for the sale and control of each transaction, including any decisions concerning acceptance or rejection of such orders, the products to be offered, the prices to be charged, fulfillment of orders, and the shipment of alcoholic beverages from Wine Cellar's premises or other authorized shipping point.

B. DWI, from an integrated logistics and communications standpoint, as directed and controlled by Wine Cellar, shall:

(i) Ascertain and provide Wine Cellar with up to date logistics information as to status of Wine Cellar's order fulfillment by wholesalers from whom Wine Cellar has elected to purchase product, and logistics information as to delivery to Wine Cellar and delivery to consumers by carrier services.

(ii) Assist in computer generated Wine Cellar customer invoices and carrier labels, and provide data flow between Wine Cellar and its wholesalers as may be warranted to insure timely delivery and fulfillment by Wine Cellar.

C. DWI, from an integrated marketing standpoint, as directed and controlled by Wine Cellar shall:

(i) Provide 1-800 customer service assistance so as to attempt to insure that Wine Cellar's customers are satisfied with the products and services provided by Wine Cellar.

(ii) Provide suggested marketing programs along with suggested wines to be offered by Wine Cellar, marketing analytics, and any other creative resources or surveys as may be requested by Wine Cellar from time to time.

(iii) Provide from time to time, as specifically may be requested of DWI by Wine Cellar, suggested web, email, and social media platforms for additional advertising by Wine Cellar at a cost to be determined by mutual agreement of the parties.

(iv) All advertisements and offers to sell alcoholic beverages by Wine Cellar, whether through its websites, print, billboard, radio, telemarketing, or television advertisements, as well as all other types of permitted advertising, only become an integral part of a sale when the sale is completed by the transfer of title of an alcoholic beverage for consideration by Wine Cellar to the consumer. The mere placement of an advertisement for an alcoholic beverage by DWI at the direction of Wine Cellar, and the consumer's furnishing of credit card information, shall not in any way constitute a transfer of title for consideration, directly or indirectly, and is not a sale nor a solicitation for sale by DWI, let alone a completed sale, by DWI.

D. None of the services provided by DWI, either individually or collectively, shall be deemed to have granted DWI, directly or indirectly, any interest or control in the operation or management of Wine Cellar directly or indirectly, its business or licenses, or its licensed premises, financially or administratively, or as to the products to be purchased and sold by Wine Cellar or prices at which they are sold to consumers. DWI, by providing the above services, has not been granted any ability to utilize Wine Cellar's licenses or permits, nor has it been granted the ability to exercise any privileges granted to Wine Cellar as the holder of any license or permit.

3. Fees. The fees charged by DWI for those services requested by Wine Cellar shall be those set forth on the attached Schedule of Fees which may as the parties determine be billed weekly or monthly.

4. Term. This Agreement may be terminated at any time by either party based upon 30 days prior written notice. Upon termination all accounts shall be settled.

5. Force Majeure. Neither party shall be liable to the other party on account of inability to perform arising out of matters beyond the reasonable control of the disabled party, including, but not limited to, acts of God, acts of government, labor disputes, or transportation embargoes, provided, however, that the disabled party exercises its best efforts to overcome the circumstances which create the disability.

6. Responsibility of Parties. The parties understand and agree that Wine Cellar maintains a permit or license in good standing with the New York State Liquor Authority and operates in compliance with the New York Alcoholic Beverage Act ("Act"), and that Wine Cellar is solely responsible for violations of the Act and its actions conducted under that permit. Based thereon, DWI shall conduct itself and fulfill its duties and obligations as set forth in this Agreement in a

competent and responsible manner, according only to the specific instructions of Wine Cellar and not otherwise in conflict with this Agreement or the laws of the State of New York.

7. **Severability.** If any provision or portion of any provision of this Agreement shall be construed to be illegal, invalid, or unenforceable, such shall be deemed stricken and deleted from this Agreement to the same extent and effect as if never incorporated herein, but all other provisions of the Agreement, as well as the remaining portion of any provision which is illegal, invalid, or enforceable in part, shall continue in full force and effect. If, however, the striking or deleting of any such provision would substantially affect or alter the commercial basis of the Agreement herein, the parties shall negotiate in good faith to amend or modify such provision. The parties also acknowledge that each of the provisions contained herein have been negotiated in good faith and at arm's-length and that the parties, as a free and voluntary act, have entered into this Agreement.

8. **Notices.** All notices, demands, statements, waivers, approvals, or other communications required or permitted to be given hereunder, shall be in writing and shall be deemed given if personally delivered or sent by Federal Express, DHL, Express Mail, or similar overnight delivery service, or by confirmed telecopy, to the parties intended at the address first set forth above. Notice shall be deemed to have been delivered only upon receipt by each addressee provided for above to whom a copy of such notice is to be given.

9. **Assignment.** Neither this Agreement nor any rights hereunder shall be assignable by either party without the prior written consent of the other party.

10. **Governing Law.** This Agreement is to be governed and construed according to the laws of the State of New York. Venue for any dispute arising out of this Agreement shall be in the Supreme Court of New York.

11. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties, supersedes and terminates all prior oral and written agreements and understandings between the parties, and is the specific Agreement between the parties. This Agreement is not incorporated into and made a part of any other agreement and shall be changed or modified only by subsequent written amendment executed by an authorized representative of DWI and Wine Cellar. Said modification or amendment shall, unless otherwise specified, be deemed to relate back to the effective date of this Agreement, first specified above, and shall not constitute a new agreement or be deemed a waiver by DWI or Wine Cellar of any of the substantive rights contained in this Agreement. Except as specified herein, no other person, agent, or employee of the parties has the authority to amend, modify, waive, supersede, or cancel any terms of this Agreement. No conduct of any such person, custom, or trade usage shall be construed to create that authority.

[Separate Signature Page Follows]

[Separate Signature Page]

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the day and year first above written.

DIRECT WINES, INC.:

By: _____
Title: _____

Date: October 1, 2013

CONNOISSEUR ENCOUNTERS COMPANY, INC. d/b/a WINE CELLAR AT RYE RIDGE:

By: _____
Title: President

Date: October 1, 2013

SCHEDULE OF FEES

Weekly Fee Schedule for Wine Cellar at Rye Ridge

Integrated Marketing & Technology----------$20,000.00
Logistics//Communications ----------$10,000.00
Customer Service----------$5,000.00