

At a Special Term of the Supreme Court, held in and for the County of Erie at the Erie County Courthouse, in the City of Buffalo, New York, on the ~~26~~²⁷ day of October, 2006

FILED
10/27/2006
CLERK OF COUNTY
OFFICE

PRESENT: Hon. Eugene M. Fahey, J.S.C.
Justice Presiding

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,
by the Attorney General of the State
of New York, ELIOT SPITZER, and THE
NEW YORK STATE LIQUOR AUTHORITY,

Petitioners,

CONSENT ORDER
AND JUDGMENT

-vs-

BACARDI U.S.A., INC., BANFI PRODUCTS
CORPORATION, BROWN-FORMAN CORPORATION,
CONSTELLATION BRANDS, INC., DIAGEO NORTH
AMERICA, INC., E & J GALLO WINERY,
FUTURE BRANDS LLC, THE ABSOLUT SPIRITS
COMPANY, INC., JIM BEAM BRANDS CO.,
KOBRAND CORPORATION, MOET HENNESSEY USA,
INC., PERNOD RICARD USA, LLC, REMY
COINTREAU USA, INC., SIDNEY FRANK
IMPORTING CO., INC., AND SKYY
SPIRITS, LLC,

Index No. I. 2006-9782

Hon. Eugene M. Fahey

Respondents,

Pursuant to Section 63, Subdivision 12
of the Executive Law.

Upon reading and filing the Verified Petition sworn to on
September 25, 2006, by Dennis Rosen, Assistant Attorney General,
and the Affirmation of Thomas J. Donohue, Esq., Counsel to the New

York State Liquor Authority, dated September 29, 2006, and upon the Stipulation and Consent of each respondent, all of which are attached hereto, in which each respondent acknowledges service of the Notice of Verified Petition and Verified Petition, consents to the entry of this Consent Order and Judgment ("Judgment"), and waives notice of entry thereof,

NOW, on motion of Eliot Spitzer, Attorney General of the State of New York ("Attorney General"), attorney for petitioner, The People of the State of New York, Assistant Attorney General Dennis Rosen, of counsel, it is

PARTIES SUBJECT TO JUDGMENT

1. ORDERED, ADJUDGED AND DECREED that this Judgment shall extend to respondents, their officers, directors, employees, agents, successors and assigns, and any other entities located in the United States which respondents own or control; and it is further

INJUNCTIVE RELIEF

Definition of "Indirectly"

2. ORDERED, ADJUDGED AND DECREED that, where this Judgment prohibits respondents from "directly or indirectly" engaging in certain conduct, "indirectly" for purposes of this Judgment includes, but is not limited to, a respondent soliciting, aiding or encouraging another person or entity to engage in the proscribed conduct; and it is further

Payments or Gifts to Retailers Prohibited

3. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing any person or entity which is licensed, pursuant to the New York Alcoholic Beverage Control Law ("ABCL"), to sell wine or liquor to consumers or to any other person for any purpose other than resale ("retailers"), with cash, cash equivalents, or gifts such as credit card swipes or AMEX checks, trips or reimbursement of travel expenses, restaurant equipment, consumer items, or any other inducement to purchase wine or liquor from respondents, except as explicitly permitted by Title 9, Subtitle B of the Official Compilation of Codes, Rules and Regulations of the State of New York ("SLA Rules"), or a Bulletin issued by the New York State Liquor Authority ("SLA"); and it is further

Discriminating Among Retailers Prohibited

4. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, discriminating among retailers when selling, or offering to sell, wine or liquor for purposes of resale, except as explicitly permitted by the ABCL, or SLA Rule or Bulletin; and it is further

Discriminatory Distribution of Limited Items Prohibited

5. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, discriminating among retailers when limiting the distribution of

any item that is of genuinely limited availability; provided that nothing herein shall prohibit a respondent from reasonably considering the nature of, and the consumer market for, a genuinely limited item when choosing a method of allocation; and it is further

Tie-Ins Prohibited

6. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, requiring or compelling retailers to purchase a particular brand in order to be able to purchase another brand; and it is further

Credits and Rebates Prohibited

7. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing retailers with any form of rebate or discount that has not been filed in a price schedule with the SLA, such as a credit against future purchases, except that nothing herein shall prohibit issuing lawful credits to a retailer in the regular course of business, including but not limited to reimbursement for breakage, spoilage, failure to deliver, or delivery of the wrong items; and it is further

Payments to Certain Persons or Entities Prohibited

8. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, making any payment to a person or entity that performs services

for a retailer if:

(a) Such payment constitutes, in effect, an incentive, reward, or rebate for purchasing or featuring products from a respondent; provided that nothing herein shall prohibit a respondent from making such a payment, where explicitly permitted by SLA Rule or Bulletin, to a person or entity that is not related to a retailer as described in (b) or (c) below; or

(b) The entity is, directly or indirectly, owned or controlled by a single retailer or group of retailers, or services a single retailer or group of retailers; or

(c) A principal, officer, or employee of the retailer, or a relative of a principal, officer, or employee of the retailer, is an officer or employee of the entity;

provided that the requirements of (b) and (c) herein shall be deemed to have been met where a respondent, or a distributor of a respondent, has obtained an affidavit from a retailer (unless the respondent knew or, in the exercise of reasonable diligence, should have known the affidavit was false) stating that the person or entity paid: (i) is not, directly or indirectly, controlled by a single retailer or group of retailers, or does not service a single retailer or group of retailers, and (ii) no principal, officer, or employee of the retailer, or relative of

a principal, officer, or employee of the retailer, is an officer or employee of the entity; and it is further

Restrictions on Payments for Wine and Drink Menus

9. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying for an on-premise licensee's wine or drink menus, or a portion thereof, unless all of the following conditions are met:

(a) The payment is not for any portion of a menu that consists of food items;

(b) The payment is not for menu jackets, covers, binders or similar items; except where such an item is made of paper, cardboard, or similar material, and is of *de minimis* value;

(c) All payments are made to a *bona fide* printing company, that is independent of the licensee, pursuant to an invoice from the printing company for the reasonable cost of printing the menus, or respondent's pro rated portion thereof;

Nothing herein shall prohibit respondents from actually printing menus for licensees themselves, provided that the conditions set forth in (a) and (b) above are met; and it is further

Restrictions on Buy-Back (Bar Spend) Events

10. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly,

purchasing wine or liquor for consumers from a retailer, except for purchases from on-premise licensees for:

(a) A consumer(s) on an individual or incidental basis;

(b) Wine or liquor actually consumed by respondents' employees, private guests or licensees' employees during the following activities conducted by respondents: *bona fide* business meetings or business entertainment, or private invitation-only events closed to the general public at locations of on-premise licensees or holders of a New York caterer's permit pursuant to ABCL § 98;

(c) Promotional events open to the general public, where a respondent spends no more than \$500.00 (excluding a wait staff gratuity of not more than 20%) per licensed premises per event, and conducts no more than six events per calendar year per licensed premises; provided that, within 20 days after each event, respondent shall file a statement with the SLA which includes (i) its date, time, location, and estimated duration; (ii) the brand(s) that were offered; and (iii) the name of the entity, and the name(s) of the persons who conducted the event on behalf of the respondent;

All purchases by a respondent from a licensee permitted pursuant to (a) - (c) shall be at no more than the licensee's regular retail price; and it is further

Gifts of Products Prohibited

11. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, providing free wine or liquor to retailers, except that nothing herein shall prohibit a respondent from providing wine or liquor to:

(a) A retailer to sample reasonably limited quantities;

(b) Consumers to sample on a retailer's premises where the retailer does not conduct the sampling and receives none of the wine or liquor;

(c) A charitable event to be conducted on a retailer's premises, or at any location designated by the charity, for which a respondent has donated products, where the retailer takes possession of the products on behalf of a charitable organization which is organized and registered under the provisions of the United States Internal Revenue Code, provided that the respondent does not leave any product with the licensee; or

(d) Holders of charitable permits pursuant to ABCL § 33.15;

and it is further

Restrictions on Payments for Participation in Retailer Advertising

12. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly,

paying for all or a portion of any advertisement produced by or for a retailer, regardless of the medium in which the advertisement may appear, except where explicitly permitted by Paragraph 13 below, SLA Rule or Bulletin, and nothing herein shall prohibit a respondent from providing to a retailer product or brand imagery and artwork for use in the advertisement; and it is further

13. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from, directly or indirectly, paying to participate, in any manner, in a catalogue produced by or for a retailer, unless all of the following conditions are met:

(a) None of the catalogues are distributed within New York State;

(b) All payments are made to a *bona fide* printing company, that is independent of the retailer, for the reasonable cost of printing the advertisement in the catalogue;

and it is further

FINES AND COSTS

14. ORDERED, ADJUDGED AND DECREED that respondents shall, contemporaneously with the filing of this Judgment, pay to petitioner, The People of the State of New York, a civil penalty, pursuant to ABCL § 17(3) and New York General Business Law Art. 22-A, in the following amounts:

Bacardi U.S.A., Inc.	\$175,000.00
Banfi Products Corporation	\$100,000.00
Brown-Forman Corporation	\$200,000.00
Constellation Brands, Inc.	\$200,000.00
Diageo North America, Inc.	\$225,000.00
E & J Gallo Winery	\$200,000.00
Future Brands LLC (also includes The Absolut Spirits Company, Inc.; Jim Beam Brands Co.)	\$175,000.00
Kobrand Corporation	\$100,000.00
Moet Hennessey USA, Inc.	\$175,000.00
Pernod Ricard USA, LLC	\$175,000.00
Remy Cointreau USA, Inc.	\$175,000.00
Sidney Frank Importing Co., Inc.	\$125,000.00
Skyy Spirits, LLC	\$175,000.00

and it is further

15. ORDERED, ADJUDGED AND DECREED that each respondent shall, contemporaneously with the filing of this Judgment, pay \$10,000.00 costs to petitioner, The People of the State of New York; and it is further

16. ORDERED, ADJUDGED AND DECREED that each respondent shall make the payments ordered in Paragraphs 14 and 15 by certified check or bank check payable to the Attorney General of the State of New York; and it is further

PROSPECTIVE PENALTIES

17. ORDERED, ADJUDGED AND DECREED that, upon a finding by the Court that a respondent has committed any violation(s) of this Judgment, the Court may impose upon that respondent: (a) any injunctive relief it deems appropriate, including but not limited to enjoining permanently, or for a specified period of time, that respondent, or any person or entity acting on their behalf, from including in any filing with the SLA, pursuant to ABCL § 101-b, brands or items owned or controlled by that respondent; and (b) any penalty set forth in the ABCL for violations of its provisions, including but not limited to a fine not to exceed \$100,000.00 per violation, and/or the revocation, cancellation or suspension of any licenses issued to that respondent pursuant to the ABCL; and it is further

18. ORDERED, ADJUDGED AND DECREED that nothing herein shall limit or prohibit any party's right to appeal an adverse determination by the Court pursuant to Paragraph 17; and it is further

ENFORCEMENT

19. ORDERED, ADJUDGED AND DECREED that either or both petitioners may apply to the Court, upon 10 days notice to all parties, for relief pursuant to Paragraph 17, or for any further relief as may be necessary to effectuate the terms of this Judgment; or, in the alternative and to the exclusion of either petitioner applying to the Court for relief, the SLA may pursue

violations of this Judgment or the corresponding ABCL violations by administratively imposing any penalty contained in the ABCL independent of the terms of this Judgment, pursuant to its functions, powers and duties as set forth in ABCL § 17 *et al.*, including but not limited to a fine not to exceed \$100,000.00 per violation, and/or the revocation, cancellation or suspension of any licenses issued to a respondent pursuant to the ABCL; however, petitioners shall not commence separate proceedings regarding alleged violations of this Judgment or the ABCL for the same conduct; and it is further

20. ORDERED, ADJUDGED AND DECREED that, for any of the conduct alleged in the Verified Petition or prohibited by the Judgment, which occurred prior to the date of each of the respondents agreeing in a Stipulation and Consent to the entry of this Judgment, there shall be no administrative, civil, criminal, regulatory, or other action taken by either or both petitioners adverse to the respondents, their officers, directors, employees, agents, successors and assigns, or any other entities that respondents own or control, pursuant to the ABCL, and they shall not be liable to petitioners in any manner other than as set forth in this Judgment; and it is further

21. ORDERED, ADJUDGED AND DECREED that any party may apply to the Court, upon 10 days notice to all parties, for a modification or termination of this Judgment as a result of any

change in the ABCL, or SLA Rules, or any other material change in circumstances, and this Judgment with any such modifications shall be enforceable against all parties; and it is further

AFFIDAVIT OF COMPLIANCE

22. ORDERED, ADJUDGED AND DECREED that each respondent shall file with the Attorney General, no later than 60 days after being served with notice of entry of this Judgment, an affidavit, sworn to by a knowledgeable employee, demonstrating that it has devised policies and procedures to effectuate compliance with the terms of this judgment; and it is further

VENUE

23. ORDERED, ADJUDGED AND DECREED that all applications under this Judgment shall be made in Erie County before this Court, except that any application by the SLA may instead be brought in New York State Supreme Court in Albany County; and it is further

NO ADMISSION

24. ORDERED, ADJUDGED AND DECREED that this Judgment, or any provision thereof, shall not be construed as an admission by any respondent of any violation of law, or of the truth of any fact alleged in the Verified Petition or that it has engaged in the conduct prohibited by this Judgment; and it is further

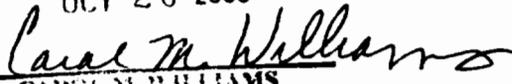
PRIVATE RIGHT OF ACTION

25. ORDERED, ADJUDGED, AND DECREED that nothing herein

shall be construed to deprive any person, corporation, association or other entity of an existing private right or remedy under law, or to create any private right or remedy.


Eugene M. Fahey, J.S.C.

GRANTED

OCT 26 2006
BY 
CAROL M. WILLIAMS
COURT CLERK