

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 ___ day of September, 2006

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

STATE OF NEW YORK : SUPREME COURT
COUNTY OF ERIE

FILED
SEP 12 11:22
ERIE COUNTY
CLERK'S OFFICE

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-

Index No. I 2006-7562

CHARMER INDUSTRIES, INC., SERVICE,
UNIVERSAL DISTRIBUTORS, INC., EBER
BROS. WINE AND LIQUOR CORPORATION,
EBER-NDC, LLC, PEERLESS IMPORTERS,
INC., COLONY LIQUOR AND WINE
DISTRIBUTORS, LLC, SOUTHERN WINE
& SPIRITS OF NEW YORK, INC.,
SOUTHERN WINE & SPIRITS OF UPSTATE
NEW YORK, INC.,

FILED
ACTIONS & PROCEEDINGS
SEP 12 2006

Respondents,

ERIE COUNTY
CLERK'S OFFICE

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

Upon reading and filing the Verified Petition sworn to on August 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 August 29, 2006, and upon the

Stipulation and Consent of each respondent, all of which are dated August 29, 2006, 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 respondents' parents, subsidiaries, affiliates, and any other entities under common ownership or control; and it is further

INJUNCTIVE RELIEF

Payments or Gifts to Retailers Prohibited

2. 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

3. 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

Full Disclosure of Pricing Information; Internet Posting

4. ORDERED, ADJUDGED AND DECREED that, to better effectuate full and fair disclosure by respondents to all retailers, each respondent shall:

(a) Post on its Internet website the same monthly price schedule that it files with the SLA pursuant to ABCL Art. 8, on the fifth day prior to the date for which such price schedule is effective;

(b) Post all similar brands and sizes together, and post all information pertaining to the same item together;

(c) Provide unlimited access to Internet postings to all holders of any New York license, pursuant to the ABCL, to

purchase or sell wine or liquor; and

(d) Include in any price book or advertising material disseminated for review by retailers, information sufficient to direct retailers to the website where the price schedules are posted;

except that the obligations of this paragraph shall be considered satisfied if the SLA or its designee places such information on the SLA's Internet website; and it is further

Restrictions on Posting Items as Limited Availability

5. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from filing a price schedule with the SLA denoting an item as one of limited availability, where the respondent has a sufficient amount of the item in its inventory to satisfy the reasonable customer demands of retailers within the State of New York; and it is further

Discriminatory Distribution of Limited Items Prohibited

6. 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

Posting Special Packs As Limited Items Prohibited

7. ORDERED, ADJUDGED AND DECREED that respondents are permanently barred and enjoined from posting an item as one of limited availability when the respondent, or a manufacturer or supplier, has artificially limited the item by creating a limited number of "special packs," which are defined, for purposes of this Judgment, as cases comprised of an unusual number of bottles, e.g., 7 or 14, of the same brand; and it is further

Certain Promotional Packs May be Limited

8. ORDERED, ADJUDGED AND DECREED that nothing herein shall prohibit a respondent from filing a price schedule with the SLA denoting an item as one of limited availability where it consists of (a) a holiday-type package which combines wine or liquor products with non-alcoholic consumer items, or (b) a combination package as described in SLA Bulletin 583 (Exhibit A), provided that the price per bottle for each brand in such packages is not lower than the lowest price per bottle (for bottles of the same brand and size) for items that are not of limited availability in the same schedule; and it is further

Restriction on Price Posting Special Packs

9. ORDERED, ADJUDGED AND DECREED that each respondent is permanently barred and enjoined from filing a price schedule for a special pack where, in the same schedule, the price per bottle in a special pack is less than the price per bottle (for

bottles of the same brand and size) of a volume of product equal to or greater than that contained in the special pack; and it is further

Tie-Ins Prohibited

10. 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

11. 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

12. 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 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

13. 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 which 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

14. 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

15. 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

16. 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 17 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

17. 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

18. 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:

Charmer Industries, Inc.	\$350,000.00
Service-Universal Distributors, Inc.	\$200,000.00

Eber Bros. Wine and Liquor Corporation	\$175,000.00
Eber-NDC, LLC	\$200,000.00
Peerless Importers, Inc.	\$250,000.00
Colony Liquor and Wine Distributors, LLC	\$125,000.00
Southern Wine & Spirits of New York, Inc.	\$175,000.00
Southern Wine & Spirits of Upstate New York	\$100,000.00

and it is further

19. 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

20. ORDERED, ADJUDGED AND DECREED that each respondent shall make the payments ordered in Paragraphs 18 and 19 by certified check or bank check payable to the Attorney General of the State of New York; and it is further

PROSPECTIVE PENALTIES

21. 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, 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

22. 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 21; and it is further

ENFORCEMENT

23. 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 21, 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 herein, or 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.*; however, petitioners shall not commence separate proceedings regarding alleged violations of this Judgment or the ABCL for the same conduct; and it is further

24. 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 respondents' parents, subsidiaries and affiliates, 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

25. 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

26. ORDERED, ADJUDGED AND DECREED that petitioners shall, within 90 days of entry of this Judgment, provide a copy of this order through any method they deem reasonable, to all holders of a license issued pursuant to the ABCL for the wholesale distribution and sale of wine and liquor, with notice that any conduct which violates this Judgment shall be considered a violation of the ABCL which will subject the violator to the penalties set forth in Paragraph 21 above; and it is further

AFFIDAVIT OF COMPLIANCE

27. 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

28. 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

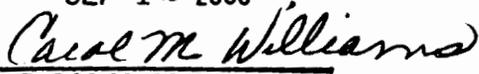
29. ORDERED, ADJUDGED AND DECREED that this Judgment, or any provision thereof, shall not be construed as an admission by any respondent of any violation of law, or of the truth of any fact alleged in the Verified Petition or that it has engaged in the conduct prohibited by this Judgment; and it is further

PRIVATE RIGHT OF ACTION

30. 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

SEP 12 2006
BY 
CAROL M. WILLIAMS
COURT CLERK

EXHIBITA



To: Distillers and Liquor Wholesalers; Wineries and Wine Wholesalers

Subject: Sealed pre-wrapped combination packages of different kinds of scheduled alcoholic beverages

Sealed pre-wrapped combination packages of an individual bottle of a scheduled alcoholic beverage and other merchandise

Sealed pre-wrapped packages which combine different scheduled alcoholic beverage products are allowed, with certain limitations.

A licensed distiller or liquor wholesaler who is the exclusive brand owner¹ of more than one brand of liquor and/or wine may combine two or more containers² of different brands which he exclusively owns into a single sealed pre-wrapped combination package, subject to the limitations set forth below.

A licensed winery or wine wholesaler who is the exclusive brand owner¹ of more than one brand of wine may combine two or more containers of different brands which he exclusively owns into a single combination package, subject to the limitations set forth below. References to liquor in the discussion which follows are inapplicable to licensed wineries and wine wholesalers.

Permissible Types of Sealed Pre-Wrapped Combination Packages

Only three types of sealed pre-wrapped combination packages are permissible:

1. a sealed pre-wrapped combination package which includes only containers of liquor and/or wine.
2. a sealed pre-wrapped combination package which contains only one bottle of liquor or wine together with other non-potable and non-edible merchandise reasonably used in connection with the preparation, storage or service of liquor or wine.

Prior approval by the Authority's Director of Wholesale Services must be obtained before a sealed pre-wrapped combination package containing non-potable and non-edible merchandise may be posted as an item on the required schedules. A request for approval must be submitted on an Application for Registration of Standard Brand Labeling (Form 652 09/93). The brand owner must write "Supplemental" on the form and submit a color copy of the combination package. No fee is required.

¹ A brand owner who is not licensed by the Authority may designate an appropriately licensed wholesaler to act as his exclusive brand agent for the purpose of filing the required schedules. The licensed wholesaler thus designated as brand agent must be a true agent of the brand owner, and the licensed wholesaler acting as agent may not pay the brand owner for the right to exercise control over the brand. Where the brand owner or the brand owner's exclusive agent does not register the brand, the brand must be registered, and schedules must be filed, by one of the persons listed in ABCL §107-a.4(b).

² A container of liquor or wine is, in most cases, an individual bottle. Because an individual container of wine may be a box, as well as a bottle, the term container is used in order to include both a bottle and an individual box. Illustrative examples in this bulletin which use the word "bottle" apply with equal force to an individual box of wine.

3. Applicable to sparkling wine only: It is permissible to post as an item a sealed pre-wrapped combination package which contains only one container of sparkling wine together with one sample of a confection, pastry, or biscuit, which sample has no greater net weight than three ounces. Please note: The provisions of this paragraph expire on January 31, 2000. Commencing on January 31, 2000, no sealed pre-wrapped combination package containing one bottle of sparkling wine and one three-ounce sample of a confection, pastry, or biscuit may be posted as an item on a schedule or sold.

Price Posting of Sealed Pre-wrapped Combination Packages

A sealed pre-wrapped combination package containing one or more bottles of liquor and/or one or more bottles of wine must be posted as an item on the schedule of prices to wholesalers, and must be posted as an item on the schedule of prices to retailers. Before a sealed pre-wrapped combination package can be entered as an item on any schedule, the following conditions must be met:

1. The sealed pre-wrapped combination package must contain only brands of liquor and/or wine which have been registered or authorized in accordance with the provisions of ABCL §107-a. Where a label has been issued a brand label registration number, that number must be set forth in the schedule listing pertaining to such sealed pre-wrapped combination package.
2. Each bottle contained in such sealed pre-wrapped combination package must be separately available to retailers in accordance with the bottle and case price posted in the schedule.
3. The scheduled item price which is posted for a sealed pre-wrapped combination package which includes only containers of liquor and/or wine must be no greater than the sum of the individual bottle prices for each bottle contained in the sealed pre-wrapped combination package. No charge may be imposed for the packaging itself by any distiller, winery, wholesaler or retailer selling or offering for sale any combination package.
4. The scheduled item price which is posted for a sealed pre-wrapped combination package which contains only one bottle of liquor or wine together with other non-potable and non-edible merchandise reasonably used in connection with the preparation, storage or service of liquor or wine may include an upcharge for the non-potable and non-edible merchandise.
5. The scheduled item price which is posted for a sealed pre-wrapped combination package which contains only one container of sparkling wine together with one sample of a confection, pastry, or biscuit, which sample has no greater net weight than three ounces, may include an upcharge for the confection, pastry, or biscuit sample.
6. An item price for a case of sealed pre-wrapped combination packages may be posted only if the total number of packages required to be purchased to obtain the case price would result in the purchase of a full case of each item contained in the sealed pre-wrapped combination package.
7. Where one or more bottles of liquor are packaged with one or more bottles of wine in a sealed pre-wrapped combination package, the item price for the sealed pre-wrapped combination package must be listed on both the schedules of liquor prices and the schedules of wine prices.