

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

EMPIRE WINE & SPIRITS LLC, and
BRADLEY A. JUNCO,

Plaintiffs-Petitioners,

-against-

**VERIFIED PETITION
& COMPLAINT**

Index No.:

NEW YORK STATE LIQUOR AUTHORITY,

Defendant-Respondent.

Plaintiffs-Petitioners Empire Wine & Spirits, LLC and Bradley A. Junco (together, “Empire”), by their undersigned attorneys, Whiteman Osterman & Hanna LLP, as and for their verified petition and complaint, allege as follows:

NATURE OF PROCEEDING

1. This is a combined CPLR Article 78 proceeding and an action for a declaratory judgment seeking a determination that the New York State Liquor Authority (“SLA”) lacks the jurisdiction and authority to restrict, regulate, or interfere with the shipment of wine to Empire’s customers outside the State of New York.

2. Under established law, SLA is precluded from asserting jurisdiction and authority over the shipment of alcoholic beverages destined for distribution to and consumption by customers outside the State of New York, even when the shipment originates in the State of New York.

3. While SLA is aware that it is legally restricted from regulating the shipment of alcoholic beverages destined for distribution and consumption outside the State of New York, SLA is nevertheless asserting jurisdiction and authority over such sales and shipments.

4. SLA claims to have such jurisdiction and authority pursuant one its self-promulgated administrative regulations, 9 NYCRR 53.1(n). Under that regulation, SLA asserts an unfettered right to cancel or revoke a liquor license for any conduct that SLA deems, *in its own discretion*, to be “improper.”

5. Although there is no New York statute or regulation expressly prohibiting the shipment of wine to customers in other states, and although SLA expressly allows New York wine retailers to sell and ship wine directly to customers *within* the State of New York, SLA is regulating Empire’s shipment of wine to customers in other states, because, in its “discretion,” it has decided that it is “improper” for Empire to ship wine to customers outside the State of New York.

6. SLA is, accordingly, seeking to revoke Empire’s license on the ground that Empire ships wine to customers in various other states.

7. In so doing, SLA is violating precedent from the United States Supreme Court and threatening to substantially and irreparably damage wine retail businesses throughout the State of New York, including Empire’s business, that ship wine to customers outside the State of New York.

8. SLA is also usurping the prosecutorial discretion and authority of other States to enforce their own laws, if any, that might apply to shipments of wine to customers in their own states.

9. For example, the State of California has expressly stated that it will not enforce its law prohibiting its residents from receiving direct shipments of wine from out-of-state retailers. Specifically, the State of California stipulated in a court of law that it “will continue to exercise its prosecutorial discretion *not to pursue enforcement action of any type . . .* against retail licensees in other States for selling and shipping wine for personal use and not for resale directly to adult California residents.” (emphasis supplied). A copy of this stipulation is attached hereto as Exhibit A.

10. Notwithstanding the policy of California, and the practice of many other States of not interfering with direct wine shipments, SLA has determined that Empire has engaged in “improper conduct” for shipping wine to California and other states. SLA is thus using New York taxpayer dollars to enforce laws of other states that have no interest in enforcing the laws themselves, the effect of which is to drive down economic and job producing activities here in New York.

11. Even if SLA did have the general power to regulate out-of-state shipments of wine, the regulation under which SLA is attempting to regulate such shipments, 9 NYCRR 53.1(n), is unconstitutionally vague because, among other things, it makes absolutely no mention of out-of-state shipping and fails to provide reasonable notice to licensees as to what “improper conduct” the regulation purportedly proscribes.

12. Accordingly, Empire seeks a writ of prohibition and/or an injunction preventing SLA from proceeding with a license revocation hearing against Empire or otherwise regulating any interstate shipments of wine by Empire.

PARTIES

13. Petitioner-Plaintiff Empire Wine & Spirits LLC is a domestic limited liability company organized and existing under the laws of the State of New York, with a principal place of business located at 1440 Central Avenue, Albany, New York 12205.

14. Petitioner-Plaintiff Bradley A. Junco is a resident of Albany County and holds an active license, issued by SLA, to sell wine and spirits through Empire Wine & Spirits, LLC.

15. Defendant-Respondent SLA is an executive department and political subdivision of the State of New York.

BACKGROUND

16. As a substantial part of its business, Empire sells wine over the internet to customers outside the State of New York. These customers elect to have the wine they purchase from Empire shipped to them directly.

17. While the State of New York has the power to regulate the sale and distribution of alcoholic beverages, it may do so only within its own borders, pursuant to the Twenty-first Amendment of the United States Constitution.

18. The State of New York regulates the sale and distribution of alcohol within its borders through SLA, which exists pursuant to the New York Alcohol Beverage and Control Law (“ABC Law”).

19. Consistent with the Twenty-first Amendment, the ABC Law empowers SLA to regulate the sale and distribution of alcohol only within the State of New York.

20. In fact, it is the express policy of the ABC Law, and the very function of SLA, “to regulate and control the manufacture, sale and distribution *within the state* of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law.” ABC Law § 2 (emphasis added).

21. There is no New York statute authorizing SLA to regulate the shipment of wine to customers outside the State of New York.

22. On August 1, 2014, SLA issued Empire a Notice of Pleading charging Empire with 16 separate violations of a single subsection of an SLA regulation, 9 NYCRR 53.1 (n). A copy of the Notice of Pleading is attached as Exhibit B.

23. 9 NYCRR 53.1 (n) provides, in pertinent part, that SLA may revoke, cancel or suspend a liquor license “[f]or improper conduct by the licensee . . . whether such conduct was on or off the licensed premises, and which conduct is of such nature that if known to the authority, the authority, in its discretion, could properly deny the issuance of a permit or license or any renewal thereof because of the unsatisfactory character and/or fitness of such person.”

24. For each of the 16 violations of 9 NYCRR 53.1(n) set forth in the Notice of Pleading, SLA alleges that Empire engaged in “improper conduct” because it allegedly “sold and shipped wine directly to a customer” in another state.

25. Empire does not dispute that it sold wine over the internet directly to one or more customers living in each of these other states. Nor does Empire dispute that such wine was shipped directly to these customers.

26. SLA, however, lacks the jurisdiction and authority to regulate shipments into others states, or to denominate such shipments as “improper conduct” under 9 NYCRR 53.1(n).

27. Under Article 1, Section 8, Clause 3 of the United State Constitution, known as the Commerce Clause, the Federal government retains jurisdiction to regulate interstate commerce, including the interstate sale and distribution of alcoholic beverages.

28. The Commerce Clause operates with full force and effect to preclude SLA from regulating the transportation of alcoholic beverages destined for distribution and consumption in another state.

29. As a matter of law, any shipment of wine originating in the State of New York and destined for another state is in “interstate commerce” and is not subject to regulation by SLA.

30. In attempting to prevent Empire from shipping wine to customers in other States, and penalizing Empire for allegedly doing so, SLA is acting without constitutional or statutory authority.

31. Neither the Twenty-first Amendment, nor any New York State statute, confers authority to SLA to regulate the shipment of alcoholic beverages in interstate commerce destined for other states.

32. By letter to SLA's General Counsel dated August 11, 2014, Empire, through its own counsel, notified SLA that it lacked the jurisdiction and authority to pursue charges against Empire for "improper conduct" based on alleged sales and shipments of wine to out-of-state customers, and requested that the Notice of Pleading against Empire be withdrawn. A copy of the August 11, 2014 letter to SLA's General Counsel is attached as Exhibit C.

33. SLA's General Counsel verbally responded to the August 11, 2014 letter in a telephone conversation with Empire's counsel on August 11, 2014. At that time, SLA's General Counsel indicated that it was SLA's position and policy that it had the authority to regulate interstate sales and shipment of wine, that it disagreed with Empire's position as articulated in the August 11, 2014 letter, that SLA would not be withdrawing the charges against Empire, and that Empire faced the suspension or revocation of its license if it contested the charges against it.

AS AND FOR FIRST CAUSE OF ACTION
(Violation of Commerce Clause and 21st Amendment)

34. Empire repeats, realleges, and reincorporates each and every allegation set forth in the individual paragraphs above as if fully set forth herein.

35. The State of New York lacks the jurisdiction and authority to regulate the shipment of wine to customers outside the State of New York.

36. SLA, an administrative agency of the State of New York, is, nevertheless, purporting to exercise jurisdiction and authority over such shipments.

37. In so doing, SLA is interfering with interstate commerce even though there is no local State interest to be served in regulating the shipment of wine to customers outside the State of New York.

38. Empire has brought it to SLA's attention that SLA lacks the jurisdiction and authority to regulate or otherwise interfere with the shipment of wine to customers outside the State of New York.

39. Nevertheless, SLA continues to maintain that it has the authority to regulate the shipment of wine to customers outside the State of New York.

40. A genuine controversy concerning a pure issue of law therefore exists between SLA and Empire.

41. This controversy is immediately ripe for judicial review and no fact finding hearing before an SLA administrative law judge is necessary, as there are no factual issues in dispute to be resolved through such a hearing, and SLA has already articulated its position as to its jurisdiction, power, and authority, through its General Counsel.

42. Empire is, therefore, entitled to a writ of prohibition pursuant to CPLR 7803(2) prohibiting SLA from proceeding with a revocation hearing against Empire or otherwise interfering with any shipments of wine by Empire to out-of-state customers.

43. Empire is also entitled to judgment pursuant to CPLR 3001 declaring that SLA lacks jurisdiction and authority over the shipment of alcoholic beverages destined for distribution to and consumption by customers outside the State of New York, even when the shipment originates in the State of New York, and enjoining SLA from proceeding with a revocation hearing against Empire or otherwise interfering with any shipments of wine by Empire to out-of-state customers.

AS AND FOR A SECOND CAUSE OF ACTION
(Ultra Vires Regulation - Lack of Statutory Authority)

44. Empire repeats, realleges, and reincorporates each and every allegation set forth in the individual paragraphs above as if fully set forth herein.

45. Even if the State of New York were empowered to regulate interstate shipments of wine, and could exercise such power without violating the Commerce Clause, the State of New York has not vested SLA with statutory power to regulate the shipment of wine to customers outside the State of New York.

46. In pursuing charges against Empire for alleged violations of “improper conduct” under 9 NYCRR 53.1 (n), based on allegations that Empire “sold and shipped wine directly to [] customer[s]” in other States, SLA is acting without or in excess of any statutory authority.

47. SLA cannot legally extend its statutory mandate, as assigned by the Legislature of the State of New York, to apply to situations not embraced by its enabling legislation, as such action is tantamount to legislation by administrative fiat and, by definition, irrational.

48. SLA's pursuit of charges against Empire for shipping wine to customers in other states is *ultra vires* and unlawful.

49. Empire is, therefore, entitled to a writ of prohibition pursuant to CPLR 7803(2) prohibiting SLA from proceeding with a revocation hearing against Empire or otherwise interfering with any shipments of wine by Empire to out-of-state customers.

50. Empire is also entitled to judgment pursuant to CPLR 3001 declaring that SLA lacks jurisdiction and authority over the shipment of alcoholic beverages destined for distribution to and consumption by customers outside the State of New York, even when the shipment originates in the State of New York, and enjoining SLA from proceeding with a revocation hearing against Empire or otherwise interfering with any shipments of wine by Empire to out-of-state customers.

AS AND FOR A THIRD CAUSE OF ACTION
(9 NYCRR 53.1 (n) -- Unconstitutionally Vague)

51. Empire repeats, realleges, and reincorporates each and every allegation set forth in the individual paragraphs above as if fully set forth herein.

52. The regulation which SLA claims has been violated by Empire, 9 NYCRR 53.1(n), fails to define the allegedly prohibited conduct – conduct “that if known to the authority, the authority, in its discretion, could properly deny the issuance of a permit or license or any renewal thereof because of the unsatisfactory character and/or fitness of such person” – in such a way as to provide citizens with a clear warning that such conduct is unlawful.

53. To the contrary, 9 NYCRR 53.1(n) provides SLA with unfettered discretion to determine, on its own whim, what conduct it might decide is “improper” or which speaks of an “unsatisfactory character and/or fitness of such person,” on any given day or under any given set of circumstances.

54. 9 NYCRR 53.1(n) does not purport to restrict the shipment of wine to customers outside the State.

55. As such, 9 NYCRR 53.1(n) is unconstitutionally vague, both on its face and as applied to Empire.

56. Empire is, therefore, entitled to a writ of prohibition pursuant to CPLR 7803(2) prohibiting SLA from proceeding with a revocation hearing against Empire or otherwise interfering with any shipments of wine by Empire to out-of-state customers.

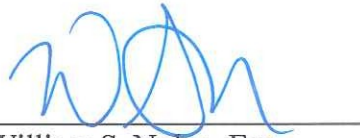
57. Empire is also entitled to judgment pursuant to CPLR 3001 declaring that 9 NYCRR 53.1(n) is unconstitutionally vague both on its face and as applied to Empire, and enjoining SLA from proceeding with a revocation hearing against Empire or otherwise interfering with any shipments of wine by Empire to out-of-state customers.

WHEREFORE, Empire requests a judgment declaring that SLA lacks the jurisdiction and authority to regulate the shipment of wine to customers in States outside of New York; declaring that NYCRR 53.1(n) is unconstitutionally vague both on its face and as applied to Empire; enjoining and prohibiting SLA from maintaining or pursuing “improper conduct” charges against Empire for allegedly having sold and shipped wine to customers in states outside of New York; and awarding Empire such further relief as this Court shall deem just, proper, or equitable.

Dated: September 22, 2014

WHITEMAN OSTERMAN & HANNA LLP

By:



William S. Nolan, Esq.
Nicholas J. Faso, Esq.
Attorneys for Plaintiffs-Petitioners
One Commerce Plaza
Albany, New York 12260
(518) 487-7773

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

BRADLEY A. JUNCO, being duly sworn, deposes and says:

1. I am the Plaintiff, in the within action.
2. I have read the foregoing Summons and Complain and knows the contents thereof.
3. The same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.



BRADLEY A. JUNCO

Sworn to before me this
22nd day of September, 2014



Notary Public

Carrie L. Gardner
Notary Public, State of New York
Qualified in Herkimer County
No. 01GA4978204
Commission Expires February 26, 2015

EXHIBIT A

E-filed 11/15/06

1 Kenneth W. Starr (SBN 58382)
 James Shannon (SBN 232039)
 2 Tracy K. Genesen (SBN 159324)
 Ryan M. Christian (SBN 239660)
 3 KIRKLAND & ELLIS LLP
 555 California Street
 4 San Francisco, California 94104-1501
 Telephone: (415) 439-1400
 5 Facsimile: (415) 439-1500
 Email: rchristian@kirkland.com
 6

Attorneys for Plaintiffs
 7 KNIGHTSBRIDGE WINE SHOPPE, LTD.;
 CASCO COMMUNICATIONS dba
 8 VIRGINIA WINE OF THE MONTH CLUB; and
 STEVEN M. COHEN, an individual
 9

10 **IN THE UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN JOSE DIVISION**
 13

14 KNIGHTSBRIDGE WINE SHOPPE, LTD.;
 15 CASCO COMMUNICATIONS dba VIRGINIA
 WINE OF THE MONTH CLUB; and STEVEN
 16 M. COHEN, an individual,

CIVIL ACTION NO. 5:06-cv-02890-JF

**STIPULATION, AGREEMENT, AND
[PROPOSED] ORDER**

Plaintiffs,

vs.

17
 18
 19 JERRY R. JOLLY, in his official capacity as
 20 Director of the California Department of
 Alcoholic Beverage Control,
 21

Defendant.

22
 23
 24
 25
 26
 27
 28

1 I. Stipulation

2 The parties have met and stipulate to the following facts:

3 1. Pursuant to the California Alcoholic Beverage Control Act (the "ABC Act"),
4 California off-sale wine and beer licensees may sell and ship wine in packages and in quantities
5 of 52 gallons or less per sale directly to adult California residents for personal use and not for
6 resale. *See* Cal. Bus. & Prof. Code §§ 23393, 25605; Cal. Code Regs. tit. 4, § 17(e). For
7 purposes of the ABC Act, an adult is a person aged 21 or over. *See, e.g.,* Cal. Bus. & Prof. Code
8 § 25658.

9 2. Retail licensees in Reciprocity States, that is, in States that afford California retail
10 licensees an equal reciprocal shipping privilege, may ship no more than two cases of wine (no
11 more than nine liters each case) per month directly from their premises to adult California
12 residents for personal use and not for resale. *See* Cal. Bus. & Prof. Code § 23661.2.

13 3. Retail licensees in Non-Reciprocity States are generally prohibited from shipping
14 wine directly from their premises to adult California residents. *See* Cal. Bus. & Prof. Code
15 §§ 23300 [generally prohibiting any person from performing any act for which a California
16 license is required without such a license]; 23661 [requiring, as a general rule, that alcoholic
17 beverages brought into California from outside the State be consigned to a California licensed
18 importer].

19 4. California law authorizes the California Department of Alcoholic Beverage
20 Control (the "Department") to seize direct shipments of wine that violate Cal. Bus. & Prof. Code
21 §§ 23300, 23661 or 23661.2.

22 5. The Department has never taken enforcement action of any type pursuant to Cal.
23 Bus. & Prof. Code §§ 23300, 23661, or 23661.2 against retail licensees in other States that sell
24 and ship wine for personal use and not for resale directly to adult California residents or against
25 common carriers that deliver such shipments for personal use and not for resale to adult
26 California residents. The Department has always devoted, and intends to continue to devote, its
27
28

1 limited enforcement resources to other higher priorities, namely, to the fulfillment of its
2 regulatory responsibilities with regard to California licensees and to violations of the ABC Act
3 that directly impact the public health and safety, such as, for example, the sale, furnishing, or
4 delivery of alcoholic beverages to minors (persons under the age of 21) or to intoxicated persons.

5 6. In *Granholm v. Heald*, 544 U.S. 460, 487, 472 (2005), the United States Supreme
6 Court declared that "the nondiscrimination principle" of the Commerce Clause prohibits States
7 from "enact[ing] laws that burden out-of-state producers or shippers simply to give a competitive
8 advantage to in-state businesses."

9 7. Plaintiffs contend that, as applied to the direct shipment of wine by out-of-state
10 licensed retailers to adult consumers, statutory schemes such as California's violate this
11 nondiscrimination principle, as do plaintiffs in other similar suits pending in the federal courts of
12 this nation. Defendant contests this and, in addition, contends, among other things, that in light
13 of the enforcement history and practice recounted above, Plaintiffs lack constitutional standing to
14 sue and that their claims are not ripe for review. Plaintiffs, in turn, contend that they have
15 constitutional standing and that their claims are ripe for review.

16 8. Recently, the parties were informed and do believe that the Specialty Wine
17 Retailers Association and/or other wine industry groups intend to pursue legislative action during
18 the 2007-2008 session of the California Legislature to amend the ABC Act to grant all retail
19 licensees in other States the right to sell and ship wine directly from their premises to adult
20 California residents.

21 **II. Agreement**

22 In light of the above Stipulation and for good and valuable consideration including the
23 mutual promises exchanged hereby, the parties agree to be bound as follows:

24
25 1. In accordance with Section I.5 above, Defendant Jolly in his official capacity as
26 Director of the California Department of Alcoholic Beverage Control, and through him, any
27 successor substituted in his place, agrees that the Department will continue to exercise its
28

1 prosecutorial discretion not to pursue enforcement action of any type pursuant to Cal. Bus. &
2 Prof. Code §§ 23300, 23661, or 23661.2 against retail licensees in other States for selling and
3 shipping wine for personal use and not for resale directly to adult California residents or against
4 common carriers that deliver such shipments for personal use and not for resale to adult
5 California residents.

6 2. Defendant Jolly, and through him any successor substituted in his place, further
7 agrees that, upon the expiration of Section II.1, as provided below, the Department will not
8 undertake retroactive enforcement action of any type pursuant to Cal. Bus. & Prof. Code §§
9 23300, 23661, or 23661.2 against retail licensees in other States based upon any sales and
10 shipments of wine for personal use and not for resale made directly to adult California residents
11 during the period Section II.1 was in effect or against any common carrier for delivery of such
12 shipments for personal use and not for resale to adult California residents during the period
13 Section II.1 was in effect.

14 3. Section II.1 will remain in effect until the earlier of:

15 a. The sixtieth (60th) day following the earlier of:

- 16 i. the date on which Defendant delivers to Plaintiffs' counsel of record
17 written notice that, in sixty (60) days, the Department intends to
18 begin enforcing Cal. Bus. & Prof. Code §§ 23300, 23661, or 23661.2
19 against retail licensees in other States that sell and ship wine for
20 personal use and not for resale directly to adult California residents
21 and/or against common carriers that deliver such shipments for
22 personal use and not for resale to adult California residents; or
23 ii. the date on which Plaintiffs file and serve a motion for a preliminary
24 injunction in this case; or
25 iii. the date on which this Court terminates the stay provided for in the
26 Order set forth in Section III on its own motion, or on Plaintiffs'
27 motion, after notice and hearing, for good cause shown.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- b. The effective date of legislation that permits all out-of-state retail licensees to ship wine via common carrier directly from their premises to adult California residents for personal use and not for resale; or
- c. December 31, 2007; except that if legislation permitting all out-of-state retail licensees to ship wine via common carrier directly from their premises to adult California residents for personal use and not for resale has not been enacted by December 31, 2007 but the Specialty Wine Retailers Association and/or some other wine industry group has, or have, engaged in good faith efforts to secure the enactment of such legislation and will continue to engage in such good faith efforts, then this date shall be extended until the last day on which legislation passed during the second year of the 2007-2008 biennial session could become law under the Constitution of the State of California or December 31, 2008, whichever is earlier.

4. A preliminary injunction hearing shall be held in this case within the sixty (60) day period provided for in Section II.3.a. so long as the moving papers are filed and served at least 35 days before the hearing date specified in the notice of motion.

5. Each side shall bear its own costs, including attorneys' fees, incurred in connection with this litigation up to and including the filing of this Stipulation, Agreement, and Order.

6. This Agreement shall become effective as of the date of entry of the proposed Order set forth in Section III as the order of this Court.

//
//
//
//
//

1 **III. Order**

2 In light of the foregoing, **THE COURT ORDERS AS FOLLOWS:**

3 1. Proceedings in this action are hereby stayed, and this stay shall remain in effect until
4 the earlier of the following dates:

- 5 a. the date of delivery of the 60-day written notice provided for in Section II.3.a.i;
- 6 b. the date on which Plaintiffs file a motion for a preliminary injunction in this
7 case as provided for in Section II.3.a.ii;
- 8 c. the date on which this Court terminates this stay as provided for in Section
9 II.3.a.iii;
- 10 d. the effective date of the legislation provided for in Section II.3.b;
- 11 e. December 31, 2007; except that this date shall be extended as provided in
12 Section II.3.c. if, by no later than December 31, 2007, the Parties have jointly
13 filed a notice with this Court authorizing such extension or this Court, on
14 motion, after hearing, has issued an order finding that such extension is
15 warranted under section II.3.c.

16 2. Any disputes between or among the Parties concerning matters contained in this
17 Agreement, if they cannot be resolved by negotiation or agreement shall be submitted to this
18 Court. This Court shall retain exclusive and continuing jurisdiction over the conduct of this case
19 and the Parties' Agreement and shall supervise, implement, and enforce the Parties' Agreement
20 in accordance with its terms.

21 3. Each side shall bear its own costs, including attorneys' fees, incurred in
22 connection with this litigation up to and including the filing of this Stipulation, Agreement, and
23 Order. The Case Management Conference scheduled for December 22, 2006 is continued
24 to Friday, March 30, 2007 ay 10:30 AM.

25 **IT IS SO ORDERED.**

26 SIGNED this 14 day of November, 2006

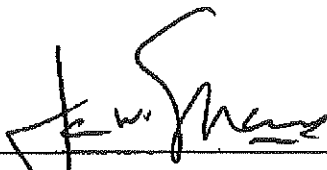
27 
HONORABLE JEREMY F. FOUCH
United States District Court Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November 10, 2006

KIRKLAND & ELLIS LLP

By: _____

By:  _____

Kenneth W. Starr (CA SBN 58382)
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017-5800
Telephone: (213) 680-8440
Facsimile: (213) 680-8500

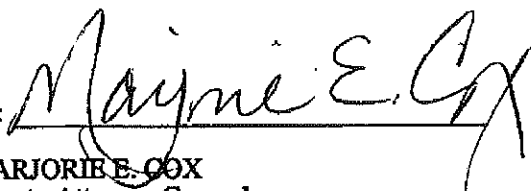
James Shannon (SBN 232039)
Tracy K. Genesen (SBN 159324)
Ryan M. Christian (SBN 239660)
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, California 94104-1501
Telephone: (415) 439-1400
Facsimile: (415) 439-1500
Email: rchristian@kirkland.com

Attorney for Plaintiffs
KNIGHTSBRIDGE WINE SHOPPE, LTD.;
CASCO COMMUNICATIONS dba
VIRGINIA WINE OF THE MONTH CLUB;
and STEVEN M. COHEN, an individual

Attorneys for Plaintiffs
KNIGHTSBRIDGE WINE SHOPPE, LTD.;
CASCO COMMUNICATIONS dba
VIRGINIA WINE OF THE MONTH CLUB;
and STEVEN M. COHEN, an individual

DATED: November 13, 2006

BILL LOCKYER
Attorney General of the State of California
JACOB APPLESMITH
Senior Assistant Attorney General
FIEL D. TIGNO
MIGUEL A. NERI
Supervising Deputy Attorneys General

By:  _____

MARJORIE E. COX
Deputy Attorney General

Attorneys for Defendant
JERRY R. JOLLY, in his official capacity as
Director of the California Department of
Alcoholic Beverage Control

EXHIBIT B

STATE OF NEW YORK
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

80 South Swan Street, Suite 900
Albany, NY 12210-8002

317 Lenox Avenue
New York, NY 10027

535 Washington Street, Suite 303
Buffalo, NY 14203

IN THE MATTER OF PROCEEDINGS TO CANCEL OR REVOKE

2137544, ALBANY L 2137544

NOTICE OF PLEADING

EMPIRE WINE & SPIRITS LLC
EMPIRE WINE & LIQUOR
1440 CENTRAL AVE
ALBANY, NY 12205

1998-2014/Case No. 88869

PLEASE TAKE NOTICE that pursuant to Section 118 of the Alcoholic Beverage Control Law you are required to answer by mail as provided below, or in person with proper photo ID, at the office of the Division of Alcoholic Beverage Control, Harlem Center, 317 Lenox Avenue, 4th Floor, (between 125th & 126th Streets), New York, New York 10027, on **09/03/2014**, at 11:00 AM, in connection with proceedings to cancel or revoke the above-referenced license, and to plead to the following charge(s):

SEE CHARGES ON SECOND PAGE

PLEASE TAKE NOTICE THAT YOUR FAILURE TO PLEAD WILL BE DEEMED A "NO CONTEST" PLEA AND NO FURTHER HEARING WILL BE HELD.

PLEASE TAKE FURTHER NOTICE that you may be represented by counsel. If you need a translator, you must bring one with you at your own expense.

PLEASE TAKE FURTHER NOTICE that you may plead to the charge(s) by mail instead of by personal appearance provided that a letter signed by you or your attorney, setting forth your plea of "Not Guilty" or "No Contest" is received by the Office of Counsel of the Division of Alcoholic Beverage Control at the above New York City address on or before the pleading date specified above.

PLEASE TAKE FURTHER NOTICE that the maximum penalty may be a revocation and forfeiture of the Bond filed by you, and/or a civil penalty. In addition, if the Authority revokes the license, the Authority may proscribe the issuance of a license at the premises for a period of two years from the date of revocation of the license.

PLEASE TAKE FURTHER NOTICE: If you plead not guilty to the charge(s), a hearing will thereafter be scheduled at which you may appear with counsel, produce witnesses, and introduce evidence in your behalf.


PURSUANT TO SECTION 301 of the State Administrative Procedure Act and Executive Order Number 26, interpreter services shall be made available to licensees, at no charge, by the Authority.

Licensee's name and residence address
JUNCO BRADLEY A
121 SWIFT RD, VOORHEESVILLE, NY 12186

Date: 08/01/2014

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Licensee's Landlord
MALL PROPERTIES INC
654 MADISON AVE, NEW YORK, NY 10021

Office of Counsel 
by: Margarita Marsico
317 Lenox Avenue, 4th Floor
New York, New York 10027

Notice to Landlord: As stated above, in the event the disposition of this case results in a Revocation of the license, the Authority may impose, as part of the penalty, a two year prohibition against the issuance of any alcoholic beverage license at these premises.

Tel: (212) 961-8318
Fax: (212) 961-8316

Certified Mail # 7012 3460 0000 7462 4327

STATE OF NEW YORK
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

80 South Swan Street, Suite 900
Albany, NY 12210-8002

317 Lenox Avenue
New York, NY 10027

535 Washington Street, Suite 303
Buffalo, NY 14203

1. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Alabama in violation of Alabama's laws; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
2. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Arizona; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
3. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Arkansas; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
4. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Delaware; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
5. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Maine; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
6. That on and before 05/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Mississippi; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
7. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Pennsylvania; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
8. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Vermont; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
9. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: sold and shipped wine directly to a customer in Ohio in violation of Alabama's laws; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
10. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in Louisiana; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
11. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in Virginia; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
12. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in California; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
13. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in Georgia; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
14. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in Illinois; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
15. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in Washington; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].
16. That on and before 08/01/14, the licensee engaged in certain conduct, to wit: shipped wine directly to a customer in Massachusetts; and that the foregoing conduct was of such improper nature as to warrant revocation, cancellation or suspension of the license in accordance with rule 36.1(n) of the Rules of the State Liquor Authority [9 NYCRR 53.1(n)].

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

PLEADING FORM

CASE #/SERIAL #

NOTICE OF PLEADING DATED:

LICENSEE NAME:

THE LICENSEE OR ITS DULY AUTHORIZED REPRESENTATIVE RESPONDS TO THE CAPTIONED NOTICE OF PLEADING AS FOLLOWS:

NOT GUILTY

STATE ANY EXPLANATION BELOW

NO CONTEST

STATE ANY EXPLANATION BELOW

CONDITIONAL NO CONTEST

INDICATE YOUR OFFER OF A PENALTY AND STATE ANY EXPLANATION BELOW

X _____

Telephone: _____

SIGNATURE OF LICENSEE OR REPRESENTATIVE

Print Name _____

Date: _____

REPRESENTATIVE'S ADDRESS: _____

RETURN THIS FORM BY DATE ON PLEADING NOTICE TO THE ADDRESS BELOW:

DIVISION OF ALCOHOLIC BEVERAGE CONTROL
OFFICE OF COUNSEL
117 LENOX AVENUE, 9TH FLOOR (BETWEEN 125TH & 126TH STREETS)
NEW YORK, NEW YORK 10027

Please note the following:

Proceeding to a Hearing

Not Guilty Plea: By pleading not guilty to charges you are requesting that a fact finding hearing be scheduled. Upon a plea of not guilty you will receive notification of a scheduled hearing.

All requests for hearing adjournments must be made in writing and received by the Authority at least three business days prior to the hearing date. If you request an adjournment please clearly state the reason for your request and include a phone number where you can be reached. Adjournments will be granted for good cause only.

If you require an interpreter you must notify the Authority at least five days before your hearing. The Authority will provide interpreters to licensees at no expense.

Appearing for a Hearing

Licensees and their representatives must appear on the date of hearing unless they have received specific written or telephone instructions from the Authority not to appear.

Licensees must bring acceptable proof of identity, such as a driver's license. Anyone appearing on behalf of a licensee, except an attorney licensed to practice law in New York, must be prepared to present documentation showing that they are authorized to appear for the licensee.

Licensees may hire an attorney to represent them. Be advised that no adjournments will be granted due to your failure to obtain counsel. The hearing will proceed whether or not you have obtained counsel or other representation.

How to Settle a Violation Without a Hearing

If you submit one of the following pleas, your plea will be forwarded to the Members of the Authority without a fact finding hearing.

No Contest Pleas: A No Contest plea is a plea whereby the licensee does not contest the charges (pleads guilty) and waits for the penalty to be discretionarily imposed by the Members of the Authority.

Conditional No Contest Pleas (CNC): A Conditional No Contest plea is a plea whereby the licensee agrees to not contest the charges (pleads guilty) *if* the Members of the Authority accept the licensee's proposed penalty.

In order to be accepted, a CNC must be in writing and the Office of Counsel must determine that (1) the licensee's proposal adequately addresses the charged violations and (2) the penalty is appropriate to submit to the Members of the Authority.

If your Conditional No Contest Plea is accepted by the Office of Counsel, your hearing will be cancelled and your plea will be submitted to the Members of the Authority for ultimate determination.

EXHIBIT C

WHITEMAN
OSTERMAN
& HANNA LLP

Attorneys at Law
www.woh.com

One Commerce Plaza
Albany, New York 12260
518.487.7600 phone
518.487.7777 fax

William S. Nolan
Partner
518.487.7773 phone
wnolan@woh.com

August 11, 2014

VIA EMAIL (Jacqueline.Flug@sla.ny.gov)

Jacqueline P. Flug
General Counsel
New York State Liquor Authority
317 Lenox Avenue
New York, New York 10027

Re: Proceedings to Cancel or Revoke – Empire Wine & Spirits LLC
(1998-2014/Case No. 88869)

Dear Ms. Flug:

This law firm represents Empire Wine & Spirits LLC (“Empire”), which received a Notice of Pleading, dated August 1, 2014, charging Empire with sixteen counts of “improper conduct” for allegedly having sold and shipped wine to customers in states outside New York. For the reasons below, we believe the New York State Liquor Authority (the “SLA”) lacks the jurisdiction, power and authority to regulate these alleged sales and shipments, and accordingly request that the charges be withdrawn.

New York State’s power to regulate the sale and distribution of alcoholic beverages *within its borders* derives from the Twenty-First Amendment of the United States Constitution. Indeed, consistent with the Twenty-First Amendment, the express policy of the ABC Law, and the very function of the SLA, is “to regulate and control the manufacture, sale and distribution *within the state* of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law.” (emphasis supplied). ABC Law § 2.

Neither the Twenty-First Amendment nor the ABC Law, however, confers authority to the State of New York to regulate the sale or distribution of alcoholic beverages in interstate commerce to customers outside the State. To the contrary, the Commerce Clause of the United State Constitution precludes SLA from attempting to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in other states. See, e.g., *Hostetter v. Idlewood Bon Voyage Liquor Corporation*, 377 U.S. 324 (1964) (prohibiting the

SLA from regulating liquor sold at an airport to departing passengers where such sales did not jeopardize New York's internal liquor market; the liquor's ultimate destination was outside of New York, and the SLA lacked authority to regulate such sales); *Johnson v. Yellow Cab Transit Co.* 321 U.S. 383 (1944) (prohibiting the State of Oklahoma from interfering with shipments of alcoholic beverages to destinations outside the State's jurisdiction).

In fact, in *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 579 (1986) the Supreme Court of the United States flatly rejected SLA's attempt to regulate sales and shipments outside the State of New York. The Court stated:

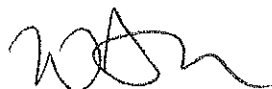
New York has a valid constitutional interest in regulating sales of liquor within the territory of New York. Section 2 of the Twenty-first Amendment, however, speaks only to state regulation of the "transportation or importation *into* any State ... for delivery or use therein" of alcoholic beverages. That Amendment, therefore, gives New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States. *The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in another State. (emphasis supplied).*

Given this established precedent, it is particularly disturbing that SLA would choose to assert charges of "improper conduct" against my client for allegedly having sold and shipped wine to customers outside the State of New York. Not only does SLA lack any jurisdiction, power or authority to control such sales and shipments, but it also lacks any policy interest in regulating them. To the contrary, SLA's prohibition of sales and shipments to out of state customers can only harm the local economy, as it appears there are no less than 80 retailers in New York that ship to customers in one or more of the states listed in the Notice of Pleading against Empire.

For the foregoing reasons, I would ask that SLA formally withdraw the Notice of Pleading against Empire.

Thank you for your attention to this matter.

Sincerely,



William S. Nolan