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STATE of SOUTH CAROLINA

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Office of the Attorney General
Columbia 29211

December 9, 1998

The Honorable James H. Harrison
Member, House of Representatives
512 Blatt Building
Columbia, South Carolina 29211

Dear Representative Harrison:

You have referenced to me the problems which beer wholesalers in South Carolina are having with the proposed Miller Brewing Company's Distributor Agreement and Performance Standards. As I understand it, the proposed Agreement would replace a longstanding Agreement with Miller. I am advised that "[p]arts of this agreement attempt to supercede our existing Franchise Law, and effectively eliminate any rights of the wholesaler." In addition, it is indicated that "[t]his agreement also requires the wholesaler to litigate any disputes in Wisconsin without the benefit ... of a jury." As I understand it, Miller has threatened to terminate any wholesalers on December 31, 1998 who have not signed the Agreement and, thus, the new Agreement has been presented to the wholesalers as a "take it or leave it" arrangement. You wish to know whether South Carolina law controls where in conflict with the proposed Agreement. You further seek advice as to whether Miller may terminate a wholesaler based upon his failure to agree to the exclusive venue clause.

Law / Analysis

First, a summary of the proposed Agreement between Miller and its distributors is in order. Paragraph 1.3 purports to give Miller the right to sell directly to retailers or consumers who are located in a distributor's territory where the retail sale or consumption is outside that area. Section 4 of the Agreement deals with the wholesaler's manager. Paragraph 4.1 requires the distributor at all times to have a manager which has been approved by Miller. Such provision does away with the concept of a successor manager. New duties and responsibilities for the manager are also established in this Section. Paragraph 4.3(b) reserves the right to Miller to withdraw its approval of any manager.

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Request Letter,

Section 5 deals with the proprietary rights of Miller. Pursuant to Paragraph 5.1(b), if an owner dies without an approved ownership transfer notification, or there is a default under the ownership transfer notification, Miller is given the right and option to purchase the distributor's Miller business. Such option may be assigned. No consent by Miller is required (pursuant to Paragraph 5.1(c)) if the distributorship is being transferred to a family member unless such transfer causes a substantial adverse financial effect on the business or the distributor does not have a manager approved by Miller. Miller reserves the right to designate a third party to whom Miller may delegate its option to purchase.

Pursuant to Paragraph 5.2(c), Miller is given the irrevocable right and option to purchase the distributor's business where such distributor has secured an offer from another buyer. Paragraph 5.4 authorizes Miller, in deciding whether to approve a proposed transfer, to consider the qualifications of the proposed purchaser, the effects of the resulting business combination, the resulting territory configuration, the potential advantages of alternative market combinations and other circumstances which Miller might deem pertinent. Pursuant to Paragraph 5.4(c), Miller may also consider whether or not the transferee will be engaged in selling competing products of malt beverages or other products.

In the area of termination of the distributorship, a number of provisions are relevant. Paragraph 7.1 deals with termination with cure. This paragraph requires a distributor to provide a plan of corrective action within 30 days of receipt of termination notice and provides the distributor 60 days to cure. Paragraph 7.1(b) purports to limit the amount of Miller's liability in the event of a termination where the distributor failed to cure. Under Paragraph 7.2 a number of circumstances are enumerated wherein Miller may terminate immediately without cure. Pursuant to Paragraph 7.3, Miller may terminate all Miller wholesalers throughout the country without cause and without payment to a wholesaler.

The venue and jurisdiction clause is found at Paragraph 16.8. It requires a distributor to litigate any disputes exclusively before the United States District Court for the Eastern District of Wisconsin. Such Paragraph requires the distributor to waive the right to change venue to another court. Where the United States District Court does not possess subject matter jurisdiction of a particular matter, the Agreement requires that "such matters shall be litigated solely and exclusively before the appropriate state court of competent jurisdiction located in Milwaukee, Wisconsin, and the parties consent to the personal jurisdiction of such courts for the purpose of such litigation." Paragraph 16.10 purports to waive the distributor's right to a jury trial.

Section 11.1 permits Miller to amend the Agreement unilaterally, resulting in termination if the wholesaler does not accept such amendment within 90 days. Moreover,

Section 3.2 authorizes Miller to alter the performance standards, again permitting termination if the wholesaler does not agree.

Section 12 of the Agreement mandates compliance with the governing state law. Section 12 states as follows:

> [t]he illegality or enforceability of any provisions of this Agreement shall not impair the legality or enforceability of any other provision. The laws, rules and regulations of the jurisdiction in which Distributor conducts its business are hereby incorporated in this Agreement to the extent that such laws, rules and regulations are required to be so incorporated and shall supersede any conflicting provision of this Agreement. If required by applicable law, Miller and Distributor may enter into an amendment of this Agreement for the sole purpose of complying with such law.

General Governing Principles

Pursuant to the Twenty-First Amendment of the United States Constitution, the states possess almost absolute power to prohibit or regulate alcoholic beverages. Wide latitude as to choice of the means to accomplish such prohibition or regulation is accorded to the state and its regulatory agencies. Op. Atty. Gen., February 27, 1985, referencing Oklahoma v. Burris, 626 P.2d 1316, 1317-18, 20 ALR 4th 593, 596 (Okla. 1980). Pursuant to its broad constitutional power, the transfer of beer within the State of South Carolina is highly regulated by the General Assembly. Op. Atty. Gen., July 3, 1991. In South Carolina, the ". . . intended policy of the state relative to beer and wine is that of regulation rather than prohibition." See State v. Langley, 236 S.C. 583, 11 S.E.2d 308 (1960), cited in Op. Atty. Gen., Op. No. 4272 (February 26, 1976). The General Assembly is thus concerned "with promoting the fair and efficient distributors of beer throughout the state . . . and in providing for the regulation of that distribution . . . " Op. Atty. Gen., May 20, 1991.

State Statutory Scheme of Regulation of Beer

S. C. Code Ann. Sec. 61-4-10 declares that all beers, ales, porter and other similar malt or fermented beverages not in excess of five percent of alcohol by weight and all wines containing not in excess of twenty-one percent of alcohol by volume to be nonalcoholic and nonintoxicating beverages. As part of its regulatory scheme, the General Assembly has constructed so-called a "three tier" scheme of regulation, regulating beer at the brewer, wholesale and retail level. Section 61-4-300 defines a "producer" as a "brewery or winery,

manufacturer, bottler, or importer of beer or wine into the United States." Pursuant to § 61-4-340, no "person other than a registered producer may ship, move, or cause to be shipped or moved, beer, ale, porter, malt beverage, or wine from outside the States to a point in the State, and only in accordance with the provision of this chapter. . . ."

Section 61-4-940 governs the relationship between a brewer and beer wholesaler. Subsection (A) provides that

> [a] manufacturer or brewer of beer, ale, porter, or other malt beverages or a person who imports these products produced outside the United States must not sell, barter, exchange, transfer, or deliver for resale beer to a person not having a wholesale permit issued under Section 61-4-500, and a holder of a wholesale permit must not sell, barter, exchange, transfer, or deliver for resale beer to a person not having a retail or wholesale permit.

Subsection (D) of § 61-4-940 regulates the ownership by a person in one tier of a business in the other tier. Such Section states:

> [a] manufacturer, brewer, and importer of beer are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. A person or an entity in the beer business on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in the beer business operation on another tier. This limitation does not apply to the interest held on July 1, 1980, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business. (emphasis added).

Section 61-4-1100 governs the agreement between the producer and the wholesaler. This provision reads as follows:

> (1) It is unlawful for a producer who holds a certificate of registration from the department (hereinafter "registered producer") or an officer, agent, or representative of a registered producer:
>
> (a) to coerce, attempt to coerce, or persuade a person holding a permit to sell beer, ale, porter, and other similar malt or fermented beverages at wholesale (hereinafter "beer wholesaler") to enter into an agreement to take any action which would violate a provision of this article or any ruling or regulation in accordance therewith; or
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> (b) to unfairly, without due regard to the equities of the beer wholesaler or without just cause or provocation, cancel or terminate a written or oral agreement or contract, franchise, or contractual franchise relationship of the wholesaler existing on May 1, 1974, or thereafter entered into, to sell beer manufactured by the registered producer; this provision is a part of a contractual franchise relationship, written or oral, between a beer wholesaler and a registered producer doing business with the beer wholesaler, just as though the provision had been specifically agreed upon between the beer wholesaler and the registered producer. However, notice of intention to cancel the agreement or contract, written or oral, franchise, or contractual franchise relationship must be given in writing at least sixty days before the date of the proposed cancellation or termination. The notice must contain (I) assurance that the agreement or contract, written or oral, franchise, or contractual franchise relationship is being terminated in good faith and for material violation of one or more provisions which are relevant to the effective operation of the agreement, or contract, written or oral, franchise, or contractual franchise relationship, if any, and (ii) a list of the specific reasons for the termination or cancellation.
>
> (2) It is unlawful for a beer wholesaler:

> (a) to enter into an agreement or take any action which would violate or tend to violate a provision of this article or any rule or regulation promulgated pursuant thereto;
>
> (b) to unfairly, without due regard for the equities of a registered producer or without just cause or provocation, cancel or terminate a written or oral agreement or contract, franchise, or contractual franchise relationship of the registered producer existing on May 1, 1974, or thereafter entered into, to sell beer manufactured by the registered producer; this provision becomes a part of a contractual franchise relationship, written or oral, between a beer wholesaler and a registered producer doing business with the beer wholesaler, just as though this provision had been specifically agreed upon between the beer wholesaler and the registered producer. However, notice of intention to cancel the agreement or contract, written or oral, franchise, or contractual franchise relationship must be given in writing at least sixty days prior to the date of the proposed cancellation or termination. The notice must contain (I) assurance that the agreement or contract, written or oral, franchise, or contractual franchise relationship is being terminated in good faith and for material violation of one or more provisions which are relevant to the effective operation of the agreement or contract, written or oral, franchise, or contractual franchise relationship, if any, and (ii) a list of the specific reasons for the termination or cancellation;
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> (c) to refuse to sell to a licensed retailer whose place of business is within the geographical limits specified in a distributorship agreement between the beer wholesaler and the registered producer for the brands involved; or
>
> (d) to store or warehouse beer or other malt beverages to be sold in the State in a warehouse located outside the State. (emphasis added).

Jurisdiction for the settlement of disputes between producer and wholesaler regarding the franchise agreement is specified in § 61-4-1120. Such Section provides as follows:

> [t]he court of common pleas has jurisdiction and power to enjoin the cancellation or termination of a franchise or agreement between a beer wholesaler and a registered producer upon the application of a beer wholesaler or producer who is or might be adversely affected by the cancellation or termination; and in granting an injunction, the court must make provisions necessary to protect the beer wholesaler or registered producer while the injunction is in effect including, but not limited to, a provision that the registered producer must not supply the customers of the beer wholesaler by servicing the customers through other distributors or means or a provision that the beer wholesaler must continue to supply to his customers the products of the registered producer. Application may be made by the beer wholesaler or producer to the appropriate court in the county in which the business of the wholesaler is located. The court may require a bond to be posted by the party seeking the injunction, securing the party enjoined for damages in an amount in the court's discretion.

Finally, § 61-4-1130 regulates the sale of a beer wholesale interest. That provision states:

> (1) Except as hereinafter provided, a proposed sale of an interest in the business carried on by a beer wholesaler which under the laws of this State would require that the purchaser obtain a permit to operate as a beer wholesaler is subject to the department's approval of the purchaser as an applicant for a permit authorizing the sale of beer. If the application of the prospective purchaser for the permit is approved, it is unlawful, notwithstanding the terms, provisions, or conditions of a written or oral contract or the franchise agreement between the beer wholesaler and the registered producer, for a registered producer to fail or refuse to approve the transfer or change of ownership.
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> (2) Except as hereinafter provided, a proposed voluntary transfer of an interest in the business carried on by a beer wholesaler or a transfer of ownership in the business by reason of death is subject to the registered producer's approval of the prospective transferee. This approval must not be unreasonably withheld. If the registered producer does not give notice of

> disapproval by certified mail within sixty days after receipt of notification of the proposed voluntary transfer or within sixty days after the death of the owner of the interest, the right of disapproval may not thereafter be exercised.

Of course, a contract or agreement may not conflict with or vary state law or state statutory provisions. It is well recognized that a contract to do an act which is prohibited by statute or which is contrary to public policy is void and cannot be enforced. Grant v. Butt, 298 S.C. 298, 17 S.E.2d 689 (1942). "A brewer may not circumvent the [State] Termination Statute by contract." Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993).

In addition, our courts recognize that unconscionable contracts will not be enforced. Unconscionability is characterized by absence of meaningful choice on the part of one of the parties due to one-sided contract provisions, together with terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. Lackey v. Green Tree Financial Corp, 330 S.C. 388, 498 S.E.2d 898 (1998). In other words, there must be a true "meeting of the minds" between the parties, not an illusory one. The South Carolina courts will not enforce a contract or provision thereof where such is contrary to the law of the state where it is to be enforced. Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961). Every contract must be deemed to include the law of force at its date. Lewis v. Dunlap, 112 S.C. 544, 100 S.E. 170 (1919). The General Assembly clearly had in mind the preservation of an equal footing relationship between brewer and wholesaler in its adoption of § 61-4-1100, which insured that South Carolina law as well as equity and fairness would be made a part of every franchise agreement.

Of course, only a court may void a specific provision of a contract which conflicts with State law or public policy. The proposed Miller contract which your have provided this Office, however, is troubling in light of its potential inconsistency with state law. I find particularly problematical a number of provisions enunciated in the proposed Agreement which at least appear to run counter to this State's "three tier" and franchise provisions in the Code. Moreover, any attempt to remove jurisdiction and venue from South Carolina courts when State law specifically provides for such jurisdiction could well be deemed by a court to be in conflict with our governing statutes as well as with South Carolina public policy concerning the regulation of beer. Furthermore, failure to agree to the exclusive venue provision and waiver of jury trial paragraph cannot, in my judgment, validly serve as grounds for termination of a franchise as such would not constitute "just cause or provocation."

I will not attempt to specify herein each and every provision in the Agreement where a court could find inconsistency with State law. Several different areas of concern are particularly bothersome, however.

First, South Carolina law does not permit a business operating on one tier to "have ownership or financial interest in the beer business operation on another tier." Section 61-4-940 (D). Our Supreme Court emphasized an earlier version of this prohibition in Yahnis v. Stroh Brewery, 295 S.C. 243, 368 S.E.2d 64 (1988). There, the Court determined that then § 61-9-315 (b) [now codified in another version in § 61-4-940] prevailed over an earlier statute that authorized a brewer to exercise a preemptive right or purchase. Analyzing the issue in accord with general rules of statutory construction, the Court concluded:

> [h]ere, § 61-9-315 (b), in plain language, prohibits a producer from having "any interest whatsoever" in a wholesale beer business. It is in direct conflict with that portion of § 61-9-1040 (1) which gives the producer the preemptive right to acquire the interest of a wholesaler. By implication, § 61-9-315 (b) repealed § 61-9-1040 (1) to the extent of this conflict.

295 S.C. at 246. As noted above, 5.2(c) gives Miller a preemptive right of first refusal "in the event that the distributor has secured an offer from another buyer." Section 5.1(b) also gives Miller a right to purchase upon certain contingencies. Thus, based upon the reasoning in Yahnis, a court could well conclude that the foregoing provisions are in conflict with South Carolina's "three tier" law.

With respect to those provisions in the Agreement governing termination of the franchise, § 61-4-1100 (b) prohibits a producer from " . . .unfairly, without due regard to the equities of the beer wholesaler or without just cause or provocation, cancel[ing] or terminat[ing] a written or oral agreement or contract, franchise, or contractual franchise relationship of the wholesaler existing on May 1, 1974, or thereafter entered into, to sell beer manufactured by the registered producer. . . ." As referenced above, a number of provisions in the proposed Agreement deal with termination of the franchise agreement, including Paragraph 7.3 which provides for contemporaneous termination of all wholesalers without cause. Additionally, is Paragraph 11.1 allowing Miller to amend unilaterally followed by termination if the wholesaler does not agree within 90 days. Likewise, pursuant to Paragraph 3.2, Miller may alter the performance standards and then terminate if the wholesaler does not meet the new standards. The Court in Miller Brewing, supra held that provisions similar to § 61-4-1100 (b) must be read into any franchise agreement. Thus, any termination must give "due regard to the equities of the beer wholesaler" and be based upon "just cause or

provocation . . ." Again, a court could determine that these provisions of the Agreement conflict with the state statute, or at least read the Franchise Law into the Agreement..

Paragraph 16.8 of the Agreement raises a potential "red flag" as well. Such provision purports to require a distributor to litigate any disputes exclusively before the United States District Court for the Eastern District of Wisconsin. The Agreement also requires the distributor to waive the right to change venue to another court. Where the United States District Court does not have subject matter jurisdiction, the Agreement requires that the matter be litigated "solely and exclusively" before "the appropriate state court of competent jurisdiction located in Milwaukee, Wisconsin." As referenced, § 61-4-1120 bestows upon the South Carolina Court of Common Pleas the jurisdiction to enjoin the cancellation or termination of a franchise or agreement between a beer wholesaler and a registered producer upon the application of a beer wholesaler or producer who is or might be adversely affected by the cancellation or termination.

It is, of course, well understood that forum selection clauses are prima facie valid and enforceable when made at arm's length by sophisticated business entities, absent a compelling reason for abrogation. Republic Leasing Co. Inc. v. Haywood, 329 S.C. 562, 495 S.E.2d 804 (Ct. App. 1998). However, such clauses will not be enforced by the courts if unreasonable or unjust. Id. See also, Sterling Forest Assoc. v. Barnett-Range Corp., 840 F.2d 249 (4th Cir. 1988); Mercury Coal & Coke v. Mannesmann Pipe and Steel, 696 F.2d 315 (4th Cir. 1982); Scott v. Guardsmark Security, 874 F.Supp. 117 (D.S.C. 1995). Courts have been particularly wary of upholding such clauses where the State's interest in regulating alcoholic beverages are concerned.

For example, in High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. 1992), the Supreme Court of Missouri refused to enforce a "forum selection clause" which required that a franchise termination be litigated in Kentucky. There, the Court opined:

> [w]e must also consider whether enforcement of the forum selection clause in this particular case would be unreasonable. The controlling substantive issue in this litigation, the application of § 407.413 to the liquor distribution franchise agreement between Brown-Forman, as the supplier, and High Life, as the licensed distributor, involves a matter of important public policy to the state of Missouri. In general, the control of liquor distribution is an important state interest in Missouri. See Vaughan v. EMS, 744 S.W.2d 542, 547 (Mo.App.1988), and May Department Stores v. Supervisor of Liquor Control, 530 S.W.2d 460, 468 (Mo.App.1975). Liquor distribution is an area that has

> always been heavily regulated by state government; moreover, the methods of distribution and extent of regulation vary enormously from state to state. It is evident that in this area what one state may approve and even encourage, another state may prohibit and declare illegal. This principle even has constitutional endorsement by reason of the Twenty-First Amendment to the United States Constitution repealing Prohibition. Thus, the interest that a particular state has in construing and applying liquor control legislation in its own state is apparent.
>
> [i]t is very much within the interest of the state of Missouri to protect its licensed liquor distributors from unwarranted or unjustified termination of their franchise. Section 407.413 does just this by providing that no such franchise shall be terminated except for good cause. Both the general subject of liquor control and the specific statutory protection of a holder of a liquor distribution franchise carry heightened public policy considerations that outweigh any public policy considerations involved in the enforcement of a forum selection clause. (emphasis added).

The Court then proceeded to point out why it is so important in alcoholic beverage regulatory matters that the jurisdiction of the Missouri courts not be abrogated by a "forum selection clause". Concluded the Court,

> [s]o it is with Missouri's statute concerning termination of liquor franchises; its importance to the public policy of the state, evidenced in part by the fact that any effort to waive or modify its provisions is unenforceable, dictates that this Court should not abrogate the responsibility of interpreting this important statute to the Kentucky courts. We hold that enforcement of the forum selection clause under these circumstances would be unreasonable and, therefore, even under the rule we adopt today, the issues in this case should be decided by the courts in Missouri.

823 S.W.2d at 499-500. Section 61-4-1100 makes it clear that "this provision is a part of a contractual franchise relationship, written or oral, between a beer wholesaler and/or registered producer doing business with the beer wholesaler, just as though the provision had been specifically agreed upon between the beer wholesaler and the registered producer."

There are a number of other areas of concern with respect to the Agreement as well. Pursuant to Paragraph 5.4, Miller may consider certain criteria in deciding whether to approve a proposed transfer. Again, Miller retains a right of first refusal for any proposed sale and a right to assign its right to a third party. It could be argued that these provisions also conflict with § 61-4-1130, which states that "[i]f the application of the prospective purchaser for the permit is approved [by the Department of Revenue], it is unlawful, notwithstanding the terms, provisions, or conditions of a written or oral contract or the franchise agreement between the beer wholesaler and the registered producer, for a registered producer to fail or refuse to approve the transfer or change of ownership." Likewise, whereas the Agreement in Paragraph 5.1(b) purports to give Miller the right of option to purchase the distributor's business upon the death of the owner, §61-4-1130 (2) gives the brewer a right of approval, but one which may not be reasonably withheld and one which disappears if the notice provisions therein are not met. As referenced above, such Paragraph could also be deemed to conflict with § 61-4-940 (D) which prohibits ownership by a person operating in one tier of a business in another tier.

Finally, Miller requires the distributor to have at all times a manager approved by Miller. In the event that Miller does not approve a manager within 180 days after a vacancy has occurred, Miller has the right to terminate the agreement under the "termination without cause" provisions of the Agreement. In effect, these provisions could be perceived as enabling Miller to exercise virtual control over the wholesaler. Again, this could be deemed to conflict with the "three tier" law and its regulatory scheme of separation between the tiers. The manager's loyalty would be divided, thereby blurring the separation between brewer and wholesaler. Such may be deemed by a court to run counter to the "equity and fairness" language of the General Assembly in § 61-4-1100. The legislative purpose of the "three tier" law and protection of this franchise would also be severely undermined by this approach.

Conclusion

It is my opinion that the General Assembly clearly intended that the beer wholesaler must be protected in his franchise with the brewer by the various provisions of state law referenced above. The proposed Miller Agreement which you have referenced contains a number of provisions which a court may conclude contradict and conflict with the Legislature's intent as well as with various provisions of state law. Such provisions cause considerable concern in this regard.

In my judgment, a court will enforce this State's beer law and provisions of the State Code where there is indeed any conflict in the Agreement therewith. Moreover, Section 12 of the Agreement also requires that State law shall "supersede any conflicting provision of this Agreement." Further, in my opinion, South Carolina courts cannot be ousted of jurisdiction and venue by such Agreement. A brewer, such as Miller, could not terminate a wholesaler for

failure to agree to an exclusive venue provision as such failure would not constitute "just cause or provocation" for termination. Likewise, notwithstanding the Agreement's terms, because the regulation of beer is such an important State interest, South Carolina courts still possess jurisdiction over and will enforce all provisions of State law where such provisions conflict with any terms of the proposed Agreement.

Sincerely,

Charles M. Condon
Attorney General

CMC/ph