

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

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AMTEC INTERNATIONAL OF NY CORP.,	)	
	)	
Plaintiff,	)	Case No.: 1:20-cv-00003-LDH-PK
v.	)	
	)	Service Date: August 15, 2022
POLISH FOLKLORE IMPORT CO., INC.,	)	
	)	
Defendant.	)	

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**POLISH FOLKLORE IMPORT CO., INC.’S  
REPLY IN SUPPORT OF ITS RULE 12(b)(6)  
MOTION TO DISMISS AMENDED COMPLAINT**

Defendant, Polish Folklore Import Co., Inc. (“PFI”), by its counsel, pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby offers its Reply in Support of its motion to dismiss the Amended Complaint of Plaintiff, Amtec International of NY Corp. (“Amtec”) and states as follows:

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## ARGUMENT

Amtec's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Opposition") confirms that Amtec has not stated a claim for relief. Amtec has not and cannot state a claim because Amtec has not and cannot allege (a) a sale or offer to sell Zubr, to Amtec within New York or New Jersey; (b) transfer of title of Zubr to Amtec within New York or New Jersey; and (c) an agreement between Amtec and PFI. Amtec makes several arguments in an effort to avoid this necessary conclusion. However, as demonstrated herein, none of those arguments save Amtec's deficiently pleaded Amended Complaint. Accordingly, because Amtec has repeatedly failed to cure its deficient allegations, this Court should dismiss Amtec's Amended Complaint with prejudice. *See Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 898 F.3d 243, 257 (2d Cir. 2018); *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008).

**A. AMTEC CANNOT ALLEGE A SALE OF, OFFER TO SELL, OR TRANSFER OF TITLE OF ZUBR PRODUCTS BY PFI TO AMTEC.**

Amtec does not seriously dispute that it has not and cannot allege Amtec was a party to PFI's (or any brewer's) sales, offers to sell, or transfers of title to Zubr products occurring within the states of New York or New Jersey. *S.K.I. Beer Corp. v. Baltika Brewery* ("S.K.I."), 443 F. Supp. 2d 313 (E.D.N.Y. 2006), a case on "all fours" with this case, demonstrates that the New York and New Jersey franchise laws require Amtec to plead the *prima facie* elements of a brewer's sale or offer to sell **and** delivery of beer to the distributor within the state. *See* 443 F. Supp. 2d at 319. Amtec cannot sustain its franchise claims because it has not alleged that PFI (or even KP or Dojlidy) sold and delivered beer to Amtec within New York or New Jersey. Moreover, the agreement between Dojlidy and Amtec unquestionably states that Amtec's

acceptance of the products occurred in Poland with all risks and title passing to Amtec in Poland. (Ex. 5, 2000 Agreement, at p. 2, Art. 5, ¶¶ 1–2.)<sup>1</sup> Amtec therefore cannot prevail on its franchise claims because “the [New York] Statute itself compels the conclusion that it regulates only those sales and deliveries which take place in the State of New York.” *S.K.I.*, 443 F. Supp. 2d at 323.

Amtec attempts to avoid this necessary conclusion by pointing to its contract with a Dojlidy (a different unrelated brewer) and asserting that “it was the express intent of the parties [not PFI, but Dojlidy and Amtec] that Amtec be appointed as the exclusive New York and New Jersey distributor.” (Pl.’s Opp. at 7.) This might be true. However, Dojlidy’s and Amtec’s contemplation of Amtec’s distribution in New York and New Jersey is irrelevant because Amtec does not allege it was sold Zubr products in New York or New Jersey and Amtec does not allege it took title to the Zubr products in New York or New Jersey. These are the requisite *prima facie* elements—where the sale of the product to the distributor took place and where transfer of title took place—not where the product was to be sold to retailers. Moreover, a requisite element Amtec must allege is a relationship between Amtec and PFI, which, as demonstrated below and in PFI’s opening brief, never existed either in fact or in law. Therefore, the beer franchise laws are inapplicable. *See S.K.I.*, 443 F. Supp. 3d at 322–23. Indeed, to hold that the beer franchise laws apply to transactions that took place entirely outside of New York or New Jersey would implicate the same dormant Commerce Clause concerns that *S.K.I.* and this Court found compelling in interpreting the franchise laws. *See id.* at 319–20. (Ex. 3, ECF No. 16, Order, at 11–14.)

Amtec incorrectly asserts that *S.K.I.* does not require “that Zubr product be sold or title transferred to Amtec in the States of New York or New Jersey.” (Pl.’s Opp. at 7.) However, the

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<sup>1</sup> The Exhibits cited within this Reply are the Exhibits attached to PFI’s Motion to Dismiss the Amended Complaint.

franchise laws and *S.K.I.* clearly contemplate otherwise. 443 F. Supp. 2d at 319–23. Moreover, Amtec misunderstands the New York and New Jersey franchise laws, which only protect wholesalers that have *agreements* with brewers. *See* New York Alcoholic Beverage Control Law (“ABC Law”), § 55-c; N.J. Stat. Ann. § 33:1-93.15. As detailed more fully below and in PFI’s Motion to Dismiss the Amended Complaint, Amtec does not (and cannot) allege an agreement between PFI and Amtec. So, the franchise laws do not and cannot protect Amtec here.

Amtec next asserts PFI’s interpretation of the franchise laws would lead to absurd results. (Pl.’s Opp. at 9.) Not so. More specifically, Amtec argues *S.K.I.* cannot be taken seriously because foreign distributors would be able to avoid the reach of the franchise laws by requiring a wholesaler to take possession of product in a foreign country. This is a possibility. However, it is well-established law that a state lacks power to regulate commerce that takes place wholly outside of its borders, regardless of whether the commerce has effects within the state. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[T]he Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” (internal quotation marks omitted)). Amtec’s complaint, therefore, is more accurately characterized as a disagreement with the dormant Commerce Clause and its applicability. The second supposedly absurd result cited by Amtec is the other side of the coin: namely Amtec asserts that New York or New Jersey could potentially regulate commerce related to beer sales in other states. This also is not and cannot be true because New York and New Jersey cannot apply state laws that have the practical effect of regulating liquor sales outside their borders. *See Brown-Forman Distillers Corp. v. New York State Liquor*, 476 U.S. 573, 584–85 (1986) (“Th[e Twenty-first] 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.”).

Amtec next argues it is “common knowledge and custom” that “foreign suppliers sell product under Incoterms that require importers and distributors to take delivery overseas and pay all customs and freight to the United States.” (Pl.’s Opp. at 10.) However, Amtec provides no support for this assertion, Amtec does not make these allegations in its Amended Complaint and, in any event, as *S.K.I.* recognized, transfer of title is not conclusively determined by Incoterms, but instead is determined by reference to the contract or to local law. *See S.K.I.*, 443 F. Supp. 2d at 322 (“Plaintiff, citing more credible authority, argues that transfer of title is not conclusively determined by Incoterms.”) (citing *Texful Textile Ltd. v. Cotton Express Textile, Inc.*, 891 F. Supp. 1381, 1388–89 (C.D. Cal. 1995)). Accordingly, PFI’s interpretation of the beer franchise laws does not lead to absurd results because PFI’s interpretation aligns with the language of the statutes, *S.K.I.*, *Texful*, and the Supreme Court’s pronouncements regarding the dormant Commerce Clause.

Amtec therefore cannot state a claim under the New York or New Jersey beer franchise laws because Amtec has not alleged that Amtec bought or acquired title to any Zubr product within New York or New Jersey from PFI (or from any other brewer). Without alleging these *prima facie* elements of its claims, Amtec’s claims against PFI must be dismissed, this time with prejudice.

**B. AMTEC DOES NOT ALLEGE AN AGREEMENT BETWEEN PFI AND AMTEC, SO ITS CLAIMS MUST BE DISMISSED.**

Amtec’s claims also fail because Amtec does not allege the existence of *any* agreement—let alone the existence of a *written* agreement as required by New York’s ABC Law and New Jersey’s MABPA—between PFI and Amtec.

New York's ABC Law and New Jersey's MABPA protect agreements between a specific brewer and a specific wholesaler. Here, Amtec alleges agreements with KP and Dojlidy, *not* with PFI. Notwithstanding, in a roundabout way, Amtec asserts PFI terminated the agreements between KP and/or Dojlidy and Amtec despite PFI never being a party to those agreements. This is not possible. *See* ABC Law, § 55-c(4) (describing occurrences that allow brewer to amend, materially modify, or otherwise terminate an agreement); N.J. Stat. Ann. § 33:1-93.15(c) (describing circumstances that do not allow brewer to terminate an agreement); *SING for Service, LLC v. DOWC Admin. Servs., LLC*, No. 1:20-cv-5617-GHW, 2022 WL 36478, at \*15–16 (S.D.N.Y. Jan. 3, 2022) (nonparty to contract cannot modify agreement); *Cty. of Morris v. Fauver*, 707 A.2d 958, 967 (N.J. 1998) (modification of agreement requires consent of parties to the contract).

Moreover, for PFI to be subject to the contracts between Amtec on the one hand, and KP or Dojlidy on the other, PFI would need to be a third-party beneficiary of those contracts or be some kind of closely related party to Amtec, KP, or Dojlidy. *See Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 184 A.D.3d 116, 121–22 (N.Y. App. Ct. 2020) (“A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary or an alter ego of a signatory or where it is a party to another related agreement that forms part of the same transaction.”); *Bedwell Co. v. Camden Cty. Improvement Auth.*, No. 14-cv-1531, 2014 WL 3499581, \*3 (D.N.J. July 14, 2014) (“Except for limited circumstances not present here, a contract cannot define the legal obligations between two entities unless those two entities are parties to the contract.”); *see also In re McGraw-Hill Global Educ. Holdings LLC*, 909 F.3d 48, 59 (3d Cir. 2018) (collecting cases from various contexts). Nowhere in the Amended Complaint does Amtec allege that PFI is a third-party



beneficiary to those agreements, and Amtec does not allege PFI has a close relationship with KP or Dojlidy that would justify holding PFI to the agreements made by KP and Dojlidy. Amtec also does not explain how a non-party to those contracts could possibly terminate Amtec's contracts with KP or with Dojlidy. Accordingly, there is no agreement with Amtec to which PFI is party, so PFI cannot modify or cancel Amtec's agreements with KP and Dojlidy. Therefore, New York's ABC Law and New Jersey's MABPA are inapplicable.

Amtec also argues PFI is a "Successor to a brewer" under the New York ABC Law and a "successor brewer" under the MABPA. However, Amtec is wrong. Under the ABC Law, a "Successor to a brewer" is defined as:

[A]ny person or entity which acquires the business or beer brands of a brewer, without limitation, by way of the purchase, assignment, transfer, lease, or license or disposition of all or a portion of the assets, business or equity of a brewer in any transaction, including merger, corporate reorganization or consolidation or the formation of a partnership, joint venture or other joint marketing alliance.

ABC Law, § 55-c(2)(c). Similarly, under MABPA, a "Successor brewer" is:

[A]ny person, not under common control with the predecessor brewer, who by any means, including, without limitation, by way of purchase, assignment, transfer, lease, license, appointment, contract, agreement, joint venture, merger, or other disposition of all or part of the business, assets, including trademarks, brands, distribution rights and other intangible assets, or ownership interests of a brewer, acquires the business or malt alcoholic beverage brands of another brewer, or otherwise succeeds to a brewer's interest with respect to any malt alcoholic beverage brands.

N.J. Stat. Ann. § 33:1-93.14.

Neither statute makes an importer a successor brewer simply because that importer imports product to be sold in the United States, which is all that Amtec alleges PFI has done. (Ex. 1, Am. Compl., ¶ 25.) Instead, a brewer or importer becomes a successor brewer only if it acquires the predecessor brewer's or importer's business or succeeds to the predecessor's

interests in a beer brand. ABC Law, § 55-c(2)(c); N.J. Stat. Ann. § 33:1-93.14. Amtec does not allege in its Amended Complaint that PFI became the successor brewer pursuant to either statute because PFI acquired a predecessor brewer's business or because PFI succeeded to a predecessor's interests in a beer brand. Rather, Amtec alleges, and solely in a conclusory fashion, merely that PFI is a "brewer" under the ABC Law and MABPA. (Ex. 1, Am. Compl., ¶¶ 34, 46.) Moreover, Amtec is obviously aware of the *prima facie* successor brewer requisites. In its Amended Complaint, Amtec alleges KP became Dojlidy's successor *because Dojlidy sold the Dojlidy Brewery to KP*. (*Id.* ¶¶ 6, 18.) Amtec makes no similar allegation with respect to PFI.

In addition, Amtec knows PFI is not a successor brewer because Amtec, in a different case with very similar facts and a similar beer franchise law, made the same argument PFI makes in this case, and Amtec prevailed. That case is *Grant Importing & Distributing Co. v. Amtec International of New York Corp.*, 384 Ill. App. 3d 68, 892 N.E.2d 1134 (1st Dist. 2008) ("*Grant*"). As explained in *Grant*, Amtec became the U.S. importer of Zywiec beer. Prior to Amtec becoming the Zywiec importer, Advanced Brands & Importing, Inc. ("Advanced") was the Zywiec importer. Advanced sold Zywiec beer to the plaintiff wholesalers, which sold Zywiec beer to Illinois retailers. After Amtec became the Zywiec importer, Amtec did not sell Zywiec beer to the plaintiff wholesalers, but instead sold Zywiec beer to Amtec's wholly owned wholesaler for it to sell to Illinois retailers. The plaintiff wholesalers brought suit alleging a violation of Illinois' beer franchise law, the Illinois Beer Industry Fair Dealing Act, 815 ILCS 720/1 *et seq.* More specifically, the plaintiff wholesalers argued Amtec was a successor brewer (just like Amtec argues PFI is the successor brewer in this case) and that Amtec terminated their statutorily protected distribution rights by not selling to them (just like Amtec argues PFI did in

this case). Amtec argued it did not terminate the Illinois wholesalers' distribution rights and it was not a successor brewer, and Amtec prevailed at both the trial and appellate courts.

The court reasoned Amtec was not a successor brewer because, "in order to qualify as a successor brewer, the distribution rights must have been obtained through some arrangement with the original holder of the rights, be it by merger, purchase of corporate shares, purchase of assets, or otherwise." *Id.* at 72, 892 N.E. 2d at 1137. The facts adduced during the temporary restraining order process were to the contrary. Accordingly, Amtec was not a successor brewer and could appoint any wholesaler it desired, including its wholly owned subsidiary to distribute Zywiec in the plaintiff wholesalers' former exclusive Zywiec beer distribution territories. The argument Amtec successfully made in *Grant* is precisely the reason why PFI is not a successor brewer in this case. Amtec does not allege PFI acquired the Zubr distribution rights from KP or Dojlidy in the manner contemplated by either the New York ABC Law or the New Jersey MABPA.

Thus, because Amtec's Amended Complaint is silent as to any transaction taking place between KP or Dojlidy on the one hand, and PFI on the other hand, that would make PFI a successor to KP or Dojlidy (*see, e.g.*, Ex. 1, Am. Compl. ¶¶ 4–6, 23–29), Amtec does not allege that PFI is a "successor to a brewer" (under New York's ABC Law) or a "successor brewer" (under New Jersey's MABPA), and Amtec does not argue that PFI otherwise qualifies as a "brewer." Therefore, Amtec's claims against PFI must fail because PFI is not subject to any agreement that is protected by the franchise laws.

### CONCLUSION

Amtec has not alleged a sale of Zubr product, *by PFI to Amtec*, occurring within New York or New Jersey. Amtec has not alleged a transfer of Zubr title *from PFI to Amtec* in New

York or New Jersey. Under New York's ABC Law and New Jersey's MABPA, these pleading deficiencies are fatal omissions because the franchise laws only protect wholesalers when they purchase beer products in those states **and** take title to those beer products in those states. Similarly, Amtec fails to make these allegations regarding Dojlidy and KP.

In addition, and independently, Amtec fails to allege it has any agreement with PFI, let alone the *written* agreement required by the statutes. Without any allegations that PFI and Amtec have an agreement, the franchise laws cannot apply. Amtec also wrongly asserts that PFI is subject to Amtec's earlier agreements with KP and/or Dojlidy. This cannot be so because PFI is not alleged to be a third-party beneficiary to those contracts or alleged to be in a close relationship with a party to those contracts. Moreover, Amtec does not allege that PFI is a successor brewer under either franchise law.

Amtec has now failed two times to plead a claim against PFI, and Amtec has not corrected errors that existed in its original Complaint. Accordingly, this Court should dismiss the Amended Complaint with prejudice.

Dated: August 15, 2022

Respectfully submitted,

POLISH FOLKLORE IMPORT CO., INC.

By: /s/ Earl E. Farkas  
One of its Attorneys

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ORAL ARGUMENT REQUESTED

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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AMTEC INTERNATIONAL OF NY CORP.,	)	
	)	
Plaintiff,	)	Case No.: 1:20-cv-00003-LDH-PK
v.	)	
	)	Date of Service: August 15, 2022
POLISH FOLKLORE IMPORT CO., INC.,	)	
	)	
Defendant.	)	

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**NOTICE OF FILING**

PLEASE TAKE notice that, on August 15, 2022, Defendant, Polish Folklore Import Co., Inc., by and through its undersigned counsel, served upon you its **Reply in Support of Its Rule 12(b)(6) Motion to Dismiss Amended Complaint** via email and first-class U.S. mail with postage prepaid.

PLEASE TAKE further notice that oral argument is requested and we shall appear before Judge LaShann DeArcy Hall in Courtroom 4H North of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, for such argument and to present the aforesaid Motion on a date and time to be designated by the Court, for a judgment to dismiss Plaintiff’s Amended Complaint pursuant to Rule 12(b)(6) and entry of any other relief that the Court deems just and equitable.

Dated: August 15, 2022

Respectfully submitted,

POLISH FOLKLORE IMPORT CO., INC.

/s/ Earl E. Farkas  
By one of its Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of the above-titled **Notice of Filing and Defendant’s Reply in Support of its Rule 12(b)(6) Motion to Dismiss Amended Complaint** were served upon all parties of record by sending copies of the same via first class U.S. mail with postage prepaid and electronic mail at or before 5:00 PM EDT on August 15, 2022, to the following attorneys of record:

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