UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

AMTEC INTERNATIONAL OF NY CORP.,

Plaintiff,

Case No.: 1:20-cv-000003-LDH-PK

- against –

POLISH FOLKLORE IMPORT CO., INC.

Defendant.

- X

PLAINTIFF AMTEC INTERNATIONAL OF NY CORP.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DIMSISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

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PRELIMINARY STATEMENT

This case concerns the improper termination of a beer distributor by a brewer in the states of New York and New Jersey in breach of N.Y. Alcoholic Beverage Control Law § 55-c ("§ 55-c") and N.J.S.A. 33:1-93.14, *et seq.* (the "Malt Beverages Protection Act" or "MBPA"), which, *inter alia*, statutorily prevents a brewer such as Defendant Polish Folklore Import Co., Inc. ("PFI") from terminating a distributor such as Plaintiff Amtec International of NY Corp. ("Amtec") except in cases where there exists "good cause."

As will be described in more detail below, PFI breached both § 55-c and the MBPA (collectively, the "Beer Statutes"), when in 2018, PFI (acting as the importer and successor to Kompania Piwoarska SA ("KP"), the brewer) appointed two new distributors for a Polish brand of beer called Zubr (the "Zubr Brand") in Amtec's New York and New Jersey exclusive territory, thus, terminating Amtec without the statutorily required good cause.

In PFI's motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) (the "Motion"), which is the second such motion filed by PFI, PFI wrongly asserts that (i) Amtec has not properly alleged that the sale and delivery of Zubr Brand product took place in New York and New Jersey, and therefore PFI cannot be deemed a "brewer" under the Beer Statutes, and (ii) Amtec did not have a written agreement with PFI appointing Amtec as the exclusive distributor of Zubr Brand product in New York and New Jersey, and thus was not afforded any protections under the Beer Statutes.

However, as will be elaborated in more detail below, PFI's motion must be rejected because:

(1) Amtec did properly plead that PFI sold or offered to sell Zubr Brand product in New York and New Jersey, which is sufficient for PFI to be deemed a "brewer" and to afford Amtec the protections of the Beer Statutes.

(2) The fact that PFI's predecessors expressly appointed Amtec as the exclusive distributor for Zubr Beer products in New York and New Jersey (and required them to set up a distribution network), also constituted a separate "offer to sell" in New York and New Jersey, as that phrase is used in the Beer Statutes.

(3) Amtec has properly pled the existence of 3 separate written agreements appointing it as the exclusive distributor of Zubr Brand products in New York and New Jersey. Since PFI is a "successor brewer" under the Beer Statutes, the existence of these written agreements is sufficient to defeat PFI's motion.

Accordingly, for the reasons stated below, this Court must deny PFI's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

STATEMENT OF FACTS

I. THE FACTS ALLEGED IN THE AMENDED COMPLAINT

The following are the relevant facts as asserted by Amtec in its Amended Complaint:

Amtec is a licensed importer and distributor of malt beverage products, *i.e.* beer, in the States of New York and New Jersey. (Doc. No. 17, ¶ 2) PFI is the importer of various brands of beer into the United States, including a Polish brand named the Zubr Brand, which is manufactured by KP. (Doc. No. 17, ¶ 4) In connection with its role as importer of the Zubr Brand, PFI sells and offers to sell the Zubr Brand to licensed beer distributors in the States of New York and New Jersey, with such sales actually taking place in New York and New Jersey. (Doc. No. 17, ¶ 5)

Beginning on or about January 11, 1998, Amtec was appointed as the importer and distributor for various beer products manufactured by the Browar Dojlidy ("Dojlidy"), including

the Zubr Brand, in the states of New York, Connecticut, New Jersey, Illinois, and Pennsylvania, by way of an Import and Wholesale Agreement. (Doc. No. 17, ¶ 8)

As a result, on February 11, 1998, and March 11, 1998, Amtec was registered as the exclusive distributor of the Zubr Brand in the states of New Jersey and New York respectively. (Doc. No. 17, ¶¶ 10, 22) Thereafter, Amtec commenced exclusive distribution of the Zubr Brand in various states, including in New York and New Jersey. (Doc. No. 17, ¶ 12)

In 2000, Amtec and the Dojlidy entered into a new distribution agreement for the Zubr Brand and other products for the states of New York, New Jersey, Illinois, and Pennsylvania (the "2000 Agreement"). (Doc. No. 17, ¶ 14) By expressly appointing Amtec as its distributor in the above states, Dojildy was directing that Amtec as distributor sell the Dojildy products in, *inter alia*, the states of New York and New Jersey. Indeed, the 2000 Agreement, provides that "the MANUFACTURER has decided to launch the Products (defined hereinafter) on the market of the Territory (defined hereinafter)." Moreover, the 2000 Agreement also provides that "the Distributor is willing to purchase the Products for the purposes of distributing the same within the Territory." (Doc. No. 17, ¶ 15)

Additionally, the 2000 Agreement also provides the following:

> (i) "Distributor undertakes to purchase Products and distribute the same, at its own risk and expense, within the Territory – subject to the provisions stipulated herein"; (ii) "Manufacturer hereby grants Distributor the right to use trademarks used in the designations of the Products, within the Territory and for duration of the terms of this Contract, for purposes related to the export and sales of Products and any related marketing activities"; and (iii) "Manufacturer undertakes to name the Distributor as the sole supplier of the Products within the Territory to any new customers."

(Doc. No. 17, ¶ 16)

On February 4, 2003, Dojlidy sold the Dojlidy Brewery, including the brand rights for the Zubr Brand, to KP, which is a SABMiller subsidiary, and became the legal successor to Dojlidy. (Doc. No. 17, ¶ 18) Thereafter, on or about April 24, 2003, Dojlidy (which was now owned by KP), issued a new appointment letter to Amtec, for various products, including the Zubr Brand, for *inter alia*, the states of New York and New Jersey (the "2003 Appointment Letter."). (Doc. No. 17, ¶ 17) In addition, Amtec continued to order product from KP, including at least as late as September 2003, and continued to sell the Zubr Brand in New Jersey and New York. (Doc. No. 17, ¶ 19)

From August 2005 through 2018, KP temporarily withdrew the Zubr Brand from the United States market. (Doc. No. 17, ¶¶ 21, 23) However, at no time did KP ever terminate the 2000 Agreement, the 2003 Appointment Letter, or Amtec's distribution rights to the Zubr Brand in New Jersey and New York. (Doc. No. 17, ¶ 22)

Based upon information and belief, PFI, who is legally the successor brewer to KP, began to import Zubr Brand into the United States in or around the second half of 2018. (Doc. No. 17, ¶¶ 25, 34, 46) Thereafter, in or around September 2018, PFI terminated Amtec's exclusive distribution rights for Zubr Brand in New York and New Jersey by appointing two new exclusive distributors for Amtec's territory (S.K.I. Wholesale Beer Corp. in New York and Kohler Distributing Co. in New Jersey) and by selling beer to those distributors in the States of New York and New Jersey. (Doc. No. 17, ¶ 28)

II. PFI'S PRIOR MOTION AND THE COURT'S DECISION

On December 10, 2020, pursuant to Fed. R. Civ. P. 12(b), PFI filed a motion to dismiss Amtec's initial Complaint. PFI sought dismissal on numerous grounds, including its assertion

that (i) Amtec's claims were time barred, (ii) the New Jersey Malt Beverages Practices Act was not applicable; (iii) the relevant agreements were governed by Polish law; (iv) PFI was not a "brewer" subject to New York's beer franchise protection statute; and (v) Amtec did not plead any purchases or title transfer with New York and New Jersey.

On March 31, 2022, this Court issued its Memorandum and Order (Document No. 16) in which it granted in part and denied in part PFI's motion, and granted Amtec leave to amend its pleadings. *Id.* at 14-15. Specifically, the Court ruled that "Defendant's motion is DENIED with respect to whether Plaintiff's claims are time-barred, whether the claims are expired by the terms of the 2000 Agreement, whether Plaintiff pleaded Defendant is a brewer subject to ABC, and whether the MPBA applies to Plaintiff's claims concerning distribution in New Jersey."

However, the Court ruled that "Plaintiff here must plead that the Defendant made a sale or offer to sell Zubr in New York or New Jersey, which Plaintiff has not done." *Id.* at 13-14. In making this ruling the Court held that the reasoning in *S.K.I. Beer Corp. v. Baltika Brewery*, 443 F. Supp. 2d 313 (E.D.N.Y 2006) was applicable.

ARGUMENT

I. THE STANDARD ON A RULE 12(B)(6) MOTION

PFI cannot meet the burden that it bears to prevail on its motion to dismiss under Fed. R. Civ. P. 12(b)(6). When considering PFI's motion, a court must accepts all factual allegations in Amtec's Complaint as true and draw all reasonable inferences in Amtec's favor. *Ruotolo v. City of N.Y.*, 514 F.3d 184, 188 (2d Cir. 2008). Dismissal is inappropriate as long as Amtec pleads, as it has in its Complaint, a facially plausible claim supported by "factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Indeed, a court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As the Second Circuit has clarified: under *Twombly* (and confirmed by *Iqbal)*, Rule 8 requires that a plaintiff allege in its complaint enough facts to state a claim to relief that is plausible on its face. To meet this standard, plaintiffs must nudge their claims across the line from conceivable to plausible. This requires alleging enough fact to raise a reasonable expectation that discovery will reveal evidence to prove the claim. *Panther Partners Inc. v. Ikanos Communs., Inc.*, 347 Fed. Appx. 617, 619 (2d Cir. 2009) (internal quotations omitted).

II. PFI'S MOTION MISTATES THE COURT' PRIOR DECISION

A. Amtec Properly Pled that PFI Sold Zubr Brand Products in New York and New Jersey

In its motion, PFI wrongly asserts that Amtec's claims must be dismissed because "Amtec does not plead (a) that PFI, Dojildy, or KP sold or offered to sell Zubr product *to Amtec* within New York or New Jersey, or (b) transfer of Zubr product title to Amtec occurring within New York or New Jersey." (PFI Br. at 5-6) Specifically, PFI attempts to rely on ABC § 55-c(2)(b), which provides that the term "'Brewer' means any person or entity engaged primarily in business as a brewer, manufacturer of alcoholic beverages, importer, marketer, broker or agent of any of the foregoing *who sells or offers to sell beer to a beer wholesaler in this state or any successor to a brewer."* (Emphasis added) Similarly, the MBPA provides that "[e]very brewer shall contract and agree in writing with a wholesaler for all supply, distribution and sale of the products of the

brewer *in this State*, and each contract shall provide and specify the rights and duties of the brewer and the wholesaler with regard to such supply, distribution and sale." N.J. Stat. Ann. § 33:1-93.15 (emphasis added).

However, neither the Court's prior decision nor *Baltika* require that Zubr product be sold or title transferred to Amtec in the States of New York or New Jersey. Indeed the Court only held that Plaintiff must plead that "Defendant [PFI] made a sale or offer to sell Zubr in New York or New Jersey." *Id.* at 13-14. Moreover, as made clear, not only did Amtec properly plead that PFI did sell Zubr Brand products in New York and New Jersey (with such sales constituting the de facto termination), but that it was the express intent of the parties that Amtec be appointed as the exclusive New York and New Jersey distributor. Indeed, the appointment of Amtec as the exclusive New York and New Jersey distributor also constituted a separate offer to sell in New York and New Jersey (in addition to PFI's actual sales in New York and New Jersey), as that phrase is used in the ABC law and MBPA.

In this regard, Amtec amended its Complaint to assert the following new facts:

(1) PFI sells and offers to sell Zubr Brand products to duly licenses distributors in the States of New York and New Jersey, with the sales actually taking place in New York and New Jersey. (Document No. 17, ¶ 5)

(2) In fact, PFI's sale of Zubr Brand product in New York and New Jersey constituted the de facto termination of Amtec's distribution rights. (Document No. 17, ¶¶ 28, 29)

(3) Dojildy expressly appointed Amtec as distributor to sell Dojildy products in the State of New York and New Jersey. (Document No. 17, ¶ 15; *also* Document No. 15-2, which contains a translated copy of the 2000 Agreement.) Moreover, the 2000 Agreement also provides

that "the Distributor is willing to purchase the Products for the purposes of distributing the same within the Territory." (Doc. No. 17, ¶ 15; Doc. No. 15-2, at p. 1, "Whereas" Provision)

(4) Additionally, the 2000 Agreement also provides the following:

> "Distributor undertakes to purchase Products and distribute the same, at its own risk and expense, within the Territory – subject to the provisions stipulated herein" (Document No. 15-2, Article 2); (ii) "Manufacturer hereby grants Distributor the right to use trademarks used in the designations of the Products, within the Territory and for duration of the terms of this Contract, for purposes related to the export and sales of Products and any related marketing activities" (Doc. 15-2, Article 4); and (iii) "Manufacturer undertakes to name the Distributor as the sole supplier of the Products within the Territory to any new customers." (Doc. 15-2, Article 4)

Based on the above, Amtec has met the Court's requirement in its prior order and properly pled that PFI sells Zubr Brand product in the States of New York. (Document No. 17, ¶ 5) Thus, because PFI sells and offers to sell beer in the New York and New Jersey, it is a "brewer" as that term is defined pursuant ABC law and MBPA, and is subject to New York and New Jersey's beer protection acts.

Moreover, the type of dormant commerce clause issues that the Court raised in *Baltika* are also alleviated by the new facts asserted in Amtec's Amended Complaint. Indeed, in *Baltika*, the Plaintiff asserted that liability was premised solely by reason that Baltika entered into a sale transaction with a licensed New York distributor. "Applying this definition, SKI contends that the Statute applies to any transaction entered into with a New York wholesaler." *Baltika,* 443 F. Supp. 2d at 318. Rather, the parties' agreement in Baltika, unlike the present case, did not specify "the final destination for the goods." As the Court stated in Baltika, "[t]his is made apparent by the Contract itself, which *makes no reference to New York at all, nor gives any indication that Baltika offered its product for sale in New York any more than in California or Japan*. At most, the

Contract could support the inference that Baltika simply expected that its beer be exported, since numerous clauses deal with the export process." *Baltika*, 443 F. Supp. 2d at 323 (emphasis added).

In the present circumstance, the 2000 Agreement makes clear that the final destination of the Zubr Brand products was New York and New Jersey. Indeed the 2000 Agreement provides that "Manufacturer undertakes to name the Distributor as the sole supplier of the Products within the Territory to any new customers" (Doc. No. 15-2, Article 4-2) and that "[t]he Distributor shall organize, of and by itself, a wholesale and retail network within the Territory and shall ensure continuous supply of the Products thereto." (Doc. No. 15-2, Article 3-1) Thus, there cannot be no doubt that unlike *Baltika*, it was always intended that not only would Zubr Brand products end up in New York and New Jersey, but that Amtec was being appointed an exclusive New York and New Jersey distributor for Zubr and that it was required to maintain a "wholesale and retail network" in New York and New Jersey. Thus, in addition, to PFI's actual sales that have taken place in New York and New Jersey, the express terms of the 2000 Agreement, whereby Amtec was appointed the New York and New Jersey distributor (and was required to set up a distribution network), also constituted a separate "offer to sell" in New York and New Jersey, as those terms are used under ABC law and MBPA.

B. Adopting the Reasoning of PFI to This Case Would Create An Absurd Result Not Intended by the Legislature

Based on the above, it is clear that unlike in *Baltika*, the parties always intended for Amtec to be appointed the exclusive distributor for Zubr Brand products in New York and New Jersey. Thus, adopting the reasoning of PFI advocated in its motion would severely undermine the statutory protections of the beer protection statutes and would create an absurd result that was clearly not intended by the legislatures of each state. *John G. Ryan, Inc. v. Molson USA, LLC*, No. 05-CV3984, 2005 WL 29 77767,*4 (E.D.N.Y Nov. 7, 2005)(describing § 55-c as a remedial statute

that was meant "to level the playing field between brewers and distributors/wholesalers by providing procedural and substantive protections to distributors."); *see also Warren Distrib. Co. v InBev USA, LLC*, CIV.A. 07-1053 RBK/J, 2011 WL 770005, at *2 (D.N.J. Feb. 28, 2011)("One purpose of the Practices Act is to "regulate the business relationship between brewers and wholesalers of malt alcoholic beverages ... and protect beer wholesalers from unreasonable demands and requirements by brewers.")

In particular, adopting an in-state sales requirement even where the agreement expressly appoints Amtec as the New York and New Jersey distributor, as advocated by PFI, would permit any manufacturer to avoid the statutory safeguards of these statutes by requiring their distributors to take possession of product in a foreign jurisdiction. Indeed, such an interpretation would completely eviscerate the protections of the statutes with respect to foreign suppliers. Specifically, it is common knowledge and custom in the industry 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. Thus, according to PFI's reasoning, § 55-c and MBPA would literally only apply to domestic and not foreign distributors. If the intent of the legislature was to only permit domestic application, it certainly knew how to indicate that. Thus, the New York and New Jersey legislatures' failure to indicate such a limitation is strong support that PFI's interpretation must be rejected. In fact, under PFI's interpretation, any brewer (including domestic brewers), could avoid the protections of the statutes simply by requiring distributors to take possession of product in a state other than New York or New Jersey. For instance, a New York distributor)even one expressly appointed) that took possession of product in New Jersey would not be afforded the protections of § 55-c.

Ironically, a non-New York distributor that took possession of product in New York, would be granted such protections. Clearly, these absurd results (namely that the Beer Statutes applied only to instate brewers that sold to in-state distributors, even where the parties' agreement granted the distributor exclusive rights to the territory) was not the intent of the legislature. The fundamental purpose of statutory interpretation is to give effect to legislative intent. *See Bronx Auto Mall, Inc. v. Am. Honda Motor Co.*, 934 F. Supp. 596, 609 (S.D.N.Y. 1996); ("Hence, the Court must turn to the purpose of the statute in an effort to divine the intent of the Legislature.") Furthermore, in a circumstance (which this case clearly is) where a statute is "remedial," the statute is to be "liberally construed, to spread their beneficial result as widely as possible. *See* McKinney's, New York Statutes, Classification of Statutes, §35, and McKinney's, New York Statutes, § 321; *Young v. Schering Corp.*, 141 N.J. 16, 25 (1995)("Where the Legislature's intent is remedial, a court should construe a statute liberally."). Accordingly, the Beer Statutes must liberally interpreted so to further this objective (the protection of distributors). In the present case, the only common sense reading of the Beer Statutes that comport with these above rules of statutory interpretation is that because KP and Dojlidy directly appointed Amtec as its New York and New Jersey distributor and thereby availed itself of the New York and New Jersey market, the statutory protections of the Beer Statutes apply.

III. PFI WRONGLY ASSERTS THE LACK OF A WRITTEN AGREEMENT

As a separate basis for dismissal, PFI asserts that lack of an existence of an agreement between PFI and Amtec. However, in its motion, PFI ignores the numerous agreements and writings that appointed Amtec as the exclusive distributor of Zubr Brand products for New York and New Jersey. These include the (1) 1998 Import and Wholesale Agreement between Dojildy and Amtec; (2) 2000 Agreement between Dojildy and Amtec; and (3) 2003 Appointment Letter.

In addition, PFI also ignores the fact that both NY's ABC law and NJ's MBPA provide that its protections shall apply not only to a brewer but also to a successor to a brewer. Under, § 55-c(2)(b), the term "'Brewer' means any person or entity engaged primarily in business as a brewer, manufacturer of alcoholic beverages, importer, marketer, broker or agent of any of the foregoing who sells or offers to sell beer to a beer wholesaler in this state or *any successor to a brewer."* (Emphasis added)

Similarly, under the MBPA, for "successor brewers," or "any person, not under common control with the predecessor brewer, who by any means . . . 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," the MBPA also provides: It shall not be a violation of this act for a successor brewer to . . . terminate, in whole or in part, . . . the contract, agreement, or relationship with a wholesaler of the brewer it succeeded, for the purpose of transferring the distribution rights in the wholesaler's territory for the malt alcoholic beverage brands to which the successor brewer succeeded . . . provided that the successor brewer or the second wholesaler . . . first pays to the first wholesaler the fair market value of the first wholesaler's business with respect to the terminated brand . . . . Id. §§ 33:1-93.14, -93.15(d)(1). Indeed, in the Court's prior order, the Court ruled that "the MBPA creates a cause of action for any wholesaler to bring suit against a brewer 'for violation of [the MBPA], or against a successor brewer in connection with a termination pursuant to [§ 33:1-93.15(d)(1)] of this act[.]'" Id. § 33:1-93.18(a).

Accordingly, because Amtec has properly alleged the existence of three separate written agreements appoint Amtec as the exclusive distributor of Zubr Brand products in New York and New Jersey, and that PFI is the successor brewer with respect to those agreements, PFI's motion lacks merit and must be denied.

CONCLUSION

For all of the reasons set forth herein, it is respectfully submitted that this Court deny Defendant's motion pursuant to Fed. R. Civ. P. 12(b) to dismiss Plaintiff's Complaint.

Dated: White Plains, New York
July 25 2022

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