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

AMTEC INTERNATIONAL OF NY CORP.,	)	
	)	
Plaintiff,	)	Case No.: 1:20-cv-00003-LDH-PK
v.	)	
	)	Service Date: November 19, 2020
POLISH FOLKLORE IMPORT CO., INC.,	)	
	)	
Defendant.	)	

POLISH FOLKLORE IMPORT CO., INC.'S RULE 12(b)(6)
MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Polish Folklore Import Co., Inc. ("PFI"), by its counsel, pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby moves to dismiss the Complaint of Plaintiff, Amtec International of NY Corp. ("Amtec") and submits its Memorandum of Law in Support as follows.

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I. INTRODUCTION

Amtec's two-count Complaint seeks relief for time-barred contract and statutory rights Amtec lost more than fourteen years ago. To conceal this staleness, Amtec dresses its claims under two state statutes – New York and New Jersey beer franchise laws, which govern relationships between beer brewers and wholesalers in New York and New Jersey, including how and when their contracts may be terminated. As demonstrated herein, Amtec's Complaint must be dismissed because (a) Amtec's rights long ago expired; and (b) the beer franchise laws do not apply to PFI and Amtec or to the contract at issue.

II. THE COMPLAINT

PFI accepts Amtec's well-pleaded Complaint allegations for purposes of this Motion. Amtec is an importer and distributor of alcoholic beverages. Ex. 1, Complaint, at ¶ 1. PFI is an importer of alcoholic beverages. *Id.* at ¶ 2. At issue is a dispute concerning the rights (or value of said rights) to distribute Zubr beer in New York and New Jersey. *Id.* at ¶¶ 6-7.

Beginning in 1998, Amtec imported Zubr from its then Polish brewer, Browar Dojlidy ("Dojlidy"), pursuant to an Import and Wholesale Agreement governing the importation and distribution of, *inter alia*, Zubr. *Id.* at ¶ 7. Dojlidy also appointed Amtec as its Zubr "brand agent" and exclusive distributor in, *inter alia*, New York and Jersey. *Id.* at ¶¶ 8-12. On December 31, 2000, Amtec and Dojlidy entered into a new agreement (the "Agreement"), pursuant to which Amtec would purchase Zubr from Dojlidy and be Dojlidy's exclusive distributor in New York and New Jersey. *Id.* at ¶¶ 14-15.

On February 4, 2003, Kompania Piwoarska SA ("KP") purchased Dojlidy. *Id.* at ¶¶ 4, 15. Amtec alleges KP "temporarily withdrew" Zubr from the United States during 2003. *Id.* at ¶

18. This "temporary" withdrawal lasted more than 14 years. *Id.* at ¶¶ 22-23. Amtec claims the Agreement and its relationship with Zubr never terminated. *Id.* at ¶ 19.

During April 2018, nearly 15 years after Amtec placed its last Zubr order, PFI began to import Zubr into the United States. *Id.* at ¶¶ 22-23. Amtec alleges PFI (not KP) "terminated" its distribution rights by appointing two Zubr distributors in New York and New Jersey. *Id*. at ¶ 23. However, Amtec does not allege PFI had any agreement or business dealings with Amtec which could be terminated. *Id.* at ¶ 25. In addition, Amtec does not allege PFI ever provided Amtec with any notice of termination. *Id.* at ¶ 26.

Amtec brings suit under the New York Alcoholic Beverage Control Law (Count I), and the New Jersey Malt Alcoholic Beverages Practices Act (Count II). These statutes generally prevent a brewer's termination of distribution relationship between a brewer and a wholesaler absent good cause. *See generally id.* at ¶¶ 38-62.

III. ADDITIONAL FACTS THIS COURT MAY CONSIDER

A. The Contract.

Amtec fails to attach a copy of the Agreement to its Complaint. However, (1) the Agreement partially or completely governs Amtec's claimed rights, and (2) Amtec is seeking to either (a) enforce the Agreement against PFI, or (b) recover the lost value of its distribution rights governed, in whole or in part, by the Agreement. Ex. 1, the Complaint, ¶¶ 51-62. Accordingly, the Agreement is an integral document to the Complaint, which, as discussed *infra* at p. 5, § IV(B), this Court may consider when ruling on the motion to dismiss. A true and accurate copy of a certified translation of the Agreement between Amtec and Dojlidy is attached as Exhibit 2 and as authenticated by Jakub Sumara's Affidavit, Exhibit 5 hereto. The Agreement is written in Polish and was translated into English by a certified translator. *Id.*, p. 9.

Significantly, the Agreement contains a durational term. It states, the "[Agreement] shall come into force as at the day of its signing and shall be concluded for a defined period of time until December 31, 2002," with a possibility of extension. Ex. 2 at p. 5, Art. 14, ¶ 1. The Agreement also contains a termination provision, allowing either party to terminate on three months' written notice. *Id.* at ¶ 2. Moreover, Amtec and Dojlidy did not evidence any intent in the Agreement to be bound by or subject to New York or New Jersey law. To the contrary, the Agreement contains a choice of Polish law provision. *Id.* at p. 6, Art. 15, ¶ 5. Also significant, pursuant to the Agreement, the sale and exchange of the goods at issue (including the Zubr product) took place at Dojlidy's warehouse in Poland, at which time title to the goods passed to Amtec. *Id*. at p. 2-3, Art. 5, ¶¶ 1-3.

B. KP Terminated Amtec's Rights During 2005 and PFI Subsequently Obtained Its Rights from a Third-Party.

During July 2019, Amtec and PFI participated in an administrative hearing before the Connecticut Department of Consumer Protection, Liquor Control Commission. PFI timely appealed the Commission's Order and the appeal is pending in the Connecticut Superior Court. *See* Exhibit 3 hereto, a true and accurate copy of PFI's confirmation of e-filing its complaint for administrative review on December 12, 2019.[1] This Court may take judicial notice of the administrative record on appeal, as discussed *infra*, relevant portions of which are attached as Group Exhibit 4. At the administrative hearing and in its post-hearing brief, Amtec introduced

[1] The administrative appeal of the Connecticut Liquor Control Commission's order remains pending in the Superior Court of the Judicial District of New Britain under docket number HHB-CV-20-6056990-S.

evidence establishing that: (1) KP, not PFI, was the manufacturer of Zubr, and (2) KP, not PFI, terminated the Agreement and any of Amtec's franchise rights during no later than 2005.

Specifically, during February 2005, Amtec attempted to place an order with KP to purchase Zubr. Ex. 4 [Ex. T to Amtec's Post-Hearing Brief, the 2005 email chain] at R. pp. 1187-94.[2] KP responded (a) it was not selling Zubr in the United States market; and (b) the Agreement with Amtec had expired. *Id.* Amtec responded and contended the Agreement was "still in force effect [sic]." However, KP reiterated there was no contract between the companies. *Id.* Subsequently, Amtec placed an order for Zubr, but KP did not respond. Ex. 4, [Ex. U to Amtec's Post-Hearing Brief, Amtec's unfulfilled purchase order to KP], at R. pp. 1195-1201, and [Amtec's Post-Hearing Brief] at R. p. 1000 ("On May 19, 2005, Amtec subsequently submitted an order for Zubr, which KP did not fill.").

Notably, PFI does not import Zubr from KP or Dojlidy, the entities from which Amtec imported Zubr. Instead, PFI imports Zubr from Mag Dystrybucja, one of KP's distributors in Poland. Ex. 4 [Amtec's Post-Hearing Brief] at R. p. 1001.

IV. APPLICABLE LEGAL STANDARDS

A. Rule 12(b)(6) Motion

When deciding a Rule 12(b)(6) motion, this Court applies the two-pronged approach articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). *Sugar v. Greenburgh Eleven Union Free Sch. Dist.*, No. 18 CV 67 (VB), 2018 WL 6830865, at *2–3

[2] Citations to Group Exhibit 4 – portions of the administrative record on appeal pending in the Connecticut administrative appeal – are made as "R. p. __" in reference to the appellate record's pagination and will designate the document being referenced in brackets where applicable. Group Exhibit 4 is ordered by pagination of the record.

(S.D.N.Y. Dec. 28, 2018). The Court: (a) disregards conclusions and threadbare recitals of the elements of a cause of action supported by conclusory allegations, and (b) takes only well-pleaded factual allegations as true and then evaluates whether they plausibly give rise to an entitlement to relief. *Ashcroft*, 556 U.S. at 678-679, *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). A plaintiff must exceed a plausibility requirement, showing more than a possibility a defendant acted unlawfully. *Id.*, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556.

B. Authority to Review Additional Materials

When assessing a Rule 12(b)(6) motion, in addition to considering complaint allegations, documents incorporated by reference, and exhibits, courts may consider documents integral to the complaint and matters subject to judicial notice. *Sugar v. Greenburgh Eleven Union Free Sch. Dist.*, No. 18 CV 67 (VB), 2018 WL 6830865, citing *Mangiafico v. Blumental*, 471 F.3d 391, 398 (2d Cir. 2006), *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* 551 U.S. 308, 322 (2007).

A document not attached as a complaint exhibit and not expressly incorporated by reference is "integral" to the complaint if the complaint "relies heavily upon its term and effect," the Court may consider the document when ruling on a motion to dismiss. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). With respect to judicial notice, a court may take notice of the records of state administrative proceedings, which are public records, without converting a motion to dismiss into a motion for summary judgment. *Thomas v. Westchester Cty. Health Care Corp.*, 232 F. Supp. 2d 273, 277 (S.D.N.Y. 2002).

V. ARGUMENT

This Court should dismiss Amtec's Complaint for the following, independent, reasons: (A) Amtec's claims are time-barred, because Amtec lost any Agreement and franchise rights no later than 2005 and the statutes of limitation expired no later than 2011; (B) New Jersey's

MABPA does not apply because (i) its enactment postdates the Agreement, and (ii) the end of Amtec's Zubr importing by years, and it is not retroactive; (C) Amtec's purchases of Zubr and the transfer of title took place in Poland and are not subject to the beer franchise laws; (D) PFI is not a "brewer" with respect to Amtec and Zubr and, therefore, not covered by the beer franchise laws; and (E) Amtec may not recover under the beer franchise laws because the Agreement is governed by Polish law and it expired during 2012 pursuant to its terms.

A. AMTEC'S CLAIMS ARE TIME-BARRED.

Amtec's claims are time-barred by the applicable statutes of limitations. There are no statutory limitations periods in New York's or New Jersey's beer franchise laws. Therefore, the applicable limitations period under New York law is three years for "an action to recover upon a liability . . . imposed by statute." *See* N.Y. C.P.L.R. 214(2). Alternatively, the New York catchall limitations period of six years applies. *See* N.Y. C.P.L.R. 213(1) (pertaining to actions "for which no limitation is specifically prescribed by law"). In New Jersey, the applicable limitations period for an action on a contract is six years. *See* N.J.S.A. § 2A:14-1. All limitations periods have long expired, since no later than 2011.

Amtec brings suit to recover the value of its lost Agreement and statutory rights due to a termination without good cause as required under the beer franchise laws. Under New York law, it is well established the limitations period for a breach action "begins to run from the day the contract was breached, not from the day the breach was discovered, or should have been discovered." *Kermanshah v. Kermanshah*, 580 F. Supp. 2d 247, 260 (S.D.N.Y. 2008) (internal citations omitted). Although Amtec's claims are statutory in nature, the same logic applies. When KP disavowed its obligations to Amtec without compensation (whether through termination, repudiation or a failure to renew), the limitations periods commenced.

From the face of the Complaint, Amtec's injury occurred no later than "in or around 2005," when KP "temporarily" withdrew Zubr from the United States. Ex. 1, the Compl., at ¶ 18. Amtec attempts to avoid its limitations problem by alleging a "temporary withdrawal" of a product from the market is not tantamount to a termination, a rescission, or a failure to renew the Agreement, which would constitute violations of the beer franchise laws. *Id.* at ¶ 19. Respectfully, this Court should reject Amtec's legal conclusion. The "temporary withdrawal" of a product subject to an exclusive distributorship agreement constitutes a breach of contract. *Biotronik, A.G. v. Medsystems Ireland, Ltd.*, 33 Misc. 3d 1219(A), 939 N.Y.S.2d 739 (Sup. Ct. 2011) (denying defendant's motion for summary judgment on breach of distribution agreement claims where defendant contended it had issued a valid recall to "temporarily withdraw" a product from the market).

A review of the Agreement makes clear Dojlidy or KP terminated the Agreement. The Agreement obligated the manufacturer, Dojlidy, to sell to Amtec a fixed amount of products. *See* Ex. 2, the Agreement, at p. 8, Appendix No. 4. The Agreement did not empower Dojlidy to "temporarily withdraw" products. *Id.* The alleged "temporary" withdrawal was therefore a breach or termination of the Agreement and a violation of the beer franchise laws (assuming, *arguendo*, they applied).

Likewise, other Amtec documents from the Connecticut administrative hearing unequivocally refute Amtec's "temporary" withdrawal allegation. During 2005, Amtec and KP exchanged a series of emails in which KP repudiated the Agreement. In responding to Amtec's purchase order for Zubr, KP stated: "[t]he agreement between the companies Amtec and Dojlidy [KP's predecessor] expired," and "[a]s far as I am aware, there is no agreement between the companies [KP] and Amtec." Ex. 4 [Ex. T to Amtec's Post-Hearing Brief, the 2005 email chain]

at R. pp. 1187-94. KP subsequently ignored Amtec's submitted purchase order for Zubr. Ex. 4 [Ex. U to Amtec's Post-Hearing Brief, Amtec's unfulfilled purchase order to KP], at R. pp. 1195-1201, and [Amtec's Post-Hearing Brief] at R. p. 1000 ("On May 19, 2005, Amtec subsequently submitted an order for Zubr, which KP did not fill.").

KP's repudiation of the Agreement and refusal to ship Zubr to Amtec each independently triggered the limitation periods. KP also never renewed the Agreement, which also triggered the franchise laws' limitation periods. Amtec's claim that a fourteen-year gap is excusable because it never received a "formal termination" from KP is untenable and contrary to the law. Ex. 1, the Compl., at ¶ 19. Amtec's causes of action – under contract and statute – expired no later than six years after KP prevented Amtec from distributing Zubr in the United States, no later than 2011. Amtec's claims are at least eight years' time barred. For this independent reason, this Court should dismiss Amtec's Complaint.

B. NEW JERSEY'S MABPA POST-DATES THE AGREEMENT'S EXECUTION AND DOES NOT APPLY.

The New Jersey MABPA post-dates Amtec's Agreement with Dojlidy and Amtec's last purchases of Zubr. Accordingly, assuming *arguendo* Amtec's claims are not time barred, the later enactment of the MABPA confers no rights in Amtec to claim a statutory violation. As alleged in the Complaint, Amtec most recently purchased beer to distribute in New Jersey during September of 2003, and KP refused to sell beer to Amtec no later than 2005. Ex. 1, Compl., at ¶¶ 16, 18. The Agreement became effective on December 31, 2000, and expired by its terms as of "December 12, 2002, with possibility of extension," and with a voluntary termination provision. Ex. 2, at p. 1, and p. 5, Article 14, ¶¶ 1-2.

In Count II, Amtec seeks relief under the MABPA and specifically under section 93.15(c)(1), which prohibits a brewer from terminating or failing to renew a wholesaler's contract without good cause. *See* Ex. 1, Compl., at ¶¶ 57-62. However, MABPA did not become effective until March 1, 2006, several years after the Agreement became effective and one year after 2005, when Amtec claims KP refused to sell to Amtec. *See* N.J. S.A. §§ 33:1-93.12 through 33:1-93.20. Therefore, Amtec may not obtain relief under the MABPA, and Amtec fails to state a claim upon which relief may be granted as to Count II.

PFI anticipates Amtec will argue the MABPA has a retroactive application to contracts existing prior to its effective date of March 1, 2006. However, the Agreement does not qualify. Section 93.15(b) provides the MABPA shall apply to all "contracts, agreements, and relationships existing prior to the effective date of this act that are continuing in nature, have an indefinite term or have no specific duration." These descriptors do not apply, because as set forth *supra*: (a) the Agreement had an explicit duration term with a voluntary termination provision; (b) KP had refused to make sales to Amtec; and (c) KP had fully repudiated, terminated, and/or failed to renew the Agreement by denying it was in force and effect during mid-2005. Accordingly, the MABPA does not and cannot apply. For this independent reason, this Court should dismiss Count II of Amtec's Complaint.

C. NEITHER OF THE BEER FRANCHISE LAWS APPLIES BECAUSE AMTEC HAS NOT PLEADED ANY PURCHASES OR TITLE TRANSFER WITHIN NEW YORK AND NEW JERSEY.

Amtec's claims also fail as a matter of law because Amtec has not pleaded (1) any of Dojlidy's or KP's sales took place in the United States, or (b) title transfer occurring within New York or New Jersey, which are the only transactions governed by each State's respective beer franchise law. New York's ABC Law, Section 55-c(b), (Count I) defines a "brewer" in part as

an "[entity] who sells or offers to sell beer to a beer wholesaler **in this state**." (Emphasis added). Likewise, New Jersey's MABPA (Count II) governs contracts for the "supply, distribution and sale of the products of the brewer **in this State**." N.J. Stat. Ann. § 33:1-93.15(a) (emphasis added).

The Complaint does not allege any sales of Zubr by Dojlidy, KP or PFI to Amtec occurring in New York or New Jersey. These glaring omissions of an essential *prima facie* element are fatal to Amtec's claims as demonstrated by *S.K.I. Beer Corp. v. Baltika Brewery*, 443 F. Supp. 2d 313, 319 (E.D.N.Y. 2006), *aff'd*, 612 F.3d 705 (2d Cir. 2010). In *S.K.I Beer Corp.*, the plaintiff beer importer sued under Section 55-c for an alleged wrongful termination of its written exclusive distributorship agreement because the defendant brewer refused to fill plaintiff's orders and to renew their contract. The defendant argued, in part, the importer failed to allege any sale of beer by the brewer to the importer within the State of New York, and therefore Section 55-c did not apply. *Id.* The court agreed.

The court evaluated the statute's purpose and concluded the statute only "applies to sales and deliveries in New York." *S.K.I. Beer Corp.*, 443 F. Supp. 2d at 322 (E.D.N.Y. 2006). According to the court, any "sale or offer to sell that would subject a brewer to the Statute [55-c] must take place in New York." *Id.* In that case, the contract provided the goods were "handed over" to the plaintiff importer at the defendant's place of business in Russia, at which time the delivery was completed. *Id.* The complaint contained no allegations that the goods were sold by the brewer to the importer in New York and that transfer of title took place in New York. *Id.* The inability of the importer to allege these *prima facie* elements, among other reasons, required the court to dismiss the complaint, and the Second Circuit affirmed. *Id.*

The facts at bar are practically "on all fours." Amtec fails to allege any sales or offers to sell Zubr to Amtec in New York or New Jersey by Dojlidy, KP or PFI. Amtec only alleges that *Amtec* sold and distributed beer in New York and New Jersey. This allegation is insufficient and the foregoing omissions warrant dismissal. More importantly, a review of the Agreement reveals the sales and title of transfer to Amtec occurred in Poland. The Agreement states:

> 1. The delivery of the Products and acceptance thereof by the Distributor [Amtec] shall be at the Manufacturer's [Dojlidy's] warehouse **located in Bialystok, at ul. Dojlidy Fabyrczne 28, Poland**.
>
> 2. The title to the Products along with all the related costs and risks **shall pass onto the Distributor [Amtec] as at the moment of the Product's acceptance** by the Distributor [Amtec] confirmed in the relevant internal export invoice signed by the Distributor's [Amtec] authorized representative (EXW – the Manufacturer's warehouse located at ul. Dojlidy Fabryczne 28, Bialystok).

Ex. 2, the Agreement, at p. 2, Article 5, §§ 1-2 (emphasis added).

The parties' contemplation of Amtec's distribution in New York and New Jersey is, as the *S.K.I. Beer Corp.* court concluded, of no moment. A distributor's reselling of beer within New York does not constitute a sale under New York's ABC laws. *S.K.I. Beer Corp.*, 443 F. Supp. 2d at 322-23. The same logic of *S.K.I. Beer Corp.* applies to both of Amtec's franchise claims. The sale and transfer of title of Zubr took place in Poland, and the franchise laws do not apply. Accordingly, for this independent reason, this Court should dismiss Amtec's Complaint.

D. PFI IS NOT A BREWER SUBJECT TO NEW YORK'S ABC LAW.

The New York ABC Law governs the relationship between a "brewer" or a "successor to a brewer" and a "wholesaler." PFI is neither a "brewer" nor a "successor to a brewer," and it cannot be liable under New York's ABC Law.

Section 55-c(2)(a), N.Y. Alc. Bev. Cont. Law § 55-(2)(a), defines a "brewer" as:

> 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.

Section 55-2(c), N.Y. Alc. Bev. Cont. Law § 55-(2)(c), defines a "successor to a brewer" as:

> Any 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.

Amtec does not allege PFI is a brewer with which it had a direct relationship. In fact, Amtec does not allege how PFI purportedly developed any contractual privity with Amtec or became obligated pursuant to the original agreement Amtec has with brewer Dojlidy or its successor, KP, which repudiated the expired Agreement. Instead, Amtec simply concludes "PFI is a 'brewer' with respect to the Zubr Brand products." This is precisely the type of conclusory and speculative label which will not survive a Rule 12(b)(6) motion and this Court must reject.

Because Amtec admits PFI was not the brewer with which Amtec had the Agreement or import relationship, Amtec's sole method of establishing liability pursuant to New York law is to plead and prove PFI is a "successor to a brewer," as that term is statutorily defined. However, Amtec fails to make this requisite allegation. It is insufficient, standing alone, for Amtec to allege PFI is a successor to a brewer merely because it currently has Zubr import rights. In a similar case – involving Amtec as a defendant – the Illinois Appellate Court came to this conclusion under Illinois' analogous beer franchise law. *Grant Importing & Distrib. Co. v. Amtec Int'l of N.Y. Corp.*, 384 Ill. App. 3d 68, 72, 892 N.E.2d 1134, 1137 (Ill. App. Ct. 2008). Similar to New York, Illinois defines "successor brewer," as a "person who in any way obtains

the distribution rights that a brewer . . . importer, or master distributor once had to manufacturer or distribute a brand or brands of beer whether by merger, purchase of corporate shares, purchase of assets, or any other arrangement, including but not limited to any arrangements transferring the ownership or control of the trademark, brand or name of the brand." 815 Ill. Comp. Stat. Ann. 720/1.1.

The Illinois *Grant Importing* court concluded the "method in which the distribution rights are obtained are critical to a determination of whether an entity is a successor brewer." *Grant Importing & Distrib. Co.*, 892 N.E.2d at 1136-37. The court continued "[w]e believe that the statute contemplates that, in order to qualify as a successor brewer, the distribution rights must have been obtained **through some arrangement with the holder of the original rights**." *Id.* (emphasis added). Thus, an importer does not become a "successor to a brewer" merely because that importer obtained distribution rights previously held by a different importer. Indeed, if the mere possession of the rights to import or distribute a brand were sufficient to establish "successor to a brewer" status, the legislature's inclusion of the various statutory methods of acquiring a prior importer's business or brands would be mere surplusage.

The Complaint in the instant case is bare of any allegations how PFI "obtained its distribution rights through some arrangement with the original holder of the rights that is similar to the type of transaction contemplated by statute." *Id.* at 1137. This omission is fatal to Amtec's New York claim unless Amtec can plead sufficient facts that exceed a plausibility threshold to support its legal conclusions. But, Amtec cannot make these allegations. Instead of doing so, Amtec now attempts to flip the same argument it made and won in the Illinois case in an attempt to hold PFI liable where there are no allegations how PFI acquired its rights through

any "purchase, assignment, transfer, lease, or license or disposition of all or a portion of the assets, business or equity of a brewer… ." N.Y. Alc. Bev. Cont. Law § 55-c(2)(c).

Finally, this Court need not speculate how PFI came to import Zubr. Amtec submitted evidence regarding PFI's relationship with Zubr in the Connecticut administrative hearing. As Amtec acknowledged, "instead of purchasing the product from KP, PFI was appointed by MAG Dystrybucja, a Polish distributor of KP." Ex. 4, [Amtec's Post-Hearing Brief], at R. p. 1001. Thus, Amtec is well aware PFI did not obtain its rights through a transaction with KP, the entity with which Amtec allegedly had an Agreement until, at the latest, 2005. Amtec has not alleged any relationship with MAG Dystrybucja, and has not alleged PFI obtained the Zubr rights through a "purchase, assignment, transfer," etc., as required by the New York statute before PFI could ever be considered a successor to a brewer. Accordingly, PFI is not a "brewer" with respect to Amtec and Zubr. For this independent reason, this Court should dismiss Count I of Amtec's Complaint.

E. THE BEER FRANCHISE LAWS DO NOT APPLY.

The beer franchise laws simply do not apply to Amtec's Agreement, and Amtec may not obtain its requested relief. Beyond the fact that the actual sales and title transfer occurred in Poland, per the Agreement: (a) Dojlidy and Amtec agreed the Agreement was governed by Polish law, **not** New Jersey or New York law; and (b) the Agreement expired by its own terms.

1. The Agreement is Governed by Polish Law.

The Agreement contains a choice of law provision, which courts generally enforce if the chosen law "bears a reasonable relationship to the parties or the transaction." *Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 148 (S.D.N.Y. 2017). In considering whether a reasonable relationship exists, courts consider (a) the location of negotiation and performance of

the agreement; (b) the parties' places of incorporation and principal places of business; and (c) the property which is the subject of the transaction. *Id.* A party's principal place of business in the selected forum is enough, standing alone, to satisfy the reasonable relationship test. *Id.*

Here, the Amtec and Dojlidy Agreement "shall be governed by the laws of Poland" and the Polish Commercial Code. Ex. 2, p. 6, Art. 15, ¶ 5. There is no dispute Dojlidy was located in Poland, brewed Zubr in Poland, and sold and transferred title of the beer to Amtec in Poland. There is a substantial and strong relationship between the choice of law provision and the Agreement. Thus, Polish, not New York or New Jersey law, controls.

Clearly, the Agreement Parties never intended the Agreement – governed by Polish law, concerning sales and transfers of title in Poland – to be subject to New York and New Jersey laws. This is particularly true because those state laws contain terms materially different from those to which the Agreement Parties agreed. Because Polish law governs the Agreement and the relationship between Dojlidy and Amtec, Amtec may not seek relief under New York and New Jersey laws. For this reason, independently, this Court should dismiss Amtec's Complaint.

2. The Agreement Expired on Its Terms.

Amtec and Dojlidy's Agreement term ran through December 12, 2002, with a "possibility of extension." Ex. 2, p. 5, Art. 14, § 1. Amtec fails to plead how or why the Agreement remained in force and effect or became resurrected and purportedly binding on a different company (PFI) during the intervening 14 years after (a) the Agreement expired; and (b) KP refused to fill Amtec's orders and denied the Agreement was in effect. For this independent reason, this Court should dismiss Amtec's Complaint.

VI. CONCLUSION

Amtec improperly seeks to evade the staleness of its contract and statutory claims to recover the alleged value of its contract rights through inapplicable statutes, more than 14 years after its contractual relationship with the former brewer ended. The Agreement expired and is not binding on PFI. Nor do the franchise laws apply to PFI and Amtec. Amtec has failed to state a claim upon which relief can be granted. Respectfully, this Court should dismiss Amtec's Complaint, with prejudice.

Dated: November 19, 2020

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, an attorney, hereby certifies that a true and correct copy of the above-titled **Defendant's Rule 12(b)(6) Motion to Dismiss and Memorandum in Support** was 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 CST on November 19, 2020, to the following attorneys of record:

Counsel for Plaintiff Amtec International of NY Corp

Joshua S. Stern, Esq.
Donovan Hatem, LLP
112 W. 34th St., 18th Fl.
New York, New York 10120
jstern@donovanhatem.com

Donna Murphy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AMTEC INTERNATIONAL OF NY CORP.

Plaintiff,

—against—

POLISH FOLKLORE IMPORT CO., INC.

Defendant.

----------X

Index No.:
Index Purchased:

SUMMONS

Basis of Venue
Plaintiff's Business Address
430 Morgan Avenue
Brooklyn, New York 11222

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your Answer, or if the Complaint is not served with this Summons, to serve notice of appearance on the plaintiff's attorney within twenty (20) days after the service of this Summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
November 25, 2019

DONOVAN HATEM LLP

By: _____

Joshua S. Stern, Esq.
Attorneys for Plaintiff
112 W. 34th Street, 18th Floor
New York, New York 10120
(212) 244-3333

To: Polish Folklore Import Co., Inc.
1128 Tower Road
Schaumburg, Illinois 60173

1

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

AMTEC INTERNATIONAL OF NY CORP.

Plaintiff,

---against—

POLISH FOLKLORE IMPORT CO., INC.

Defendant.

----------X

Index No.:

COMPLAINT

Plaintiff, Amtec International of NY Corp., by and through its attorneys, Donovan Hatem LLP, as and for its Verified Complaint alleges as follows:

THE PARTIES

1. Plaintiff Amtec International of NY Corp. ("Amtec") is a New York corporation with its principal place of business located at 430 Morgan Avenue, Brooklyn, New York.

2. Amtec is a duly licensed, multi-brand distributor and importer of alcoholic and beverage products within, *inter alia,* the States of New York, Connecticut, and New Jersey.

3. Upon information and belief, Defendant Polish Folklore Import Co., Inc. ("PFI") is an Illinois corporation with its principal place of business at 1128 Tower Road, Schaumberg, Illinois.

4. Upon information and belief, PFI is the importer of various brands of beer manufactured by Kompania Piwoarska SA ("KP") in the States of New York, Connecticut, and New Jersey, including the Zubr brand ("Zubr Brand").

5. Upon information and belief, on or about February 4, 2003, KP purchased Browar Dojilidy ("Dojildy"), and acquired the rights to manufacture the Zubr Brand.

PLAINTIFF'S RELATIONSHIP WITH BROWAR DOJILDY AND ITS SUCCESSOR, KP

6. Amtec has been an importer, brand agent, and distributor of the Zubr Brand in certain states, including New York, New Jersey, and Connecticut since approximately 1998.

7. On or about January 11, 1998, Amtec and Dojlidy entered into a formal Import and Wholesale Agreement pursuant to which Dojlidy appointed Amtec as its exclusive importer and distributor of five separate Dojlidy products, namely Zubr, Magnat, Classic, Herbowe, and Porter, in the States of New York, Connecticut, New Jersey, Illinois, and Pennsylvania.

8. On or about February 5, 1998, Browar Dojlidy issued an appointment letter designating Amtec as its brand agent for Magnat and Zubr for the states of: New York, New Jersey, Connecticut, Illinois, Michigan, Wisconsin, Mass., Maryland, Delaware, and Penn. (the "1998 Appointment Letter").

9. On February 11, 1998, Amtec was registered as the exclusive distributor for the Zubr Brand in the State of New Jersey.

10. On February 26, 1998, Amtec was registered as the exclusive distributor for the Zubr Brand in the State of Connecticut.

11. On March 11, 1998, Amtec was registered as the exclusive distributor for the Zubr Brand in the State of New York.

12. Thereafter, Amtec commenced exclusive distribution of the Zubr Brand in the States of New York, New Jersey, and Connecticut.

13. Approximately two years later, on or about December 31, 2000, Browar Dojlidy and Amtec entered into a new distribution agreement for Zubr and Magnat products for the states of New York, Connecticut, New Jersey, Illinois, and Pennsylvania (the "2000 Agreement").

14. In addition, on or about April 24, 2003, Browar Dojlidy issued a new appointment letter to Amtec for Magnat, Zubr, Porter, and Mocne for the States of: New York, New Jersey, Illinois, Michigan, Arizona, California, Connecticut, Florida, Florida, Georgia, Maryland, Nevada, Pennsylvania, Rhode Island, and Washington (the "2003 Appointment Letter").

15. On or about February 4, 2003, Dojlidy sold the Dojlidy Brewery to KP, which was a SABMiller subsidiary, becoming the legal successor to Dojildy.

16. Nevertheless, despite the sale of the Dojlidy Brewery to KP, Amtec continued to order Zubr from KP through at least September 2003, and continued to sell the Zubr Brand to retailers in the States of New York, New Jersey, and Connecticut.

17. For instance, for the year 2004, Amtec sold approximately $165,000 of the Zubr Brand in the State of New York, and $187,000 in the State of New Jersey.

18. Upon information and belief, in or around 2005, KP temporarily withdrew the Zubr Brand from the United States market.

19. However, at no point in time were the 2000 Agreement and/or 2003 Appointment Letter granting Amtec its distribution rights for the States of New York, New Jersey, and Connecticut ever terminated or rescinded by KP or any other entity, and Amtec has continued to remain the exclusive distributor of record for the Zubr Brand in the States of New York, New Jersey, and Connecticut.

PFI'S TERMINATION OF AMTEC'S DISTRIBUTION RIGHTS

20. The Zubr Brand remained out of the United States market from August 2005 through 2018 (the "Withdrawal Period").

21. Despite this, during the Withdrawal Period, Amtec continued to remain the exclusive distributor of the Zubr Brand in the States of New York, New Jersey, and Connecticut.

22. On or about April 11, 2018, PFI submitted an Application for Certificate of Label Approval to the United States Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau in order to begin the process of recommencing import of the Zubr Brand into the United States market. Thereafter, upon information and belief, PFI began to import the Zubr Brand into the United States in the second half of 2018.

23. In or around September 2018, PFI attempted to terminate Amtec's exclusive distribution rights for the Zubr Brand in the State of Connecticut by appointing a new exclusive distributor, namely Arko, and began to sell Zubr Brand product to Arko.

24. PFI's termination of Amtec's distribution rights for the Zubr Brand in the State of Connecticut proved unsuccessful. In fact, on September 24, 2019, the State of Connecticut, Department of Consumer Protection issued a Memorandum of Decision ruling that (i) even though KP had withdrawn Zubr from the United States market in 2005, Amtec had not relinquished its exclusive distribution rights; (ii) that the Zubr Brand product distributed by Amtec was the same as that imported by PFI; and (iii) PFI did not have just and sufficient cause to terminate Amtec's exclusive distribution rights for the Zubr Brand in the State of Connecticut. Thus, Amtec continues to remain the duly registered distributor of Zubr Brand product in the State of Connecticut.

25. Similarly, upon information and belief, in or around September 2018, PFI terminated Amtec's exclusive distribution rights for the Zubr Brand in the States of New York and New Jersey by appointing two new exclusive distributors (S.K.I. Wholesale Beer Corp. in New York and Kohler Distributing Co. in New Jersey) in Amtec's territory and by selling Zubr Brand product to those distributors.

26. Although PFI has not provided formal notice of termination to Amtec regarding its distribution rights for Zubr Brand products, as it did in Connecticut, by selling Zubr Brand products to other distributors in the States of New York and New Jersey, which is Amtec's exclusive territory, such actions constitute a defacto termination of Amtec's distribution rights.

NEW YORK BEER DISTRIBUTOR STATUTE

27. The relationship between "brewers" and "wholesalers" of beer in New York is regulated by Alcoholic Beverage Control Law Section 55-c ("ABC § 55-c").

28. Under ABC § 55-c(2)(a), an "Agreement" is defined as any contract, agreement, arrangement, course of dealing or commercial relationship between a brewer and a beer wholesaler pursuant to which a beer wholesaler is granted the right to purchase, offer for sale, resell, warehouse or physically deliver beer sold by a brewer.

29. A "Brewer" is defined as 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 New York, or any successor to a brewer, under ABC§ 55-c(2)(b).

30. "Beer wholesaler" and "wholesaler" means the holder of a wholesaler's license pursuant to Section fifty-three of the Alcoholic Beverage Control Law who purchases, offers to sell, resells, markets, promotes, warehouses or physically distributes beer sold by a brewer, under ABC § 55-c(2)(d).

31. PFI is a "brewer" with respect to the Zubr Brand products under ABC § 55-c.

32. Amtec is a "wholesaler" with respect to the Zubr Brand products under ABC§ 55-c.

33. In enacting ABC§ 55-c, New York recognized the substantial role wholesalers play in the development of the market and good will of a brewers' products and the equity that wholesalers develop in such good will, and sought to protect the significant investment of capital and resources by New York wholesalers by prohibiting, under ABC § 55-c-(4}, the termination or the material modification of "Agreements" except for "good cause."

34. ABC§ 55-c(2)(e) defines "Good cause" as, *inter alia,* "[t]here is a failure by the beer wholesaler to comply with a material term of an agreement required by subdivision three of this section between the brewer and beer wholesaler, provided that: (A) the wholesaler was given written notice by the brewer of the failure to comply with the agreement as provided for in subdivision five of this section and in which the brewer states with particularity the basis for the brewer's determination of non-compliance, and upon the wholesaler's written request within ten days of receipt of the notice, the brewer has supplemented such notice by submitting to the wholesaler in writing the brewer's recommended plan of corrective action to cure the claimed defaults or deficiencies in a manner satisfactory to it; (B) the wholesaler was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement by curing the claimed defaults or deficiencies specified in said notice within the time provided for in clause (C) of this subparagraph; and (C) the wholesaler was afforded fifteen days after receipt of such notice to submit a written plan of corrective action to comply with the agreement by curing the claimed non-compliance and seventy five days to cure such non-compliance in accordance with the plan."

35. ABC § 55-c(6) provides that a beer wholesaler may maintain a civil action in a court of competent jurisdiction within this State.

36. ABC§ 55-c(6) also provides that the burden of proof for "good cause" to terminate is with the brewer.

37. Lastly, ABC § 55-c(l l) states the protections granted to wholesalers under Section 55-c "may not be altered, waived or modified by written or oral agreement in advance of a bona fide case and controversy arising under a written agreement complying with this section."

NEW JERSEY MALT BEVERAGE PRACTICES ACT

38. The relationship between "brewers" and "wholesalers" of beer in New Jersey is regulated by the Malt Beverages Practices Act, N.J.S.A. 33: 1-93.12 *et seq* (the "Malt Beverages Practices Act").

39. Under N.J.S.A. 33:1-93.13(c), the act was in part intended to "protect beer wholesalers from unreasonable demands and requirements by brewers, while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages."

40. Under N.J.S.A. 33:1-93.14, a "Wholesaler" means a plenary wholesale licensee or a limited wholesale licensee who purchases malt alcoholic beverages from a brewer for the purpose of resale to Class C licensees or State Beverage Distributor Licensees.

41. Under N.J.S.A. 33:1-93.14, a "Brewer" means any person, whether located within or outside the State who: (a) brews, manufactures, imports, markets or supplies malt alcoholic beverages and sells malt alcoholic beverages to a plenary wholesale licensee or a limited wholesale licensee for the purpose of resale; (b) is an agent or broker of such a person who solicits orders for or arranges sales of such person's malt alcoholic beverages to a plenary wholesale licensee or a limited wholesale licensee for the purpose of resale; or (c) is a successor brewer.

42. Under N.J.S.A. 33:1-93.14, a "Successor brewer" means any 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."

43. PFI is a "brewer" with respect to the Zubr Brand under the Malt Beverages Practices Act.

44. Amtec is a "wholesaler" with respect to the Zubr Brand under the Malt Beverages Practices Act.

45. Under N.J.S.A. 33:1-93.15(c)(l), the Malt Beverages Practices Act prohibits a brewer from "terminat[ing], cancel[ling] or refus[ing] to renew a *contract, agreement or relationship with a wholesaler,* or to fail or refuse to grant to a wholesaler the right to purchase and resell any brand extension under the same form of agreement as the base product, in part or in whole, except where the brewer establishes that it has acted for *good cause and in good faith."* (emphasis added)

46. Under N.J.S.A. 33:1-93.14(1), "Good cause" means, and is limited to "a failure to substantially comply with reasonable terms contained in a contract or agreement between a brewer and wholesaler that contains the same terms as the brewer's contract with similarly situated United States, not including United States territories or possessions, distributors.

47. In addition, under N.J.S.A. 33:1-93.14(3), the Malt Beverages Practices Act also requires that the Brewer "first giv[e] the wholesaler written notice setting forth all of the alleged

deficiencies on the part of the wholesaler and giving the wholesaler a reasonable opportunity of not more than 120 days to cure the alleged deficiencies; provided, however, that such period for cure may be increased or reduced to a commercially reasonable period by an order of a court in this State in a proceeding in which each party shall bear its own costs and expenses."

48. Lastly, under N.J.S.A. 33:1-93.15(b), the Malt Beverage Practices Act provides that "the injured wholesaler's reasonable damages shall include the fair market value of the wholesaler's business with respect to the terminated brand or brands."

49. In addition, under N.J.S.A. 33:1-93.15(a), a wholesaler is also entitled to the costs of bringing an action including, but not limited to, reasonable attorney's fees.

50. Under N.J.S.A. 33:1-93.14, "Fair market value" of an asset means "the price at which the asset would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have knowledge of the relevant facts."

FIRST CLAIM FOR RELIEF
(Breach of ABC§ 55-c)

51. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 50 above with the same force and effect as if fully set forth herein.

52. Pursuant to ABC § 55-c(4), no brewer may cancel, fail to renew, or terminate an agreement with a distributor, unless the brewer has good cause as defined in the statute, and provided the brewer has acted in good faith.

53. Pursuant to ABC § 55-c(5), no brewer may cancel, fail to renew or terminate an agreement unless the brewer or beer wholesaler furnished prior notification in accordance with ABC§ 55-c(5)(c).

54. PFI has breached ABC § 55-c by terminating Amtec's distribution rights in the State of New York by appointing a new exclusive distributor for the Zubr Brand in the territory without good cause and in bad faith.

55. PFI has breached ABC § 55-c by terminating Amtec's distribution rights in the State of New York by appointing a new exclusive distributor for the Zubr Brand in the territory without the required notification in accordance with ABC§ 55-c(5)(c).

56. By reason of the foregoing, Amtec is entitled to an award of damages due to PFI's violation of ABC § 55-c in an amount to be determined by the court pursuant to Section 7 of ABC §55-c, which exceeds the jurisdictional limitation of all lower Courts which would otherwise have jurisdiction over this action.

SECOND CLAIM FOR RELIEF
(Breach of Malt Beverage Practices Act)

57. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 56 above with the same force and effect as if fully set forth herein.

58. Pursuant to N.J.S.A. 33:1-93.15(c)(l), a brewer is prohibited from "terminat[ing], cancel[ling] or refus[ing] to renew a *contract, agreement or relationship with a wholesaler,* or to fail or refuse to grant to a wholesaler the right to purchase and resell any brand extension under the same form of agreement as the base product, in part or in whole, except where the brewer establishes that it has acted for *good cause and in good faith."* (emphasis added)

59. Pursuant to N.J.S.A. 33:1-93.14(3), before attempting to terminate a wholesaler, a brewer must "first giv[e] the wholesaler written notice setting forth all of the alleged deficiencies on the part of the wholesaler and giving the wholesaler a reasonable opportunity of not more than 120 days to cure the alleged deficiencies; provided, however, that such period for

cure may be increased or reduced to a commercially reasonable period by an order of a court in this State in a proceeding in which each party shall bear its own costs and expenses."

60. PFI has breached the Malt Beverages Practices Act by terminating Amtec's exclusive distribution rights for the Zubr Brand in the State of New Jersey by appointing a new exclusive distributor in the same territory without good cause and in bad faith.

61. PFI has breached the Malt Beverages Practices Act by terminating Amtec's exclusive distribution rights in the State of New Jersey for the Zubr Brand by appointing a new exclusive distributor in the same territory without the required notification in accordance with N.J.S.A. 33:1-93.14(3), and without giving Amtec the ability to cure the alleged deficiencies.

62. By reason of the foregoing, Amtec is entitled to an award of damages due to PFI's violation of Malt Beverage Practices Act in an amount to be determined by the court pursuant to N.J.S.A. 33:1-93.14(b), but which exceeds the jurisdictional limitation of all lower Courts which would otherwise have jurisdiction over this action.

WHEREFORE, Plaintiff demands judgment against Defendant for all causes of action in a sum which exceeds the jurisdictional limitation of all lower Courts which would otherwise have jurisdiction over this action, together with attorneys' fees, costs and disbursements and interest from the date of any verdict rendered herein.

Dated: New York, New York
November 25, 2019

DONOVAN HATEM LLP

By: _____
Joshua S. Stern, Esq.
Attorneys for Plaintiff
112 W. 34th Street, 18th Floor
New York, New York 10120
(212) 244-3333

DISTRIBUTORSHIP CONTRACT

Concluded on December 31, 2000 in Białystok by and between:
"**BROWAR DOJLIDY**" [Dojlidy Brewery] a limited liability company with its registered seat in Białystok, at ul. Dojlidy Fabryczne 28, 15-955 Białystok, entered into the register of Entrepreneurs maintained by the Local Court [Pol. *Sąd Rejonowy*] on Białystok, Commercial Court, Registry Division, under no. RHB 1217, NIP [VAT no.]: 542-00-11-792,
represented by:
1. Janina Koczara – Member of the Board
2. Przemysław Nowacki – Member of the Board

Hereinafter referred to as the **MANUFACTURER**

And

AMTEC International of NY Corp., with its registered seat in the USA, State of New York, County of Winchester, address: 213-215 N.9th St. Brooklyn, NY 11211, USA,
represented by:
Bogdan Pajor – President,
hereinafter referred to as the **DISTRIBUTOR**.

[Rectangular sticker reading: EXHIBIT, Respondents 2]

WHEREAS the MANUFACTURER has decided to launch the Products (defined hereinafter) on the market of the Territory (defined hereinafter),

WHEREAS the DISTRIBUTOR is willing to purchase the Products for the purposes of distributing the same within the Territory,

WHEREAS both parties are planning to expand the Products' market to the Territory,

in light of the afore, the Parties hereby agree as follows:

ARTICLE 1
DEFINITIONS

1. For the purposes of this Contract, "Products" shall mean good produced by the Manufacturer, as listed in detail in Appendix no. 1 hereto;
2. For the purposes of this Contract, "Territory" shall mean the geographic area specified in Appendix no. 2 hereto;
3. For the purposes of this Contract, "Price List" shall mean the price listing agreed upon by the Parties hereto and provided as Appendix no. 3 to the Contract;
4. For the purposes of this Contract, the expression "Sales Schedule" shall mean the framework schedule of sales and Product delivery dates, appended hereto as Appendix no. 4.

ARTICLE 2
SUBJECT OF CONTRACT

1. This Contract is concluded to specify the terms and conditions of collaboration between the Parties with regard to the sales and distribution of Products offered by the Manufacturer.
2. The Manufacturer hereby undertakes to sell Products to the Distributor and the Distributor undertakes to purchase Products and distribute the same, at its own risk and expense, within the Territory – subject to the provisions stipulated herein.

EXHIBIT 2

ARTICLE 3
SPECIFIC OBLIGATIONS OF THE DISTRIBUTOR

1. The Distributor shall organize, of and by itself, a wholesale and retail network within the Territory and shall ensure continuous supply of the Products thereto.
2. The Distributor – during the terms of this Contract – shall make all reasonable efforts to promote and expand sales of the Products, as well as to maintain and improve the Products' reputation.
3. The Distributor shall ensure storage of the Products in conditions consistent with the standards of beer storage.
4. The Distributor shall be obliged to inform the Manufacturer of any changes pertaining to the legal status of its business (name, address, personnel, persons authorized to represent the company, composition of the management board, etc.) as well as, where necessary, provide the Manufacturer, upon request, with information necessary to establish the Distributor's financial standing.
5. The Distributor shall not be authorized to accept any orders, take any credit, make or accept any commitments, be it express or implied, for or on behalf of the Manufacturer, nor shall it be authorized to represent the Manufacturer as an agent thereof or in any other capacity other than specifically agreed in this Contract.
6. The Distributor shall not use, or allow any natural or legal person under its control to use, any trademarks, or tradenames constituting the property of the Manufacturer without prior express consent of the Manufacturer.
7. Upon expiry of this Contract, the Distributor shall discontinue the use of any trademarks, service names or other tradenames or other Product designations used under the consent of the Manufacturer, as well as any marketing materials containing such trademarks, service names, tradenames or other designations owned by the Manufacturer.

ARTICLE 4
SPECIFIC OBLIGATIONS OF THE MANUFACTURER

1. The Manufacturer hereby grants the Distributor the right to use trademarks used in the designations of the Products, within the Territory and for the duration of the term of this Contract, for purposes related to the export and sales of Products and any related marketing activities.
2. The Manufacturer undertakes to name the Distributor as the sole supplier of the Products within the Territory to any new customers.
3. The Manufacturer undertakes to maintain the adequate quality of the Products in compliance with all applicable standards.
4. The Manufacturer undertakes to use only brand-new bottles and pallets.

ARTICLE 5
PERFORMANCE OF THE SUBJECT OF CONTRACT

1. The delivery of the Products and acceptance thereof by the Distributor shall be at the Manufacturer's warehouse located in Białystok, at ul. Dojlidy Fabryczne 28 , Poland.
2. The title to the Products along with all the related costs and risks shall pass onto the Distributor as at the moment of the Product's acceptance by the Distributor confirmed in the relevant internal export invoice signed by the Distributor's authorized representative (EXW – the Manufacturer's warehouse located at ul. Dojlidy Fabryczne 28, Białystok).

3. The Distributor shall be obliged to collect the Products on a regular basis, in accordance with the Products acceptance dates specified in the Sales Schedule.

ARTICLE 6
ORDERS

1. The Parties agree that the sale of Products shall take place only on the basis of orders placed by the Distributor within timeframes and in quantities stipulated in the Sales Schedule.
2. The orders referred to in paragraph 1 shall be placed by the Distributor by mail or fax, at least 14 days in advance prior to the planned date of delivery.
3. The orders shall be subject to acceptance or rejection by the Manufacturer, in whole or in part. The Manufacturer shall notify the Distributor of the acceptance or rejection, in whole or in part, of each order within one business day or receiving the order.
4. If an order is rejected, in whole or in part, the Sales Schedule shall be subject to amendment. The amendment shall adjust the time frame for the subsequent orders from the Distributor.

ARTICLE 7
QUANTITATIVE ACCEPTANCE

1. The quantitative acceptance of the Products shall be confirmed in the form of an internal export invoice signed by the representatives of the Distributor and the Manufacturer upon verifying that the quantity of the Products is consistent with the Distributor's order.
2. If quantity inconsistencies are not notified within the time frame specified in paragraph 1 above, the Distributor shall lose the right to make claims regarding the same.

ARTICLE 8
PRICE

1. Products shall be sold by the Manufacturer to the Distributor at prices specified in the Price List applicable as at the day of the sale.
2. The Manufacturer reserves the right to change the Product prices specified in the Price List. Any such change shall be notified by the Manufacturer to the Distributor at least 30 days in advance.
3. If the prices are subject to change, the Manufacturer shall provide the Distributor with the new applicable Price List, which shall be tantamount to amendment of the prices of Products sold by the Manufacturer under this Contract.

ARTICLE 9
PAYMENTS

1. The Distributor's payment for Products requisitions in an order, constituting a *pro-forma invoice*, shall be effected by depositing 50% of the purchase price, by way of advance payment, to the Manufacturer's bank account: **Kredyt Bank S.A. Białystok** [redacted]
The remaining 50% of the purchase price shall be paid to the Brewery's bank account within 35 (thirty-five) days of the date of issue of the invoice.

2. The Manufacturer's initiation of order performance activities shall be conditional upon the receipt of the Distributor effecting the advance payment.
3. The Distributor shall be obliged to present to the Manufacturer an adequate document confirming the payment. The document can be provided to the Manufacturer in person, by mail or by fax. The Manufacturer shall accept a document provided by fax only if the content of the faxed document remains legible.
4. The Distributor's payments shall be deemed as duly effects once the funds have been credited to the Manufacturer's bank account.

ARTICLE 10
CONFIDENTIALITY CLAUSE

1. The Distributor undertakes to keep confidential, during the term of this Contract, and not disclose without prior written consent of the Manufacturer, except as required by law or a competent authority, any information that remains not publicly available and is disclosed to the Distributor, and to use Confidential Information solely for purposes related to the performance of this Contract.
2. A breach by the Distributor of the provisions of the confidentiality clause contained in this Article shall oblige the Distributor to pay to the Manufacturer a contractual penalty in the amount stipulated in Art. 12.3 of this Contract.

ARTICLE 11
CONTRACTUAL PENALTIES

1. In the case of the Distributor's failure to comply with the Product acceptance time limits stipulated in Art. 6.1., the Distributor shall pay a contractual penalty for each day of delay in the amount of 1% (one percent) of the value of unclaimed Products.
2. In the case of the Distributor's failure to comply with Product volumes specified in the Sales Schedule, the Distributor shall be obliged to pay to the Manufacturer a contractual penalty in the amount of 10% (ten percent) of the value of Products unordered and/or unclaimed in due time.
3. In the event of the Distributor's breach of the obligations specified in Art. 3 or Art. 10.1 hereof, the Distributor shall be obliged to pay to the Manufacturer, for each instance of breach, a contractual penalty in the amount of USD 5.000,- (five thousand US dollars).

ARTICLE 12
SECURITY ON MANUFACTURER'S RECEIVABLES

1. By way of securing the Manufacturer's receivables under this Contract, on the date of signing hereof, the Distributor shall submit to the Manufacturer three (3) blank promissory notes with a "protest waived" clause signed by the Distributor.
2. The Manufacturer shall be entitled to fill out any of the promissory notes, at any time, stating the amount of receivables in arrears or contractual penalties due and assign the due date thereof. The promissory notes shall be returned to the Distributor immediately upon the expiry of this Contract, provided that any and all amounts due from the Distributor to the Manufacturer have been duly settled.

ARTICLE 13

SECURITY ON CONTINUITY OF COLLABORATION

1. This Contract constitutes an agreement strictly bound to the Distributor and as such may not be assigned by the Distributor without prior written consent of the Manufacturer.
2. The Distributor shall be *obliged to inform* the Manufacturer of any changes pertaining to the legal status of its business (name, address, personnel, principles of representation, etc.).
3. The Distributor shall be obliged to inform the Manufacturers immediately, in advance of any actual or legal circumstances related to in particular:
   a) the intention to discontinue economic activity or planned suspension thereof,
   b) initiation of bankruptcy, liquidation, or enforcement proceedings,
   c) loss of the license to trade in beer.

   Failure to notify the Manufacturer of any of the circumstances specified hereinabove shall constitute a material breach of the Contract with the consequences stipulated in Art. 14.3 of this Contract.
4. The Distributor hereby represents that any entity acquiring, in whole or in part, the title to or other rights in the Distributor's business shall be bound by all of the provisions of this Contract and that the rights and obligations of the parties under the provisions of this Contract shall survive and remain fully binding. The same shall apply irrespective of whether said acquisition occurs by way of sale of assets, sale of shares, a public offering, merger, or international partnership. Otherwise, all obligations under this Contract shall remain jointly and severally binding on the owners of (partners in) the Distributor's business as at the date of signing this Contract.

ARTICLE 14
TERM OF CONTRACT AND TERMINATION

1. This Contract shall come into force as at the day of its signing and shall be concluded for a defined period of time until December 31, 2002, with the possibility of extension.
2. Each of the Parties may terminate this Contract at any time, subject to a three (3) month period of notice submitted at the end of a calendar month. In each case the notice of termination shall be served by registered mail or in person. In particular, the date of receipt of the first postal advice note by the addressee or return of the letter to the sender with an "addressee unknown" or similar annotation shall also be construed as the date on which such notice has been duly served.
3. Notwithstanding of the foregoing, this Contract may be terminated by the Manufacturer with immediate effect, subject to written notification, in the event of:
   a) failure to provide the commercial effects stipulated in the Contract, in particular the Distributor's failure to comply with the time limits, order volumes and Product acceptance terms stipulated in the Sales Schedule,
   b) declaration of bankruptcy or liquidation with regard to the Distributor, or high likelihood of any of such circumstances occurring,
   c) a material breach of another provision of this Contract.

ARTICLE 15
FINAL PROVISIONS

1. This Contracts, including the appendices hereto, constitutes the sole and exclusive agreement between the Manufacturer and the Distributor pertinent to the subject matter hereof. This Contract supersedes any prior arrangements made between the Parties, be it written or oral. Both Parties confirm that they are not bound by any agreement, guarantee, or arrangement other than provided in this Contract.
2. All the appendices to this Contract constitute integral parts hereof.
3. This Contract shall remain binding upon the successors of the Distributor in the event that the Distributor sells its assets, merges with another company, or sells or assigns any part of its business.
4. Each of the Parties hereto hereby represents and warrants to the other Party that it has the full right and authority enter into this Contract, all the necessary steps have been taken by the Party with the competent authorities to facilitate the conclusion and performance of this Contract, the Party is bound by no contractual or other obligations that would prevent it from signing or performing this Contract. Each of the Parties hereto represents that it has presented registration documents valid as at the day of entering into this Contract.
5. This Contract shall be governed by the laws of Poland, in particularly by the provisions of the Polish Civil Code.
6. Any amendment or modification of this Contract must be done in writing by mutual agreement of the Parties, otherwise null and void.
7. All property disputes arising from or in relation to this Contract shall, under the Parties agreement, be subject to settlement by the Arbitration Court at the National Chamber of Commerce in Warsaw (Poland) pursuant to the court's rules of procedure.
8. Other disputes not subject to arbitration shall be settled by a common court of law competent for the Manufacturer's registered seat.
9. The headings used by the Parties in this Contract have been included only for the sake of convenience and shall not have normative significance.
10. Any correspondence and notifications pertaining to this Contract shall be deemed as served if sent to the following service addresses of the Parties, unless an address change has been duly notified by a Party:
    a) Ul. Dojlidy Fabryczne 28, 15-955 Białystok – Manufacturer
    b) 213-215 N. 9th St. Brooklyn, NY 11211, USA – Distributor
11. This Contract has been drawn up in two identical copies, one for each of the Parties.

Signatures and stamps of the Parties to the Contract

Manufacturer	**Distributor**
[rectangular stamp reading: Member of the Board, Chief Commercial Officer, Przemysław Nowacki; (-) signature illegible] [rectangular stamp reading: Member of the Board, /illegible/]	[rectangular stamp reading: BROWAR DOJLIDY Spółka z o.o. [LLC], 15-955 Białystok, ul. Dojlidy Fabryczne 28, tel. 7410-430, Dir. 73-29-970, NIP [VAT no.] 542-00-11-792, REGON [stat. no.] 050254575]

APPENDIX No. 1
PRODUCT SPECIFICATION

to the Distributorship Contract of December 31, 2000

The **Products** shall include the following products of the Manufacturer:

1. **"Żubr" Beer**
2. **"Magnat" Beer**

APPENDIX No. 2
Territory

to the Distributorship Contract of December 31, 2000

The **Territory** shall include the territories of the following US states:

1. **New York**
2. **Connecticut**
3. **New Jersey**
4. **Illinois**
5. **Pennsylvania**

APPENDIX No. 3
Price List

to the Distributorship Contract of December 31, 2000

The Parties to this Contract Product Price List:
1. "Żubr" Beer (0.5-liter bottle) – 6.2% vol, 12.5 BLG – USD 0.43
2. "Magnat" Beer (0.5-liter bottle) – 7.0% vol, 15.0 BLG – USD 0.47

APPENDIX No. 4
SALES SCHEDULE

to the Distributorship Contract of December 31, 2000

The Parties to this Contract agree upon the following schedule of Product orders in 2001:

In the period from January 2001 to December 2001 – 462,000 0.5-liter bottles.

Day Translations

Certified Translation

Certificate of Accuracy

Witold Wojtaszko
Translator

Translated documents: Distributorship Contract of December 31, 2000 (Browar Dojlidy / AMTEC International of NY Corp.)

As a translator for Day Translations, Inc., I, Witold Wojtaszko, declare that I am a bilingual translator who is thoroughly familiar with the English and Polish languages. I have translated the attached document to the best of my knowledge from Polish into English and the English text is an accurate and true translation of the original document presented to the best of my knowledge and belief.

Signed on March 31, 2020



Witold Wojtaszko

Professional Translator for Day Translations, Inc.

ADMINISTRATIVE APPEAL UNDER GENERAL STATUTES SECTION 4-183 — NOTICE OF FILING
(For use when service is made by certified or registered mail)

JD-CV-137 Rev. 10-15
C.G.S. § 4-183; P.B. § 14-7A

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

Instructions to Person Appealing Decision:

1. *Serve, in accordance with applicable law, a copy of the Appeal and this Notice of Filing by certified or registered mail on the agency that made the decision that is being appealed at the address of the agency or, if allowed by law, at the Office of the Attorney General, 55 Elm Street, Hartford, Connecticut.*
2. *Also serve a copy of the Appeal and this Notice of Filing by certified or registered mail on each party named in the decision of the agency at the address of the party contained in the decision.*
3. *File the Appeal and this Notice of Filing with the Clerk of the Superior Court for the Judicial District of New Britain or for the Judicial District in which the person appealing resides or, if that person is not a resident of this state, with the Clerk of the Judicial District of New Britain.*

Name of case *(Plaintiff v. Defendant)*		Case type code *(See reverse for codes)*
Polish Folklore Import Co., Inc. v. Connecticut Department of Consumer Protection, et al.		Major: **A** Minor: **20**
Judicial District	Address of Court	Telephone number of Court *(with area code)*
New Britain	**20 Franklin Square, New Britain, CT 06051**	**(860)515-5180**

Number of Plaintiffs: **1** | Number of Defendants: **3** | ☐ Form JD-CV-2 attached for additional parties

Parties	Name *(Last, First, Middle Initial)* and Address of Each party *(Number; Street; P.O. Box; Town; State; Zip; Country, if not USA)*	
First Plaintiff	Name: **Polish Folklore Import Co., Inc.** Address: **1128 Tower Road, Schaumberg, IL 60173**	P-01
Additional Plaintiff	Name: Address:	P-02
First Defendant	Name: **State of Connecticut Department of Consumer Protection** Address: **450 Columbus Boulevard, Suite 901, Hartford, CT 06103 c/o Attorney Caitlin Anderson**	D-01
Additional Defendant	Name: **Boguslaw Pajor, Amtec International of NY Corp.** Address: **1 Hartford Square, New Britain, CT 06052**	D-02
Additional Defendant	Name: **Attorneys Joshua Stern and Laura Beth Foster** Address: **Donovan Hatem LLP, 112 West 34th Street, 18th Floor, New York, NY 10120 -- Attorneys for Amtec**	D-03
Additional Defendant	Name: Address:	D-04

Notice To Defendant

1. The Plaintiff will file the attached Appeal of a final administrative decision. The Appeal attached to these papers states the claims that each Plaintiff is making.
2. **To be notified of further proceedings, you or your attorney must file a form called an "Appearance" with the clerk of the above-named Court at the above Court address within thirty (30) days of the mailing of the Appeal. You do not have to come to court on that date unless you receive a separate notice telling you to come to court.**
3. If you do not file an "Appearance" in a timely manner, the Court is authorized to enter a sanction against you.
4. The "Appearance" form may be obtained at the Court address above or at *www.jud.ct.gov* under "Court Forms."
5. If you have questions about the Notice of Filing and the Appeal, you should talk to an attorney quickly. **The Clerk of Court is not allowed to give advice on legal questions**.

Signed *(Sign and "x" proper box)*		Name of person signing at left	Date
Robert F Shea Jr	☐ Plaintiff ☒ Attorney for Plaintiff	**Robert F. Shea, Jr.**	**12/12/2019**

ADA NOTICE
The Judicial Branch of the State of Connecticut complies with the Americans with Disabilities Act (ADA). If you need a reasonable accommodation in accordance with the ADA, contact a court clerk or an ADA contact person listed at *www.jud.ct.gov/ADA*.

For Court Use Only
File Date

EXHIBIT 3

Docket number

STATE OF CONNECTICUT

RETURN DATE: JANUARY 14, 2020	)	SUPERIOR COURT
POLISH FOLKLORE IMPORT CO., INC.	)	JUDICIAL DISTRICT OF NEW BRITAIN
v.	)	AT NEW BRITAIN
DEPARTMENT OF CONSUMER PROTECTION, LIQUOR CONTROL DIVISION and AMTEC INTERNATIONAL OF NY CORP.	)	DECEMBER 12, 2019

ADMINISTRATIVE APPEAL

Polish Folklore Import Co., Inc. ("Polish Folklore"), by its undersigned counsel, pursuant to Connecticut General Statutes § 4-183, files this Administrative Appeal of the Decision of the Department of Consumer Protection, Liquor Control Division, issued on October 31, 2019 in the matter captioned *Boguslaw Pajor, Amtec International of NY Corp., Backer Amtec International of NY Corp., Liquor Permit Nos: LIW.605, LCB.517 and LCL.574*, Case No. 2019-500. In support thereof, Polish Folklore states:

INTRODUCTION

1. At issue is the right to sell at wholesale in Connecticut an imported beer called Zubr. Appellant Polish Folklore is a small importer and out-of-state shipper of alcoholic beverages. During 2018, Polish Folklore began to import Zubr beer, which is brewed in Poland by a company called Kompania Piwowarska. After Polish Folklore began to sell Zubr to a licensed Connecticut alcohol beverage distributor by the name of Arko, LLC ("Arko"), Amtec International of NY Corp. ("Amtec"), which operates competitive import and distribution companies, complained to the Department of Consumer Protection, Liquor Control Division ("Liquor Control Division"). Amtec claimed (a) it sold -- almost 15 years ago -- a beer called Dojlidy Zubr, which was brewed by a company by the name of Dojlidy Brewery; (b) Kompania Piwowarska's Zubr

was the "successor" to Dojlidy Brewery's Dojlidy Zubr, and (c) Amtec was thus entitled to be the distributor of Zubr in Connecticut pursuant to the Connecticut Liquor Control Act (the "Act").

2. Significantly, Zubr and Dojlidy Zubr are distinct and different brands and products. Dojlidy produced many beer products, including, but not limited to, Dojlidy Classic, Dojlidy Herbowe, Dojlidy Porter, Dojlidy Magnat and Dojlidy Zubr. The Dojlidy Brewery is no longer owned by Dojlidy, it is no longer operated as the Dojlidy Brewery, and none of the Dojlidy beers, including Dojlidy Zubr, have been produced for at least a decade. The Dojlidy Zubr trademark, which remained owned by Dojlidy, has expired.

3. During 2003, Kompania Piwowarska purchased the Dojlidy Brewery operations. However, Kompania Piwowarska did not produce Dojlidy Zubr or any other of the Dojlidy beers. Kompania Piwowarska brews Zubr, which is not the same brand as Dojlidy Zubr. Polish Folklore imports Zubr, not Dojlidy Zubr.

4. Although Zubr uses the old Dojlidy Zubr recipe, the brands are legally distinct. Zubr and Dojlidy Zubr have different packaging labels, with different designs and different colors. Moreover, each product was registered with the State of Connecticut, pursuant to the Act, under different legal names. Each product was also registered with the federal Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the federal alcoholic beverage regulator, under different legal names and with different federally approved packaging labels.

5. Amtec never registered any brand with any regulator by the name of Zubr. All of Amtec's State and Federal registrations were for Dojlidy Zubr. Additionally, both the State and Federal regulators treated Zubr and Dojlidy Zubr as distinct and different brands.

6. As a consequence of Amtec's complaint, the Liquor Control Division ordered Arko to stop selling Zubr to licensed retailers in Connecticut.

7. On June 7, 2019, Polish Folklore filed a petition with the Liquor Control Division in which it sought a determination by the Liquor Control Commission, *inter alia*, that: (a) Amtec is not, and was never, entitled to distribute Zubr in Connecticut; and (b) assuming *arguendo* Amtec had any right to distribute Zubr in Connecticut, (i) Polish Folklore had just and sufficient cause pursuant to the Act to terminate Amtec's distributorship, and (ii) Amtec waived its right to claim entitlement to distribute Zubr in Connecticut because it made no effort to purchase Zubr from Polish Folklore.

8. On July 18, 2019, the Liquor Control Commission held an evidentiary hearing and left the record open until August 12, 2019 for the parties to file post-trial briefs. On September 24, 2019, the Liquor Control Commission issued a Memorandum of Decision in favor of Amtec.[1] A copy of the September 24, 2019 Memorandum of Decision is attached hereto as Exhibit A. On October 11, 2019, Polish Folklore filed a Motion to Reconsider, which the Liquor Control Commission denied on October 31, 2019 without examining or addressing any of the points of error and arguments Polish Folklore presented. A copy of the October 31, 2019 Liquor Control Division ruling is attached hereto as Exhibit B.

9. Polish Folklore brings this action for administrative review and for judgment reversing the Liquor Control Commission's Orders of September 24, 2019 and October 31, 2019 and for such other relief as requested herein.

---

[1] One of the three Commissioners resigned after the hearing and before the Liquor Control Commission issued the Memorandum of Decision in this case.

The Parties

10. Appellant, Polish Folklore, is an Illinois corporation with its principal place of business in the State of Illinois. Polish Folklore is licensed as an out-of-state shipper of alcoholic beverages with the Liquor Control Division. Polish Folklore is the authorized United States importer of Zubr, which is produced by Kompania Piwowarska. Kompania Piwowarska appointed MAG Dystrybucja (a Polish distribution company) as the "Official Supplier" of Zubr to Polish Folklore. Polish Folklore purchases Zubr from MAG Dystrybucja.

11. The Liquor Control Division is an "agency" within the executive branch of government as that term is defined in Connecticut General Statutes § 4-166(1).

12. Amtec is a New York corporation, with its principal place of business in the State of New York. Amtec is an importer of alcoholic beverages, and Amtec owns and operates an alcoholic beverage distributor within the State of Connecticut.

Venue and Jurisdiction

13. Polish Folklore appeals pursuant to Connecticut General Statutes § 4-183 from the October 31, 2019 final decision of the Liquor Control Commission of the State of Connecticut Department of Consumer Protection.

14. Polish Folklore has exhausted all administrative remedies and is aggrieved by a final decision pursuant to Connecticut General Statutes § 4-183.

15. This appeal is filed and is being served within forty-five days of the October 31, 2019 final decision issuance in accord with General Statutes § 4-183.

Standard of Review

16. The interpretation of statutes presents a question of law. Although the Court is to give considerable weight to factual and discretionary determinations of administrative agencies, it is for the Courts, and not for administrative agencies, to expound and apply governing principles

of law. The Court's duty is to determine, in view of all the evidence, whether the agency, in issuing its orders, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.

Applicable Law

17. The Liquor Control Act provision at issue states in pertinent part:

> (2) When a holder of a wholesaler permit has had the distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper for six months or more, such distributorship may be terminated or its geographic territory diminished upon (A) the execution of a written stipulation by the wholesaler and manufacturer or out-of-state shipper agreeing to the change and the approval of such change by the Department of Consumer Protection; or (B) the sending of a written notice by certified or registered mail, return receipt requested, by the manufacturer or out-of-state shipper to the wholesaler, a copy of which notice has been sent simultaneously by certified or registered mail, return receipt requested, to the Department of Consumer Protection. No such termination or diminishment shall become effective except for just and sufficient cause, provided such cause shall be set forth in such notice and the Department of Consumer Protection shall determine, after hearing, that just and sufficient cause exists.
>
> C.G.S.A. § 30-17 (a)(2)

18. The Act applies only to a distributorship, *i.e.*, an ongoing relationship between a brewer and a distributor with respect to a particular brand, and then only to distribution relationships of six months or longer. C.G.S.A § 30-17(a)(2). The relationship can be terminated (assuming the existence of a distributorship) for just and sufficient cause. *Id.*

19. Connecticut law requires each brand of beer to be registered separately. It is not sufficient to simply register a general class of brands produced by a brewer.

20. The Act, as Section 30-63, states in pertinent part:

> Registration of brands, fees. Posting and notice of prices. Brand registration of fortified wine. When departmental approval prohibited. (a) No holder of any manufacturer, wholesaler or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale, any alcoholic liquors unless the name of the

> brand, trade name or other distinctive characteristic by which such alcoholic liquors are bought and sold, the name and address of the manufacturer thereof and the name and address of each wholesaler permittee who is authorized by the manufacturer or his authorized representative to sell such alcoholic liquors are registered with the Department of Consumer Protection and until such brand, trade name or other distinctive characteristic has been approved by the department.
>
> C.G.S.A § 30-63.

21. Sec. 30-6-B1 of the regulations provides:

> Sales to permittees. Every holder of an out-of-state shipper's permit shall sell only to a manufacturer or wholesaler in good standing within the state. No bottled goods shall be shipped into the state by an out-of-state shipper until the brand has been registered and the distributor nominated as required by section 30-63 of the Connecticut General Statutes.

22. Federal law is in accord with Connecticut law. Pursuant to Federal law, every brand of beer must receive a Certificate of Label Approval ("COLA"). 27 C.F.R. Subpart C - Labeling Requirements for Malt Beverages.

23. Section 30-17 of the Act does not give a distributor a right to distribute a brand it has never before distributed.

24. What constitutes a brand is a question of law, which is decided by considering a number of factors, including whether the products have: (a) different names; (b) different labels with different designs and colors; (c) different brewers; (d) different out-of-state shipper registrations; (e) different price postings; and (f) different federal COLAs. Also significant is how the distributors, the State and the Federal regulators treat the products.

Proceedings Before the Commission

25. At the hearing before the Commission, the following evidence was presented:

a. In addition to Dojlidy Zubr, the Dojlidy Brewery produced many beer products, including, but not limited to, Dojlidy Classic, Dojlidy Herbowe, Dojlidy Porter and Dojlidy Magnat.

b. The Dojlidy Brewery is no longer owned by Dojlidy, and is no longer operated as the Dojlidy Brewery. During 2003, Kompania Piwowarska purchased the operations of the Dojlidy Brewery.

c. Kompania Piwowarska is the Zubr brewer, *whereas* the Dojlidy Brewery was the Dojlidy Zubr brewer.

d. Kompania Piwowarska brews Zubr in multiple breweries, *whereas* Dojlidy Zubr was brewed only in the Dojlidy Brewery, which has not operated as the Dojlidy Brewery since 2003.

e. The trademarked name of the brand Amtec sold was Dojlidy Zubr, not Zubr. Kompania Piwowarska did not own the Dojlidy Zubr trademark.

f. The Dojlidy Brewery continued to own the Dojlidy Zubr trademark after it closed, and the Dojlidy Zubr trademark expired.

g. Zubr is packaged in a predominantly green can, *whereas* Dojlidy Zubr was packaged in a predominantly red can.

h. The Zubr beer label contains the phrase "Recipe of Dojlidy Brewery" for marketing purposes, which phrase also appears on products that were never produced by Dojlidy Brewery, such as PraZubr, *whereas* the Dojlidy Zubr label stated it was brewed at the "Dojlidy Brewery Bialystok," the purpose of which statement was to let the consumer know where the beer was brewed.

i. The brand name Zubr is prominently displayed on the brand Polish Folklore sells, *whereas* the brand name Dojlidy Zubr is prominently displayed on the brand Amtec sold.

j. Zubr is 6.0% alcohol by volume, *whereas* Dojlidy Zubr was 5.7% alcohol or 6.2% alcohol by volume.

k. Polish Folklore was authorized by MAG Dystrybucja (a Polish distributor for Kompania Piwowarska, the brewer of Zubr) to import a brand called Zubr, *whereas* Amtec (a New York importer) was

authorized by the Dojlidy Brewery to import the Dojlidy brand of products, including Dojlidy Zubr.

l. Polish Folklore filed a Federal COLA application for a brand called Zubr, *whereas* Amtec filed two Federal COLA applications for a brand called Dojlidy Zubr.

m. Polish Folklore registered a brand called Zubr Lager Beer with the Liquor Control Division, *whereas* Amtec registered a brand called Dojlidy Zubr or Dojlidy Zubr Beer with the Liquor Control Division.

n. Arko (Polish Folklore's Connecticut wholesaler) price posted Zubr in Connecticut, until requested by the Liquor Control Division to remove the price posting, *whereas* Amtec (the distributor) price posted "Dojlidy Zubr" and Amtec never price posted "Zubr."

o. Polish Folklore invoiced Arko for the purchase of Zubr, *whereas* Amtec invoiced its customers for the purchase of "Zubr – Dojlidy."

p. Amtec's monthly tax filings with Connecticut repeatedly reference "Zubr – Dojlidy" and not Zubr.

q. Other alcoholic products are sold by other companies and are called Zubr. One is another unrelated beer. One is another unrelated vodka. Polish Folklore also sold Arko PraZubr beer, which also has a bison on its label.

r. Amtec never once filed a document with the State or the Federal regulators calling the brand it was selling Zubr.

s. Amtec last sold Dojlidy Zubr during 2005.

t. Amtec never attempted to purchase Zubr from Polish Folklore, even though Amtec knew Polish Folklore was the United States importer of Zubr.

u. The brand Dojlidy no longer exists. The Dojlidy Brewery was sold and Dojlidy beers, including Dojlidy Zubr, have not been brewed for more than a decade.

The Commission's Memorandum of Decision

26. In its Memorandum of Decision, the Commission concluded "(1) Amtec was the duly appointed and registered exclusive importer and distributor of ***Zubr*** in the State of Connecticut by letter dated on or about 1998 from Dojlidy Brewery; (2) Amtec was duly reappointed and registered as the exclusive distributor of ***Zubr*** in State of Connecticut by letter dated April 24, 2003 from Dojlidy Brewery; (3) Amtec never relinquished its distribution rights to ***Zubr*** beer; (4) Amtec actively purchased and/or distributed ***Zubr*** beer to Connecticut retailers from 1998 to 2005; (5) Kompania Piwowarska S.A. (hereinafter "KP"), purchased the Dojlidy Brewery on February 4, 2003; (6) Amtec ceased distributing ***Zubr*** beer in Connecticut because KP the Polish manufacturer of Zubr beer, withdrew the product from the United States market from 2005 to 2018 and was unable to fill any Amtec purchase orders; (7) Polish Folklore never offered to sell Zubr beer to Amtec, which was the duly appointed and registered exclusive importer and distributor of ***Zubr*** in the State of Connecticut; (8) ***Zubr*** beer has been continuously brewed since 1768 according to the same recipe of the Dojlidy Brewery; (9) Zubr beer is sold with a distinctive label portraying the Zubr logo – a bison, and the bottle neck refers to the product as "Zubr"; and (9) (sic) Zubr beer is sold under the same brand name irrespective of a different alcohol by volume (ABV) or hops content." (Emphasis added.)

27. The Commission jumped to the conclusion, that Zubr and Dojlidy Zubr were the same product and brand. In reaching its decision, the Commission only concluded Zubr and Dojlidy Zubr are the same product and brand purportedly because:

> (1) both beers have been brewed pursuant to the exact same recipe; (2) both beers are brewed at the Dojlidy Brewery; (3) both beers use the Zubr beer trade name; and (4) both beers use the same bison logo. The fact that the beer might have a different brewery owner, different packaging, or lack of sales does not make the two beers different brands.

28. The Commission's conclusions are both legally and factually inaccurate and are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record.

A. The Commission Failed to Apply the Legal Standards Considered When Determining Whether Products are the Same or Different.

29. The Commission committed reversible error because it never considered the relevant legal factors applied when determining whether two alcohol beverage products are the same or different. These factors include each product's (a) different name; (b) different label with different designs and colors; (c) different brewers; (d) different out-of-state shipper registrations; (e) different price postings; and (f) different federal COLAs. Nor did the Commission consider how the distributors, the State and the Federal regulators treat and classify the products.

30. The Memorandum of Decision is, accordingly, in legal error, in excess of the Commission's statutory authority and arbitrary and capricious and/or an abuse of discretion.

B. The Commission's Findings of Fact are Clearly Erroneous in View of the Reliable, Probative and Substantial Evidence of the Whole Record, and its Findings Are Arbitrary and Capricious.

31. The Commission's Memorandum and Decision repeatedly and wrongfully concludes without any basis in fact that Amtec sold a product called "Zubr." This error is found in Commission findings above numbered (1), (2), (3), (4), (6) and (7). This conclusion is contrary to all of the evidence presented, which unequivocally demonstrates that Amtec sold a beer called "Dojlidy Zubr," not "Zubr." Among the evidence the Commission ignored, (a) Amtec's state registration listed the product it sold as "Dojlidy Zubr;" (b) Amtec obtained a federal COLA for the brand "Dojlidy Zubr;" (c) the brand name "Dojlidy Zubr," not "Zubr," appeared on the product Amtec previously sold; and (d) Amtec never once filed a document with the State or the Federal regulators calling the brand it was selling "Zubr."

32. The Memorandum of Decision is, accordingly, in legal error, in excess of the Commission's statutory authority and arbitrary and capricious and/or an abuse of discretion.

C. The Commission Applied Inapplicable Brand Reintroduction Law to Conclude Amtec has a Right to Distribute Zubr.

33. The Commission committed reversible error when it relied upon Commission decisions holding that the withdrawal of a product from the marketplace does not constitute just and sufficient cause for an out of state shipper to terminate a distribution relationship upon the product's reintroduction into the Connecticut marketplace. The error was committed because the products Zubr and Dojlidy Zubr are not, and have never been, the same product or brand.

34. The Memorandum of Decision is, accordingly, in legal error, in excess of the Commission's statutory authority and arbitrary and capricious and/or an abuse of discretion.

D. The Commission Wrongly Concluded Polish Folklore had an Obligation to Solicit Amtec to Purchase and Distribute Zubr.

35. The Commission committed reversible error when it concluded Polish Folklore had an affirmative duty to seek out Amtec and offer Amtec the opportunity to purchase Zubr for wholesale distribution in the State of Connecticut.

36. Polish Folklore imports the Zubr brand of beer, not Dojlidy Zubr, which Amtec last sold during 2005. Nothing in the law required Polish Folklore to offer Amtec the opportunity to distribute Zubr in Connecticut.

37. The Memorandum of Decision is, accordingly, in legal error, in excess of the Commission's statutory authority and arbitrary and capricious and/or an abuse of discretion.

E. Amtec Waived any Right to Distribute Zubr, Assuming *Arguendo*, Zubr is the Same Beer as Dojlidy Zubr.

38. The Commission committed reversible error by failing to address Amtec's waiver of its right to distribute Zubr beer, assuming *arguendo* Zubr is the same brand/product as Dojlidy Zubr.

39. Polish Folklore presented uncontroverted evidence that Amtec never attempted to purchase Zubr from Polish Folklore.

40. Because Amtec never attempted to purchase Zubr from Polish Folklore, Amtec waived its right to complain about its claimed entitlement to purchase and distribute Zubr in Connecticut.

41. The Memorandum of Decision is, accordingly, in legal error, in excess of the Commission's statutory authority and arbitrary and capricious and/or an abuse of discretion.

F. Assuming, *Arguendo*, Zubr is the Same Beer as Dojlidy Zubr, Polish Folklore had Just and Sufficient Cause to Terminate Amtec's Right to Distribute Zubr in Connecticut.

42. The Commission committed reversible error when it did not consider Amtec's failure to purchase, or even attempt to purchase, Zubr beer from Polish Folklore for distribution in Connecticut.

43. Amtec never placed an order for Zubr with Polish Folklore, and never attempted to place an order with Polish Folklore, for the purchase of Zubr for distribution in Connecticut.

44. Failure to purchase or attempt to purchase product from the legally registered importer of the product constitutes just and sufficient cause under the Act warranting a termination of distribution rights.

45. The Memorandum of Decision is, accordingly, in legal error, in excess of the Commission's statutory authority and arbitrary and capricious and/or an abuse of discretion.

WHEREFORE, Plaintiff Appellant, Polish Folklore, Inc. respectfully prays for the entry of a judgement finding:

A. The Liquor Control Commission committed reversible error;

B. Dojlidy Zubr and Zubr are, and have always been, different brands;

C. Amtec never had a right to distribute Zubr, and therefore is not entitled to distribute Zubr pursuant to the Liquor Control Act, C.G.S.A § 30-17 (a)(2);

D. There is just and sufficient cause to terminate Amtec as a distributor, assuming *arguendo* Dojlidy Zubr and Zubr are the same brand;

E. Polish Folklore is legally entitled to sell Zubr to Arko (its registered Connecticut distributor);

F. Polish Folklore is entitled to recover from the State reasonable fees and expenses pursuant to Connecticut General Statutes § 4-184a; and

G. For such other and further relief as is just.

Dated: December 12, 2019

Respectfully submitted,

POLISH FOLKLORE IMPORT CO., INC.

By: Robert F. Shea, Jr.
One of its Attorneys

Earl E. Farkas (e.farkas@gozdel.com)
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(*Pro Hac Vice*)

Robert F. Shea, Jr. (shea@shealawinc.com)
LAW OFFICES OF ROBERT F. SHEA, JR., LLC
P.O. Box 271883
Hartford, CT 06127
(860) 989-5567
Juris No. 404133

EXHIBIT A

STATE OF CONNECTICUT

DEPARTMENT OF CONSUMER PROTECTION

IN THE MATTER OF

Boguslaw Pajor
Amtec International of NY Corp.
1 Hartford Square
New Britain, CT 06052

Case No. 2019-500
September 24, 2019

MEMORANDUM OF DECISION

This matter involves a request to terminate Amtec International of NY Corp. (hereinafter "Amtec"), holder of out-of-state wholesaler permit LIW.605, Connecticut out-of-state shipper of liquor permit LCL.574, and Connecticut out-of-state shipper of beer permit LCB.517, as wholesaler for Zubr beer in the State of Connecticut. A formal administrative hearing was held on July 18, 2019 before the Liquor Control Commission (hereinafter "Commission"). The record was left open to allow for the submission of post-hearing briefs until August 12, 2019.

The Department of Consumer Protection had received a notice dated June 7, 2019 from Polish Forklore Import Co., (hereafter "Polish Forklore") holder of an out-of-state shipper liquor permit LSL.1814 and out-of-state shipper of beer permit LSB.1001, for the termination of Amtec, as wholesaler for Zubr beer in the State of Connecticut.

Polish Forklore seeks to terminate Amtec's distribution rights pursuant to Section 30-17(a)(2) which requires a showing of "just and sufficient cause". The statute defines just and sufficient cause as "...the existence of circumstances which, in the opinion of a reasonable person considering all of the equities of both the wholesaler and the manufacturer or out-of-state shipper warrants a termination or diminishment of a distributorship as the case may be." The "...determination of what constitutes "just and sufficient cause" is a matter for consideration by this Commission, after weighing the equities of both parties to

ascertain whether termination is warranted." Schiefflin & Co. v. Department of Liquor Control, 194 Conn. 165, 479 A.2d 1191 (1984).

Based upon the evidence and testimony adduced at the hearing, we find the following facts: (1) Amtec was the duly appointed and registered exclusive importer and distributor of Zubr in the State of Connecticut by letter dated on or about 1998 from Dojlidy Brewery; (2) Amtec was duly reappointed and registered as the exclusive distributor of Zubr in the State of Connecticut by letter dated April 24, 2003 from Dojlidy Brewery; (3) Amtec never relinquished its distribution rights to Zubr beer; (4) Amtec actively purchased and/or distributed Zubr beer to Connecticut retailers from 1998 to 2005; (5) Kompania Piwowarska S.A. (hereafter "KP"), purchased the Dojlidy Brewery on February 4, 2003; (6) Amtec ceased distributing Zubr beer in Connecticut because KP the Polish manufacturer of Zubr beer, withdrew the product from the United States market from 2005 to 2018 and was unable to fill any Amtec purchase orders; (7) Polish Forklore never offered to sell Zubr beer to Amtec, which was the duly appointed and registered exclusive importer and distributor of Zubr in the State of Connecticut; (8) Zubr beer has been continuously brewed since 1768 according to the same recipe of the Dojlidy Brewery; (9) Zubr beer is sold with a distinctive label portraying the Zubr logo – a bison, and the bottle neck refers to the product as "Zubr"; and (9) Zubr beer is sold under the same brand name irrespective of a different alcohol by volume (ABV) or hops content.

Based upon the testimony given at the Hearing and evidence submitted into the record, Amtec has demonstrated that it is the duly appointed and registered distributor of Zubr beer to retailers in the State of Connecticut. Previous decisions by the Commission have held that the withdrawal of a product from the marketplace for several years does not constitute just and sufficient cause to terminate a distributorship. *(In the Matter of Amtec International of NY Corp., October 22, 1988,* citing Declaratory Ruling *In Re Johnny Barton, Inc.* November 10, 1987). In addition, the Commission declined to terminate a wine distributorship in Connecticut even though product had not been ordered for more than six years. *(In the Matter of New England Wines & Spirits, Inc. November 4, 2014).*

Polish Forklore makes the additional legal argument that the Zubr beer that was distributed by Amtec is a different brand than the product imported by Polish Forklore. The Commission finds this legal argument to be without factual basis. The evidence and testimony presented at the hearing demonstrate the following: (1) both beers have been brewed pursuant to the exact same recipe; (2) both beers are brewed at the Dojlidy Brewery; (3) both beers use the Zubr beer trade name; and (4) both beers use the same bison logo. The fact that the beer might have a different brewery owner, different packaging, or lack of sales does not make the two beers different brands.

Polish Forkore's General Manager, Jakub Samara, testified that the recipes of both beers are identical. No contrary evidence or testimony was submitted by Polish Forklore to refute this testimony. In addition, KP admits in Polish Forklore's June 7, 2019 letter submitted to the Commission, that "[t]his is to inform that Kompania Piwowarska SA...on 04.02.2003 purchased the Dojlidy Zubr brewery in Pialystock. Therefore, since 2003, the company has been the owner of the ZUBR brand, is in the possession of the formula and all the rights above." (See Exhibit K to Polish Forklore's Termination Notice). KP's admission that it took over the Zubr brand from the Dojlidy Brewery upon its acquisition is evidence that the two beers are one and the same product.

In addition, Polish Forklore makes the argument that its Zubr beer is a "brand extension" different from Amtec's Zubr beer brand. The Commission finds this legal argument to be without merit. The evidence submitted to the Commission demonstrates that Polish Forklore's Zubr beer and Amtec's Zubr beer are both sold under the Zubr trade name and both use the logo of a bison on the beer's packaging. Polish Forkore's General Manager, Jakub Samara, testified that the recipes of both beers are identical with the only distinction between the two beers being the use of Dojlidy (the brewery for both products) in the name of both said brands. Finally, the two beers different alcohol by volume (ABV) or hops content is a byproduct of the manufacturing process and does not constitute a "brand extension".

Based upon the testimony and evidence presented at the Hearing and subsequent briefs submitted into the record, the Commission does not find the existence of circumstances that warrant a termination in accordance with C.G.S. Section 30-17(a)(2).

DEPARTMENT OF CONSUMER PROTECTION
LIQUOR CONTROL COMMISSION
BY:

Anne K. Stiber

Anne K. Stiber, Esq., Designated Presiding Officer

Laura Anne Cahill

Laura A. Cahill, Commissioner

Parties:

Attorneys Joshua S. Stern and Laura Beth Foster, Attorneys for Amtec International of NY Corp.
Donovan Hatem LLP
112 West 34th Street, 18th Floor
New York, NY 10120

Attorney Earl E. Farkas, Attorney for Petitioner, Polish Forklore Import Co., Inc.
Gozdecki, Del Giudice, Americus, Farkas & Brocato, LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601

Attorney Robert F. Shea, Jr., Attorney for Petitioner, Polish Forklore Import Co., Inc.
Law Offices of Robert F. Shea, Jr., LLC
P.O. Box 271883
Hartford, CT 06127

Nonparties:

John Suchy, Director, Liquor Control Division
Connecticut Beverage Journal, 2508 Whitney Ave, P.O. Box 185159. Hamden, CT 06518

Connecticut State Library, 231 Capitol Avenue, Hartford, CT 06106

EXHIBIT B

STATE OF CONNECTICUT

DEPARTMENT OF CONSUMER PROTECTION

October 31, 2019
Via US Mail and Certified Mail

Boguslaw Pajor
Amtec International of NY Corp.
1 Hartford Square
New Britain, CT 06052

Case No. 2019-500

DENIAL OF REQUEST FOR RECONSIDERATION

On July 18, 2019, after due notice, the Department of Consumer Protection, Liquor Control Commission, held a request for termination hearing regarding Amtec International of NY Corp. ("Amtec"), as requested by Polish Folklore Import Co., Inc. ("Polish Folklore"). The record was held open until August 12, 2019 to allow for the submission of post-hearing briefs. In a decision dated September 24, 2019, the Liquor Control Commission denied the request for termination.

In an e-mail sent on October 11, 2019, Polish Folklore sent a motion for reconsideration in accordance with Connecticut General Statues Section 4-181a. In an e-mail sent October 21, 2019, Amtec sent its opposition to Polish Folklore's request.

In order to grant reconsideration of its decision, we must find there has been an error of fact or law that must be corrected, new and material evidence exists that for good reason was not presented previously, or other good cause for reconsideration has been shown. In the present case, however, the request for reconsideration fails to include any of the above. Polish Folklore has failed to provide any actionable justification for reconsideration. Therefore, the Liquor Control Commission, Department of Consumer Protection hereby denies the request for reconsideration of its September 24, 2019 decision.

DEPARTMENT OF CONSUMER PROTECTION
LIQUOR CONTROL COMMISSION
BY:

Anne K. Stiber

Anne K. Stiber, Esq.
Designated Presiding Officer

Laura Cahill, Commissioner

Parties:
Attorneys Joshua S. Stern and Laura Beth Foster
Donovan Hatem LLP
112 West 34th Street, 18th floor
New York, NY 10120

Attorney Earl E. Farkas
Gozdecki, Del Giudice, Americus, Farkas & Brocato, LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601

Non-parties:
Connecticut Beverage Journal, 2508 Whitney Ave., P.O. Box 185159, Hamden, CT 06518
John Suchy, Director, Liquor Division
Connecticut State Library, 231 Capitol Avenue, Hartford, CT 06106



Attorney/Firm: ROBERT FRANCIS SHEA JR (404133) E-Mail: shea@shealawinc.com Logout

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Type of Transaction:	**E-File New Case**
Court Fee:	**$360.00**
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retailers throughout Connecticut. (*See* Exhibit J, Invoices)[6] In connection therewith, Amtec price posted Zubr in Connecticut. For the next seven years through at least July 2005, Amtec sold Zubr to retailers in Connecticut. (*See* Exhs. K, L, M, N, O, P, and Q, Beverage Tax Returns)

C. The Sale of the Dojlidy Brewery to KPin 2003

On or about February 4, 2003, Browar Dojlidy sold the Dojlidy Brewery to KP, which is a SABMiller[7] subsidiary. (*See* Exhibit R, and PFI Exhibit 14)[8] (*See also*, Exhibit K to PFI's Termination Notice wherein KP attests that it "purchased the Dojlidy Zubr brewery in Bialystok. Therefore, since 2003 the company [KP] has been the owner of the ZUBR brand, is in the possession of the formula and all the rights to be above.") Nevertheless, despite the sale of the Dojlidy Brewery to KP, Amtec continued to order Zubr through September 2003. (*See* Exhibit S, Purchase Orders) Tellingly, the documents evidencing Amtec's post-KP acquisition orders simply list the product being sold as Zubr and not as Dojlidy Zubr.

During 2004, as indicated in correspondence to KP from the then Amtec General Manager, Beata Wiacek ("Wiacek") (who testified at the Hearing), Amtec emailed KP's Export Manager, Jerzy Kowalski to place additional orders of Zubr; but, Kowalski did not respond thereto. Ultimately, Wiacek's email was sent to Anna Swietek at KP who only then informed Amtec that "there are no specific plans on the distribution of Zubr in the U.S." (*See* Exhibit T, 2004 Email) On May 19, 2005, Amtec subsequently submitted an order for Zubr, which KP did not fill. (*See* Exhibit U, Purchase Orders)

II. KP'S REINTRODUCTION OF ZUBR INTO THE US MARKET

A. PFI's Distribution of Zubr in Connecticut

[6] The handwritten invoices simply refer to the product as Zubr.
[7] In 2002, South African Breweries bought the North American Miller Brewing Company to found SABMiller, becoming the second largest brewery, after North American Anheuser-Busch.
[8] "PFI Exhibit _" refers to PFI's hearing exhibits.

GROUP EXHIBIT 4

Zubr remained out of the United States market from 2005 through 2018. On April 11, 2018, PFI submitted an Application for Certificate of Label Approval, which the TTB approved on April 26, 2018 (the "PFI Certificate"). (*See* PFI Exhibit 15) Much like Amtec's 1997 Certificate and its 2003 Certificate, the PFI Certificate provided that the Zubr beer front labels read as follows: "ORIGINAL RECIPE OF BEER DOJLIDY (NAME OF THE CITY)" and "ORIGINAL RECIPE AND TASTE." Additionally, as shown on the three labels attached thereto: (1) the front label contained a logo of a bison, (2) the neck label read "ORIGINAL RECIPE," and (3) the back label stated "ZUBR LAGER BEER DOJLIDY BREWERY," "ORIGINAL RECIPE AND TASTE," and listed an ATV of 6% (as compared with 6.2% on the 1997 Certificate and 5.7% on the 2003 Certificate). (See Exhibit V, Regarding Simplification of Packaging) Although there was no testimony as to when PFI began to import Zubr into the US, it appears that it was middle to end of 2018.[9] However, instead of purchasing the product from KP, PFI was appointed by MAG Dystrybucja ("MAG"), a Polish distributor of KP.[10]

Thereafter, PFI specifically undertook to undermine Amtec's distribution rights in Connecticut. In particular, by Letter of Appointment dated September 27, 2018, PFI certified that it had appointed Arko as a distributor for the State of Connecticut for "ZUBR LAGER BEER." On October 14, 2018, PFI registered "ZUBR LAGER BEER" with the Department.

In January 2019, Amtec first became aware that Arko had price posted Zubr in Connecticut, and contacted the Department to report same. (PFI Exhibit 7) However, in its response to Amtec's assertion that it had the rights to distribute Zubr in Connecticut, PFI claimed that the Zubr product distributed by Amtec was different than the product being imported by PFI. Accordingly, by letter dated April 25, 2019 to the Department, Amtec replied to PFI's ridiculous

[9] PFI's appointment letter (PFI Exhibit 14) is not dated until October 17, 2018.

EXHIBIT T

Beata Wiacek

From: Anna Świętek <ANNA.SWIETEK@kp.sabmiller.com>
To: Beata Wiacek <beata@yespils.com>
Sent: Monday, April 18, 2005 8:22 AM
Subject: RE: Magnat and Żubr

Dear Beata,

Today I have attempted to get in contact with Mr. Bogusław Pajor.
As far as I am aware, there is no agreement between the companies Piwowarska and Amtec. Thus, I do not really understand the focus on the company Piwowarska: "Our Agreement is still in force."

The beer Magnat was removed from production at the Dojlidy Breweries. There are also no specific plans on the distribution of Żubr in the US. I will attempt to clarify this issue on the phone with Bogusław.

At the Dojlidy Breweries (BD) there is no export department and the entirety of export activities is handled in Poznan. Mr. Kowalski has not worked at BD since last year.

Sincerely,
Anna Świętek

Anna Świętek
Kompania Piwowarska S.A.
Tel: +48 61 87 87 415
Fax: +48 61 87 87 538
Mobile: +48 601 569 355
E-mail: aswietek@kp.pl

-----Original Message-----
From: Beata Wiacek [mailto:beata@yespils.com]
Sent: Wednesday, March 09, 2005 8:36 PM
To: Anna Świętek
Subject: Re:

Ms Anna Swietek

We have received you e-mail.
In response to you statement that our agreement has expired I would like to correct you that our Agreement is still in force effect
and Amtec is the importer for the United States for your brands Dojlidy Zubr and Magnat.
Regarding the missing documents you have mentioned I would like to inform you that a whole package of documents was mailed by registered letter
(# RR 162513918 US) on November 5th 2004 to your attention.
I would like to add that Amtec is still interested in having your brands in our portfolio and attached please find our order for 4 containers of
Zubr and Magnat beer.

Thank you,

Beata Wiacek
General Manager
Amtec Int'l of NY Corp.

4/18/2005

— Original Message —
From: Anna Świętek
To: Beata Wiacek
Sent: Wednesday, February 23, 2005 9:42 AM

Dear Beata,
Currently the company Piwowarska does not sell Żubr beer for export to the US.

Therefore, the agreement between the companies Amtec and BD expired but there remains one unpaid amount of USD 6,603.00, which occurred in conjunction with the overload of a computer at BB. I therefore kindly request that you send an invoice for the amount above in order to pay this amount, in accordance with the correspondence dated 11/03/04.

Kind regards,

Ania Świętek

Anna Świętek
Kompania Piwowarska S.A.
Tel: +48 61 87 87 415
Fax: +48 61 87 87 538
Mobile: +48 601 569 355
E-mail: aswietek@kp.pl

— Original Message —
From: Beata Wiacek [mailto:beata@yespils.com]
Sent: Thursday, February 10, 2005 7:38 PM
To: Anna Świętek
Subject: Dojlidy
Greetings,

I took the liberty to write to you because I have not had contact with the current export manager at Dojlidy, Mr. Jerzy Kowalski, for several months. I have not received any response to any of my e-mails in which I request information on Żubr and Magnat.
We are prepared to place orders and we wish to prepare promotions but no one has contacted us.
I kindly request information on who can be contacted on these issues and who is the person in charge of exports.

Sincerely,
Beata Wiacek
General Manager
Amtec Int'l of NY Corp.

4/18/2005

This e-mail and any file attachments transmitted with it are intended solely for the addressee(s) and may be legally privileged and/or confidential. If you have received this e-mail in error please destroy it and contact the sender. Replies to this email may be monitored by KP S.A. If you are not the addressee you may not disclose, copy, distribute or take any action based on the contents hereof. Any unauthorised use or disclosure is prohibited and may be unlawful. The views and opinions expressed in this e-mail message may not necessarily be those of the Management Board of KP S.A.

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4/18/2005

TRANSPERFECT

STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK

CERTIFICATION

I, Anders Ekholm, as an employee of TransPerfect Translations, Inc., do hereby certify, to the best of my knowledge and belief, that the provided Polish into English translation(s) of the source document(s) listed below are true and accurate:

- Emails between Beata Wiacek and Anna Swietek from February to April 2005

TransPerfect Translations, Inc., a translation organization with over 90 offices on six continents, is a leader in professional translations. TransPerfect Translations, Inc. has over twenty years experience translating into the above language pair, its work being accepted by business organizations, governmental authorities and courts throughout the United States and internationally.

TransPerfect Translations, Inc. affirms that the provided translation was produced in according to our ISO 9001:2015 and ISO 17100:2015 certified quality management system, and also that the agents responsible for said translation(s) are qualified to translate and review documents for the above language pair, and are not a relation to any of the parties named in the source document(s).

Anders Ekholm, Project Assistant

Sworn to before me this
Wednesday, July 17, 2019

Signature, Notary Public

AURORA ROSE LANDMAN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01LA6380858
Qualified in New York County
My Commission Expires 09-17-2022

Stamp, Notary Public

Beata Wiacek

From: "Anna Świętek" <ANNA.SWIETEK@kp.sabmiller.com>
To: "Beata Wiacek" <beata@yespils.com>
Sent: Monday, April 18, 2005 8:22 AM
Subject: RE: Magnat i Żubr

Szanowna Pani Beato,

Postaram się w dniu dzisiejszym skontaktować z p. Bogusławem Pajorem.

O ile mi wiadomo, nie ma umowy pomiędzy Kompanią Piwowarską a firmą Amtec. Nie bardzo więc rozumiem uwagę na temat umowy z Kompanią Piwowarską: " our Agreement is still in force".

Piwo Magnat zostało wycofane z produkcji w Browarach Dojlidy. Nie ma też konkretnych planów co do dystrybucji piwa Żubr w USA. Postaram się wyjaśnić tę sprawę telefonicznie z p. Bogusławem.

W browarach Dojlidy nie istnieje dział eksportu i całość sprzedaży eksportowej jest obsługiwana w Poznaniu. Pan Kowalski nie pracuje w BD od maja zeszłego roku.

Z wyrazami szacunku,
Anna Świętek

Anna Świętek
Kompania Piwowarska S.A.
tel: +48 61 87 87 415
fax: +48 61 87 87 538
mobile: +48 601 569 355
e-mail: aswietek@kp.pl

-----Original Message-----
From: Beata Wiacek [mailto:beata@yespils.com]
Sent: Wednesday, March 09, 2005 8:36 PM
To: Anna Świętek
Subject: Re:

Ms Anna Swietek

We have received you e-mail.
In response to you statement that our agreement has expired I would like to correct you that our Agreement is still in force effect
and Amtec is the importer for the United States for your brands Dojlidy Zubr and Magnat.
Regarding the missing documents you have mentioned I would like to inform you that a whole package of documents was mailed by registered letter
(# RR 162513918 US) on November 5th 2004 to your attention.
I would like to add that Amtec is still interested in having your brands in our portfolio and attached please find our order for 4 containers of
Zubr and Magnat beer.

Thank you,

Beata Wiacek
General Manager
Amtec Int'l of NY Corp.

---- Original Message ----
From: Anna Świętek
To: Beata Wiacek
Sent: Wednesday, February 23, 2005 9:42 AM

Szanowna Pani Beato,

Aktualnie Kompania Piwowarska nie prowadzi sprzedaży piwa Żubr do USA.

Ponieważ umowa pomiędzy firmą Amtec i BD wygasła, a pozostała jeszcze nie rozliczona kwota 6.603,00 USD, która powstała w wyniku strat w związku
z przeładowaniem komputera w BD, bardzo proszę o przesłanie faktury na powyższą kwotę w celu rozliczenia tej kwoty, zgodnie z pismem z dnia 3.11.04.

Pozdrowienia,

Ania Świętek

Anna Świętek
Kompania Piwowarska S.A.
tel: +48 61 87 87 415
fax: +48 61 87 87 538
mobile: +48 601 569 355
e-mail: aswietek@kp.pl

-----Original Message-----
From: Beata Wiacek [mailto:beata@yespils.com]
Sent: Thursday, February 10, 2005 7:38 PM
To: Anna Świętek
Subject: Dojlidy

Witam

Pozwalam sobie do Pani napisac poniewaz od kilku miesiecy nie mam kontaktu
z dotychczasowym managerem exportu w Dojlidach Panem Jerzym Kowalskim.
Nie dostalam odpowiedzi na zaden z mich e-mail w ktorych prosze o informacje
na temat Zubra i Magnata.
Jestesmy gotowi do zlorzenia zamowien, chcemy przygotowac promocje ale
nikt z nami sie nie kontaktuje.
Bardzo prosze o informacje do kogo mozemy kierowac pytania i kto jest osoba
ktora zajmuje sie exportem

Z powazaniem
Beata Wiacek
General Manager
Amtec Int'l Of NY Corp.

Ta wiadomosc oraz wszystkie zalaczniki w postaci plikow przekazane wraz z nia przeznaczone sa wylacznie dla adresata (lub adresatow) i moga byc poufne. Jesli otrzymaliscie Panstwo te wiadomosc przez pomylke, prosimy ja zniszczyc i skontaktowac sie z nadawca. Odpowiedzi na te wiadomosc moga byc monitorowane przez KP S.A. Jesli nie sa Panstwo adresatem tej

wiadomosci, zabronione jest jej ujawnianie, kopiowanie, dystrybuowanie lub jakiekolwiek inne wykorzystanie niezgodne z interesem KP S.A. Uzycie lub ujawnienie wiadomosci bez odpowiednich uprawnien jest zabronione i moze byc niezgodne z prawem. Poglady i opinie wyrazone w tej wiadomosci nie musza byc zgodne z pogladami Zarzadu KP S.A.

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U.S.A.

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KOMPANIA PIWOWARSKA / SAB MILLER
ANNA ŚWIĄTEK
UL. DOJLIDY FABRYCZNE 28, 15-955 BIAŁYSTOK
POLAND

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FROM
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430 MORGAN AVE.
BROOKLYN, NY 11222
U.S.A.

KOMPANIA PIWOWARSKA S.A.

Emtec
INTERNATIONAL OF NY CORP.
Beer Importer & Distributor
430 Morgan Avenue, Brooklyn, NY 11222 | Tel. 718-782-8993, Fax 718-782-8990 | info@yespils.com

18 Maj 2005

Pani Anna Swietek
Dzial Exportu
Kampania Piwowarska
Ul Dojlidy Fabryczne 28
15-955 Bialystok

W zalaczeniu przesylam ponownie zamowienia na piwo Zubr i Magnat.
Prosze o kontakt kiedy mozemy liczyc na zrealizowanie zamowien.

Z powazaniem
Beata Wiacek
General Manager

AMTEC INT'L OF NY CORP.

Beer Importer & Distributor
430 Morgan Av, 1-800-YES-PILS
Brooklyn, NY 11222
1-800-YES-PILS

Purchase Order

DATE	P.O. NO.
3/9/2005	1579

Vendor

Dojlidy Bialystok Brewery
28 Dojlidy Fabryczne St.
15955 Białystok,Poland

SHIP TO

AMTEC INTERNATIONAL OF NY CORP.
430 MORGAN AVENUE
BROOKLYN, NY 11222
USA

ORDER #	TERMS	Expected	SHIP VIA
	Due on receipt	3/9/2005	

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Zubr-Dojlidy	Zubr-Dojlidy 16.9 FL.Oz. 1 KONTENER 40 STOPOWY NA PALETACH			

AMTEC INT'L OF NY CORP
Beer Importer & Distributor
430 Morgan Avenue
Brooklyn,NY 11222
TEL (718)782-8993
FAX (718)782-8990

Total $0.00

AMTEC INT'L OF NY CORP.

Purchase Order

Beer Importer & Distributor
430 Morgan Av, 1-800-YES-PILS
Brooklyn, NY 11222
1-800-YES-PILS

DATE	P.O. NO.
3/9/2005	1580

Vendor

Dojlidy Bialystok Brewery
28 Dojlidy Fabryczne St.
15955 Bialystok,Poland

SHIP TO

AMTEC INTERNATIONAL OF NY CORP.
430 MORGAN AVENUE
BROOKLYN, NY 11222
USA

ORDER #	TERMS	Expected	SHIP VIA
02/2005	Due on receipt	3/9/2005	

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Magnat Dojlid	Magnat Dojlidy Bialystok 16.9 Fl.Oz. 1 KONTENTENER 40 STOPOWY NA PALETACH			

AMTEC INT'L OF NY
Beer Importer & Distributor
430 Morgan Avenue
Brooklyn,NY 11222
TEL (718)782-8993
FAX (718)782-8990

Beata Wigell

Total $0.00

AMTEC INT'L OF NY CORP.
Beer Importer & Distributor
430 Morgan Av, 1-800-YES-PILS
Brooklyn, NY 11222
1-800-YES-PILS

Purchase Order

DATE	P.O. NO.
3/9/2005	1581

Vendor

Dojlidy Bialystok Brewery
28 Dojlidy Fabryczne St.
15955 Bialystok,Poland

SHIP TO

Amtec Int'l of NY Corp - Chicago
2690 LAKE STR,
MELROSE PARK, IL 60160
USA

ORDER #	TERMS	Expected	SHIP VIA
03/2005	Due on receipt	3/9/2005	

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Zubr-Dojlidy	Zubr-Dojlidy 16.9 FL.Oz.			

1 KONTENER 40 STOPOWY NA PALETACH

UWAGA !!!!!!!!!!

WYSYLKA DO CHICAGO

AMTEC INT'L OF NY CORP
Beer Importer & Distributor
430 Morgan Avenue
Brooklyn,NY 11222
TEL (718)782-8993
FAX (718)782-8990

Total $0.00

AMTEC INT'L OF NY CORP.
Beer Importer & Distributor
430 Morgan Av, 1-800-YES-PILS
Brooklyn, NY 11222
1-800-YES-PILS

Purchase Order

DATE	P.O. NO.
3/9/2005	1582

Vendor

Dojlidy Bialystok Brewery
28 Dojlidy Fabryczne St.
15955 Bialystok,Poland

SHIP TO

Amtec Int'l of NY Corp - Chicago
2690 LAKE STR,
MELROSE PARK, IL 60160
USA

ORDER #	TERMS	Expected	SHIP VIA
04/2005	Due on receipt	3/9/2005	

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Magnat Dojlid	Magnat Dojlidy Bialystok 16.9 Fl.Oz.			

1 KONTENER 40 STOPOWY NA PALETACH

UWAGA!!!!!!!!!!!

WYSYLKA DO CHICAGO

AMTEC INT'L OF NY CORP
Beer Importer & Distributor
430 Morgan Avenue
Brooklyn,NY 11222
TEL (718)782-8993
FAX (718)782-8990

Total $0.00

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

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

AFFIDAVIT OF JAKUB SUMARA

I, Jakub Sumara, under penalties of perjury, state:

1. I am an individual over the age of 18, have personal knowledge of the following facts, and would and could testify competently to the same if so called.

2. I am employed by Polish Folklore Import Co., Inc., Defendant in the above-captioned matter. Defendant is respectfully moving this Court to issue an order dismissing Plaintiff's Complaint pursuant to Rule 12(b)(6).

3. I have reviewed Defendant's Rule 12(b)(6) Motion to Dismiss and Memorandum of Law in Support (the "Motion"). Polish Folklore Import Co., Inc., is entitled to the requested relief because Plaintiff has failed to state a claim as a matter of law for the reasons set forth in the Motion.

4. Additionally, all of the exhibits appended to the Motion are true and accurate copies of the documents as they are identified therein.

FURTHER AFFIANT SAYETH NOT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2020

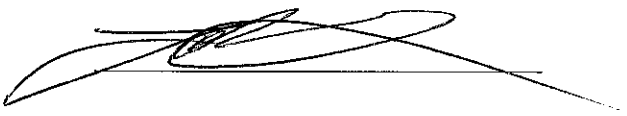

EXHIBIT 5

ORAL ARGUMENT REQUESTED

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

AMTEC INTERNATIONAL OF NY CORP.,	)	
	)	
Plaintiff,	)	Case No.: 1:20-cv-00003-LDH-PK
v.	)	
	)	Date of Service: November 19, 2020
POLISH FOLKLORE IMPORT CO., INC.,	)	
	)	
Defendant.	)	

NOTICE OF MOTION

PLEASE TAKE notice that on November 19, 2020, Defendant, Polish Folklore Import Co., Inc., by and through its undersigned counsel, moved this Court to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) and in support of the same the undersigned served upon you **Polish Folklore Import Co., Inc.'s, Rule 12(b)(6) Motion to Dismiss and Memorandum of Law in Support** 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 Complaint pursuant to Rule 12(b)(6) and enter any other relief that the Court deems just and equitable.

Dated: November 19, 2020

Respectfully submitted,

POLISH FOLKLORE IMPORT CO., INC.

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

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Email: e.farkas@gozdel.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copies of the above-titled **Notice of Motion and Defendant's Rule 12(b)(6) Motion to Dismiss and Memorandum of Law in Support** were served upon all parties of record by sending copies of the same via first class U.S. mail with postage prepaid and/or electronic mail at or before 5:00 PM CST on November 19, 2020, to the following attorneys of record:

Counsel for Plaintiff Amtec International of NY Corp

Joshua S. Stern, Esq.
Donovan Hatem, LLP
112 W. 34th St., 18th Fl.
New York, New York 10120
jstern@donovanhatem.com

Donna Murphy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

AMTEC INTERNATIONAL OF NY CORP.,

Plaintiff, Civil Action No.: 1:20-cv-00003(LDH)(PK)

-against-

POLISH FOLKLORE IMPORT CO., INC.,

Defendant.

----------X

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT POLISH FOLKLORE IMPORT CO. INC'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)

Donovan Hatem LLP.
Attorneys for Plaintiff
112 W. 34th Street, 18th Floor
New York, New York 10120
(212) 502-7019

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Ashcroft v. Iqbal, 556 U.S. 662 (2009). 5

Barclay Knitwear Co., Inc. v. King'swear Enterprises Ltd., 141 A.D.2d 241 (1st Dep't 1988) 15

Barnhart v. Thomas, 313 20 U.S. 20 (2003) 15

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). 5

Biotronik, A.G., v. Conor Medsystems Ireland, Ltd, 33 Misc. 3d 1219(A) (Sup. Ct., NY Co., 2011) 7

Bronx Auto Mall, Inc. v. Am. Honda Motor Co., 934 F. Supp. 596 (S.D.N.Y. 1996) 14

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Duncan v. Walker, 533 U.S. 167 (2001) 18

Fellowes, Inc. v. Michilin Prosperity Co., Ltd., 491 F. Supp. 2d 571 (E.D. Va. 2007) 10

Fin. One Pub. Co. Ltd. V. Lehman Bros. Special Fin., Inc., 414 F.3d 325 (2d Cir 2005) 21

Grant Importing & Distrib. Co. v. Amtec Int'l of N.Y. Corp., 384 Ill. App. 3d 68 (1st Dist. 2008) 19

John G. Ryan, Inc. v. Molson USA, LLC, No. 05-CV3984, 2005 WL 29 77767,*4 (E.D.N.Y Nov. 7, 2005) 6, 13

Kramer v. Time Warner Inc., 937 F.2d 767 (2d Cir.1991) 6

Lia v. Saporito, 909 F. Supp 2d 149, 178 (E.D.N.Y. 2012) 6

Nobelman v. American Savings Bank, 508 U.S. 324 (1993) 15

O'Connor v. Sleasman, 14 A.D.3d 986 (3d Dep't 2005) 8

O'Shanter Res. v. Niagara Mohawk Power Corp.,

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Palmiero v. Spada Distrib. Co., 217 F.2d 561 (2d Cir.1954) 8

Panther Partners Inc. v. Ikanos Communs., Inc.,
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Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 107 (1997) 17

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Ruotolo v. City of N.Y., 514 F.3d 184 (2d Cir. 2008) 5

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S.K.I. Beer Corp. v. Baltika Brewery, 443 F. Supp. 2d 313 (E.D.N.Y. 2006) 9

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Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189 (1985) 21

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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 Folkore 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"), PFI wrongly asserts that (i) Amtec's rights under the Beer Statutes are time barred, as it alleges that KP had previously terminated Amtec in 2005 when KP temporarily withdrew the Zubr Brand from the United States marketplace, and (ii) because PFI believes the Beer Statutes do not apply with respect to Amtec's New York and New Jersey distribution rights for the Zubr Brand.

However as described below, at no time did Amtec ever relinquish its rights to the Zubr Brand, and KP's temporary withdrawal from the United States did not terminate the parties' relationship. In fact, in a related case with regard to Amtec's Connecticut distribution rights for the Zubr Brand filed with the Connecticut Department of Consumer Protection, Liquor Control Commission (the "Commission"), and a subsequent appeal to the Connecticut Superior Court, already determined that at no time did Amtec relinquish its distribution rights to the Zubr Brand.

Moreover, PFI's additional argument that this case must be dismissed because the Beer Statutes are inapplicable is simply belied by both the overwhelming facts and the law, all of which provide that Amtec's causes of action are sufficiently pleaded to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

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 COMPLAINT

The following are the relevant facts as asserted by Amtec in its 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. 1, ¶ 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. 1, ¶ 4)

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. 1, ¶ 7)

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. 1, ¶¶ 9, 19) Thereafter, Amtec commenced exclusive distribution of the Zubr Brand in various states, including in New York and New Jersey. (Doc. No. 1, ¶ 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. 1, ¶ 13) 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. 1, ¶ 15) 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. 1, ¶ 14) 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. 1, ¶ 16)

From August 2005 through 2018, KP temporarily withdrew the Zubr Brand from the United States market. (Doc. No. 1, ¶¶ 18, 20) 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. 1, ¶ 19)

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. 1, ¶¶ 22, 31, 43) 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. (Doc. No. 1, ¶ 25)

On November 25, 2019, Amtec filed its summons and complaint in the Supreme Court of New York, County of Kings, alleging violations of § 55-c and the MPBA and seeking statutory damages (which are the fair market value of the Zubr Brand) due to PFI's improper termination of its distribution rights. PFI subsequently removed this matter to this Court.

II. THE CONNECTICUT ADMINISTRATIVE HEARING AND DECISION

Much like PFI's appointment of new beer distributors in New York and New Jersey, in September 2018, PFI also appointed a new distributor for Connecticut named Arko. (Doc. No. 1, ¶ 23) Thereafter, on June 7, 2019, PFI filed a petition with the Connecticut Liquor Control Commission seeking to terminate Amtec's distribution rights for the Zubr Brand in Connecticut.[1] (Ex. 3 to PFI Motion, ¶7) As a result, on July 18, 2019, the Commission conducted an evidentiary hearing with live witnesses. On September 24, 2019, the Commission issued its Memorandum of Decision which determined that pursuant to Connecticut General Statutes Section 30-17(a)(2), PFI did not possess just and sufficient cause to warrant the termination of Amtec's distribution rights for the Zubr Brand. A copy of the Commission Decision is annexed hereto as Exhibit A.

In particular, the Commission determined the following relevant issues:

(1) Amtec was duly reappointed as the exclusive distributor of the Zubr Brand in the State of Connecticut by way of letter dated April 24, 2003. (Ex. A. at 2) This is as a result of the 2003 Appointment Letter.

(2) Amtec never relinquished its distribution rights to the Zubr Brand. (Ex. A at 2)

(3) Amtec ceased distributing the Zubr Brand in Connecticut because KP the Polish manufacturer of the Zubr Brand, withdrew the product from the United States market from 2005 to 2018 and was unable to fill any Amtec purchase orders. (Ex. A at 2)

In addition, the Commission also determined that withdrawal of a product from the marketplace does not constitute just and sufficient cause to terminate a distributorship. (Ex. A at 2)

III. THE CONNECTICUT SUPERIOR COURT'S DECISION

Recently, on November 24, 2020, the Connecticut Superior Court issued a Memorandum and Decision that upheld the Commission's denial of PFI's petition to terminate Amtec as the

[1] One of PFI's arguments to the Commission was that the Zubr brand it was importing was different than that which Amtec had previously imported and distributed. This argument was rejected by the Commission and is not raised by PFI *sub judice*.

Connecticut distributor for the Zubr Brand. A copy of the Superior Court's decision is annexed hereto as Exhibit B. The Superior Court affirmed the Commission's decision for two main reasons. First, it held that under Connecticut law, PFI did not have standing pursuant to C.G.S.A. §30-17(a)(2) to terminate Amtec's distribution rights for Zubr. (Ex. B at 9) Second, the Superior Court agreed with the Commission that Amtec did not waive or abandon its rights to distribute Zubr in 2005 when KP ceased selling product in the United States. (Ex. B at 9)

ARGUMENT

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

A. The Applicable Standard

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).

B. Introduction of Evidence Outside of the Complaint

In its motion, PFI submitted numerous documents and evidence for consideration by the Court that are outside of Amtec's Complaint. Although Amtec agrees with PFI that the parties' relevant agreements (the 2000 Agreement and 2003 Appointment Letter) can be considered by the Court because they are integral to and referenced in the Complaint, much of the evidence submitted by PFI in support of its Motion (including the introduction of email evidence) is inappropriate and should not be considered by the Court. Indeed, as made clear in *Lia v. Saporito*, 909 F. Supp 2d 149, 178 (E.D.N.Y. 2012), although a Court in ruling on a Fed. R. Civ. P. 12(b)(6) motion is entitled to take judicial notice of documents submitted in an administrative hearing, it cannot take judicial notice of such documents for the truth of the matters asserted, particularly when such documents are submitted for the sole purpose of attempting to controvert the facts as alleged in a complaint. *See also Kramer v. Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir.1991) ("[C]ourts routinely take judicial notice of documents filed in other courts, …not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.")

Therefore, much of the extraneous evidence submitted by PFI must not be considered for its truthfulness, particularly evidence that was unilaterally submitted by PFI during the hearing before the Commission and was not subject to challenge or discovery.

II. AMTEC'S CLAIMS ARE NOT TIME BARRED

Amtec's distribution rights for the Zubr Brand are statutory protected pursuant to § 55-c and the MBPA, which prohibit a brewer from terminating a lawfully appointed distributor except for "good cause," which is statutorily defined. *See generally*, *John G. Ryan, Inc. v. Molson USA, LLC*, No. 05-CV-3984, 2005 WL 29 77767,*4 (E.D.N.Y Nov. 7, 2005)("Although there is little

legislative history concerning the passage of § 55-c, the Statute was meant to serve as a remedial measure to level the playing field between brewers and distributors/wholesalers by providing procedural and substantive protections to distributors."); *Warren Distrib. Co. v. InBev USA, LLC*, CIV.A. 07-1053 RBK/J, 2011 WL 770005 (D.N.J. Feb. 28, 2011). In the present case, Amtec alleges that PFI, acting as the successor to KP, improperly terminated Amtec's distribution rights without the required good cause by appointing a new distributor in Amtec's exclusive New Jersey and New York territories.

In its Motion, PFI wrongly asserts that Amtec's claims are time barred because a "temporary withdrawal" is tantamount to termination, and that this is an issue that can be decided as a matter of law. However, the sole trial level case cited in support, *Biotronik, A.G., v. Conor Medsystems Ireland, Ltd*, 33 Misc. 3d 1219(A), 939 N.Y.2d 739 (Sup. Ct., NY Co., 2011), is factually inapposite and does not stand for the proposition cited. Rather, the *Biotronik* case concerns issues of contractual interpretation when a product was permanently (and not temporarily) withdrawn from the market due to safety concerns. In fact, both the Commission and the Superior Court in its rulings, which have a collateral estoppel effect against PFI, have already held that notwithstanding this temporary withdrawal, Amtec never relinquished its distribution rights to the Zubr Brand. (Ex. A at 2); *Ryan v. New York Tel. Co.,* 62 N.Y.2d 494, 499 (1984)("At the outset, it should be made clear that the doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies.")

Moreover, based on improperly submitted emails, PFI asserts that at the time of the temporary withdrawal, KP repudiated the parties' agreement, and that this repudiation constituted a termination. Ex. T to Ex. 4 of PFI's Motion. First, as described above, these emails must not be

considered in this Motion as PFI has submitted them for the truth of the matters asserted. Second, even if considered, whether a particular communication or act constitutes repudiation of a contract (as is being asserted by PFI) generally presents a question of fact. *Palmiero v. Spada Distrib. Co.,* 217 F.2d 561, 565 (2d Cir.1954) (issue of repudiation raised a question of fact that should have been left to the jury); *O'Shanter Res. v. Niagara Mohawk Power Corp.,* 915 F. Supp. 560, 564, 567 (W.D.N.Y.1996) (noting that repudiation generally presents a question of fact and denying summary judgment where defendant offered plaintiff a buy-out and stated that if plaintiff did not accept the offer, he should contact defendant "to initiate discussions regarding the implementation of a new contract"); *O'Connor v. Sleasman,* 14 A.D.3d 986, 987–88 (3d Dep't 2005) (holding that repudiation is a "factual determination [that] is heavily dependent upon a determination of whether 'a breaching party's words or deeds are unequivocal.'")

Indeed, as made clear by the April 18, 2005, email between Anna Swietek of KP and Beata Wiacek of Amtect, which PFI cites in support (labeled R. 1188), the parties intended to have additional communications regarding the relationship, "I will attempt to clarify this issue on the phone with Boguslaw [Pajor, President of Amtec]." Thus, although Amtec believes that no repudiation of the Agreement occurred, particularly because none of the words were unequivocal in terminating the relationship, at the very least, these emails present an incomplete factual picture that must be resolved following discovery, and not on a Fed. R. Civ. P. 12(b)(6) motion.

Accordingly, PFI has not met its burden of demonstrating that the claims asserted in this action are time barred, and the Fed. R. Civ. P. 12(b)(6) must be denied.

III. THE MBPA APPLIES WITH RESPECT TO AMTEC'S RIGHTS FOR THE ZUBR BRAND

PFI wrongly asserts that the New Jersey claims must be dismissed because the agreement between Amtec and KP pre-date the Statue's enactment in March 2006. However, the MBPA expressly provides that:

> This act shall apply to all contracts, agreements and relationships among any brewers and wholesalers, including contracts, agreements or relationships entered into, renewed, extended or modified after the effective date of this act. *Contracts, agreements and relationships existing prior to the effective date of this act that are continuing in nature, have an indefinite term or have no specific duration shall be deemed for purposes of this act to have been renewed 60 days after the effective date of this act*. N.J.S.A. 33:1-93.15(b)(Emphasis added).

In its brief, PFI argues that N.J.S.A 33:1-93.15(b) is not applicable because the 2000 Agreement contained a definite term, which expired on December 31, 2002. However, PFI ignores the fact that after the expiration of the 2000 Agreement, on April 24, 2003, Dojildy (which had already been purchased by KP), re-appointed Amtec by way of the 2003 Appointment Letter. In fact, the Commission in its decision already determined this fact, stating that "Amtec was duly reappointed as the exclusive distributor of Zubr in the State of Connecticut by way of letter dated April 24, 2003." (Ex. A. at 2) Since the 2003 Appointment Letter and the parties relationship (even if governed by a hold-over continuation of the 2000 Agreement) has an indefinite term and no specific duration, pursuant to the express terms of N.J.S.A. 33:1-93.15(b), it is deemed to renew 60 days after the act.

Accordingly, because the 2003 Appointment Letter and the expired 2000 Agreement is deemed to renew 60 days after the effective date of the MBPA, the MBPA is applicable to the relationship of the parties.

IV. PFI WRONGLY ASSERTS THAT THE BEER STATUTES CANNOT APPLY BECAUE AMTEC TOOK TITLE TO THE ZUBR BRAND IN POLAND

In its motion, PFI wrongly asserts that Amtec's claims must be dismissed because, without offering any evidence in support, Amtec took possession of the Zubr Brand in Poland. Relying solely on the trial court decision of *S.K.I. Beer Corp. v. Baltika Brewery*, 443 F. Supp. 2d 313, 318 (E.D.N.Y. 2006), PFI asserts that the protections of the Beer Statutes only include instances where a distributor takes possession (where title passes) of product in New York or New Jersey. According to PFI, since the 2000 Agreement between Amtec and Dojlidy required Amtec to take possession of Zubr in Poland, Amtec is not affored any protection under the Statutes.

However, as will be described in more detail below, PFI's reliance on *Baltika* is misplaced and its arguments must be rejected because (1) PFI has not offered any evidence regarding where Amtec took possession of the product and its motion is premature; (2) *Baltika* is factually and legally distinguishable, (3) PFI's argument would create an absurd result that would eviscerate the safeguards of the Statutes and undermine the legislative intent to protect distributors from wrongful termination, (3) PFI's argument ignores basic rules of statutory construction and grammar concerning the placement of "modifiers" in a sentence.

A. PFI Has Not Offered Any Evidence As To Where Title Was Transferred and Its Argument Are Premature On a Motion to Dismiss

Tellingly, PFI has offered no evidence that the sale of Zubr Brand product occurred in Poland, a fact that is fatal to its argument that *Baltika* even applies to the facts of this case. *See, generally, Fellowes, Inc. v. Michilin Prosperity Co., Ltd.*, 491 F. Supp. 2d 571, 577 (E.D. Va. 2007) ("It is well established that the reach of Section 271(a) is limited to infringing activities that occur within the United States. The situs of infringement is determined according to the places of contracting and performance, not solely the place where legal title passes. The location of passage of title, standing alone, without more, does not determine where a "sale" or "offer to sell" occurs

for purposes of § 271(a).") (internal citations omitted) (emphasis added). Indeed, PFI's sole argument appears to be not that Amtec actually took possession of product in Poland (precisely because it has no evidence), but that Amtec was required to and failed to plead that it took possession of Zubr Brand product in the United States. Although Amtec disputes that *Baltika* is even relevant to this case (for the reasons stated below), or that Amtec is specifically required to plead such a fact in its Complaint, to the extent that Court determines that *Baltika* is applicable and that Amtec and is required to allege the location where it took possession in its Complaint, Amtec hereby requests leave to amend its pleadings in this regard.

In addition, PFI arguments regarding where Amtec may have taken title or possession of product is entirely premature and improper in a motion to dismiss. Indeed, in an unrelated case involving Amtec, namely *Amtec Intern. of N.Y. Corp. v Beverage All. LLC*, 10-CV-1147 NGG SMG, 2011 WL 4597480, at *2 (E.D.N.Y. Sept. 30, 2011), Judge Garafus ruled that an analysis under *Baltika* during a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)was premature, specifically stating:

> BA analogizes to *S.K.I. Beer Corp. v. Baltika Brewery,* 443 F. Supp.2d 313 (E.D.N.Y.2006), a case decided by Judge Glasser. Although the court has the greatest respect for judge Glasser, his opinion is not—as BA urges—"controlling legal authority." (*See* Reply Reconsideration at 3, n. 4.) Nor is the factual record in this case sufficiently complete so as to allow the court to assess relevant similarities or differences in the structure of the parties' agreement in that case and this one. As discussed *infra,* such a determination would be premature on a motion to dismiss.

B. The Reasoning of *Baltika* Is Not Applicable or Controlling to the Facts of this Case

Baltika is both factually and legally distinguishable from the present case and its holding is simply inapposite. In particular, in *Baltika*, which concerned the enforcement of a forum selection clause and not termination, the parties' agreement for the sale of goods did not "specify the final

destination of goods" and in fact, required the application of foreign law and arbitration in a foreign venue. Thus, in *Baltika*, there was no expectation that the product was being sold in New York so as to trigger New York law, and in fact, the product that was delivered in Russia, could have ended up anywhere. As a result, the *Baltika* decision put considerable emphasis on the dormant Commerce Clause and whether "[p]laintiff's reading would impose New York's statutory regime for brewer-wholesaler relations on agreements consummated and completed on the other side of the globe merely because the wholesaler was licensed in New York." (*Baltika*, at 320) (Emphasis added). In an effort to avoid these perceived constitutional difficulties with the dormant commerce clause and the extraterritorial effect of New York law where it was not intended, the *Baltika* court determined that the defendant was not a brewer because it had no connection to New York, and in fact the beer was sold and delivered overseas. This reasoning was ultimately not accepted by the Second Circuit, who affirmed *Baltika* on other grounds. *See S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705, 709 (2d Cir. 2010).

The facts of the present case are entirely different. In this case, the both the 2000 Distribution Agreement and 2003 Appointment Letter specifically appointed Amtec as the New York and New Jersey distributor of Zubr. Moreover, the 2000 Distribution Agreement regulated the actions that Amtec could undertake in marketing and distributing Zubr products in New York and New Jersey. (Article 3 of 2000 Distribution Agreement) Moreover, the beer, which was packaged by KP in Poland, was required to and would have contained information on the label concerning New York and New Jersey's five-cent deposit return law. *See, e.g,* N.Y. Envtl. Conserv. Law § 27-1003 (McKinney) Thus, while in *Baltika*, the court emphasized that the defendant did not know that goods it sold in Russian would end up in New York, in this case, the goods that were purchased by Amtec in Poland were specifically intended for New York (as well

as New Jersey and Connecticut) pursuant to specific obligations under the 2000 Distribution Agreement and 2003 Appointment Letter.

As a result, since KP and Dojlidy elected to do business with a New York and New Jersey distributor and specifically directed its products to the New York and New Jersey market, it knowingly benefited from having its products sold in New York and New Jersey.

Accordingly, the reasoning adopted by the court in *Baltika* is simply not applicable to the facts of this case.

C. Adopting the Reasoning of *Baltika* to This Case Would Create An Absurd Result Not Intended by the Legislature

In addition, adopting the reasoning of *Baltika* to the facts of this case would also severely undermine the statutory protections of the Beer 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, 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 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) 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.

D. With Respect to § 55-c, PFI's Interpretation of the Statute Would Ignore Basic Rules of Statutory and Grammatical Interpretation.

By relying on *Baltika*, PFI is in essence arguing that the words "in this state" contained in § 55-c should be read as modifying the words "sells or offers to sell" and not the word "wholesaler" which the phrase directly follows. ("[O]f any of the foregoing who sells or offers to sell beer to a beer wholesaler in this state or any successor to a brewer.") This reading is plainly at odds with the well-established rule of last antecedent. Under this rule of grammar and statutory construction, a limiting clause or phrase (in this case, the clause "in this state") should be read as modifying only the noun or phrase it immediately follows (here "wholesaler"). *See Barnhart v. Thomas*, 313 20 U.S. 20, 26, (2003) (citing Singer on Statutory Construction, §47.33, p. 369 (6th rev. ed. 2000)); William Strunk, Jr. & E.B. White, The Elements of Style 30 (4th ed.2000) ("Modifiers should come, if possible, next to the word they modify.") (emphasis added); *Barclay Knitwear Co., Inc. v. King'swear Enterprises Ltd.*, 141 A.D.2d 241, 247, (1st Dep't 1988). According to the Supreme Court in Barnhart, while the rule of last antecedent is "not absolute, and can assuredly be overcome by other indicia of meaning…construing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Id.* (citing *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993)). The grammatical principle of the rule of last antecedent is also codified in New York: Relative or qualifying words of clauses in a statute ordinarily are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote, unless the intent of the statute clearly indicates otherwise. (emphasis added). N.Y. Statutes, §254 (McKinney's 2006). In this case, when the definition of "brewer" is read in accordance with the

rule of last antecedent, § 55-c applies to a brewer who sells or offers to sell beer to a wholesaler that is located in New York. To this end, this interpretation would contain a "limiting principal" because, pursuant to § 55-c(2)(d), the only wholesalers who may claim the protections of the statute are those that are located and operate their franchise within New York and hold a New York wholesaler's license. *See* N.Y. Alco. Bev. Cont. Law § 53. Moreover, not only is the interpretation resulting from an application of the rule of last antecedent consistent with the remainder of the statutory text, such an interpretation is also supported by the act's legislative history and purpose. As stated above, § 55-c was enacted for the purpose of governing the relationship and leveling the playing field between brewers and their New York wholesalers. *See South End Dist. Corp. v. Hornell Brewing Co.*, 685 N.Y.S. 2d 594, 596 (Sup. Ct. Kings Co. 1999) (the section "governs commercial relationships between brewers and malt beverage wholesalers engaged in the distribution of such products in New York State.")

V. PFI IS A SUCCESOR BREWER UNDER NEW YORK LAW

PFI wrongly asserts that Amtec's claims under New York law must be dismissed because it is neither a brewer nor a successor brewer under § 55-c, and thus, the statute and its good cause protections do not apply. However, as will be elaborated below, PFI's motion must fail because it grossly misinterprets § 55-c, advocating in favor of overly narrow interpretation of the term "successor brewer," which ignores the clear intent and purpose of the statute and would lead directly to the protections of the statute being rendered moot.

A. PFI Wrongly Asserts that Amtec has Not Pled That PFI Was A Successor Brewer

In its motion, PFI argues that Amtec has not pled in its Complaint that PFI was a successor brewer under § 55-c. However, this is plainly wrong. 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). Indeed, in many sections of the statute, the term brewer is exclusively used because it expressly includes a "successor." Similarly, Amtec's allegations that PFI was a "brewer" includes the fact that PFI was a successor to KP. In fact, Amtec specifically cited to the definition of a successor brewer in its Complaint for this purpose.

However, to the extent that the Court believes that Amtec's pleading is deficient in this regard, Amtec requests leave to submit an amended complaint.

B. The Language of the Statute Is Clear And Unambiguous; A Successor Brewer is "Any Entity Which Acquires the Business or Beer Brands of a Brewer."

"Statutory construction must begin with the language employed by [the legislature] and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States v. Albertini,* 472 U.S. 675, 680 (1985) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985)). Where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)); *see also Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . .When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 107, 667 N.Y.S.2d 327 (1997) ("[A]bsent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute,' because 'no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal*.'")

In this case, the language of § 55-c(2)(c) and its definition of a "successor brewer" is clear and unambiguous; a successor brewer is any entity that acquires the business or beer brands of a brewer. In full, Section 55-c(2)(c) provides that,

> "Successor to a brewer" *means any 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. (emphasis added)

While PFI would like the Court to decide that the word "acquire" must be limited to a situation where a party succeeds to its import rights by way of a transaction with the previous importer, to do so would ignore the plain and ordinary meaning of the text. In fact, no where does the statute provide that the successor must have acquired its rights "from" the previous importer or brewer as PFI asserts.[2] *See Roberts v. Tishman Speyer Props., L.P.*, 62 A.D.3d 71, 81, 874 N.Y.S.2d 97, 105 (1st Dept. 2009) ("[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein.") Rather the text simply says "any entity which acquires the business or beer brands **of** a brewer." (Emphasis added) Furthermore, such a reading would also ignore the phrase **"without limitation"** and render it superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001)(holding that a court's duty is "to give effect, if possible, to every clause and word of a statute."); *Wash. Mkt. Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("As early as in

[2] Indeed, there are questions of fact and discovery is needed on the issue about how PFI acquired its rights to import the Zubr Brand. During the hearing before the Commission, PFI asserted that it acquired its rights from another distributor of KP, namely MAG Dystrybucja. However, this has not been verified in discovery, and no information is yet known about KP's involvement in this relationship, or whether this arrangement may even have been meant to evade the statutory protections of the Beer Statutes. In fact, KP submitted evidence in the hearing – which supports the fact that KP is involved in some way with the relationship between MAG Dystrybucia and KP.

Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'")

Accordingly, this Court must give the definition of successor brewer its plain and ordinary meaning by holding that a successor brewer means "any person or entity which acquires the business or beer brands of a brewer," and that it is not limited by the subsequent illustrative examples, which are expressly provided **"without limitation."**

C. PFI'S Interpretation of Successor Brewer Would Render a Large Component of the Statute's Protections Meaningless

One of the key components of § 55-c's protection of distributors, and its requirement that "good cause" be required before a distributor is terminated, is the fact that it applies to both brewers and "successor brewers." *See* § 55-c(2)(b). This is because without such application to successors, a manufacturer could easily defeat the purpose of the good cause requirement by creatively forming another company as an intermediary, or in the case of foreign manufacturer, by transferring or assigning the import rights to a new import company.

The fact remains that § 55-c was enacted in order to recognize "the value added function performed by beer wholesalers and the legitimate and significant *interest* that beer wholesalers *acquire* in the brands of brewers," and to provide distributors with procedural safeguards and protections against arbitrary termination. *Ryan*, 2005 WL 2977767, *4. In light of the statutory rules of interpretation mentioned above (McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 95, 96) and the remedial nature of the statute, it would denude the statutory protections to limit the definition of successor brewer as advocated by PFI.

D. PFI'S Reliance on *Grant v. Amtec* is Misplaced

PFI relies heavily on the Illinois case of *Grant Importing & Distrib. Co. v. Amtec Int'l of*

N.Y. Corp., 384 Ill. App. 3d 68, 72, 892 N.E.2d 1134, 1137 (1st Dist. 2008), in support of its position that Amtec's cause of action vis-à-vis § 55-c must be dismissed because PFI is not a "successor brewer." However, PFI ignores several key factual and legal differences between *Grant* and the instant action[3]. In particular, the Illinois Beer Industry Fair Dealing Act (815 ILCS 720/1 et seq.) ("IBIFDA") was worded substantially different than § 55-c. In fact, IBIFDA defined successor brewer as,

> [A]ny person who in any way obtains the distribution rights that a brewer or master distributor once had to manufacture or distribute a brand or brands of beer whether by merger, purchase of corporate shares, purchase of assets, **or any other arrangement**. 815 ILCS 720/1.1 (6) (West 2006) (emphasis added)

Thus, one of the key differences between § 55-c and IBIFDA is the fact that IBIFDA does not use the unambiguous term "without limitation," and instead contains several specific examples followed by the general term "any other arrangement." In fact, the decision in *Grant* specifically concerned the interpretation of the general phrase "or any other arrangement," which is not found in § 55-c. This is a critical difference, which as explained above, changes the textual analysis of the statute and renders *Grant* legally inapposite. Moreover, because there is very little legislative history concerning the passage of IBIFDA, the court gleamed the legislative intent solely from the text of the statute (which as described above is differently worded than § 55-c). However, in the present case, such a problem does not exist because there is ample legislative history, which in addition to New York's rules of statutory construction, supports a liberal interpretation of the definition of "successor brewer" to include PFI. It also must be noted that after *Grant* was decided, the Illinois Legislature amended its definition of "successor brewer," by expanding on the term "or any other arrangement."

[3] Both counsel for PFI (Earl Farkas) and Amtec (Joshua Stern) were attorneys in the *Grant* case.

Moreover, *Grant* was also factually different from the instant action. In *Grant*, the distributors who brought suit acquired their distributor rights solely through an agreement from the previous importer (Advanced). In this case, Amtec acquired its distribution rights directly from KP and Dojlidy at the same time it acquired its import rights.

VI. THE PARTIES' RELATIONSHIP IS NOT GOVERNED BY POLISH LAW

As its final argument in it Motion, PFI baldly asserts that the claims asserted by Amtec must be dismissed because (i) the parties' agreed that Polish law would control, and (ii) the 2000 Agreement expired by its own terms.

First, with respect to any choice of law provision contained in the 2000 Agreement, the provision is extremely narrow in that it only provides "[t]his contract shall be governed by the laws of Poland." It does not provide that the parties' relationship, or Amtec's distribution rights pursuant to the Beer Statutes would be governed by Polish law, and thus is inapplicable to the present dispute. *See, e.g., In re Sling Media Slingbox Adv. Litig.,* 202 F. Supp 3d 352, 358 (S.D.N.Y. 2016)("Where the choice of law provision states only that " 'this [contract] shall be governed by and construed in accordance with the laws of [a particular state]' .... [there is] no way such language can be read broadly enough to apply to [tort claims]."); Fin. One Pub. Co. Ltd. V. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 335 (2d Cir 2005). Moreover, a choice of law provision will generally not be enforced where it is violative of public policy. Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 202 (1985). In the present circumstance, if Polish law is applied, a New York and New Jersey beer distributor will not receive the benefits of statutory protections that are the public policies of New York and New Jersey.

Second, PFI's argument that the 2000 Agreement expired on December 31, 2002 (besides undermining its choice of law and other arguments), ignored the fact that in 2003 Amtec was re-

appointed by way of the 2003 Appointment Letter. Indeed, this fact was already litigated and decided by the Commission. Additionally, the parties' continued their relationship even after the expiration. *See, e.g. Town of Webster v. Vil. of Webster*, 280 AD2d 931, 933 (4th Dep't 2001)("Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract' However, '[t]he fact that the parties continue to deal under some sort of informal arrangement does not, without more, mean that all the terms of the expired formal contract continue to apply.'")(internal citations omitted).

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: New York, New York
December 3, 2020

DONOVAN HATEM LLP

By: _____
Joshua S. Stern, Esq.
Attorneys for Plaintiff
112 W. 34th Street, 18th Floor
New York, New York 10120

TO: ALL COUNSEL OF RECORD (VIA ECF)

4845-0435-8355, v. 1

EXHIBIT A

STATE OF CONNECTICUT

DEPARTMENT OF CONSUMER PROTECTION

IN THE MATTER OF

Boguslaw Pajor
Amtec International of NY Corp.
1 Hartford Square
New Britain, CT 06052

Case No. 2019-500
September 24, 2019

MEMORANDUM OF DECISION

This matter involves a request to terminate Amtec International of NY Corp. (hereinafter "Amtec"), holder of out-of-state wholesaler permit LIW.605, Connecticut out-of-state shipper of liquor permit LCL.574, and Connecticut out-of-state shipper of beer permit LCB.517, as wholesaler for Zubr beer in the State of Connecticut. A formal administrative hearing was held on July 18, 2019 before the Liquor Control Commission (hereinafter "Commission"). The record was left open to allow for the submission of post-hearing briefs until August 12, 2019.

The Department of Consumer Protection had received a notice dated June 7, 2019 from Polish Forklore Import Co., (hereafter "Polish Forklore") holder of an out-of-state shipper liquor permit LSL.1814 and out-of-state shipper of beer permit LSB.1001, for the termination of Amtec, as wholesaler for Zubr beer in the State of Connecticut.

Polish Forklore seeks to terminate Amtec's distribution rights pursuant to Section 30-17(a)(2) which requires a showing of "just and sufficient cause". The statute defines just and sufficient cause as "...the existence of circumstances which, in the opinion of a reasonable person considering all of the equities of both the wholesaler and the manufacturer or out-of-state shipper warrants a termination or diminishment of a distributorship as the case may be." The "...determination of what constitutes "just and sufficient cause" is a matter for consideration by this Commission, after weighing the equities of both parties to

ascertain whether termination is warranted." Schiefflin & Co. v. Department of Liquor Control, 194 Conn. 165, 479 A.2d 1191 (1984).

Based upon the evidence and testimony adduced at the hearing, we find the following facts: (1) Amtec was the duly appointed and registered exclusive importer and distributor of Zubr in the State of Connecticut by letter dated on or about 1998 from Dojlidy Brewery; (2) Amtec was duly reappointed and registered as the exclusive distributor of Zubr in the State of Connecticut by letter dated April 24, 2003 from Dojlidy Brewery; (3) Amtec never relinquished its distribution rights to Zubr beer; (4) Amtec actively purchased and/or distributed Zubr beer to Connecticut retailers from 1998 to 2005; (5) Kompania Piwowarska S.A. (hereafter "KP"), purchased the Dojlidy Brewery on February 4, 2003; (6) Amtec ceased distributing Zubr beer in Connecticut because KP the Polish manufacturer of Zubr beer, withdrew the product from the United States market from 2005 to 2018 and was unable to fill any Amtec purchase orders; (7) Polish Forklore never offered to sell Zubr beer to Amtec, which was the duly appointed and registered exclusive importer and distributor of Zubr in the State of Connecticut; (8) Zubr beer has been continuously brewed since 1768 according to the same recipe of the Dojlidy Brewery; (9) Zubr beer is sold with a distinctive label portraying the Zubr logo – a bison, and the bottle neck refers to the product as "Zubr"; and (9) Zubr beer is sold under the same brand name irrespective of a different alcohol by volume (ABV) or hops content.

Based upon the testimony given at the Hearing and evidence submitted into the record, Amtec has demonstrated that it is the duly appointed and registered distributor of Zubr beer to retailers in the State of Connecticut. Previous decisions by the Commission have held that the withdrawal of a product from the marketplace for several years does not constitute just and sufficient cause to terminate a distributorship. *(In the Matter of Amtec International of NY Corp., October 22, 1988,* citing Declaratory Ruling *In Re Johnny Barton, Inc.* November 10, 1987). In addition, the Commission declined to terminate a wine distributorship in Connecticut even though product had not been ordered for more than six years. *(In the Matter of New England Wines & Spirits, Inc. November 4, 2014).*

Polish Forklore makes the additional legal argument that the Zubr beer that was distributed by Amtec is a different brand than the product imported by Polish Forklore. The Commission finds this legal argument to be without factual basis. The evidence and testimony presented at the hearing demonstrate the following: (1) both beers have been brewed pursuant to the exact same recipe; (2) both beers are brewed at the Dojlidy Brewery; (3) both beers use the Zubr beer trade name; and (4) both beers use the same bison logo. The fact that the beer might have a different brewery owner, different packaging, or lack of sales does not make the two beers different brands.

Polish Forkore's General Manager, Jakub Samara, testified that the recipes of both beers are identical. No contrary evidence or testimony was submitted by Polish Forklore to refute this testimony. In addition, KP admits in Polish Forklore's June 7, 2019 letter submitted to the Commission, that "[t]his is to inform that Kompania Piwowarska SA...on 04.02.2003 purchased the Dojlidy Zubr brewery in Pialystock. Therefore, since 2003, the company has been the owner of the ZUBR brand, is in the possession of the formula and all the rights above." (See Exhibit K to Polish Forklore's Termination Notice). KP's admission that it took over the Zubr brand from the Dojlidy Brewery upon its acquisition is evidence that the two beers are one and the same product.

In addition, Polish Forklore makes the argument that its Zubr beer is a "brand extension" different from Amtec's Zubr beer brand. The Commission finds this legal argument to be without merit. The evidence submitted to the Commission demonstrates that Polish Forklore's Zubr beer and Amtec's Zubr beer are both sold under the Zubr trade name and both use the logo of a bison on the beer's packaging. Polish Forkore's General Manager, Jakub Samara, testified that the recipes of both beers are identical with the only distinction between the two beers being the use of Dojlidy (the brewery for both products) in the name of both said brands. Finally, the two beers different alcohol by volume (ABV) or hops content is a byproduct of the manufacturing process and does not constitute a "brand extension".

Based upon the testimony and evidence presented at the Hearing and subsequent briefs submitted into the record, the Commission does not find the existence of circumstances that warrant a termination in accordance with C.G.S. Section 30-17(a)(2).

DEPARTMENT OF CONSUMER PROTECTION
LIQUOR CONTROL COMMISSION
BY:

Anne K. Stiber

Anne K. Stiber, Esq., Designated Presiding Officer

Laura Anne Cahill

Laura A. Cahill, Commissioner

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Connecticut Beverage Journal, 2508 Whitney Ave, P.O. Box 185159. Hamden, CT 06518

Connecticut State Library, 231 Capitol Avenue, Hartford, CT 06106

EXHIBIT B

DOCKET NO.: HHB-CV20-6056990S	:	SUPERIOR COURT
POLISH FOLKLORE CO., INC.	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	
DEPARTMENT OF CONSUMER PROTECTION, LIQUOR CONTROL DIVISION, ET AL.	:	NOVEMBER 24, 2020

OFFICE OF THE CLERK
SUPERIOR COURT
2020 NOV 24 AM 11 01
JUDICIAL DISTRICT OF
NEW BRITAIN

MEMORANDUM OF DECISION

The plaintiff petitioned the defendant Liquor Control Commission[1] for a declaratory ruling that it had the exclusive right to distribute Zubr beer in Connecticut. The Commission denied the petition, finding that another company, Amtec International of NY Corp., had the exclusive distribution rights to Zubr beer. The plaintiff now appeals that ruling. Because substantial evidence supports the Commission's factual findings, and because its decision does not prejudice the plaintiff's substantial rights for any of the reasons set forth in General Statutes § 4-183(j), the Commission's decision is AFFIRMED.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff ("Polish Folklore") is an importer and out-of-state shipper of alcoholic beverages. It claims the exclusive right in Connecticut to sell Zubr beer through a distributor named Arko. Zubr beer is brewed in Poland by a company called Kompania Piwowarska.[2] Defendant Amtec International of NY Corp. ("Amtec") is an out-of-state wholesaler which also claims the exclusive right to sell Zubr beer in Connecticut.

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[1] The Liquor Control Commission ("Commission") is a body within the Liquor Control Division of the defendant Department of Consumer Protection. The court refers to the Commission as the defendant solely for ease of reference.

[2] "Zubr" means bison in Polish.

11/24/20 Copy sent to Reporter of Judicial Decisions; notice sent to all counsel of record.

In 1998, Amtec obtained the exclusive right to distribute Zubr beer in Connecticut through an arrangement with the Polish brewer, Dojlidy Brewery. In 2003, Kompania Piwowarska purchased the Dojlidy Brewery. The purchase included the rights to the Zubr beer product. In 2005, Kompania Piwowarska stopped selling Zubr beer in the United States and declined to fill further orders that Amtec placed.

In 2018, Polish Folklore began to sell Zubr beer in Connecticut through Arko. Polish Folklore did not buy the product directly from Kompania Piwowarska, but rather from MAG Dystrybucja, a Polish distributor of Kompania Piwowarska. Polish Folklore registered and price-posted Zubr with the appropriate federal and state regulators.

In January 2019, Amtec learned that Polish Folklore was selling Zubr beer in Connecticut through Arko. Amtec contacted the Department of Consumer Protection, Liquor Control Division, and explained that Amtec had exclusive Zubr beer distribution rights in the state. On June 5, 2018, the Department formally agreed with Amtec and ordered Arko to remove Zubr beer from its price postings.

Polish Folklore responded by petitioning the Commission for a declaratory ruling that the two Zubr beer products were not, in fact, the same brand. Specifically, Polish Folklore argued that Amtec had sold a brand called "Dojlidy Zubr" beer, whereas Polish Folklore was currently selling a different brand called "Zubr" beer. In the alternative, Polish Folklore argued that even if the two brands were the same, "just and sufficient" grounds existed to terminate Amtec's distributorship under General Statutes § 30-17,[3] including that Amtec had waived or abandoned

[3] General Statutes § 30-17 (a) (2) provides in relevant part: "When a holder of a wholesaler permit has had the distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper for six months or more, such distributorship may be terminated or its geographic territory diminished upon (A) the execution of a written stipulation by the wholesaler and manufacturer or out-of-state shipper agreeing to the change and the approval of such change by

any distributorship rights it once had by making no effort to purchase and distribute Zubr beer after 2005.

The Commission held an evidentiary hearing on July 18, 2019 and issued its final decision on September 24, 2019, which found the following facts: "(1) Amtec was the duly appointed and registered exclusive importer and distributor of Zubr in the State of Connecticut by letter dated on or about 1998 from Dojlidy Brewery; (2) Amtec was duly reappointed and registered as the exclusive distributor of Zubr in the State of Connecticut by letter dated April 24, 2003 from Dojlidy Brewery; (3) Amtec never relinquished its distribution rights to Zubr beer; (4) Amtec actively purchased and/or distributed Zubr beer to Connecticut retailers from 1998 to 2005; (5) Kompania Piwowarska S.A. (hereafter "KP"), purchased the Dojlidy Brewery on February 4, 2003; (6) Amtec ceased distributing Zubr beer in Connecticut because KP the Polish manufacturer of Zubr beer, withdrew the product from the United States market from 2005 to 2018 and was unable to fill any Amtec purchase orders; (7) Polish Folklore never offered to sell Zubr beer to Amtec, which was the duly appointed and registered exclusive importer and distributor of Zubr in the State of Connecticut; (8) Zubr beer has been continuously brewed since 1768 according to the same recipe of Dojlidy Brewery; (9) Zubr beer is sold with a distinctive

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the Department of Consumer Protection; or (B) the sending of a written notice by certified or registered mail, return receipt requested, by the manufacturer or out-of-state shipper to the wholesaler, a copy of which notice has been sent simultaneously by certified or registered mail, return receipt requested, to the Department of Consumer Protection. *No such termination or diminishment shall become effective except for just and sufficient cause*, provided such cause shall be set forth in such notice and the Department of Consumer Protection shall determine, after hearing, that just and sufficient cause exists. If an emergency occurs, caused by the wholesaler, prior to such hearing, which threatens the manufacturers' or out-of-state shippers' products or otherwise endangers the business of the manufacturer or out-of-state shipper and said emergency is established to the satisfaction of the Department of Consumer Protection, the department may temporarily suspend such wholesaler permit or take whatever reasonable action the department deems advisable to provide for such emergency and the department may continue such temporary action until its decision after a full hearing." (Emphasis supplied.)

label portraying the Zubr logo – a bison, and the bottle neck refers to the product as "Zubr"; and (8) Zubr beer is sold under the same brand name irrespective of a different alcohol by volume (ABV) or hops content." Memorandum of Decision (dated September 24, 2019), 2 ("Final Decision").

The Commission also found that both Zubr beer products were brewed using the "exact same recipe," that both beers were brewed "at the Dojlidy Brewery" (notwithstanding the change in ownership) and that both beers used the Zubr beer trade name and Bison logo. Id., 3. "The fact that the beer might have a different brewery owner, different packaging, or lack of sales does not make the two beers different brands." Id.

Significantly, Kompania Piwowarska admitted in a letter submitted in evidence that it "purchased the Dojlidy Zubr brewery" and that "since 2003, the company has been the owner of the ZUBR brand, is in the possession of the formula and all the rights above." Id. (citing Exhibit K).

In sum, the Commission squarely rejected Polish Folklore's primary argument that its Zubr beer product and Amtec's Zubr beer product were different brands. The Commission also rejected Polish Folklore's alternative argument that Amtec's exclusive distributorship rights should be terminated under General Statutes § 30-17 for "just and sufficient cause" based on Amtec's alleged abandonment or waiver of those rights. The Commission explained that "the withdrawal of a product from the marketplace for several years does not constitute just and sufficient cause to terminate a distributorship." Id., 2.

Polish Folklore filed a motion for reconsideration, which the Commission denied. Polish Folklore then timely filed this administrative appeal. The court heard oral argument on September 25, 2020.

II

DISCUSSION

Polish Folklore makes two basic arguments on appeal: First, the Commission erred in finding that the two Zubr beers are the same brand; second, even if the beers are the same brand, the Commission erred by declining to terminate Amtec's exclusive distributorship for "just and sufficient cause" under § 30-17 (a) (2). Neither argument is persuasive.

A.

Preliminarily, the court must decide whether the Commission's determination that the two Zubr beers at issue are the same brand is a question of fact, a mixed question of law and fact, or a matter committed to the agency's discretion.[4] This issue is critical because it determines the scope of the court's review under General Statutes § 4-183(j). If the Commission's brand determination is a purely factual matter, the substantial evidence standard applies. If the determination is a mixed question of law and fact, Polish Folklore argues for plenary review. But if the determination was committed to the Commission's discretion, the court's scope of review is limited to whether the Commission abused its discretion or acted arbitrarily or capriciously.

Polish Folklore argues that a brand determination is a mixed question of law and fact because it requires the Commission to identify legally relevant criteria and then to make factual findings based on those criteria. Polish Folklore's Memorandum of Law in Support of Administrative Appeal (dated April 6, 2020) ("Polish Folklore Mem."), 16-22. The Commission contends that whether two liquor products are the same or different brands is a matter committed to its administrative discretion. "There is no provision in the Liquor Control Act, or in the pertinent Commission Regulations, which sets forth the criteria for the Commission to weigh

[4] Neither party argues that whether the two beers are the same brand is a question of law.

when making a determination as to what constitutes a Brand. Accordingly, the relevant criteria for this decision are left to the Commission. . . . It is well established that the Commission is granted significant deference in this process." Brief of the Defendant, Department of Consumer Protection, Liquor Control Commission (dated April 29, 2020), 6-7.

The court agrees with the Commission. Neither the Liquor Control Act nor any regulation promulgated thereon requires the Commission to apply specific legal criteria when resolving a brand dispute. The Commission was not precluded from considering the factors or criteria that Polish Folklore asked it to consider, but it was not required to do so.[5]

Accordingly, the court applies the abuse of discretion standard to the Commission's selection of the criteria it used to decide that the two beer products were the same brand. The court applies the substantial evidence standard to the Commission's basic findings of fact.

B

The court concludes that the Commission did not abuse its discretion when it used criteria such as common recipes, trade names, and logos to determine whether the two beers were the same brand. While other federal or state regulators might have used different or additional criteria, the court is not persuaded that the Commission acted arbitrary or capriciously in its selection of relevant criteria.

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[5] *Kysela Pere et Fils* v. *Matias*, Docket No. CV990585559, 2001 WL 1329946 (Superior Court, Oct. 10, 2001), on which Polish Folklore places great weight, does not require a different conclusion. *Kysela* was a collections action involving an alleged breach of an exclusive wine distributorship agreement. By way of defense, the defendant (an out-of-state wine shipper) argued that the wine it was providing to another distributor was a different brand from the one it was legally obligated to distribute through the plaintiff. To resolve this dispute, the court looked to a ruling of the then Bureau of Alcohol, Tobacco and Firearms, which identified certain criteria relevant to resolving the brand dispute. Id., * 4. The Commission was not a party to the case, and the decision does not suggest, must less hold, that the Liquor Control Act or any agency regulation requires the Commission to use those factors.

The court also concludes that substantial evidence supports the Commission's basic findings of fact, particularly its findings that both beers have been brewed pursuant to the exact same recipe and at the same brewery since 1768;[6] both beers use the Zubr beer trade name; and both beers use the same bison logo.[7]

Perhaps most significant, Polish Folklore does not contest a critical admission by the current owner of the Dojlidy Zubr brewery, Kompania Piwowarska. The current owner stated that in 2003 it purchased the rights to the Zubr beer *brand*—not merely the recipe. See Commission Final Decision, 3 (citing Exhibit K). When the current owner of a particular brewery admits that the product a new distributor (e.g., Polish Folklore) is selling is the same brand that the previous owner brewed and sold to the original distributor (e.g., Amtec), any argument that the two products are different brands borders on the specious.

C

Polish Folklore offers a backup argument. It contends that even if the two Zubr beers are the same brand, the Commission should have terminated Amtec's exclusive distributorship for "just and sufficient cause" under General Statutes § 30-17 (a) (2). According to Polish Folklore, just and sufficient cause existed because Amtec allegedly waived or lost its rights to distribute Zubr beer in 2005. The court rejects this alternative argument for two reasons.

Initially, the argument is contrary to the plain and unambiguous language of § 30-17 (a) (2). In relevant part, the statute states, "When a holder of a wholesaler permit has had the

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[6] The court agrees with Polish Folklore that this factor alone would not support the Commission's determination that the two beers are the same brand. But the Commission did not rely solely on this fact.

[7] Polish Folklore argues that the Commission repeatedly erred in its factual findings when it stated that Amtec sold a product called "Zubr." According to Polish Folklore, Amtec sold a product called "Dojlidy Zubr." See Polish Folklore's Memorandum of Law, 24-28. The Commission did not find this alleged factual distinction credible.

distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper for six months or more, such distributorship may be terminated or its geographic territory diminished upon . . . (B) *the sending of a written notice by certified or registered mail, return receipt requested, by the manufacturer or out-of-state shipper to the wholesaler*, a copy of which notice has been sent simultaneously by certified or registered mail, return receipt requested, to the Department of Consumer Protection." (Emphasis added.) General Statutes § 30-17 (a) (2).

To illustrate how this provision works, let us call the manufacturer or out-of-state shipper of a particular product Party A. And let us call the particular wholesaler with whom Party A has a distributorship agreement Party B. The plain language of the statute permits Party A to ask the Commission to terminate the agreement with Party B, provided that Party A complies with the statute's notice procedures, i.e., Party A must send written notice to Party B and the Commission. In this case, Party A is Kompania Piwowarska, which purchased the Dojlidy Brewery in 2003, including the rights to the Zubr beer product. Party B is Amtec, which has the exclusive right to distribute Zubr beer in Connecticut via its 1998 agreement with Dojlidy Brewery, Kompania Piwowarska's predecessor-in-interest.

The plain language of the statute does not authorize a Party C—a stranger to the distribution agreement between Party A and Party B—to ask the Commission to terminate the agreement. If Party A desires to replace Party B with Party C, Party A may send the requisite statutory notice of intent to terminate to Party B and to the Commission. The Commission will then hold a hearing to determine whether Party A has presented "just and sufficient cause" to terminate its arrangement with Party B. But Party C cannot initiate termination proceedings.[8]

[8] During oral argument, the court asked the Commission's counsel about this interpretation of the statute. Counsel answered that the Commission has on occasion permitted a non-party to an exclusive distribution agreement to ask the Commission to terminate the agreement under § 30-17

Polish Folklore is Party C. Therefore, it lacks standing under § 30-17 (a) (2) to ask the Commission to terminate the exclusive distribution agreement between Amtec and Kompania Piwowarska. For this reason Polish Folklore's alternative argument for reversing the Commission's final decision must fail.

The court would reach the same conclusion, however, even if Polish Folklore had standing under § 30-17 (a) (2) to ask the Commission to terminate Amtec's exclusive distributorship. The Commission correctly noted that "the determination of what constitutes 'just and sufficient cause' is a matter for consideration by this Commission, after weighing the equities of both parties to ascertain whether termination is warranted." Final Decision, 1-2 (quoting *Schiefflin & Co.* v. *Department of Liquor Control*, 194 Conn. 165, 479 A.2d 1191 (1984)). Could the Commission have balanced the equities Polish Folklore's favor? Perhaps. Did the Commission abuse its discretion when it balanced the equities in Amtec's favor? No.

Polish Folklore also argues that Amtec "waived" and/or "lost the right to distribute" Zubr beer in 2005 when Kompania Piwowarska ceased selling the product in the United States. Polish Folklore Mem., 22-24, 31-32. The Commission rejected this argument based on its past precedents, particularly its declaratory ruling in *In re: Johnny Barton, Inc.* (November 10, 1987). The following excerpt from that decision is informative: "Section 30-17 [of the Liquor Control Act], the provision . . . that deals with termination and diminishment, has been around in some

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(a) (2). The Supreme Court has held that an "agency's reasonable interpretation of an ambiguous statute is entitled to deference only when that interpretation has been subjected to judicial review or the agency interpretation is both reasonable and time-tested. To satisfy the time-tested requirement of the rule according deference to an agency's interpretation of a statute, that interpretation must formally have been articulated and applied over a long period of time. . . ." (Internal quotation omitted.) *Brucuglio* v. *Thompsonville Fire Dist. # 2*, 190 Conn. App. 718, 730, 212 A.3d 751 (2019). Because the relevant text in § 30-17 (a) (2) is not ambiguous, the court does not defer to the Commission's interpretation.

form since 1933. . . . Since 1949 it has been amended in twelve different sessions of the legislature. The statute and actions taken pursuant to it have been challenged in several important and hotly contested cases. To say that it has been a controversial section of the Liquor Control Act and one that has been the subject of intense and detailed legislative scrutiny would certainly be no overstatement.

"The Commissioners do not believe one can 'read in' common law concepts of abandonment when this area of the law . . . has evolved so painstakingly over the years through legislative enactment. This statute . . . and the Regulations . . . set forth a detailed framework to guide the Department in the determination if a termination or diminishment has occurred. Abandonment is not mentioned in the statute or regulation despite the great detail with which the framework is outlined. We must assume that abandonment is not a manner by which a wholesaler can be terminated or have its territory diminished unless the affected out-of-state shipper or manufacturer cites that as cause for the termination or diminishment (in the case of beer) and then proves to the Commissioners at a public hearing that just and sufficient cause for the termination or diminishment exists." Polish Folklore Memorandum of Law, 9.

The court agrees that *In re: Johnny Barton, Inc.* applies here. If a manufacturer/out-of-state shipper of a liquor product has a longstanding exclusive distribution arrangement with a particular wholesaler, and if that wholesaler effectively abandons the arrangement by not purchasing the product for an extended period of time, the manufacturer/out-of-state shipper may cite abandonment as "just and sufficient cause" for the Commission to terminate the exclusive distribution agreement. However, if a new out-of-state shipper (like Polish Folklore) enters into an agreement with the manufacturer or authorized seller to distribute a product, the new out-of-

state shipper cannot collaterally attack the original wholesaler's (e.g., Amtec) exclusive distribution agreement by arguing that the original wholesaler abandoned that agreement.[9]

III

CONCLUSION

The Commission did not act contrary to law, nor did it abuse its discretion, when it selected particular criteria to decide whether the two Zubr beer products are the same brand. The Liquor Control Act leaves the selection of relevant criteria to the Commission's discretion. Further, substantial evidence supports the Commission's factual findings. Accordingly, there is no merit to Polish Folklore's arguments that the Commission committed reversible error in deciding that the Zubr beer products are the same brand. Polish Folklore's alternative argument that the Commission should have terminated Amtec's exclusive distribution agreement for "just and sufficient cause" under § 30-17 (a) (2) is also unpersuasive, both on standing grounds and on its merits.

For the foregoing reasons, the Commission's Final Decision is AFFIRMED.

SO ORDERED.

Dated: November 24, 2020

/s/ Daniel J. Klau, Judge

[9] Polish Folklore argues that *In re: Johnny Barton* permits out-of-state shippers to make abandonment arguments. Polish Folklore's Reply Memorandum (dated May 22, 2020), 14. Polish Folklore misreads that decision. *In re: Johnny Barton* acknowledges that an out-of-state shipper may cite abandonment as grounds for termination *if the out-of-state shipper is a party to the exclusive distributor agreement that the shipper wants to terminate*. That is not the case here. Polish Folklore is an out-of-state shipper, but it is not the out-of-state shipper that has a distributorship agreement with Amtec.

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

AMTEC INTERNATIONAL OF NY CORP.,	)	
	)	
Plaintiff,	)	Case No.: 1:20-cv-00003-LDH-PK
v.	)	
	)	Service Date: December 10, 2020
POLISH FOLKLORE IMPORT CO., INC.,	)	
	)	
Defendant.	)	

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

Defendant, Polish Folklore Import Co., Inc. ("PFI"), by its counsel, respectfully submits its Reply in Support of its Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss the Complaint of Plaintiff, Amtec International of NY Corp. ("Amtec").

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As PFI demonstrates in its Motion, this Court should dismiss Amtec's Complaint because (a) its claims are time-barred; (b) MABPA postdates the Agreement; (c) Amtec failed to plead a sale and delivery of beer in the territories necessary to provide statutory protection; (d) PFI is not a successor brewer subject to New York's ABC Law; (e) Polish law governs the Agreement; and (f) the Agreement terminated. Amtec's Response does not overcome these fatal deficiencies.

A. PFI'S EVIDENCE IS ADMISSIBLE.

As a threshold matter, the Court should consider PFI's evidence supporting the Motion, which includes: (a) the Agreement; (b) documents Amtec entered into evidence at the Connecticut hearing (the "Hearing"); and (c) Amtec's Post-Hearing Brief. Amtec agrees the Court can consider the Agreement. Contrary to Amtec's assertion that PFI relies on "unilaterally submitted evidence" by PFI during the Hearing (Resp., p. 6), Amtec submitted this evidence. Amtec's concern that the evidence was "not subject to challenge or discovery" is misplaced.

PFI agrees a court generally cannot take judicial notice of documents from an administrative hearing for the truth of the matter asserted. However, there are exceptions. A court may consider an integral document if the complaint "relies heavily upon its term and effect." *Sugar v. Greenburgh Eleven Union Free Sch. Dist.*, No. 18 CV 67 (VB), 2018 WL 6830865. Judicial notice of an administrative record is also appropriate, including for the truth of the matter asserted, where the facts are undisputed and/or not subject to a reasonable dispute. *In re FedEx Ground Package Sys.*, 2010 U.S. Dist. LEXIS 30303, at *1-2 (N.D. Ind. Mar. 29, 2010). Here, the document contents are not subject to reasonable dispute because Amtec submitted and relied upon them at the Hearing. Amtec may disagree about their legal effect, but this disagreement creates a *legal* dispute for determination by the Court, not a factual dispute. In addition, courts may take judicial notice of a party's admissions and documents in the public

record that contradict a party's factual assertions in a subsequent action. *Landow v. Wachovia Sec., LLC*, 966 F. Supp. 2d 106, 119 (E.D.N.Y. 2013). Here, Amtec's documents admitted at the Hearing contradict Amtec's claimed "temporary withdrawal."

B. THERE IS NO COLLATERAL ESTOPPEL.

Amtec wrongly argues the Hearing and Superior Court decision ("Decision") should have a "collateral estoppel effect against PFI." (Resp., p. 7.) Collateral estoppel applies when (a) the same issue decided in a prior action is decisive in the present action, and (b) the litigant had a full and fair opportunity to contest the decision. *Evans v. Ottimo*, 469 F.3d 278, 281 (2d Cir. 2006). At issue here are alleged violations of New York's and New Jersey's franchise laws. The Hearing and Decision interpreted Connecticut franchise law, which does not impact New Jersey and New York's franchise laws. Furthermore, the Decision is not final and is not conclusive.

C. AMTEC'S CLAIMS ARE TIME-BARRED.

PFI has proven the statutes of limitation bar Amtec's claims. (Mot., pp. 6-8.) The limitations period began to run no later than 2005 when KP unequivocally repudiated the Agreement. Thus, Amtec's claims were absolutely time-barred by no later than 2011. *Id*.

Amtec argues KP "temporarily withdrew" Zuber and did not repudiate the Agreement. (Resp., pp. 7-8.) However, KP's decision was not "temporary." KP wrote: (a) the Agreement expired and was not in effect; and (b) "there are also no specific plans on the distribution of Zubr in the US." *Id.*, Ex. T to Amtec's Post-Hearing Brief at R p. 1187. Amtec's reference to KP's statement that it would clarify the refusal is of no moment. A repudiation clarified is still repudiation. Moreover, following this "clarification," KP refused to sell to Amtec, which demonstrates the Agreement terminated or was repudiated. *Id.*, R. p. 1000. Indeed, Amtec does not plead any purchases of Zubr product since 2003. *Id.*, and Mot. Ex. 1, the Compl., ¶ 16.

In an attempt to avoid the indisputable facts, Amtec argues repudiation is a question of fact. However, repudiation of a contract is appropriate to resolve on a motion to dismiss where it is apparent as a matter of law. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (repudiation is not an issue of fact when it is in writing and unambiguous). Repudiation is an unqualified and clear refusal to perform. *Id.* Again, KP explicitly wrote no Agreement was in effect and the Agreement had expired, and it subsequently refused to fill Amtec's order. There is no basis for Amtec to contend the Agreement was not repudiated as a matter of law.

Moreover, nothing in the Agreement authorized a "temporary withdrawal." Rather, KP agreed to sell Zubr to Amtec according to the Agreement's sales schedule. (Mot. Ex. 2, the Agreement, at p. 8.) Failure to sell would be a breach. In *Biotronik, A.G. v. Conor Medsystems Ireland, Ltd.*, the defendant had a distribution agreement allowing it to withdraw its product for recall purposes. 33 Misc. 3d 1219(A), 939 N.Y.S.2d 739 (Sup. Ct. 2011). The plaintiff alleged the defendant breached by issuing a "sham recall" by removing its product for business rather than safety reasons. *Id.* at *6. The court recognized a "sham recall" could constitute a breach. *Id.* at *11. Obviously, if the withdrawal of a product subject to a recall provision could constitute a breach, the withdrawal of a product without any contractual authority for the withdrawal is a breach. Accordingly, Amtec's claims accrued no later than 2005, Amtec's claims are time-barred, and this Court should dismiss Amtec's Complaint.

D. MABPA POST-DATES THE AGREEMENT AND DOES NOT APPLY.

MABPA post-dates Amtec's Agreement and does not apply. (Mot., pp. 8-9.) The Agreement expired on December 12, 2002, with the "possibility of extension." (Mot. Ex. 2, the Agreement, at p. 1, and p. 5, Art. 14, ¶¶ 1-2.) Amtec last purchased Zubr beer during September 2003, and KP refused to sell to Amtec no later than 2005. (Mot. Ex. 1, Compl., at ¶¶ 16-18.)

Moreover, during 2005, KP unequivocally stated the Agreement expired and was no longer in effect, and KP refused to sell beer to Amtec. New Jersey enacted MABPA during 2006, after the Agreement concluded. Thus, MABPA post-dates the Agreement and does not apply.

Amtec concedes MABPA post-dates the Agreement but erroneously argues the Agreement had an indefinite term and therefore became subject to MABPA when enacted. (Resp., p. 9.) But the Agreement did not have an indefinite term. The Agreement terminated on December 31, 2002. (Mot. Ex. 2, the Agreement, at p. 1.) Amtec's reference to the 2003 "appointment letter" is a red herring. The 2003 "appointment letter" acknowledges Amtec as KP's brand agent, which permitted Amtec to register and import KP's products into the referenced states. (*See* Ex. 6 hereto, a true and accurate copy of the 2003 "appointment letter" admitted into evidence at the Hearing.) Nothing in the "appointment letter" purports to extend the term of the Agreement, and the letter is not a distribution agreement or modification of the Agreement subject to the protections of the beer franchise laws.

In any event, PFI established KP unequivocally repudiated the Agreement by no later than mid-2005, thereby nullifying the appointment letter, when KP stated the Agreement expired and was not in effect, and refused to fill Amtec's order. (Mot., pp. 7-9). Amtec lacks any basis to support its fictional interpretation that its relationship with KP was "ongoing." Accordingly, the Amtec-KP relationship clearly terminated no later than 2005, predating the enactment of MABPA, MABPA does not apply, and this Court should dismiss Amtec's MABPA claims.

E. AMTEC DOES NOT PLEAD SALE AND DELIVERY IN THE U.S.

Amtec has not pleaded the *prima* facie elements of a sale and delivery of beer within the territories. Mot., pp. 9-11. This Court held in the nearly identical case of *S.K.I. Beer Corp. v. Baltika Brewery* ("*S.K.I.*") that the New York franchise law requires *prima facie* elements of a

brewer's sale or offer to sell **and** delivery of beer to the distributor within the state. 443 F. Supp. 2d 313, 319 (E.D.N.Y. 2006) (the statute "regulates only those sales and deliveries in New York."). Amtec cannot sustain its franchise claims because it has not pleaded KP sold and delivered beer to Amtec within New York or New Jersey, and the Agreement is to the contrary. Indeed, the Agreement, as in *S.K.I.*, conclusively states that acceptance of products occurs in Poland and title and all risks passed to Amtec at that time. Ex. 2, the Agreement, p. 2, Art. 5, §§ 1-2. Amtec therefore cannot prevail on its franchise claims.

Amtec incorrectly argues PFI's argument fails because it is not "offering any evidence" that Amtec took title in Poland. (Resp., p. 10.) However, it is Amtec's burden to plead the required elements, and Amtec is impermissibly attempting to shift its burden to PFI. Moreover, PFI did offer evidence – the Agreement, which expressly states that the sale and/or delivery of the beer purchased took place at the Dojlidy warehouse in Poland.

Amtec cites only one irrelevant decision in an attempt to support its proposition that the beer franchise laws do not require sales and deliveries in their respective states. However, *Fellowes, Inc. v. Michilin Prosperity Co., Ltd.*, concerns a patent infringement claim under 35 U.S.C. § 271(a). *Fellowes, Inc. v. Michilin Prosperity Co., Ltd.*, 491 F. Supp. 2d 571, 577 (E.D. Va. 2007). Amtec offers no explanation how or why the *situs* of a patent infringement claim under an unrelated federal statute applies to its beer franchise law claims. In any event, the applicable beer franchise laws require a sale **and** delivery within their respective states.

Amtec next wrongly argues it is "premature and improper" to evaluate PFI's argument concerning the passage of title. Amtec's position is contradicted by the *S.K.I* decision, which decided a motion to dismiss and held New York's beer franchise law did not apply due to, in part, to the situs of title transfer. *S.K.I.*, 443 F. Supp. 2d at 313. Amtec cites to *Amtec Intern. Of*

N.Y. Corp. v. Beverage Alliance., LLC as support for its contention that it is premature to conduct a title analysis. (Resp., p. 11.) However, the *Beverage Alliance* court declined to analyze whether the defendant was a successor brewer, **not** where title passed. *AMTEC Int'l of N.Y. Corp. v. Beverage All. LLC*, 10-CV-1147 NGG SMG, 2011 WL 4597480, at *2, n. 2 (E.D.N.Y. Sept. 30, 2011). Thus, *Beverage Alliance* does not support Amtec's position.

Amtec also misleadingly argues the *S.K.I.* trial court's reasoning was "ultimately not accepted" by the Second Circuit. (Resp., p. 12.) The Second Circuit never rejected the trial court's analysis pertaining to title because it affirmed the case on other grounds. *S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705, 709 (2d Cir. 2010) ("We do not need to decide whether the agreement between SKI and Baltika is subject to § 55-c, because, [even if it were], it does not the bar the forum selection clause at issue here.").

Amtec's additional attempts to distinguish *S.K.I.* because it "concerned the enforcement of a forum selection clause and not termination" are unavailing. (Resp., p. 11.) This Court's analysis in *S.K.I.* concerned whether Section 55-c of New York's ABC law applied to a contract where the sale and transfer of goods occurred outside of New York. *S.K.I.*, 443 F. Supp. 2d at 322. Contrary to Amtec's argument, it is immaterial whether *S.K.I.* concerned a forum selection clause and not a termination. The analysis is identical. Moreover, Amtec is mistaken because the underlying issue in *S.K.I.* was termination. *Id.* at 315 ("Plaintiff contends that [Defendant's actions] constituted a termination of the agreement.").

In a further attempt to distinguish *S.K.I.*, Amtec makes much of the fact that the Agreement references New York and New Jersey as distribution territories and that KP issued a 2003 appointment letter designating Amtec as its "brand agent" for these states. (Resp. at pp. 11-12.) While it is true the *S.K.I.* contract did not explicitly refer to New York, the contract

emphasized that the beer would be exported, and, like the instant case, the *S.K.I.* defendant brewer appointed the plaintiff as its brand agent in New York. *S.K.I. Beer Corp. v. Baltika Brewery,* 612 F.3d 705, 707 (2d Cir. 2010) ("[Defendant] designated [plaintiff] as its exclusive brand agent in New York State; it did so by a letter to the State of New York Alcoholic Control Wholesale Bureau."). Finally, Amtec argues KP knew its beer would be sold in New York due to labeling requirements, which differentiates this case from *S.K.I.* (Resp. p. 12.) However, the same labeling requirement would have applied to the defendant brewer in *S.K.I.*

Amtec next wrongly argues the Court's reasoning in *S.K.I.* creates an "absurd result." (Resp., pp. 13-14.) However, applying a statute as written leads to the result the legislature intended, not an absurd result. As the *S.K.I.* Court noted, Amtec's interpretation would create an absurd result because a sale of beer anywhere in the world to a wholesaler that happens to be licensed in New York would trigger application of the state beer franchise laws. Such a result would be contrary to the statutes and an unconstitutional violation of the dormant commerce clause. *S.K.I.*, 443 F. Supp. 2d at 320. ("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.").

Finally, Amtec incorrectly argues "PFI's interpretation of the statute would ignore basic rules of statutory and grammatical interpretation." (Resp., p. 15.) Amtec suggests the interpretation offends the "rule of last antecedent," but the *S.K.I.* Court rejected the application of the rule in this context. *Id.* at 319-20. Similarly, the rule of the last antecedent can be overcome with other indicia of meaning, which the *S.K.I.* Court analyzed and found abound in New York's ABC Law. Amongst other provisions, the New York legislature stated the purpose of its beer franchise law was to "regulate and control the manufacture, sale and distribution *within the state*." *Id.* at 319, citing N.Y. Alco. Bev. Cont. ("ABC") Law § 2 (emphasis in original).

Furthermore, the New York legislature defined "to sell" to include the "delivery of any alcoholic beverage *in the state*." *Id.* (emphasis added). As the *S.K.I.* Court noted, this is the only possible interpretation because a court must not interpret a statute in a way that might be unconstitutional. *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (in evaluating two possible statutory interpretations, courts should interpret to avoid constitutional problems).

For the foregoing reasons, Amtec does not and cannot plead KP's sales and deliveries within the respective states. This Court should dismiss Amtec's claims predicated on its failure to plead *prima facie* elements to bring its claims within the franchise laws' coverage.

F. PFI IS NOT A SUCCESSOR BREWER UNDER NEW YORK'S LAW.

PFI is not a "successor brewer" under New York law. (Mot. pp. 11-14.) According to the New York ABC Law, to be a successor, there must be an acquisition in a manner described therein (a "successor" is "any person or entity which '**acquires**' …"). N.Y. ABC Law § 55-c(2)(c). Amtec does not allege PFI acquired its import rights in any of the ways addressed in the statute. To the contrary, Amtec admits PFI obtained its rights from a different company, MAG Dystrybucja. (Mot. Ex. 4, Amtec's Post-Hearing Brief, at R. p. 1001.)

The parties disagree only as to the meaning of "without limitation." PFI demonstrates *ejusdem generis* requires "without limitation" to mean an acquisition similar to those described in the statute. (Mot., pp. 12-13.) PFI's interpretation does not add "new language" to the statute by changing the word "of" to "from," as Amtec argues. (Resp., p. 18.) Nor does this interpretation render the phrase "without limitation" superfluous. (Resp., p. 18.) It should be interpreted under the doctrine of *ejusdem generis*.

Amtec's attempts to distinguish *Grant* are also unavailing. Like New York's statute, the Illinois statute identified non-exclusive examples by which a brewer or importer must obtain its

rights before it could be deemed a successor, such as a merger, purchase, *etc. Grant Importing & Distrib. Co. v. Amtec Int'l of N.Y. Corp.*, 892 N.E.2d 1134, 1137 (Ill. App. Ct. 2008). If one of the enumerated acquisitions was not present, *ejusdem generis* required the beer importer to have obtained its rights in a manner similar to the acquisition examples described in the statute if it was to be deemed a successor. *Id.* at 1136-37. Amtec, in *Grant*, did not acquire its rights in a manner described by statute. Thus, Amtec was not a successor. The same is true here. PFI did not acquire its rights in a manner described by the New York ABC Law.

Next, Amtec wrongly claims PFI's interpretation would enable brewers to avoid statutory obligations by "transferring or assigning" rights to a new import company. (Resp., p. 19.) In such a situation, however, there would be an acquisition resulting in a successor. And if not, like in *Grant*, the importer would not be deemed a successor. Finally, Amtec claims it needs to conduct discovery to learn how PFI acquired its rights. (Resp., p. 18, n. 2.) However, Amtec judicially admitted PFI acquired its right from third-party MAG Dystrybucja. (Mot. Ex. 4, Amtec's Post-Hearing Brief, at R. p. 1001.) Accordingly, this Court should dismiss Amtec's New York claim because PFI is not a "successor brewer" as a matter of law.

G. POLISH LAW GOVERNS THE AGREEMENT.

The Agreement is governed by Polish law (Mot., pp. 14-15), which Amtec admits. Thus, the New York and New Jersey statutes do not apply.

Amtec wrongly argues Polish law applies only to the Agreement and not the parties' "relationship." (Resp., p. 21.) The Agreement plainly governs the relationship between Amtec and KP, including purchase terms and a termination provision. Amtec's case decisions cited in support of its position are wholly irrelevant. Both cases addressed a completely different issue, whether a contract's choice of law provision precluded unrelated *tort* claims that was not

addressed by the parties' contract. *In Re Sling Mediabox Adv. Litig.*, 202 F. Supp. 3d 352, 358 (S.D.N.Y. 2016), *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 335 (2d Cir. 2005). Finally, applying the choice of law provision does not violate public policy, as Amtec claims, because Amtec offers no argument or authority that it does not have adequate rights under Polish law or that its rights thereunder are inconsistent with New York law. Accordingly, Polish law applies to the Agreement. This Court should dismiss the Complaint.

H. THE AGREEMENT EXPIRED ON ITS TERMS.

The Agreement expired by its terms. The Agreement had an expiration date of December 12, 2002, with a possibility of extension." (Mot., Ex. 2, p. 5, Art. 14, § 1.) Amtec fails to plead how the Agreement remains effective and purportedly binds PFI, which is not in privity with KP, 14 years after (a) the Agreement expired; and (b) KP denied its effectiveness, repudiated any obligation it might have, and refused to fill Amtec's orders.

Amtec's incorrectly argues the ongoing nature of its relationship with KP "was already litigated and decided by the Commission." (Resp., p. 22.) However, the Commission's decision has no preclusive effect. *Supra*, p. 2. Amtec next argues the 2003 "appointment letter" demonstrates the parties continued to interact. However, the "appointment letter" is not a written distribution agreement that conferred rights protected by the franchise laws. *Supra*, pp. 4-5. As Amtec itself concedes, the fact that parties may continue interacting after a contract expire does not necessarily mean all of the contract's terms survive. (Resp., p. 22). Accordingly, this Court should dismiss Amtec's Complaint.

CONCLUSION

For the reasons set forth herein and more thoroughly in PFI's Motion, this Court should dismiss Amtec's Complaint with prejudice.

Dated: December 10, 2020

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 a true and correct copy of the above-titled **Defendant's Reply in Support of Its Rule 12(b)(6) Motion to Dismiss** was served upon all parties of record by sending copies of the same via ECF, U.S. mail and/or electronic mail at or before 5:00 PM CST on December 10, 2020, to the following attorneys of record:

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DOJLIDY
The Spirit of Poland
Since 1768

April 24.03

TO WHOMIT MAY CONCERN

The Browar Dojlidy – Białystok located at , ul. Dojlidy Fabryczne 28 Poland brand owner and producer of Dojlidy Beer–Magnat and Dojlidy Beer – Żubr, Porter, Mocne, do hereby appoint Amtec International of NY Corp. 430 Morgan Ave. Brooklyn, N.Y. 11222, USA as our brand agent for our mantioned above brands for following States of America : New York, New Jersey, Illinois, Michigan, Arizona, California, Connecticut, Florida, Georgia, Maryland, Nevada, Pensylwania, Rhode Island, Washington.

Manufacturer

BROWAR DOJLIDY
Spółka z o.o.
ul. Dojlidy Fabryczne 28

EXHIBIT 6

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

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

NOTICE OF FILING

TO: ALL PARTIES OF RECORD

PLEASE TAKE NOTICE that on **Thursday, December 10, 2020**, we filed with the Clerk of the United States District Court for the Eastern District of New York, **Defendant's Reply in Support of Its Rule 12(b)(6) Motion to Dismiss**, a copy of which is hereto attached and served upon you.

Dated: December 10, 2020

Respectfully submitted,

POLISH FOLKLORE IMPORT CO. INC.

/s/ Earl E. Farkas
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Defendant's Reply in Support of Its Rule 12(b)(6) Motion to Dismiss** was filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record, on this 10th day of December, 2020.

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