

**STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

IN THE MATTER OF HUNTERDON)	SR 2023-11
BREWING CO, LLC, A LICENSED NEW)	SPECIAL RULING AUTHORIZING
JERSEY PLENARY WHOLESALER,)	ISSUANCE OF TEMPORARY
DISPOSITION OF REMAINING INVENTORY)	MISCELLANEOUS CONTINGENCY PERMIT
IN LIGHT OF CLOSING ITS BUSINESS ON)	TO HUNTERDON BREWING CO.
DECEMBER 1, 2023.)	
_____)	

Nicholas J. Bergman, Esq., on behalf of Hunterdon Brewing Co, LLC.

BY THE DIRECTOR:

This matter comes before the Division of Alcoholic Beverage Control (Division) by way of a petition for relief by Hunterdon Brewing Co, LLC, (Hunterdon), which holds a New Jersey plenary wholesale license (3402-23-728-001) and is ceasing its business operations in New Jersey as of December 1, 2023. Hunterdon requests rescission of four closeout permits issued and issuance of a Temporary Miscellaneous Contingency Permit under N.J.S.A. 33:1-74 and N.J.A.C. 13:2-5.5 to sell a certain limited quantity of products remaining in its inventory at terms consistent with this Special Ruling. Due to the unique circumstances of this matter and for the reasons set forth herein, the Division will grant relief to Hunterdon, subject to the conditions contained in this Special Ruling.

Background

According to its petition, Hunterdon will be discontinuing its business as of December 1, 2023. Hunterdon’s decision to discontinue its business was announced September 1, 2023. Hunterdon has distribution rights for many craft beers, as well as wine and spirits, and its closing will affect those brands. Hunterdon is self-described as the premier craft beer distributor in New

Jersey, and has focused its business model on bringing an array of craft products from around the country to the New Jersey marketplace.

As of September 1, 2023, the date it announced its closing, Hunterdon's on-hand inventory consisted of 115,570 units of various products, valued at approximately \$4 million. Hunterdon represents that most of this inventory will be split up among five existing New Jersey wholesalers: High Grade Beverage Co., Ritchie & Page Distributing Co., Inc., Northern Eagle Beverage Company, Inc., Konrad Beer Distributors, Inc., and Harrison Beverage Co. (collectively referred to as the Anheuser-Busch or AB Network). According to Hunterdon's records, of the 115,570 units¹ it had on hand as of September 1, 2023, 100,406 of those units will be purchased by the AB Network at closing and by other successor wholesalers, or Hunterdon was able to either sell those units in the regular course of business to retailers, other wholesalers, or brewers. The remaining 15,164 units of product, approximately 13% of its remaining inventory, were either fall seasonal products that would not be marketable in December after the closing date, or did not have a designated successor wholesaler in New Jersey. Hunterdon refers to this inventory as "distressed inventory."

Hunterdon states that it has taken multiple steps to liquidate this distressed inventory, including returning the products to the suppliers, selling the products to other wholesalers outside of New Jersey when permitted, and incentivizing employees to sell the products at cost or above to retailers. Though Hunterdon offered any supplier who would not be represented by a known successor wholesaler a chance to repurchase its product, according to Hunterdon this effort was minimally successful because many suppliers are small and were unable to purchase it back at

¹ Hunterdon's remaining inventory consists of "units," which are generally one-case or one-keg of an item or brand.

Hunterdon's laid-in cost.² Hunterdon also had minimal success moving inventory from its New Jersey location to out of state locations, as that type of shipment can violate out-of-state three-tier system laws. Hunterdon represents it was only able to sell 1,142 units of its distressed inventory (approximately 7%) in September 2023 either at cost or above cost pursuant to its September Current Price List (CPL), leaving 14,012 units of distressed product on-hand by the end of September 2023.

To aid in liquidating this remaining distressed inventory, Hunterdon identified 119 stock keeping units (SKUs), amounting to 6,727 units of product (less than half of its remaining distressed inventory) for which it would apply for closeout permits³ from the Division. The remaining distressed inventory of 8,437 units would be sold either at cost or above cost as set forth in Hunterdon's October and November 2023 CPLs.

In September 2023, prior to receiving any closeout permits for the 6,727 units, Hunterdon sold 1,142 units either at cost or above cost, pursuant to its September 2023 CPL. See Exhibit A, Inventory Summary. On October 2, 2023, Hunterdon applied for and received four closeout permits through the Division's POSSE system (permit numbers 110447, 110448, 110449, and 110468), which covered 96 SKUs, most but not all of the 119 SKUs it had identified. Id., rows 4 through 99.

² A wholesaler's "laid-in cost" combines the cost of the actual product the wholesaler is purchasing from the supplier with shipping costs and taxes. According to counsel for Hunterdon, it is a widespread and customary industry practice for suppliers to buy back product, when appropriate, at laid-in cost.

³ A closeout permit pursuant to N.J.A.C. 13:2-24.8 authorizes a licensee to sell or offer for sale alcoholic beverages at a price below "cost," which is defined as "the actual proportionate invoice price and freight charge to a distributor or wholesaler and the actual proportionate invoice price to a retailer, as the case may be, of any given container of an alcoholic beverage product, plus applicable State and federal taxes. The actual invoice price shall be determined by the 'last-in-first-out' method applying generally accepted accounting principles." See N.J.A.C. 13:2-24.8(b).

Hunterdon's October 2023 CPL reflected the closeout permits and pricing for those 96 SKUs, and in October 2023, Hunterdon sold 5,124 units of product below cost and had 461 units of product remaining that Hunterdon had planned to sell below cost. However, of those 461 remaining units, only 59 were covered by the October 2, 2023 closeout permits. As noted above, Hunterdon had not yet applied for closeout permits for all of those units, so on October 24, 2023, Hunterdon applied to the Division for two additional closeout permits covering the remaining 23 SKUs and 402 units of product.⁴ In other words, as of the date of today's Special Ruling, Hunterdon has 461 units of distressed inventory for which its needs relief.

On October 17, 2023, Division staff met with members of the Brewers Guild of New Jersey (Brewers Guild), who contacted the Division and expressed their concerns that Hunterdon's closeout permits would result in a flood of below-cost beer in the New Jersey craft beer marketplace (and negatively impact retailers' purchasing decisions of New Jersey craft beer), and would further have the unintended consequence of prohibiting any products (including products manufactured in New Jersey) listed on the closeout permits from being sold for one year following the expiration of the closeout permits pursuant to Special Ruling 2021-10.⁵ The Brewers Guild asserted that the closeout permits issued would have a destabilizing effect on the New Jersey craft beer marketplace and could have unintended financial consequences for its members.

On October 26, 2023, the Division relayed its concerns and the concerns of the Brewers' Guild to Hunterdon regarding the closeout permits and the liquidation of Hunterdon's inventory.

⁴ These applications pending in the Division's POSSE system, with job numbers 638873 and 638859.

⁵ Special Ruling 2021-10 enunciated the Division's long-standing policy with respect to closeout permits. A product that is the subject of a closeout permit may not be sold in the State for twelve months following the expiration date of the closeout permit, and may not be re-introduced into the marketplace unless approved by the Director.

In consideration of the unintended consequences of its closeout permits that would essentially remove certain craft breweries' products from the New Jersey marketplace for at least one year, and in further consideration of the effect that liquidating its inventory could potentially have on the New Jersey alcoholic beverage marketplace, Hunterdon petitioned the Division for special relief. In its petition, Hunterdon asks the Division to rescind the four closeout permits issued on October 2, 2023, and cancel two pending October 24, 2023 closeout permit applications, and instead issue a Temporary Miscellaneous Contingency Permit that would allow it to sell 461 units of product, covering the SKUs still in Hunterdon's on-hand inventory listed in Exhibit A, in a manner authorized by this Special Ruling. In addition, Hunterdon requests that the relief granted in this Special Ruling retroactively apply to the sales of the 5,124 units of distressed inventory (96 SKUs) that occurred in October 2023. According to its petition, Hunterdon seeks this relief in order to minimize the "significant detriment to its brand suppliers" and avoid disruption to the craft beer marketplace.

Legal Authority

The Division has a duty to supervise the manufacture, distribution, and sale of alcoholic beverages in a manner that fulfills the policies of the Alcoholic Beverage Control Act (ABC Act), N.J.S.A. 33:1-1 to 4-1. As directed by the Legislature, these policies include the duty to maintain trade stability, encourage the beneficial aspects of competition, and prohibit discrimination in the sale of alcoholic beverages to retail licensees. See N.J.S.A. 33:1-3.1. In accomplishing these duties, the Division has broad authority to regulate the alcoholic beverage industry and is entitled to heightened deference to allow for exercise of its discretion in the "delicate area" of alcohol regulation. Circus Liquors, Inc. v. Middletown, 199 N.J. 1, 12-13 (2009). "The grant of an express power is always attended by the incidental authority fairly and reasonably necessary or appropriate

to make it effective Authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent.” Cammarata v. Essex County Park Comm'n, 26 N.J. 404, 411 (1958).

The Division is expressly authorized to issue Special Rulings “as may be necessary for the proper regulation and control of the manufacture, sale and distribution of alcoholic beverages.” N.J.S.A. 33:1-39. Furthermore, under N.J.S.A. 33:1-74, as implemented by N.J.A.C. 13:2-5.5, the Division has the authority to provide special relief in the form of temporary miscellaneous contingency permits “where it would be appropriate and consonant with the spirit of this chapter” to do so, and N.J.A.C. 13:2-24.8 allows the Division to authorize a sale below cost when a licensee petitions for such relief.

It is against this background that the Division reviews Hunterdon’s request for relief. The Division considers Hunterdon’s situation to be unique as it involves the closure of a large wholesaler, the liquidation of a portion of its inventory, and the inevitable impact on the New Jersey craft beer marketplace. The Division appreciates the concerns expressed by the Brewers Guild that the dissolution of Hunterdon could result in a flooding of the market with below-cost craft beer and that, through the closeout permit process, suppliers (both in New Jersey and out-of-state) could be inadvertently prohibited from selling their products in this State for at least one year. Accordingly, a remedy needs to be created that allows Hunterdon to wind down its business operations without causing disruption to trade stability and competition in the craft beer market. See Circus Liquors, 199 N.J. at 13 (“We are convinced that the Legislature meant for the Director to have ample implied authority to deal fairly with the parties when executing his extensive authority over alcoholic beverage licenses.”).

Based on the information provided by Hunterdon and supplemented during the Division's review of its petition, the Division believes that Hunterdon has made a good faith effort to sell its inventory on-hand as of September 1, 2023, in a manner that avoids, to a large extent, disruption to the New Jersey marketplace. Most of its products have been sold to the AB Network, and the record shows that more than half of Hunterdon's 15,164 units of inventory on-hand September 1, 2023, was sold at cost or at full price. Additionally, as noted above, many of the SKUs listed on Exhibit A are seasonal "Oktoberfest" style products, and as of the date of this Special Ruling would be out of season or nearly out of season for retailers to purchase, thus Hunterdon's sale of these products would not unduly interfere with New Jersey craft manufacturers' current product lines. Since receiving closeout permits on October 2, 2023, Hunterdon has sold 5,124 units of product below cost in October 2023. Hunterdon supplied a log of these sales and its data shows that the largest purchase of these units was to a retailer who purchased 1,393 units, or 24.9% of the inventory that was available under the closeout permits issued October 2, 2023.

When Hunterdon applied for the four closeout permits, Hunterdon may not have been aware of the unintended consequence that these products could not be sold in New Jersey for one year following the expiration of the permits. See Special Ruling 2021-10. As such, a traditional closeout permit was not the appropriate vehicle for Hunterdon's liquidation of its distressed inventory. Thus, as part of the relief set forth herein, the Division will rescind closeout permits 110447, 110448, 110449, and 110468, and the relief authorized herein will be retroactive to October 2, 2023, the date those permits were issued.⁶

⁶ On October 24, 2023, Hunterdon applied for two additional closeout permits with job numbers 638873 and 638859. With the issuance of this Special Ruling, these pending closeout permits are no longer necessary and the Licensing Bureau shall cancel those jobs.

Retroactive relief is being granted, in part, based on the Division's analysis that the 5,124 units sold below cost consisted largely of seasonal beers and would not be expected to alter the craft beer purchasing decisions of retailers, that the quantities sold were relatively small and would not be expected to have a destabilizing impact on the craft beer market, and that there was no evidence thus far of discriminatory selling or steering of these products to certain favored retailers. Similarly, if the closeout permits were allowed to stand, the affected brands would be out of the New Jersey market for at least one year, unbeknownst to its suppliers and the small number of dual wholesalers distributing these products. This would have been an untenable result. While the Division is granting this extraordinary relief based on the unique circumstances of Hunterdon's dissolution, the Division reserves its right to take appropriate enforcement action against Hunterdon should the information relied upon in making this determination be different.

As for Hunterdon's request to sell the remaining 461 units of its distressed inventory (as listed in Exhibit A) at prices intended to move these products and reduce the remaining quantities that may need to be destroyed or otherwise disposed, the Division is mindful that these products must be treated carefully so as not to pose a hardship to Hunterdon, retailers, affected suppliers, consumers, and New Jersey-licensed limited breweries. Thus, before authorizing the relief Hunterdon is seeking, certain safeguards must be put in place. First, Hunterdon may sell its remaining products in a manner consistent with the relief granted herein, and must ensure that sales to retailers are made in a nondiscriminatory manner and avoid any sales that could be viewed as "steering" product to certain preferred retailers. See June 12, 2015 Special Ruling: "In Re Anti-Competitive and/or Potentially Discriminatory Practices in Wholesale Alcoholic Beverage Industry." While not required by this Special Ruling, Hunterdon is encouraged to make additional efforts to sell this remaining inventory back to its suppliers.

Second, Hunterdon was required to demonstrate that the amount of product subject to this Special Ruling (461 units) will not have a destabilizing effect on the craft beer market, such that New Jersey retailers will be inundated with extremely inexpensive craft beer to the detriment of the New Jersey limited breweries. In considering Hunterdon's request, the Division analyzed the total amount of remaining products that would be subject to the requested permit (shown in Exhibit A), and determined that this is a small amount of product and would not have an adverse impact on the New Jersey craft beer market.

The Division is sensitive to the time constraints that Hunterdon faces, having less than three weeks remaining from the date of this Special Ruling to deplete its inventory. To balance the Division's concerns about unfair trade practices and steering, with Hunterdon's legitimate business interest to sell its remaining products, the Division will authorize Hunterdon to sell no more than 35%⁷ of the products listed in Exhibit A to a single retailer before November 17, 2023. After November 17, 2023, Hunterdon may sell those products on a first-come, first-serve basis. Thirty days following the expiration of the special contingency permit that is authorized by this Special Ruling, Hunterdon will be required to provide to the Division an itemization of any inventory sold pursuant to this Special Ruling, as well as the sales made pursuant to the closeout permits that were rescinded by this Special Ruling. This post-Special Ruling inventory shall include the names of the brands, the specific quantities sold, and the retailers who purchased these items.

⁷ As a guide, the Division is made aware of the State of New York Liquor Authority's Advisory #2016-2, which allows wholesalers offering products below cost to sell no more than 10% of such inventory to a single retailer for the first month of sales, with no limitation on sales in following months. Here, however, Hunterdon has less than a month to liquidate its remaining inventory, thus a higher sales limitation was appropriate in this instance.

Accordingly, based on the foregoing and for special cause shown, in order to ensure a seamless closing of this wholesaler and to avoid any potential disruption in the marketplace, the Director hereby authorizes the Licensing Bureau to issue a Temporary Miscellaneous Contingency Permit pursuant N.J.S.A. 33:1-74 and N.J.A.C. 13:2-5.5 subject to the following:

1. Hunterdon may sell the products listed in Exhibit A at no more than an 85% discount off of its cost, but in no event shall Hunterdon sell any product for less than \$1 per unit. Such prices shall be listed in its November current price list (CPL), which it shall amend as soon as possible following the issuance of this Special Ruling.
2. Product prices must be made available to all retailers on a nondiscriminatory basis pursuant to Hunterdon's CPL. Nothing in this Special Ruling shall authorize Hunterdon to sell a product for a price different from what is listed in its CPL.
3. Hunterdon must make its inventory available to all retailers on a nondiscriminatory basis and must avoid the practice of steering. From the date of this Special Ruling through November 17, 2023, Hunterdon may not sell more than 35% of the remaining on-hand products listed in Exhibit A to any one retailer. After November 17, 2023, Hunterdon may sell any remaining on-hand inventory of the products listed in Exhibit A on a first-come, first-serve basis without any per-retailer purchase limitations.
4. Thirty days following the expiration of the Temporary Miscellaneous Contingency Permit authorized by this Special Ruling, Hunterdon will be required to provide to the Division an itemization of any inventory sold since October 2, 2023, pursuant to this Special Ruling and to the previously-issued closeout permits, which shall

include the name of the brands, the specific quantities sold, and the retailers who purchased these items.

In issuing this Special Ruling, the Division notes that the issuance of this Temporary Miscellaneous Contingency Permit will not result in the one-year removal from the New Jersey market of any of the products addressed herein (referred to as the “affected products”). This Temporary Miscellaneous Contingency Permit will be retroactive to October 2, 2023, so as to create a seamless transition with Hunterdon closing its business. As described below, manufacturers or suppliers of the affected products may find other wholesalers to distribute their products and appoint these new wholesalers by amending or renewing their brand registrations in accordance with N.J.S.A. 33:1-2(c) and (d) and N.J.A.C. 13:2-33.1 to 33.2.

Affected Manufacturers and Suppliers

Hunterdon carried a large array of alcoholic beverage brands from both in and out of state manufacturers. As part of the wind-down of Hunterdon’s business, the Division recognizes that most, if not all of the suppliers or manufacturers who appointed Hunterdon to sell their brands in New Jersey will need to amend their brand registrations to add a new distributor. Given that brand registrations expire on December 31, and in recognition of the unique situation caused by Hunterdon closing its business December 1, the Division will allow any manufacturers or suppliers of products that were carried by Hunterdon to amend their brand registrations to add a new distributor without paying a fee. Such amendments may only be made in November and December 2023. After January 1, 2024, all brands that were not renewed will need to be re-registered following normal procedures. Nothing in this Special Ruling shall be interpreted to affect, modify or change the brand registration process.

Conclusion

In light of the foregoing, the Director is hereby authorizing the Licensing Bureau to rescind the four aforementioned closeout permits issued, cancel the pending two closeout permit applications, and issue a Temporary Miscellaneous Contingency Permit that will permit Hunterdon to liquidate its remaining distressed inventory listed in Exhibit A pursuant to conditions 1 through 4 as stated above. Furthermore, any affected manufacturers and suppliers as described herein may amend their brand registrations through POSSE to add a new distributor during November and December 2023 without paying a fee.

The relief granted above is based on the representations made by Hunterdon. Should any facts or circumstances differ from these representations, the Division reserves its right to revoke or modify the provisions above, or take any other appropriate action against the licensee. Nothing in this Special Ruling shall be construed to affect the validity of Hunterdon's license, which is in effect until June 30, 2024.


JAMES B. GRAZIANO
DIRECTOR

Dated: November 14, 2023