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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

April 3, 1969

BULLETIN 1845

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ITEM

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1. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALER - DISTILLER ORDERED TO SUPPLY WHOLESALER.

JOELI WINE DISTRIBUTORS, INC., t/a PERRONE WINES & SPIRITS, Petitioner, v. BROWNE-VINTNERS COMPANY, Respondent	)	ON PETITION CONCLUSIONS AND ORDER

Meyer Sugarman, Esq., Attorney for Petitioner.
Toner, Vanderbilt, Michels & Light, Esqs., by William R. Vanderbilt, Esq., Attorneys for Respondent.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Petitioner, a licensed wholesaler of alcoholic beverages in New Jersey, seeks to compel respondent (an unincorporated division of the House of Seagram, Inc.) to sell its products to petitioner, claiming such right under the provisions of R.S. 33:1-93.6 et seq. (L. 1966, c. 59).

Petitioner (hereinafter Joeli) contends in its petition that from 1959 to date it was a duly appointed distributor of nationally advertised brands of alcoholic beverages imported, blended, distilled or rectified by respondent (hereinafter Browne-Vintners) for resale in New Jersey; that during the past year it sold approximately $200,000 worth of Browne-Vintners products; that its volume of sales of Browne-Vintners products per salesman compares favorably to that of other authorized distributors of Browne-Vintners. It further alleges that on June 9, 1967 it was notified by Browne-Vintners by letter dated June 8, 1967 of its discontinuance of Joeli as an authorized distributor "effective immediately."

On June 20, 1967 Joeli ordered three hundred cases of national brand merchandise from Browne-Vintners, which Browne-Vintners refused and continues to refuse to fill the said order. Joeli further alleges that it has been at all times able to pay for the merchandise and that termination of its distributorship is discriminatory within the meaning of Chapter 59 of the Laws of New Jersey (1966), contained in R.S. 33:1-93.6-11. It seeks a determination by the Director that the aforesaid refusal is discriminatory and for an order directing Browne-Vintners to complete the sale in accordance with the said order.

In its answer Browne-Vintners admits that Joeli was a duly appointed distributor of its products until June 9, 1967, when it notified Joeli that it was discontinuing such authorization.

In separate defenses Browne-Vintners sets forth that it acted "in good faith and in the exercise of an informed business judgment" in its decision to discontinue Joeli together with twenty-four other wholesalers distributing its products in New Jersey, and designating as its exclusive distributor in this State Reitman Industries, Inc. and its affiliated companies Galsworthy, Inc., Fleming & McCaig, Inc., and Crest Wine & Spirits Company, Ltd.; that it acted "under the authority of the statute made and provided" in such appointment; and that under the said statute it was "justified in terminating the authority" of Joeli.

It was stipulated at the outset that all of the products of Browne-Vintners sold in New Jersey are nationally advertised except Kayser's wines and Brolio chianti. Additionally, it was agreed that Joeli has the ability to pay for the products of Browne-Vintners which would be ordered by Joeli.

In order to understand the motivation and the intention of the Legislature, the import of the amendatory legislation herein involved and the governmental purpose effectuated by the said enactment, it is necessary to examine briefly the prior act and analyze the present law.

The present matter is governed by the provisions of R.S. 33:1-93.6 et seq. which became effective on June 2, 1966, and which repealed the former statute R.S. 33:1-93.1-5. This is known as Chapter 59 of the Laws of 1966 and was enacted concurrently with Chapter 58 of the Laws of 1966 (N.J.S.A. 33:1-43). The repealed statute, which was a supplement to the Alcoholic Beverage Law by Chapter 264 of the Laws of 1942, provided in part as follows (R.S. 33:1-93):

> 93.1: "There shall be no discrimination in the sale of alcoholic liquors by distillers, importers, and rectifiers of nationally advertised brands of alcoholic liquors to duly licensed wholesalers of alcoholic liquors in this state."
>
> 93.2: "In the event any distiller, importer, or rectifier shall refuse to sell to any individual wholesaler any amount of alcoholic liquor or comply with the provisions of this act [33:1-93.1 to 33:1-93.5], then the wholesaler shall petition the commissioner of alcoholic beverage control setting forth the facts and demanding a hearing thereon to determine whether such refusal to sell is arbitrary or not."

The present statute provides as follows:

> "6. There shall be no discrimination in the sale of any nationally advertised brand of alcoholic beverage other than malt alcoholic beverage, by importers, blenders, distillers, rectifiers and wineries, to duly licensed wholesalers of alcoholic beverages who are authorized by such importers, blenders, distillers, rectifiers and wineries to sell such nationally advertised brand in New Jersey.
>
> "7. In the event any such importer, blender, distiller, rectifier or winery shall refuse to sell alcoholic beverages other than malt alcoholic beverages,

to any such individual wholesaler or comply with the provisions of this act, then such wholesaler shall petition the director setting forth the facts and demanding a hearing thereon to determine whether or not said refusal to sell was discriminatory.

"8. If the director shall determine that said refusal to sell is discriminatory and shall be satisfied with the ability of the wholesaler to pay for such merchandise as ordered, he shall order the importer, blender, distiller, rectifier or winery to complete said sale of alcoholic beverages other than malt alcoholic beverages, to the wholesaler.

"9. In the event said importer, blender, distiller, rectifier or winery refuses to complete said sale or to comply with the terms of the director's order, the director shall issue an order to every licensed wholesaler prohibiting purchase by such wholesaler of any alcoholic beverages other than malt alcoholic beverages, of said importer, blender, distiller, rectifier or winery directly or indirectly until there is strict compliance by said importer, blender, distiller, rectifier or winery with the order of the Director.

"10. The Director shall adopt and promulgate such rules and regulations as may be necessary to carry out and insure compliance with the provisions of this act.

"11. 'An act concerning alcoholic beverages, and supplementing chapter 1 of Title 33 of the Revised Statutes,' approved June 25, 1942, is repealed."

The wording of these sections is significantly different from that of the former sections in the following respects: The first section of the original statute (93.1) refers to the sale of alcoholic <u>liquors</u> whereas the present statute (93.6) refers to nationally advertised brands of alcoholic <u>beverages</u> other than malt alcoholic beverages. Thus the present statute includes wines and vinous products. The first section of the original statute prohibited discrimination in the sale "to duly licensed wholesalers of alcoholic liquors in this State" whereas the first section of the present statute prohibits discrimination in sales "to duly licensed wholesalers of alcoholic beverages who are authorized by such importers, blenders, distillers, rectifiers and wineries to sell such nationally advertised brand in New Jersey."

Accordingly, the Legislature appears to have clearly indicated that the statutory discrimination prohibited can exist only as between wholesalers who have not only been licensed, but who have been <u>authorized</u> to sell the brand in question by the distiller. What it meant by its language in that respect will be considered <u>infra</u>.

The second section of the new statute limited its application "<u>to any such individual wholesaler</u>" whereas the old statute applied "to <u>any</u> individual wholesaler."

Finally, under the old law any wholesaler aggrieved by discriminatory sale practice engaged in by a distiller, such as refusal on the part of the distiller to sell to that wholesaler, could petition the Director of Alcoholic Beverage Control for an order compelling the distiller to sell to it. Upon a showing that the refusal was arbitrary, the Director could order the sale. Under the amendment only an authorized wholesaler may petition the Director for an order of compulsion upon a showing of a "discriminatory" refusal.

Prefatorily, the introducer's statement sets forth:

> "The purpose of this bill is to insure an equitable basis for competition between supplier franchised wholesalers of alcoholic beverages in New Jersey."

Significantly, with the evident intention of strengthening the position and independence of the wholesaler vis-a-vis the distiller, the Legislature simultaneously enacted Chapter 58 of the Laws of 1966 which amended R.S. 33:1-43, the tied-house provision of the alcoholic beverage law. In substance, the 1966 amendment for the first time precludes a distiller from conducting the business of, or maintaining an interest in the business of, a licensee when that licensee is engaged in the business of sale from wholesaler to retailer. In effect, this prevents a distiller from selling direct to a retailer.

It thus became clear that the governmental purpose effectuated by the enactment of these laws was based upon what the Legislature conceived to be the importance of the need to keep a buffer of independent wholesalers active in the industry because it relates directly to the ultimate control objectives, to wit: the protection of the public, promotion of temperance and elimination of illegal activity. This has been pointed up in Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co., 28 N.J. 444, 455 (1958) when the Supreme Court, speaking through Justice Proctor, said:

> "In order to accomplish this purpose the statute seeks to achieve as far as necessary the independence of wholesalers from distillers. A wholesaler dependent upon a distiller for a supply of sought-after merchandise might be tempted to comply with the non-legitimate desires of the distiller if the latter were free to discontinue the supply at will. For the purpose of strengthening the wholesaler's resistance if confronted with a distiller's wish to overstimulate sales and thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts, e.g., tie-in sales, the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler. To effectuate this end, both the statute and the authority delegated by it to the Director will be liberally construed."

After spelling out an existing situation (of the tied-house), by which improper practices trickle down to the retail level and which call for regulation, the court, in Grand Union Co. v. Sills, 43 N.J. 390, 402 (1964), mentioned the "long-standing legislative policy aimed at relationships and practices calculated to stimulate sales and impair the State's policy favoring trade stability and the promotion of temperance in the liquor field."

In this situation the court, in Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co., supra (Justice Francis' concurring opinion), stated at p. 460:

> "The Legislature may well have believed that such a situation would produce practices known to be inimical to the public interest."

Against this background we observe that, under R.S. 33:1-93.1-5 as it read prior to amendment, and R.S. 33:1-93.6-11 as it read after amendment, there existed the potential for impairment of the very goals the Legislature had sought for years with the encouragement and expressed concern of the courts. Nothing in Section 93.1-5 precluded a distiller from engaging in direct sales activity to a retailer. Thus a distiller licensed to sell at wholesale might have done so prior to 1966. In so doing the distiller would not have been subject to an order of the Director compelling it to sell to a wholesaler, authorized or not, simply by reason of the fact that the distiller's direct activity in the field preempted all independent wholesalers from complaining of discrimination as between each other. Carried to its logical conclusion, such a practice by a distiller could eliminate entirely the desired buffer of independent wholesalers.

The case which was concerned with this particular issue was that of Hoffman v. Hock, 8 N.J. 397 (1952). There it appeared that the respondent Park & Tilford had been distributing its own products in New Jersey for several years with the exception of a distributor in Asbury Park. In 1949 it began changing its method of direct distribution and appointed a distributor to cover the southern end of the State and two distributors in the Trenton area. It authorized petitioner (Hoffman) to act as distributor for Hudson County with the understanding that it would discontinue direct distribution there. In 1950 respondent reconsidered its method of distribution and decided to return to its former policy of handling its own product in northern New Jersey. Accordingly it notified petitioner and the other distributors in northern New Jersey that the distributorships would be terminated as of the end of the year.

Petitioner brought a proceeding before the Division and the Director, after the hearing, concluded that this was a bona fide decision of management and there was no unlawful discrimination. Petitioner appealed and the Supreme Court certified on its own motion. The Supreme Court held that the act prohibited only arbitrary or unfair discrimination between wholesalers and did not reveal any purpose to prohibit a producer from terminating a distributor and acting as the exclusive distributor or wholesaler of its own product. The court there indicated that it was not violative of the statute to sell directly to retailers in the northern area without the use of any wholesalers at all there. Hoffman v. Hock, supra, at p. 409. In other words, however, if one wholesaler were appointed to act, all other such wholesale licensees operating in the area who are similarly situated would be entitled to have their purchase orders filled. This was one objective criterion by which the court permitted a distiller to distribute its products in the State, in excluding wholesalers of its products. Now, by its enactment of Chapter 58, the Legislature prevented such activity and spoke of the potential threat to independent wholesalers so aptly noted by the Supreme Court in Canada Dry.

It should be noted parenthetically, with respect to Chapter 58, that a grandfather clause was included to provide that, in the event a licensee for the sale at wholesale on July 1, 1965 and thereafter until the effective date of the act (June 2, 1966) shall have filed for publication by this Division price listings for brands of alcoholic beverages, he shall not be foreclosed from continuing to sell to retailers regardless of his tied affiliation.

Based upon the petition and the stipulation between counsel, we address ourselves to the decisive issues for determination herein, viz., (1) was Joeli and "authorized" wholesaler within the purview of the statute above referred to, and (2) was Browne-Vintners guilty of "discrimination" against Joeli in its refusal to supply and continue to supply its nationally advertised brands of alcoholic beverages to Joeli.

I

The term "authorized" is an amendment to the prior act and must be read within the context of the statute in order to determine its true meaning. If we were to consider the word "authorized" in its literal sense, without reference to the statutory intent, it would mean that the protection of the statute extends only to those with whom the importer wishes to deal. Implied in this construction is the argument that, if the importer authorizes dealings, it may also withdraw authorization. Under this construction an importer might withdraw authorization to a wholesaler to deal in its products and could thereafter refuse to sell to the wholesaler. Thus the wholesaler would never be entitled to a determination by the Director on the issue of discrimination because the wholesaler would, upon removal of authorization, cease to be a party entitled to the protection of the statute. It follows, therefore, that the withdrawal of such authorization must inevitably result in a dismissal of any petition since, by the time the matter is set for hearing, the petitioner has been effectively de-authorized.

In the interpretation of statutes the legislative will is the all-important and controlling factor. Indeed, it has been frequently stated in effect that the intention of the Legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the Legislature, and carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy or defeat the intention of the Legislature. 50 Am. Jur. Statutes, sec. 223.

In the scope of proper statutory construction and interpretation, it cannot be said that the Legislature intended to pass an act the effect of which is a nullity. The court stated in State v. Provenzano, 34 N.J. 318 (1961), at p. 322:

> "The goal of the interpretative process is the intent of the Legislature. It is axiomatic that a statute will not be construed to lead to absurd results. All rules of construction are subordinate to that obvious proposition. The rule that a penal statute should be strictly construed does not mean that a ridiculous result shall be reached because some ingenious path may be found to that end. Rather it means that a statute shall not be extended by tenuous interpretation beyond the fair meaning of its terms lest it be applied to persons or conduct

> beyond the contemplation of the Legislature. In part that rule also is designed to avoid surprise to the citizen who conscientiously seeks to stay within the law. As to this, it could hardly be supposed that any officer or business agent, or a person dealing with him, decided to engage in bribery after carefully reading the statute to be inapplicable because the status of the union's representative was the product of an election. If a word is capable of two usages, and in the context one makes good sense and the other nonsense, good sense prevails whether the statute be civil or criminal."

Likewise, in the case of Hoffman v. Hock, supra (8 N.J. 397, at p. 406), the court, in discussing the statutory interpretation under the 1942 statute, said:

> "... A construction that will render any part of a statute inoperative, superfluous or meaningless, is to be avoided." 2 Sutherland, Statutory Construction (3rd ed.), sec. 4705, p. 339.

In 50 Am. Jur. Statutes, sec. 238, the following is set forth:

> "The rule in favor of the construction of statutory terminology in accordance with the commonly accepted meaning prevails where the words have not acquired a technical or special meaning and where there is no reason for contrary construction -- and where the interpretation in accordance with the accepted meaning is not at variance but is consonant with sound public policy, principles of justice, the objects of the statute, and the manifest intention of the law-making body."

And further, Section 361:

> "The construction of a statute should be avoided which affords an opportunity to evade an act, and that construction is favored which would defeat subterfuges, expediencies or evasions employed to continue the mischief sought to be remedied by the statute, or to defeat compliance with its terms or any attempt to accomplish by indirection what the statute forbids."

Further, words or phrases may be altered where that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the Legislature. Accordingly, if a statute is fairly susceptible of two constructions, one of which will give effect to the act while the other will defeat it, the former construction is preferred. Am. Jur. Statutes, sec. 357. Statutes regulating the liquor business are to be construed according to the rules which are applicable in statutory interpretation in general, unless particular principles for their construction have been ordained by law. Except as to the penal provisions thereof, which are to be construed strictly, the liquor control laws are to be construed liberally in order to effectuate their purposes. 48 C.J.S. Intoxicating Liquors, sec. 192(b); R.S. 33:1-73.

In construing the word "authorized" within the historical context of the prior act and the present applicable statute, it will be noted that in the interpretation of the prior statute there was a conflict in interpretation between the majority and minority of the Supreme Court in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., supra. In that matter Justice Francis, in his concurring opinion (at p. 458) expressed a minority view "that all wholesalers duly licensed by the Director of Alcoholic Beverage Control have an equal right to purchase the products of distillers operating in New Jersey, and that if they have the financial capacity to pay therefor, they cannot be refused arbitrarily. Prima facie all wholesalers must be treated on a parity, and prima facie the distillers cannot limit the number with whom they will deal."

The majority view, however, disagreed with this construction and held that the statute did not apply to all wholesalers but only to those with whom the supplier was dealing; and that the Director has the authority to determine whether a refusal by the distiller to sell to such wholesaler was arbitrary or not.

A fair and reasonable construction of the 1966 statute would seem to restrict the right of a distiller to limit its applicability to those wholesalers who were authorized as of the date of the enactment of this amendment, or who are thereafter invested with such authorization. The contention by Browne-Vintners that the word "authorized" should be construed to mean that a withdrawal of authorization could operate to deny wholesalers the protection against discrimination intended by the statute is rejected as being contrary to the manifest intent of the said statute. As noted above, the precise legislative limitation in the applicable statute clarifies and reaffirms the majority view reflected in Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., supra, with respect thereto and is consistent with the ultimate goal sought to be attained by the statute. 28 N.J. 444, at p. 455. And, as also noted, both the statute and the authority delegated to it by the Director will be liberally construed. See Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373, 384 (1956); R.S. 33:1-73. Additionally, our courts have consistently ruled that any contracts or agreements between wholesalers and importers, distillers or wineries with respect to the distribution of the products of the said importers, distillers or wineries are not relevant in the determination under the aforementioned sections of this statute. Cf. Hoffman v. Hock, supra (8 N.J. 397).

I therefore find that Joeli was a duly authorized distributor of Browne-Vintners products under the provisions of this act and is entitled to seek relief herein.

One further parenthetical note: There is presently pending an action in the New Jersey Superior Court, Chancery Division (Essex County), Affiliated Distillers Brands Corp., a Corp. of the State of New York v. Arthur J. Sills, Attorney General of the State of New Jersey, et seq. (Docket No. C-3085-65), instituted shortly after the enactment of Chapters 58 and 59 of the Laws of 1966, challenging their constitutional propriety. Of course, no such challenge was raised in the instant proceedings, nor could it be validly interposed, since this administrative tribunal, in the present posture, must assume that the applicable statute is constitutional, valid and binding upon it. See Phillipsburg v. Burnett, 125 N.J.L. 157; Blanck v. Magnolia, 73 N.J. Super. 306.

II

Having determined that Joeli is an authorized wholesaler within the meaning of the applicable statute, we now consider whether Browne-Vintners' refusal to sell to Joeli was discriminatory. The record reflects that Joeli commenced business with Browne-Vintners as to the wine products in 1958, and commenced handling its liquor products in 1961. Joeli further shows that it employs five full-time and one part-time solicitor, covering approximately one thousand accounts. Further, it has transacted $200,000 gross sales of Browne-Vintners products, which were prestige items, and that it has built up its business to its present level on the strength of handling those items.

Joeli further argues that the testimony of Browne-Vintners' president indicated that, in making its decision to discontinue Joeli, it did not act upon the advice of marketing specialists which were available to it. The depletion schedule introduced by Browne-Vintners shows that the sales per man by Joeli on a five-man basis was one hundred cases of White Horse scotch per year compared to twenty cases of White Horse scotch per year by the Reitman group on a one-hundred-fifty man basis. It further showed that the sale per solicitor compared favorably with the sales of the solicitors of the Reitman group.

Finally, there was some evidence of a family relationship between the Eastern Division manager of Browne-Vintners and the sales manager of the components of the Reitman group. Thus Joeli argues that there was no rational basis established for the change of marketing pattern and, on the record alone, there is clear evidence of discrimination.

Browne-Vintners, on the other hand, gave the following account: Prior to June of 1967 it was distributing through nineteen wholesalers and their branch offices, making a total of approximately twenty-five. Joeli was one of the nineteen wholesalers. Commencing in the middle of 1966 the management of Browne-Vintners undertook a review and study of all their markets, including the Eastern Division of which New Jersey was a part, to determine whether sales of Browne-Vintners products were keeping up with the competing sales of other distillers and importers. The Eastern Division consists of Washington, D.C., Maryland, Delaware, New Jersey, New York, Connecticut, Massachusetts and Rhode Island. The studies showed that in New Jersey, which was a large, fast-growing market, Browne-Vintners' products were not keeping up with the competing sales of other importers and distillers, and that Browne-Vintners was losing its share of the market. As a result of these studies and evaluations, it was the opinion of Browne-Vintners management that something had to be done to obtain a more substantial share of the business in New Jersey, thereby keeping pace with competition and not continuing to lose a share of the market. It was decided by the management of Browne-Vintners that its best interests would be served in the promotion of its products in New Jersey by the appointment of an exclusive distributor for the entire State. It felt that such exclusive distributor would be able to stimulate and increase sales in New Jersey and thus maintain its position in the market which it asserts it has been losing.

In considering the wholesaler which might be appointed the exclusive distributor, it reviewed such factors as best sales performance, financial responsibility, account coverage, territory coverage, number of salesmen, warehousing facilities and location, method of distribution and the marketing of its products. It arrived at a judgment that Reitman Industries and its affiliated companies Galsworthy, Fleming and McCaig and Crest could best serve as its prime distributors in New Jersey. In comparing the facilities of Joeli to the Reitman group, it found that Joeli had only five full-time and one part-time salesmen operating within a radius of fifty miles of Elizabeth, and had only about one thousand accounts in the State.

Further, its review of the depletion records for a five-year period shows that there were no instances where Joeli out-sold the Reitman group in Browne-Vintners' products. On the other hand, it gave consideration to the fact that Reitman and its affiliates adequately served and covered the entire State. They had one hundred forty-three salesmen and were servicing over eleven thousand accounts; they had two physical plants in New Jersey (one in Newark and one in Camden) which provided them with frequent delivery service in all parts of the State. They thus reached a decision, based upon what they considered to be a reasonable business objective, of obtaining an exclusive distributor to adequately cover the State in the promotion of its products. Accordingly, by letter dated June 8, 1967, Browne-Vintners notified Joeli that it had decided to discontinue Joeli as its sales agent, effective immediately.

In determining whether or not the action of Browne-Vintners was discriminatory, it is significant that the present act eliminated the word "arbitrary" when it discussed the matter of discrimination. "Discrimination" means "in general, a failure to treat all equally; favoritism." Black's Law Dictionary, 4th Ed., 553; "showing partiality (in favor of) or prejudice (against)." Webster's New World Dictionary. See, with respect to validity of the State's regulation of alcoholic beverages, and discrimination, 30 Am. Jur. Intoxicating Liquors, sec. 31, p. 546. Thus, in its most basic sense, any refusal to sell a nationally advertised brand to any authorized wholesaler would be discriminatory. However, the Legislature clearly did not intend that "discrimination" be defined in its broadest sense in sections 93.6-8; it is not an absolute term. Section 93.8 requires the Director to determine that a particular refusal to sell is discriminatory; and it is, therefore, apparent that a refusal to sell was not intended to be discriminatory *per se*.

Under the prior statute our courts have held that, once a wholesaler (such as Joeli) proves a refusal to deal on the part of the distiller or winery with a wholesaler able to pay for nationally advertised brands, the burden of proof shifts to the distiller who must then justify the refusal to deal by reference to an objective standard reasonably related to the legitimate business goals sought to be achieved by the distiller and consistent with the purposes and objectives of the Alcoholic Beverage Law. Canada Dry Ginger Ale, Inc. v. F & A Distributing Co., supra; James M. McCunn & Co., Inc. v. Fleming & McCaig, Inc., 81 N.J. Super. 97.

In Canada Dry, which was decided on the basis of the prior law which spoke of "arbitrary discrimination", Judge Sullivan, speaking for the majority of the court, concluded that it is not necessarily improper to take away a prime distributorship from one wholesaler and give it to another provided facts are present to demonstrate that the supplier's action was a reasonable, proper and legitimate business decision and not one tending to defeat the purpose or policy of the statute. Said the court (28 N.J. 444, at p. 453):

> "...Petitioners have shown that Canada Dry has refused to deal further with them while continuing to sell to other wholesalers. Canada Dry is in a far better position than the petitioners to know why this action was taken. It is reasonable to require it to come forward with an explanation and factual statement so that the Director may effectively fulfill his statutory duty and determine whether the refusal to sell was the result of a decision fairly arrived at or was arbitrary within the statutory prohibition. This is the only feasible manner in which the statutory hearing can be conducted...."

Similarly, in James M. McCunn & Co., Inc. v. Fleming & McCaig, Inc., supra, the Appellate Division held that the respondent was required to set forth objective criteria in order to sustain its position. Judge Sullivan, in the opinion of the court, held (at p. 104):

> "On the basis of the Canada Dry decision we conclude that a prime distributorship is not *per se* a violation of the statute and that the taking away of a prime distributorship from one wholesaler and giving it to another is not necessarily improper. Thus, McCunn's elimination of McCaig as its prime distributor would not be contrary to N.J.S.A. 33:1-93.1 *et seq.*, provided McCunn presented facts demonstrating that the action taken was reasonable, a proper and legitimate business decision, and not tending to defeat any relevant purpose or policy of the statute."

The Appellate Division held that the showing by the liquor importer that it had eliminated the prime distributor because of its inability to purchase 8,000 cases of scotch would constitute "objective criteria" but remanded the case to permit the Director to determine whether such criterion was unreasonable or excessive so as to make it arbitrary within the meaning of the statute. Judge Sullivan in the opinion for the court held (at p. 104):

> "As heretofore noted, the conclusions of the Division of Alcoholic Beverage Control in the instant case were that McCunn had not established any objective criteria to justify its refusal to continue McCaig as prime distributor. The Division therefore held that McCunn's action was arbitrary and discriminatory."

Another case of interest, which was decided under the prior statute, was that of Garden State Liquor Wholesalers, Inc. v. Canada Dry Corporation, Bulletin 1604, Item 1. In that case Canada Dry had eight distributors. It decided to terminate the eight and designate F & A as its exclusive distributor. Petitioner sought relief after orders were refused. After reviewing the provisions of the statute as it then existed and the relevant cases, the Director held that Canada Dry had set forth certain objective criteria and presented facts demonstrating that its action was reasonable, a proper and legitimate business decision, and not tending to defeat any relevant purpose or policy of the statute.

In the light of the foregoing precedent, it is clear that, under the prior statute, the determination of a distiller to change from a multiple distributor to an exclusive distributor was not per se a violation of the statute, and that the taking away of a distributorship from one wholesaler and giving it to another is not improper provided such action is not arbitrary. If the distiller's determination was made on a rational basis, in good faith and supported by objective criteria, its business judgment must be sustained.

However, under the present statute, as noted hereinabove, the clear intention of the Legislature was to eliminate the factor of objective criteria and substitute statutory criteria when it eliminated the word "arbitrary" discrimination and substituted the word "discrimination." "Arbitrary" means "depending on will or discretion;" that is, not governed by any fixed rules or standards. A "discrimination" made without adequate principles is arbitrary. "Arbitrary" has also been defined as "independent of law or rule; discriminatory; capricious."

Since the statute has eliminated the word "arbitrary", it must be assumed that the intent of the Legislature was to narrow the definition of "discrimination." Therefore it would seem that the burden of Browne-Vintners to show that it has not discriminated against Joeli becomes greater. Although Browne-Vintners decided to reside its distributorship in one wholesaler (the matter of exclusive distributorship is not involved or even germane to this issue), it cannot discriminate against other wholesalers who comply with the provisions of the applicable statute.

In the aforesaid cases, which were decided under the prior statute, objective criteria were sought to be offered by suppliers to prove that their actions were not "arbitrary" or "arbitrarily discriminatory." The extent to which they were objective was decided by the tribunals in each case. Since these objective criteria were offered in defense or in explanation of the word "arbitrary", and the word "arbitrary" having been eliminated by the statute, such offerings cannot be now offered to prove lack of guilt of "discrimination."

Therefore, the total concept of objective criteria must be discarded in favor of the specific statutory criteria as defined in the present statute. Accordingly, it becomes irrelevant whether the Reitman group has more salesmen, a greater volume of accounts, shinier trucks or better plant facilities. The Legislature was more inclined to adopt the reasoning of the concurring opinion of Justice Francis in Canada Dry, supra, except for taking issue with Justice Francis' opinion that all wholesalers duly licensed by the Director of Alcoholic Beverage Control have a right to purchase the products of distillers operating in New Jersey (the statute narrows the class of wholesalers, according to my interpretation, to those wholesalers who were authorized at the time of the enactment of the present statute or thereafter became authorized wholesalers) to the effect that prima facie "all authorized wholesalers must be treated on a parity, and prima facie the distillers cannot limit the number with whom they will deal." Said Justice Francis (at p. 458):

> "The fact that it would be more convenient or more feasible or more efficient for the distiller to deal with a limited number would not of itself provide an escape from condemnation as arbitrary discrimination ...."

And further (at p. 460):

> "In the field of strictly private enterprise such a curtailment of the prerogatives of management might well be invalid. Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 F. 46 (2 Cir. 1915). But the liquor business, attended as it is with dangers to the community, must bow to the heavy and pervasive hand of the police power -- if the Legislature wills it" (citing cases).

Counsel for Browne-Vintners argues that, if the Division should find that Joeli was an authorized distributor of Browne-Vintners within the meaning of R.S. 33:1-93.6 <u>et seq</u>., the burden to show discrimination should rest with the petitioner. "It would be nearly 'impossible' for the respondent to affirmatively prove that no conceivable discrimination existed." Browne-Vintners can, of course, show, if the facts warranted, in support of its defense against discrimination, that Joeli engaged in improper or proscribed trade practices, it disparaged Browne-Vintners products, or it showed unfair preferment in sales efforts for those of a competitor. In the absence of such proof (and none is here asserted or even suggested), the only burden imposed upon Joeli is to show that it has complied with the statutory criteria. Since it has been stipulated that Joeli handled nationally advertised brands and had the ability to pay, and since it has been further determined that Joeli is an authorized wholesaler, it has met its burden under the present statute.

Further, what the present statute proscribes is the "exclusive" or sole distributorship, in those instances where other wholesalers, statutorily qualified, are withdrawn from the line by the distiller. The distiller or importer or winery may refuse to sell to all wholesalers in this State; but, if it grants such authorization to one wholesaler, then, as between statutorily qualified wholesalers, none can be deprived of such distributorship.

The rationale inherent in the imperative language of the statute is clear. It seeks to restrain the distiller from changing or eliminating distributors at will and thereby destroy the independence of wholesalers. This could leave many distributors, who would be affected by such eliminations, in serious economic difficulty. This in turn might compel them to resort to some of the practices frowned upon under the concepts of proper alcoholic beverage control.

As the court stated in <u>Grand Union Co. v. Sills</u>, <u>supra</u>, at p. 407:

> "... if the legislature believes that the restrictions 'will reduce the volume of sales and tend to promote temperance rather than intemperance,' then it may not be said as a matter of law 'that such a conclusions has no connection with the public welfare, safety or morals.'"

It is very clear that the court recognized the necessity for the independence of wholesalers from distillers and sought to perceive the status of independent wholesalers and to prevent their being eliminated in favor of large operators. See Grand Union Co. v. Sills, supra, at p. 402.

Under all of the facts and circumstances herein, it is recommended that an order be entered determining that the action of Browne-Vintners is discriminatory, and directing Browne-Vintners to sell alcoholic beverages to Joeli on terms usually and normally required by Browne-Vintners; and that, in the event Browne-Vintners refuses to comply with the terms of said order, a further order be entered in accordance with the provisions of R.S. 33:1-93.9.

Conclusions and Order

Pursuant to Rule 5 of State Regulation No. 15A, respondent has filed exceptions to the Hearer's report and written argument in support thereof. Answering argument has been filed by the petitioner.

Respondent takes issue principally with the Hearer's recommended construction of "authorized" wholesalers and the significance of the substitution of the word "discriminatory" for the word "arbitrary" in the amendatory legislation embodied in Chapter 59 of the Laws of 1966. For the reasons set forth in the Hearer's report, I am in accord with the Hearer's interpretation of "authorized" wholesalers as it applies to the instant factual situation. Since the cessation of petitioner as an authorized distributor of nationally advertised brands of respondent was immediately followed by the filing of the within petition, it is not necessary in this case to decide what interval of time must elapse from such cessation before a wholesaler would no longer be considered an "authorized" distributor.

As to the other point raised, respondent argues that the Legislature, by substituting "discriminatory" for "arbitrary", intended merely "to tighten the language and correct the shortcomings" of the original legislation in question. That is, the Legislature originally intended that the meaning of the word "arbitrary" in R.S. 33:1-93.2 was to be synonomous with the word "discrimination" in R.S. 33:1-93.1, and in 1966 merely corrected the unintentional inconsistent use of language. Thus it is urged that only an improvement in draftsmanship was effected by the substituting language, with the substantive meaning of the legislative standard of discrimination, as enunciated by the Supreme Court in Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co., 28 N.J. 444 (1958), remaining unchanged.

Reliance for this contended interpretation is placed upon (1) the similarity between the introducer's statement in the 1942 legislation and the one in the recent enactment and (2) the prior Division decision of Hoffman Import & Distributing Company v. S.S. Pierce, Bulletin 1818, Item 3, decided August 21, 1968. However, I am unable to derive any assistance from either introducer's statement in resolving this issue. And it is noted that the aforesaid Hoffman decision specifically left open for future determination the statutory construction question now raised -- the order there entered did not adopt any interpretation of this section of the law, but merely requested that the parties brief this issue upon the case being remanded to the Hearer for further hearings. Upon the remand of the Hoffman case, a final decision was rendered on October 9, 1968 (Bulletin 1826, Item 2) dismissing the petition of the wholesaler on other grounds. The instant proceeding therefore squarely presents this issue for final decision for the first time.

In the Canada Dry case, the Supreme Court attributed meaning to the word "arbitrary" separate and apart from the word "discrimination." At page 455 it said:

> "Section 2 of the statute gives the Director authority to determine whether a refusal by a distiller to sell to a wholesaler is arbitrary or not. Implicit therein is a recognition that there is an area in which a distiller may justifiably refuse to sell to a wholesaler even though the latter is financially responsible. Canada Dry's initial decision to reduce its number of wholesalers within the State does not in itself contravene the statute. While the Director is not authorized to command a distiller to distribute his product to every wholesaler who desires to purchase it, the Director is empowered to determine whether a reasonable method has been employed by a distiller in the selection of wholesalers with whom he will or will not deal...." (Underscoring added.)

The Canada Dry case was succeeded by several Division cases in which this very criterion of "reasonable selection method" was applied to determine the issue of arbitrariness. Surely the Legislature must be presumed to have been aware of these judicial and administrative determinations which spelled out a delineation of the term "arbitrary" as used in the then effective statute.

With this background in mind, the substitution of statutory language in Chapter 59 assumes significance greater than the mere tidying of inartful legislative draftsmanship. If only language "tightening" were intended, this could more logically have been accomplished by adding "arbitrary" as an adjective to precede "discrimination" in the first section.

It is clear that Chapter 59 altered the standard by which prohibited discrimination is to be determined, and altered it by eliminating an area of convenience in which a wholesaler's supplier may justifiably refuse to sell to another such wholesaler if, in good faith, he uses a reasonable method of selection objectively documented, notwithstanding the absence of any impropriety by the wholesaler. The standard now is discriminatory sales treatment of an authorized wholesaler or wholesalers. Prima facie all authorized wholesalers must continue to be sold nationally advertised brands, and no mere convenience of the supplier will justify the elimination of any such wholesaler. This construction of the statute is consonant with Chapter 58, adopted simultaneously and in pari materia with Chapter 59, which seeks to strengthen further the independence of the wholesaler from the pressures of the manufacturer. Whether the defense of incompetence or improper trade practices on the part of the petitioning wholesaler may nevertheless be interposed by the supplier to justify refusal to continue selling, as stated in Justice Francis' concurring opinion in the Canada Dry case need not here be decided since no allegation of such nature is involved herein.

Having carefully considered the entire record herein, I concur in the Hearer's findings and conclusions and adopt his recommendation.

Accordingly, it is, on this 28th day of January 1969,

ORDERED that respondent The House of Seagram, Inc., t/a Browne-Vintners Company, sell and continue to sell to petitioner Joeli Wine Distributors, Inc. all its alcoholic beverage products distributed in New Jersey, other than Kayser's wines and Brolio chianti, on terms usually and normally required by said respondent.

JOSEPH M. KEEGAN
DIRECTOR

2. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALER - DISTILLER ORDERED TO SUPPLY WHOLESALER.

AMERICAN B. D. COMPANY, a New Jersey Corporation, Petitioner, v. HOUSE OF SEAGRAMS, INC., t/a Browne-Vintners Company, Respondent.	)	ON PETITION CONCLUSIONS AND ORDER
NATIONAL WINE & LIQUOR CO., a New Jersey Corporation, Petitioner, v. HOUSE OF SEAGRAMS, INC., t/a Browne-Vintners Company, Respondent.	)	

Harrison and Jacobs, Esqs., by Joseph M. Jacobs, Esq., Attorneys for Petitioners
Toner, Crowley, Woelper & Vanderbilt, Esqs., by Willard G. Woelper, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

<u>Hearer's Report</u>

Petitioners (licensed wholesalers of alcoholic beverages in New Jersey) seek to compel respondent division of House of Seagrams, Inc. (hereinafter Browne-Vintners) to sell its products to them claiming such right under the provisions of R.S. 33:1-93.6 <u>et seq</u>.

Since both matters involve common questions of fact and law and were the subject of a combined hearing, they will, by stipulation of counsel, be consolidated in a single Hearer's report.

American B. D. Company (hereinafter American) contends in its petition that for the past twenty-one years, it has been an authorized distributor of nationally advertised brands of alcoholic beverages imported, blended, distilled or rectified by Browne-Vintners for resale in New Jersey; that it has become largely dependent upon this source of supply in the operation of its business; that it has maintained "the good will and standards" of Browne-Vintners products and has not been subjected to any complaints by Browne-Vintners with reference to "the manner of merchandising respondent's products;" that it has expended large sums of money, time and effort to establish a "good will and a viable market" for the said products.

It further alleges that by letter dated June 8, 1967, Browne-Vintners notified American of its discontinuance of American as its authorized distributor effective immediately. It further asserts that Browne-Vintners has failed and refused to honor purchase orders Nos. 754 and 755 dated June 29, 1967, for nationally advertised brands of alcoholic beverages distributed by Browne-Vintners, copies of which purchase orders are attached to the petition. Thus American contends that the failure to fill such orders prevents American from filling its customers' orders for Browne-Vintners products; and its continued failure to honor orders "will result in substantial and irreparable injury and damage" to American. Further, American maintains that it has been, at all times, able to pay for the merchandise; that the termination of its distributorship and refusal to sell its nationally advertised brands of alcoholic beverages is discriminatory and contrary to the requirements of R.S. 33:1-93.6 <u>et seq</u>. It seeks a determination that the aforesaid refusal is discriminatory, and for an order to compel Browne-Vintners to complete the sale of merchandise ordered on June 29, 1967, in accordance with the said purchase orders.

The petition of National Wine & Liquor Co. (hereinafter National) sets forth substantially the same allegations as hereinabove delineated in American's petition, except that it has been an authorized distributor of Browne-Vintners products for the past three years. On June 12, 1967, it placed purchase orders Nos. 1410 and 1411 (copies annexed to the said petition) for nationally advertised brands of alcoholic beverages distributed by Browne-Vintners, dated June 19, 1967, based upon a prior letter dated June 8, 1967, in which this petitioner was advised that National was being discontinued as a sales agent for Browne-Vintners "effective immediately."

In similar answers filed to both petitions, Browne-Vintners admits that American and National were distributors of its products until the date of the receipt of letters notifying them of the discontinuance of their authorization as such distributors. In separate defenses, Browne-Vintners asserts that it acted in "good faith and in the exercise of an informed business judgment" in its decision to discontinue both National and American together with twenty-three other wholesalers distributing its products in New Jersey, and designating as its exclusive distributors in this State Reitman Industries, Inc. and its affiliated companies Galsworthy, Inc., Fleming & McCaig, Inc. and Crest Wine & Spirits Ltd.; that it acted "under the authority of the statute made and provided" in such appointments; and that under the said statute, it was justified in terminating the authority of both distributorships.

It was stipulated at the outset, by leave granted to amend the answers of Browne-Vintners, that the products of Browne-Vintners sold in New Jersey are nationally advertised except

Kayser Chianti and Brolio wines. Additionally, it was agreed that National and American have the ability to pay for the products of Browne-Vintners which would be ordered by American and National.

I

Before discussing the law as applied to the facts developed in the record, it may be well to dispose of the jurisdictional issue which has been raised with respect to the order for Kayser Chianti and Brolio wines. Browne-Vintners alleges that these wines are not nationally advertised brands and therefore are not embraced within the provisions of the applicable statute.

The record is almost completely bare of any testimony which would indicate that the Kayser Chianti and Brolio wines are nationally advertised. The only testimony bearing upon such allegation comes from Hubert Opici who states that he was served Brolio wine in restaurants in Napa (California), San Francisco, Los Angeles, Chicago and Cincinnati. "I don't know if it is advertised there or not. You can buy it there." He added that he saw these wines displayed in these restaurants and he ordered them from the menus.

Kingsley Bliemier (president of Browne-Vintners) testified that these wines have never been advertised nationally in any magazine or in any other media.

There is not a scintilla of evidence in these cases to show that these products were advertised in any medium, either newspaper, magazine, billboards, radio or television. I reject the argument of counsel for National and American that it is not necessary to advertise every item in the line so long as Browne-Vintners has identification through national advertising. He contends that "If the law were construed otherwise it would be open to the supplier to argue that every distinctive label and every shape and size bottle would have to be the subject of national advertising in order to meet the statutory requirement." That statement, in my opinion, clearly expresses the significance of the term "nationally advertised." If a company has one hundred products and nationally advertises five of its products, it cannot be reasonably contended that the other ninety-five products are nationally advertised brands. I, therefore, find that Kayser and Brolio wines were not nationally advertised, and that the sale of these products does not fall within the scope of R.S. 33:1-93.6 <u>et seq</u>. The statute is not applicable as to these products, and the further findings herein will be made exclusive of and expressly excepting the said products.

II

(Here the language is substantially the same as in <u>Joeli Wine Distributors, Inc., v. Browne-Vintners Company</u>, Bulletin 1845, Item 1, from "In order to understand the motivation..." (p. 2) to "is constitutional, valid and binding upon it. See <u>Phillipsburg</u>, etc." (p. 9), substituting "National and American" for "Joeli".)

IV

Having determined that National and American are authorized wholesalers of Browne-Vintners nationally advertised brands of alcoholic beverages within the meaning of the applicable statute and are able to pay for products ordered from Browne-Vintners, we now consider whether Browne-Vintners' refusal to sell to National and American was discriminatory.

The record reflects that American has handled the Browne-Vintners line continuously since 1947. American has a sales force of eleven salesmen, utilizes five trucks and two station wagons, services about two thousand active accounts; and ninety per cent of its business is in the distribution of wines. Its depletion figures for the years 1965-66 and 1966-67 disclose that the greatest volume of sales was in B & G and Noilly Prat vermouth. It contends that since a large part of its business is concerned with serving fine restaurants, the loss of the line from Browne-Vintners would result in a loss of customers for their other brands.

With respect to National, the testimony adduced shows that it has thirty-one salesmen and twelve trucks servicing about four thousand accounts. It does not enjoy exclusivity in any national brand of alcoholic beverages; it asserts that the loss of Browne-Vintners line would not only result in the loss of profits, but would have an adverse effect upon its salesmen, and the maintenance and retention of its sales force.

The petitioners argue that Browne-Vintners did not make an analysis of the performance record of each of the twenty-five wholesalers handling its line; that no guidelines were available within the Seagram organization governing determination, either to change from multiple distribution to exclusive distribution or from exclusive distribution to multiple distribution. No comparisons were made of the performance record of the wholesalers making up the Reitman group, with the remaining wholesalers handling the line; and no indication was given as to the methods of distribution in the remaining states of the Eastern Division.

Petitioners further proved that in the preparation for this hearing on the petitions, Browne-Vintners compiled data purporting to show a lagging New Jersey market but these figures were for limited periods (August 1, 1966 to April 30, 1967, compared with August 1, 1965 to April 30, 1966). If a serious fall-off in sales was taking place, Browne-Vintners could have produced yearly figures showing the trend of three or four past full years and in particular for years prior to July 1966 when, according to the testimony of Frankel, the subject of exclusive distributorship was first discussed.

Petitioners argue that if the contention of Browne-Vintners thattwenty-five wholesalers handling the line was too many, it was incumbent upon it to investigate the sales efforts and sales performance of each of the twenty-five wholesalers in order to determine whether the decline could be placed at the doorstep of particular wholesalers. They noted that, in this connection, the sales of White Horse by National increased 12.5 per cent in the fiscal year 1966-67 over the fiscal year 1965-66. Similarly, while the sales of Kijafa fell 28.4 per cent in New Jersey, it declined only 15 per cent in the balance of the Eastern Division while the sales of this item by American increased 29.5 per cent in the fiscal year 1966-67 over the fiscal year 1965-66. It is thus reasoned that in the absence of an analysis of the sales record of each of the twenty-five wholesalers, Browne-Vintners could not make a determination based upon objective criteria as to which wholesalers could properly be eliminated. They thus conclude that the respondent's proofs do not serve to establish that a refusal to sell to petitioners is not discriminatory.

They add that while Browne-Vintners may for reasons of its own--which may include a family relationship between the principals involved--decide to concentrate its distributorships in the wholesalers making up the Reitman group, it may not at the same time discriminate against the petitioners who have fully complied with the provisions of the statute.

Browne-Vintners, on the other hand, offered testimony to the following effect: Its investigation of the sales of its New Jersey activities showed that such sales were not keeping pace with the sales of others in a growing market and were lagging behind the sales of its other products in other states of its Eastern Division, of which New Jersey is a part. As a result of its studies and evaluations, the Browne-Vintners management was persuaded that the system of distribution was not operating efficiently in New Jersey and that a more effective distribution of its products could be achieved through an exclusive distributor. Such decision, it maintained, was a business decision based upon Browne-Vintners' experience in changing from multiple to single distribution in other areas of the Eastern Division and its knowledgeability of the favorable results obtained thereby.

In the exercise of its business judgment, it determined that Reitman Industries and its affiliated companies could best serve the interests of Browne-Vintners as its exclusive distributor. Consideration was given to the fact that Reitman Industries has one hundred forty-three salesmen servicing over eleven thousand accounts out of the twelve thousand accounts in New Jersey. The Reitman group has two physical plants--one located in Newark and the other located in Camden--and has forty delivery trucks for the distribution of its products throughout the State. They have eight sales supervisors, four sales managers, a wine expert and an exclusive plant manager who are able to give their salesmen overall supervision. They have a computer for accurate and prompt figures of sales reports, sales coverage in each county and market data.

Comparing their physical and personnel set-up with those of the petitioners, it determined that the Reitman group would be able to function better than either of the petitioners. It was pointed out that National had only about thirty salesmen and twelve trucks and serviced about four thousand accounts. Its warehouse facilities were located in Passaic and afforded better delivery service in the northern area of the State than in the southern area. It further alleged that a review of its sales record over a five-year period convinced it that there were no instances where National outsold the Reitman group in its products.

American, which had a warehouse in Hawthorne, was limited in its sales activities primarily to northern New Jersey, with some accounts in Princeton and the Asbury Park area. It serviced between one thousand and two thousand accounts; had eleven salesmen, five trucks and two station wagons; ninety per cent of its business was in the sale of wine, dealing largely with restaurants. In its five-year survey of sales, the Reitman group exceeded American in all products with the exception of Brolio. Therefore, as counsel for Browne-Vintners reasoned in his memorandum, "It is clear that the decision to appoint the Reitman group as exclusive distributor and not petitioner was based upon the reasonable business objective of obtaining a distributor who had the facilities, sales force and distribution capabilities to adequately cover the State in the promotion of respondent's products."

> (Here the language is substantially the same as in Joeli, supra, from "In determining whether or not..." (p. 10) to "eliminated in favor of large operators. See Grand Union, etc." (p. 14)).

Under all of the facts and circumstances herein, it is recommended that an order be entered determining that the action of Browne-Vintners in refusing to sell its nationally advertised alcoholic beverages (with the exception of Kayser Chianti and Brolio wines, which I find not to be nationally advertised brands and therefore not embraced within the provisions of the statute) to be discriminatory, and directing Browne-Vintners to sell its nationally advertised brands of alcoholic beverages to National and American on terms usually and normally required by Browne-Vintners; and that in the event Browne-Vintners refuses to comply with the terms of said order, a further order be entered in accordance with the provisions of R.S. 33:1-93.9.

Conclusions and Order

Pursuant to Rule 5 of State Regulation No. 15A, respondent has filed exceptions to the Hearer's report and written argument in support thereof. Answering argument has been filed by the petitioner.

Having carefully considered the entire record herein, I concur in the Hearer's findings and conclusions and adopt his recommendation for the reasons stated in my Conclusions and Order in Joeli Wine Distributors, Inc. v. Browne-Vintners Company, supra.

Accordingly, it is, on this 30th day of January 1969,

ORDERED that respondent House of Seagram, Inc., t/a Browne-Vintners Company, sell and continue to sell to petitioners American B.D. Company and National Wine & Liquor Co. all its alcoholic beverage products distributed in New Jersey, other than Kayser's and Brolio wines, on terms usually and normally required by said respondent.

JOSEPH M. KEEGAN
DIRECTOR

3. PETITION PROCEEDINGS - DISCRIMINATION AGAINST WHOLESALER - DISTILLER ORDERED TO SUPPLY WHOLESALER.

FLAGSTAFF LIQUOR CO., a corporation, Petitioner,	)	ON PETITION CONCLUSIONS AND ORDER
v.	)	
BROWNE-VINTNERS COMPANY, a division of THE HOUSE OF SEAGRAM INC., a corporation, Respondent.	)	

Sidney Berg, Esq., Attorney for Petitioner
Hellring, Lindeman & Landau, Esqs., by Philip Lindeman, II, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Petitioner, a licensed wholesaler of alcoholic beverages in New Jersey (hereinafter Flagstaff) seeks to compel respondent, an unincorporated division of The House of Seagram Inc. (hereinafter Browne-Vintners) to sell its products to Flagstaff, claiming such right under the provisions of R.S. 33:1-93.6 et seq.

Flagstaff contends in its petition that since 1933 it and its predecessors were duly appointed distributors of nationally advertised alcoholic beverages imported, blended, distilled or rectified by Browne-Vintners for resale in New Jersey; that during this period of time it has purchased and sold many millions of dollars worth of Browne-Vintners brands of alcoholic beverages; that during the period of years in which it was a distributor of Browne-Vintners products it expended large sums of money and much time and effort in the promotion of Browne-Vintners brands of alcoholic beverages. It further alleges that by letter dated June 8, 1967, Browne-Vintners notified Flagstaff of its discontinuance of Flagstaff as an authorized distributor "effective immediately."

On June 15, 1967, Flagstaff ordered nationally advertised brands of alcoholic beverages imported by Browne-Vintners and usually distributed by Flagstaff as evidenced by Purchase Orders 1483, 1484 and 6123, copies of which are attached to the petition. By letter dated June 16, 1967, Browne-Vintners rejected Flagstaff's orders aforesaid, and returned the said purchase orders to Flagstaff. Flagstaff asserts that it has been at all times able to pay for the merchandise and that the termination of its distributorship and refusal to sell its nationally advertised brands of alcoholic beverages is "illegal, improper and discriminatory" within the meaning of R.S. 33:1-93.6-11. It seeks a determination by the Director that the aforesaid refusal is discriminatory, and for an order directing Browne-Vintners to complete the sale of merchandise ordered on June 15, 1967, in accordance with the said purchase orders.

In its answer Browne-Vintners admits that Flagstaff and its predecessors were distributors of its products and that Flagstaff was such a distributor until June 8, 1967, when it notified Flagstaff that it was discontinuing such authorization. It adds that any monies and efforts expended by Flagstaff for the sale of these products were "for [Flagstaff's] own benefit and profit."

In separate defenses Browne-Vintners sets forth that it acted in "good faith and in the exercise of an informed business judgment" in its decision to discontinue Flagstaff together with twenty-four other wholesalers distributing its products in New Jersey and designating as its exclusive distributors in this State Reitman Industries, Inc. and its affiliated companies Glasworthy, Inc., Fleming & McCaig, Inc. and Crest Wine & Spirits Ltd.; that it acted "under the authority of the statute made and provided" in such appointments and that under the said statute it was justified in terminating the authority of Flagstaff.

It was stipulated at the outset that all of the products of Browne-Vintners sold in New Jersey are nationally advertised except Kayser chianti and Brolio wines. Additionally, it was agreed that Flagstaff has the ability to pay for the products of Browne-Vintners which would be ordered by Flagstaff.

(Here the language is substantially the same as in Joeli Wine Distributors, Inc. v. Browne-Vintners Company, Bulletin 1845, Item 1, from "In order to understand the motivation..." (p. 2) to "is constitutional, valid and binding upon it. See Phillipsburg etc." (p. 9), substituting "Flagstaff" for "Joeli".)

II

Having determined that Flagstaff is an authorized wholesaler of Browne-Vintners nationally advertised brands of alcoholic beverages within the meaning of the applicable statute and is able to pay for products ordered from Browne-Vintners, we now consider whether Browne-Vintners' refusal to sell to Flagstaff was discriminatory.

The record reflects that Flagstaff and its predecessors commenced business with Browne-Vintners in 1933 and has continued to handle its nationally advertised products since that time until its attempted discontinuance by Browne-Vintners. Flagstaff further shows that it operates throughout the entire State, with one warehouse comprising 85,000 square feet plus truck space and eighteen trucks for delivery service. Additional trucks are used in "busy seasons." It has about fifty salesmen who service from 7,500 to 8,000 accounts in the State (in all twenty-one counties). Flagstaff further argues that it was not seeking to become an exclusive or prime distributor, and that appointing Galsworthy, Fleming & McCaig and Crest as its exclusive distributors is an "illusory situation, in order to obtain three wholesalers in place of twenty-five, to the detriment of" Flagstaff.

Flagstaff further contends that an analysis (Exhibit R-1 in evidence), based on the total sales, the number of salesmen and the average number of cases per salesman shows that the performance of Flagstaff was better that that of Fleming & McCaig and Crest combined. Flagstaff notes that, with the number of salesmen of Crest and Fleming & McCaig combined, it outsold the said two companies by 62.8 per cent., outsold Fleming & McCaig by 246.4 per cent. and outsold Crest Wine & Spirits by 480.6 per cent. during the period set forth in Browne-Vintners Exhibit R-1. Further, that, on the basis of individual performance by its salesmen, Flagstaff sales per man exceeded those of Fleming & McCaig, Crest and Galsworthy. It thus concludes that its management, the quality of its service, the interest of its principals and its successful depletion of Browne-Vintners brand is superior to that of the

Reitman group. Finally it argues that, on the basis of the testimony of Browne-Vintners' president and its Eastern Divisional Manager in charge of sales, it was shown that neither of these persons ever visited the executive or physical plant of Flagstaff or had any contact with Flagstaff's executives from the time that they were employed in January of 1966. Lastly it argues that the real reason for favoring the three companies of the Reitman group and retaining them as "its exclusive distributor" was because of the family relationship between L. Dover Frankel (Browne-Vintners' Eastern Divisional Manager in charge of sales) and Mr. Frank Reitman (his uncle) who is chairman of the board, and Raymond Reitman (his cousin), the president of the Reitman group, and his brother Raymond Frankel who is sales manager of Fleming & McCaig.

Browne-Vintners in its defense gave the following account: Its investigation of the sales of its New Jersey activities showed that such sales were not keeping pace with the sales of others in a growing market and were lagging behind the sales of its other products in other States in the Eastern Division, of which New Jersey is a part. As a result of its studies and evaluations, Browne-Vintners management concluded that the system of distribution was not operating efficiently in New Jersey, and that a more effective distribution of its products could be achieved through an exclusive distributor. Such decision was a business decision based upon Browne-Vintners' experience in changing from multiple to single distributors in other areas of the Eastern Division and its knowledgeability of the favorable results obtained thereby. In the exercise of its business judgment, it determined that the Reitman Industries and its affiliated companies could best serve the interests of Browne-Vintners as its exclusive distributor. They covered the entire State with one hundred forty-three salesmen who were servicing well over eleven thousand accounts of the twelve thousand accounts in New Jersey. They thus felt that the Reitman group had the better capability to give Browne-Vintners products adequate promotion. The Reitman group has two physical plants -- one located in Newark and the other located in Camden -- and has forty delivery trucks for the distribution of its products throughout the State. It further maintained that Flagstaff was eliminated because it could not serve as an exclusive distributor. While Flagstaff operated throughout the State, it has only one warehouse and eighteen trucks for delivery service. It had about fifty salesmen who serviced about six thousand to seventy-five hundred accounts in the State, and Browne-Vintners' analysis of the sales record of Flagstaff indicated to it that it did not compare to that of the Reitman group.

Thus, as counsel for Browne-Vintners reasons in his memorandum:

> "As a result of the studies and evaluations, it was clear that something had to be done to stimulate sales and to obtain a more substantial share of the business in New Jersey thereby keeping pace with competition and not continuing to lose a share of the market ...."

It determined that the appointment of an exclusive distributor, and the discontinuance of Flagstaff, "was based upon the reasonable business objective of obtaining a distributor who had the facilities, sales force and distribution capabilities to adequately cover the State in the promotion of [Browne-Vintners'] products."

(Here the language is substantially the same as in Joeli, supra, from "In determining whether or not..." (p. 13 to "eliminated in favor of large operators. See Grand Union etc." (p. 14).)

Under all of the facts and circumstances herein, it is recommended that an order be entered determining that the action of Browne-Vintners is discriminatory, and directing Browne-Vintners to sell alcoholic beverages to Flagstaff on terms usually and normally required by Browne-Vintners; and that, in the event Browne-Vintners refuses to comply with the terms of said order, a further order be entered in accordance with the provisions of R.S. 33:1-93.9.

Conclusions and Order

Pursuant to Rule 5 of State Regulation No. 15A, respondent has filed exceptions to the Hearer's report and written argument in support thereof. Answering argument has been filed by the petitioner.

Having carefully considered the entire record herein, I concur in the Hearer's findings and conclusions and adopt his recommendation for the reasons stated in my Conclusions and Order in Joeli Wine Distributors, Inc. v. Browne-Vintners Company, supra.

Accordingly, it is, on this 30th day of January 1969,

ORDERED that respondent House of Seagram, Inc., t/a Browne-Vintners Company, sell and continue to sell to petitioner Flagstaff Liquor Co. all its alcoholic beverage products distributed in New Jersey, other than Kayser's and Brolio wines, on terms usually and normally required by said respondent.

Joseph M. Keegan
Director