

ISSUED JANUARY 16, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PETITION OF	)	AB-6847
	)	
PETE'S BREWING COMPANY	)	
514 High Street	)	[No administrative hearing was
Palo Alto, CA 94301,	)	held.]
Appellant/Licensee,	)	
	)	
v.	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	July 2, 1997
Respondent.	)	Los Angeles, CA
	)	

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Pete's Brewing Company (appellant), appeals from the response of the Department of Alcoholic Beverage Control<sup>1</sup> to a petition from appellant in which the Department interpreted the words "identical ... brand" in Business and Professions Code §23104.2 to mean "identical product" for purposes of that section.

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<sup>1</sup> The response of the Department, dated April 1, 1997, is set forth in the appendix.

Appearances on appeal include appellant Pete's Brewing Company, appearing through its counsel, John A. Hinman, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

## FACTS AND PROCEDURAL HISTORY

Appellant and the Department have agreed to a statement of undisputed facts which we quote here from appellant's opening brief:

"1. Pete's, which has its corporate headquarters at 514 High Street in Palo Alto, California, holds a valid, current, out-of-state beer manufacturer's certificate and a Type 10 Importer's license in California. Pete's sells its beer products to California licensed beer wholesalers, who are responsible for selling the beer products to retail accounts, both on-premises and off-premises.

"2. Pete's markets its beers under the federal trademark-protected 'Pete's' brand name. A copy of the United States Patent and Trademark Office Registration (Reg.No. 1,792,847) is attached [to appellant's petition to the Department as Exhibit A]. Certain of Pete's beer products are marketed on a 'seasonal' basis. Seasonal products include beer marketed as Pete's 'Wicked Summerbrew,' Pete's 'Wicked Winterbrew,' Pete's 'Oktoberfest' (fall) and Pete's 'Mardi Gras' (spring). Each seasonal product is produced once per year prior to the season in which it is intended to be sold and consumed. Pete's, from time to time, also markets other seasonal and limited production beer products under the Pete's brand.

"3. Each Pete's beer product has a limited shelf life. The nature of beer is such that the characteristics of flavor and quality intended by the brewer to be manifested in the product are most evident immediately after brewing. From the date of manufacture on, beer commences to deteriorate in quality. Pete's products have a shelf life of up to 60 days for draught product and have up to 180 days for glass product. Manufacturer 'code dates' placed on each individual product container measure shelf life by indicating the date that the beer product was bottled. When the shelf life limitation period has expired for a particular beer, that product is referred to as 'out-of-code-date.'

"4. Pete's image and continuing goodwill with the consuming public are dependent upon the public's perception that only palatable (i.e., not stale or out-of-code) Pete's beer products will be made available for public purchase and consumption.

"5. It is not possible for a beer wholesaler exercising Section 23104.2 exchange privileges to exchange one out-of-code-date seasonal beer product for the same seasonal beer product in the same season. If a seasonal beer product goes out-of-code, it must (in accordance with the department's current interpretation of Section 23104.2) either remain at the retailer's premises until the following year, when it

may be exchanged for the identical seasonal product produced for the next season, or be sold to the consuming public.

"6. Pete's has no legal basis to require a retailer to refrain from selling a product that the retailer has lawfully purchased.

"7. Retailers in possession of out-of-code-date or stale Pete's seasonal beer products sell such Pete's seasonal beer products out of season. This activity is harmful to the image and good will of Pete's because the beer products have deteriorated in quality.

"8. Pete's requires its California wholesalers to warrant that all Pete's products that are either out-of-code-date or close to out-of-code-date will be removed from retail inventory. Failure by a beer wholesaler to remove out-of-code-date products from the retail marketplace is grounds for termination of the distribution relationship. Under current department interpretation, if a beer wholesaler exchanges one seasonal beer product for a seasonal beer product from another season (i.e., Winterbrew for Summerbrew), it (and Pete's as a California licensee and the real party in interest directing the action) would be subject to department disciplinary action.

"9. No prices are controlled by Section 23104.2, either at wholesale or at retail. Thus, the price charged to the retailer for the beers which are exchanged may (and often do) change from time-to-time (in accordance with Section 25000, et.seq. of the ABC Act), resulting in the probability that a product for product exchange will either result in a more expensive beer product being exchanged for a less expensive beer product, or vice-versa. In addition, different beer products from the same beer producers are marketed and sold to retailers for different prices. Some beer producers offer 'premium' lines of beer, and 'regular' lines of beer, with premium lines of beer being more expensive than regular lines of beer. "

(App. Opening Br., May 14, 1997, pp. 2 - 5.)

On January 21, 1997, appellant sent a letter to Mr. Donald Decious, chief of the Business Practices Unit of the Department, requesting an interpretation of the meaning of the word "brand" as it is used in Business and Professions Code §23104.2.<sup>2</sup> No evidentiary hearing was held, since the parties agreed that the question involved is one of law. On April 1, 1997, Mr. Decious sent a letter to

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<sup>2</sup> All statutory references hereinafter are to the Business and Professions Code unless otherwise noted.

appellant setting out the Department's position on the issue. At the end of the letter was a statement, signed by Mr. Decious, certifying the letter as "its decision in the petition . . . ." On April 23, 1997, appellant filed this appeal.

The Department's letter stated that "identical ... brand," as used in §23104.2, is interpreted by the Department to mean "identical product." This interpretation is used to prevent the retailer receiving an illegal "thing of value" from the supplier, which the Department considers to have happened when a retailer returns "low-priced sub-premium beer products ... in exchange for the same quantity of higher-priced super-premium products." (Dept. letter, p. 1.)<sup>3</sup>

Appellant argues that the legislative history of the statute shows that its purpose is to "protect the public from stale beer." Appellant also points out that the dictionary definition of brand--"all products of the same class from the same manufacturer"--is consistent with the trademark for appellant, which was issued for "beer, in class 32." These things, taken together, appellant contends, lead to the conclusion that "all beers (seasonal or otherwise) marketed under the Pete's brand are, for the purposes of Section 23104.2, 'identical ... brand(s)' of beer." Therefore, appellant concludes, retailers should be allowed to exchange any "out-of-code-date" beer bearing a manufacturer's brand (meaning the mark or label

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<sup>3</sup> At the hearing on this appeal, the Department argued that even the exchange of fresh beer for stale beer would result in the retailer receiving a prohibited "thing of value."

identifying a class of goods produced by a single manufacturer) for an identical quantity of any other beer that bears the same brand.

The parties were asked to address the preliminary issue of whether this Board has jurisdiction to hear this appeal pursuant to the California Constitution, article XX, §22, and Business and Professions Code §23080.

#### DISCUSSION

The California Constitution, in §22 of article XX, specifies the subject matter jurisdiction of the Appeals Board:

"When any person aggrieved thereby appeals from a decision of the Department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature."

Business and Professions Code §23080 defines "decision" as "any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the Board under Section 22 of Article XX of the Constitution." Section 23080, although it uses the generalized term "affecting a license," clearly does not expand the subject matter jurisdiction of the Appeals Board beyond that set forth in the Constitution.

Appellant states that this Board has jurisdiction to hear this appeal because "(1) the 'brand' decision was a quasi-judicial action by the Department; (2) the proper interpretation of the 'brand' as used in Business & Professions Code Section 23104.2 is a question of law that falls within the Board's power to review; (3) the correspondence between [appellant] and the Department provides a sufficient

record for the Appeals Board to review; (4) [appellant] is an 'aggrieved' party; and (5) the subject matter of the Department's decision is within the constitutionally permissible categories in that it is related to and involves (a) a penalty assessment and (b) a suspension or revocation of a license." (App. Juris. Br., p. 2.)

The Department contends that its letter is not a "decision" within the meaning of article XX, §22, of the California Constitution and Business and Professions Code §23080, since it does not order a penalty assessment or issue, deny, affect the transfer of, suspend, or revoke a license. Only a decision that does one of these things can be appealed to this Board. Appellant's remedy for its disagreement with the Department's letter, the Department argues, is to petition for a writ of mandate from the Supreme Court or the Court of Appeal pursuant to §23090.5.

We conclude that the Department's position is correct. The Constitution and statutes are very specific both as to the scope of this Board's subject matter jurisdiction and, within that jurisdiction, the issues that it may consider. (Cal. Const., art. XX, §22; Bus. & Prof. Code §23080.) Contrary to appellant's assertion, the "decision" appealed from is not "related to and [does not] involve[] (a) a penalty assessment and (b) a suspension or revocation of a license." At most, there is the potential for a penalty assessment, a suspension, or a revocation of some license. This potential will not materialize, however, unless and until some licensee does some act that the Department considers to be violative of its interpretation of §23104.2. Even then, there would still be only potential

disciplinary action until the Department acted by issuing an accusation, holding a hearing, and issuing a decision finding that some licensee had acted in a manner that justified discipline. That decision would then be an appealable decision, since it would involve a penalty assessment or suspension or revocation of some license.

Appellant, therefore, has appealed from an action of the Department that is outside the scope of the Board's subject matter jurisdiction.

#### CONCLUSION

The Board having no jurisdiction to hear this matter, the "appeal" is dismissed.

BEN DAVIDIAN, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
JOHN B. TSU, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD