HOUSE DOCKET, NO. 2759 FILED ON: 1/21/2011

# HOUSE . . . . . No. 1897

## The Commonwealth of Massachusetts

PRESENTED BY:

***Alice Hanlon Peisch***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act relative to small brewers.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: |
|---|---|
| *Alice Hanlon Peisch* | *14th Norfolk* |
| *Carolyn C. Dykema* | *8th Middlesex* |
| *Sean Garballey* | *23rd Middlesex* |
| *Geraldo Alicea* | *6th Worcester* |
| *William C. Galvin* | *6th Norfolk* |
| *Linda Dorcena Forry* | *12th Suffolk* |
| *James J. O'Day* | *14th Worcester* |
| *Jeffrey Sánchez* | *15th Suffolk* |
| *Antonio F. D. Cabral* | *13th Bristol* |
| *Louis L. Kafka* | *8th Norfolk* |
| *Sheila C. Harrington* | *1st Middlesex* |
| *Paul Brodeur* | *32nd Middlesex* |
| *Carl M. Sciortino, Jr.* | *34th Middlesex* |
| *Viriato Manuel deMacedo* | *1st Plymouth* |
| *Peter V. Kocot* | *1st Hampshire* |
| *Susan Williams Gifford* | *2nd Plymouth* |
| *Ann-Margaret Ferrante* | *5th Essex* |
| *Frank I. Smizik* | *15th Norfolk* |

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| *Lori A. Ehrlich* | *8th Essex* |
| *William N. Brownsberger* | ☐ *[District]* ☐ |
| *Jay R. Kaufman* | *15th Middlesex* |
| *Timothy R. Madden* | *Barnstable, Dukes and Nantucket* |
| *Todd M. Smola* | *1st Hampden* |
| *Angelo L. D'Emilia* | *8th Plymouth* |
| *Kate Hogan* | *3rd Middlesex* |
| *Colleen M. Garry* | *36th Middlesex* |
| *Paul McMurtry* | *11th Norfolk* |
| *Matthew A. Beaton* | *11th Worcester* |
| *Tom Sannicandro* | *7th Middlesex* |
| *James J. Dwyer* | *30th Middlesex* |
| *Byron Rushing* | *9th Suffolk* |
| *John W. Scibak* | *2nd Hampshire* |
| *Chris Walsh* | *6th Middlesex* |
| *Ryan C. Fattman* | *18th Worcester* |
| *James M. Murphy* | *4th Norfolk* |
| *Cory Atkins* | *14th Middlesex* |
| *Elizabeth A. Poirier* | *14th Bristol* |
| *Steven L. Levy* | *4th Middlesex* |
| *Alice K. Wolf* | *25th Middlesex* |
| *Kevin J. Kuros* | *8th Worcester* |
| *Bradley H. Jones, Jr.* | *20th Middlesex* |
| *Geoff Diehl* | *7th Plymouth* |
| *Stephen L. DiNatale* | *3rd Worcester* |
| *Denise Provost* | *27th Middlesex* |
| *Kay Khan* | *11th Middlesex* |
| *Michael J. Rodrigues* | ☐ *[District]* ☐ |
| *Thomas P. Conroy* | *13th Middlesex* |
| *Jason M. Lewis* | *31st Middlesex* |
| *Stephen Kulik* | *1st Franklin* |
| *Bradford Hill* | *4th Essex* |
| *Kimberly N. Ferguson* | *1st Worcester* |
| *Nick Collins* | *4th Suffolk* |
| *Ellen Story* | *3rd Hampshire* |

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|---|---|
| *Joyce A. Spiliotis* | *12th Essex* |
| *John H. Rogers* | *12th Norfolk* |
| *Jonathan Hecht* | *29th Middlesex* |
| *James R. Miceli* | *19th Middlesex* |
| *Michael D. Brady* | *9th Plymouth* |
| *Demetrius J. Atsalis* | *2nd Barnstable* |
| *Denise Andrews* | *2nd Franklin* |

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# HOUSE . . . . . No. 1897

By Ms. Peisch of Wellesley, a petition (accompanied by bill, House, No. 1897) of Alice Hanlon Peisch and others relative to small brewers of alcoholic beverages. Consumer Protection and Professional Licensure.

## The Commonwealth of Massachusetts

An Act relative to small brewers.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 138 of the general laws, as appearing in the 2008 Official Edition, is hereby amended by striking out section 25E as appearing in the 2008 Official Edition, and inserting in place thereof the following section:

Section 25E. Refusal to sell brand name alcoholic beverages to wholesalers as unfair trade practice; exception for good cause; discontinuance notice and procedure. It shall be an unfair trade practice and therefore unlawful for any manufacturer, winegrower, farmer-brewer, importer or wholesaler of any alcoholic beverages, to refuse to sell, except for good cause shown, any item having a brand name to any licensed wholesaler to whom such manufacturer, winegrower, farmerbrewer, importer or wholesaler has made regular sales of such brand item during a period of six months preceding any refusal to sell.

Any manufacturer, importer or wholesaler shall forward a notice in writing to the wholesaler, to whom it has sold any brand item, prior to discontinuing sales to such wholesaler of such brand item and shall forward a copy of said notice to the commission. The notice of discontinuance of sale shall be furnished by the manufacturer, importer or wholesaler to the wholesaler being discontinued at least one hundred and twenty days before the effective date of such discontinuance. The notice shall state the specific grounds for such discontinuance. Either party may appeal to the commission for a hearing on the notice of discontinuance and the commission shall make a determination after hearing on the issue of good cause for discontinuance. Upon application by the wholesaler to the commission, the commission shall order the manufacturer, importer or wholesaler giving notice of refusal to sell to continue to make sales in the regular course to such wholesaler pending determination by the commission on the merits of said appeal. The commission shall after notice to all parties and hearing, make a determination on the issue of good cause and grant such relief as may be appropriate under the circumstances. Good cause as used herein shall be limited to the following conduct:

25 (a) disparagement of the product so as to impair the reputation of the brand owner or the
26 brand name of any product,
27 (b) unfair preferment in sales effort for brand items of a competitor,
28 (c) failure to exercise best efforts in promoting the sale of any brand item,
29 (d) engaging in improper or proscribed trade practices, or
30 (e) failure to comply with the terms of sale agreed upon between the supplier and
31 wholesaler.

32 The prior two paragraphs of this section 25E shall not apply to a "small brewer
33 relationship," which may be discontinued as established by contract or through the process
34 described below. For purposes of this paragraph, a "small brewer relationship" shall mean any
35 relationship between a manufacturer of malt beverages licensed under this Chapter, a farmer-
36 brewer licensed under this Chapter, or a manufacturer of malt beverages located outside of the
37 Commonwealth that holds a certificate of compliance permitting it to sell malt beverages to
38 wholesalers in this state (collectively such manufacturer or farmer-brewer referenced as a
39 "supplier" below) and a wholesaler if: (i) the annual global sales of such supplier does not
40 exceed six million barrels of malt beverages; and (ii) the sales of products to the wholesaler by
41 the supplier do not exceed 20% of the wholesaler's total sales in the prior calendar year
42 preceding any refusal to sell. In calculating a supplier's annual global sales and sales to
43 wholesalers, the sales of a "controlled group," as such term is defined in 26 U.S.C. §
44 5051(a)(2)(B) or a successor provision, shall count as the sales of a single entity. Any dispute
45 concerning whether a supplier-wholesaler relationship is or is not a small brewer relationship
46 within the meaning of this Section 25E shall be determined by final binding arbitration, which
47 either the supplier or the wholesaler in the relationship may request within thirty (30) days of
48 either party claiming rights under a small brewer relationship. The arbitration shall be conducted
49 in accordance with arbitration process established below. Nothing in this Section 25E shall be
50 construed to expand or diminish the rights or obligations established by contract in a small
51 brewer relationship provided, however, that a supplier in a small brewer relationship also may
52 elect at any time to refuse to sell to any wholesaler in accordance with the following paragraph.

53 To initiate a supplier's non-contractual right to refuse to sell as established under the
54 immediately preceding paragraph, the supplier in a small brewer relationship shall provide the
55 wholesaler with not less than thirty (30) days written notice of the refusal to sell, which written
56 notice shall identify the successor wholesaler(s) who will begin servicing the affected territory
57 (the "successor wholesaler"). Upon any refusal to sell under this paragraph of Section 25E, the
58 successor wholesaler(s) shall compensate the affected wholesaler in an amount equal to the fair
59 market value of the supplier's distribution rights granted to the wholesaler in the terminated

60 wholesaler's territory. Supplier's refusal to sell may take effect following the notice period in
61 supplier's notice, which shall not be less than thirty (30) days, regardless of whether the
62 successor wholesaler has compensated the affected wholesaler. If the successor wholesaler(s)
63 and the affected wholesaler can not agree to the fair market value compensation due to the
64 affected wholesaler within the thirty (30) days following the supplier's notice of its refusal to
65 sell, either the affected wholesaler or any successor wholesaler may request that the amount of
66 compensation be determined by final binding arbitration conducted in accordance with the
67 arbitration process established below.

68 Arbitrations under this Section 25E shall be conducted before a single impartial arbitrator
69 selected by the parties or, if they cannot agree to an arbitrator within thirty (30) days, selected by
70 the nearest office of the American Arbitration Association or its successor organization. The
71 commercial arbitration rules of the American Arbitration Association or its successor
72 organization shall govern the arbitration. The arbitration proceeding shall conclude not later than
73 ninety (90) days after the date of the notice of intent to arbitrate is transmitted to the other party,
74 unless the parties agree to extend the time by mutual agreement or the arbitrator extends the time
75 for good cause shown. An arbitrator's award in any arbitration held pursuant to the immediately
76 preceding paragraph with regard to fair market value shall be monetary only and shall not enjoin
77 or compel conduct. Any arbitration held pursuant to this Section 25E shall be in lieu of all other
78 remedies and procedures. The costs of the arbitrator and any other costs of the arbitration shall
79 be equally divided by the parties engaged in the arbitration. Each party shall bear all other
80 expenses related to the arbitration, provided that the arbitrator may award the prevailing party in
81 the dispute as to whether a small brewer relationship exists its costs and reasonable attorney's
82 fees for good cause shown. The arbitrator shall render a written decision not later than thirty
83 (30) days after the conclusion of the arbitration proceeding, unless the parties agree to extend the
84 time by mutual agreement or the arbitrator extends the time for good cause shown. The
85 arbitrator's decision shall be final and binding and may be enforced by commencing a civil
86 action in any court of competent jurisdiction. Any party duly notified of an arbitration involving
87 its rights that fails to participate in an arbitration proceeding held pursuant to this paragraph
88 waives all rights it would have had in the arbitration and is considered to have consented to the
89 determination of the arbitrator."

90 SECTION 2. The legislature intends that this Act apply to all small brewer relationships
91 existing as of its effective date, and all agreements and relationships entered into after its
92 effective date.

93 SECTION 3. This Act shall take effect on the date of enactment.