

Asset Purchase Agreement

The Parties to the Deal:

Drinks Americas Holdings, Ltd. (“Drinks Americas”) is a Delaware Corporation that is in the business of developing, producing, marketing and/or distributing alcoholic and non-alcoholic beverages for sale in the continental United States.¹ Drinks Americas was founded in 2002 by an experienced group of consumer product, beverage, retail and entertainment industry professionals and is currently based in Wilton, Connecticut.² One of Drinks Americas’ founders, J. Patrick Kenny, was a former executive at Joseph E. Seagrams & Sons and the Coca-Cola Company and is currently Chief Executive Officer of Drinks Americas.³

Drinks Americas specializes in marketing and distributing beverages that are associated with “icon entertainers, sports figures, celebrities, and destinations.”⁴ Drinks Americas’ portfolio of premium alcoholic and non-alcoholic beverages includes Willie Nelson’s Old Whiskey Bourbon, Aguila Tequila, Norman’s Wines, Cohete Rum, Newman’s Own All Natural Sparkling Fruit Juice Drinks, and Y Sake.⁵ Throughout fiscal years 2005 and 2006, Drinks Americas embarked on a plan to acquire and develop additional, well-recognized brands, and to further distribution and marketing of such brands.⁶

On June 24, 2005, Drinks Americas announced it had signed a letter of intent with Rheingold Brewing Company, Inc. (“Rheingold”) to purchase Rheingold.⁷ Drinks Americas’ press release announcing the deal did not disclose the price to be paid for Rheingold and only noted that the transaction was subject to obtaining certain documentation and consents and that the transaction was expected to close “within the next thirty (30) days”⁸; however, in its Form 10-KSB filing with the Securities and Exchange Commission, dated August 14, 2006, Drinks Americas disclosed that the total consideration to be paid included (i) \$1,050,000, payable in shares of Drinks Americas’ Common Stock, (ii) \$100,000, payable in cash, and (iii) the assumption by Drinks Americas of certain obligations previously incurred by Rheingold.⁹

Rheingold is a small brewery in New York City that traces its roots back over one-hundred fifty years to Ludwigsburg, Germany, where the company’s founder, Samuel Liebman, operated the

¹ Form 10-KSB for the fiscal year ended April 30, 2006 of Drinks Americas Holdings, Ltd. *available at* <http://www.drinksamericas.com/downloads/10KSB.doc> (hereinafter Form 10-KSB).

² *Id.*

³ *Id.*; http://www.drinksamericas.com/ir_execs.htm.

⁴ Form 10-KSB, *supra* note 1.

⁵ Marketwire, *Drinks America Announces Intent to Purchase Rheingold* (June 24, 2005), *available at* http://www.marketwire.com/mw/release_html_bl?release_id=89439 (hereinafter Drinks Intent).

⁶ Form 10-KSB, *supra* note 1.

⁷ Drinks Intent, *supra* note 5.

⁸ *Id.*

⁹ Form 10-KSB, *supra* note 1; Asset Purchase Agreement Material Contract.

Liebman Brewery beginning in 1840.¹⁰ Following Samuel Liebman's immigration to America in 1850, he established the new Liebman Brewery, a small brewery based in Brooklyn, and began to build a successful business.¹¹ Samuel Liebman's three sons, Joseph, Henry and Charles, took over the business from their father and in 1883 introduced the Rheingold brand, "so named for the resemblance of its distinctive yellow hue to the golden color of the Rhine River" in Germany.¹²

Rheingold continued to grow for decades as the company was passed down from generation to generation; indeed, Rheingold even survived Prohibition by selling lemonade and "Near Beer," a predecessor to today's O'Doul's.¹³ Following the end of Prohibition, Rheingold resumed brewing beer and within a few short decades became "the most widely requested and best selling beer in New York City."¹⁴ It was during this period that the famed "Miss Rheingold" contest emerged, a contest crowning one luck lady as the queen of the then "king of beers" of New York City.¹⁵ The annual contest drew over twenty million ballots during the 1950's.¹⁶

However, beginning in the 1950's, competition from national and regional breweries eroded Rheingold's hold on the New York City market.¹⁷ In 1963, Rheingold was sold to the Pepsi Bottling Company of New Jersey and, in 1976, the Rheingold brewery in Brooklyn was finally closed.¹⁸ Ultimately, Stroh Brewery Company (and, by extension, its successor in interest Pabst Brewing Co.) obtained the intellectual property rights to the Rheingold brand, but the brand lay dormant for approximately twenty years.¹⁹ But, in 1996, Michael Mitaro, Rheingold's current President, leased the rights to the brand from Stroh Brewery Company and joined forces one year later with Walter Liebman – a descendant of Rheingold's original founder.²⁰ The two men who revitalized the Rheingold brand recruited one of Rheingold's former brew masters and reintroduced the brand, primarily in its target market of New York City.²¹

¹⁰ Rheingold Beer, *Our History*, available at <http://www.rheingoldbeer.com/beer/history.aspx> (hereinafter *Our History*); New York University, Leonard N. Stern School of Business, *Rheingold Beer*, available at http://pages.stern.nyu.edu/~rwiner/Rheingold_case.doc (hereinafter *NYU Stern*).

¹¹ *Our History*, *supra* note 10.

¹² *NYU Stern*, *supra* note 10.

¹³ *Our History*, *supra* note 10.

¹⁴ *NYU Stern*, *supra* note 10.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Our History*, *supra* note 10.

¹⁸ *NYU Stern*, *supra* note 10; New York Times, *After Brewer Unveils Ads, Mugs Aren't All That's Frosty* (April 19, 2004), available at <http://www.nytimes.com/2004/04/19/nyregion/19beer.html?ex=1397793600&en=2f3e730a171e9120&ei=5007&partner=USERLAND>.

¹⁹ Asset Purchase Agreement Material Contract; *NYU Stern*, *supra* note 10.

²⁰ *NYU Stern*, *supra* note 10.

²¹ *Id.*

Drinks Americas approached Rheingold regarding a form of business combination because Rheingold fits well with Drinks Americas' business plan, which is "to market brands that have the benefit of association with icons."²² Although its visibility had certainly faded since its heyday of the 1950's and 1960's, the Rheingold name, along with the famed "Miss Rheingold" contest, certainly accorded Rheingold at least partial icon status in New York City. Drinks Americas contended that the deal made sense because Rheingold fits into the company's preexisting distributor network since many of its distributors were already engaged in the business of beer wholesaling; moreover, Rheingold would provide Drinks Americas with a "New York icon, known and enjoyed throughout the market."²³

The Chairman and President of Rheingold is Michael Mitaro and the Chief Executive Officer is Tom Bendheim.²⁴ Rheingold is selling its business to Drinks Americas via an asset purchase agreement transferring all of Rheingold's assets for certain consideration noted within the asset purchase agreement.

The Deal v. The Press Releases and related SEC Filings:

The announcements of the upcoming acquisition of Rheingold by Drinks Americas began appearing on June 24, 2005.²⁵ Interestingly, while the announcements of the acquisition noted that the transaction would close "within thirty (30) days," Drinks Americas' filing with the Securities and Exchange Commission announcing the transaction and attaching the asset purchase agreement as a material contract was filed on August 14, 2006 and the asset purchase agreement was dated "October ___, 2005" (however, it should be noted that Drinks Americas' Form 10-KSB confirmed that the effective date of the asset purchase agreement was October 27, 2005).²⁶ It appears at least somewhat unusual that the filing of a material contract, such as an asset purchase agreement, would occur nearly ten months following its execution. Whether this reflects the immateriality of the transaction to Drinks Americas or an oversight by legal counsel, it is certainly a curiosity related to this overall transaction.

In the press release announcing the acquisition, there was no mention of the proposed purchase price; instead, the announcement focused on Drinks Americas' position, following the transaction, as "the exclusive producer and marketer of Rheingold Beer, famous in New York since 1883."²⁷ The announcement continued to focus upon the Rheingold trademark, how Rheingold "fit" into Drinks Americas' overall business plan, and, perhaps most importantly, how "Rheingold will benefit in a number of ways from the *synergy* which comes from being a brand within Drinks as opposed to an independent company."²⁸ While the press release announcing the transaction lacked substance and talked only in terms of positive developments, what was left out was the fact that this was certainly a small transaction to purchase a brand that had hardly made a dent in the New York market since its reintroduction; in fact, the purchase price was only \$1,150,000 (to be made up primarily of Drinks

²² Drinks Intent, *supra* note 5.

²³ *Id.*

²⁴ NYU Stern, *supra* note 10.

²⁵ Drinks Intent, *supra* note 5.

²⁶ Form 10-KSB, *supra* note 1; Asset Purchase Agreement Material Contract.

²⁷ Drinks Intent, *supra* note 5.

²⁸ *Id.*

Americas' Common Stock) and the assumption of certain of Rheingold's previously incurred liabilities.²⁹

Interestingly, while the asset purchase agreement filed as a material contract with the Securities and Exchange Commission specifically detailed the purchase price for the acquisition, the description of the acquisition in Drinks Americas' Form 10-KSB differed from the description of the transaction within the asset purchase agreement. For example, the asset purchase agreement detailed the purchase price as follows: (i) First installment – Common Stock with a fair market value of \$650,000 and the assumption of certain liabilities, and (ii) Second Installment – Common Stock with a fair market value of \$400,000 and cash in the amount of \$100,000³⁰; in addition, certain adjustments to the second installment were to be made in the event of a deficiency in Rheingold's purported Net Working Capital as of the Effective Date of the asset purchase agreement.³¹ However, in its description of the transaction in its Form 10-KSB, Drinks Americas noted that upon closing of the acquisition, it issued 724,638 shares of restricted common stock with a fair value of \$86,900 and assumed certain liabilities; further, the Form 10-KSB noted that Drinks Americas was contractually obligated to issue an additional \$500,000 to Rheingold, payable \$350,000 in Common Stock and \$150,000 in cash.³² Thus, even within its own securities filing, Drinks Americas appears to contradict itself regarding the amount and value of Common Stock issued in the First Installment of the purchase price and the makeup of the Second Installment differs materially from the terms of the material contract exhibit filed with the Securities and Exchange Commission.³³ While some of the discrepancies can be traced to calculation or other errors, other differences can only be explained as an error, a change in circumstances, or a last minute change in the asset purchase agreement that is not reflected in Drinks Americas' Form 10-KSB.

Additionally, as with many acquisitions, promises of seamlessness and continuity accompanied the press release announcing Drinks Americas' acquisition of Rheingold.³⁴ Drinks Americas stressed its excitement regarding the "prospect" that Norm Snyder, the Chief Operating Officer of Rheingold, would be joining the Drinks Americas team.³⁵ While the press release contains a statement from Mr. Snyder indicating that the board of directors and shareholders of Rheingold see the transaction as an

²⁹ *Id.*; NYU Stern, *supra* note 10; Asset Purchase Agreement Material Contract.

³⁰ Asset Purchase Agreement Material Contract.

³¹ *Id.*

³² Form 10-KSB, *supra* note 1. However, it should be noted that, pursuant to the Asset Purchase Agreement Material Contract, Drinks Americas retained the right to pay the Second Installment entirely in cash if the company so desired.

³³ It should be noted, however, that the error regarding the value of the Common Stock issued as payment of the First Installment of the purchase price for the acquisition may be as innocuous as a simple mathematical error. Research regarding the historical stock prices of Drinks Americas Holdings, Ltd. indicates that, as of the closing date of the acquisition transaction, Drinks Americas' stock closed at a price of \$0.90 per share. Although this is one data point and does not take into account the asset purchase agreement's 60 day averaging of Drinks Americas' stock price, multiplying \$0.90 by 724,638 shares (the amount said to be issued under the Form 10-KSB) yields a total Common Stock value of \$652,174.20 – an amount within two thousand dollars of the purported First Installment of the purchase price that is noted within the asset purchase agreement. See http://bigcharts.marketwatch.com/historical/default.asp?detect=1&symbol=DKAM&close_date=10%2F27%2F2005&x=0&y=0; Asset Purchase Agreement Material Contract. Therefore, it appears there is simply a calculation error contained in Drinks Americas' Form 10-KSB and the amount actually paid under the First Installment is the same as that noted in the transaction documents.

³⁴ Drinks Intent, *supra* note 5.

³⁵ *Id.*

opportunity to add value and build the Rheingold brand, there is no mention in the asset purchase agreement of continued employment for Mr. Snyder with Drinks Americas.³⁶ Further, a search of both Rheingold and Drinks Americas' websites makes no mention of Mr. Snyder continuing, accepting or even being offered employment with Drinks Americas following the transaction. Although what actually occurred following the acquisition has not been disclosed by any party, as with many acquisitions and promises of continued, seamless management teams, if the promised employment agreement is not structured as a condition of the acquisition, such employment agreement may never materialize.

Similarly, subsequent press releases concerning the re-launch of Rheingold Beer in New York City mimicked the press release announcing the transaction and its pronounced optimism.³⁷ For example, for all the talk of "synergy" and the "prestige" of the Rheingold Beer brand, Drinks Americas also noted in its press releases that Rheingold could make "a material contribution to our top line in the coming year. Over the longer term the opportunity is even more dramatic."³⁸ While reading such a press release might make an average person, or perhaps even the average investor, buoyant with optimism, any student of business would note what Drinks Americas is not saying—while Rheingold is expected to contribute to the top line (i.e. gross revenues), there is absolutely no mention of an even more critical metric, the bottom line (i.e. net profits).

Conclusion:

The transaction bringing Rheingold Beer into the Drinks Americas family of alcoholic and non-alcoholic beverages appears to have been finalized on October 27, 2005.³⁹ The Rheingold Beer emblem is now prominently displayed at the bottom of Drinks Americas' website.⁴⁰

While the press releases concerning the acquisition paint a picture of seamlessness, synergy, and unparalleled opportunity for both Drinks Americas and Rheingold, later filings of Drinks Americas with the Securities and Exchange Commission, in addition to later press releases, indicate that stagnation, rather than synergy, may be a more appropriate word to describe the acquisition up to this point. As with many transactions, promises of efficiencies and continued employment of target senior executives have not come to fruition; however, Drinks Americas has built its business model on acquiring existing brands with some nostalgic value (even if they do not have current profits) and subsequently integrating such brands into its marketing and distribution channels. Only time will tell if Drinks Americas' acquisition of Rheingold can re-establish Rheingold Beer as "the most requested beer in the Greater New York area."⁴¹

³⁶ *Id.*; Asset Purchase Agreement Material Contract.

³⁷ Marketwire, *Rheingold Beer to Be Re-Launch by Drinks Americas in October* (July 18, 2006), available at http://www.marketwire.com/mw/release_html_bl?release_id=145024 (hereinafter Rheingold Re-Launch).

³⁸ *Id.*

³⁹ Form 10-KSB, *supra* note 1.

⁴⁰ See <http://www.drinksamericas.com>.

⁴¹ Our History, *supra* note 10.