

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is entered into by and between ASM Liquor Pty Ltd., a corporation formed under the laws of Australia with an address at Unit 8, 7-29 Bridge Road, Stanmore, Sydney NSW 2048, Australia ("ASM") and Intercontinental Packaging Co., a Minnesota corporation with an address at 1999 Shepard Road, St. Paul, Minnesota 55116 United States ("Intercontinental").

RECITALS

WHEREAS, ASM produces and sells various liquor products in Australia, the United States and other countries;

WHEREAS, ASM is the owner of the trademarks KINKYNERO RUM and KINKYLUX RUM, and the following registrations therefor in the United States Patent and Trademark Office ("USPTO"): KINKYNERO RUM, Registration No. 3,458,693, and KINKYLUX RUM, Registration No. 3,458,692, each covering "rum" and each issued on July 1, 2008 (collectively, the "ASM Marks");

WHEREAS, Intercontinental produces and sells various liquor products in the United States and other countries;

WHEREAS, Intercontinental has filed an application in the USPTO to register the trademark KINKY, Serial No. 85/212918, covering: "distilled spirits; liqueurs," filed on January 7, 2011 (the "Intercontinental Mark");

WHEREAS, the ASM Marks have been cited by the USPTO as bars to the registration of the Intercontinental Mark;

WHEREAS, on September 30, 2011, Intercontinental filed Petitions to Cancel the ASM Marks in the U.S. Trademark Trial and Appeal Board (the "TTAB"), which have been designated as Cancellation Nos. 92054592 and 92054593 (collectively, the "Cancellation Proceedings");

WHEREAS, ASM and Intercontinental, without admitting any liability, desire to settle and compromise any and all claims they have against each other relating to the Cancellation Proceedings and the parties' use of their respective marks.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants set forth below, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

AGREEMENT

1) COVENANTS OF INTERCONTINENTAL.

- a) Within ten (10) days from the Effective Date, as defined below, Intercontinental shall withdraw the Cancellation Proceedings, with prejudice.

- b) Intercontinental will not use, or register or apply to register as a trademark, the term "KINKY" in connection with the terms "NERO" or "LUX," or any other terms confusingly similar thereto.
- c) Intercontinental will not use, or register or apply to register, the mark KINKY in connection with rum or any other alcoholic beverage using or being marketed with the term "rum."
- d) Intercontinental will refrain from filing a petition for cancellation or from undertaking any other actions or proceedings adverse to the ASM Marks or ASM's use of the ASM Marks, provided that such use is in compliance with the terms of this Agreement.
- e) Intercontinental shall not use, in connection with the Intercontinental Marks, any bottle or packaging the design of which is confusingly similar to that used in connection with the ASM Marks as shown on Exhibit A hereto.

2) **COVENANTS OF ASM.**

- a) ASM will not use, or register or apply to register, the mark KINKYNERO or KINKYLUX in connection with distilled spirits or liqueurs other than rum.
- b) ASM will not use or register or apply to register the term KINKY except as part of the ASM Marks KINKYNERO and KINKYLUX.
- c) ASM will refrain from opposing or from undertaking any other actions or proceedings adverse to the Intercontinental Mark or Intercontinental's use of the Intercontinental Mark, provided that such use is in compliance with the terms of this Agreement.
- d) ASM shall not use, in connection with the ASM Marks, any bottle or packaging the design of which is confusingly similar to that used in connection with the Intercontinental Mark as shown on Exhibit B hereto.

3) **MUTUAL ACKNOWLEDGMENTS AND COVENANTS.**

- a) Each party acknowledges and recognizes that their current uses of their respective marks on their respective goods do not cause a likelihood of confusion.
- b) The parties will take all necessary steps to obviate any potential confusion that may occur as the result of the use of their respective marks in the future.

- 4) **MUTUAL RELEASE.** Each of the parties hereto, on behalf of itself, its officers, directors, shareholders, subsidiaries, parent companies, attorneys, employees, agents, successors and assigns, hereby releases and discharges the other party and its officers, directors, shareholders, subsidiaries, parent companies, attorneys, employees and agents, successors, and assignees, individually and collectively, from any and all claims, actions, causes of action (including without limitation any action arising out of an allegation of trademark infringement, false designation of origin, unfair competition, trademark dilution, and/or unfair or deceptive business practices, or the assertion or prosecution of any claim related thereto), suits, debts, costs, damages, losses, obligations and demands of any nature whatsoever, whether now asserted or otherwise suspected or unsuspected,

known or unknown, liquidated or unliquidated, arising out of or in connection with or relating to any claim the releasing party may have, may claim to have, or hereinafter claims to have, against the released party as of the Effective Date of this Agreement, as defined below.

5) **TERRITORY.** The scope of this Agreement shall be worldwide.

6) **TERM.**

a) This Agreement shall be effective on the date of the last signature of the parties hereto (the "Effective Date").

b) This Agreement will terminate in the event that Intercontinental abandons the Intercontinental Mark, or ASM abandons the ASM Marks.

7) **MISCELLANEOUS.**

a) This Agreement shall be binding on and shall inure to the benefit of the parties hereto, and their respective successors (including successors in ownership of the marks at issue), assigns, licensees, subsidiaries, affiliates, agents, officers, directors and employees, and any entity owned or controlled by any of them.

b) This Agreement represents the entire agreement and understanding between the parties with respect to the subject matter hereof and may be amended only by a writing duly executed by each party hereto.

c) No party shall publish this Agreement or the terms hereof, such as by a press release, nor shall any party provide a copy of this Agreement to any third person, except as required by law, subpoena or other lawful process, or judicial decree. It shall not be considered a violation of this paragraph to provide a copy of this Agreement to: a) a trademark examiner in order to overcome a citation of the other party's trademark application or registration as a bar to a trademark application of the party providing the copy, b) an auditor, insurance carrier or attorney for a party to the Agreement, or c) an entity that is a potential buyer, merger partner or other acquirer of a party to the Agreement or substantially all of the assets of such a party, provided that the entity is bound by written obligations of confidentiality not to disclose this Agreement or the terms thereof.

d) Each party hereto agrees to execute and deliver any and all further documents, and to perform such other reasonable acts, as may be necessary to carry out the provisions of this Agreement and make it effective.

e) This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same agreement. Telefaxed or "pdf" signatures will be deemed original signatures for all purposes.

f) Each party represents and warrants that it is a legal business entity duly organized, validated, existing and in good standing under the laws of the jurisdiction of its formation and that it has full power and authority to enter into and perform this Agreement. Each party also represents and warrants that the person signing this Agreement on its behalf has been properly authorized and empowered to do so.

- g) This Agreement shall be governed by and construed in accordance with the laws and decisions of the State of New York, exclusive of its choice of law provisions.
- h) No waiver by either party to this Agreement of any breach of any of the covenants, agreements or undertakings contained herein shall be construed as a waiver of any succeeding breach of the same or of any other covenant, agreement or undertaking or effect the right of either party to require the strict performance thereof on a subsequent occasion. No waiver, consent, or similar action with respect to any covenant, agreement or undertaking contained herein shall be effective unless embodied in a writing specifically stating that it is such a waiver, consent, extension, indulgence or similar action and signed by the part to be bound thereby.
- i) This Agreement is to operate as a resolution of the pending trademark dispute only as between the parties hereto, and it is understood that the parties expressly reserve the right to prosecute suits and claims against any and all other entities or persons that may use like or confusingly similar marks to either of the parties' trademarks.
- j) The recitals set forth above are hereby incorporated in and made a part of this Agreement as if set forth in full herein.
- k) If any term or provision of this Agreement shall be found to be illegal or unenforceable, then notwithstanding such illegality or unenforceability, this Agreement shall remain in full force and effect and such term or provision shall be deemed to be deleted.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed on the dates indicated below.

ASM LIQUOR PTY LTD

By: 

Print Name: Simon Sinda

Title: Director

Date: 8TH MARCH 2012

INTERCONTINENTAL PACKAGING CO.

By: 

Print Name: Michael Johnson

Title: PRESIDENT

Date: MARCH 8, 2012

Exhibit A

Intercontinental Packaging Design



Exhibit B

ASM Packaging Designs

