



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
239 Causeway Street
Boston, Massachusetts 02114
Tel. (617) 727-3040
Fax: (617) 727-1510*

Jean M. Lorizio, Esq.
Chairman

**NO. 25E-1331
RUBY WINES, INC.,
Petitioner,**

v.

**TERLATO WINES &
SANTA MARGHERITA USA, INC.,
Respondents.
HEARD: 5/15/2018**

**MEMORANDUM AND ORDER ON
PETITIONER'S MOTION TO COMPEL DISCOVERY
AND RESPONDENTS' CROSS-MOTIONS FOR PROTECTIVE ORDERS
AND AMENDED SCHEDULING ORDER**

The Alcoholic Beverages Control Commission ("Commission") hereby issues this Memorandum and Order in response to Ruby Wines' Motion to Compel Further Discovery from Terlato Wines and from Santa Margherita USA, Inc. and Respondents' Cross-Motions for Protective Orders.

PROCEDURAL BACKGROUND

This case arises under M.G.L. c. 138, § 25E. Petitioner, Ruby Wines, Inc. ("Petitioner" or "Ruby") is a Massachusetts wholesaler aggrieved at the refusal of Terlato Wines ("Terlato")¹ and Santa Margherita USA, Inc. ("SMUSA") to make sales of Santa Margherita brand wines (the "Brand Items"). The Petitioner filed its petition with the Commission on April 19, 2016. On May 6, 2016, pursuant to the mandate in § 25E, the Commission issued an order to Terlato and SMUSA to make sales of the Brand Items to Ruby pending the Commission's determination of the petition on the merits. The Commission also authorized discovery to take place, with the provision that "[d]iscovery by each party may include not more than forty-five (45) written interrogatories, not more than thirty (30) requests for the production of documents and not more than two (2) depositions."

¹ The correct name of the entity is Paterno Imports, Ltd. d/b/a Terlato Wines International.

On September 15, 2016, SMUSA filed an Assented-to Motion to Extend Time for Discovery, which the Commission allowed on October 4, 2016, extending the discovery deadline to December 28, 2016. SMUSA noted in the motion that Terlato had not yet appeared with regard to this matter.

Since October 2016, the Commission issued additional Amended Scheduling Orders. The last such order issued on October 2, 2017, which mandated that discovery be completed by January 12, 2018, with motions for summary decision due by February 12, 2018 and Oppositions due by February 26, 2018.

On December 19, 2017, Ruby filed its Motion to Compel Further Discovery from Terlato and from SMUSA (the “Motion to Compel”). In its motion, Ruby claimed that Terlato had failed to respond to Ruby’s request for production of documents and interrogatories and that SMUSA’s responses to the requests and interrogatories were incomplete.

On January 5, 2018, Terlato² filed its Opposition to Ruby’s Motion to Compel Further Discovery and a Cross-Motion for Protective Order (“Terlato’s Motion for Protective Order”).

On January 9, 2018, Ruby served on SMUSA its Second Request for Production of Documents and Second Set of Interrogatories (collectively, the “Second Requests”).

On January 12, 2018, SMUSA filed its Opposition to Ruby’s Motion to Compel Further Discovery [filed under seal of confidentiality], and then on February 5, 2018, SMUSA filed its Motion for a Protective Order against Ruby (“SMUSA’s Motion for Protective Order”).

In January and February 2018, Ruby filed its Reply to SMUSA’s Opposition as well as Oppositions to the two Motions for Protective Orders.

The Commission held a hearing on these motions on May 15, 2018. The day after the hearing, Petitioner filed a post-hearing letter to the Commission, and the following day, May 17, 2018, SMUSA filed a post-hearing supplemental memorandum of law.³

The Commission has reviewed all of the papers submitted and arguments made by counsel and finds as follows.

FACTUAL BACKGROUND

Santa Margherita, S.p.A. (“Santa Margherita”) is a supplier of wine in Italy and for years sold its product to importer Terlato for distribution in the United States. (Exhibit A to SMUSA’s Opposition) Terlato would then sell the Brand Items to wholesaler Ruby. (Exhibit C to SMUSA’s Opposition, at Answer 5(d)) The relationship between Santa Margherita and Terlato crumbled, and on June 27, 2011, Santa Margherita informed Terlato that effective December 31, 2015, their agreement would terminate. (Exhibit B to SMUSA’s Opposition) In 2014, Santa Margherita created a subsidiary, SMUSA, in the United States and appointed it as the exclusive importer/distributor of the Brand Items effective January 1, 2016. (Exhibit C to SMUSA’s

² Attorney O’Neal filed a limited Notice of Appearance with regard to the Motion to Compel and Motion for Protective Order.

³ None of the parties objected to either of the post-hearing filings.

Opposition, at Answers 19, 23) In April 2016, SMUSA informed Ruby that it would not voluntarily sell the Brand Items to it. (Exhibit C to SMUSA's Opposition, at Answer 5(d))

DISCUSSION

Parties' Arguments

Petitioner seeks an order compelling SMUSA to produce additional documents and additional answers to interrogatories and compelling Terlato to wholly respond to its requests for documents and answer its interrogatories.

SMUSA responds by stating that it has produced all relevant, responsive, non-objectionable documents that are in its possession, custody, and control, other than any additional documents that its Italian parent corporation, Santa Margherita, might have. Nonetheless, SMUSA argues that all other documents and information that Ruby seeks to compel production of are irrelevant to the § 25E inquiry and that SMUSA should not be compelled to produce any additional documents or further answers to interrogatories.

Furthermore, SMUSA seeks a protective order from having to respond to the Second Requests that Petitioner served on it. SMUSA asserts that the Second Requests have no relevance to the case.

Terlato states that it never received the requests for documents or interrogatories. Terlato's counsel stated at the hearing that she still had not seen them as they were not attached to the Motion to Compel. Additionally, in its Motion for Protective Order, Terlato asserts that it should not have to respond to any discovery requests given that it is an aggrieved entity with no stake in the case. Terlato argued that responding to any discovery requests and participating in discovery would be unduly burdensome to this disinterested party.

Ruby responded that it would be willing to narrow the scope of its discovery requests for one side or the other but that the Commission should issue sanctions against both parties.

Applicable discovery rules

The Commission operates under the Informal "Fair Hearing" Rules promulgated under 801 C.M.R. 1.02 in matters arising under M.G.L. c. 138, § 25E. Under these Rules, "Parties to an Adjudicatory Proceeding are encouraged to engage in voluntary discovery." 801 C.M.R. 1.02(8)(a). Because § 25E matters are complex and usually include voluminous discovery, the Commission generally tracks the discovery protocol as laid out in the Formal Rules under 801 C.M.R. 1.01(8) and cites to the Massachusetts Rules of Civil Procedure in order to provide helpful guidance and to promote regularity and efficiency when it grants discovery requests. See Alexander Cella and Gerald McDonough, *Massachusetts Practice: Administrative Law & Practice* § 548 (2014) ("it would appear that the full panoply of discovery techniques, including depositions and interrogatories, available under the Formal Rules may be made available to a party under the Informal/Fair Hearing Rules as a matter of discretion under appropriate circumstances").

Motion to Compel as to SMUSA and first set of paper discovery

The Motion to Compel as to SMUSA raises two overarching questions: (1) is SMUSA obligated to produce the relevant, non-objectionable, responsive documents of its parent corporation, Santa Margherita, and (2) do the subject document requests seek relevant information?

Under Mass. R. Civ. P. 34(a), a party can make a request for production of documents that are in the “responding party's possession, custody, or control.” With regard to the issue of whether SMUSA has an obligation to produce its parent’s documents, this issue was determined in the case of Strom v. American Honda Motor Co., Inc., 423 Mass. 330 (1996). In Strom, the Supreme Judicial Court adopted a rule that “attributes sufficient control for purposes of requiring discovery whenever the claimant has met his burden of showing that the information sought is in the possession or custody of a wholly owning parent (or virtually wholly owning) or wholly owned (or virtually wholly owned) subsidiary corporation, or of a corporation affiliated through such a parent or subsidiary. We do not hold that such a relationship is necessary to a finding of control, only that it is sufficient.” Strom v. American Honda Motor Co., Inc., 423 Mass. 330, 342 (1996). The burden of proving control is on the party seeking discovery. However, “[t]he discovering party settles a right to the material merely by demonstrating the corporate relationship.” Hon. Hiller Zobel and James Smith, Esq., Massachusetts Practice: Rules Practice, § 34.1 (2d ed. 2016) (citing Strom, 423 Mass. at 344-345).

Here, SMUSA admits that its parent corporation is Santa Margherita, and the corporate relationship between SMUSA and Santa Margherita has been established. The Commission concludes that SMUSA must produce the relevant, non-objectionable, responsive documents of its parent corporation, Santa Margherita.

However, SMUSA also argues that it answered and responded fully to the first set of discovery that Ruby served on it and/or objects on the basis that that the subject interrogatories and document requests do not seek relevant information.⁴ The Commission denies Ruby’s motion to compel further answers to interrogatories (numbered 3, 4, 11, 12, 15, 16, 21, and 24) for the reasons cited in SMUSA’s Opposition and Answers to Interrogatories.

With regard to the motion to compel further responses to document requests numbered 5, 7, 8, 10-13, and 15-18, the Commission allows the motion in part and denies it in part.⁵ For the reasons

⁴ Mass. R. Civ. P. 26(b)(1) provides that, “[p]arties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*.” Mass. R. Civ. P. 26(b)(1) (emphasis added).

⁵ The Commission’s task in deciding the Motion to Compel is challenged by the fact that neither party has produced a copy of SMUSA’s responses to the requests for production of documents and by the fact that SMUSA does not specifically identify in its opposition to which numbered requests it refers.

cited in SMUSA's Opposition, the Commission denies the Motion to Compel with regard to document requests numbered 7, 12, 15-16, and 18. As explained in SMUSA's Opposition, such requests are overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and/or SMUSA has represented that such documents do not exist.

However, the Commission allows, in part, the Motion to Compel with regard to document requests 5, 8, 10, 11, 13, and 17. Document request 13 seeks, in large part, SMUSA's Certificate of Compliance ("COC") issued by the ABCC. Ruby is entitled to a copy of it, and SMUSA shall produce copies of such COCs effective during the period of January 1, 2015 through January 1, 2017. Document request 17 seeks "written agreements, documents, and communications confirming or setting out the terms of any agreements (oral or otherwise) between and/or among the Brand Owner (or any of its affiliates) or Terlato (or any of its affiliates) or Santa Margherita (or any of its affiliates), including but not limited to . . . wind-up agreements, regardless of the date of such documents." The Commission orders relative to document request 17 that SMUSA produce any wind-up agreements between and/or among Santa Margherita, Terlato, and/or Santa Margherita between the time period of January 1, 2016 through January 1, 2017. Likewise, SMUSA shall produce any communications concerning any such wind-up agreements in that same time period. SMUSA's search shall include a search of the agreements/correspondence in the possession of its parent, Santa Margherita, under the terms set forth herein.

Document requests 5, 8, 10 and 11 seek communications related to the "Transaction," which Ruby defines as "the entire legal arrangement (or arrangements) by which [SMUSA] became authorized to distribute the Brands. . ." While the Commission agrees with SMUSA that some of the information sought in these requests may result in a collection of documents some of which may not be relevant to the issues in this case, the Commission finds that the requests are calculated to lead to the discovery of admissible evidence. The Commission acknowledges SMUSA's concern that the way in which the requests are framed may result in a "costly and cumbersome document collection." "A judge ruling on discovery requests must also take into account considerations of efficiency and economy." Matter of Roche, 381 Mass. 624, 637 (1980) (citing Herbert v. Lando, 441 U.S. 153, 177 (1979) (discovery provisions "are subject to the injunction of rule 1 that they 'be construed to secure the just, speedy, and inexpensive determination of every action'")). Consistent with the Commission's discovery orders in other 25E cases, the Commission hereby orders that in response to document requests numbered 5, 8, 10, and 11, all of which seek communications, SMUSA shall produce to Ruby the emails and other correspondence to/from the two people at each of SMUSA and Santa Margherita with the most knowledge of the "Transaction" to/from their two counterparts at Terlato on the issue of the "Transaction." The date range shall be one year prior to January 1, 2016, the effective date of the Transaction, through one year following the effective date (namely January 1, 2015 through January 1, 2017). If necessary due to the number of resulting documents, the parties shall promptly agree on search terms so as to limit the results. After SMUSA has reviewed the resulting emails/correspondence for relevancy, SMUSA shall produce said documents on or before **November 5, 2018**. As indicated above, SMUSA's search shall include a search of the emails/correspondence in the possession of its parent, Santa Margherita, under the terms set forth herein.

Ruby's request for sanctions against SMUSA is denied with prejudice.

SMUSA's Motion for Protective Order regarding the Second Requests

SMUSA seeks a protective order from having to respond to the Second Requests-- both the interrogatories and requests for production of documents that Ruby served on SMUSA on January 9, 2018. While the Informal Fair Hearing Rules do not specifically address protective orders,⁶ the Formal Rules provide that "the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense." 801 CMR 1.01(8)(a). The Massachusetts Rules of Civil Procedure provide guidance as to what may constitute an undue burden or expense, including:

- (1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
- (2) whether the discovery sought is unreasonably cumulative or duplicative; and
- (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

Mass.R.Civ.P. 26(c).

The Second Requests seek information and documents regarding: sales and marketing activities of Terlato and Santa Margherita related to the Brand Items; any disputes or disagreements about the termination of Terlato; whether Terlato had any influence over the production of discovery in this matter; interrogatory answers; and whether Terlato and Santa Margherita referred to their relationship as a partnership, joint venture, or agency. SMUSA argues that all of the Second Requests are irrelevant to this matter and are also time consuming.

With the exception of interrogatory number 36 and request for production of documents number 25 the Commission agrees with SMUSA that for the reasons cited in SMUSA's Motion for Protective Order, the Second Requests seek information not reasonably calculated to lead to the discovery of admissible evidence or seek information that is duplicative of that which was sought in the first set of requests and interrogatories. This conclusion is consistent with the third factor above-- that the likely burden or expense in preparing responses to the Second Requests outweighs the likely benefit of receipt of the requested documents/information, and the sought discovery is not important to resolving this particular § 25E matter.

Interrogatory number 36 asks SMUSA to, "[i]dentify all communications between Terlato and the Brand Owner in which their relationship was referred to as a partnership or joint venture, or one

⁶ The Informal Fair Hearing Rules generally provide for motions, i.e. "requests." See 801 CMR 1.02(7)(c) (providing that "[a] party may request rulings or relief in writing at any time or orally during a hearing").

of agency.”⁷ Said interrogatory is relevant to the § 25E inquiry in this matter. SMUSA has asserted that the main issue in this particular case is whether “[Santa Margherita] controlled Terlato for ‘the discrete purpose of making regular sales of [the Brand] to downstream customers.’” (SMUSA’s Opp. to Motion to Compel, at 4 (citing Brown-Forman Corp. v. Alcoholic Beverages Control Comm’n, 65 Mass. App. Ct. 498, 506 (2006))). SMUSA shall answer interrogatory number 36 under the terms as follows.

In keeping with the Commission’s orders above with regard to e-discovery and SMUSA’s obligation to provide responsive documents of its parent, Santa Margherita, the Commission hereby orders that with regard to interrogatory number 36, SMUSA shall limit its search of information/documents to one year before the Transaction through one year following the Transaction, ie from January 1, 2015 through January 1, 2017, and shall include in its search the documents of Santa Margherita.

Document request number 25 seeks, “[a]ll documents that were identified, or were requested to be identified, in any interrogatory served to Terlato or to Santa Margherita in this matter.” Ruby had a similar request in the first request for documents, number 20. Given that SMUSA likely already responded to request 20 (Ruby did not seek to compel responses to it) and given the Commission’s order that SMUSA shall now answer interrogatory number 36, the Commission limits document request number 25 to all documents identified in answer to interrogatory number 36.

The Commission orders that SMUSA answer interrogatory number 36 and respond to document request number 25 under the terms described herein on or before **November 5, 2018**.

Motion to Compel as to Terlato and Terlato’s Motion for Protective Order

In its Opposition to Terlato’s Motion for Protective Order, Ruby asserts that it served interrogatories and requests for production of documents on Terlato at its business address on May 20, 2016. However, Ruby’s certificate of service for the discovery requests states that Ruby’s counsel served the discovery requests upon the attorneys of record for the parties. At the time of the asserted service, May 20, 2016, Terlato had not made an appearance in this case. In fact, the first time Terlato made an appearance, albeit a limited appearance, was January 5, 2018. Terlato states that it never received the discovery requests. According to Terlato, the requests were never served in or about May 2016; the requests were not attached to the Motion to Compel; and as of the time of the hearing on the Motion to Compel, Terlato still did not have a copy of the discovery requests.⁸ The Commission declines to compel Terlato to respond to requests for production and interrogatories that it has never seen. Consequently, the Commission denies the Motion to Compel as to Terlato.

⁷ If SMUSA’s assertion is true – that there was no agency relationship between Terlato and Santa Margherita –, SMUSA’s search will likely result in a finding that no responsive communications/documents exist. Consequently, it cannot be said that this interrogatory poses an undue burden or expense on SMUSA.

⁸ Furthermore, there is no evidence or even assertion that Ruby has attempted since the hearing on this matter to properly serve Terlato.

With regard to Terlato's Motion for Protective Order, Terlato was involuntarily removed as the importer of the Brand Items by the supplier, Santa Margherita, as of December 31, 2015. (Ex. B to SMUSA's Opposition) Consequently, Terlato argues, it has had no role whatsoever with distribution, marketing, or sale of the Brand Items since that time. Terlato claims that responding to discovery from Ruby would impose an unfair burden and expense upon it. Indeed, Terlato argues that it is improperly named as a respondent in this matter. Massachusetts General Laws, Chapter 30A, which governs state administrative procedure, defines a party to an adjudicatory proceeding, in relevant part, as, "(a) the specifically named persons whose legal rights, duties or privileges are being determined in the proceeding. . ." M.G.L. c. 30A § 1 (3). The Commission agrees that Terlato's legal rights, duties and/or privileges are not being determined in this proceeding. Indeed, as of December 31, 2015, Santa Margherita terminated Terlato, and Terlato no longer has any right to the Brand Items. It follows that if Ruby were to succeed on the merits of this case, Terlato is in no position whatsoever to provide the relief that Ruby seeks—sale to Ruby of the Brand Items for distribution. Terlato's Motion for Protective Order is allowed.

Ruby's request for sanctions against Terlato is **DENIED WITH PREJUDICE**.

CONCLUSION

For the foregoing reasons, Ruby Wines' Motion to Compel Further Discovery from Santa Margherita, USA Inc. is **ALLOWED IN PART AND DENIED IN PART**; SMUSA's Motion for a Protective Order is **ALLOWED IN PART AND DENIED IN PART**; Ruby Wines' Motion to Compel Discovery from Terlato Wines is **DENIED**; and Terlato Wines' Motion for a Protective Order is **ALLOWED**.

Other than as detailed herein, discovery has closed.

AMENDED SCHEDULING ORDER

The Commission hereby amends its scheduling order as follows:

- a) Discovery responses as set forth above shall be due by **November 5, 2018**.
- b) Any and all Motions for Summary Decision shall be due by **November 26, 2018**, and any oppositions or responses are due by **December 7, 2018**.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner 

Kathleen McNally, Commissioner 

Dated: October 9, 2018

You have the right to appeal this decision to the Superior Court under the provisions of Chapter 30A of the Massachusetts General Laws within thirty days of receipt of this decision.

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