



***Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150***

Jean M. Lorizio, Esq.
Chairman

No. 25E-1382

**S&H Independent Premium Brands East, LLC, and
S&H Independent Premium Brands West, LLC,
Petitioners,**

v.

**Win-It-Too d/b/a Global Beer Network, and
Stiegl Getranke & Service GMBH & CO KG,
Respondents.**

HEARD: 8/17/2020

**MEMORANDUM AND ORDER ON THE RESPONDENTS' MOTION TO DISMISS
APPLICATION FOR RELIEF UNDER M.G.L. C. 138, § 25E**

The Alcoholic Beverages Control Commission ("Commission") issues this Memorandum and Order in response to the Respondents' Motion to Dismiss Application for Relief under M.G.L. c. 138, § 25E.

PROCEDURAL & FACTUAL BACKGROUND

This case arises under M.G.L. c. 138, § 25E. Petitioners, S&H Independent Premium Brands East, LLC, and S&H Premium Brands West, LLC ("Petitioners") are certificate of compliance holders aggrieved by the refusal of Win-It-Too d/b/a Global Beer Network, and Stiegl Getranke & Service GMBH & CO KG, a Massachusetts wholesaler and a certificate of compliance holder, respectively ("Respondents"), to make sales of Stiegl products ("brand items"). The Petitioners filed their § 25E petition with the Commission on December 17, 2019. On December 20, 2019, pursuant to the mandate in § 25E, the Commission issued an order to the Respondents to make sales of the brand items to the Petitioners pending the Commission's determination of the petition on its merits.

On February 5, 2020, the Respondents filed a Motion to Dismiss Application for Relief Under M.G.L. c. 138, § 25E. The Petitioners filed their Opposition of S&H Independent Premium Brands East, LLC and S&H Independent Premium Brands West, LLC to Motion to Dismiss on February 20, 2020. The Respondents filed a Reply to Opposition to Motion to Dismiss on March 6, 2020. The Petitioners filed an affidavit of Robert Schraml on August 12, 2020, and the Respondents filed an affidavit of Claudia Nussbaumer on August 14, 2020. The Petitioners then filed a Motion to Strike Affidavit of Claudia Nussbaumer.

The Commission held a hearing on the motion to dismiss on August 17, 2020.

It was requested by Petitioner and agreed upon by the Respondent that the Commission take administrative notice of the content of the Commission files as to all parties.

The record was left open until August 31, 2020 for the Respondents to respond in writing to the Petitioner's Motion to Strike Affidavit of Claudia Nussbaumer. Said response was timely received and Petitioner's Reply to Respondent's Opposition to Motion to Strike Affidavit of Claudia Nussbaumer was filed shortly thereafter. The Record is now closed.

DISCUSSION

It is undisputed the Petitioners do not hold, and have never held, § 18 wholesaler licenses but instead hold certificates of compliance pursuant to M.G.L. c. 138, § 18B. The Respondents argue because the Petitioners do not hold § 18 wholesaler licenses they are not permitted to petition the Commission for relief under § 25E, and therefore their petition should be dismissed. The Petitioners counter with sixteen assertions of substantive and procedural deficiencies in support of why the motion to dismiss should be denied.

Whether the Petitioners, who do not possess § 18 wholesaler licenses, can lawfully use § 25E as a vehicle to compel other licensees to continue sales of the brand items is an important jurisdictional question that must be resolved. Therefore, the Commission shall answer the sole question before it: whether a licensee other than a § 18 wholesaler can petition the Commission under § 25E over distributorship disputes.

Section 25E states, in relevant part:

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.

M.G.L. c. 25E (emphasis added).

By the plain language of § 25E, only an aggrieved § 18 wholesaler may petition the Commission for relief.

If there was any question lingering about the language of the statute, the Appeals Court has already affirmed the Commission's understanding of the statute. Last year, in an unrelated § 25E matter, the Appeals Court explained only aggrieved § 18 wholesalers may petition the Commission: "By statute, when a *licensed Massachusetts wholesaler* of alcoholic beverages has been distributing a particular brand name item for more than six months, the supplier cannot discontinue sales of the brand to the wholesaler without good cause. See G. L. c. 138, § 25E (§ 25E)." Martignetti Grocery Co. v. Alcoholic Beverages Control Commission, 96 Mass. App. Ct. 729, 729 (2019) (emphasis added).

The Petitioners contend because § 25E does not define "wholesaler," § 25E does not require a petitioner to be a § 18 *licensed* wholesaler. However, the Petitioners' argument ignores the well-established principle of statutory construction that "G.L. c. 138 may properly be read as a whole, [.] So] we may refer to related statutory provisions to determine the meaning of the phrase" "wholesaler" in § 25E. Johnson v. Martignetti, 374 Mass. 784, 789 (1978) (internal citation omitted). All of c. 138 discusses wholesalers in the terms of being § 18 licensed wholesalers. Not once does it address conduct of out-of-state wholesalers, and for good reason – c. 138 and the Commission can only regulate the "the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages" that occurs within Massachusetts. Chapter 10, § 71, of the General Laws, "which established the ABCC, was legislatively intended to 'give the commission comprehensive and exclusive jurisdiction over the conduct of liquor business in the commonwealth.'" Austin, Nichols & Co. v. Alcoholic Beverages Control Commission, 2005 WL 2476218 at *3 (Mass. Super. Aug. 26, 2005) (M.G.L. c. 10, § 71.), quoting Universal Mach. Co. v. Alcoholic Beverages Control Commission, 301 Mass. 40 (1938) (emphasis added); accord Miller Brewing Co. v. Alcoholic Beverages Control Commission, 56 Mass. App. Ct. 801, 810 n.7 (2002). Since c. 138 is read as a whole, it is clear the use of the term "wholesaler" in § 25E means § 18 wholesalers and their conduct within Massachusetts.

Finally, the Petitioners raise multiple other grounds for why the motion to dismiss should be denied and the affidavit of Claudia Nussbaumer stricken. A majority of these arguments do not address the propriety of the motion to dismiss, but instead relate to the merits of the underlying petition. In any event, because of the Commission's ruling in this matter, those other grounds raised by the Petitioners and the question as to whether the Nussbaumer Affidavit should be stricken do not need to be addressed.¹

¹ Insofar as the Commission must address the Petitioners' claims that the Respondents' motion lacked adequate factual and legal citations in support of their motion, 801 C.M.R. 1.02(7)(c), which is the vehicle for parties to file motions to the Commission, does not necessarily require

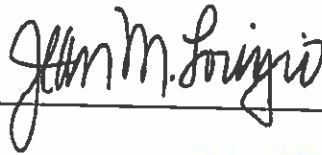
Where the Petitioners are not § 18 wholesalers and are instead § 18B certificate of compliance holders, and where § 25E only permits § 18 wholesalers to petition the Commission for relief, the Petitioners cannot seek relief from the Commission under § 25E and the petition must be dismissed.

CONCLUSION

For the foregoing reasons the Respondents' Motion to Dismiss Application for Relief Under M.G.L. c. 138, 25E, is ALLOWED.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Deborah Baglio, Commissioner



Dated: August 19, 2021

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

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cc: William A. Kelley, Esq.
Caroline O'Connell, Esq.
Administration, File

factual or legal support. Furthermore, if the Commission were to deny the motion to dismiss on these bases, there would be nothing to prevent the Respondents from re-filing their motion with factual and legal support. Therefore, out of interests of administrative economy, and because this jurisdictional question must be addressed now, the Commission will not require the Respondents to go through the work of re-filing their motion. The Commission is confident it can rule on the pleadings with the factual and legal support provided by both parties.