

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

NO. 25E-1289
M.S. WALKER, INC., PETITIONER
v.
THE WINE GROUP, RESPONDENT

MEMORANDUM AND ORDER
ON PETITIONER'S MOTION TO ENLARGE TIME FOR DISCOVERY
AND AMENDED SCHEDULING ORDER

The Commission hereby issues this Order in response to M.S. Walker's June 20, 2014, Motion to Enlarge Time for Discovery. The Commission has fully considered the Motion and other discovery-related matters of legal substance and issues the following Order as it is necessary to move this case forward.

PROCEDURAL BACKGROUND

This case arises under M.G.L. c. 138, §25E. Petitioner, M.S. Walker, Inc. ("Walker") is a Massachusetts wholesaler aggrieved at the refusal of Respondent, The Wine Group ("Wine Group"), a Massachusetts manufacturer of alcoholic beverages, to ship Trapiche, Falling Star, and Broquel ("Brand Items") to Walker. Walker filed its petition under §25E on April 10, 2012. On May 2, 2012, pursuant to the mandate in M.G.L. c. 138, §25E, the Commission issued an order to Wine Group to make sales of the Brand Items to Walker pending the Commission's determination of the petition on the merits. The Commission also authorized discovery to take place. Discovery was ordered to be completed on or before July 2, 2012.

On May 17, 2012, Walker filed and served Initial Interrogatories and a Request for Production of Documents on Wine Group. Two months later, on July 2, 2012 – the date at which discovery was supposed to be complete – Wine Group filed its First Request for Production of Documents. Wine Group also served its Answers to Interrogatories on August 20, 2012, some six weeks past the discovery deadline.

Wine Group filed a Motion to Dismiss the petition on January 13, 2013, for "petitioner's failure to prosecute, failure to comply with the Commission's pre-hearing order, and failure to respond to respondent's pre-hearing discovery." Walker filed its Opposition to Wine Group's Motion to Dismiss along with a Response to the Document Request of Wine Group on January 15, 2013. Wine Group filed a Reply to Walker's Opposition on February 13, 2013. On February 27, 2013, Walker filed a Motion for an Order Compelling Discovery and for a Protective Order. Wine

Group opposed this motion on March 15, 2013. The Commission held a hearing on April 3, 2013. That same day, the Commission denied Wine Group's motion to dismiss and ruled on the motion to compel discovery and ordered the following: "the parties are required to produce formal discovery responses (RPD) by 5-8-13 and 6 mos. prior course of dealing by 5-8-13. Parties must inspect documents by 6-15-13 and produce documents by 6-19-13."

Wine Group filed a letter on June 10, 2013, requesting the dismissal of Walker's §25E petition. Walker filed a letter in response to Wine Group's June 10, 2013, letter. As these letters were not properly before the Commission, they were not considered.

A year passed with no word from the parties. Then, on June 20, 2014, Walker filed a Motion to Enlarge Time for Discovery. Wine Group opposed this motion on July 7, 2014.

Wine Group filed a Motion for Summary Decision on September 12, 2014. Walker filed a Motion to Enlarge Time to Respond to Motion for Summary Decision, which the Commission allowed on October 31, 2014. In the meantime, the Commission scheduled a status conference for October 28, 2014, which was postponed. On November 12, 2014, Walker filed a response to Wine Group's document requests – more than two years after Wine Group made its documents request.

On May 15, 2015, another seven months with no word from the parties, the Commission, *sua sponte*, convened a hearing on the motion. Wine Group filed a Chronology of Discovery and Other Procedural Events on June 8, 2015. The Commission held a status conference on June 9, 2015. At the Commission's request, Walker filed, post-hearing, a Memo to Clarify Issue.

DISCUSSION

Walker has moved to enlarge the time for discovery. In its motion, Walker claims that Wine Group has not fully complied with Walker's May 17, 2012, requests for documents. It seeks additional time so that it can obtain these additional documents from Wine Group and further seeks additional time to notice and conduct depositions if necessary after documentary discovery is complete.

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. Although not specified in the Informal Rules, a party may seek discovery pursuant to 801 C.M.R. 1.02(7)(c) governing "special requests." 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) in order to promote regularity and efficiency when it grants discovery requests. *See, e.g.,* 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").

In counsel's November 13, 2013 letter for Wine Group to counsel for Walker, Attorney O'Neal informed Attorney Coyne that she was going to request "several additional documents and information . . . from The Wine Group, and incorporate into supplement responses to Walker's document requests or TWG's answers to Walker's interrogatories." Attorney O'Neal then

outlined to which document requests and interrogatories the additional documents would relate. To date, Wine Group has not provided Walker with these documents. Wine Group must produce the documents it has previously agreed to produce as contained in its November 13, 2013, letter to Walker.

Likewise, Walker has not produced documents to Wine Group that it had agreed to produce in its January 16, 2013, Response to the Document Request of Wine Group. Walker must produce all documents it had previously agreed to produce for The Wine Group, including but not limited to, requests 3, 7, 8, 12, 15, and 16.

While Walker has requested an enlargement of time for discovery, it also has argued before the Commission that documentary discovery should not have a deadline for completion because "deadlines are a complete waste of time" and are a "useless exercise," implying that parties, including Walker, routinely and deliberately disregard Commission orders. The Commission reminds the parties that should a party fail to obey an order of the Commission without good cause, including to provide or permit discovery by a specific deadline as ordered, the Commission may, pursuant to its authority under 801 CMR §§ 1.02(7)(c) & (10)(f), ultimately make orders in regard to the failure as are just, including but not limited to ordering that designated facts shall be established adversely to the party failing to comply with the order; or an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters. Contrary to Walker's position, deadlines are essential to keeping §25E cases moving. Without deadlines, §25E cases like this one could sit for years with no progress toward a resolution, to the detriment of the supplier who is subject to a shipping order. Should a discovery deadline be unreasonable for a party, the party always has the option to move the Commission under 801 CMR 1.02(7) for an enlargement of time to comply with discovery.

CONCLUSION

Walker's Motion to Enlarge Time for Discovery is **ALLOWED**. The Commission further orders the following:

- 1) Wine Group must produce all documents it had previously stated it would produce in its November 13, 2013, memorandum to counsel for Walker; and
- 2) Walker must produce documents it had previously agreed to produce to Wine Group in its January 16, 2013, Response to the Document Requests of the Wine Group.

Both parties must comply with this order by the end of discovery as stated in the Amended Scheduling Order below.

AMENDED SCHEDULING ORDER

The Commission hereby amends its scheduling order as follows:¹

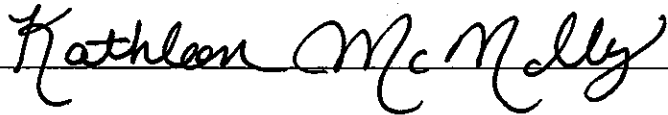
- a) All answers to Interrogatories and Requests for Production of Documents must be completed by August 14, 2015;
- b) Any further motions to compel discovery must be filed by August 21, 2015;
- c) Hearing regarding the status of discovery and any motions to compel discovery on August 25, 2015;
- d) Any and all requests for Depositions must be filed with this Commission by September 23, 2015;
- e) Any and all Depositions must be completed by October 21, 2015; and
- f) Any and all Motions for Summary Decision shall be due by November 18, 2015, and any oppositions or responses are due by December 2, 2015.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: July 20, 2015

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.

Cc: Mary O'Neal, Esq. via email
William Coyne, Esq. via email

¹ The parties should not anticipate the Commission granting any further amendments to the Scheduling Order.