



*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-1294**  
**M.S. WALKER, INC.**  
**PETITIONER**  
**v.**  
**CONSTELLATION BRANDS, INC.**  
**RESPONDENT**  
**HEARD: 03/18/2015**

**MEMORANDUM AND ORDER IN RESPONSE**  
**TO M.S. WALKER'S MOTION FOR DISCOVERY SANCTIONS WITH**  
**COMMISSION'S AMENDED DISCOVERY AND SCHEDULING ORDER**

The Commission hereby issues this Order in response to M.S. Walker's November 19, 2014, Motion for Discovery Sanctions Against Constellation Brands, Inc. The Commission has fully considered the Motion for Discovery Sanctions 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. (M.S. Walker) is a Massachusetts wholesaler aggrieved at the refusal of Constellation Brands Inc. (Constellation), a Massachusetts manufacturer of alcoholic beverages, to ship Mark West Wines (Brand Items) to M.S. Walker. On or about September 13, 2012, pursuant to the mandate in M.G.L. c. 138, §25E, the Commission issued an order to Constellation to make sales of the Brand Items to M.S. Walker pending the Commission's determination of the petition on the merits. The Commission also authorized discovery to take place.

On February 7, 2014, Constellation filed a Motion for Summary Decision. In response, on February 20, 2014, M.S. Walker filed a Motion to Enlarge Time to Respond to Constellation's Motion for Summary Decision. On February 27, 2014, M.S. Walker filed a further Motion to Strike and to Compel Further Discovery Responses. On February 28, 2014, Constellation filed a Partial Opposition to Walker's Motion to Enlarge Time. The Commission allowed M.S. Walker's Motion to Enlarge Time and set a new pre-hearing timeline on July 29, 2014. The next day, on July 30, 2014, the Commission ordered Constellation to produce several documents, including certain electronic records.

Constellation filed a Motion for Clarification and Reconsideration on August 8, 2014, which resulted in the Commission amending its pre-hearing timeline on November 3, 2014. On November 5, 2014, Constellation provided M.S. Walker with a disc containing email discovery, containing over 120,000 documents. Less than two weeks later, on November 18, 2014, M.S. Walker filed a Motion for Discovery Sanctions Against Constellation.

A hearing was held before the Commission on Tuesday, December 9, 2014, to address M.S. Walker's Motion for Discovery Sanctions. The Commission held another hearing on Monday, December 15, 2014, regarding M.S. Walker's Motion for Discovery Sanctions and Motion to Revise Scheduling Order. At this hearing, Constellation agreed that its produced discovery was not responsive to M.S. Walker's requests and would go back and search again.

The Commission scheduled a status conference for Monday, December 23, 2014, to hear further on the ongoing discovery dispute but the parties jointly requested that the status conference be postponed, which the Commission allowed.

At some point following the Commission hearing on December 9, 2014, in an attempt to narrow the prior production of 120,000 emails, Constellation hired a third party vendor, Target Litigation Consulting, to search its email system for agreed-upon search terms.<sup>1</sup> As a result, on March 11, 2015, Constellation provided M.S. Walker with a thumb-drive containing 24,638 emails, compiled by Target Litigation Consulting. At another status hearing on Wednesday, March 18, 2015, the Commission heard the parties on the Motion for Discovery Sanctions and other discovery-related matters. Both parties have filed correspondence with the Commission as it related to the March 18, 2015, status hearing.

### DISCUSSION

M.S. Walker has moved for discovery sanctions requesting that the Commission order Constellation to do one of the following: (1) order Constellation to fully comply with the Commission's July 30, 2014, order to produce all emails and other responsive documents and to identify the discovery request to which each document produced is responsive; (2) order Constellation to pay the cost of having Walker's counsel review the emails already produced at a rate of \$385 per hour, plus expenses; or (3) order Constellation to reimburse Walker for the cost of employee time and benefits incurred in having its employees review the emails produced by Constellation.

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:

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<sup>1</sup> Search terms included: SWC, sonomawines, Sonoma wines, markwest, mark west, derekbenham, derek benham, benham, purple wine, purple, projectpioneer, project pioneer.

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”).

The Commission is also guided by Mass. R. Civ. P. 34, and its federal counterpart, Fed. R. Civ. P. 34, as it relates to electronic discovery. Under Rule 34, a party has two options for the production of documents in response to a discovery request. The party may either produce documents “as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.” The Advisory Committee Note to the Federal Rule states that the purpose of this rule was to eliminate the practice of “deliberately [mixing] critical documents with others in the hope of obscuring significance.” This provision prohibits simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought. Allowing the production of documents as they “are actually kept in the usual course of business” was intended to minimize the burden of production while maintaining the “internal logic reflecting business use.”

Rule 34 does not elaborate on the term “usual course of business.” A party choosing to produce documents as maintained in the ordinary course of business bears the burden of demonstrating that the documents made available are in fact produced consistent with Rule 34. S.E.C. v. Collins & Aikman Corp., 256 F. R. D. 403, 410 (S.D.N.Y. 2009); Pass & Seymour, Inc. v. Hubbell Inc., 255 F. R. D. 331, 336 (N.D. N.Y. 2008). Documents produced as they are ordinarily maintained “must be organized in such a way that the system utilized in the producing party is replicated, in other words, the documents should be produced, organized, and labeled, and, if appropriate, indexed just as they are maintained by the producing party.” Pass & Seymour, Inc. v. Hubbell Inc., 255 F. R. D. 331, 336 (N.D. N.Y. 2008).

Constellation did not produce the electronic records as they are kept in the usual course of business; Constellation instead retained a third party vendor, Target Litigation Consulting, to compile a thumb drive of thousands of electronic documents that contain specified search terms. A compilation of electronic records made by a third party vendor is clearly not compiled and produced in the usual course of business as they are maintained by Constellation. Therefore, the inquiry is whether the electronic records are organized and labeled to correspond to the categories in the discovery request.

When a party does not produce documents in the usual course of business, it must produce the documents in a usable fashion so that the requesting party can reasonably locate documents responsive to its specific requests. S.E.C. v. Collins & Aikman Corp., 256 F. R. D. 403, 413 (S.D. N.Y. 2009); In re: Mentor Corp. Obsolete Transobutator Sling Products Liability Litigation, 2009 WL 152495, at \*2 (M.D. Ga. 2009). This involves the production of an index or orderly listing of the documents presented. Rickles, Inc. v. Frances Denney Corp., 508 F. Supp. 4, 7 (D. Mass. 1980); see also, Budget Rent-A-Car- of Mo., Inc. v. Hertz Corp., 55 F. R. D. 354, 357 (W.D. Mo. 1972) (rules of discovery do not permit a party to “impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records”).

“A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b) runs the risk that the requesting party can show that the produced form is not reasonably usable . . . .” Branhaven, LLC v. BeefTek, Inc., 288 F. R. D. 386, 391-392 (D. Md. 2013), citing Advisory Committee Notes to Fed. R. Civ. P. 34. That is precisely what happened here. At the March 18, 2015, status hearing, M.S. Walker produced computer screen shots that explain how arduous it is just to open each electronic document produced by Constellation, which are located under several subfolders, are not labeled but are rather numbered, and are not searchable. (Ex. 2, March 18, 2015, hearing). Constellation countered by providing the Commission a sample of ten pages of spreadsheets, which each line representing an electronic document along with the document’s custodian, the search terms found in that document, and a file link. (Ex. 1, March 18, 2015, hearing).

The Commission finds that while Constellation attempted to comply with its discovery obligations, it has not produced its documents in a usable fashion so that M.S. Walker can reasonably locate documents responsive to its specific requests. The thumb-drive is not reasonably searchable and the spreadsheets that correspond with the thumb-drive do not rise to the level of a usable index or orderly listing of the documents presented. However, the Commission further finds that Constellation has not acted in bad faith in producing this most recent round of discovery, and accordingly, sanctions are not warranted.

#### CONCLUSION

M.S. Walker’s Motion for Discovery Sanctions is **DENIED**. Furthermore, Constellation is ordered to re-produce the documents it provided to M.S. Walker via thumb-drive in a usable fashion by June 1, 2015, including the production of an index or other orderly listing of the documents presented so that M.S. Walker can reasonably locate documents responsive to its specific discovery requests. Moreover, any further production of documents from either party must be produced either as they are kept in the usual course of business along with proof that the records have been produced as they are stored in the ordinary course of business, or must be organized and labeled in a usable fashion so that the requesting party can reasonably locate documents responsive to its discovery requests.

AMENDED SCHEDULING ORDER

The Commission hereby amends its scheduling order as follows:

- a) All answers to Interrogatories and Requests for Production of Documents must be completed by June 1, 2015;
- b) Any and all requests for Depositions must be filed with this Commission by June 1, 2015;
- c) Any and all Depositions must be completed by August 1, 2015;
- d) Discovery Conference scheduled for August 14, 2015;
- e) Any and all Motions for Summary Decision shall be due by August 14, 2015, and any oppositions or responses are due by September 1, 2015; and
- f) Pre-Hearing Memorandum due by September 1, 2015.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman

Kathleen McNally, Commissioner

Dated: May 6, 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: William F. Coyne, Jr., Esq. via email  
Mary O'Neal, Esq. via email  
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