

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

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.*  
*Chairman*

No. 25E-1294  
M.S. WALKER, INC.  
V.  
CONSTELLATION BRANDS, INC.  
HEARD: 06/04/2014

**MEMORANDUM AND ORDER  
ON CONSTELLATION BRANDS, INC. AND  
M.S. WALKER, INC.**

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 Constellation Brands Inc. ("Constellation"), a Massachusetts manufacturer of alcoholic beverages, to ship Mark West Wines (the "Brand Items") to 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 Mark West Wines brand items to 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, Walker filed a Motion to Enlarge Time to Respond to Constellation's Motion for Summary Decision. On February 27, 2014, 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.

On Wednesday, June 4, 2014 the Commission held a hearing on the Petitioner's Motions to Enlarge Time and to Strike and to Compel Further Discovery Responses. Prior to the beginning of the hearing, Constellation provided answers to Walker's outstanding discovery responses. Walker requested additional time to review the discovery responses to ascertain if the documents were responsive. On June 11, 2014, with the Commission's permission, after Reviewing Constellation's Response, Walker filed a Supplement to its Motion to Compel.

In its Motion to strike and compel discovery, Walker contends that Constellation has refused to properly and fully answer interrogatories and respond to document requests. As a result, Walker has requested that the Commission:

- a) enter an order to enlarge time for Walker to respond to Constellation's Motion for Summary Decision;
- b) enter an order to striking Constellation's answers to interrogatories, and enter an order compelling "new answers" to interrogatories be provide by Constellation; and
- c) enter an order compelling the production of responsive documents.
- d) enter an order modifying the pre-hearing order to extend discovery deadlines and the allotted time for filing a joint pre-hearing memorandum.

After hearing and consideration of the exhibits and arguments provided by the parties, the Commission finds the following facts and makes the following rulings.

### DISCUSSION

Ronald Fondiller, Senior Vice President and General Counsel, Wine & Spirits Division, Constellation Brands, Inc. ("CBI") provided discovery responses on behalf of Constellation in this matter. Mr. Fondiller works at CBI's corporate offices located in Victor, New York and is generally familiar with the facts and circumstances surrounding the negotiation and execution of the Asset Purchase and Sale Agreement among Constellation, Purple Wine Company, and Derek Benham. Mr. Fondiller's responses have been and are a major subject of this discovery dispute.

Walker has requested that CBI's Interrogatory Answers be stricken and that new Answers to Interrogatories be provided by CBI. Walker charges that on a number of Interrogatories, CBI, through Mr. Fondiller, answers questions "upon information and belief," and that this practice is objectionable and insufficient to properly answer the questions in the context of a complicated contract involving a \$160,000,000 corporate sale.

It is well settled law that a corporate officer may answer interrogatories as if he or she were the corporation itself. See generally, Gunn v. New York, N.H. & H.R. Co., 171 Mass. 417, 419 (1898). Accordingly, the Commission determines that it was appropriate and lawful for Mr. Fondiller to provide discovery answers. This does not end the inquiry, however, as more is required. As provided in Gunn,

*"[i]n any case, where the answers are upon information and belief, it may be so stated. But an admission is none the less binding because made upon information and belief, and for that reason the party interrogating properly may insist that the party interrogated shall make reasonable inquiries of his servants, agents, and attorneys, who were engaged as such in the transaction in question, for the purpose of ascertaining the facts in relation thereto, and answering accordingly."* Id.

Accordingly, Mr. Fondiller was under an obligation to make reasonable inquiries of his agents, attorneys and employees "for the purpose of ascertaining the facts."

Moreover, the law is clear that to the extent that information is obtained from agents, servants and attorneys, an answer containing hearsay evidence is proper. Falzone v. Burgoyne, 317 Mass. 493, 497 (1945). Additionally, "[t]o this extent a party may be required to state that which is hearsay and which he could not give as a witness testifying upon the trial." Warren v. Decoste, 269 Mass. 415, 418 (1930).

Walker's Interrogatory No. 2 asks "Identify all persons who provided information used in preparing the answers to these interrogatories." Constellation answered only "Mr. Fondiller, Senior Vice President and General Counsel, Wine & Spirits Division, of Constellation Brands, Inc." In Constellation's Answer to Interrogatory 8, Constellation does provide the name and contract number of a number of individuals in possession of "the most knowledge" about particular categories of information.

M.S. Walker suggests, in its Motion to Strike and Compel Further Discovery Responses, that it is significant that Mr. Fondiller is not listed as one of the people with the most knowledge about any of the categories requested in Interrogatory 8, except for (e) and (f), the two categories involving legal implications. The Commission agrees that Constellation is under an obligation to make reasonable inquiries of persons with actual knowledge of all of the matters in question.

### CONCLUSION

The Commission **ALLOWS** Walker's motion to extend the discovery deadlines and time for filing a joint pre-hearing memorandum. The Commission hereby establishes a new pre-hearing timeline order provided, infra, Section II (4).

The request for the Extension of Discovery Deadlines is granted and amended as follows:

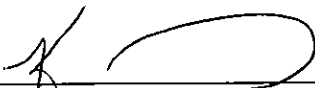
- a) All answers to Interrogatories and Requests for Production of Documents must be completed by October 1, 2014;
- b) Any and all requests for Depositions must be filed with this Commission by October 1, 2014;
- c) Any and all Depositions must be completed by December 1, 2014;
- d) Discovery Conference scheduled for December 16, 2014;
- e) Pre-Hearing Memorandum due by January 5, 2015;
- f) Any and all Motions and/or Responses on the Motion for Summary Decision shall be due by January 5, 2015.

The Commission hereby orders Constellation:

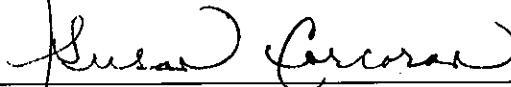
- a) Provide supplemental Answers to Interrogatories;
- b) In such supplemental Answers to Interrogatories, Mr. Fondiller shall make reasonable inquiries of those with actual knowledge, and after doing so shall, for each question answered, list the name, professional position and contact information of each and every person consulted with in preparing discovery answers;
- c) Otherwise indicate the extent to which Answers provided are based upon hearsay.

### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Dated: July 29, 2014

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 days of receipt of this decision.

cc: William F. Coyne, Jr., Esq. via email  
Mary O'Neal, Esq. via email  
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