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Department of the State Treasurer  
Alcoholic Beverages Control Commission  
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**Jean M. Lorizio, Esq.**  
*Chairman*

**No. 25E-1343**

**RUBY WINES INC.,**

**Petitioner,**

**v.**

**CONSTELLATION BRANDS INC. and  
CHARLES SMITH WINERY,**

**Respondents**

**HEARD: 03/22/2018**

**ORDER ON DISCOVERY MOTIONS**

The Alcoholic Beverages Control Commission ("Commission") held a hearing on Thursday, March 22, 2018, to consider the following motions made by Ruby Wines, Inc. ("Ruby"):

- 1) Ruby's First Motion to Compel Discovery;
- 2) Ruby's Motion Regarding Designation and Production of Highly Confidential Documents;  
and
- 3) Ruby's Second Motion to Modify Scheduling Order

(collectively, the "Motions"), which Constellation Brands Inc. ("Constellation") timely opposed. After reviewing the parties' filings and following oral arguments, the Commission denies the Motions for the reasons set forth below but with the qualifications as to electronic discovery. The Commission is also issuing an Amended Scheduling Order.

**PROCEDURAL BACKGROUND**

On November 12, 2016, Ruby filed a petition for relief under M.G.L. c. 138, § 25E, alleging that the Respondents, Constellation and Charles Smith Winery,<sup>1</sup> refused to ship certain Brand Items in violation of the statute. In its petition, Ruby denies that Constellation had good cause within the meaning of the statute to terminate sales of the Brand Items to Ruby.

The Commission issued a Notice of Filing of M.G.L. c. 138, § 25E Petition and Pre-Hearing Order on November 18, 2016. In its Notice, the Commission ordered the Respondents "to make sales of the Brand Items and continue to make sales and deliver same to Ruby Wines in the regular course of business." The Brand Items in the Notice included Charles Smith Wine Brand Names.

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<sup>1</sup> Constellation asserts that the proper name of the entity is Charles Smith Wines, LLC.

On June 13, 2017, Ruby filed its first Motion to Modify the Scheduling Order. After review, the ABCC issued an Amended Scheduling Order on July 13, 2017, to extend the discovery deadline to on or before September 18, 2017.

On September 19, 2017, Ruby filed its First Motion to Compel Discovery and Second Motion to Modify the Scheduling Order. Constellation timely filed an Opposition on September 28, 2017, to which Ruby filed its Reply to Respondents' Opposition on October 20, 2017. The motions were under Commission review.

On December 5, 2017, Ruby filed a Motion regarding the Designation and Production of Highly Confidential Documents. Constellation timely filed an Opposition on December 15, 2017, and Ruby filed its Reply to Respondents' Opposition on January 3, 2018.

The Commission scheduled a hearing on all of the Motions for March 8, 2018, which was postponed due to a snowstorm. The hearing was rescheduled to Thursday, March 22, 2018. The day after the hearing, on March 23, 2018, Ruby's counsel submitted a letter to the Commission, on which Constellation's counsel was copied, responding to an issue raised at the hearing regarding Ruby's motion regarding the highly confidential documents.

### MOTION TO COMPEL

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). 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").

The Commission has reviewed the Motion to Compel, Opposition, Reply, and all relevant papers, and following the hearing, the Commission denies Ruby's Motion to Compel for the reasons cited in the Opposition, Exhibit C to Ruby's Motion, and the arguments made by counsel for Constellation at the hearing. However, the Commission orders that the parties shall engage in electronic discovery as set forth below.

### Electronic Discovery

With regard to the issue of e-discovery, the Commission is guided by the discovery orders in M.S. Walker, Inc. v. Constellation Brands, Inc., 25E-1294 (June 30, 2015 Memorandum and Order), Martignetti Grocery Co. Inc d/b/a Carolina Wine Co. v. Constellation Brands, Inc. and Constellation Brands U.S. Operations, Inc., 24E-1324 (August 30, 2016 Memorandum and Order), and M.S. Walker, Inc. v. Moet Hennessy USA, Inc. and Campari America LLC, 25E-1338 (April 28, 2017 Amended Scheduling Order and Order on M.S. Walker's Second Motion to Compel). In M.S. Walker, Inc. v. Constellation Brands, Inc., the Commission ordered a two-step process for

email discovery. First, the parties were to agree on search terms for the respondent's email system. Second, the respondent was to then reduce the emails that contained the search terms "to only relevant documents so that [the petitioner] 'can reasonably locate documents responsive to its specific discovery requests.'" M.S. Walker, Inc. v. Constellation Brands, Inc., 25E-1294. Similarly, in M.S. Walker, Inc. v. Moët Hennessy USA, Inc. and Campari America LLC, the Commission ordered that the respondent produce emails to/from the two people at its company most involved with/ knowledgeable about the asset purchase agreement to/from their two counterparts at the predecessor supplier. The date range was one year prior to the effective date of the asset purchase agreement through the present, and the Commission ordered the parties to agree on search terms to limit the number of emails if necessary.

Consistent with the Commission's prior discovery orders and as proposed by Constellation, the Commission hereby orders that Constellation shall produce to Ruby the emails to/from the two people at Constellation with the most knowledge of the transaction that is the subject of the Asset Purchase Agreement in question to/from their two counterparts at Charles Smith Wines LLC and/or K Vinters, LLC.<sup>2</sup> See Ex. C to Motion. The date range shall be one year prior to the effective date of the Asset Purchase Agreement through the present. If necessary due to the number of resulting emails, the parties shall promptly agree on search terms to limit the number of emails. After Constellation has reviewed the resulting emails for relevancy, Constellation shall produce said emails on or before **August 20, 2018**.

#### MOTION REGARDING DESIGNATION AND PRODUCTION OF HIGHLY CONFIDENTIAL DOCUMENTS

The Commission denies with prejudice Ruby's Motion Regarding Designation and Production of Highly Confidential Documents (the "Highly Confidential Motion"). The Highly Confidential Motion seeks two types of relief, namely: (1) that Constellation prove that the documents it marked as "highly confidential" are entitled to that designation and if they are not entitled to that designation, that the Commission order that the documents be re-designated and (2) that the Commission order Constellation to provide Ruby's counsel with unredacted copies of the documents designated as highly confidential. (Highly Confidential Motion at 2)

Of Constellation's 251-page document production, Constellation redacted certain information as highly confidential and marked it with the "highly confidential" designation. (Opp. to Highly Confidential Motion at 5) Ruby's counsel was invited to view the highly confidential documents in unredacted form at Constellation's attorney's office.

The parties had previously entered into an Agreed Protective Order for Confidential Information, which the Commission approved on April 26, 2017 (the "Agreement"). Ruby's counsel argues that the Agreement permits him to have an unredacted copy of the challenged documents for his eyes only. The Commission disagrees. The Agreement provides that, "Highly Confidential

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<sup>2</sup> Note that in Answer to Interrogatory No. 3, Constellation identified as the Key Person for the Brand Owner, Constellation, and Charles Smith Wines: Garth Hankinson (Constellation), James Bourdeau (Constellation), Jon Guggino (Super Premium & Ultra Premium Wines), and Lisa Pyrczak (Charles Smith Wines), and In Answer to Interrogatory No. 4, Constellation identified as the members of the Transition Team for the Brand Owner, Constellation, and Charles Smith: Garth Hankinson (Constellation), James Bourdeau (Constellation), and Blair Veenema (Constellation).

information may be seen only by the trial attorney of a party” and does not specifically articulate that the attorney shall receive an unredacted copy of the document containing the highly confidential information. The next sentence provides that a “second copy” of the document shall be produced, “to the extent possible, . . . with redactions as needed to make it only Confidential.” See Agreement at ¶ 6. Under the terms of the Agreement, it is “the party designating information as confidential or highly confidential [here, Constellation, who has] the burden of proving the propriety of such designation.” Agreement at ¶ 7.

“The language in contracts is to be given its plain meaning in the [absence of] ambiguity or sufficient evidence demonstrating the parties' intentions to the contrary. See Frelander, 357 Mass. at 525-26. Massachusetts Mun. Wholesale Elec. Co. v. City of Springfield, 49 Mass. App. Ct. 108, 111 (2000) (‘In interpreting a contract, the court must construe all words that are plain and free from ambiguity according to their usual and ordinary meaning.’).” Templeton Bd. of Sewer Commissioners v. American Tissue Mills of Mass., Inc., 2005 WL 1156109 (Mass. Super. April 19, 2005), at \* 6.

In giving the Agreement its plain meaning, only Ruby’s counsel may see the highly confidential information. Constellation’s actions were in accordance with the Agreement. Constellation invited Ruby’s counsel to inspect the unredacted documents at Constellation’s counsel’s office. Constellation’s counsel also complied with the plain meaning of the Agreement by redacting the highly confidential information from its production of documents and thereafter producing the subject redacted copies.

Ruby’s counsel admitted at the hearing that he has never viewed the unredacted version of the documents designated as highly confidential, never sought to review them, and never requested that Constellation’s attorney bring the unredacted version of the documents to the hearing for the Commission’s review.<sup>3</sup> Ruby’s counsel stated that he is able to assume the type of information that was withheld based on the context of the unredacted portions of the documents. He also asserted that he did not want to “waste his time” in going to Constellation’s attorney’s office to review the redacted information and stated, “[o]nce I see the information, I may agree to keep it as highly confidential. I may not challenge the designation, but I do think that dragging me off to the attorney’s office to look at the 45 pages is a tremendous waste of my time and not called for by the rules or by the agreement.” When asked whether the Highly Confidential Motion was premature, Ruby’s counsel responded that it was not premature because Constellation has the burden, under the Agreement, of proving the propriety of its highly confidential designations.

The Commission finds that in filing the Highly Confidential Motion without first reviewing the unredacted versions of the highly confidential documents, it is Ruby who has wasted both Constellation’s and the Commission’s time. That is confirmed by Ruby’s counsel’s statement: “I am perfectly happy once I have the documents in front of me to see whether I will withdraw the challenge.” Nonetheless, Ruby filed the Highly Confidential Motion—which necessitated an opposition by Constellation—and a Reply and asks the Commission to re-designate the highly confidential information as confidential. However, Ruby has not even provided the Commission

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<sup>3</sup> Ruby asserts that since it is Constellation’s burden to prove the propriety of the highly confidential designations, Ruby should not be held to a “standard of good faith” in making its challenge. See letter from W. Coyne, Jr., Esq. to the Commission, 3/23/18. The Commission disagrees.

with a copy of the redacted documents, let alone asked Constellation to provide the Commission with a copy of the unredacted documents. Given that the Commission does not have any documents before it to review, the Commission is not in a position to determine whether Constellation's highly confidential designations were appropriate and warranted. Consequently, the Highly Confidential Motion is **DENIED WITH PREJUDICE**.

#### MOTION TO MODIFY SCHEDULING ORDER

The Commission's July 13, 2017 Amended Scheduling Order provided that the parties were to complete discovery by September 18, 2017. Given the Commission's other findings in this Order, the Commission denies the Motion to Modify the Scheduling Order but allows Constellation about a month in which it shall produce to Ruby the electronic discovery referenced above. Discovery, in all forms, has otherwise closed. The deadlines in this case going forward are set forth in the Second Amended Scheduling Order below.

#### CONCLUSION

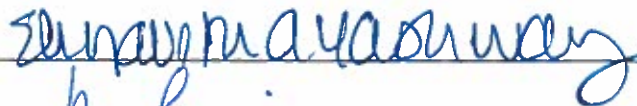
For the foregoing reasons, Ruby's Motions to Compel Discovery, regarding Highly Confidential Documents, and to Modify the Scheduling Order are **DENIED**.

#### SECOND AMENDED SCHEDULING ORDER

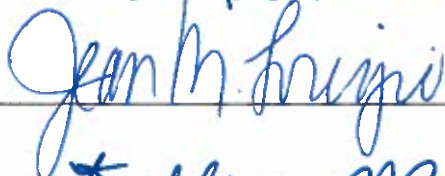
1. Deadline for Constellation to produce electronic discovery to Petitioner: August 20, 2018;
2. Deadline for filing of any/all motions for summary decision: September 17, 2018; and
3. Deadline for filing any/all oppositions/responses to motions for summary decision: October 1, 2018.

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

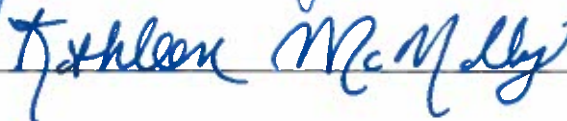
Elizabeth A. Lashway, Commissioner



Jean M. Lorizio, Chairman



Kathleen McNally, Commissioner



Dated: July 19, 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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cc: William Coyne, Esq. via email  
Mary E. O'Neal, Esq. via email  
Anthony V. Bova II, Esq. via email