



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
239 Causeway Street
Boston, Massachusetts 02114
Tel. (617) 727-3040
Fax: (617) 727-1510*

Jean M. Lorizio, Esq.
Chairman

NO. 25E-1359

Atlantic Importing Company, Inc.
Petitioner,

v.

**The Sazerac Company, Inc. &
Pernod Ricard**
Respondents.

HEARD: 9/14/18

**MEMORANDUM AND ORDER ON
PETITIONER'S MOTION TO COMPEL DISCOVERY AND
TO AMEND SCHEDULING ORDER
AND THE SAZERAC COMPANY'S CROSS-MOTION FOR
PROTECTIVE ORDER AND DISMISSAL**

The Alcoholic Beverages Control Commission ("Commission") hereby issues this Memorandum and Order in response to Petitioner's Motion to Compel Discovery and to Amend Scheduling Order (the "Motion") and Respondent The Sazerac Company, Inc.'s Cross-Motion for Protective Order and Dismissal.

PROCEDURAL BACKGROUND

This case arises under M.G.L. c. 138, § 25E. Petitioner, Atlantic Importing Company, Inc. ("Petitioner" or "Atlantic") is a Massachusetts wholesaler aggrieved at the refusal of Pernod Ricard ("PRUSA")¹ and The Sazerac Company, Inc. ("Sazerac") (collectively, the "Respondents") to make sales of alcoholic beverages bearing the Del Maguey Mezcal brand name (the "Brand Items"). The Petitioner filed its § 25E petition with the Commission on September 28, 2017. On October 6, 2017, pursuant to the mandate in § 25E, the Commission issued an order (the "Ship Order") to PRUSA and Sazerac to make sales of the Brand Items to Atlantic pending the Commission's determination of the petition on the merits. The Commission also authorized discovery to take place, with the provision that "[d]iscovery by each party may include not more

¹ The correct name of the entity is Pernod Ricard USA, LLC ("PRUSA"). (PRUSA's Opposition, at 1)

than forty-five (45) written interrogatories, not more than thirty (30) requests for the production of documents and not more than two (2) depositions.” (Ship Order) The discovery deadline was set for February 6, 2018. Id.

On December 6, 2017, Atlantic served document requests and interrogatories on each of the Respondents. On February 5, 2018, the parties entered into an Agreed Protective Order for Confidential Information, and, in response, the Commission entered an order regarding confidential information on March 6, 2018. The parties jointly moved to enlarge time for discovery on February 9, 2018, which the Commission allowed on February 20, 2018. The new discovery deadline was April 6, 2018. On April 6, 2018, the parties again jointly moved to extend the discovery deadline to April 26, 2018, which the Commission allowed. On April 26, 2018, Atlantic filed its Motion as well as a second set of document requests and interrogatories on Sazerac. Sazerac filed its Opposition and Cross-Motion for Protective Order and Dismissal on May 18, 2018. PRUSA filed its Opposition to the Motion on May 21, 2018.

The Commission held a hearing on the Motion, Oppositions, and Cross-Motion on September 14, 2018. The Commission has reviewed all of the papers, exhibits, and arguments made by counsel and finds as follows.

FACTUAL BACKGROUND

Starting February 9, 2011, Sazerac imported the Brand Items for Del Maguey, the producer of the Brand Items. (Ex. A to Sazerac’s Opposition, at 6, 9) Sazerac would then sell the Brand Items to wholesaler Atlantic. (Id. at 6; Ex. D to Sazerac’s Opposition, at 3) Sazerac’s importation of the Brand Items ceased on August 31, 2017 pursuant to a termination agreement with Del Maguey. (Ex. A to Sazerac’s Opposition, at 9) Since that time, Sazerac has not had access to the Brand Items and therefore has not had the ability to sell the Brand Items to Atlantic. (Ex. D to Sazerac’s Opposition, at 5) Following the termination of Sazerac, NBV Investments, Inc. became the controlling shareholder of Del Maguey. Id. Del Maguey appointed PRUSA as the exclusive importer of the Brand Items in the United States, and PRUSA appointed United Liquors, LLC as the Massachusetts wholesaler. Id. Both NBV Investment, Inc. and PRUSA are indirectly-owned subsidiaries of Pernod Ricard S.A., a French corporation. Id. at 4.

DISCUSSION

Parties’ Arguments

Petitioner seeks an order compelling Respondents to produce additional documents and further answers to interrogatories.

PRUSA responds by stating that it has produced all relevant, responsive, non-objectionable documents that are in its possession, custody, and control and that its discovery responses are complete. PRUSA argues that it should not be compelled to produce any additional documents or further answers to interrogatories.

In its Cross-Motion for Protective Order, Sazerac asserts that it in good faith answered interrogatories and responded to requests for documents but that it should not be obligated to further respond or answer given that it is an aggrieved entity with no stake in the case. Sazerac argued in its Cross-Motion that Atlantic never served upon it the second set of discovery requests,

which Atlantic purports to have served on April 26, 2017, the day discovery closed. Furthermore, Sazerac argues that any and all claims against it should be dismissed because it is not a proper party to this case.

Applicable discovery rules

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). 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) and cites to the Massachusetts Rules of Civil Procedure in order to provide helpful guidance and to promote regularity and efficiency when it grants discovery requests. See 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”).

Motion to Compel as to PRUSA

Atlantic takes issue with PRUSA’s answers to interrogatories numbered 1-4 and 7-12 and seeks to compel PRUSA to produce organization charts (Requests Nos. 1 and 2), documents listing key persons or members of the transition team (Requests Nos. 3 and 4), and documents that describe the transition to PRUSA (Request No. 6). For the reasons cited in PRUSA’s Opposition to the Motion and arguments made at the hearing, the Commission sustains PRUSA’s objections and finds that PRUSA has thoroughly responded to the document requests and answered the interrogatories. The Motion is denied.

Motion to Compel as to Sazerac and Sazerac’s Motion for Protective Order and to Dismiss

Sazerac asks the Commission to deny Atlantic’s Motion, issue a protective order from Sazerac having to further respond to discovery requests, and dismiss Sazerac from this case.

The Informal Fair Hearing Rules generally provide for motions, i.e. “requests.” See 801 CMR 1.02(7)(c) (providing that “[a] party may request rulings or relief in writing at any time or orally during a hearing”). While the Informal Fair Hearing Rules do not specifically address protective orders, the Formal Rules provide that “the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense.” 801 CMR 1.01(8)(a). The Massachusetts Rules of Civil Procedure provide guidance as to what may constitute an undue burden or expense, including:

- (1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
- (2) whether the discovery sought is unreasonably cumulative or duplicative; and
- (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties’ relative access to the information, the amount in

controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

Mass.R.Civ.P. 26(c).

Sazerac argues that it was improperly named as a respondent in this matter. Massachusetts General Laws, Chapter 30A, which governs state administrative procedure, defines a party to an adjudicatory proceeding, in relevant part, as, “(a) the specifically named persons whose legal rights, duties or privileges are being determined in the proceeding. . .” M.G.L. c. 30A § 1 (3). The Commission agrees that Sazerac’s legal rights, duties and/or privileges are not being determined in this proceeding. Sazerac was removed as the importer of the Brand Items by the producer, Del Maguey, as of August 31, 2017. (Ex. A to Sazerac Opposition, at 6) Consequently, Sazerac has had no role with importing, marketing, or distributing the Brand Items since that time. It follows that if Atlantic were to succeed on the merits of this case, Sazerac is in no position whatsoever to provide the relief that Atlantic seeks—sale to Atlantic of the Brand Items for distribution. Consequently, Sazerac is not a proper party to this proceeding, as defined by Chapter 30A, and Sazerac’s Motion to Dismiss is allowed. Having determined that Sazerac is dismissed from this case, the Commission denies Atlantic’s Motion to Compel as to Sazerac and allows Sazerac’s Motion for Protective Order.

Atlantic’s Motion to Amend Scheduling Order

The Commission has twice extended the scheduling order to allow the parties additional time for discovery. Atlantic has had the Respondents’ answers to interrogatories and responses to requests for documents since March 2018. In its Motion, which was filed on the last day of the current discovery deadline, April 26, 2018, Atlantic was still unsure as to whether it desired to take any depositions. See Motion, at 9 (arguing that the discovery deadline should be extended for purposes of further written discovery and “to take depositions if that should prove necessary”). The Commission finds that it is not “required to allow [Atlantic] further time for discovery or investigation—all the while receiving product involuntarily shipped from [PRUSA].” See Boston Wine Co., Ltd. d/b/a Winebow Boston v. Alcoholic Beverages Control Comms’n, No. 18-567-D, at 8-9 (Mass. Super. Ct. Mar. 26, 2018).

CONCLUSION

For the foregoing reasons, Atlantic’s Motion to Compel Further Discovery from PRUSA is DENIED; Atlantic’s Motion to Compel Discovery from Sazerac is DENIED; and Sazerac’s Cross-Motion for a Protective Order and Dismissal is ALLOWED. Discovery has closed, and Atlantic’s Motion to Amend Scheduling Order is DENIED. However, the Commission revises the dates for summary decision briefing as follows:

AMENDED SCHEDULING ORDER

The Commission hereby amends its scheduling order as follows:

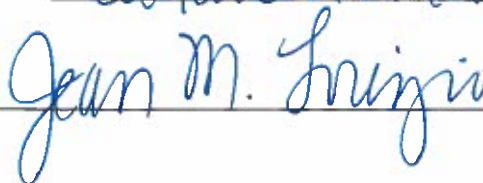
- a) Motions for Summary Decision are due by **December 10, 2018** and
- b) Oppositions/Responses to Motions for Summary Decision are due by **December 21, 2018**.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner



Jean M. Lorizio, Chairman



Dated: November 9, 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
Mark Dickison, Esq. via email

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