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**COMMONWEALTH OF MASSACHUSETTS**

# SUPREME JUDICIAL COURT

Suffolk County.

Supreme Judicial Court No.
Appeals Court No. 2023-P-0439

ATLANTIC IMPORTING COMPANY, INC.,
Plaintiff-Appellee,

v.

AMERICAN ARBITRATION ASSOCIATION
and

JACK'S ABBY BREWING, LLC
Defendant-Appellant.

## JACK'S ABBY BREWING, LLC'S APPLICATION FOR DIRECT APPELLATE REVIEW

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....3

REQUEST FOR DIRECT APPELLATE REVIEW .....7

PRIOR PROCEEDINGS .....7

STATEMENT OF FACTS……..10

STATEMENT OF ISSUES AND WHETHER RAISED BELOW……12

ARGUMENT .....13

I. THE JURY TRIAL RIGHT OF ART. 15 DOES NOT EXTEND TO WHOLLY NEW RIGHTS CREATED BY THE LEGISLATURE.....13

A. The Arbitration Provisions In G.L. c. 138, §25E½ Do Not Violate art. 15……..15

1. A Jury Trial Is Not Required Because G.L. c. 138, §25E½ Creates New Rights Unknown At Common Law.....16

2. The Arbitration Provisions of G.L. c. 138, §25E½ Incorporate the Procedures of the Massachusetts Arbitration Act, G.L. c. 251. .....17

B. Atlantic Consented to Arbitration under G.L. c. 138, §25E½ by Operating in the Heavily Regulated Liquor Industry……..18

II. THE SUPERIOR COURT ERRED BY DENYING JACK'S ABBY'S MOTION TO DISMISS .....20

STATEMENT OF WHY DIRECT APPELLATE REVIEW IS APPROPRIATE.22

REQUEST FOR RELIEF .....24

CERTIFICATE OF COMPLIANCE.....25

CERTIFICATE OF SERVICE .....26

ADDENDUM……27

## TABLE OF AUTHORITIES

**Cases**

Atwater v. Comm'r of Educ.,
460 Mass. 844 (2011) .....19

Boehm v. Premier Ins. Co.,
446 Mass. 689 (2006) .....18

Carleton v. Rugg,
149 Mass. 550 (1989) .....14

Connolly v. Alcoholic Beverages Control Comm'n.,
334 Mass. 613 (1956) .....20

Dalis v. Buyer Advertising,
418 Mass. 220 (1994) .....13

Department of Revenue v. Jarvenpaa,
404 Mass. 177 (1989) .....13

Energy Reserves Group v. Kan. Power & Light Co.,
459 U.S. 400 (1983).....18

Floors, Inc. v. B.G. Danis of New England, Inc.,
380 Mass. 91 (1980) .....21

Kauders v. Uber Technologies, Inc.,
486 Mass. 557 (2021) .....18, 21

Lumbermens Mut. Casualty Corp. v. Bay State Truck Lease, Inc.,
366 Mass. 727 (1975) .....13, 17, 18, 19

Lyons v. Duncan,
81 Mass. App. Ct. 766 (2012).....20

Mugler v. Kansas,
123 U.S. 623, 1887 Lexis 2204, (1887).....14

Nationwide Mut. Ins. Co. v. Commissioner of Ins.,
397 Mass. 416 (1986) .....18, 19

Nei v. Burley,
388 Mass. 307 (1983) .....13, 16

In re Opinion of the Justices,
309 Mass. 562 (1941) .....14, 17

Opinion of Justices to House of Representatives,
368 Mass. 857 (1975) .....14

Opinion of the Justices to the House of Representatives,
401 Mass. 1211 (1987) .....19

Pronghorn, Inc. v. Licensing Bd. of Peabody,
13 Mass. App. Ct. 70 (1982).....20

Quinn v. Rent Control Bd. of Peabody,
45 Mass. App. Ct. 357 (1998).....19, 20

Seagram Distillers Co. . Alcoholic Beverages Control Com.,
401 Mass. 713 (1988) .....15

Stonehill College v. Mass. Comm'n Against Discrimination,
441 Mass. 583 (2004) .....13

Supreme Malt Products Co. v. Alcoholic Beverages Control Comm'n,
334 Mass. 59 (1956) .....20

**Massachusetts Statutes**

G.L. c. 90, §340.....17

G.L. c. 93A.....16

G.L. c. 138, §2.....15

G.L. c. 138, §12.....15

G.L. c. 138, §15.....15

G.L. c. 138, §18.....10, 15

G.L. c. 138, §18B.....15

G.L. c. 138, §19.....15

G.L. c. 138, §25E ..... *passim*

G.L. c. 138, §25E½ ..... *passim*

G.L. c. 152 ..... 14

G.L. c. 231, §118 ..... 9

G.L. c. 249, §4 ..... 8

G.L. c. 251 ..... 17

G.L. c. 251,§11 ..... 21

G.L. c. 251,§12 ..... 21

G.L. c. 251,§13 ..... 21

G.L. c. 251,§15 ..... 21

G.L. c. 251, §18 ..... 21

**Statutes of Other Jurisdictions**

Cal. Bus. & Prof. Code §25000.2(f)(1) ..... 16

Colo. Rev. Stat. 44-3-408(4)(c)(1) ..... 16

815 ILCS 720/9 ..... 16

Md. Alcohol. Bev. Code Ann. §5-109(c)(2) ..... 16

Me. Rev. Stat. Ann. tit. 28-A, 1457.2 ..... 16

Minn. Stat. §325B.07 ..... 16

Mont. Code Ann. 16-3-416(4) ..... 16

N.D. Cent. Code, §5-04-07 ..... 16

Rev. Code Wash. 19.126.040(8) ..... 16

Va. Code Ann. §4.1-508 ..... 16

Wis. Stat. §125.33(10)(d) ..... 16

**U.S. Constitution**

U.S. Const. amend. XVIII .....11

U.S. Const. amend. XXI .....11

**Massachusetts Declaration of Rights**

Article 15.....*passim*

Article 30.....8

**Rules**

Mass. R. Civ. P. 12(b)(9) .....9, 19

Mass. R. Civ. P. 54(b)……...9

Mass R. Civ. P. 64(a)……... 9

## REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11, the Defendant-Appellant, Jack's Abby Brewing, LLC ("Jack's Abby"), respectfully submits this Application for Direct Appellate Review of the Superior Court's (Krupp, J.) Memorandum And Order On Motion To Dismiss And Cross-Motions For Judgment On The Pleadings, dated February 1, 2023 (the "Decision"), which declared that G.L. c. 138, §25E½ is "unconstitutional because it violates art. 15 of the Massachusetts Declaration of Rights," and simultaneously vacated a Final Arbitration Award issued on June 28, 2021. See Decision, p. 24 (attached in Addendum). As discussed below, all three grounds for direct appellate review in M.R.A.P. 11 are satisfied by this application, as it presents: (1) questions of first impression regarding the arbitration provisions in G.L. c. 138, §25E½ which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the right to a jury trial under art. 15 of the Massachusetts Declaration of Rights; and (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

## PRIOR PROCEEDINGS

Litigation between the parties arose on March 29, 2021, when the Plaintiff, Atlantic Importing Company, Inc. ("Atlantic") filed C.A. No. 2184CV0725-BLS-1 (hereinafter, "Lawsuit I"), a declaratory judgment action seeking to enjoin Jack's Abby, a Massachusetts brewery, from invoking its new statutory rights under G.L.

c. 138, §25E½, enacted on January 12, 2021, to terminate its brewer/wholesaler relationship with Atlantic, and utilize final and binding arbitration to determine the amount of compensation due to Atlantic, for the "fair market value" of its distribution rights under G.L. c.138, §25E½. Lawsuit I also challenged Jack's Abby's notice of termination (contending that it misinterprets the term "successor wholesaler" in §25E½) and alleged that G.L. c. 138, §25E½ violates art. 15 and art. 30 of the Massachusetts Declaration of Rights in this case by depriving Atlantic of its right to a jury trial. The matter proceeded to arbitration and on June 29, 2021, the arbitration panel issued a Final Arbitration Award.

On July 7, 2021, Atlantic filed a second lawsuit in Suffolk Superior Court, C.A. No. 2184-CV-01531 – *which is the subject of this appeal* -- seeking de novo review of the Final Arbitration Award by certiorari under G.L. c. 249, §4 ("Lawsuit II"). The Complaint alleges that the arbitration panel committed errors of law: first, by failing to rule that Jack's Abby's notice of termination under §25E½ was improper; and second, by concluding that enactment of §25E½ caused a significant reduction in the fair market value of Jack's Abby Brands. Jack's Abby filed a Motion to Dismiss, which argued that the Complaint should be dismissed under Mass. R. Civ. P. 12(b)(9) due to the pending Lawsuit I, as well as the doctrine of accord and satisfaction. Subsequently, the Parties filed cross-motions for judgment on the pleadings. Atlantic did not raise any constitutional issues in Lawsuit II;

however, the constitutionality of G.L. c. 138, §25E½ was at issue in Lawsuit I, and both cases were consolidated for a hearing on May 3, 2022. At the hearing, the Court requested additional briefing on the constitutional issue, which the parties submitted. On February 1, 2023, the Court issued a Memorandum & Order declaring that G.L. c. 138, §25E½ is "unconstitutional because it violates art. 15 of the Massachusetts Declaration of Rights," and vacated the Arbitration Award. See Decision, p. 24-26. On March 6, 2023, Jack's Abby filed a "Motion For Entry of Separate And Final Judgment Pursuant to M.R.C.P. 54(b), or Alternatively, For Report of the Decision Pursuant to M.R.C.P. 64(a), And For a Stay." To preserve its right to appeal, Jack's Abby also filed Petitions for Interlocutory Review under M.G.L. c. 231, §118, first para. in the Appeals Court for both Lawsuits. On March 15, 2023, Judge Krupp granted Jack's Abby's Motion, in part, and reported his Decision to the Appeals Court. See Report to Appeals Court (attached in Addendum).

On or about May 2, 2023, the Attorney General filed the "Commonwealth's Motion To Intervene," in which the Commonwealth of Massachusetts requested to intervene as an appellant in both appeals, "in order to defend the constitutionality of G.L. c. 138, §25E½." On May 10, 2023, the Appeals Court granted the Commonwealth's request to intervene in both appeals as an intervenor/appellant.

## STATEMENT OF FACTS

Jack's Abby is a brewer and supplier of alcoholic beverages. See Decision, p. 3. Atlantic is an alcoholic beverage wholesaler licensed under G.L. c. 138, §18. Id. Since 1971, the relationship between alcoholic beverage suppliers and wholesalers in Massachusetts has been strictly controlled by G.L. c. 138, §25E, which requires a supplier to have "good cause" to terminate a wholesaler that purchased the supplier's brands for six months or longer. Thus, prior to the enactment of §25E½, a supplier could not terminate the wholesaler without "good cause." The ABCC adjudicated disputes between the supplier and the wholesaler pursuant to §25E, and made the "good cause" determination itself, without a jury trial.

About ten years ago, Atlantic began purchasing products from Jack's Abby and thereby acquired distribution rights in Jack's Abby products under §25E. Id. In April 2018, the parties entered into an Alcoholic Beverage Marketing Agreement ("Marketing Agreement"), to further define their relationship. The Marketing Agreement had no termination provision, but expressly incorporated G.L. c. 138 §25E and stated that it is "subject to the alcoholic beverage control laws and regulations of the United States and the states in which regulated conduct takes place."

In response to concerns regarding §25E from the craft brewing industry, on January 12, 2021, the Legislature enacted §25E½ which allows both in-state and out-

of-state breweries to terminate their wholesaler without a §25E "good cause" determination by the ABCC. By 2019, Jack's Abby had become dissatisfied with Atlantic's ability and commitment to distribute its brands and notwithstanding efforts to resolve the issues, the distribution relationship continued on through 2020. On January 14, 2021, two days after §25E½ became effective, Jack's Abby sent a letter to Atlantic, invoking the provisions of §25E½ to terminate the parties' supplier/wholesaler relationship and seek arbitration to determine the amount of "full compensation" Atlantic was entitled to receive under the statute. See G.L. c. 138, §25E½. Section §25 E½ details how arbitration is to be conducted, before a panel of three arbitrators, "in the commonwealth, applying the laws of the commonwealth," and using "the commercial rules of the Arbitration Association." Id. [1]

On June 28, 2021, following a lengthy arbitration that included thousands of pages of documents, testimony by four (4) expert witnesses, as well as other witnesses and legal briefing, the arbitration panel issued a Final Award to Atlantic. The Final Arbitration Award was less than Atlantic had sought in the arbitration but was more than Jack's Abby had argued should be awarded.

[1] The three-member Arbitration Panel included two retired Superior Court judges, Hon. Margaret R. Hinkle (Ret.) and Hon. Stephen E. Neal (Ret.).

## STATEMENT OF THE ISSUES OF LAWAND WHETHER THEY WERE RAISED BELOW

1. Whether the Superior Court erred by ruling that the arbitration provision in G.L. c. 138, §25E½ is unconstitutional because it violates art. 15 of the Massachusetts Declaration of Rights. (This issue was raised in Lawsuit I and at the hearing in both cases on May 5, 2022, after which the Superior Court requested supplemental briefing on the constitutional issue. The parties submitted supplemental briefing on the art. 15 issue and it was preserved in the lower court).[2]

2. Whether the Superior Court erred by vacating the Final Arbitration Award on the grounds that G.L. c. 138, §25E½ deprives Atlantic of the right to a jury trial, in violation of art. 15 of the Massachusetts Declaration of Rights. (This issue was raised in Lawsuit I and at the hearing in both cases on May 5, 2022, after which the Superior Court requested supplemental briefing on the constitutional issue. The parties submitted supplemental briefing on the art. 15 issue and it was preserved in the lower court).

3. Whether the Superior Court erred by ruling that Atlantic did not consent to arbitration, although Supreme Judicial Court precedent holds that a party doing business in a highly regulated industry is deemed to consent to an arbitration

[2] The constitutionality of G.L. c. 138, §25E½ was not initially at issue in Lawsuit II, but the Superior Court consolidated Lawsuit I and Lawsuit II for purposes of the hearing, as well as his request for supplemental briefs – which the parties both submitted, and he issued the same Decision in both cases.

provision in a statute that is part of the regulatory scheme.[3] (This issue was raised in Lawsuit II and properly preserved in the lower court).

4. Whether the Superior Court erred by denying Jack's Abby's Motion to Dismiss and allowing the Complaint for Certiorari to proceed, notwithstanding the pending lawsuit between the parties in C.A. No. 2184CV0725-BLS1. (This issue was raised in Lawsuit II and properly preserved in the lower court.)

## ARGUMENT

### I. THE JURY TRIAL RIGHT OF ART. 15 DOES NOT EXTEND TO WHOLLY NEW RIGHTS CREATED BY THE LEGISLATURE

The Superior Court erred by declaring that G.L. c. 138, §25E½ is "unconstitutional because it violates art. 15 of the Massachusetts Declaration of Rights." Exceptions to the art. 15 right to a jury trial include matters within the equity jurisdiction of the courts, see Dalis v. Buyer Advertising, 418 Mass. 220, 221 (1994), and when a statute creates wholly new rights that were unknown in 1780 when the Massachusetts Constitution was adopted. Department of Revenue v. Jarvenpaa, 404 Mass. 177, 188 (1989) ("[i]f a wholly new cause of action is created, a jury trial does not attach to that claim"); Stonehill College v. Mass. Comm'n Against Discrimination, 441 Mass. 583 (2004). For example, a jury trial is not required under the Massachusetts Consumer Protection Act, G.L. c. 93A. See Nei

[3] See Lumbermens Mut. Cas. Corp. v. Bay State Truck Lease, Inc., 366 Mass. 727 (1975).

v. Burley, 388 Mass. 307, 313 (1983). Similarly, a jury trial is not required under the Massachusetts Workmen's Compensation Act, G.L. c. 152, see In re Opinion of the Justices, 309 Mass. 562, 568 (1941), because both statutes express rights not recognized at common law.

The history of our country's liquor laws demonstrate that G.L. c. 138, §25E½ creates new rights that were unknown in 1780, and thus do not require a jury trial. Since the mid-1800's, regulation of the alcohol industry has been extensive and intrusive -- no other commodity has been the subject of two Constitutional amendments. By the mid-1800's, many states including Massachusetts enacted statutes making the manufacture and sale of alcohol illegal. See Carleton v. Rugg, 149 Mass. 550 (1989); Mugler v. Kansas, 123 U.S. 623, 1887 Lexis 2204, *47 (1887). At the federal level, Prohibition began with the Eighteenth Amendment, ratified on January 16, 1919. See U.S. Const. amend. XVIII (repealed 1933). On December 5, 1933, ratification of the Twenty-first Amendment repealed the Eighteenth Amendment and ended Prohibition. The Twenty-first Amendment gave states the authority to regulate the production, importation, distribution, sale, and consumption of alcoholic beverages within their own borders. See U.S. Const. amend. XXI, §2. Opinion of Justices to House of Representatives, 368 Mass. 857, 861-862 (1975).

After Prohibition ended, a vast majority of the states, including Massachusetts, enacted statutes to establish a "three-tier system" in order to "prevent vertical integration in the industry," i.e., the so-called "tied-houses." The three-tier system inserts an independent distributor between the liquor supplier and the retailer. The Massachusetts Liquor Control Act, prohibits the manufacture, sale, and distribution of alcoholic beverages unless authorized by the statute. See G.L. c. 138, §2. Under the three-tier system, manufacturers or suppliers sell alcoholic beverages to licensed wholesalers who, in turn, distribute the product to retailers for ultimate sale to consumers. See G.L. c. 138, §12, 15, 18, 18B, 19. In 1970, the Legislature enacted G.L. c. 138, §25E titled, "Unfair Trade Practice –Refusal to Sell Brand Names," to "counteract the tendency toward vertical integration in the liquor industry –the so-called 'tied house' evil." Seagram Distillers Co. . Alcoholic Beverages Control Com., 401 Mass. 713, 716 (1988). Section 25E makes it an unfair trade practice for a manufacturer or other supplier to discontinue selling a brand of alcohol to a wholesaler, *absent good cause*, if the manufacturer has made regular sales to the wholesale for six months. G.L. c. 138, §25E.

### A. The Arbitration Provisions In G.L. c. 138, §25E½ Do Not Violate art. 15

During the past decade, §25E was criticized as needing modification. In 2021, the Legislature enacted Section 25E½, which allows a brewery to terminate its distributor relationship without good cause by providing full compensation, as

defined by the statute. If the parties cannot agree on the compensation, either party can request that the amount of compensation be determined by arbitration.

Numerous states throughout the country have alcohol control statutes with similar arbitration provisions, and to date, there is no case law challenging the constitutionality of any of these statutes on jury trial grounds. See, e.g., Colo. Rev. Stat. 44-3-408(4)(c)(1); Cal. Bus. & Prof. Code §25000.2(f)(1); Me. Rev. Stat. Ann. tit. 28-A, 1457.2.; Rev. Code Wash. 19.126.040(8); Minn. Stat. §325B.07; N.D. Cent. Code, §5-04-07; Md. Alcohol. Bev. Code Ann. §5-109(c)(2); Va. Code Ann. §4.1-508; Wis. Stat. §125.33(10)(d); Mont. Code Ann. 16-3-416(4); 815 ILCS 720/9 (Illinois allows a choice between arbitration and judicial declaratory judgment).

**1. G.L. c. 138, §25E½ Creates New Rights Unknown At Common Law.**

Similar to G.L. c. 93A, which also regulates "unfair trade practices," Section 25E created new rights and "conduct heretofore lawful under common and statutory law is now unlawful," thus there is no right to a jury trial. Nei v. Burley, 388 Mass. at 315. The three-tier system was undeniably unknown at the time the Constitution was adopted in 1780. Section 25E was implemented after Prohibition and the Twenty-first Amendment, pursuant to the Commonwealth's police power to prevent the so-called evil of a tied-house. Section 25E½ is a modification of those

laws and a jury trial is simply not required under art. 15. See Opinion of the Justices, 309 Mass. at 569-570.

**2. The Arbitration Provisions of G.L. c. 138, §25E½ Incorporate the Procedures of the Massachusetts Arbitration Act, G.L. c. 251.**

Second, the Superior Court erred by adopting Atlantic's argument that Atlantic did not consent to arbitration. In Lumbermens Mut. Casualty Corp. v. Bay State Truck Lease, Inc., 366 Mass. 727, 737 (1975), the SJC construed an inter-insurer subrogation statute, G.L. c. 90, §340, and rejected precisely the same argument. In Lumbermens, the defendant, Truck Lease, argued that it "did not agree in writing to arbitrate, that §340 calls for arbitration 'in accordance with the provisions of the General Laws' and that the relevant provisions of the General Laws (G.L. c. 251) apply only where the claim for arbitration is based on a written agreement." Id. In addition, Truck Lease argued that "compulsory, binding arbitration violates its right to trial by jury." Id. (emphasis added). The SJC flatly disagreed with both arguments, and held that if Truck Lease could avoid arbitration under the statute by simply not agreeing to arbitrate, the purpose of the statute "would be frustrated." Id. The SJC held that the reference in §340 to "arbitration in accordance with the provisions of the General Laws" was "an incorporation of the procedures of our arbitration statute (G.L. c. 251)," and that *"[t]he Legislature did not violate Truck Lease's right to a jury trial when it established arbitration*

*under G.L. c. 251*" as the procedure by which claims would be handled. Id. at 730 (emphasis added).

The same reasoning applies here. The words in §25E½, "*applying the laws of the commonwealth*" must also be interpreted as "an incorporation of the procedures of our arbitration statute (G.L. c. 251)." Lumbermens, 366 Mass. at 737. The Legislature is "presumed to know the existing law and the decisions of this court," thus the Legislature was presumed to know of the SJC's decision in Lumbermens when it enacted §25E½. Boehm v. Premier Ins. Co., 446 Mass. 689, 691 (2006). Moreover construing the language of Section 25E½, "*applying the laws of the commonwealth*" to incorporate the provisions of the Massachusetts Arbitration Act, G.L. c. 251 means that Atlantic has the right to "limited judicial review of the award." See Kauders v. Uber Technologies, Inc., 486 Mass. 557, 566-567 (2021).

**B. Atlantic Consented to Arbitration under G.L. c. 138, §25E½ by Operating in the Heavily Regulated Liquor Industry**

Contrary to the Superior Court's Decision, Atlantic consented to arbitration under G.L. c. 138, §25E½ by operating in a heavily regulated industry. In Nationwide Mut. Ins. Co. v. Commissioner of Ins., 397 Mass. 416, 424 (1986), the SJC held, "A company in a heavily regulated industry is on notice that future legislation may adjust its position." Id. (citing Energy Reserves Group v. Kan. Power & Light Co., 459 U.S. 400, 413 (1983)). See Opinion of the Justices, 309

Mass. at 569 ("an insurer by electing to insure an employer consents to the procedural provisions of the existing law as amended by the bill"). Further, in Atwater v. Comm'r of Educ., 460 Mass. 844, 855-856 (2011), the SJC held that requiring arbitration does not violate art. 30 by impermissibly delegating the judicial power to adjudicate, if the statute's terms allow an opportunity for judicial review of the arbitrator's decision. Id.

The Superior Court's Decision cites to Lumbermens, and discusses the facts of the case, explicitly recognizing that "In Massachusetts, consent may be reasonably inferred when a party decides to engage in conduct covered by a statute that specifies arbitration as the remedial forum." In footnote 23 of the Decision, the Court explained its rationale for refusing to follow the SJC's plain holding in Lumbermens – i.e., that "*Jack's Abby's termination notice was issued two days after Section 25E½ went into effect*," thus Atlantic did not have time to decide whether to "*maintain*" the brewer/wholesaler relationship and "*accept[] all the consequences of that election*," including arbitration. The Court's logic is flawed because §25E½ is a legitimate exercise of the State's police power to regulate the liquor industry. See Nationwide, 397 Mass. at 423 ("The Legislature may act pursuant to a valid exercise of its police power for the general good of the public, even though contracts previously entered into may be affected"); see also Opinion of the Justices to the House of Representatives, 401 Mass. 1211, 1223 (1987); Quinn v. Rent Control Bd.

of Peabody, 45 Mass. App. Ct. 357, 373 (1998); Pronghorn, Inc. v. Licensing Bd. of Peabody, 13 Mass. App. Ct. 70, 73 (1982) (the conditions under which liquors may be sold are subject to abrupt change at the will of the State); Supreme Malt Products Co. v. Alcoholic Beverages Control Comm'n, 334 Mass. 59, 61 (1956); Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956).

## II. THE SUPERIOR COURT ERRED BY DENYING JACK'S ABBY'S MOTION TO DISMISS

The Superior Court also erred by denying Jack's Abby's Motion to Dismiss the Complaint under Mass. R. Civ. P. 12(b)(9). Rule 12(b)(9) "provides for the dismissal of a second action in which the parties and the issues are the same as those in a prior action still pending in a court of Massachusetts." Lyons v. Duncan, 81 Mass. App. Ct. 766, 767 (2012). The Court's logic – i.e., "It would make no sense to have the second case dismissed and permit plaintiff leave to amend the complaint in the first case to bring the later-arising claims asserted in the second"-- is in error because the Complaint for certiorari should have been dismissed.

Contrary to Atlantic's argument that certiorari was its only option for judicial review because "G.L. c. 138, §25E½ contains no provision for judicial review of decisions or awards issued by an arbitration panel," the language in Section 25E½ provides:

> "the affected wholesaler or the brewery may request that the amount of compensation be determined by final and binding arbitration conducted in the commonwealth, *applying the laws of the commonwealth*"

See G.L. c. 138, §25E½ (emphasis added). In Lumbermens, as noted above, the SJC construed nearly identical language in a statutory arbitration provision, and held that it incorporated the Massachusetts Arbitration Act ("MAA"), G.L. c. 251. Lumbermens, 384 Mass. at 737 (emphasis added).

If the SJC is correct, then "once the arbitration was completed and the arbitrator issues an award, the MAA sets the procedure for limited judicial review of the award itself."[4] Kauders v. Uber Technologies, Inc., 486 Mass. at 567 (explaining procedures under G.L. c. 251, §§11, 12, 13 and 18 to vacate, modify, correct, confirm, and/or appeal the award). Id. Thus, Atlantic could have moved to vacate the Award in Lawsuit I, under G.L. c. 251,§12(a) (1)-(5). There would have been no need to amend the Complaint in Lawsuit I, because under G.L. c. 251,§15, Atlantic *could simply have filed a motion* in Lawsuit I. See G.L. c. 251,§15 ("[e]xcept as otherwise provided, an application to the court under this chapter shall be by motion"); Floors, Inc. v. B.G. Danis of New England, Inc., 380 Mass. 91, 95 (1980).

## STATEMENT OF WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct appellate review by the Supreme Judicial Court is appropriate because the appeal raises novel issues of law; i.e., whether an arbitration provision in a

[4] See G.L. c. 251, §18 which provides for a limited right to appeal.

Massachusetts liquor statute, G.L. c. 138, §25E½, violates art. 15 of the Declaration of Rights. In addition, direct appellate review is appropriate because the Superior Court's Decision invalidated a statute regulating the liquor industry. This alone warrants direct appellate review, because liquor is a highly regulated industry (as noted above, no other industry has been the subject of two constitutional amendments).

The SJC opinion, Lumbermens Mut. Casualty Corp. v. Bay State Truck Lease, Inc., supra, is directly on point with this case -- although it concerns an inter-insurer subrogation statute, G.L. c. 90, §340, rather than liquor -- and supports Jack's Abby's position that the arbitration provision in G.L. c. 138, §25E½ is valid, and that the words in §25E½, "*applying the laws of the commonwealth*" must be interpreted as "an incorporation of the procedures of our arbitration statute (G.L. c. 251)," including a limited right to appeal. Lumbermens, 366 Mass. at 737. However, this Court decided Lumbermens in 1975 -- almost 50 years ago-- and the constitutional issues about statutorily required arbitration have not been revisited since then, in any Massachusetts appellate case. In Lumbermens, this Court transferred the appeal to itself from the Appeals Court, recognizing the importance of the issues. For the same reasons, direct appellate review is warranted here, 50 years later, to ensure a correct decision on the complex issues.

In addition, direct appellate review is appropriate because of the serious threat to the public interest as well as the hardship that Jack's Abby, a small local beer manufacturer, will suffer if final determination by the SJC is delayed. The Decision invalidating G.L. c. 138, §25E½ has significant impact beyond these two immediate cases.[5] The Decision impacts all malt beverage alcohol industry participants -- who have a right to know whether the laws under which they are currently doing business are constitutional or not. Since the issues are both novel and constitutional, and affect the public interest, justice requires a final determination by the full Supreme Judicial Court. Judge Krupp himself recognized the seriousness of these issues when he granted Jack's Abby's Motion and reported his interlocutory Decision to the Appeals Court. See Report to Appeals Court.

Jack's Abby justifiably acted in reliance upon the assumption that G.L. c. 138, §25E½ *is constitutional* when it exercised its rights under Section 25E½ to terminate its brewery-wholesaler relationship with Atlantic Importing Company, Inc. ("Atlantic"), a liquor wholesaler, and arbitrated the amount of compensation Atlantic was entitled to under §25E½. Jack's Abby is currently working with a new wholesaler in a different brewery-wholesaler relationship, and the Decision that

[5] Judge Krupp issued the identical Decision in Lawsuit which is Appeals Court No. 2023-P-0440, thus Jack's Abby is simultaneously filing a separate Application for Direct Appellate Review in Lawsuit I.

§25E½ is unconstitutional and that the arbitration award is vacated throws Jack's Abby's business into chaos. The Decision creates confusion and uncertainty within the industry, and is directly at odds with the Legislature's intent. For all of these reasons, direct appellate review is appropriate.

## REQUEST FOR RELIEF

Jack's Abby respectfully requests that the Supreme Judicial Court GRANT this Application for Direct Appellate Review.

Respectfully submitted,

**JACK'S ABBY BREWING, LLC**
By its attorneys,

/s/Patricia B. Gary

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## CERTIFICATE OF COMPLIANCE

I, Patricia B. Gary, counsel for the Defendant-Petitioner, Jack's Abby Brewing, LLC ("Jack's Abby"), hereby certify pursuant to Mass. R. App. P. 11, this Application for Direct Appellate Review complies with including but not limited to M.R.A.P. 16 (k), and Rule 20 (a)(4)(B) and that compliance with the length limit of Rule 20(a)(4) was ascertained by using the proportionally spaced font Times New Roman, size 14, with 1,994 non-excluded words, using Microsoft Word version 2202, build 14931.20724.

/s/Patricia B. Gary

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## CERTIFICATE OF SERVICE

I, Patricia B. Gary, counsel for the Defendant-Appellant, Jack's Abby Brewing, LLC, hereby certify pursuant to Mass. R. App. P. 11 and 13 that on May 10, 2023, the within Application for Direct Appellate Review was filed using the Electronic Filing Service Provider, Tyler, for electronic service, and by email to the counsel of record at the address set forth below.

/s/Patricia B. Gary
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**ADDENDUM**

**TABLE OF CONTENTS**

Table of Contents ……... 27

Superior Court Docket Sheet ……. 28

Memorandum and Order on Motion to Dismiss and Cross-Motions
for Judgment on the Pleadings…… 34

Report to Appeals Court …… 65

# 2184CV01531 Atlantic Importing Company, Inc. vs. American Arbitration Association

- Case Type:
- Business Litigation
- Case Status:
- Open
- File Date
- 07/06/2021
- DCM Track:
- B - Special Track (BLS)
- Initiating Action:
- Fraud, Business Torts, etc.
- Status Date:
- 07/06/2021
- Case Judge:
-
- Next Event:
-

All Information | Party | Event | Docket | Disposition

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More Party Information

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**Party Attorney**

More Party Information

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More Party Information

## Events

| Date | Session | Location | Type | Event Judge | Result |
|---|---|---|---|---|---|
| 01/25/2022 02:00 PM | Business Litigation 1 | BOS-13th FL, CR 1309 (SC) | Rule 12 Hearing | Davis, Hon. Brian A | Rescheduled |
| 03/18/2022 02:00 PM | Business Litigation 1 | BOS-13th FL, CR 1309 (SC) | Rule 12 Hearing | Krupp, Hon. Peter B | Rescheduled |
| 03/31/2022 02:00 PM | Business Litigation 1 | BOS-13th FL, CR 1309 (SC) | Rule 12 Hearing | Krupp, Hon. Peter B | Rescheduled |
| 05/03/2022 02:00 PM | Business Litigation 1 | BOS-13th FL, CR 1309 (SC) | Rule 12 Hearing | Krupp, Hon. Peter B | Held - Under advisement |
| 02/23/2023 02:00 PM | Business Litigation 1 | BOS-13th FL, CR 1309 (SC) | Conference to Review Status | Krupp, Hon. Peter B | Held as Scheduled |

## Docket Information

| Docket Date | *Docket Text* | File Ref Nbr. | *Image Avail.* |
|---|---|---|---|
| 07/06/2021 | Civil action cover sheet filed. | 1 | Image |
| 07/06/2021 | Complaint electronically filed. | 2 | Image |
| 07/06/2021 | Case assigned to:<br>DCM Track X - Accelerated was added on 07/06/2021 | | |
| 07/19/2021 | General correspondence regarding From AAA regarding not participating in litigation. | 3 | Image |
| 07/20/2021 | Service Returned for<br>Defendant American Arbitration Association: Service through person in charge / agent; | 4 | Image |
| 07/29/2021 | Plaintiff Atlantic Importing Company, Inc.'s Motion for<br>Special Process Server | 5 | Image |
| 08/05/2021 | Endorsement on Motion for Special Process Server (#5.0): ALLOWED<br>(dated 8/03/21) notice sent 8/05/21 | | Image |

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| 08/12/2021 | Endorsement on Motion for Special Process Server (#5.0): ALLOWED<br>(dated 7/30/21) notice sent 08/09/21 | | Image |
| 08/13/2021 | Service Returned for<br><br>Applies To: Jack's Abby Brewing, Llc (Defendant) | 6 | Image |
| 08/19/2021 | Plaintiff Atlantic Importing Company, Inc.'s Motion to<br>Transfer Action to Business Litigation Session | 7 | Image |
| 08/19/2021 | Affidavit<br><br>Superior Court Rule 9A Affidavit of No Opposition | | Image |
| 08/19/2021 | Plaintiff Atlantic Importing Company, Inc.'s Notice of<br>Filing List of Documents | | Image |
| 08/23/2021 | Defendant Jack's Abby Brewing, Llc's Assented to Motion to<br>Impound Certified Record of American Arbitration Association and all Subsequent Filings Referencing and/or Appending Documents from the Certified Record | 8 | Image |
| 08/23/2021 | Attorney appearance<br>On this date Kenneth B Walton, Esq. added for Defendant Jack's Abby Brewing, Llc | | |
| 08/23/2021 | Attorney appearance<br>On this date Amanda Mathieu, Esq. added for Defendant Jack's Abby Brewing, Llc | | |
| 08/23/2021 | Affidavit<br><br>of Kenneth B. Walton, ESQ. | 9 | Image |
| 08/25/2021 | Plaintiff Atlantic Importing Company, Inc.'s Motion to<br>Transfer Action to the Business Litigation Session (w/o opposition) | 10 | Image |
| 08/25/2021 | Affidavit of compliance with Superior Court Rule 9A<br>of no opposition<br><br>Applies To: Dickison, Esq., John Mark (Attorney) on behalf of Atlantic Importing Company, Inc. (Plaintiff) | 11 | |
| 09/01/2021 | Endorsement on Motion for Transfer to Business Litigation Session (#7.0): ALLOWED<br>Pending acceptance by the BLS Administrative Justice (dated 8/23/21) notice sent 8/27/21 | | Image |
| 09/07/2021 | General correspondence regarding NOTICE OF ACCEPTANCE INTO BUSINESS LITIGATION SESSION "BLS1"<br>The court (Cowin, J.) has previously allowed a Motion to Transfer this case to the Business Litigation Session in Suffolk County. After review of that Motion and the relevant pleadings, this case has been accepted into the Suffolk Business Litigation Session and will be assigned to BLS1. In the future, as shown above, all parties must include the initials "BLS1" at the end of the docket number on all filings. Dated: Aug. 31, 2021 Notice sent 9/3/21 (See P#12 for complete notice) | 12 | Image |
| 09/07/2021 | Endorsement on Motion to Impound Certified Record of American Arbitration Association and all Subsequent Filings Referencing and/or Appending Documents from the Certified Record (#8.0): ALLOWED<br>Pursuant to Trial Court Rule VIII, Rules 2(a), 7(b) and 7(c), good cause having been shown. Impoundment shall continue until further order of the court. Dated: 8/31/21 Notice sent 9/3/21 | | Image |
| 09/07/2021 | Civil action cover sheet mailed re: BLS | | |
| 09/14/2021 | Endorsement on Motion to Impound (#8.0): ALLOWED<br>without a haring pursuant to Trial Court Rule VIII, Rule 7(e), provided, however, that the party making any subsequent filing that references or appends documents or information from the impounded Certified Record also files a redacted version of the filing that excludes the confidential information contained therein (dated 9/7/21) notice sent 9/10/21 | | Image |
| 09/15/2021 | Civil action cover sheet filed.<br><br>(BLS) | 13 | Image |
| 09/15/2021 | Defendant Jack's Abby Brewing, Llc's Notice of<br>Filing Motion to Dismiss | 14 | Image |
| 12/08/2021 | The following form was generated:<br><br>Notice to Appear<br>Sent On: 12/08/2021 09:52:59<br>Notice Sent To: John Mark Dickison, Esq. Lawson and Weitzen, LLP 88 Black Falcon Ave, Boston, MA 02210<br>Notice Sent To: John R Bauer, Esq. Lawson and Weitzen, LLP 88 Black Falcon Ave Suite 345, Boston, MA 02210<br>Notice Sent To: Joshua M Segal, Esq. Lawson and Weitzen, LLP 88 Black Falcon Ave Suite 345, Boston, MA 02210 | | |

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| | Notice Sent To: Kenneth B Walton, Esq. Lewis Brisbois Bisgaard and Smith LLP One International Place Suite 350, Boston, MA 02110<br>Notice Sent To: Amanda Mathieu, Esq. Lewis Brisbois Bisgaard and Smith LLP One International Place 3rd Floor, Boston, MA 02110 | | |
| 01/19/2022 | Event Result:: Rule 12 Hearing scheduled on:<br>01/25/2022 02:00 PM<br>Has been: Rescheduled For the following reason: Joint request of parties<br>Hon. Peter B Krupp, Presiding<br>Staff:<br>Gloria Brooks, Assistant Clerk Magistrate | | |
| 01/19/2022 | The following form was generated:<br><br>Notice to Appear<br>Sent On: 01/19/2022 10:09:56 | | |
| 02/23/2022 | Event Result:: Rule 12 Hearing scheduled on:<br>03/18/2022 02:00 PM<br>Has been: Rescheduled For the following reason: By Court prior to date<br>Hon. Peter B Krupp, Presiding<br>Staff:<br>Gloria Brooks, Assistant Clerk Magistrate | | |
| 02/23/2022 | The following form was generated:<br><br>Notice to Appear<br>Sent On: 02/23/2022 15:59:40 | | |
| 03/22/2022 | Event Result:: Rule 12 Hearing scheduled on:<br>03/31/2022 02:00 PM<br>Has been: Rescheduled For the following reason: Joint request of parties<br>Hon. Peter B Krupp, Presiding<br>Staff:<br>Gloria Brooks, Assistant Clerk Magistrate | | |
| 03/22/2022 | The following form was generated:<br><br>Notice to Appear<br>Sent On: 03/22/2022 14:37:53 | | |
| 03/22/2022 | Plaintiff, Defendants Atlantic Importing Company, Inc., American Arbitration Association, Jack's Abby Brewing, Llc's Motion to continue / reschedule an event 03/31/2022 02:00 PM Rule 12 Hearing | 15 | Image |
| 03/29/2022 | Endorsement on Motion to continue (#15.0): ALLOWED<br>(date 3/22/22) Notice 3/28/22 | | Image |
| 05/03/2022 | Matter taken under advisement: Rule 12 Hearing scheduled on:<br>05/03/2022 02:00 PM<br>Has been: Held - Under advisement<br>Hon. Peter B Krupp, Presiding<br>Staff:<br>Gloria Brooks, Assistant Clerk Magistrate | | |
| 07/21/2022 | Atlantic Importing Company, Inc.'s Memorandum<br>Supplemental in response to Court's Order Re: Further Briefing | 16 | Image |
| 08/26/2022 | General correspondence regarding Letter to Judge Krupp and Submission of Memorandum and Order in case 2184CV2125 | 17 | Image |
| 01/25/2023 | The following form was generated:<br><br>Notice to Appear<br>Sent On: 01/25/2023 14:52:08 | | |
| 02/01/2023 | MEMORANDUM & ORDER:<br><br>Memorandum and Order on Motion to dismiss and Cross-Motions for Judgment on the Pleadings<br>See paper #17.1 for full order.<br>(Dated 1/25/23) (Notice sent 2/1/23)<br><br>Judge: Krupp, Hon. Peter B | 17.1 | Image |
| 02/23/2023 | Event Result:: Conference to Review Status scheduled on:<br>02/23/2023 02:00 PM<br>Has been: Held as Scheduled<br>Hon. Peter B Krupp, Presiding<br>Staff:<br>Gloria Brooks, Assistant Clerk Magistrate | | |
| 02/27/2023 | Attorney appearance electronically filed. | | Image |

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| 02/27/2023 | Attorney appearance<br>On this date Patricia Bramante Gary, Esq. added for Defendant Jack's Abby Brewing, Llc | | |
| 03/02/2023 | Notice of docket entry received from Appeals Court<br>Petition pursuant to G.L. c. 231, § 118 with attachments, filed by Jack's Abby Brewing, LLC. | 18 | Image |
| 03/02/2023 | Notice of appeal filed.<br><br>Notice sent 3/3/2023<br><br>Applies To: Jack's Abby Brewing, Llc (Defendant) | 19 | Image |
| 03/06/2023 | Defendant Jack's Abby Brewing, Llc's Motion for<br>Entry Of Separate And Final Judgment Pursuant To M.R.C.P. 54(b) Or, Alternatively, For Report Of Decision Pursuant To M.R.C.P.64(a), And For A Stay | 20 | Image |
| 03/06/2023 | Jack's Abby Brewing, Llc's Memorandum in support of<br>Its Motion For Entry Of Separate And Final Judgment Pursuant To M.R.C.P. 54(b) Or, Alternatively, For Report Of Decision Pursuant To M.R.C.P.64(a), And For A Stay | 21 | Image |
| 03/06/2023 | Opposition to Jack's Abby Brewing, LLC's Motion For Entry Of Separate And Final Judgment Pursuant To M.R.C.P. 54(b) Or, Alternatively, For Report Of Decision Pursuant To M.R.C.P.64(a), And For A Stay filed by Atlantic Importing Company, Inc. | 22 | Image |
| 03/06/2023 | Reply/Sur-reply<br><br>Memorandum | 23 | Image |
| 03/06/2023 | Rule 9A Affidavit Of Compliance | | Image |
| 03/06/2023 | Rule 9A Notice Of Filing And List Of Documents Filed | | Image |
| 03/13/2023 | Endorsement on Motion for Entry of Separate and final Judgment Pursuant to M.R.C.P. 54(b) or, Alternatively, for Report of Decision Pursuant to M.R.C.P. 64(a), and for Stay (#20.0): DENIED<br>After review, the request for a report is Allowed. See Report to Appeals Court of same date. The request for entry of separate and final judgment is DENIED. Subject to further order of this court, all discovery and further proceedings in this case are STAYED pending appeal, except that any part seeking prejudgment security may file an appropriate motion and the court will hear the motion in the ordinary course.<br>(3/13/23) (Notice sent 3/15/23) | | Image |
| 03/13/2023 | ORDER: Report to Appeals Court<br>See paper #24 for full report.<br>(Dated 3/13/23) | 24 | Image |
| 03/21/2023 | Notice of docket entry received from Appeals Court<br>Please take note that on March 21, 2023, the following entry was made on the docket of the above-referenced case:<br>ORDER: The stay of proceedings on the petition is vacated. In light of the judge's report to the Appeals Court, the petition is moot and is denied as such. Pursuant to Mass. R. A.P. 5, "[a] report of a case for determination by an appellate court shall for all purposes under these rules be taken as the equivalent of a notice of appeal. Whenever a case or any part of it is reported after decision . . ., the aggrieved party (as designated by the lower court) shall be treated as the appellant." The appeal shall then be governed by all applicable rules of appellate procedure, including but not limited to rules 8 through 10, which concern the record on appeal, assembly of the record and transmission of notices, and the entry of the appeal on this court's docket by the designated appellant or appellants. The petitioner's request to consolidate the judge's reports is denied without prejudice subsequent to entry of the appeals on this court's panel docket. So ordered. (Meade, J.). *Notice/Attest/Krupp, J. | 25 | Image |
| 03/27/2023 | Party(s) file Stipulation<br>that Transcript is Unnecessary<br><br>Applies To: Atlantic Importing Company, Inc. (Plaintiff); Jack's Abby Brewing, Llc (Defendant) | 26 | Image |
| 04/06/2023 | Notice of assembly of record sent to Counsel | | |
| 04/06/2023 | Notice to Clerk of the Appeals Court of Assembly of Record | | |
| 04/26/2023 | Notice of Entry of appeal received from the Appeals Court<br>In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2023-P-0439) was entered in this Court on April 19, 2023. | 27 | Image |

## Case Disposition

| Disposition | Date | Case Judge |
|---|---|---|
| Pending | | |

| Disposition | Date | Case Judge |
| --- | --- | --- |
| | | |

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 21-725-BLS1

ATLANTIC IMPORTING COMPANY, INC.
Plaintiff

vs.

JACK'S ABBY BREWING, LLC
Defendant

---

Civil No. 21-1531-BLS1

ATLANTIC IMPORTING COMPANY, INC.
Plaintiff

vs.

AMERICAN ARBITRATION ASSOCIATION, & another[1]
Defendants

**MEMORANDUM AND ORDER ON MOTION TO DISMISS AND CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

For decades, the relationship between alcoholic beverage suppliers and wholesalers in Massachusetts has been strictly controlled by Section 25E of Chapter 138 of the Massachusetts General Laws ("Section 25E"). Among other things, Section 25E has required a supplier to have "good cause" to terminate a wholesaler that purchased the supplier's product over a six-month period.

In early 2021, in response to concerns from the craft brewing industry, the Legislature and Governor Baker approved new legislation, codified at G.L. c. 138, § 25E½ ("Section

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[1] Jack's Abby Brewing, LLC.

25E½"), which allowed breweries to terminate wholesalers without cause. Two days after Section 25E½ took effect, Jack's Abby Brewing, LLC ("Jack's Abby") sent a letter to its long-time wholesaler Atlantic Importing Company, Inc. ("Atlantic"), invoking Section 25E½, terminating Atlantic as its wholesaler, and seeking arbitration under Section 25E½ to determine what it owed Atlantic due to the termination.

Atlantic promptly filed suit (Case No. 21-725), objected to arbitration, and pursued declarations about the application, scope, and constitutionality of Section 25E½. After the Court (Green, J.) denied Atlantic's motion to enjoin the arbitration, the parties arbitrated the compensation issue over Atlantic's objection. In June 2021, the arbitration panel issued its award to Atlantic, which was considerably less than Atlantic claimed it was due. Atlantic then filed a second action (Case No. 21-1531) to challenge and set aside the results of the arbitration under G.L. c. 249, § 4.

In the two cases, Atlantic now pursues a declaration that Jack's Abby could not lawfully terminate Atlantic's distribution rights or did not do so properly; a declaration that Section 25E½ is unconstitutional, at least as applied here, because it compelled Atlantic to have the amount it was due on termination determined through arbitration without its consent; and an order vacating the arbitration award. The cases are before me on the parties' cross-motions for judgment on the pleadings in Case No. 21-725; and on Jack's Abby's motion to dismiss and the parties' cross-motions for judgment on the pleadings in Case No. 21-1531. All of the motions challenge or defend, and ultimately turn on, the constitutionality of Section 25E½. For the following reasons, I conclude that Section 25E½ is unconstitutional as applied and I rule on the various pending motions accordingly.

## BACKGROUND

### A. The Parties' Relationship

Atlantic is an alcoholic beverage wholesaler licensed under G.L. c. 138, § 18. Jack's Abby is a brewer and supplier of alcoholic beverages bearing the Jack's Abby and Springdale brand names ("the Brands"). Jack's Abby holds a farmer-brewery license under G.L. c. 138, § 19C. Beginning roughly a decade ago, and for more than six months, Atlantic regularly purchased products from Jack's Abby. Atlantic thereby acquired distribution rights in Jack's Abby products, which were protected under Section 25E's "continuing affiliation" doctrine. As a result, by the mid-2010s, Jack's Abby could only terminate its relationship with Atlantic "for good cause shown."[2]

In or about April 2018, Atlantic and Jack's Abby entered into an Alcoholic Beverage Marketing Agreement (the "Agreement"). Under the Agreement, Atlantic agreed to spend $2.5 million promoting the Brands over five years in exchange for the exclusive right to distribute Jack's Abby's products in Massachusetts and Rhode Island.[3] The Agreement does not have a termination provision. Instead, it was clearly negotiated with Section 25E in mind. The Agreement stipulates that it "does not affect rights or obligations of the parties under" Section

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[2] Section 25E makes it "an unfair trade practice and therefor unlawful" for an alcoholic beverage supplier, like Jack's Abby, "to refuse to sell" its products to a licensed wholesaler to whom it "has made regular sales" of its brand items "during a period of six months," "except for good cause shown." G.L. c. 138, § 25E, para. 1. See generally Martignetti Grocery Co., Inc. v. Alcoholic Beverages Control Comm'n, 96 Mass. App. Ct. 729, 732-733 (2019).

[3] The Agreement specified that the $2.5 million would be front-end loaded, with a stepped-down annual marketing "obligation," ranging from a high of $800,000 in the first year (April 2018 – March 2019) to expenditures of $250,000 in the fourth and fifth years (April 2021 – March 2022; April 2022 – March 2023).

25E and "a violation of this Agreement shall not constitute good cause for termination of sales or cancellation of an agreement under" Massachusetts law.

### B. The Structure and Purpose of Section 25E½

Against this history between the parties, Section 25E½ was enacted. Section 25E's requirement that an alcoholic beverage supplier have "good cause" for terminating a relationship with an alcoholic beverage wholesaler necessarily created friction in the industry's distribution chain, restricted distribution choices available to suppliers, and chilled competition among wholesalers. Section 25E½, which took effect on January 12, 2021, was designed to change that for the craft beer segment of the alcoholic beverage industry.

Notwithstanding Section 25E, Section 25E½ created a single, unified procedure for a brewery to "terminate the right of a licensed wholesaler . . . to distribute . . . malt beverages" and to do so "without good cause." G.L. c. 138, § 25E½(b). Under Section 25E½, to "terminate the right to distribute of an affected wholesaler," a brewery[4] must (a) provide "not less than 30 days' written notice," which "shall identify the successor wholesaler who will begin servicing the affected territory;" and (b) pay "full compensation as specified" in the statute. Id. § 25E½(c)(1). Although the phrase "full compensation" is not defined, Section 25E½ states that the brewery is responsible for paying the affected wholesaler[5] "as sole and exclusive compensation for termination of the right to distribute the brands of the brewery, an amount equal to" the sum of

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[4] The law applies to breweries that "produced less than 250,000 barrels, or 3,445,000 case equivalents, of malt beverages in the 12-month period immediately preceding the date of the written notice of termination." G.L. c. 138, § 25E½(a) (definition of "Brewery").

[5] The statute provides that "[t]he brewery shall cause to be paid to the affected wholesaler" and does not "prevent a successor wholesaler from paying the compensation to the affected wholesaler directly or from compensating a brewery for any compensation paid by the brewery under [Section 25E½]." G.L. c. 138, § 25E½(d) (emphasis added).

(1) "the laid-in cost of the merchantable inventory;" (2) "the laid-in cost of the current sales and marketing material;"[6] and (3) "the fair market value of the distribution rights for the brands that are being terminated by the brewery."[7] Id. § 25E½(d).

Not only does Section 25E½ expressly prohibit termination of an affected wholesaler's distribution rights before payment of "full compensation," Id. § 25E½(c)(1), but "to prevent a brewery from terminating the right to distribute prior to receipt of full compensation," it compels the parties after a termination notice is sent to "continue their relationship with similar effort as prior to the notice of termination." Id.

Because Section 25E½ compels the continuation of the distribution relationship after a notice of termination has been provided, Section 25E½ supplies a mechanism for an expedited determination of the amount to be paid in full compensation so that the parties can swiftly

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[6] Upon termination, the affected wholesaler must sell to the brewery its "inventory" and its "current sales and marketing materials." G.L. c. 138, § 25E½(c)(2).

[7] Section 25E½ defines "[f]air market value" as "the price that the affected wholesaler's business that is related to the terminated brands of the brewery would sell for in an arms-length transaction between a willing buyer and a willing seller as of the date the notice of termination was received by the affected wholesaler . . . with neither being required to act and both having reasonable knowledge of all relevant facts." G.L. c. 138, § 25E½(a). This definition is consistent with the notion of fair market value in other contexts under Massachusetts law. See, e.g., Boston Edison Co. v. Massachusetts Water Resources Auth., 459 Mass. 724, 731 (2011) (real property value: "the highest price that a hypothetical arm's-length willing buyer would pay to a hypothetical willing seller in a free and open market, based on the highest and best use of the property"); Bernier v. Bernier, 449 Mass. 774, 779 n.8 (2007) (business value: "the 'price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts'"), quoting Gross v. Commissioner of Internal Revenue, 272 F.3d 333, 344 (6th Cir. 2001), cert. denied, 537 U.S. 827 (2002); Champion v. Champion, 54 Mass. App. Ct. 215, 218 (2002) (sole proprietorship value: "[t]he willing buyer/willing seller test"). Fair market value calculations involve questions of fact that often require expert opinions. See Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 541 n.47 (1997).

disentangle their relationship.[8] The statute envisions that the parties will use the first 30 days after the termination notice to discuss what must be paid as full compensation. If the parties "cannot agree on the compensation due to the affected wholesaler . . . within the 30 days of the brewery's notice of its termination . . . , the affected wholesaler or the brewery may request that the amount of compensation be determined by final and binding arbitration."[9] Id. § 25E½(e)(2).

Section 25E½ details how, and on what timetable, the "final and binding arbitration" is to be conducted. The statute requires the arbitration to be held "in the commonwealth, applying the laws of the commonwealth," id., and using "the commercial arbitration rules of the American Arbitration Association" ("AAA"). Id. § 25E½(f)(1). It mandates "a panel of 3 arbitrators," id., provides a framework and strict timetable for selecting arbitrators,[10] id.; defines how arbitration

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[8] It is reasonable to expect that a written notice of termination would strain the relationship between brewer and wholesaler. The wholesaler may lose enthusiasm for marketing and growing the brewer's brand if the wholesaler knows that it will not benefit from those efforts, including from any increased sales. Section 25E½ actually creates a disincentive for a wholesaler to grow the brewer's brand after receipt of the termination notice because the wholesaler's "full compensation" is determined "as of the date the notice of termination was received by the affected wholesaler." G.L. c. 138, § 25E½(a) (definition of fair market value). Future efforts leading to an improved future income stream would not factor into the "fair market value" calculation under Section 25E½.

[9] The statute envisions that, as occurred here, one of the parties will request arbitration. Section 25E½ is silent about how "full compensation" is to be determined, and in what forum, if neither party requests arbitration. Although the issue is not presented here, if neither party requested arbitration, the parties could presumably seek recourse from the courts, although prior to a resolution they would be required to "continue their relationship," however strained, "with similar effort as prior to the notice of termination." G.L. c. 138, § 25E½(c)(1).

[10] Each party is to select an arbitrator "[w]ithin 15 days after the commencement of arbitration," and the two arbitrators selected by the parties are to select the third arbitrator "within 30 days of notice of the arbitration being filed." G.L. c. 138, § 25E½(f)(1). If any arbitrators "are not selected within 30 days after notice of the arbitration being filed," AAA is to select the vacant arbitrator. Id.

costs will be apportioned,[11] id., requires the arbitration to "conclude not later than 60 days after the date of the notice of intent to arbitrate is provided to the other party, unless the parties agree" to an extension or the arbitrators extend the time "for good cause," id. § 25E½(f)(2); and requires the arbitrators to "render a written, reasoned decision not later than 30 days after the conclusion of the arbitration proceeding, unless the parties agree to extend the time for a decision by agreement." Id.

Section 25E½ also makes a requested arbitration the mandatory and exclusive forum for determining the amounts that must be paid to terminate the affected wholesaler's rights to distribute the brewer's brands. It specifically provides that "[a]ny party duly notified of an arbitration involving its rights that fails to participate in an arbitration proceeding held pursuant to this section shall be considered to have waived all rights it would have had in the arbitration and to have consented to the determination of the panel of arbitrators." Id. § 25E½(f)(3). It also makes clear that "[a]n arbitration held pursuant to this section shall be in lieu of all other remedies and procedures." Id. § 25E½(f)(2) (emphasis added).

If the comprehensive nature of Section 25E½'s termination procedure were not evident from the language of Section 25E½, the section immediately following, which was enacted at the same time, makes clear that Section 25E½ is to be considered as a whole. Under Section 25E¾ of Chapter 138, "the provisions of section 25E½ shall not be severable," and "[i]f any provision of said section 25E½ shall be adjudged unconstitutional or invalid said section 25E½ shall be

[11] The arbitrators' costs must be "equally divided" between the parties, with each party otherwise bearing their own expenses. G.L. c. 138, § 25E½(f)(2).

invalid." G.L. c. 138, § 25E¾, para. 1. This legislative treatment of Section 25E½ is in stark contrast to the statute's treatment of the remainder of Chapter 138.[12]

### C. The Termination Notice and Subsequent Events

On January 14, 2021, two days after the effective date of Section 25E½, Jack's Abby notified Atlantic in writing that it was terminating Atlantic's distribution rights pursuant to Section 25E½ and, "for the foreseeable future after termination, will distribute its brand pursuant to its own [s]elf-distribution wholesaling rights under G.L. c. 138, Section 19C."[13] Jack's Abby invited Atlantic to share its fair market value calculation with Jack's Abby so that "the parties can hopefully thereupon agree upon a 'Fair Market Value' within the next thirty days."

On or about February 12, 2021, Jack's Abby initiated arbitration before the AAA in a proceeding captioned Jack's Abby Brewing, LLC v. Atlantic Importing Company, Inc., American Arbitration Association Case No. 01-21-0001-9951 (the "Arbitration"). In the Arbitration, Jack's Abby sought to have the issue of "full compensation," including issues of "fair market value," determined in accordance with Section 25E½.

### D. The Instant Litigation

In late March 2021, Atlantic filed the first of the two actions captioned above (Civil No. 21-725) in which it seeks extensive declaratory relief. Specifically, Atlantic seeks declarations that Jack's Abby's attempted termination of Atlantic's rights to distribute the Brands would

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[12] See G.L. c. 138, § 25E¾, para. 2 ("If any other provision of this chapter . . . is adjudged unconstitutional or invalid, the remaining provisions shall be construed in accordance with the intent of the general court to further limit rather than to expand commerce in alcoholic beverages, to enhance strict regulatory control over taxation, distribution and sale of alcoholic beverages through the regulatory system imposed by this chapter upon beer and malt beverages.").

[13] Under G.L. c. 138, § 19C(g)(4), a licensed farmer-brewer may sell its products "at wholesale" up to 50,000 gallons.

breach the parties' Agreement (Count I); that Jack's Abby's notice of termination was defective because it did not identify "the successor wholesaler who will begin servicing the affected territory," as required in Section 25E½(c)(1) (Count II); that Section 25E½ is unconstitutional in violation of art. 15 of the Massachusetts Declaration of Rights because it compels arbitration as the forum to determine the value of an affected wholesaler's distribution rights (Count III); and that the compelled arbitration under Section 25E½ is unconstitutional in violation of art. 30 of the Massachusetts Declaration of Rights (Count IV). Atlantic also sought injunctive relief to stop the Arbitration.

Atlantic initially moved for a preliminary injunction to stay the Arbitration. On April 7, 2021, after a hearing, the Court (Green, J.) denied Atlantic's motion for a preliminary injunction and refused to stay the arbitration. In a one-page decision, and without addressing the merits, Judge Green found that "Atlantic has not demonstrated that it likely will succeed on the merits" and has not "shown that denial of the injunction requested will result in its irreparable harm." See Decision on Plaintiff's Motion for Preliminary Injunction at 1 (Docket #6).

Atlantic filed an interlocutory appeal. On April 16, 2021, a Single Justice of the Appeals Court refused to alter Judge Green's decision. Without discussing the merits, the Single Justice found that Atlantic "has not demonstrated that the judge abused her discretion in denying their motion for a preliminary injunction seeking to stay an arbitration and grant a permanent stay of the arbitration."

The parties proceeded to arbitration over Atlantic's objection. In the Arbitration, Atlantic argued to the panel that Jack's Abby failed to comply with the notice requirements of Section 25E½ and that Section 25E½ does not apply to Atlantic's separate right under its Agreement

with Jack's Abby. The arbitration panel rejected both arguments.[14] The panel did not address whether the statutory requirement to arbitrate a dispute about what constitutes "full compensation," including the determination fair market value of the affected wholesaler's interests, was unconstitutional.

An evidentiary hearing in the Arbitration was held in mid-April 2021. On or about June 10, 2021, the Arbitration panel issued a Partial Final Award, which determined the fair market value component of "full compensation" under Section 25E½ (the "Fair Market Value Amount"). Atlantic had argued the fair market value of its distribution rights was considerably higher. After further filings by the parties, on June 28, 2021, the Arbitration panel issued a Final Award, incorporating the Fair Market Value Amount, and finding the value of the merchantable inventory plus the laid-in costs of the current sales and marketing material (the "Inventory Amount").

On June 29, 2021, Jack's Abby delivered two treasurer's checks made payable to Atlantic, one for the Fair Market Value Amount, and the other for the Inventory Amount. The cover letter accompanying the two checks stated that the checks were provided "in full accord and satisfaction of the Partial Final Award and Final Award in the Arbitration."

Atlantic's counsel held the two checks in their safe. About a month later, Atlantic cashed the check for the Fair Market Value Amount and deposited it into an escrow account held by

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[14] See Memorandum and Order on Respondent's Objection to the Jurisdiction of the Arbitrator and Motion to Dismiss the Arbitration at 1, 2-4 (Apr. 16, 2021), attached as Exhibit 1 to Defendant Jack's Abby Brewing, LLC's Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint Pursuant to Mass. R. Civ. P. 12(b)(6) & (9) ("Jack's Abby's Mem. in Second Case"), which was filed in Case No. 2184CV01531. See also Partial Final Award at 3-4, attached as Exhibit 5 to Jack's Abby's Mem. in Second Case.

Atlantic's counsel. Atlantic returned the check for the Inventory Amount to Jack's Abby together with the Jack's Abby inventory and marketing materials.[15]

## DISCUSSION

Before me are cross-motions for judgment on the pleadings in both cases, and Jack's Abby's motion to dismiss in Case No. 21-1531. All of the motions challenge or defend, and ultimately turn on, the constitutionality of Section 25E½. Atlantic argues that the Agreement may not be terminated under Section 25E½; Jack's Abby's termination notice failed to comply with the requirements of Section 25E½; and Section 25E½ is unconstitutional because it compels arbitration in violation of Atlantic's right to a jury trial, and constitutes an illegal delegation of the judicial function by the legislature. Atlantic asks the Court to fashion a remedy to restore the parties to their relationship before Section 25E½ was enacted and before Jack's Abby terminated Atlantic as its exclusive Massachusetts wholesaler, and to set aside the arbitration panel's award.

Both parties construe Section 25E½ as requiring a non-consenting party to submit to arbitration on the request of the other to determine the compensation to be paid for terminated distribution rights.[16] Jack's Abby argues that this is constitutional because the arbitration is

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[15] The information contained in this paragraph is not included in the pleadings. See Affidavit of J. Mark Dickison in Support of Atlantic Importing Company, Inc.'s Opposition to Jack's Abby Brewing, LLC's Motion to Dismiss Complaint Pursuant to Mass.R.Civ.P 12(b)(6) & 12(b)(9) ¶¶ 5-8, which was filed in Case No. 21-1531. Although Jack's Abby does not materially dispute this information, the information is not material to my determination.

[16] Apparently content with the results of the Arbitration, Jack's Abby does not contradict Atlantic's statutory construction. It argues that both parties need not consent to arbitration for arbitration under Section 25E½ to be required. See Defendant Jack's Abby Brewing, LLC's . . . Memorandum of Law in Support of its Cross-Motion for Judgment on the Pleadings Pursuant to Mass. R. Civ. P. 12(c) at 10-11, which was filed in Case No. 21-725 ("Section 25E½, itself, states that, '**An arbitration held pursuant to this section shall be <u>in lieu of all other remedies and procedures</u>**.' G.L. c. 138, § 25E½(1)(f)(3) [sic] (emphasis added). Indeed, Section 25E½ provides that an arbitration conducted pursuant to this statute is a 'final and binding arbitration.' G.L. c. 138, § 25E½(1)(e)(2) [sic]. Even though Atlantic now

designed to resolve matters related to statutorily created rights in a highly regulated industry. Jack's Abby also claims that Atlantic's claims are barred by the doctrine of accord and satisfaction, and that Case No. 21-1531 should be dismissed under Mass. R. Civ. P. 12(b)(9) because of the prior pendency of Case No. 21-725.

## I. Standards of Review

A motion for judgment on the pleadings under Mass. R. Civ. P. 12(c) "is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted." Jarosz v. Palmer, 436 Mass. 526, 529 (2002) (internal citation omitted). It "tests the legal sufficiency of the complaint" by assuming the truth of all of the nonmoving party's well-pleaded factual allegations. Champa v. Weston Pub. Schs., 473 Mass. 86, 90 (2015). See also Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). "A court may rule on a motion for judgment on the pleadings seeking declarations of the parties' rights if the answer admits all material allegations in the complaint such that there are no material issues of fact remaining to be determined." Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 726 (2013).

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claims in its papers that it did not agree or consent to the Arbitration, Atlantic fails to recognize its termination and its compensation for termination are governed exclusively by Section 25E½ and it is not required to 'agree or consent to the Arbitration,' as this termination process is mandated by state law regardless of whether or not Atlantic consents to it.") (emphasis in original). After the hearing on the cross-motions, I requested further briefing "on the question of whether there is a construction of Section 25E½ that would avoid the constitutional question raised by plaintiff." Order Re: Further Briefing at 2 (June 29, 2022) (Docket #30 in Case No. 21-725). In their further briefing, the parties adhered to their prior positions that if one party requested arbitration, Section 25E½ did not require the other party to consent to arbitration in order to mandate arbitration as the forum to determine the fair market value of an affected wholesaler's terminated distribution rights. See, e.g., Jack's Abby Brewing, LLC's Supplementary Memorandum of Law in Support of Motion for Judgment on the Pleadings at 4-5 (July 21, 2022) (Docket #31 in Case No. 21-725); Atlantic Importing Company, Inc.'s Supplemental Memorandum in Response to Court's Order Re: Further Briefing at 1-2 (July 21, 2022) (Docket #34 in Case No. 21-725).

The meaning of a statute is a question of law for the court. Commissioner of Revenue v. Gillette Co., 454 Mass. 72, 76 (2009). It is a "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014) (internal citation omitted). Legislative intent is usually distilled from the plain meaning of the statute's language "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Oracle USA, Inc. v. Commissioner of Revenue, 487 Mass. 518, 522 (2021) (internal citation omitted). Statutory construction "must be reasonable and supported by the . . . history of the statute." Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 373, 378 (2019) (internal citation omitted).

A "statute is presumed to be constitutional and every rational presumption in favor of the statute's validity [should be] made. The challenging party bears the burden of demonstrating beyond a reasonable doubt that there are no conceivable grounds which could support its validity." Gillespie v. Northampton, 460 Mass. 148, 152-153 (2011) (internal citation omitted). Under the canon of constitutional avoidance, if statutory language is "susceptible of multiple interpretations," one of which raises constitutional impediments, the court "should adopt a construction that avoids potential constitutional infirmity." Oracle USA, Inc., 487 Mass. at 525; see also Edwards v. Commonwealth, 488 Mass. 555, 567 (2021); Demetropolos v. Commonwealth, 342 Mass. 658, 660 (1961). Ultimately, the court must avoid any construction "which leads to an absurd result, or that otherwise would frustrate the Legislature's intent," Bellalta, 481 Mass. at 378 (internal citation omitted); however, it "must *interpret* the statute, not

rewrite it." See Jennings v. Rodriguez, ___ U.S. ___, 138 S. Ct. 830, 836 (2018) (italics in original).

I first address Jack's Abby's arguments in defense, which seek dismissal of both cases based on the doctrine of accord and satisfaction, and seek dismissal of Case No. 21-1531 because of the prior pendency of a related proceeding.[17] Thereafter, I discuss the constitutionality of Section 25E½.

## II. Defenses Asserted by Jack's Abby

### A. Accord and Satisfaction

Jack's Abby contends that both cases are barred by the doctrine of accord and satisfaction because Atlantic cashed Jack's Abby's check for the Fair Market Value Amount and returned the check for the Inventory Amount, together with the inventory and marketing materials; in light of the fact that Jack's Abby provided both checks "in full accord and satisfaction of the Partial Final Award and Final Award in the Arbitration." I disagree.

"The defense of accord and satisfaction is premised on the principle that '[i]f a creditor, having an unliquidated or disputed claim against his debtor, accepts a sum smaller than the amount claimed in satisfaction of the claim, he cannot afterwards maintain an action for the unpaid balance of his original claim.'" Cuddy v. A&E Mechanical, Inc., 53 Mass. App. Ct. 901, 901 (2001) (rescript), quoting Chamberlain v. Barrows, 282 Mass. 295, 299 (1933). The receipt of, or negotiation of, a check for a portion of the amount claimed due is insufficient to make out

[17] Although Jack's Abby also moves to dismiss Case No. 21-1531 under Mass. R. Civ. P. 12(b)(6) ("[f]ailure to state a claim upon which relief can be granted"), it does not meaningfully argue Atlantic's complaint fails to state a claim under G.L. c. 249, § 4, to challenge certain rulings in the Arbitration. Such arguments are waived. Rather than advance a proper argument under Rule 12(b)(6), Jack's Abby's arguments amount to a contention that it is entitled to prevail on the merits.

the defense without an agreement supported by adequate consideration discharging the debt. Acceptance of a partial payment, the value of which is indisputably owed, does not foreclose the recipient from pursuing further claims related to the remaining portion of the disputed debt. Cuddy, 53 Mass. App. Ct. at 901, quoting Whitaker Chain Tread Co. v. Standard Auto Supply Co., 216 Mass. 204, 208 (1913); Emerson v. Deming, 304 Mass. 478, 481 (1939) ("The reason for the rule is that there is no consideration for the promise of the creditor to relinquish the excess due beyond the amount paid."); Sherman v. Sidman, 300 Mass. 102, 106 (1938) ("partial satisfaction does not discharge the original claim"). Thus, unless Jack's Abby can show an agreement, supported by adequate consideration, that the undisputed sum satisfied the entire disputed debt, Atlantic may maintain an action regardless of its acceptance of partial payment.

In this instance, Jack's Abby did not provide the checks in accord and satisfaction of the amounts Atlantic claimed due under Section 25E½, in accord and satisfaction of the fair market value of Atlantic's distribution rights at the time of Jack's Abby's termination, or in accord and satisfaction of the amounts Atlantic claimed due in the Arbitration. Rather, the checks were provided only in full accord and satisfaction of the sums due under the terms of the Arbitration award, which is the portion of Atlantic's claim that Jack's Abby was willing to admit was due. There is no basis to find that Atlantic accepted the two checks in full satisfaction of its disputed claims,[18] see, e.g., Ferry v. Clary, 82 Mass. App. Ct. 1109, 2002 WL 3165491 at *3 (Aug. 7, 2012) (Rule 1:28 decision) (defendant's payment of only what defendant "did not dispute that

[18] The fact that Atlantic deposited the larger of the two checks into an escrow account underscores Atlantic's determination that its acceptance of the two checks would not constitute an accord and satisfaction of disputed amounts. See, supra, at 10-11 & n.15.

they owed" plaintiff, did not permit accord and satisfaction defense), and certainly no basis to dismiss plaintiff's claims at this stage under the doctrine of accord and satisfaction.[19]

**B. Existence of Prior Proceeding**

Jack's Abby moves to dismiss Case No. 21-1531 under Mass. R. Civ. P. 12(b)(9) because of the "[p]endency of a prior action in a court of the Commonwealth." "The purpose of rule 12(b)(9) is to concentrate the adjudication of a claim or 'action' in a single court, and to prevent parties from 'claim-splitting,' or pursuing the same claims in two separate actions." Thaddeus v. Secretary of Exec. Off. Of Health and Human Servs., 101 Mass. App. Ct. 413, 419 (2022). "For a rule 12(b)(9) defense to succeed, 'the parties and the issues [must be] the same as those in a prior action still pending.'" Id., quoting Lyons v. Duncan, 81 Mass. App. Ct. 766, 770-771 (2012). See Zora Enterprises, Inc. v. Burnett, 61 Mass. App. Ct. 341, 346 (2004) (dismissal under Rule 12(b)(9) proper when operative facts supporting second action had occurred before filing first action).

In this instance, while there is some overlap in the issues in the two cases, this can hardly be considered a case of claim splitting or forum shopping. The second case, Case No. 21-1531, arises out of certain rulings made during the Arbitration and seeks review of such rulings under G.L. c. 249, § 4. The rulings during the Arbitration did not exist prior to the filing of the first case. Thus, the issues are not identical in the two cases, even if a ruling in one case could have a direct effect on the other. More importantly, both cases were filed in the same court and are both now before me. It would make no sense to have the second case dismissed and permit plaintiff leave to amend the complaint in the first case to bring the later-arising claims asserted in the

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[19] The factual predicate for Jack's Abby's accord and satisfaction argument go beyond the allegations in the pleadings. Such arguments are not ripe for determination in this case under Mass. R. Civ. P. 12(b)(6) or 12(c).

second. The portion of Jack's Abby's motion which seeks dismissal of Case No. 21-1531 under Mass. R. Civ. P. 12(b)(9) is denied.

## III. Constitutionality of Section 25E½

Atlantic argues that Section 25E½ is unconstitutional because it allows one party (Jack's Abby) to compel another (Atlantic) to submit without its consent to arbitration for determining the full compensation due for termination of its distribution rights in violation of the other's (Atlantic's) constitutional right to a jury trial. For the reasons explained below, I conclude that, as applied in this case, Section 25E½ is unconstitutional.[20]

### A. Trial By Jury in Civil Disputes

Article 15 of the Massachusetts Declaration of Rights provides: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to trial by jury; and this method of procedure shall be held sacred . . . ." Mass. Const. Decl. Rights, art. 15. Article 15 "preserves the common law trial by jury in its indispensable aspects as it was known at the time

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[20] Atlantic also argues that Jack's Abby's notice of termination was defective because it failed to "identify the successor wholesaler who will begin servicing the affected territory" as required by Section 25E½(c)(1). Atlantic contends Jack's Abby could not name itself as the successor, but had to name a wholesaler "licensed" under G.L. c. 138, § 18. I disagree. As a licensed farmer-brewer, Jack's Abby was authorized to sell at wholesale up to 50,000 gallons of its product. Nothing in the record indicates that that authorized quantity would not be sufficient to allow Jack's Abby to "begin servicing the affected territory." Nothing in the statutory provision requiring notice explicitly requires the disclosure of a licensed wholesaler to perform that function, nor does the wholesaler disclosed have to be envisioned to be the wholesaler for any specific duration, and certainly need not be a wholesaler who might acquire rights under Section 25. To the extent Atlantic contends Jack's Abby's limit of 50,000 would not allow it to service its "affected territory," the argument depends of facts beyond the pleadings that may not be resolved on a Rule 12 motion. It is also notable that this argument depends on the language of Section 25E½. If, as I find for other reasons, Section 25E½ is unconstitutional as applied in this case, the notice requirements are irrelevant because the entire termination provision must fall. See G.L. c. 138, § 25E¾, para. 1.

our Constitution was adopted." Lavelle v. Massachusetts Comm'n Against Discrimination, 426 Mass. 332, 333 (1997), overruled in part in Stonehill Coll. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549 (2004). In other words, "[u]nless a dispute brought to court is one that a court would have decided in 1780 without a jury, art. 15 prescribes the right to a trial by jury as a sacred procedure for resolving the case." Lavelle, 426 Mass. at 333.

Although Article 15 "sweeps broadly" and is "construed with 'flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character.'" Dalis v. Buyer Advertising, 418 Mass. 220, 222 (1994), quoting Bothwell v. Boston Elevated Ry., 215 Mass. 467, 477 (1913). In Dalis, for example, the plaintiff claimed she was discharged by her employer because she was pregnant. She alleged gender discrimination by her employer and brought claims under a variety of state statutes none of which explicitly provided a right to a jury trial and none of which existed in 1780. She sought "compensatory damages, exemplary damages, interests and costs, attorney's fees, and reinstatement." Dalis, 418 Mass. at 223 & n. 3. In holding that the plaintiff was entitled to a jury trial on her claims, the Supreme Judicial Court ("SJC") recognized that the case was "a suit between two persons which clearly sets forth a controversy concerning property," the plaintiff "does not seek primarily equitable relief," and the claims are not "analogous to any case which was traditionally heard in a court of equity" when the Massachusetts Constitution was adopted in 1780. Id. at 223.

Where a plaintiff's claim is similar to those traditionally treated as actions at law or the remedy sought is "predominantly legal," Article 15 protects the plaintiff's right to a jury trial. Id. at 226. Compensatory damages, exemplary damages, interest, costs, and attorney's fees are legal remedies that carry a right to a jury trial, Stonehill Coll., 441 Mass. at 560, while restitution and injunctive relief, which traditionally fell within the jurisdiction of courts of equity, do not carry

jury trial rights. Id; Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 137 (1997). When a plaintiff "mix[es] a traditionally equitable remedy with a traditionally legal remedy, [the court] may not compromise [the] constitutional right to a trial by jury." Stonehill Coll., 441 Mass. at 560, quoting Rosati v. Boston Pipe Covering, Inc., 434 Mass. 349, 352 (2001) (internal quotations omitted). Accord Dalis, 418 Mass. at 227. On the other hand, where a party seeks solely equitable relief, a jury trial is not guaranteed. Nei v. Burley, 388 Mass. 307, 315 (1983).

A cause of action is sufficiently similar to one that existed in 1780, if it "fundamentally" resembles a claim at law then in existence. See Stonehill Coll., 441 Mass. at 560; Dalis, 418 Mass. at 226; Farnham v. Lenox Motor Car Co., 229 Mass. 478, 480 (1918) ("[T]he ordinary action of contract is a controversy concerning property, in which trial by jury was had as of right at the time of the adoption of the Constitution."). See, e.g., Rosati, 434 Mass. at 351 (although statute creating action to recover lost wages and benefits had aspects not typically found in traditional common law claims, it "is fundamentally a contract claim for wages owed under an employment contract").

There is no bright line rule. In determining whether a claim carries a right to a jury trial, courts consider a variety of factors, including the type of controversy, see Waltham Tele-Communications v. O'Brien, 403 Mass. 747, 749 (1989), Smyth v. Conservation Comm'n of Falmouth, 94 Mass. App. Ct. 790, 796 (2019), the underlying purpose of the cause of action, see Stonehill Coll., 441 Mass. at 562-563, the essential elements of the claim, see Nei, 388 Mass. at 313, and, if it is a claim created by statute, whether the Legislature intended a specific alternative procedural avenue for claim-resolution, such as administrative or arbitration proceedings. See Stonehill Coll., 441 Mass. at 567; Lumbermens Mut. Cas. Corp. v. Bay State Truck Lease, Inc., 366 Mass. 727, 730 (1975).

A statutorily-created cause of action that resembles a common law claim in tort or contract is not guaranteed the right to jury trial if its essential purpose differs greatly from its common law analog. See Stonehill Coll., 441 Mass. at 567 (administrative proceeding's purpose did not align with private action claim allowing individuals to recover damages). Moreover, if a statute creates a valid, separate procedural avenue for claim-resolution, such as through administrative proceeding controlled by the administrative agency, courts are hesitant to imply a right to jury trial. See Id. at 565-567 (statutorily-created administrative proceeding not dispute between two or more persons, but was initiated, directed, and limited by government commission on behalf of Commonwealth; statute created separate legal mechanism that did not interfere with individuals' right to sue and have case heard by jury).

**B. Arbitration as an Alternative Forum**

In contrast to the constitutional right to a jury trial, arbitration is generally a matter of consent. As the United States Supreme Court has long held, the "first principle [of arbitration] is that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986) (emphasis added), quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), and cited with approval in Local Union No. 1710, Int'l Ass'n of Fire Fighters, AFL-CIO v. Chicopee, 430 Mass. 417, 420 (1999).[21] See Viking River Cruises, Inc. v. Moriana, ___ U.S. ___, 142 S. Ct. 1906, 1918 (2022) ("first principle of our [federal arbitration] jurisprudence[] [is] that arbitration is strictly a matter of consent" (internal citation omitted)).

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[21] The Supreme Judicial Court generally has looked to the U.S. Supreme Court for "guiding principles" regarding arbitration. See Local Union No. 1710, 430 Mass. at 420.

The situation is no different when arbitration is specified by statute. In Massachusetts, consent may be reasonably inferred when a party decides to engage in conduct covered by a statute that specifies arbitration as the remedial forum. In Lumbermens, for example, the SJC considered a statute that had been effective since January 1, 1972, which required arbitration as the forum for expedited resolution of interinsurer subrogation claims. 366 Mass. at 729-731. In that case, a two-vehicle motor vehicle collision occurred on November 20, 1972. Lumbermans Mutual Casualty Corp. ("Lumbermens") insured one vehicle and defendant Bay State Truck Lease, Inc. ("Truck Lease") issued a motor vehicle liability bond covering the other. When Lumbermens sought to arbitrate its subrogation claim against Truck Lease, Truck Lease argued that "it may not be forced to arbitrate Lumbermens' claim" because "it ha[d] not agreed in writing to arbitrate." Id. at 730. The SJC ruled that "Truck Lease in effect elected to become a self-insurer when it decided to maintain a motor vehicle liability bond and must accept all the consequences of that election." Id. at 731 (emphasis added).

"[T]here is an understandable attitude of wariness about arbitration forced on a party." School Comm. of Boston v. Boston Teachers Union, Local 66, Am. Federation of Teachers (AFL-CIO), 372 Mass. 605, 613 (1977). See also Massachusetts Highway Dep't v. Perini Corp., 444 Mass. 366, 374 (2005) (core principles related to contested arbitration proceedings "seek a balance between the statutory policy favoring arbitration as an expeditious and efficient means for resolving disputes and the courts' role as the guardian of the parties' right to submit to arbitration only those disputes that the parties intended") (emphasis added). As the Supreme Court has recently reiterated, the federal policy is not to actively foster arbitration, notwithstanding acknowledged language to that effect in certain decisions, but "to place such agreements upon the same footing as other contracts" and overcome "the judiciary's

longstanding refusal to enforce agreements to arbitrate." Morgan v. Sundance, Inc., ___ U.S. ___, 142 S. Ct. 1708, 1713 (2022), quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 302 (2010). Or, formulated another way:

> The policy is to make arbitration agreements as enforceable as other contracts, but not more so. . . . Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. The court may not devise novel rules to favor arbitration over litigation. . . . If an ordinary procedural rule – whether of waiver or forfeiture or what-have-you – would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

Morgan, 142 S. Ct. at 1713 (internal quotations and citations omitted). Consistent with this policy, Massachusetts courts have refused to require parties to submit to arbitration when they have not agreed, or where it cannot be reasonably inferred that they have agreed, to do so. See, e.g., Vassalluzzo v. Ernst & Young, LLP, 22 Mass. L. Rptr. 654, 2007 WL 2076471 at *2 (Mass. Super. June 21, 2007) (Gants, J.) (refusing to apply a broad notion of equitable estoppel to bind a party to arbitrate absent an agreement); G.L. c. 251, § 1 (arbitration provision is "valid, enforceable and irrevocable" if presented in "written agreement" or "written contract," unless there exists valid ground to revoke the contract).[22]

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[22] A party generally must consent to arbitration because arbitration lacks many of the protections that mark a jury trial. Not only is the decision maker different (one or more arbitrators instead of jurors with instructions from a judge), but the time to conduct discovery or prepare other legal challenges is usually abbreviated in arbitration, see, e.g. Section 25E½(f)(2) ("arbitration proceeding shall conclude not later than 60 days after the date of the notice of intent to arbitrate"), and an arbitration award is, at most, only "subject to a narrow scope of review." Beacon Towers Condo. Trust v. Alex, 473 Mass. 472, 474 (2016), quoting Superadio L.P. v. Winstar Radio Prods., LLC, 446 Mass. 330, 333 (2006). As the SJC has explained the standard of review of arbitration awards, courts "do not review an arbitration award for errors of law or errors of fact. . . . [Courts] review an arbitration award only to determine whether it 'was procured by corruption, fraud or other undue means,' whether the arbitrator was evidently partial, or whether the arbitrator exceeded the scope of his or her authority." Beacon Towers, 473 Mass. at 475, quoting G.L. c. 251, § 12. Accord Plymouth-Carver Regional Sch. Dist. v. J.

### A. One-Party Consent to Arbitration Under Section 25E½

Section 25E½ authorizes either party to compel arbitration without the consent of the other party. After a termination notice, if the brewer and wholesaler cannot agree on the compensation due to the wholesaler, then, either "the affected wholesaler or the brewery may request that the amount of compensation be determined by final and binding arbitration." G.L. c. 138, § 25E½(d)(2) (emphasis added). A "request" for arbitration under subsection (d)(2), however, is not really a "request;" it does not require the agreement or even the acquiescence of the other party. Instead, the "request" compels the other party (without its consent) to engage in the arbitration or risk waiving its right to contest the results of the arbitration. See Section 25E½(f)(3) ("Any party duly notified of an arbitration involving its rights that fails to participate in an arbitration proceeding held pursuant to this section shall be considered to have waived all rights it would have had in the arbitration and to have consented to the determination of the panel of arbitrators."). Compelling the use of arbitration without Atlantic's consent contradicts the central tenet of arbitration. See, supra, at 20-22.

The arbitration envisioned in Section 25E½ is not designed to evaluate the lawfulness of the termination. Its sole purpose is to determine the "full compensation" due to the affected wholesaler, including "the laid-in cost of the merchantable inventory;" "the laid-in cost of the current sales and marketing material;" and, most importantly, "the fair market value of the

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Farmer & Co., 407 Mass. 1006, 1007 (1990) (rescript). See also, e.g., Lynn v. Thompson, 435 Mass. 54, 61 (2001) (in reviewing arbitration decision, courts "are strictly bound by an arbitrator's findings and legal conclusions, even if they appear erroneous, inconsistent, or unsupported by the record at the arbitration hearing. . . . 'An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference.'"), quoting Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 670 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989).

distribution rights for the brands that are being terminated by the brewery." G.L. c. 138, § 25E½(d).

As applied in this case, Section 25E½ is unconstitutional because it violates art. 15 of the Massachusetts Declaration of Rights.[23] The factual issues which Section 25E½ sends to arbitration, including the fair market value of the wholesaler's distribution rights, involve a property dispute between two persons and legal remedies akin to contract damages, which trigger a right to a jury trial.[24] See Mass. Highway Dep't, 444 Mass. at 374; Stonehill Coll., 441 Mass. at 560; Dalis, 418 Mass. at 226.

Moreover, the arbitration, if invoked by one of the parties, is the exclusive remedy to determine the full compensation due upon termination. See Section 25E½(f)(2) ("An arbitration held pursuant to this section shall be in lieu of all other remedies and procedures."). Here, the parties did not only have historic rights under Section 25E, but they also had a separate

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[23] There are certainly cases in which Section 25E½ would operate without violating art. 15. In some cases, both the brewer and the wholesaler might agree to arbitration. In other future cases, the termination may occur sufficiently after the enactment of Section 25E½ that a party to a brewer/wholesaler relationship has sufficient notice of the arbitration provision in Section 25E½ to decide whether and how to proceed. In the latter situation, by "deciding to maintain" the brewer/wholesaler relationship, the parties could fairly be said to have "accept[ed] all the consequences of that election," including the statutory obligation to submit their dispute to arbitration. Lumbermens, 366 Mass. at 731. Here, in contrast, Jack's Abby's termination notice was issued two days after Section 25E½ went into effect.

[24] I assume for these purposes that determining the value of inventory or marketing materials on hand at the time of termination amounts to restitution, which is equitable relief. See Doherty, 425 Mass. at 137. However, this has no effect on Section 25E½'s constitutionality. Claimants entering arbitration pursuant to Section 25E½ seek both legal and equitable remedies in the form of fair market value or expectation costs, and restitution. In such an instance, the trial court may not compromise the constitutional right to a jury trial. See Stonehill Coll., 441 Mass. at 560. Moreover, in almost all cases, the fair market value of terminated distribution rights will, as in this case, far exceed the inventory value of the products the wholesaler has on-hand. Thus, the party requesting arbitration seeks primarily legal, not equitable, relief. See Dalis, 418 Mass. at 223. By mandating arbitration of these issues, Section 25E½ runs afoul of art. 15.

Agreement, which gave Atlantic the right to serve as Jack's Abby's exclusive distributor in Massachusetts and Rhode Island. Section 25E does not compel exclusivity, nor does it extend beyond Massachusetts; as a result the Agreement gave Atlantic valuable contractual rights beyond its right to continue distributing Jack's Abby's brands under Section 25E. As a result of the termination, Atlantic lost its rights under the Agreement, and its damages from that termination also had to be determined. Such contract damages are uniquely jury issues. By permitting Jack's Abby to compel Atlantic (without its consent) to arbitrate the damages due from Jack's Abby's termination of the Agreement, Section 25E½ transgressed art. 15.

None of the provisions in Section 25E½ are severable; the entire section must be invalidated. G.L. c. 138, § 25E¾, para. 1. The obvious purpose of Section 25E½ was to create an exception to the Commonwealth's strict regulatory scheme allowing breweries to exit distribution relationships with wholesalers without a showing of "good cause." While invaliding Section 25E½ frustrates that purpose, the Court cannot rewrite the statute, which is unconstitutional as applied here. See Jennings, 138 S. Ct. at 836. Not only is it not the Court's role to do so, but the Legislature has specifically required the invalidation of all of Section 25E½ if any portion is unconstitutional. G.L. c. 138, § 25E¾, para. 1.[25]

**ORDER**

It is hereby ORDERED as follows:

1. In Case No. 21-725:

   a. Plaintiff Atlantic Importing Company, Inc.'s Motion for Judgment on the Pleadings is **ALLOWED in part** insofar it is hereby DECLARED and ADJUDGED that G.L. c. 138, § 25E½, as applied in this case, is unconstitutional because it violates art. 15 of

[25] In light of my ruling, and in light of the fact that Jack's Abby does not contest that the Arbitration decision may be appealed under G.L. c. 249, § 4, I need not address Atlantic's argument that Section 25E½ also violates art. 30 of the Massachusetts Declaration of Rights.

the Massachusetts Declaration of Rights. The Court shall hear from the parties about what further relief should be ordered. See para. 3 of this Order.

b. Defendant, Jack's Abby Brewing, LLC's Cross-Motion for Judgment on the Pleadings Pursuant to Mass. R. Civ. P. 12(c) is **DENIED**.

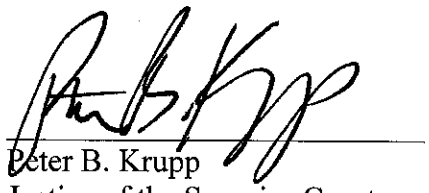
2. In Case No. 21-1531:

a. Defendant Jack's Abby Brewing, LLC's Motion to Dismiss Plaintiff's Complaint Pursuant to Mass. R. Civ. P. 12(b)(6) & (9) is **DENIED**.

b. Atlantic Importing Company, Inc.'s Cross-Motion for Judgment on the Pleadings Under Mass. R. Civ. P. 12(c) is **ALLOWED in part** insofar as the Arbitration Award is hereby **VACATED**. The Court shall hear from the parties about what further relief should be ordered. See para. 3 of this Order.

c. Defendant, Jack's Abby Brewing, LLC's Cross-Motion for Judgment on the Pleadings Pursuant to Mass. R. Civ. P. 12(c) is **DENIED**.

3. On February 23, 2023, at 2 p.m., the Court will conduct a status conference in person in both cases to hear from the parties about how the Court should determine what further relief should be granted, e.g. whether further briefing will be necessary, whether evidence will be required in written form or through live testimony, etc. See G.L. c. 231A, §§ 1, 5.



Dated: January 25, 2023

Peter B. Krupp
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUFFOLK SUPERIOR COURT
CA No. 2184CV00725-BLS1

ATLANTIC IMPORTING COMPANY, INC. )
)
Plaintiff, )
)
vs. )
)
JACK'S ABBY BREWING, LLC, )
)
Defendant. )

1/25/23 After hearing, DENIED. See Memorandum and Order of same date.

**DEFENDANT, JACK'S ABBY BREWING, LLC'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO MASS. R. CIV. P. 12(c)**

NOW COMES Jack's Abby Brewing, LLC ("Jack's Abby") and, pursuant to Mass. R. Civ. P. 12(c), respectfully submits this Cross-Motion for Judgment on the Pleadings. As further detailed in the attached Memorandum of Law, Atlantic's Complaint in this lawsuit should be dismissed because (1) Atlantic Importing Company, Inc. ("Atlantic") has accepted and negotiated full payment of the Arbitration Final Award in accord and satisfaction of its claims; (2) the Marketing Agreement entered between Jack's Abby and Atlantic does not govern the parties' distribution rights; (3) Atlantic's "Successor Wholesaler Argument" has already been presented by Atlantic to the Alcoholic Beverages Control Commission, the Arbitration Panel in that arbitration proceeding captioned as *Jack's Abby Brewing, LLC v. Atlantic Importing Company, Inc.*, AAA Case No. 01-21-0001-9951, twice to the Suffolk Superior Court and to the Massachusetts Appeals Court, all thus far to no avail and there have been no changed circumstances that warrant a different result; and (4) Atlantic is not entitled to a jury trial because Section 25E½ is a newly created statutory right designed to equitably remedy a party's claim under that new statute with a monetary award of compensation. Accordingly, the Court should grant Jack's Abby's Cross-Motion for Judgment on the Pleadings.

4881-8705-9978.1

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv00725-BLS1

ATLANTIC IMPORTING COMPANY, INC.
Plaintiff,

v.

JACK'S ABBY BREWING, LLC
Defendant.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2022 FEB 15 A 8:16
CLERK / MAGISTRATE

1/25/23 After hearing, ALLOWED in part. See Memorandum and Order of same date.

**PLAINTIFF ATLANTIC IMPORTING COMPANY, INC.'S**
**MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Mass. R. Civ. P. 12(c), the plaintiff Atlantic Importing Company, Inc. ("Atlantic") moves for judgment on the pleadings in its favor on Counts I, II, III and IV of its Verified Complaint against Jack's Abby Brewing, LLC ("Jack's Abby"). Specifically, Atlantic seeks that the Court declare that G.L. c. 138, § 25E½ is unconstitutional, or alternatively that Jack's Abby did not properly invoke §25E or have authority to terminate the Marketing Agreement between the parties. Further, Atlantic requests that the Court, after determining Atlantic should prevail on the pleadings, hold further proceedings to fashion a remedy that fully and fairly restores the parties to their relationship *ex ante* before § 25E½'s enactment and prior to Jack's Abby's termination of Atlantic as its exclusive Massachusetts wholesaler by i) entering an injunction ordering that Jack's Abby, and its officers, agents, servants, employees, and those persons in active concert or participation with them shall be enjoined from refusing to sell the brands at issue to Atlantic and that Jack's Abby shall further exclusively sell its brands to only Atlantic, ii) awarding damages to Atlantic, including attorney's fees, costs and any other further

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUFFOLK SUPERIOR COURT
C.A. No. 2184CV01531

ATLANTIC IMPORTING COMPANY, INC. )
)
Plaintiff, )
)
vs. )
)
AMERICAN ARBITRATION ASSOCIATION, )
and JACK'S ABBY BREWING, LLC, )
)
Defendants. )

1/25/23 After hearing, DENIED. See Memorandum and Order of same date.

**DEFENDANT, JACK'S ABBY BREWING, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO MASS. R. CIV. P. 12(b)(6) & (9)**

NOW COMES Jack's Abby Brewing, LLC ("Jack's Abby") and, pursuant to Mass. R. Civ. P. 12(b)(6) and (9), respectfully submits this Motion to Dismiss Plaintiff, Atlantic Importing Company, Inc's ("Atlantic") Complaint ("Complaint"). As further detailed in the attached Memorandum of Law, Atlantic seeks to overturn a valid arbitration award issued against Jack's Abby. However, Jack's Abby has, in full accord and satisfaction, tendered full payment of the arbitration award to Atlantic and Atlantic has negotiated payment of same. Therefore, Atlantic cannot state a cause of action herein to alter or reverse that final award pursuant to Mass. R. Civ. P. 12(b)(6). Additionally, Atlantic's Complaint in this lawsuit involves the same parties (Atlantic and Jack's Abby) and issues as the already pending matter captioned *Atlantic Importing Company, Inc. v. Jack's Abby Brewing, LLC*, Civil Action No. 2184CV00725. Mass. R. Civ. P. 12(b)(9) provides for the dismissal of a second action in which the parties and the issues are the same as those in a prior action still pending in a Massachusetts court.

Accordingly, for both of these reasons, the Court should dismiss Atlantic's Complaint against Jack's Abby in its entirety.

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv01531

ATLANTIC IMPORTING COMPANY, INC.
Plaintiff,

v.

AMERICAN ARBITRATION ASSOCIATION
and JACK'S ABBY BREWING, LLC,
Defendants.

1/25/23 After hearing. ALLOWED in part. See Memorandum and Order of same date. [signature]

**ATLANTIC IMPORTING COMPANY, INC.'S**
**CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS UNDER MASS. R. CIV. P. 12(c)**

This is a case of first impression in which Atlantic Importing Company, Inc. ("Atlantic") is seeking certiorari review under G.L. c. 249, § 4 of the first ever arbitration pursuant to G.L. c. 138, § 25E½, a statute which went to effect on January 12, 2021 and effectively modified G.L. c. 138, § 25E. Atlantic seeks to have the Court vacate the Arbitration Award and order reinstatement of Atlantic's statutory right to distribute Jack's Abby's Brands in the Commonwealth.

The Arbitration panel's determination that Jack's Abby's written notice to terminate Atlantic's statutory distribution rights satisfied the statutory requirement that it identify the "successor wholesaler who will begin servicing the affected territory" by naming itself as the "success wholesaler" was an error of law because Jack's Abby is not a licensed wholesaler. The panel's error permitted Jack's Abby to terminate Atlantic's statutory right to distribute Jack's Abby's brands in the Commonwealth, thus causing Atlantic to suffer substantial injury or injustice. Indeed, Jack's Abby's notice to terminate contained a fundamental misrepresentation. Upon concluding the Arbitration, Jack's Abby engaged another licensed wholesaler (that it failed to identify in its notice) to service Massachusetts retailers.

FILED UNDER SEAL

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUFFOLK SUPERIOR COURT
C.A. No. 2184CV01531

ATLANTIC IMPORTING COMPANY, INC. )
)
Plaintiff, )
)
vs. )
)
AMERICAN ARBITRATION ASSOCIATION, )
and JACK'S ABBY BREWING, LLC, )
)
Defendants. )

1/25/23 After hearing, DENIED. See Memorandum and Order of same date. [illegible]

**DEFENDANT, JACK'S ABBY BREWING, LLC'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO MASS. R. CIV. P. 12(c)**

NOW COMES Jack's Abby Brewing, LLC ("Jack's Abby") and, pursuant to Mass. R. Civ. P. 12(c), respectfully submits this Cross-Motion for Judgment on the Pleadings. As further detailed in the attached Memorandum of Law, Atlantic's Complaint in this lawsuit should be dismissed because Atlantic's "Successor Wholesaler Argument" has already been presented by Atlantic to the Alcoholic Beverages Control Commission, the Arbitration Panel in that arbitration proceeding captioned as *Jack's Abby Brewing, LLC v. Atlantic Importing Company, Inc.*, AAA Case No. 01-21-0001-9951, twice to the Suffolk Superior Court and to the Massachusetts Appeals Court, all thus far to no avail and there have been no changed circumstances that warrant a different result.

Accordingly, the Court should grant Jack's Abby's Cross-Motion for Judgment on the Pleadings.

3/13

NOTIFY!

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 21-725-BLS1

ATLANTIC IMPORTING COMPANY, INC.
Plaintiff

vs.

JACK'S ABBY BREWING, LLC
Defendant

---

Civil No. 21-1531-BLS1

ATLANTIC IMPORTING COMPANY, INC.
Plaintiff

vs.

AMERICAN ARBITRATION ASSOCIATION, & another[1]
Defendants

## REPORT TO APPEALS COURT

Pursuant to Mass. R. Civ. P. 64(a) and Mass. R. App. P. 5, I report to the Appeals Court the two cases captioned above, and, in particular, my decision declaring that G.L. c. 138, § 25E½ ("Section 25E½), as applied in these cases, violates art. 15 of the Massachusetts Declaration of Rights. See Memorandum and Order on Motion to Dismiss and Cross-Motions for Judgment on the Pleadings (Jan. 25, 2023) ("Mem. & Order"), a copy of which is attached as Exhibit A. Ample background on both cases is set forth in the attached Mem. & Order and need not be repeated here. For the convenience of the appellate court, I briefly explain why I am reporting these cases.

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[1] Jack's Abby Brewing, LLC.

Section 25E½ was enacted two years ago to allow craft brewers to terminate their relationship with alcoholic beverage wholesalers without good cause upon payment to the wholesaler of, among other things, the fair market value of the distribution rights being terminated. For the craft beer segment of the alcoholic beverage industry, Section 25E½ did away with the statutory protection afforded to alcoholic beverage wholesalers, which generally prohibits alcoholic beverage suppliers from terminating an established wholesaler relationship without good cause. G.L. c. 138, § 25E, para. 1. See, e.g., Martignetti Grocery Co., Inc. v. Alcoholic Beverages Control Comm'n, 96 Mass. App. Ct. 729, 732-733 (2019) (discussing "continuing affiliation" doctrine under § 25E).

To facilitate disentangling the brewer/wholesaler relationship, Section 25E½ created a procedure that allowed one party to obligate both parties to submit to arbitration to determine the amount to be paid as full compensation to the wholesaler terminated under Section 25E½. I found this provision, as applied, violates the non-consenting party's constitutional right to a jury trial under art. 15 of the Massachusetts Declaration of Rights and, because of an explicit non-severability provision, I found Section 25E½ to be invalid. G.L. c. 138, § 25E¾, para. 1.

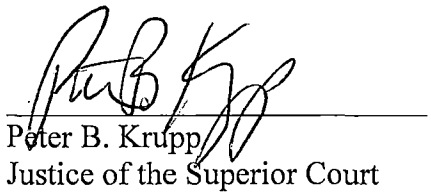
I am reporting these cases for a few reasons:

1. Case-Specific Considerations. While my ruling resolves the central question in these cases, it does not address the sticky issues about what equitable and legal remedies should apply as a result. A resolution of the appeal of my decision will allow the parties and this Court to pursue the appropriate remedy, including orders regarding the relative positions of the parties and the possibility of a jury trial to determine the monetary compensation due to Atlantic Importing Company, Inc. ("Atlantic"). I am informed that, since Jack's Abby Brewing, LLC ("Jack's Abby") terminated Atlantic as its wholesaler, Jack's Abby has entered into a

relationship with a different wholesaler. Rather than potentially upset that new wholesaler relationship unnecessarily, certainty on the constitutional question would be useful to the parties and would allow the Court to resolve these cases most fairly and efficiently.[2]

2. Industry Certainty. The Mem. & Order finding Section 25E½ unconstitutional as applied has surely created some uncertainty in the craft brewing industry in Massachusetts. A prompt resolution of the appeal of this decision is in the best interest of the industry as a whole.

For these reasons, I report these cases to the Appeals Court.



Dated: March 13, 2023

Peter B. Krupp
Justice of the Superior Court

[2] Jack's Abby has asked the Court, among other relief, to report the decision. Atlantic does not oppose the request for a report.

# EXHIBIT A

PLEASE SEE PAGE 034

Memorandum and Order on Motion to Dismiss and Cross-Motion for Judgment on the Pleadings