

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

Steven Grossman
Treasurer and Receiver General

NOTICE OF SUSPENSION

Kim S. Gainsboro, Esq.
Chairman

November 28, 2012

THE BOSTON LECO CORP. D/B/A GUILT
71-79 WARRENTON ST.
BOSTON, MA 02116
LICENSE#: 011600792
VIOLATION DATE: 11/04/2011
HEARD 02/07/2012

After a hearing on February 7, 2012, the Commission finds The Boston Leco Corp. d/b/a Guilt in violation of:

- 1) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (d) sell, offer to sell or deliver to any person an unlimited number of drinks during any set period of time for a fixed price, except at private functions not open to the public; and
- 2) M.G.L. c. 138, §23 Transfer of the Privilege of a license without proper approval.

The Commission suspends the licensee's license for a total of twenty (20) days to be served. The suspension shall commence on Wednesday, January 9, 2013 and terminate on Monday, January 28, 2013. The license will be delivered to the Local Licensing Board or its designee on Wednesday, January 9, 2013 at 9:00 A.M. It will be returned to the licensee Tuesday, January 29, 2013.

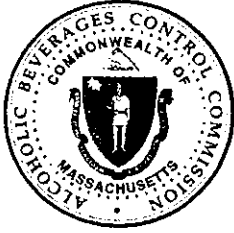
You are advised that pursuant to the provisions of M.G.L. c.138 §23, you may petition the Commission to accept an offer in compromise in lieu of suspension within twenty (20) calendar days following such notice of such suspension. If accepted, you may pay a fine using the enclosed form. All checks must be certified and accompanied by the enclosed form, which must be signed by a Massachusetts Licensed Accountant.

You are advised that you have the right to appeal this decision under M.G.L. c. 30A to Superior Court within thirty (30) days upon receipt of this notice.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro
Chairman

cc: Local Board
Frederick G. Mahony, Chief Investigator
Jamie Binienda, Investigator
Evan T. Lawson, Esq., via facsimile
Administration
File



The Commonwealth of Massachusetts
Department of the State Treasurer
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DECISION

Kim J. Gainsboro, Esq.
Chairman

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71-79 WARRENTON ST.
BOSTON, MA 02116
LICENSE#: 011600792
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The Boston Leco Corp. d/b/a Guilt (the "Licensee" or "LECO" or "Guilt") holds an all alcohol license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, February 7, 2012, regarding alleged violations of 204 CMR 4.00 Prohibition of Certain Practices:

- 1) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (a) offer or deliver any free drinks to any person or group of persons;
- 2) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (c) sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public;
- 3) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (d) sell, offer to sell or deliver to any person an unlimited number of drinks during any set period of time for a fixed price, except at private functions not open to the public; and
- 4) M.G.L. c. 138, §23 Transfer of the Privilege of a license without proper approval.

The above captioned alleged violation occurred on November 4, 2011 according to Investigator Binienda's Investigative Report.

The following document is in evidence:

1. Investigator Binienda's Investigative Report dated November 4, 2011.

There is one (1) audio recording of this hearing.

FACTS

1. On Friday, November 4, 2011, the Commission's Investigation and Enforcement Division received a complaint alleging that the licensee was offering complimentary cocktails from 10:30 p.m. to 11:30 p.m. on November 4, 2011, and was advertising this offer on a website: www.ChrisHarrisresents.com.
2. LECO's last-disclosed and approved the following officers and directors: President, Treasurer, and Director, Mr. Louis Delpidio; and Secretary and Director, Mr. Robert Merowitz.

3. In the most recent application for a transfer of stock, which was approved on April 28, 1998, the licensee's only disclosed and approved stockholders in the corporation are: Mr. Charles Delpidio, Ms. Myrna Merowitz, Mr. Jon Platt, the Estate of Earl Cohen, and the LAD Trust.
4. This application, approved in 1998, swore under the pains and penalties of perjury that these people are the only persons or entities that would have any direct or indirect beneficial or financial interest in this license.
5. This application did not disclose or submit for approval Christian Harris, Rafael Sanchez, or CHP, Inc. as having any direct or indirect beneficial interest in this license.
6. On Friday, November 04, 2011, at approximately 10:35 p. m., Investigator Binienda, in an undercover capacity, entered The Boston Leco Corp. d/b/a Guilt to determine the manner in which their business was being conducted, and to investigate the complaint received.
7. A doorman checked Investigator Binienda's identification, and he entered the premises.
8. Investigator Binienda then paid a female seated inside the premises a ten (10) dollar cover charge.
9. Investigator Binienda asked if the open bar was going on now, and the female stated, "Yes, until 11:30." The female did not ask to see his identification, and she did not verify a guest list.
10. Investigator Binienda ordered an Amstel Light beer from a male bartender.
11. The bartender delivered the beer to Investigator Binienda, and did not charge him.
12. The bartender did not ask to see identification from Investigator Binienda, nor did he verify a guest list.
13. Investigator Binienda notified Investigator Carey, who was in a stationary surveillance outside the licensed premises, of the violation and asked him to enter the premises.
14. Investigator Carey entered the licensed premises, and with Investigator Binienda, identified themselves to the manager on duty, Jeff Delpidio.
15. Jeff Delpidio then notified the owner, Charles "Chuck" Delpidio, that the Commission Investigators were at the licensed premises.
16. Investigator Binienda spoke with Christian "Chris" Harris, the Promoter.
17. Mr. Harris stated that he collects all monies charged at the door, which was a ten (10) dollar cover charge, from 10:00 p.m. to 1:30 a.m.
18. The owner, Chuck Delpidio, came downstairs to speak with investigators.
19. Investigators informed Chuck Delpidio of the violation, and that a report would be filed with the Chief Investigator for further review.
20. Chuck Delpidio stated to Investigator Carey, "Is there any way around writing a report?"
21. Investigator Carey responded, "No."
22. Investigators then exited the licensed premises without incident.

DISCUSSION

Pursuant to Commission regulations promulgated at 204 CMR4.03, a series of practices are prohibited for §12 license holders. Among these prohibited practices are that no licensee or employee or agent of a licensee shall:

1. 204 CMR4.03 (1) (a) Offer or deliver any free drinks to any person or group or persons;
2. 204 CMR4.03 (1) (c) Sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public;
3. 204 CMR4.03 (1) (d) Sell, offer to sell or deliver to any person an unlimited number of drinks during any set period of time for a fixed price, except at private functions not open to the public.

In May 2004, the Commission issued a series of decisions in which it sanctioned §12 licensees for violating this regulation. In these decisions, the Commission adjudicated the standards by which an activity would be analyzed to determine whether it was a private function not open to the public. See, e.g., *In Re: Boston Leco Corporation dba Matrix*, Boston, (ABCC Decision dated May 24, 2004). In this 2004 decision, the Commission held that -

in order to qualify as a private function not open to the public within the meaning of 204 CMR 4.00, *et seq.*, (hereinafter referred to as a "Private Function"), evidence must be presented to persuade and prove that the licensee:

- (1) identified an individual or group as the host of any Private Function held in the licensed premises;
- (2) restricted admission to the Private Function to particular persons or a group based on specific, *bona fide* invitations issued by the individual or group identified as the host of the Private Function;
- (3) did not charge, directly or indirectly, any individual invited to attend the Private Function by the identified host a fixed price for an unlimited number of drinks during any set period of time at any time and did not receive directly or indirectly any payment from any individual invited by the identified host to attend the Private Function;
- (4) did charge for and accept payment from only the individual or group identified as the host of the Private Function;
- (5) did not advertise the availability of the Private Function to the general public (but may have at the request of the host of the Private Function, invited to attend the Private Function only the particular persons or groups selected by the host of the Private Function to be invited to attend and to whom admission is restricted); and,
- (6) created written records of the particular persons or groups to whom admission to the Private Function was granted that included within the records the name, address and contact number(s) for the individual or group identified as the host of the Private Function and were available for inspection by the licensing authorities and their agents.

The Commission again reads its regulation to include these elements of proof for an activity to be considered a Private Function. None of these elements were present in this case. The public policy advanced by the Commission when it first promulgated 204 CMR 4.00, *et seq.*, in 1984 remains vital today, viz., moderation in the sale and consumption of alcoholic beverages. It remains the public policy of the Commonwealth, and the statutory duty of the Commission, to promote moderation and responsibility in the use of alcoholic beverages that is, in one word, temperance. M.G.L. c. 10, § 71, as enacted by the Acts of 2003, chapter 26, § 48.

In Re: Boston Leco Corporation dba Matrix, Boston, (ABCC Decision dated May 24, 2004 at page 5-6).

In November 2009, the Commission issued an advisory to all §12 licensees about the compliance issues, with specific reference to compliance obligations under the Commission's regulation at 204 CMR 4.00, *et seq.* This November 2009 advisory remains posted on the website of the Commission.

www.mass.gov/abcc/pdf

This November 2009 advisory reminds each §12 licensee, such as LECO, that "licensees may not legally offer an "open bar" to customers for a fixed price or offer discounted prices for drinks during a limited time period." This Commission advisory further warned each §12 licensee, such as LECO, that licensees who intend to host private functions must be aware of Commission decisions that issued in May 2004. [citing to *In Re: Boston Leco Corporation dba Matrix*, Boston, (ABCC Decision dated May 24, 2004 among others)]. ...

The licensee must demonstrate that:

- the host is the only individual responsible for payment to the licensee;
- the private function was not publicly advertised; and
- written records containing the guest list exist and are available for inspection by the licensing authorities.

Moreover, a Licensee's obligation to comply with the Liquor Control Act and Commission regulations cannot be circumvented by using a third party. Licensees should understand that allowing a third party to sell tickets or use other methods of admission (where the price of admission includes any alcoholic beverages), results in the licensee transferring the privilege of its license, or transferring a direct or indirect beneficial interest in its license to a third party. This is a violation of the Liquor Control Act.

Alcoholic Beverages Commission Advisory "COMPLIANCE ISSUES DURING THIS HOLIDAY SEASON" dated November 23, 2009(www.mass.gov/abcc/pdf)

In this case, Investigator Binienda was not an invited guest, he was charged ten (10) dollars to enter the licensed premises, there was no guest list on the licensed premises, and the function on the licensed premises was advertised on the internet at website: www.chrisharrisrepresents.com. Therefore, the Commission is persuaded and finds that this activity occurred at an event that was not a private function not open to the public within the meaning of 204 CMR 4.00, et seq.

The evidence is undisputed that Investigator Binienda paid ten (10) dollars to gain admission to the premises and for that fixed price, was offered an unlimited number of drinks during a set period of time. This activity is commonly referred to as "an open bar." In this case, Investigator Binienda asked if the open bar was currently going on, and the female stated, "Yes, until 11:30." There was no evidence that this activity occurred at a private function not open to the public. Therefore, the Commission is persuaded and finds that the licensee or an employee or agent of the licensee sold, offered to sell or delivered to persons an unlimited number of drinks during a set period of time in violation of 204 CMR 4.03(1)(d).

Indeed, this statement made by an employee or agent of the licensee was corroborated when Investigator Binienda ordered an Amstel Light beer from a male bartender, that bartender delivered the beer to Investigator Binienda, and did not charge him. An Amstel Light beer is an alcoholic beverage and a "drink" within the meaning of 204 CMR 4.00, et seq.,. There was no evidence that this activity occurred at a private function not open to the public. Therefore, while this evidence corroborates the statement of the female who collected ten (10) dollars from Investigator Binienda for the "open bar", the Commission is not persuaded and does not find that the licensee or an employee or agent of the licensee sold, offered to sell and delivered to Investigator Binienda a free drink in violation of 204 CMR 4.03(1) (a). Investigator Binienda paid ten (10) dollars for an unlimited number of drinks until 11:30.

There was no evidence submitted that showed what the price list in effect was on the date of this incident. Pursuant to 204 CMR 4.03(1)(c), a §12 licensee such as LECO, must set a price and make all sales of alcoholic beverages at the price in effect during the same calendar week, viz., Sunday through Saturday. Without evidence of the price in effect on the day in question, the Commission is left to engage in speculation and conjecture on what the price in effect was and whether that price was higher than the ten (10) dollars paid by Investigator Binienda. The Commission therefore is not persuaded that the licensee or an employee or agent of the licensee sold, offered to sell and delivered to Investigator Binienda any drinks at a price less than the price regularly charged for such drinks during the same calendar week.

M.G.L. c. 138 §23- Transfer of the privilege of a license without prior approval:

A licensee who wishes to transfer its license, or an interest in its alcoholic beverages license, is required to obtain prior written approval from the licensing authorities. This allows the licensing authorities to

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A licensee who wishes to transfer its license, or an interest in its alcoholic beverages license, is required to obtain prior written approval from the licensing authorities. This allows the licensing authorities to determine if the transfer is in the public interest, and if the proposed transferee is someone who qualifies to hold a license.

Implicit in the transfer of a license is the surrender of control. A "transfer of a business takes place when the person introduced to it runs the business for his own account." Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass. App.Ct.768, 771, 429 N.E.2d 62, 65 (1981). The Commission is instructed by the cases of Cleary v. Cardullo's, Inc., 347 Mass. 337, 346-350, 198 N.E.2d 281 (1964) and Number Three Lounge, Inc. v. Alcoholic Beverages Control Comm., 7 Mass.App. 301, 304-308, 387 N.E.2d 181 (1979). LECO's last-disclosed and approved officers and directors for this license are: President, Treasurer, and Director, Mr. Louis Delpidio; and Secretary and Director, Mr. Robert Merowitz. The licensee's only disclosed and approved stockholders in the corporation are: Mr. Charles Delpidio, Ms. Myrna Merowitz, Mr. Jon Platt, the Estate of Earl Cohen, and the LAD Trust.¹

The application did not disclose, and thus never sought, the statutorily required prior approval for Christian Harris, Rafael Sanchez, or CHP, Inc. to have any direct or indirect beneficial interest in this license. Investigator Binienda spoke with Mr. Christian "Chris" Harris, the Promoter. Mr. Harris stated that he collects all monies charged at the door, which was a ten (10) dollar cover charge from 10:00 p.m. to 1:30 a.m. The Appeals Court held in Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 301 (1979), the concept of an ownership interest can vary from an absolute proprietary interest to a mere possessory right.

All §12 licensees, such as LECO, were on notice since at least November 2009, that allowing a third party to sell tickets or use other methods of admission (where the price of admission includes any alcoholic beverages), results in its transferring the privileges of its license, or in its transferring a direct or indirect beneficial interest in its license, to a third party. A licensee's obligation to comply with the Liquor Control Act and Commission Regulations cannot be circumvented by using a third party. A licensee must receive prior approval from both the local licensing authority, and the Commission before transferring the privilege of its license, or transferring any type of interest in it. In contravention of the statute, no other individual has been investigated or approved to have control of, or benefit from, this licensed business. See Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass. App. Ct. 768, 771 (1981).

By regulation promulgated at 204 CMR 2.16, the Commission has established compliance obligations for a licensee such as LECO to collect a so-called "cover charge." This regulation provides that:

[t]he posting of a "cover charge" shall be made in accordance with M.G.L.c. 140 §183D. Said "cover charge" shall not be collected in advance of gaining entrance to the licensed premises, and can only be charged upon a written or printed receipt, permanently recorded and numbered seriatim, presented to each individual customer or group of customers. Records of such receipts shall be kept by the licensee for a period not less than two years. For the purposes of 204 CMR 2.00, the term "cover charge" shall include all admission fees or admission charges, except that the sign required to be posted under M.G.L. c. 140 §183D shall, in the case of an admission fee or charge, be posted on the outside of the licensed premises. Nothing in 204 CMR 2.00 shall be construed to prohibit advanced ticket sales by any licensee under M.G.L.c.138, §12.

204 CMR 2.16 (1).

¹ It is not clear to the Commission on the record of this hearing how a corporation with five (5) stockholders had only two (2) directors and complied with the applicable law of corporations.

In this case, there is no evidence that there was compliance with M.G.L.c. 140 §183D. This statute specifies that only a license holder may lawfully charge a "cover charge."² In this case, there is no dispute that the Licensee LECO ceded to an undisclosed and unapproved person the ability to charge and collect so-called "cover charges" when the statute and the regulation authorize this financial transaction to be made only by the Licensee.

Further, among the compliance requirements set out in this regulation, the Commission has mandated that "[n]o minimum charge for the purchase of alcoholic beverages or minimum alcoholic beverage drinking requirement shall be imposed upon any customer of a section twelve licensee." In addition, "[s]aid minimum charge shall not be collected in advance of gaining entrance to licensed premises and can only be charged upon a written or printed receipt permanently recorded and numbered seriatim, presented to each individual customer or group of customers." There is no evidence in this matter that a receipt was provided as required by the regulation.

The Commission is convinced by satisfactory proof and finds that there was a transfer of a direct or indirect beneficial interest in the license without first obtaining written approval from both the Local Board and the Commission, as required by statute. The acts of handing over the admission charges paid at the door of the licensed premises to Mr. Harris, who was not disclosed or approved by both the Local Board and the Commission, and allowing him to benefit from collecting the cash receipts, is a violation of M.G.L. Ch. 138 §15A, a lesser included violation of transferring the license without prior written approval as required by M.G.L. c. 138 §23, paragraph 9.

² M.G.L. c. 140, §183D provides, in pertinent part, that "[n]o inn holder, common victualer or person owning, managing or controlling a cafe, restaurant, or other eating or drinking establishment shall require any person to pay a minimum charge or cover charge unless a sign is conspicuously posted at every entrance to any dining room or rooms where such charge is required, in letters no less than one inch in height, stating that a minimum charge or cover charge shall be charged and also stating the amount of charge."

CONCLUSION

Based on the evidence, the Commission finds the licensee did not violate:

- 1) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (a) offer or deliver any free drinks to any person or group of persons; and
- 2) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (c) sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public.

Based on the evidence, the Commission finds the licensee did violate:

- 3) 204 CMR 4.03 (1) No licensee or employee or agent of a licensee shall: (d) sell, offer to sell or deliver to any person an unlimited number of drinks during any set period of time for a fixed price, except at private functions not open to the public; and
- 4) M.G.L. c. 138, §23 Transfer of the Privilege of a license without proper approval.

This is not the first offense by this Licensee for violating the Commission Regulations at 204 CMR 4.00, et seq. Given the past history of this Licensee in which it was on actual notice since May 2004 of the compliance requirements of this regulation, and the Commission advisory posted for years for all licensees to view on the Commission website, the Commission finds the Licensee's conduct to be a deliberate indifference to the law. This deliberate indifference is an aggravating circumstance for these violations.

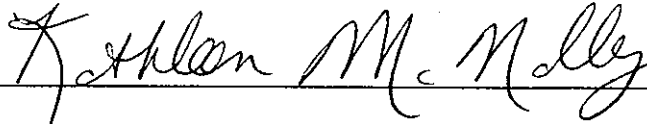
On the first violation therefore, the Commission **suspends the license for a period of twenty (20) days with ten (10) days to be served, and ten (10) days to be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur. If the Licensee commits any violation within this two (2) year period of the ten (10) day suspension being held in abeyance, the Licensee must serve this ten (10) day suspension. The ten (10) day suspension will be served consecutively to any sanction imposed in sub-paragraph 2 below.**

On the second violation, the Commission **suspends the license for a period of twenty (20) days, with ten (10) days to be served and ten (10) days to be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur. . If the Licensee commits any violation within this two (2) year period of the ten (10) day suspension being held in abeyance, the Licensee must serve this ten (10) day suspension.**

In total the Commission will **suspend the license for a period of twenty (20) days to be served, and twenty (20) days to be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur.**


ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Susan Corcoran, Commissioner



Dated: November 28, 2012

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Evan T. Lawson, Esq., via facsimile
The Licensing Board for the City of Boston
Frederick G. Mahony, Chief Investigator
Jamie Binienda, Investigator
Administration
File