



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

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

July 24, 2013

AQUA RESTAURANT CORP. DBA LATITUDE 43
25 ROGERS STREET
GLOUCESTER, MA 01930
LICENSE#: 045000044
VIOLATION DATE: 7/26/2012
HEARD: 11/06/2012

After a hearing on November 6, 2012, the Commission finds Aqua Restaurant Corp. dba Latitude 43 in violation of M.G.L. c. 138, §15A - Failure to disclose all persons who have a beneficial interest in the license.

The Commission **suspends the licensee's license for a total of thirty (30) days to be served. The suspension shall commence on Wednesday, September 11, 2013 and terminate on Thursday, October 10, 2013.** The license will be delivered to the Local Licensing Board or its designee on Wednesday, September 11, 2013 at 9:00 A.M. It will be returned to the licensee Friday, October 11, 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 Licensing Board
Frederick G. Mahony, Chief Investigator
Paul Capurso, Investigator
Stephen Miller, Esq. via Facsimile 617-946-4624
Administration
File



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DECISION

AQUA RESTAURANT CORP. DBA LATITUDE 43
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VIOLATION DATE: 7/26/2012
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Aqua Restaurant Corp. dba Latitude 43 (the "Licensee" or "Aqua") holds a restaurant alcohol license issued pursuant to M.G.L. c. 138, §12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, November 6, 2012, regarding an alleged violation of M.G.L. c. 138, §15A - Failure to disclose all persons who have a beneficial interest in the license, according to Investigator Capurso's Report.

The following documents are in evidence:

Licensee Exhibits

1. Letter dated February 27, 2012 from Attorney Steve Miller (3 pages); and
2. Letter dated August 17, 2012 from Attorney Steve Miller (2 pages) with Attached Employee Agreement (4 pages).

Commission Exhibits

- A. Investigator Capurso's Investigative Report dated July 26, 2012.

The Commission took administrative review of the files: Aqua Restaurant Corp. dba Latitude 43, Gloucester; Serenitee Catering Corp. dba Maggie's Farm, Middleton; Flour n Water Corp, Beverly; Eden Restaurant Corp, Gloucester; and Neighborly Restaurant Group, Inc., Manchester.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

FACTS

1. Aqua Restaurant Corp. is a Massachusetts corporation organized and filed under M.G.L. Chapter 156D on September 7, 2004. (Exhibit A)
2. Mr. Mark McDonough is listed as the President, Treasurer, Secretary, Director, and Sole Stockholder. (Exhibit A)

3. Aqua submitted an application dated November 24, 2004 for the Transfer of a §12 annual all alcoholic beverages, restaurant-type license. (Exhibit A)
4. The Commission approved this transfer application on January 12, 2005. (Exhibit A)
5. The approved license manager is Blake Dreiman. (Exhibit A)
6. On November 3, 2005, the licensee renewed its license for calendar year 2006. The renewal form appears to be signed by Jeffrey Cala, who is not a person authorized under chapter 138, §16A to sign the renewal application for the Licensee.¹ (Exhibit A)
7. The license was renewed for calendar years 2007 – 2008 with the renewal form signed by Mr. McDonough. (Exhibit A)
8. On November 8, 2008, the Licensee renewed its license for calendar year 2009. The renewal form appears to be signed by Jeffrey Cala, who is not a person authorized under chapter 138, § 16A to sign the renewal application for the Licensee. (Exhibit A)
9. The license was renewed for calendar years 2010 – 2011 with the renewal form signed by Mr. McDonough. (Exhibit A)
10. On November 30, 2011, Investigator Capurso conducted an on-site investigation of the premises located at 119 South Main Street, Middleton regarding an application for transfer of license and alteration of premises submitted by Serenitee Catering Corp. dba Maggie's Farm. (Exhibit A)
11. Mr. McDonough was also listed as the sole stockholder of that corporation. (Exhibit A)
12. Jeffrey Cala called Investigator Capurso and identified himself as Mr. McDonough's "silent partner" in Serenitee Catering Corporation, as well as a number of other corporations which hold alcoholic beverages licenses. (Exhibit A, Testimony)
13. As a result, Investigator Capurso began reviewing Mr. McDonough's other corporate licensees. Investigator Capurso informed Mr. Cala that the application he had in front of him listed Mr. Mark McDonough as the sole shareholder and corporate officer. (Exhibit A, Testimony)
14. Investigator Capurso's investigation revealed that:
 - (a) on November 8, 2010, the North Shore Magazine posted an article on its website, www.nshoremag.com regarding Serenitee Restaurant Group. The article describes Mr. Cala as the "corporate chef and managing partner" of the six (6) businesses which it operates;
 - (b) a video from the Eagle Tribune, posted on www.food.eagletribune.com, describes Mr. Cala as the owner/chef; and,
 - (c) an article from the Gloucester Times posted on www.gloucestertimes.com describes Mr. Cala as a co-owner with Mr. McDonough.

¹ This presents the question whether this license was renewed in violation of M.G.L. c. 138, §16A. The Licensee was not charged with this offense. Therefore, the Commission refers this matter back to the Investigative Division through the Commission's chief investigator for the required investigation and prosecution of this issue.

15. Investigator Capurso requested and received additional documentation from Mr. McDonough and Mr. Cala to explain the ownership interest of this license and of the other entities which Mr. McDonough owns.
16. Mr. McDonough also was required to give a definitive description of what Mr. Cala's interest, duties, and responsibilities were relative to this license. (Exhibit A)
17. The documentation revealed the extent of Mr. Cala's operational control of all five (5) licensed premises, and resulted in the investigation of five (5) separate license entities, including Aqua, based upon M.G.L. c. 138, §56. (Exhibit A, Testimony)
18. Investigator Capurso's investigation showed that Mr. Cala was the Vice President of Operations. His job description included hiring and firing staff, menu development, restaurant personnel policies, dealing and negotiating with food and restaurant supply vendors, maintenance of all facilities, developing new concepts for food and marketing, and investigating and administering the building of new restaurants.
19. He is involved in the current five (5) restaurants, as well as the new entity Serenitee Catering Corp., and his annual salary is roughly \$220,000. (Exhibit A, Testimony)
20. Mr. Cala is statutorily disqualified from having any interest in a license pursuant to M.G.L. c. 138, §12. (Exhibit A, Testimony)
21. Mr. McDonough stated he understood that any person who has any direct or indirect beneficial financial interest in a license must be disclosed on the application, and he apologized for whatever statements Mr. Cala had made.
22. At hearing before the Commission, Mr. Mark McDonough testified that he "cured" the defects that existed from the prior operations. (Testimony)
23. In addition, he filed curative documents, redefining and clarifying Mr. Cala's limited role in the establishment.
24. Mr. Cala is a salaried employee only and does not own any part of this restaurant. He is currently in charge of overseeing daily operations. (Testimony)
25. This oversight includes hand-to-hand guidance; strategizing; maintenance of buildings; vendor contacts; vendor pricing negotiations; event planning; specialty events.
26. Mr. Cala also oversees the chefs and sous-chefs at all locations. He is a W2 employee of Serenitee Management Corporation.
27. He has put no money into the formation of Serenitee Management Corporation or any of the restaurants.
28. He has no liability on any the loans or share of any of the profits.
29. Mr. McDonough is in charge of accounting, human resources policies, marketing, IT, systems of customer feedback, capital allocation decision, and the hiring and firing of managers and chefs in consultation with Jeff Cala.

30. There are no agreements, written, verbal, electronic or otherwise, current, promised or expected, that Mr. Cala has with Mark McDonough regarding any interest in this or any other business licensed under M.G.L. chapter 138. (Testimony)
31. As of this time, Mr. Cala has no interest in this business. (Testimony)

DISCUSSION

M.G.L. c. 138, §15A requires that a licensee or applicant for an alcoholic beverages license disclose all individuals who have a direct or indirect beneficial interest in the license. In order for there to be a violation of G.L. c.138, §15A, there has to be a showing that the licensee failed to disclose to the licensing authorities and obtain their prior approval of any and all persons holding a direct or indirect beneficial interest in the license. The concept of a “direct or indirect beneficial interest” in a license can range from an ownership interest to an absolute proprietary interest to a mere possessory right and includes the right of control. Number Three Lounge, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 301 (1979), See In Re: Napoli Beverage, Inc. dba Clippership Tavern, (ABCC Decision dated April 28, 2009). The officers and directors of a corporation constitute the control group of a corporation.

In this case, Mr. Cala told Investigator Capurso that he was an undisclosed owner of the licensed premises. Although this factor creates a serious question regarding an undisclosed beneficial interest in the Commission’s mind, Mr. Cala’s statement alone does not automatically create a violation of the statute. On the license application and corporate documents, Mr. McDonough is the only person who has an interest in Aqua. Mr. Cala is not even the approved license manager. However, a review of Mr. Cala’s involvement in the business, demonstrates that he had operational control of the licensed premises.

Mr. Cala was involved in all aspects of the day-to-day management including hiring and firing, menu development, personnel policies, negotiating with vendors, maintenance of all facilities, developing new concepts, and administering the building of new restaurants. According to Mr. McDonough, Mr. Cala is the “go-to” person whom everyone calls when there are problems and he has keys to all the establishments and all phone numbers of persons who need to be called for emergency or personnel situations. Mr. Cala acts as Mr. McDonough’s operations manager and speaks for ownership in the running of all the restaurants.

The acts of control that Mr. Cala took and regularly exercised created a beneficial interest in this license without the required approval. See Number Three Lounge, Inc., supra. Mr. McDonough handed over control of the licensed premises to Mr. Cala, who was not approved by the Commission. He allowed Mr. Cala to run the business. The acts of hiring and supervising the employees, paying all expenses and collecting the cash receipts vested Mr. Cala with a direct or indirect beneficial interest in the license that was not approved by both the local licensing authorities and the Commission. See Id. This is a violation of M.G.L. Ch. 138 §15A.

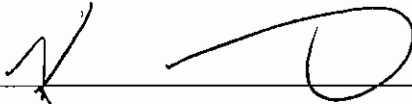
To his credit, Mr. McDonough has taken steps to rectify the situation, which includes executing an employment contract which clearly defines Mr. Cala’s role in the organization. Mr. McDonough has created a corporate structure which illustrates his reclamation of control of the premises. Although Mr. McDonough’s actions mitigate the offense, they do not excuse or justify the misconduct.

CONCLUSION

Based on the evidence, the Commission finds the Licensee violated M.G.L. c. 138, §15A - Failure to disclose all persons who have a beneficial interest in the license, that being the interest of Jeff Cala. Therefore, the Commission **suspends the license for thirty (30) days.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



DATE: July 24, 2013

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: Local Licensing Board
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Paul Capurso, Investigator
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