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**LD HOLDINGS LLC D/B/A BAR 74  
76 MERRIMACK STREET  
LOWELL, MA 01852  
LICENSE#: 03090-RS-0630  
HEARD: 01/23/2019**

**MEMORANDUM AND ORDER  
ON THE CITY OF LOWELL LICENSE COMMISSION'S MOTION TO DISMISS**

LD Holdings, Inc. d/b/a Bar 74 (the "Licensee" or "Bar 74") holds an all alcoholic beverages license issued pursuant to M.G.L. c. 138, § 12 located at 76 Merrimack Street, Lowell, MA 01852.

On October 18, 2018, the Lowell License Commission (the "Local Board" or "Lowell") held a hearing and voted to revoke Bar 74's license. The decision of the Local Board, dated October 24, 2018, was received by the Licensee.

The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was scheduled on the appeal for January 8, 2019. On December 31, 2018, while the revocation appeal hearing was pending, the Local Board filed a Motion to Dismiss the Licensee's appeal for the Licensee's failure to timely renew its § 12 license pursuant to c. 138, § 16A.

The Commission scheduled a hearing on the Local Board's Motion for Wednesday, January 23, 2019. The Commission held a hearing on the Local Board's motion to dismiss. The Local Board and the Licensee appeared. The Local Board filed 13 exhibits (Exhibits 1 – 13) and the Licensee filed 43 Exhibits (Exhibits A – QQ, 42 exhibits on a CD Rom, and one paper exhibit). At the close of the hearing, the Record was left open until Friday, February 1, 2019 for the Local Board to file an additional document. The Local Board did not submit any additional documents. The record is now closed.

There is one (1) audio recording of this hearing and two (2) witnesses (Local Board's Executive Secretary, Mr. Ryan Wynn, and Ms. Lauren DiSalvo, principal of the Licensee) testified. The Commission took administrative notice of the Licensee's Commission file.

During the Commission hearing regarding the motion, the Local Board admitted that it intentionally did not mail the Licensee its 2019 renewal form.<sup>1</sup>

The principal of the Licensee mailed a 2019 Renewal form to the Local Board on November 11, 2018.<sup>2</sup>

### STANDARD FOR MOTION TO DISMISS

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007). As a result, the non-moving party must plead enough factors to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. Id. at 545. The Massachusetts Supreme Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all of the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008)<sup>3</sup>.

This Commission operates pursuant to the Informal Fair Hearing Rules, which are silent regarding a Motion to Dismiss. See 801 CMR 1.02. Therefore, the Commission turns to the Standard Adjudicatory Rules of Practice and Procedure, ("Formal Fair Hearing Rules") for the legal standard to be applied in a motion to dismiss. See 801 CMR 1.00.

Pursuant to Rule 801 CMR section 1.01(7)(g)(3), the Commission may dismiss an appeal for lack of jurisdiction or where the appeal fails to state a claim upon which relief can be granted. See Rule 801CMR section 1.01(7)(g)(3).

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<sup>1</sup> Local Board Executive Secretary, Mr. Ryan Wynn, testified that he was advised by the City of Lowell Law Department not to mail the 2019 renewal form to Bar 74. This was the first time ever in his 38 years as Executive Secretary that this has occurred. (Testimony)

<sup>2</sup> The principal of the Licensee, Lauren DiSalvo, copied her 2018 renewal form, changed the date to 2019, and mailed this renewal form with a business check to the Local Board. (Testimony, Exhibits 13, QQ)

<sup>3</sup> The Massachusetts Supreme Judicial Court in the Iannacchino decision retired the language and prior legal standard governing motions to dismiss for failure to state a claim articulated in the case of Conley v. Gibson. Conley v Gibson, 355 U.S. 41, 45-46 (1957); Iannacchino v. Ford Motor Co. 451 Mass. 623, 636 (2008). The Massachusetts Supreme Judicial Court adopted the language in the U.S. Supreme Court case of Bell Atl. Corp v. Twombly. Bell Atl. Corp v. Twombly, 550 U.S. 544, 547 (2007). The prior standard applied by the Commission in a motion to dismiss regarding ABCC cases was the legal standard articulated in Conley v. Gibson. Conley v Gibson, 355 U.S. 41, 45-46 (1957). See Tavern on the Square, Inc. (ABCC Decision August 30, 2000); Classic Wine Imports, Inc. v. Rosemount Estates, Inc. and Carolina Wine, Co. (ABCC Decision January 20, 2000).

Motions to Dismiss <sup>4</sup>are decided under the well-recognized standards for summary disposition.<sup>5</sup>

### DISCUSSION

All licenses and permits issued pursuant to Chapter 138 expire on December thirty-first each year. M.G.L. c. 138, § 23. As a result, all such licensees and permittees are required to renew their licenses at the end of every calendar year. Retail licensees possess the prima facie right to renew the license every November: “The holder of an annual license under section twelve or fifteen who applies during the month of November in any licensing period for a license of the same class for the next succeeding licensing period . . . shall be prima facie entitled thereto . . .” M.G.L. c. 138, § 16A.

The implication of § 16A is that the continuing right to exercise the privileges of the license in the succeeding year are predicated on renewing the license for the succeeding year. This reading of § 16A is substantiated by M.G.L. c. 30A, the state’s Administrative Procedure Act. Chapter 30A prohibits the Commission from revoking or refusing to renew a license “unless it has first afforded the licensee an opportunity for [an adjudicatory hearing]. If a licensee has, in accordance with any law and with agency regulations, made timely and sufficient application for a renewal, his license shall not expire until his application has been finally determined by the agency.” M.G.L. c. 30A, § 13. Indeed, the Supreme Judicial Court has already squarely determined that a Licensee’s appeal becomes moot when the Licensee fails to renew its license. Zelman v. Alcoholic Beverages Control Comm’n, 335 Mass. 515 (1957).

Section 16A therefore makes the prima facie right of renewal for a succeeding year of a license under § 12 dependent upon application in November of the current year. “Except for an application in November the current license terminates at the year end and the licensee . . . stands the same as do applicants who are applying for the first time.” Id. at 520.

The Local Board admitted that it intentionally did not mail Bar 74’s 2019 renewal form to the Licensee. The Principal of the Licensee, having not received Bar 74’s 2019 renewal form, printed her own 2019 renewal form and mailed it to the Local Board on November 11, 2018, which constituted an application filed within the statutory time period for automatic renewal pursuant to c. 138, sec. 16A.

The Commission is guided by a recent Superior Court decision Arslan, Inc. d/b/a Village Dairy v. Town of Grafton and Alcoholic Beverages Control Commission (“Arslan”). Arslan, Inc. d/b/a Village Dairy v. Town of Grafton and ABCC, 1785CV01011, (August 28, 2018). Arslan is a case involving a lengthy and complicated procedural history which included a license revocation and the non-renewal of an annual retail license. Id. The Superior Court originally denied the local board’s M.G.L. c. 30A appeal and upheld the ABCC’s decision reinstating Arslan’s retail package

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<sup>4</sup> The standard, as a matter of law, states, “viewing the evidence in the light most favorable to the non-moving party,” the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case.” See e.g., Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 550 n. 6 (2008); Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 249 - 250 (2008).

<sup>5</sup>This standard is similar to Massachusetts Civil Procedure Rule 12(b)(6). See Schaer v. Brandeis University, 432 Mass. 474, 477 - 478 (2000).

store license. Id. Despite the Court's order to reinstate and renew Arslan's license, "the Grafton Local Board mailed renewal applications to all licensees operating within its jurisdiction, except to Arslan." Id. The Court held that the local board of Grafton engaged in a "willful thwarting of the renewal process" for Arslan and ordered the local board to reinstate and renew Arslan's license. Id.

The Commission finds, in "viewing the evidence in the light most favorable to the non-moving party," and viewing the non-moving party's factual allegations (Testimony, Exhibits 13, QQ) "on the assumption that all of the allegations in the appeal are true, even if doubtful in fact" the Commission determines that the Licensee timely mailed its 2019 renewal form to the Local Board on November 11, 2018, which constituted an application, in compliance with M.G.L. c. 138 § 16A. See Iannacchino v. Ford Motor Co. 451 Mass. 623, 636 (2008); Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 550 n. 6 (2008); Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 249 – 250 (2008).

The Commission is persuaded and finds, consistent with the holding in Arslan, that the Local Board "willfully thwarted" the renewal process of Bar 74. Arslan, Inc. d/b/a Village Dairy v. Town of Grafton and ABCC, 1785CV01011, (August 28, 2018). Therefore, the Commission denies the Licensing Commission of Lowell's Motion to Dismiss the appeal of LD Holdings, LLC d/b/a Bar 74.

#### CONCLUSION

The Alcoholic Beverages Control Commission **DENIES** the Licensing Commission of Lowell's Motion to Dismiss the Appeal of LD Holdings, LLC d/b/a Bar 74. LD Holdings, LLC d/b/a Bar 74's appeal of the Local Board's decision of revocation shall remain on the docket for an appeal hearing before the ABCC.

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

Kathleen McNally, Commissioner



Elizabeth Lashway, Commissioner



Dated: February 12, 2019

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cc: Gary Gordon, Esq. via facsimile 978-453-1510  
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