

*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chair

DECISION

**JOHNSON BROTHERS OF MASSACHUSETTS, INC.
305 FORBES BOULEVARD
MANSFIELD, MA 02048
LICENSE#: WA-LIC-000376
VIOLATION DATE: Various in 2018
HEARD: 8/01/2019**

Johnson Brothers of Massachusetts, Inc. ("Johnson Bros." or "JBM") holds a wholesaler's and importer's all alcoholic beverages license issued pursuant to M.G.L. c. 138, § 18. The Alcoholic Beverages Control Commission ("Commission" or "ABCC") held a hearing on Thursday, August 1, 2019 regarding alleged violations of:

- 1) M.G.L. Ch. 138, § 18 In order to ensure the necessary control of traffic in alcoholic beverages for the preservation of the public peace and order, the shipment of such beverages into the commonwealth, except as provided in this section and section 19F, is hereby prohibited;
- 2) M.G.L. Ch. 138, § 18B No person who holds a certificate under this section shall hold or be granted a license under section 18;
- 3) M.G.L. Ch. 138, § 23 Transfer of the privilege of a license without proper approval;
- 4) M.G.L. Ch. 138, § 77 The licensing authorities may, after hearing or reasonable opportunity therefor, cancel any license issued under this chapter if the licensee ceases to conduct the licensed business; and
- 5) M.G.L. Ch. 138, § 18 All alcoholic beverages, wines and malt beverages purchased by any licensee under this section, and all alcoholic beverages, wines and malt beverages shipped into the commonwealth pursuant to any such purchase, shall be warehoused at the warehouse facilities of such licensee and held in his physical possession at such warehouse prior to reshipment to persons holding licenses under section 12 or section 15.

The above violations are alleged to have occurred on various dates in 2018.

Prior to the commencement of the hearing, the Johnson Bros. stipulated to the facts alleged in Investigator Velez's Report.

The following documents are in evidence:

1. Investigator Velez's report;
2. Johnson Brothers of Massachusetts, Inc. ("JBM") 2019 wholesaler license pursuant to M.G.L. Chapter 138, § 18;
3. Johnson Brothers of Massachusetts, Inc. wholesaler application received 2012;
4. Johnson Brothers of Massachusetts, Inc. application approval by ABCC;
5. Minnesota Department of Public Safety Alcohol and Gambling Department ("MDPSAG") license file of Johnson Brothers Liquor Company ("JBLC");
6. United States Distilled Products Company ("USDPC") 2019 Certificate of Compliance license pursuant to M.G.L. Chapter 138, § 18B;
7. USDPC ownership information provided by its Vice President, Patricia Pelzer;
8. Deutsch Family Wine & Spirits ("Deutsch Family") 2019 Certificate of Compliance license pursuant to M.G.L. Chapter 138, § 18B;
9. Milton's Distributing Company, Inc. ("Milton's") 2019 Certificate of Compliance license pursuant to M.G.L. Chapter 138, § 18;
10. Gordon Logistics, LLC ("Gordon") 2019 transportation permit pursuant to M.G.L. Chapter 138, § 22;
11. Massachusetts Fine Wine & More, LLC d/b/a Total Wines (Natick) ("Total Wines") retail package store license pursuant to M.G.L Chapter 138, § 15;
12. Minnesota Department of Public Safety Alcohol and Gambling Department license file of United States Distilled Products Company ("USDPC");
13. Joe Souba's email correspondence on behalf of Doug McIntosh to ABCC, 6/25/2018;
14. Purchase orders from Total Wines;
15. Purchase orders from Deutsch Family;
16. Invoices from Deutsch Family;
17. Invoices from Total Wines;
18. Payments from Deutsch Family;
19. Joint Stipulation of Facts; and
20. Michael Johnson's letter Re: JBM's Voluntary Surrender of License, 7/2/2019.

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

STIPULATED FACTS

1. Johnson Brothers of Massachusetts, Inc. ("Johnson Bros." or "JBM") holds a wholesaler's and importer's all alcoholic beverages license issued pursuant to M.G.L. c. 138, § 18. (Exhibit 1; Testimony)
2. JBM is a Massachusetts corporation with a place of business at 305 Forbes Blvd., Mansfield, Massachusetts. Its officers are:

- a. Michael H. Johnson – President, Director, and 50% stockholder;
 - b. Todd W. Johnson – Vice President and 50% stockholder;
 - c. Kevin Loegering – Treasurer;
 - d. Keith Miranda and Roy T. Coleman – Directors. See id.
3. Commission records indicate the license was approved on October 10, 2012. The manager of record is Michael Johnson. Johnson is a resident of Minnesota. See id.
4. Johnson Brothers Liquor Company (“JBLC”) is a wholesaler of alcoholic beverages licensed by the State of Minnesota with a place of business at 199 Shepard Road, St. Paul, Minnesota. JBLC currently does business in 24 states of the USA. See id.
5. Minnesota Department of Public Safety Alcohol and Gambling Department (“MDPSAG”) files indicate that JBLC has the following officers and directors:
 - a. Michael H. Johnson, CEO and Director, 41% stockholder;
 - b. Todd W. Johnson, COO, Director, Secretary, 41% stockholder;
 - c. Scott L. Belsaas, President and Director;
 - d. Douglas William McIntosh, Executive Vice President;
 - e. Kevin C. Loegering, CFO
 - f. William C. Anderson, Vice President; and
 - g. 1997 Irrevocable Trust of Lynn Johnson, 18% stockholder. See id.
6. United States Distilled Products Company (“USDPC”) is a Certificate of Compliance holder licensed by this Commission under M.G.L. c. 138, § 18B, with a usual place of business at 1607 12th Street, South Princeton, Minnesota. USDPC is a supplier doing business with JBM. USDPC has the following officers and directors:
 - a. Bradley Paul Johnson, Director and Officer;
 - b. Steven Murray, Director;
 - c. Shawn O’Grady, Director;
 - d. Keith A. Woodward, Director;
 - e. Michael J. Duggan, Officer;
 - f. Brian D. Kholbeck, Officer;
 - g. Scott T. King, Officer;
 - h. Patricia S. Pelzer, Officer. See id.
7. USDPC’s stock ownership is held by: 2004 Revocable Trust of Bradley P. Johnson – 50%; Bradley P. Johnson Grantor Retained Annuity Trust I – 25%; Jill D. Johnson Grantor Retained Annuity Trust I – 25%. See id.
8. Deutsch Family Wine & Spirits (“Deutsch Family”) is a Certificate of Compliance holder licensed by this Commission under M.G.L. c. 138, § 18B, with a usual place of business at 201 Tresser Boulevard, Stamford, Connecticut. See id.
9. Milton’s Distributing Company, Inc. (“Milton’s”) holds a wholesaler’s and importer’s all alcoholic beverages license issued pursuant to M.G.L. c. 138, § 18 with a usual place of business at 305 Forbes Blvd., Mansfield, Massachusetts. See id.

10. Gordon Logistics, LLC (“Gordon”) holds a transportation and delivery permit issued pursuant to M.G.L. c. 138, § 22, with a usual place of business at 305 Forbes Blvd., Mansfield, Massachusetts. See id.
11. Massachusetts Fine Wine & More, LLC d/b/a Total Wines & More (“Total Wines”) holds retail package-store all alcoholic beverages licenses issued pursuant to M.G.L. c. 138, § 15. Total Wines has locations in Danvers, Everett, Natick, and Shrewsbury. See id.
12. On Wednesday, June 13, 2018, Investigators Binienda and Velez entered the licensed premises of JBM and Milton’s located at 305 Forbes Blvd., Mansfield, MA. See id.
13. Investigators spoke to Hope Crowley, the Director of Compliance and Vendor Management for Milton’s. Ms. Crowley stated to Investigators that JBM has no office space, no desk, nor any employees at this location. Crowley further stated that no JBM product is currently stored on the licensed premises. Crowley told Investigators that Gordon Logistics, LLC (“Gordon”) provides all transportation logistics for JBM. See id.
14. Crowley explained to Investigators that all administrative work, such as generating invoices, is conducted at the corporate headquarters in Minnesota. She provided Investigators with contact information for Doug McIntosh, Executive Vice President of Johnson Brothers Liquor Company (“JBLC”). See id.
15. Later that same day, on June 13th, Investigator Velez spoke to Doug McIntosh by telephone. McIntosh confirmed that no invoicing for JBM was conducted at the Mansfield premises as all invoicing is done at the JBLC’s corporate office in Minnesota. McIntosh further stated that no JBM product is stored at Milton’s warehouse as JBM does not want to pay the storage fee. See id.
16. McIntosh stated that all invoices are sent electronically from Minnesota to Milton’s office where JBM has a desk and a file cabinet. Milton’s places the invoices in the file cabinet. See id.
17. On Thursday, June 14, 2018, Investigators Kenny and Velez entered the licensed premises for JBM, 305 Forbes Blvd, Mansfield. No JBM representative was present to answer any questions. See id.
18. On Wednesday, June 20, 2018, Investigators Carey and Velez entered 305 Forbes Blvd., the premises for JBM. No JBM representative was present to answer any questions. Investigators spoke to Melissa Gordon, President of Milton’s; Hope Crowley, and Mathew Webster, the general manager for the warehouse. They provided information to Investigators that JBM representatives were only at this location a few times per year. See id.
19. Webster stated that he has a file cabinet in his office where he places the JBM purchase orders received via email from Minnesota. Webster told Investigators that when a truck containing JBM product arrives at the premises, it almost never enters the warehouse unless due to extreme weather conditions. He said the seal on the truck is never broken until the product is delivered to the retailer. See id.

20. On June 25, 2018, Investigator Velez conducted a telephone interview with JBLC's Vice-President, Doug McIntosh. Mr. McIntosh confirmed that USDPC is owned by Bradley Johnson who is the brother of both Michael Johnson and Todd Johnson, owners of both JBM and JBLC. See id.
21. By email dated June 25, 2018, McIntosh stated to Investigator Velez that in previous years JBM had purchased alcoholic beverages directly from USDPC but that practice changed in the past year. Now USDPC sells alcoholic beverages directly to Deutsch Family. Then Deutsch Family in turns sells product to JBM. McIntosh said this arrangement between the two suppliers was the best way to get product to the market. See id.
22. On Thursday, July 16, 2018, Investigator Velez conducted another telephone interview with Doug McIntosh. McIntosh informed Velez that JBM has no payroll, no employees, and no bank account. McIntosh stated that JBLC has a cooperate account with US Bank in Minnesota where funds are maintained for JBM. See id.
23. Investigator Velez reviewed purchase orders, invoices and other documents provided to him by JBM. See id.
24. Purchase orders ("POs") from Total Wines were submitted via email from Total's headquarters in Bethesda, Maryland to JBLC's Minnesota headquarters. Pos had markings: on the Wholesaler copy – Sell-through order; Store destination – Total; Wholesaler destination – Johnson Br-MA-WD Blue and Origin – Deutsch. See id.
25. The purchase orders indicated the wholesaler's purchase cost and selling cost as well as the difference. A review of these cost differences indicated a wholesale mark-up of approximately 4%. See id.
26. JBLC then created purchase orders which were forwarded to Deutsch Family by the customer service team at JBLC. See id.
27. Deutsch Family prepared the alcoholic beverages for shipment. Gordon's sent a truck to Deutsch Family at Western Carriers to pick up the alcohol. Gordon's transported the alcoholic beverages to JBM's Mansfield address, and then on to the retailer. See id.
28. Invoices from Deutsch Family were sent to JBLC headquarters in Minnesota. Invoices were marked: Sell To: Johnson Brothers, Susan Wilder at 1999 Shephard Road in St. Paul, MN with a Ship To: Johnson Brothers – MA, Susan Wilder at 305 Forbes Blvd. in Mansfield, MA. See id.
29. Invoices to Total Wines were created at the JBLC office in Minnesota and then emailed to Total Wines corporate headquarters in Bethesda, Maryland. The invoices had markings: Johnson Brothers Liq. Co. of MA with the Mansfield, MA address but telephone and facsimile numbers were of the JBLC office in Minnesota. See id.
30. Payments made to Deutsch Family originated from the JBLC Demand Deposit Account ("DDA") at the US Bank Minnesota. Funds were transferred using an Electronic Funds Transfer ("EFT") account which JBLC has set up for each JBLC state wholesaler. The DDA is controlled by JBLC headquarters in Minnesota. Deutsch Family then submitted a

debit to the fund for payment. Payments from Total Wines are made via electronic transfer to a JBLC bank account. See id.

31. By way of letter addressed to ABCC Executive Director Ralph Sacramone on July 2, 2019, JBM returned to the ABCC its wholesaler's and importer's license issued pursuant to M.G.L. c. 138, § 18. In the letter, JBM informed the ABCC that it had ceased operations in Massachusetts and would not seek a license for the remainder of 2019

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in Massachusetts General Laws, Chapter 138.

Chapter 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted ... to serve the public need and ... to protect the common good." M.G.L. c. 138, § 23. "[T]he purpose of discipline is not retribution, but the protection of the public." Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given "comprehensive powers of supervision over licensees." Connolly, 334 Mass. at 617.

Every violation the Commission finds must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 528 (1988). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc. v. Comm'r of Ins., 420 Mass 707, 710 (1995).

Here, faced with charges that it violated numerous sections of the Massachusetts General Laws, one of which if found by the Commission would have resulted in the revocation of not only JBM's license but arguably also that of USDPC¹, and in an effort to evade discipline, JBM ceased doing business and surrendered its license. By letter dated July 2, 2019, JBM relinquished its § 18 wholesaler's/importer's license to the ABCC and informed the Commission that it no longer operated in Massachusetts and would not seek a license for the remainder of 2019. In said letter, JBM expressly waived "...its rights to possess or operate pursuant to the license, including but not necessarily limited to any right to reinstate, recover, hold or renew the license during the remainder of 2019." (Exhibit 20)

JBM signed a Stipulation of Facts and given that, along with the evidence presented at the Commission hearing, the Commission is persuaded that JBM was in violation of M.G.L. Ch. 138 §§ 18 and 18B on various dates in 2018 as cited in the Investigator's Report.

¹ Under M.G.L. Ch. 138 § 18B, "[v]iolation of the provisions of this section shall be cause for the revocation of all certificates and licenses held by the certificate holder and his immediate family."

The ABCC has jurisdiction to penalize only Chapter 138 licensees. Section 23 provides that whenever the Commission determines that a Chapter 138 licensee, "fails to maintain compliance with the requirements of this chapter, . . . [the Commission] may, after hearing or opportunity therefor, modify, suspend, revoke or cancel such license or permit." M.G.L. c. 138, § 23. There is nothing in the statute that allows for the Commission to penalize non-licensees. Here the Commission's hands are tied. Where JBM is no longer a § 18 licensee, the Commission has no jurisdiction over it.

Furthermore, putting aside the jurisdiction issue, the Commission, having found JBM violated §§ 18 and 18B, has no way to penalize JBM. The Commission only has the authority to "modify, suspend, revoke or cancel" licenses. See M.G.L. c. 138, § 23. Without a license, JBM has no license to modify, suspend, revoke or cancel.

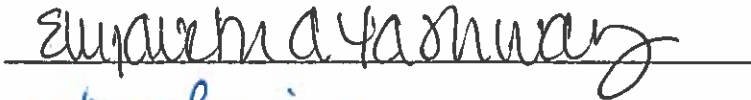
The Commission takes this opportunity to warn licensees that the stipulated facts in this case are egregious and would have led to the statutorily required revocation of the license of JBM and arguably the certificate of USDPC, but the Commission is without authority to proceed in this matter.

CONCLUSION

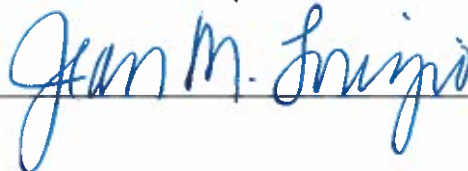
Based on the evidence, the Commission finds a violation but has no jurisdiction to issue any sanctions.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Jean M. Lorizio, Chairman



Dated: October 4, 2019

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.

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