



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

January 18, 2017

**MASSACHUSETTS FINE WINES & SPIRITS
D/B/A TOTAL WINE & MORE
321 SPEEN STREET
NATICK, MA 01760
VIOLATION DATE: 5/1/2016-6/30/16
HEARD: 12/7/2016**

After a hearing on December 7, 2016, the Commission finds Massachusetts Fine Wines & Spirits d/b/a Total Wine & More violated 204 CMR 2.04 (1): "No holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage."

Therefore the Commission suspends the license for a period of eleven (11) days of which three (3) days will be served, and eight (8) days will be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur. This suspension shall run concurrently with the suspension issued in the Commission's decision of this date for the violation occurring in November and December 2015.

The suspension shall commence on Wednesday, March 22, 2017 and terminate on Friday, March 24, 2017. The license will be delivered to the Local Licensing Board or its designee on Wednesday, March 22, 2017 at 9:00 A.M. It will be returned to the licensee on Saturday, March 25, 2017.

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 which must be signed by the Licensee and 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

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cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Rose Bailey, Investigator
Thomas R. Kiley, Esq. via facsimile 617-330-8774
Administration, File



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DECISION

MASSACHUSETTS FINE WINES & SPIRITS
D/B/A TOTAL WINE & MORE
321 SPEEN STREET
NATICK, MA 01760
VIOLATION DATE: 5/1/2016-6/30/16
HEARD: 12/7/2016

Massachusetts Fine Wines & Spirits d/b/a Total Wine & More (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, § 15. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Wednesday, December 7, 2016, regarding an alleged violation, occurring during the months of May and June 2016, of 204 CMR 2.04 (1): "No holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage."

The following documents are in evidence:

1. Investigative Report;
 2. Cost Detail by Invoice Spreadsheet;
 3. Spreadsheet and Invoices from Horizon and Martignetti;
-
- A. Licensee's Hearing Memorandum;
 - B. Natick #2 Invoice/Pricing Package; and
 - C. Email from Dave Brennan with attached photographs.

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

The Commission took Administrative Notice of the Licensee's record. The parties requested that their legal arguments and the evidence presented at the other two similar violation hearings of December 7, 2016 involving the Licensee be considered by the Commission in its determination of the instant violation. The Commission granted that request and has taken Administrative Notice of them.

FINDINGS OF FACT

1. During the months of May and June 2016, the Commission received multiple complaints that the Licensee was selling specific alcoholic beverages at a price less than invoiced cost. The subject alcoholic beverages were: Smirnoff 1.75 liter, Bacardi 1.75 liter, Dewars 1.75 liter, Skyy Vodka 1.75 liter, New Amsterdam 1.75 liter, Captain Morgan 1.75 liter and Absolut Vodka 1.75 liter. (Exhibit 1; Testimony)
2. Commission Investigator Rosemary Egan-Bailey, who was assigned to this matter, contacted the Licensee's attorney Trish Farnsworth and requested invoices for the months of May and June 2016 from all wholesalers in which the specific alcoholic beverages had been purchased as well as the cost sold at retail for the same. (Exhibit 1; Testimony)
3. Investigator Bailey received the requested information, namely invoices from the Horizon Beverage Company and the Martignetti Companies. (Exhibit 1; Testimony)
4. The invoices and other documentation reflect the following. (Exhibits 1-3; Testimony)
 - a. For Smirnoff 1.75 liter, Wholesaler Martignetti Companies:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
6/1/16	094660750	80	\$119.96	\$19.99	\$19.79	\$16.99
6/29/16	094707016	80	\$119.96	\$19.99	\$19.79	\$16.99

- b. For Bacardi 1.75 liter, Wholesaler Horizon Beverage Company:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
5/11/16	273644	60	119.94	\$19.99	\$19.79	\$17.99
5/17/16	276854	60	119.94	\$19.99	\$19.79	\$17.99
6/24/16	304178	60	119.94	\$19.99	\$19.79	\$17.99

- c. For Dewars 1.75 liter, Wholesaler Horizon Beverage Company:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
5/27/16	285362	45	\$179.94	\$29.99	\$29.69	\$27.99
6/24/16	304178	45	\$179.94	\$29.99	\$29.69	\$27.99

- d. For Skyy Vodka 1.75 liter, Wholesaler Horizon Beverage Company:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
5/11/16	273644	55	\$110.94	\$18.49	\$18.31	\$16.99
5/13/16	275764	1	\$110.94	\$18.49	\$18.31	\$16.99
6/2/16	288681	48	\$110.94	\$18.49	\$18.31	\$16.99
6/24/16	304178	48	\$110.94	\$18.49	\$18.31	\$16.99

- e. For New Amsterdam Vodka 1.75 liter, Wholesaler Martignetti Companies:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
5/6/16	012731403	5	\$107.94	\$17.99	\$17.81	\$13.99
6/22/16	012785686	80	\$107.94	\$17.99	\$17.81	\$13.99

- f. For Captain Morgan's Spiced Rum 1.75 liter, Wholesaler Martignetti Companies:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
5/4/16	094617315	71	\$126.55	\$21.09	\$20.88	\$19.99
5/25/16	094651389	72	\$126.55	\$21.09	\$20.88	\$19.99
6/8/16	094673481	69	\$126.55	\$21.09	\$20.88	\$19.99

- g. For Absolut Vodka 1.75 liter, Wholesaler Martignetti Companies:

Date	Invoice #	# of cases	\$/case	\$/bottle	Prompt payment discount 1%	Retail price
5/11/16	094630311	45	\$155.94	\$25.99	\$25.73	\$24.99
6/24/16	094101010	68	\$155.94	\$25.99	\$25.73	\$24.99

5. After the wholesalers delivered the products to the Licensee, the wholesalers issued the Licensee credit adjustments based on case accumulation discounts they offered.

(Testimony; Exhibits 1, 2, B) For instance, on June 28, 2016, Horizon Beverage Company issued a credit adjustment to the Licensee of \$5,520 for Bacardi 1.75 liter and \$3,852 for Dewars 1.75 liter. (Exhibit B) On July 28, 2016, Horizon Beverage Company issued Licensee a credit adjustment of \$1,345.50 for Skyy Vodka. (Exhibit B)

6. The Licensee applied the case accumulation discounts to the retail prices before the suppliers sent the Licensee the credit adjustment invoices. (Testimony; Exhibits 1, B)
7. The Licensee is invoiced at the time of purchase, and payment by the Licensee to the supplier occurs at the time of delivery. (Testimony) However, the supplier does not invoice any accumulation discounts to the Licensee until sometime after the Licensee receives the product. (Testimony) The Licensee has no control over when the supplier will issue the accumulation discount. (Testimony)
8. It is standard practice in the industry for retailers to not take credit adjustments until after they have received the invoice reflecting the credit adjustment. (Testimony)

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 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) (emphasis supplied). 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). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The Licensee is charged with a violation of 204 CMR 2.04 (1), which provides that “[n]o holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage. Use of any device, promotion or scheme which results in the sale of alcoholic beverages at less than invoiced cost is prohibited.”

The Licensee argues that it did not violate the regulation because the subsequently issued invoices reflecting the accumulated discounts relate back to and are inextricably intertwined with the initial invoices. (Exhibit A) The Licensee urges that it earned each of its discounts by purchasing the

required number of cases before setting its retail price and before offering the products for sale to consumers. (Exhibit A) However, the regulation does not speak to discounts earned or invoices relating back to original invoices. Instead, the regulation focuses on the “invoiced cost” and the “net cost appearing on the invoice.” 204 CMR 2.04 (1).

The Commission interprets “invoiced cost” in the regulation to be the actual cost to the § 15 retailer of the alcoholic beverages as printed on the invoice issued by a supplier to the § 15 retailer at the time of purchase of the alcoholic beverages. It follows that any offers that do not appear on the invoice issued for the alcoholic beverages being purchased cannot be used in calculating the invoiced cost.

The Commission has considered the Licensee’s other arguments, including those detailed in its legal memorandum marked as Exhibit A, and finds them unconvincing. For instance, in considering the subject regulation, the Commission will not look to former, unrelated regulations that were invalidated. Likewise, focusing on the price discrimination statute, M.G.L. c. 138, § 25, is inapposite here. Furthermore, the Commission is unpersuaded that it should look to contract law between the Licensee and the supplier and consider when the Licensee earned the cumulative discount. Moreover, 204 CMR 2.04 (1) is wholly enforceable and does not violate the Sherman Act. Finally, the Commission’s enforcement of 204 CMR 2.04 (1) as articulated in this decision does not violate the Licensee’s due process rights.

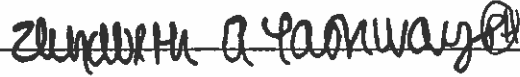
For all of the subject products, namely Smirnoff 1.75 liter, Bacardi 1.75 liter, Dewars 1.75 liter, Skyy Vodka 1.75 liter, New Amsterdam 1.75 liter, Captain Morgan 1.75 liter and Absolut Vodka 1.75 liter, the Licensee sold the bottles at prices less than the costs appearing on the original invoices before the wholesalers issued subsequent invoices reflecting credit adjustments.

CONCLUSION

Based on the evidence, the Commission finds the Licensee violated 204 CMR 2.04 (1): “No holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage.” Therefore the Commission **suspends the license for a period of eleven (11) days of which three (3) days will be served, and eight (8) days will be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur. This suspension shall run concurrently with the suspension issued in the Commission’s decision of this date for the violation occurring in November and December 2015. See In re: Massachusetts Fine Wines & Spirits d/b/a Total Wine & More, Natick (ABCC decision dated January 18, 2017 for violation of 204 CMR 2.04 (1), violation dates 11/1/15-12/31/15).**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: January 18, 2017

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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