



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

**Jean M. Lorizio, Esq.**  
*Chairman*

**NIGHT SHIFT DISTRIBUTING, LLC,**  
**Petitioner,**  
v.

**LOVERBOY INC.,**  
**Respondent.**

**COMMISSION MEMORANDUM AND ORDER**

The Alcoholic Beverages Control Commission (“Commission”) has before it a matter of first impression involving the interplay of M.G.L. c. 138, § 25E, and newly enacted M.G.L. c. 138, § 25E ½. Loverboy Inc. has terminated its malt beverage distributorship agreement it had with Night Shift Distributing, LLC. Night Shift, in response, has filed purported petitions with the Commission under both § 25E and § 25E ½ requesting the Commission either rule on the matter under § 25E or order the parties into binding arbitration under § 25E ½.

**PROCEDURAL & FACTUAL BACKGROUND**

Night Shift Distributing, LLC (“Night Shift”) is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18, aggrieved at the refusal of Loverboy Inc. (“Loverboy”), a Massachusetts farmer-brewery licensed under M.G.L. c. 138, § 19C, to ship to Night Shift all of its malt beverage brand items. The parties had entered into a distributorship agreement on October 11, 2019, for Loverboy to sell its malt beverage brand items to Night Shift. Loverboy provided notice of termination of the agreement on December 1, 2020, with an effective date of January 3, 2021.

On January 12, 2021, M.G.L. c. 138, § 25E ½ (“§ 25E ½”) became law. See Acts of 2020, c. 324.

The following day, on January 13, 2021, Night Shift filed a Petition pursuant to M.G.L. c. 138, §25E (“§ 25E”) against Loverboy.

One week later, on January 21, 2021, Night Shift filed an “Amended Petition for Relief from Supplier’s Refusal to Sell Brands (G.L. c. 138, § 25E, § 25E 1/2)” (“First Amended Petition”). In this First Amended Petition, Night Shift requested relief under not just M.G.L. c. 138, § 25E, but also § 25E ½.

Loverboy filed a Motion to Dismiss both Night Shift's Petition and First Amended Petition on February 16, 2021.

Night Shift filed a Second Amended Petition for Relief Pursuant to G.L. c. 138, § 25E and § 25E ½ ("Second Amended Petition") on March 1, 2021. Loverboy responded by filing a Motion to Dismiss the Second Amended Petition on March 15, 2021 ("Second Motion to Dismiss").

Loverboy filed a Motion for Expedited Decision of Respondent's Motions to Dismiss ("Motion for Expedited Decision") on March 17, 2021, which Night Shift opposed on March 23, 2021, and to which Loverboy filed a reply on March 26, 2021.

On March 23, 2021, Night Shift filed an Opposition to Loverboy Inc.'s Motion to Dismiss and Cross-Motion to Compel Arbitration Under G.L. c. 138 § 25E ½ ("Opposition").

### DISCUSSION

While there are several motions before the Commission in this matter, they all boil down to whether Night Shift may seek relief under M.G.L. c. 138, § 25E, for Loverboy's refusal to sell its brand items to Night Shift, or whether § 25E ½ controls.<sup>1</sup>

Traditionally, if a manufacturer seeks to terminate a distributorship agreement after making regular sales to a wholesaler for at least six months, the manufacturer must establish "good cause" under § 25E for the termination. Any disputes arising from the termination of a distributorship agreement are resolved by the Commission.

On January 12, 2021, the Massachusetts Legislature enacted M.G.L. c. 138, § 25E ½. This statute carves out an exception from § 25E for "brewers." It permits brewers to terminate a distributorship agreement "without good cause." M.G.L. c. 138, § 25E ½ (b).

Any brewer that seeks to terminate a distributorship agreement with a wholesaler pursuant to § 25E ½ is required to comply with certain requirements, including notice and compensation, laid out in § 25E ½ (c) & (d). If a wholesaler and brewer cannot agree on dissolution of the distributorship agreement, including the amount of compensation to the wholesaler, they must submit to arbitration for resolution, as opposed to petitioning the Commission. § 25E ½ (e) & (f).

It is important to note that § 25E ½ removes the Commission from having any role in these proceedings except, upon request of the parties, to determine whether the brewery fits the definition of a "brewer" under § 25E ½ (a). § 25E ½ (e)(1).

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<sup>1</sup> The Commission is aware that Loverboy also argues that neither § 25E or § 25E ½ applies because the distributorship agreement between the parties, which includes a termination provision, controls. However, this would be a question of fact that would need to be analyzed by the Commission under the § 25E framework or for an arbitrator to consider under the § 25E ½ framework.

The question before the Commission is whether § 25E ½ applies to the distributorship termination dispute at issue. If § 25E ½ does control, the Commission has no role to play and any disputes must be addressed in arbitration. If § 25E controls, then the dispute will be addressed in the usual § 25E course before the Commission.

As an initial matter, neither of the parties dispute that Loverboy is a “brewer,” as defined in § 25E ½ (a).

The issue that remains then is whether § 25E ½ applies retroactively because it did not become law until nine days after Loverboy’s notice of termination became effective. The parties had entered into their distributorship agreement on October 11, 2019. Loverboy provided a termination letter to Night Shift on December 1, 2020, with an effective date of January 3, 2021. Section 25E ½ became effective nine days later, on January 12, 2021.

In absence of an express stated directive regarding retroactivity, the general rule is that all statutes are prospective in their operation. Moakley v. Eastwick, 423 Mass. 52, 57 (1996); Nationwide Mut. Ins. Co. v. Commissioner of Ins., 397 Mass. 416, 422 (1986). However, where the Legislature enacts a statute that specifically affects contractual terms, “[a]s a general rule . . . a statute will be construed to operate retroactively only where the Legislature evidences a clear intent to alter existing contract rights.” Nationwide Mut. Ins. Co. v. Commissioner of Ins., 397 Mass. 416, 421 (1986), citing Nantucket Conservation Found. Inc. v. Russell Management, Inc., 380 Mass. 212, 214 (1980) and Liberty Mut. Ins. Co. v. Wolfe, 7 Mass. App. Ct. 263, 266 (1979).

It is the Commission’s determination that the Legislature intended for § 25E ½ to alter existing brewer distributorship agreements, and not just future brewer distributorship agreements. First, an industry that “has from the beginning been subject to pervasive regulation . . . is on notice that future legislation may alter [their] position[s].” Opinion of the Justices to the House of Representatives, 401 Mass. 1211, 1223 (1987); accord Quinn v. Rent Control Bd. of Peabody, 45 Mass. App. Ct. 357, 373 (1998). Alcohol is one of those industries: “the business of selling alcoholic beverages is subject to pervasive regulation . . . and the conditions under which liquors may be sold are subject to abrupt change at the will of the state or locality.” Pronghorn, Inc. v. Licensing Bd. of Peabody, 13 Mass. App. Ct. 70, 73, 430 N.E.2d 842, 844 (1982), citing Supreme Malt Products Co. v. Alcoholic Beverages Control Comm’n., 334 Mass. 59, 61 (1956); Connolly v. Alcoholic Beverages Control Comm’n., 334 Mass. 613, 619 (1956).<sup>2</sup>

Second, the preamble to the 2020 Act creating § 25E ½ indicates retroactive intent: “The deferred operation of this act would tend to defeat its purpose, which is to forthwith further regulate commerce of alcoholic beverages, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.” Preamble, Acts of 2020, c. 324. See Nationwide Mut. Ins. Co. at 422 (where preamble language indicates that its provisions

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<sup>2</sup> Other examples of industries subject to pervasive regulation include motor vehicle insurance, Nationwide Mut. Ins. Co.; affordable housing, Quinn, 45 Mass. App. Ct. at 373; savings bank life insurance systems, Opinion of the Justices, 401 Mass. at 1223; and the pharmaceutical industry, Commonwealth v. Liponi, 385 Mass. 370, 380-81 (1982).

are effective immediately, without reference to existing contracts, and where “[t]he deferred operation of this act would tend to defeat its purpose,” the Legislature was indicating retroactive application of a statute altering contract terms).<sup>3</sup>

Because § 25E ½ applies retroactively, it controls here and not § 25E. Where § 25E ½ removes all authority from the Commission to resolve this brewer distributorship termination dispute, the Commission cannot “order” the parties to submit to arbitration under § 25E ½. However, the Commission encourages the parties to review § 25E ½ and the procedure by which they may resolve any disputes arising from the termination of the parties’ distributorship agreement, including arbitration.

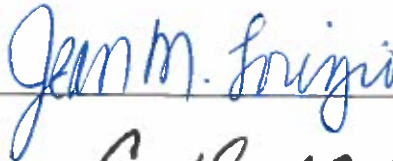
### CONCLUSION

For the foregoing reasons, the Alcoholic Beverages Control Commission issues the following rulings:

- 1) Loverboy’s First Motion to Dismiss is ALLOWED;
- 2) Loverboy’s Second Motion to Dismiss is ALLOWED;
- 3) Night Shift’s Cross-Motion to Compel Arbitration is DENIED;
- 4) Loverboy’s Motion for Expedited Decision of Respondent’s Motions to Dismiss is DENIED.

### ALCOHOLIC BEVERAGES CONTROL COMMISSION

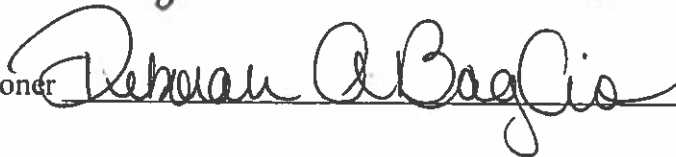
Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Deborah A. Baglio, Commissioner



Dated: June 23, 2021

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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<sup>3</sup> The Commission has not evaluated the constitutionality of the retroactivity of this legislation because neither party has raised it, and it is a decision better reserved for the Courts to decide.

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cc: Alva Mather, Esq. via email  
David J. Sullivan, Esq. via email  
Administration, File