



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

Steven Grossman
Treasurer and Receiver General

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Chairman

NO. 25E-1290

**BOSTON WINE COMPANY, LTD.
DBA WINEBOW BOSTON**

V.

**BRUNO GIACOSA CASA VINICOLA
AND
FOLIO WINE COMPANY, LLC**

**MEMORANDUM AND ORDER ON
PETITIONER'S REQUEST FOR DEFAULT**

The Alcoholic Beverages Control Commission ("the Commission") issues this Memorandum and Order on the Request For Default filed by the Petitioner Boston Wine Company, Ltd. dba Winebow Boston ("Winebow") regarding the above-referenced petition for relief under General Laws Chapter 138, § 25E. Winebow is a Massachusetts wholesaler aggrieved as a result of Folio Wine Company, LLC's ("Folio"), a Massachusetts Certificate of Compliance holder, and Bruno Giacosa Casa Vinicola's ("BrunoGCV") refusal to comply with the Commission order to ship BrunoGCV wine brand items ("Bruno Wines") to Winebow.

FACTS

After consideration of the arguments and documents provided by the Winebow and Folio, the Commission finds the following facts and makes the following rulings.

1. On or about May 1, 2012, pursuant to the mandate in G.L. c. 138, § 25E, following Winebow's filing an application for relief pursuant to M.G.L. c. 138, § 25E, the Commission issued an order to Folio to make sales of Bruno Wines to Winebow pending the Commission's determination of the petition on the merits.
2. In issuing this order, the Commission specifically notified Folio that the Commission construed the statute and the order issued pursuant to the statute "to obligate the supplier to sell up to 110% per year of the highest annual sales, by product and size, sold to the wholesaler during the preceding four or five years."

3. The Commission specifically cited *Somerset* as the legal authority for that order. The Commission also ordered the parties to engage in limited discovery within a short time period.
4. On September 19, 2012, Winebow submitted a request for default of BrunoGCV. Winebow seeks the Commission to order BrunoGCV in default and then issue a final order to Bruno GCV for sales to be made to Winebow by BrunoGCV.
5. Bruno GCV did not file any appearance or file any opposition to the request for a default.
6. On October 5, 2012, FOLIO filed an opposition to the request for default against BrunoGCV.

DISCUSSION

Standing of Folio

At first blush, a question is identified by the Commission on the standing of Folio to file an opposition to a request for default of a separate party in this action, BrunoGCV. This question is resolved in favor of Folio upon review of the controlling statutory language and evidence submitted to the Commission in this matter.

Bruno Giacosa Vini e Spumanti (“Bruno GIVES”), who is referred to in the opposition and thus acknowledged to be the same as BrunoGCV, is the sole owner of eight (8) specifically identified Italian wines. Exhibit A to Folio’s Opposition to Petitioner’s Request For Default. In this same document, dated September 19, 2011, Folio is appointed by Bruno GCV/Bruno GIVES “as our exclusive brand agent in all states of the USA, with full authority to register our products, appoint distributors, post prices and conduct any other form of compliance as may be required by law.” Id.

Azienda Agricola Falletto di Bruno Giacosa (AAFBG), who is referred to in the opposition and thus acknowledged to be the same as BrunoGCV, is the sole owner of nine (9) specifically identified Italian wines. Exhibit B to Folio’s Opposition to Petitioner’s Request For Default. This second document, submitted as Exhibit B, also dated September 19, 2011, is very similar, if not identical, to the letter submitted as Exhibit A to Folio’s Opposition. Folio is appointed by BrunoGCV/AAFBG “as our exclusive brand agent in all states of the USA, with full authority to register our products, appoint distributors, post prices and conduct any other form of compliance as may be required by law.” Id.

These letters designating Folio as agent of these BrunoGCV affiliates qualifies Folio as a “Primary American source of supply” as defined in G.L. c. 138, § 18.¹ Thus, Folio is a lawful source of supply to all wholesalers licensed under M.G.L. c. 138, §18, subject to Folio obtaining the required certificate(s) of compliance pursuant to G.L. c. 138, §18B.

¹ G.L. c. 138, § 18, as amended by Acts 2004, Chapter 149, Section 181, provides in pertinent part that “[i]t shall be unlawful for any licensee under this section to purchase alcoholic beverages from any source other than the primary American source of supply unless authorized by the primary American source of supply. ‘Primary American source of supply’ shall mean the distiller, bottler, brewer, vintner, brand owner, or designated agent of the distiller, bottler, brewer, vintner, or brand owner.” Folio is not the vintner or brand owner of the Bruno Wines. But by these letters Folio is the “designated agent of the ... vintner, or brand owner.”

These two letters submitted as Exhibit A and Exhibit B to the opposition designating Folio as agent of the Bruno affiliates and BrunoGCV qualifies Folio to file a schedule of prices as required by G.L. c. 138 § 25B(c)(2). This is a substantial compliance requirement given the public policy specifically stated in G.L. c. 138 § 25B(a) that “[n]o brand of alcoholic beverages shall be sold within the commonwealth to a wholesaler unless schedules, as provided by this section, are filed with the commission and are then in effect.” See *Hastings Associates Inc. v. Local 369 Building Fund, Inc.*, 42 Mass.App.Ct. 162, 173-178 (1997)(private contract that violates chapter 138 is unenforceable as contrary to public policy).

Therefore, the Commission rules that Folio has standing to advocate for BrunoGCV and its affiliates regarding the request for default since Folio is the agent of BrunoGCV and its affiliates for all forms of compliance required by law.

Request For Default

Folio advances three (3) reasons why the Request For Default should be denied. First, Folio posits that Winebow is not eligible for relief under G.L. c. 138, §25E based on Folio’s reading of that statute. Second, Folio posits that no notice of a separate Motion For Sanctions was given to BrunoGCV and no notice of the hearing held by the Commission on September 5, 2012 was given to BrunoGCV, so the Commission cannot allow the request for default against BrunoGCV filed on September 19, 2012. Third, Folio posits that Winebow urges an interpretation of §25E that is without precedent. The Commission addresses Folio’s three positions as follows.

Winebow’s Eligibility for §25E relief

Folio reads the statute as being available only to a “wholesaler” and Folio submits that a “wholesaler” in Massachusetts is distinct from an “importer.” Folio cites no legal authority for its position, other than a single superior court decision from over 25 years ago.² Folio ignores the fact that a license issued pursuant to M.G.L. c. 138, §18 is commonly referred to as a “wholesaler” license, that there is no license that is named an “importer’s license” created and existing within the Liquor Control Act, General Laws chapter 138. The “wholesaler license” issued under §18 carries multiple permissions with it, including the authority to import into the Commonwealth alcoholic beverages or alcohol. A business who seeks to engage in importing into Massachusetts alcoholic beverages or alcohol fills out and files the application forms for a wholesaler license as indicated on the Commission’s website at <http://www.mass.gov/abcc/pdf/forms/state/whab.pdf>. The Commission is not persuaded by Folio’s argument on this point.

² This superior court decision is *Bacardi Imports Inc. v. The Massachusetts Alcoholic Beverages Control Commission*, 1987 WL 1422318 (Mass. Super. January 7, 1987). Folio does not address the pertinent provisions of M.G.L. c. 138, §18B which provide “that such certificate shall be issued upon the condition that the holder shall ... comply with the provisions of this chapter and any rules or regulations made under authority contained therein which pertain to a licensee of the same class, type or character, doing business in this commonwealth under a license issued by the commission.”

Lack of Notice.

Folio argues that a request for default against BrunoGCV must be denied when that default request was filed with the Commission on September 19, 2012, after a hearing held by the Commission on September 5, 2012 regarding a completely separate motion for sanctions against Folio, because BrunoGCV did not get notice of that completely separate motion for sanctions and the hearing thereon regarding Folio. The Commission fails to see a basis to deny the default request based on activities that occurred with Folio, not BrunoGCV, some 14 days before the default request was filed. The Commission is not persuaded by Folio's argument on this point.

Unprecedented Interpretation of § 25E.

Folio argues that request for default must be denied because Winebow advances what is to Folio, an unprecedented interpretation of § 25E. Winebow's petition makes verified factual statements that establish the essential elements of a claim for relief under § 25E. These verified factual statements are not new or unprecedented. The Commission is not persuaded by Folio's argument on this point.

Applicability of the Formal Rules of Adjudicatory Procedure. 801 C.M.R. 1.01, et seq.

The Commission expressly stated in both the *Notice of Filing of M.G.L. c. 138, § 25E Petition* dated May 1, 2012 and the *Notice of Hearing* dated July 23, 2012, that "[h]earings are held pursuant to M.G.L. c. 138, c. 30A and 801 CMR § 1.02 and § 1.03". This is consistent with all Commission proceedings. These are the Informal Rules of Adjudicatory Procedure. The Formal Rules of Adjudicatory Procedure do not apply. The Commission is not persuaded by Winebow's argument on this point.

Remedy Requested.

Winebow seeks the Commission to enter a final order requiring BrunoGCV to sell the Bruno Wines to Winebow. BrunoGCV does not hold a certificate of compliance. Thus, BrunoGCV may not lawfully sell alcoholic beverages to a wholesaler in Massachusetts. Moreover, BrunoGCV has no price schedules filed with the Commission. Thus, it is unlawful for BrunoGCV to sell alcoholic beverages to a wholesaler. The relief requested cannot lawfully be granted by the Commission.

CONCLUSION

The request for default is DENIED WITH PREJUDICE.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: April 3, 2013



The Commonwealth of Massachusetts
Department of the State Treasurer
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**BOSTON WINE COMPANY, LTD.
DBA WINEBOW BOSTON**

V.

**BRUNO GIACOSA CASA VINICOLA
AND
FOLIO WINE COMPANY, LLC**

**MEMORANDUM AND ORDER ON
PETITIONER'S MOTION TO COMPEL PRODUCTION**

The Alcoholic Beverages Control Commission ("the Commission") issues this Memorandum and Order on the Motion to Compel Production ("Motion") filed by the Petitioner Boston Wine Company, Ltd. dba Winebow Boston ("Winebow"). Winebow is a Massachusetts wholesaler aggrieved at the refusal of Folio Wine Company, LLC ("Folio"), a Massachusetts Certificate of Compliance holder, and Bruno Giacosa Casa Vinicola ("Bruno GCV) to ship Bruno GCV wine brand items ("Bruno Wines") to Winebow.

FACTS

After consideration of the arguments and documents provided by the Winebow and Folio, the Commission finds the following facts and makes the following rulings.

1. On or about May 1, 2012, pursuant to the mandate in G.L. c. 138, § 25E, following Winebow's filing an application for relief pursuant to M.G.L. c. 138, § 25E, the Commission issued an order to Folio to make sales of Bruno Wines to Winebow pending the Commission's determination of the petition on the merits.
2. In issuing this order, the Commission specifically notified Folio that the Commission construed the statute and the order issued pursuant to the statute "to obligate the supplier to sell up to 110% per year of the highest annual sales, by product and size, sold to the wholesaler during the preceding four or five years."

3. The Commission specifically cited Somerset as the legal authority for that order. The Commission also ordered the parties to engage in limited discovery within a short time period.
4. On September 19, 2012, Winebow submitted this Motion. Winebow seeks the discovery to assist the Commission in adjudicating a Motion for Sanctions filed by Winebow on or about May 11, 2012 and heard by the Commission on September 5, 2012.
5. On September 19, 2012, Folio filed with the Commission certain documents in response to a Commission request made during the hearing on the motion for sanctions held on September 5, 2012.
6. The Commission has this day issued a separate Memorandum and Order on the Motion for Sanctions.

CONCLUSION

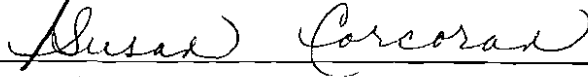
The underlying issue regarding the documents sought has been resolved, as a result, the motion is moot, and therefore DENIED.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

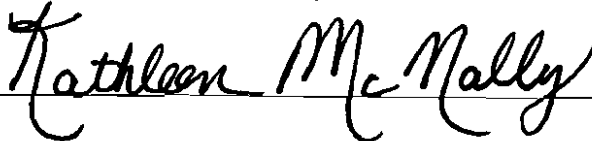
Kim S. Gainsboro, Chairman



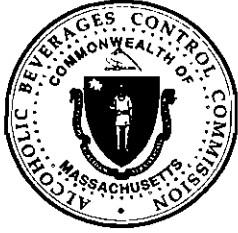
Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: April 3, 2013



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NO. 25E-1290

**BOSTON WINE COMPANY, LTD.
DBA WINEBOW BOSTON**

v.

**BRUNO GIACOSA CASA VINICOLA
AND
FOLIO WINE COMPANY, LLC
HEARD: 09/05/2012**

**MEMORANDUM AND ORDER ON
PETITIONER'S VERIFIED MOTION FOR SANCTIONS**

Petitioner, Boston Wine Company, Ltd. ("Winebow") is a Massachusetts wholesaler, which filed a petition for relief under Massachusetts General Laws Chapter 138, §25E. As a result of the petition, the Commission ordered the Respondents, Folio Wine Company, LLC ("Folio"), a Massachusetts Certificate of Compliance holder, to ship 110% of the volume of Bruno Giacosa Casa Vinicola's ("Bruno GCV") wine brand items ("Bruno Wines") to Winebow that Bruno GCV had shipped to Winebow during the prior four years, pending a decision on the merits of the 25E petition.

The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Winebow's Verified Motion For Sanctions ("Motion") as a result of Folio's refusal to comply with the Commission's Order. Winebow asks that the Commission: (1) find that Folio violated the pre-hearing ship order and § 25A of Chapter 138 of the General Laws; (2) order Folio to fill all pending orders from Winebow for Bruno Wines forthwith; and, (3) sanction Folio as requested.

FACTS

After hearing and consideration of the exhibits provided by the parties, the Commission finds the following facts and makes the following rulings of law.

1. In 2008, Winebow became Bruno GCV's importer for Massachusetts.

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2. On May 7, 2009, Winebow submitted purchase order (“PO”) number 0262054 to Bruno GCV for 82 cases of wine.
3. On October 8, 2009, Winebow submitted PO0272738 to Bruno GCV for 31 cases of wine.
4. On June 14, 2010, Winebow submitted PO0280901 to Bruno GCV for 80 cases of wine.
5. On October 28, 2010, Winebow submitted PO0291947 to Bruno GCV for 48 cases of wine.
6. On March 2, 2011, Winebow submitted PO0298211 to Bruno GCV for 138 cases of wine to be shipped on March 16, 2011.
7. On August 1, 2011, Winebow submitted PO0306733 to Bruno GCV for 45 cases of wine to be shipped on August 16, 2011.
8. From 2009 – 2011, Winebow bought Bruno GCV’s entire allocation of Bruno Wines and Bruno GCV filled all Winebow’s purchase orders. There were consistently two release dates from Bruno GCV for Bruno wines.
9. In September 2011, Bruno GCV alerted Winebow that it was no longer its Massachusetts importer.
10. At some point in late 2011, Bruno GCV appointed Folio as its exclusive United States Importer.¹
11. The appointment permitted Folio to select distributors and wholesalers in the United States to distribute Bruno GCV’s products.
12. In early 2012, Folio began importing and selling these products.
13. Commission records show that Folio applied for and was issued only one (1) certificate of compliance for 2012 and only one (1) certificate of compliance for 2013 pursuant to M.G.L. c. 138, §18B. This single certificate of compliance authorized shipments of alcoholic beverages from a single shipping location in Napa, California.
14. Commission records show that Folio filed a price schedule for Bruno Wines in July 2012, effective September 1, 2012.²
15. Jennifer Crowley, a Folio employee, was responsible for working with potential distributors in the New England Region to develop a sales plan, select wholesalers and allocate the available products throughout her region.

¹ Following this hearing, on October 5, 2012, Folio filed with the Commission an *Opposition to Petitioner’s Request For Default*. Attached to that document as exhibits were two (2) letters appointing Folio as the agent of Bruno GCV and brand owner of the Bruno Wines.

² This price schedule listed prices only for sales made “FOB” at the location in Napa, California.

16. As a result of a press release showcasing that Folio had been appointed the national wholesaler of Bruno GCV's products, Winebow became aware of Folio's designation.
17. During the first week of January, 2012, Tony Morello, Winebow's Portfolio Director made several attempts to contact representatives of Folio.
18. On January 10, 2012 at 9:27 p.m., Brennan Anderson, marketing manager for Folio, sent Jennifer Crowley, as well as a number of other Folio employees, an email titled allocations and DI orders.
19. Mr. Anderson's email informed his team that he had uploaded the 2012 allocations onto Foliopolis, apparently a software program used internally by Folio.
20. He requested that the "team" follow their sales plan as closely as possible and assign distributors to each allocation by January 31, 2012.
21. Thereafter, Ms. Crowley had several conversations with Tony Morello, Winebow's Portfolio Director about Bruno GCV's Product.
22. During these conversations, Ms. Crowley informed Mr. Morello that Folio was considering which wholesalers to conduct business with in Massachusetts.
23. Ms. Crowley informed Mr. Morello specifically that Folio was selling all of its other wine products exclusively to Horizon Beverage Company in Massachusetts.
24. Ms. Crowley went on to say that she felt it was in the best interests of the Bruno Wines to consider selling Bruno Wines to Horizon as well.
25. Mr. Morello responded by saying that Folio was required to ship Bruno Wines to Winebow because of their prior course of dealing with Bruno GCV.
26. Mr. Morello offered to send Ms. Crowley proof of Winebow's past purchases from Bruno GCV.
27. On January 23, 2012 Tony Morello, sent an email to Ms. Crowley, providing information regarding its 2010 and 2011 purchases from Bruno GCV.
28. At 9:23 a.m. that day, Ms. Crowley responded to Mr. Morello's email. Ms. Crowley thanked him for getting the information to her so promptly, and told him that the information would help her immensely. She attached to her email response, a customer profile form that Winebow needed to complete and return to Folio.
29. Ms. Crowley told Mr. Morello that the customer profile needed to be returned before he could submit a purchase order.
30. Ms. Crowley emailed that she would have the "FOBs" to Mr. Morello shortly.

31. At 9:51 a.m. Ms. Crowley emailed Mr. Morello, Folio's pricing allocation and "FOBs" for Winebow.
32. Ms. Crowley informed Mr. Morello that Folio was asking all east coast markets to order "DI". She told him she would try and get the allocations to him within the next day so he could place an order and consolidate the containers.
33. At 10:15 a.m. Ms. Crowley sent Mr. Morello another email containing a list with Bruno GCV's alcohol percentages as well as "SCC" codes. The list included the vintage, brand, alcohol percentage, UPC and SCC.
34. At 10:25 a.m. Mr. Morello, via email, thanked Ms. Crowley for the customer profile form. He indicated that Greg Farris, Winebow's Operations Director, would return the completed form soon.
35. Mr. Morello also asked Ms. Crowley to supply him with information regarding the logistics of the purchase orders and payments. Mr. Morello requested the information in order to establish Folio as a vendor of Winebow.
36. At 11:00 a.m. Ms. Crowley sent Mr. Morello an email attaching the allocations which Folio could offer to Winebow. Ms. Crowley indicated that the attached allocations either matched or slightly exceeded Winebow's 2011 allocation. Ms. Crowley also indicated that she had allocated every wine available in her region and strongly recommended that Mr. Morello place Winebow's purchase order as soon as possible.
37. Ms. Crowley's email attachment is titled "Bruno Giacosa" and contains the wine's description, vintage, size/quantity, FOB, and Winebow's price.
38. At 11:04 a.m. Ms. Crowley sent Mr. Morello another email with an attachment labeled FOLIO INFORMATION SHEET. Ms. Crowley explained that the information attached would assist Mr. Farris in setting up Folio as a vendor in Winebow's system. She told him to notify her if he needed any additional information.
39. At 1:29 p.m., Ms. Crowley emailed Mr. Morello again. She attached an amended allocation sheet, indicating she had added a particular size of the Barbaresco Asili Riserva that she had inadvertently forgotten to include in her prior allocation.
40. At 1:44 p.m. Ms. Crowley emailed Mr. Morello a second amended allocation sheet for Winebow. She indicated that the master allocation sheet was in actuals rather than 9L, so she had revised the Spumante Brut allocation.
41. The next day, on January 24, 2012 at 1:06 p.m., Mr. Morello emailed Ms. Crowley and asked if Folio was the importer of record. If Folio was the importer of record, Mr. Morello requested copies of the TTB label approvals with the new black label.

42. Ms. Crowley forwarded Mr. Morello's email to Jennifer Flohr at 1:08 p.m. and asked if Ms. Flohr could send the TTB approvals to Mr. Morello and copy her.
43. On January 26, 2012 at 12:14 p.m. Greg Farris, purchasing and operations manager of Winebow sent the completed customer profile to Ms. Crowley and copied Mr. Morello.
44. Horizon Beverage Company ("Horizon") placed a PO on January 30, 2012 for the entire Massachusetts allocation.
45. On February 2, 2012 at 12:04 p.m., Mr. Farris emailed Jeniffer [sic] Murphy, an employee of Folio, Winebow's PO. Mr. Farris asked Ms. Murphy to let him know the release dates for the wines so that he could arrange shipment as soon as possible.
46. Ms. Murphy's auto-generated Out-of-Office message was sent to Greg Farris.
47. At 12:06 p.m., Greg Farris forwarded his 12:04 p.m. email to Ms. Murphy on to Monica Perry, with no additional message.
48. On February 7, 2012 at 11:12 a.m., Mr. Morello emailed Ms. Crowley, and copied Greg Farris.
49. Mr. Morello said Winebow had sent in a purchase order for their allocation of Bruno Wines and had not received confirmation.
50. Mr. Morello asked if Ms. Crowley could look into this, and let them know when the goods will come into Gori's warehouse.
51. On February 8, 2012 at 6:58 p.m., Mr. Morello emailed Ms. Crowley and copied Tom Modica.
52. Mr. Morello apologized that he didn't return Ms. Crowley's phone call today, as he was running out the door when they were speaking. Mr. Morello said he had worked as a supplier, and so he could appreciate Folio's desire to have their brands under one roof in Massachusetts, but he hoped they could understand Winebow's desire to keep it. Mr. Morello said that Giacosa has a long history at Winebow, going back more than fifteen years. For Winebow, it represents too much in sales revenue to walk away, over one hundred thousand per year. In addition, they have already started pre-selling this year's releases based on the allocation Folio had given them.
53. Mr. Morello requested that Folio process the purchase order they had sent in the previous week. He requested to receive the confirmation within the next two days.
54. On February 13, 2012 at 1:31 p.m., Mr. Morello emailed Ms. Crowley and copied Tom Modica and Tony Gonzalez. Mr. Morello advised Ms. Crowley that Winebow had not yet received confirmation of their purchase order. He requested

the order confirmation be sent to his attention by the end of the day so that Winebow could plan their consolidation.

55. In the email, Mr. Morello expressed concern that while Winebow did not want to start this new relationship on an adversarial note, by not filling this purchase order, Folio would be in violation of Chapter 138, §25E of the General Laws of the Commonwealth of Massachusetts. Mr. Morello expressed Winebow's wish to continue to work with Bruno GCV, and that they would have no other option than to file a complaint with the Alcoholic Beverages Control Commission.
56. Mr. Morello requested that Folio confirm receipt of this email.
57. On February 20, 2012, David Durden, Director of Sales for Folio, sent a letter to Mr. Morello. Mr. Durden advised Mr. Morello that Folio had decided to consolidate their business with another supplier in Massachusetts.
58. As a result, Folio did not fill any of Winebow's orders for Bruno Wines.
59. Thirty-two (32) days later, on March 23, 2012, Folio issued an invoice numbered 43134 to Horizon for a shipment of Bruno Wines from Italy. This Folio invoice was in response to a specified purchase order from Horizon numbered 76123.
60. On April 4, 2012, Winebow filed an application for relief under G.L. Chapter 138 §25A and G.L. Chapter 138 § 25E against Bruno GCV and Folio.
61. On May 1, 2012, this Commission issued a Notice of Filing and Pre-Hearing Order to Ship Bruno Wines to Folio.
62. In an affidavit dated May 22, 2012, Ms. Crowley swore under oath that from January 2012 to May 1, 2012 when the Commission issued its Order to Ship to Folio, "all the Products allocated to and purchased by Horizon have been shipped."
63. On May 6, 2012, five (5) days after the Commission issued to Folio its Order To Ship, Folio issued a second invoice numbered 43768 to Horizon for a second shipment of Bruno Wines from Italy. This invoice was also in response to a second specified purchase order from Horizon Beverages numbered 76770.
64. Again on May 24, 2012, after the Commission issued an Order To Ship to Folio, Folio issued an invoice numbered 44016 to Horizon for a third shipment of Bruno Wines from Italy. This third invoice was in response to a third specified purchase order from Horizon Beverages numbered 76770.
65. This third invoice, dated May 24, 2012, issued by Folio was also two (2) days after Folio's employee Ms. Crowley swore under oath that "all the Products ... purchased by Horizon have been shipped."
66. Ms. Crowley also swore under oath in the affidavit dated May 22, 2012 that Folio indeed did possess cases of the Bruno Wines that were subject to the Commission Order To Ship.

67. But, as Ms. Crowley acknowledges under oath, Folio did not ship the Bruno Wines to Winebow as required by the Commission order; instead, Folio retained possession of the Bruno Wines as a “marketing reserve.”
68. As of the date of the hearing, Folio has failed to comply with this Commission’s order and has not shipped any Bruno Wines to Winebow.
69. As a result of the Respondents’ failure to comply with the Commission’s order, Winebow has lost profits in the amount of \$37,603.00.

DISCUSSION

M.G.L. Chapter 138, § 25E mandates that “[u]pon application by the wholesaler to the commission, the commission shall order the manufacturer, importer or wholesaler giving notice of refusal to sell to continue to make sales in the regular course to such wholesaler pending determination by the commission on the merits of said appeal.” On April 4, 2012, Winebow filed an application for relief under M.G.L. Chapter 138, § 25E and sought this interim order for Folio and Bruno GCV to continue making sales in the regular course. Commission records indicate that Folio held and now holds the necessary legal authority to make sales to wholesalers. Bruno GCV does not. The Commission issued this interim order requiring Folio to ship Bruno Wines to Winebow on May 1, 2012.

In interpreting and applying G.L. Chapter 138, § 25E, the Appeals Court has written that “[a] legislative purpose to maintain normal business volume may be inferred by the interim remedy § 25E provides upon a complaint to the ABCC of unlawful cutback. Pending determination by the ABCC, the distributor is bound “to make sales in the regular course” to the wholesaler. G. L. Chapter 138, § 25E.” Somerset Importers, Ltd. v. Alcoholic Beverages Control Com'n, 28 Mass.App.Ct. 381, 384-385 (1990). Folio and Bruno GCV offer no reason for refusing to comply with the Commission’s order. Based on the facts of this case as found by the Commission above, it is no excuse that Folio sold its entire 2012 Massachusetts allocation to a new wholesaler. Folio’s duty to comply with § 25E and this Commission’s order is ongoing and compulsory. The Commission is persuaded that Folio’s actions were done intentionally to divest itself of all inventory of Bruno Wines to circumvent the operation and effect of G.L. Chapter 138, § 25E. The Commission is further persuaded that Folio’s actions following the issuance of the ship order were willful.

Folio’s arguments in opposition to this motion do not rebut the analysis of the Appeals Court in Somerset Importers concerning the statutory mandate to the Commission to order sales to be made pending the determination on the merits of the pending application for relief under § 25E. The Commission issued a pre-hearing order, along with the interim order to continue sales of the Bruno Wines, which enabled the parties to schedule and obtain a fair hearing under G.L. Chapter 30A on the merits of the application.

Folio argues in opposition to the request for sanctions that Folio had no Bruno Wines to ship to Winebow in compliance with the Commission's May 1, 2012 Order To Ship. The facts do not support Folio's position. The facts as found by the Commission above show 3 shipments by Folio after Winebow sent its purchase order on February 2, 2012, as admitted by Folio. No shipment was made to the competing wholesaler in Massachusetts until March 23, 2012. Further, two (2) shipments of Bruno Wines were made by Folio after the Commission issued its Order To Ship. Both shipments went to the competing wholesaler and not to Winebow as required by the Commission's order. The Commission finds this conduct to be egregious and obstreperous.

Folio's arguments on the standing of Winebow to file a petition for relief under § 25E cite no legal authority in support of the position. Folio bases its position on speculation and guesswork while inviting the Commission to rule based on Folio's speculation and guesses. The Commission declines the invitation to do so.

CONCLUSION

The Commission finds that Folio is in violation of this Commission's Order To Ship. Folio intentionally divested itself of its entire inventory of Bruno Wines in a willful action designed to circumvent G.L. Chapter 138, § 25E. Folio's actions following the issuance of the ship order have been willful.

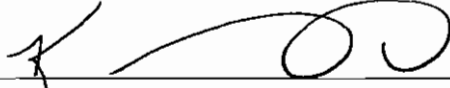
The Commission hereby orders Folio to ship forthwith all orders pending from Winebow made between January 1, 2012 and September 5, 2012. Folio shall ship all such pending orders to Winebow before Folio ships any Bruno Wines to any other Massachusetts wholesaler. Folio shall furnish the Commission with documented evidence of its compliance with this order within 14 days of Folio's receipt of this Memorandum and Order.

As sanction for its willful violation of the Commission order, Folio is now ordered to continue to make sales of Bruno Wines to Winebow in sufficient quantities to continue to provide a fair flow of inventory conformable with the regular course of business in the marketplace, now in the aggregate up to 140% of the product, by size and quantity, of the calendar year total sold to Winebow during the previous four years. Folio shall ship all orders to Winebow, now in the aggregate up to 140% of the product, before Folio ships any Bruno Wines to any other Massachusetts wholesaler.

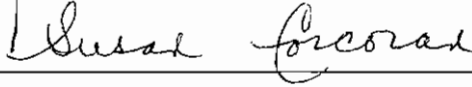
The orders for relief contained herein are interim orders that apply until the Commission issues its decision on the merits. This matter will be adjudicated by the Commission in due course. Further, the Commission refers to the Commission's Chief Investigator Folio's activities regarding Bruno Wines for the conduct of all needful and appropriate investigations into Folio's compliance with M.G.L. c. 138, §18B, M.G.L. c. 138, §25B, and 204 C.M.R. 2.03(4).

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: April 3, 2013

cc: J. Mark Dickison, Esq., via Facsimile 617-439-3987
Mary E. O'Neal, Esq., via Facsimile 617-722-8101
Administration
File