

Milton's Distributing Co., Inc.
d.b.a. Signature Imports
305 Forbes Boulevard
Mansfield, MA 02048-1805

v.

Dao Sul-Sociedade Viticicola, S.A.
Quinta de Cabriz – Apartado 28
3430-909 Carregal do Sal, Portugal

No.: 25E-1271

Heard: June 23, 2009

MEMORANDUM AND ORDER

This was a hearing before the Alcoholic Beverages Control Commission (“the Commission”) on the Petition For Contempt and Request For Sanctions (“Motion”) filed by Milton's Distributing Co., Inc. d.b.a. Signature Imports regarding the above-referenced petition for relief under General Laws Chapter 138, § 25E. Milton's Distributing Co., Inc. d.b.a. Signature Imports (“MILTON'S”), the petitioner in Commission Case No. 25E-1271, is a Massachusetts wholesaler aggrieved at the refusal of Dao Sul-Sociedade Viticicola, S.A. (“DSV”), a Massachusetts Certificate of Compliance holder, to ship to MILTON'S the Santar wine brand items (“SANTAR”) ordered by it pending a decision on the merits of its 25E petition.

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

Facts

On or about January 15, 2009, MILTON'S filed an application for relief pursuant to M.G.L. c. 138, § 25E. On or about January 20, 2009, pursuant to the mandate in G.L. c. 138, § 25E, the Commission issued an order to DSV to make sales of SANTAR to MILTON'S pending the Commission's determination of the petition on the merits. In issuing this order, the Commission specifically notified DSV 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.” The Commission specifically cited *Somerset* as the legal authority for that order.

DSV has refused to ship any SANTAR ordered by MILTON'S. As of the date the Motion was filed, DSV has refused to ship orders placed since January 2009 by MILTON'S. DSV did not

appear at this hearing, either directly or through legal counsel.¹ DSV continues to refuse to ship any orders.

MILTON'S seek relief as follows: (1) the Commission finding that DSV is in contempt of the ship order; (2) an order from the Commission to DSV to fill all pending orders from MILTON'S for SANTAR forthwith; and, (3) an order from the Commission for DSV to show cause that, in making sales to MILTON'S, DSV violated General Laws Chapter 138, § 25A as interpreted and applied in *Miller Brewing Company v. ABCC*, 56 Mass.App.Ct. 801, 780 N.E.2d 80 (2002); (4) an award to MILTON'S of its damages, costs and expenses, including attorney's fees; and, (5) such other relief as the Commission deems appropriate.

Discussion

1. Non-Compliance With Ship Order; Prior Orders. Pursuant to the mandate in G.L. c. 138, § 25E, the Commission issued an order to DSV to make sales of SANTAR to MILTON'S pending the Commission's determination of the petition on the merits. In issuing this order, the Commission specifically notified DSV 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." The Commission specifically cited *Somerset* as the legal authority for that order. The purpose of the statute and the 110% factor may be to allow the petitioning wholesaler to maintain its volume of purchases from its supplier so the wholesaler may continue to service its retail accounts and the quantity of cases due the wholesaler under the 110% factor is calculated by the benchmark of how much it bought from the supplier, and not how much it sold to retailers. See, *Somerset Importers Ltd. v. ABCC*, 28 Mass. App. Ct 381, 551 N.E.2d 545 (1990).

DSV chose to absent itself from these proceedings. DSV proffered no defense of its conduct and refusals to comply with the Commission's order to ship. DSV submitted no opposition to the pending Motion. DSV has failed, neglected or refused to explain its conduct following the order to ship issued by the Commission.

The Commission finds the conduct of DSV to be obstreperous. DSV is hereby found to be in violation of the order previously issued by the Commission. The Commission further finds the actions of DSV following the issuance of the ship order to be willful. The Commission hereby orders DSV to ship forthwith all orders pending from MILTON'S made between January 1, 2009 and June 22, 2009. DSV shall ship all such pending orders to MILTON'S before DSV ships any SANTAR brand items to any other Massachusetts wholesaler. DSV shall furnish the Commission with documented evidence of its compliance with this order within 14 days of DSV's receipt of this Memorandum And Order so that DSV may purge itself of its past and continuing contemptuous conduct.

2. General Laws Chapter 138, § 25A applied in *Miller Brewing Company v. ABCC*, 56 Mass.App.Ct. 801, 780 N.E.2d 80 (2002). The Commission recognizes that while "[n]othing in this

¹ At hearing on this Motion, legal counsel did identify himself to the Commission as being contacted by DSV but not yet representing DSV.

chapter shall require any manufacturer, winegrower or wholesaler to extend credit to any licensee,” G.L. c. 138, § 25, it has been held by the Appeals Court that “we are not persuaded that § 25 and § 25A are mutually exclusive, that § 18B certificate holders ... are, by virtue of their exemption from the strictures placed on credit terms by § 25, thereby also exempt from the prohibition on price discrimination set forth in § 25A, or that § 18B certificate holders are permitted to discriminate in the otherwise unrestricted credit terms they may offer to those to whom they are permitted to sell alcoholic beverages.” *Miller Brewing Company v. ABCC*, 56 Mass.App.Ct. 801, 808, 780 N.E.2d 80, 85 (2002). Further, the Commission acknowledges that it is inappropriate to limit an appellate court’s decision to its facts. *Heublein, Inc. v. Capital Dist. Co., Inc.*, 434 Mass. 698, 705, 751 N.E.2d 410, 415 (2001). As held in *Miller*, variations by a supplier in credit is a violation of G.L. c. 138, § 25A. *Miller Brewing*, 56 Mass.App.Ct. at 807; 751 N.E.2d at 85. (“Given the articulated purpose of eliminating differential treatment of ‘favored licensees,’ § 25A can reasonably be construed as prohibiting even seemingly minor discrepancies in prices offered by suppliers licensed under § 18B to their wholesalers.”) The purpose of § 25A is in accord with the purpose of § 25E.

As to unlawful price discrimination in violation of General Laws Chapter 138, § 25A, the Commission will not hesitate to take strong enforcement action for violations, G.L. c. 138, §§ 18B, 64; *Miller Brewing*, or order remedial relief when presented with facts that warrant such relief. G.L. c. 138, § 25E (“the commission shall ... grant such relief as may be appropriate under the circumstances”). The Commission admonishes the parties, as well as every participant in the alcoholic beverages industry in Massachusetts, of their obligations to comply with “any law of the commonwealth.” G.L. c. 138, § 64. This Commission action of admonition may well change in any future matter based on facts as they may be presented. See, *BAA Massachusetts, Inc. v. Alcoholic Bev. Control Commn.*, 49 Mass.App.Ct. 839, 849, 733 N.E.2d 564, 572 (2000) (“the fact that the commission imposed more lenient penalties for similar violations in the past does not render the [harsher] sanctions ... arbitrary or capricious.”) The Commission by copy of this Memorandum and Order refers the conduct of DSV to the Commission’s Investigative and Enforcement Unit for any needful and appropriate investigations “to enforce or cause to be enforced the penalties provided by law against every person who is guilty of a violation of this chapter of which they can obtain reasonable proof.” M.G.L. c. 138, § 56.

3. Damages, Costs and Expenses, Including Attorney’s Fees & Other Relief As The Commission Deems Appropriate. The Commission is persuaded that other relief for MILTON’S is warranted based on the undisputed facts about the willful, contemptuous conduct of DSV. The Appeals Court has held that

the question whether the circumstances warranted discontinuance of sale should be determined by the commission. It was [the supplier’s] obligation to provide the written discontinuance notice required by § 25E and to seek commission review of the matter. Allowing a supplier ... to make unilateral decisions about a wholesaler’s right to notice would defeat the equalizing purpose of the statute.

Heineken USA Inc. v. Alcoholic Bev. Control Commn., 62 Mass.App.Ct. 567, 574, 818 N.E.2d 191, 198 (2004). The Commission is persuaded that allowing a supplier like DSV to make unilateral decisions about whether to comply with an order to ship issued by the Commission would defeat the equalizing purpose of the statute.

DSV is hereby further ordered to continue to make sales of SANTAR to MILTON'S in sufficient quantities to continue to provide a fair flow of inventory conformable with the regular course of business in the marketplace, up to 110% of the product, by size and quantity, of the calendar year total sold to MILTON'S during the previous four years plus an additional 15% of the product, by size and quantity, of the calendar year total sold to MILTON'S during that period. DSV is ordered to continue to make sales of SANTAR to MILTON'S 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 125% of the product, by size and quantity, of the calendar year total sold to MILTON'S during the previous four years.

Conclusion

The Commission finds the conduct of DSV to be obstreperous. DSV is found to be in violation of the order previously issued by the Commission. The Commission further finds the actions of DSV following the issuance of the ship order to be willful.

The Commission hereby orders DSV to ship forthwith all orders pending from MILTON'S made between January 1, 2009 and June 22, 2009. DSV shall ship all such pending orders to MILTON'S before DSV ships any SANTAR brand items to any other Massachusetts wholesaler. DSV shall furnish the Commission with documented evidence of its compliance with this order within 14 days of DSV's receipt of this Memorandum And Order so that DSV may purge itself of its past and continuing contemptuous conduct.

As sanction for its contemptuous conduct in violation of the Commission order, DSV is now ordered to continue to make sales of SANTAR to MILTON'S 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 125% of the product, by size and quantity, of the calendar year total sold to MILTON'S during the previous four years.

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.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Robert H. Cronin, Commissioner _____

Susan Corcoran, Commissioner _____

Dated at Boston, Massachusetts this 26th day of August 2009.

cc: Mary E. O'Neal, Esq.
File