

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

No. 25E-1325

RUBY WINES

Petitioner,

v.

**INTERNATIONAL BEVERAGE CO. INC. and
MHW LTD. D/B/A DISTELL LIMITED**
Respondents

**SECOND AMENDED ORDER TO SHIP AND
ORDER ON MHW LTD. D/B/A DISTELL LTD.'S MOTION
TO CLARIFY AND AMEND ORDER TO SHIP**

Following the December 9, 2015 hearing on MHW Ltd. d/b/a Distell Limited's Motion to Clarify and Amend Order to Ship (the "Motion"), the Alcoholic Beverages Control Commission hereby allows the Motion in part and denies the Motion in part and issues a Second Amended Order to Ship.

PROCEDURAL BACKGROUND

On September 17, 2015, Ruby Wines ("Ruby" or "Petitioner") filed a petition for relief under M.G.L. c. 138, § 25E, alleging that the Respondents, International Beverage Co. Inc. and MHW Ltd. d/b/a Distell Limited ("MHW" or "Distell") refused to ship certain Brand Items in violation of the statute. In its petition, Ruby denies that Distell had good cause within the meaning of the statute to terminate sales of the Brand Items to Ruby.

The Commission issued a Notice of Filing of M.G.L. c. 138, § 25E Petition and Pre-Hearing Order on September 23, 2015. In its Notice, the Commission ordered the Respondents "to make sales of the Brand Items and continue to make sales and deliver same to Ruby Wines in the regular course of business." The Brand Items in the Notice included "Angostura brand rums; Fernandes brand rums; Forres Park brand rums; Black Bottle brand scotch; Bunnahabhain brand scotch; Deanston brand cognac & scotch; Ledaig brand scotch; and Tobermory brand scotch."

Distell filed a Motion to Clarify and Amend Order to Ship on October 9, 2015. Ruby subsequently agreed that (1) Amaro di Angostura; (2) Bunnahabhain Ceobanach Scotch; and (3) Deanston 18 year LE Cognac Finish should be excluded from the order to ship, and therefore, on October 23, 2015, the Commission issued an order on the Motion, which amended the

September 23, 2015 Order to Ship by excluding those three Brand Items. With regard to the remaining Brand Items that were the subject of the Motion, the Commission held a hearing on the Motion on December 9, 2015.

Following the hearing, on December 16, 2015, Ruby filed a Supplemental Response to MHW's Motion to Amend Order to Ship seeking an order that Ruby be allowed to purchase an increased amount of another Brand Item.¹ Distell opposed the filing on January 5, 2016, and Ruby filed a letter in response to Distell's opposition on January 12, 2016.

DISCUSSION

Under M.G.L. c. 138, §25E, it is an "unfair trade practice and therefor unlawful for any importer . . . of any alcoholic beverages to refuse to sell, except for good cause shown, any item having a brand name to any licensed wholesaler to whom such [supplier] has made regular sales of such brand item during a period of six months preceding any refusal to sell." M.G.L. c. 138, §25E. The pertinent "six months" provision of §25E requires a regular course of dealing for a six month period before the obligation to continue sales attaches. Pastene Wine & Spirits Co., Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 612, 620 (1988) ("the Legislature intended that there be a regular course of dealing for a full six months before suppliers are obligated to continue sales to wholesalers").

In the present case, Distell notified Ruby by letter that as of August 15, 2015, Distell would not sell to Ruby any of the Distell items. (Exh. B to Danis Aff.) Therefore, the refusal to sell date is August 15, 2015, and six months prior to that date is February 15, 2015.

There are five Brand Items that are the subject of the Motion and which were not resolved in the Commission's October 23, 2015 order. Those items, which were properly before the Commission at the December 9, 2015 hearing, are:

- 1) Angostura 1824 Rum 6/750 ml 40% alc/vol ("Item 1");
- 2) Angostura Reserva Rum 6/750 ml 40% alc/vol ("Item 2");
- 3) Angostura White Oak Rum 40% alc/vol 12/1L ("Item 3");
- 4) Black Bottle Original Scotch 12/750ml 40% alc/vol ("Item 4"); and
- 5) Bunnahabhain 40 year 2/750 ml 46.3% alc/vol ("Item 5").

¹ At the December 9, 2015 hearing on the Motion, Ruby's counsel argued that certain Brand Items should be sold in greater quantity than they currently are under the order to ship. The Commission informed Ruby's counsel that the issue of quantity was not properly before the Commission at that time and that Ruby would need to file a motion if it sought to have the Commission address its arguments. The Commission established a deadline for Ruby to file its motion and a deadline for a response from Distell. Ruby's Supplemental Response to MHW's Motion to Amend Order to Ship is not named a "motion" but does seek relief, and in its January 12, 2016 letter, Ruby requests that the December 16, 2015 filing be treated as a motion. In the interest of efficiency, the Commission will treat Ruby's December 16, 2015 filing as a motion. To require Ruby to refile its request and Distell to refile its opposition would be inefficient and a waste of time and resources.

At the hearing, Petitioner represented that Distell likely is no longer producing Items 2 and 4, and therefore that Items 2 and 4 likely could be removed from the ship order.² Consequently, the Commission will remove those items from the order to ship. However, if Distell returns either of those two Brand Items to production during the course of this litigation, it shall promptly notify the Commission and the Petitioner.³

Distell argues that Items 1, 3, and 5 were last purchased at a date remote in time and that there was not a regular course of dealing for a full six months. Petitioner last purchased Item 1 on May 1, 2013. Item 5 was only purchased once, on August 22, 2013, which was approximately two years before the refusal to sell date. Similarly, Petitioner purchased Item 3 only one time, in September 2014, which was about a year before the refusal to sell date.

Despite Distell's persuasive arguments concerning Items 1, 3, and 5, the Commission will not disturb the order to ship. The purpose of an order to ship is to maintain the status quo during the course of the §25E litigation. Somerset Importers, Ltd. v. Alcoholic Beverages Control Comm'n, 28 Mass. App. Ct. 381, 384-385 (1990) (§ 25E obligates supplier "to maintain normal business volume" pending ABCC's decision upon supplier's alleged § 25E obligations); Austin-Nichols & Co., Inc. v. Alcoholic Beverages Control Comm'n, Suffolk County Superior Court C.A. No. 02-0619H (Walker, J., Mem. & Order Mar. 27, 2002) (§ 25E ship order's purpose is to "preserve the status quo" pending the Commission's final ruling upon the § 25E obligations, if any, of a supplier). The statute is explicit that, upon a wholesaler's application, 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.*" M.G.L. c. 138, §25E (emphasis added). The merits of the appeal have not yet been heard, and therefore, the Commission must continue to enforce its order requiring that Distell continue to ship Items 1, 3, and 5 to Ruby.

CONCLUSION

Distell's Motion to Clarify and Amend the Commission's Order to Ship is further **ALLOWED** as to Item 2 (Angostura Reserva Rum 6/750 ml 40% alc/vol) and Item 4 (Black Bottle Original Scotch 12/750ml 40% alc/vol) and **DENIED** as to Items 1, 3, and 5.

² Items 2 and 4 are not listed as brands in the termination letter from Distell to Ruby. (Exh. B to Danis Aff.)

³ With regard to the issue of quantity discussed in footnote 1 above, the Petitioner focusses on "Black Bottle Scotch" in its Supplemental Response to MHW's Motion to Amend Order to Ship and in the Affidavit of John Pettine. The Commission infers that the Petitioner refers to the 6 bottle package of Black Bottle Original Scotch, which is referenced in Distell's termination letter to Petitioner. (Exh. B to Danis Aff.) To the contrary, the Commission notes that Distell's January 5, 2016 opposition to Petitioner's filing assumes that Petitioner seeks an increased amount of the 12 bottle package (Item 4). See Respondent's Opposition to Ruby's Supplemental Response to Respondent's Motion to Clarify and Amend Order to Ship, p. 1. The Commission expects the parties to clarify this issue at the upcoming hearing on Ruby's motion (Ruby's Supplemental Response to MHW's Motion to Amend Order to Ship).

SECOND AMENDED ORDER TO SHIP

The Commission hereby amends its October 23, 2015, Order to Ship to exclude the following Brand Items:

- Angostura Reserva Rum 6/750 ml 40% alc/vol ("Item 2"); and
- Black Bottle Original Scotch 12/750ml 40% alc/vol ("Item 4").

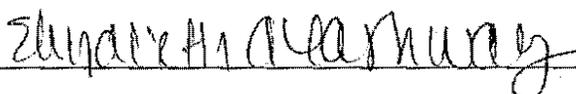
If Item 2 and/or Item 4 is produced again during the course of this litigation, Distell shall inform the Commission and Petitioner of the same.

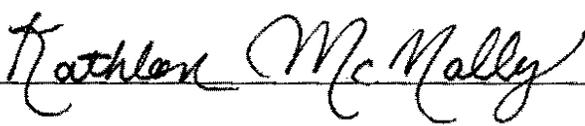
In accordance with the Commission's October 23, 2015 Order to Ship, the following Brand Items remain excluded from the Order to Ship:

- a) Amaro di Angostura;
- b) Bunnahabhain Ceobanach Scotch; and
- c) Deanston 18 Year LE Cognac Finish.

The remainder of the Commission's original September 2015 Order to Ship remains in full effect.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner 

Kathleen McNally, Commissioner 

Dated: January 29, 2016

You have the right to appeal this decision to the Superior Court under the provisions of Chapter 30A of the Massachusetts General Laws within thirty days of receipt of this decision.

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cc: William Coyne, Esq. via email
Mary O'Neal, Esq. via email
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