Commonwealth of Massachusetts
Supreme Judicial Court

DOCKET NO. SJC-12547

CRAFT BEER GUILD, LLC, d/b/a
CRAFT BREWERS GUILD,
Plaintiff-Appellant,

v.

ALCOHOLIC BEVERAGES CONTROL COMMISSION,
Defendant-Appellee.

On Appeal from a Decision and Judgment of the Superior Court Department of the Massachusetts Trial Court – Suffolk County, Docket No. 1684CV00809

BRIEF OF THE APPELLANT CRAFT BEER GUILD, LLC d/b/a CRAFT BREWERS GUILD

J. Mark Dickison BBO# 629170
Caroline O'Connell BBO# 640271
Joshua M. D. Segal BBO# 678367
LAWSON & WEITZEN, LLP
88 Black Falcon Avenue Suite 345
Boston, MA 02210
Telephone: (617) 439-4990
Facsimile: (617) 439-3987
mdickison@lawson-weitzen.com
coconnell@lawson-weitzen.com
jsegal@lawson-weitzen.com

Dated: September 14, 2018

Table of Contents

Table of Authorities

Cases

Statutes

Treatises

Regulations

Statement of the Issues

The overarching issue on this appeal is whether the Superior Court erred in affirming the Alcoholic Beverage Control Commission ("ABCC") decision suspending Craft Beer Guild, LLC, d/b/a Craft Brewers Guild's ("Craft") alcoholic beverage wholesale license for fifteen months, with 90 days to serve, and allowing Craft to pay a $2,623,466.70 fine in lieu of suspension. Stated differently, at issue is whether the ABCC improperly found violations of G.L. c. 138, § 25A without satisfying all of the statutory requirements and 204 C.M.R. § 2.08 even though the Legislature repealed the regulation's legislative support. More specifically, this appeal turns on the following issues:

1) Whether the Superior Court incorrectly affirmed the ABCC's decision finding a violation of 204 C.M.R. § 2.08 even though the Superior Court significantly narrowed the scope of 204 C.M.R. § 2.08 because the Legislature repealed its statutory analogue in 1970 and the regulation was never re-promulgated thereafter.

2) Whether the Superior Court incorrectly held that the ABCC made findings of facts necessary to satisfy a prima facie violation by Craft of G.L. c. 138, § 25A.

3) Whether the Superior Court incorrectly affirmed the ABCC decision and erroneously found that the ABCC's findings and holdings were supported by substantial evidence and were not arbitrary and capricious; especially where there was record evidence that the ABCC absolved other licensees accused of accepting rebates and/or payments from Craft of any violation due to a lack of evidence, but found Craft liable based on the same evidence.

4) Whether the Superior Court incorrectly affirmed the ABCC decision even though it found that the ABCC violated Craft's due process rights when it took administrative notice of certain records in its files without complying with G.L. c. 30A, § 11(5) which required the Commission to give Craft prior notice of the administrative notice.

Statement of the Case

On April 29, 2015, the ABCC issued a Notice of Hearing alleging that Craft violated G.L. c. 138, § 25A and 204 C.M.R. § 2.08 on March 18, 2015. [R.A. 70.] That same day, the ABCC's Investigators released a Violation Report (the "Report") to Craft setting forth the factual underpinning for the alleged violations. The Report contained a narrative, a description of reviewed documents, and 441 pages of exhibits.[1] [R.A. 330-787]. It chronicled a seven-month investigation of Craft and 28 Boston retail licensees and recounted interviews with a dozen witnesses concerning 15 transactions that occurred on various dates in 2013 and 2014 between Craft and certain non-licensed marketing entities. The Report asserted that Craft made 15 payments to the non-licensed marketing entities. [R.A. 330-347.] The ABCC held a hearing on September 2, 2015 during which Craft stipulated to the facts in the Report. [R.A. 788.] In the ABCC Order and Decision dated February 11, 2016, the ABCC suspended Craft's license for fifteen months, with 90 days to be

[1] Although the Notice of Hearing charged a single violation occurring on March 18, 2015, the Report contains no evidence of or reference to any act occurring on that date.

served, and the balance of twelve months held in abeyance for two years. The ABCC found that Craft's payments to retailers and unlicensed marketing companies violated 204 C.M.R. § 2.08 and G.L. c. 138, § 25A. The ABCC provided Craft the opportunity to avoid closing for 90 days if it agreed to pay a fine in lieu of the 90-day suspension under G.L. c. 138, § 23. [R.A. 239-40, 243-264.] To avoid the potentially business-ending penalty of a closure, Craft paid a record-setting fine of $2,623,466.70. [R.A. 265-76.]

On March 10, 2016, Craft filed a Complaint challenging the ABCC Decision in the Suffolk Superior Court seeking review under G.L. c. 30A, § 14, relief in the nature of certiorari, and declaratory relief overturning or altering the ABCC Decision, or in the alternative, a remand to the Commission for further proceedings. [R.A. 5-59.]

On October 2, 2017, after briefing and a hearing on cross motions for judgment on the pleadings, the Superior Court (Wilkins, J.) issued a Memorandum of Decision and Order. In that decision, the Superior Court held that 204 C.M.R. § 2.08 has been partially repealed, limiting its effect to only inducements constituting price discrimination. Nonetheless, the

Superior Court affirmed the ABCC Decision. [R.A. 1613-1639.]

Judgment entered in the Superior Court on October 4, 2017. [R.A. 1639.] Craft filed a timely notice of appeal on October 18, 2017. [R.A. 1640.] The record was assembled and transmitted to the Appeals Court on April 5, 2018 and this appeal was entered in the Appeals Court on April 12, 2018. On May 1, 2018 Craft filed a petition with this Court for direct appellate review which was allowed on June 22, 2018.

Summary of Argument

This case arises out of the ABCC's highly publicized and inconsistent enforcement of statutes and regulations governing the trade practices of licensees who purchase, sell, and promote beer in the Commonwealth. Since the ABCC's February 11, 2016 decision finding that Craft allegedly violated certain trade practices, the ABCC has, with one exception, declined to find any of the other allegedly involved licensed retailers liable even though they stipulated to the same facts. It has also declined to enforce the same law against other Massachusetts wholesalers.

The ABCC's Decision was flawed for many reasons, however four that are central to this appeal require this Court to set aside the ABCC's decision and enter judgment in favor of Craft.

First, the regulation at issue, 204 C.M.R. § 2.08, is invalid because the Legislature repealed its statutory authority in 1970 and the regulation was never re-promulgated thereafter. A regulation that contradicts express legislative intent is invalid. Moreover, even in light of the regulation's invalidity, the ABCC erroneously enforced it for the first time in this underlying proceeding. Because the

regulation is invalid, its application to Craft must be set aside. [pp. 10-24].

Second, the ABCC found Craft liable under G.L. c. 138, § 25A for alleged price discrimination. It did so despite failing to find facts sufficient to satisfy each of the statute's prima facie requirements. The ABCC's decision therefore was not based on substantial evidence. [pp. 25-30].

Third, when the ABCC was faced with identical evidence (specifically, the same investigative report that it used in this matter), it absolved other licensees accused of accepting the rebates and/or payments from Craft of any violation and made contradictory findings. This arbitrary and capricious administrative action should be set aside. [pp. 30-36].

Fourth, the ABCC considered secret evidence depriving Craft of due process. Following the hearing, the ABCC took administrative notice of its own records without any opportunity for Craft to present additional evidence or oppose their consideration. Craft has argued that the ABCC did not have sufficient evidence to find violations. The consideration of secret evidence – especially in light of Craft's

argument – is a violation of due process requiring the ABCC's decision to be set aside. [pp.36-41].

In sum, the ABCC's authority to regulate trade practices in the alcoholic beverage industry is limited and its decision in this case was unlawful, arbitrary, inaccurate, and contradictory and has led to inconsistent and inequitable enforcement in related and unrelated cases. Craft should not have been singled out and assessed an extraordinary penalty for conduct that was condoned by the Legislature and for which virtually every other industry member has been exonerated.

Argument

Judicial review of the ABCC Decision is governed by G.L. c. 30A, §§ 14-15. Section 14(7) permits a court to set aside the Decision if it is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) based upon an error of law; (d) based on unlawful procedure; (e) unsupported by substantial evidence; (f) unwarranted by the record facts, or (g) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Reviews of the ABCC's legal holdings is de novo. G.L. c. 30A, § 14(8)(c). Findings of fact cannot stand if "unsupported by substantial evidence." Raytheon Co. v. Director of Div. of Emp't Sec., 364 Mass. 593, 595 (1974). "Substantial evidence is more than just some evidence to support the conclusion of the administrative agency." Griffin's Brant Rock Package Store, Inc. v. ABCC, 12 Mass. App. Ct. 768, 770 (1981), citing Cohen v. Bd. of Registration in Pharm., 350 Mass. 246, 253 (1966).

In conducting review under G.L. c. 30A, § 14, the Court "consider[s] . . . the entire record and must take into account whatever in the record fairly detracts from its weight." Griffin's Brant Rock Package Store, Inc., 12 Mass. App. Ct. at 770 (citations and internal quotation marks omitted). The Court is "not required to affirm the [agency] merely on a finding that the record contains evidence from which a rational mind might draw the desired inference [but] [r]ather . . . to probe whether the evidence points to an appreciable probability of the conclusion arrived at by the commission." Id. (first alternation original) (citations and internal quotation marks omitted).

Although the ABCC's "experience, technical competence, [and] specialized knowledge" is given due weight, Brown-Forman Corp. v. ABCC, 65 Mass. App. Ct. 498, 503-04 (2006), "this principle is one of deference, not abdication." Leopoldstadt, Inc. v. Comm'r of the Div. of Health Care Fin. & Policy, 436 Mass. 80, 91 (2002), quoting Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 618 (1997).

Any findings not within the particular expertise of the ABCC are not entitled to deference. Brown-Forman Corp., 65 Mass. App. Ct. at 503-04; cf. Griffin's Brant Rock Package Store, Inc., 12 Mass. App. Ct. at 771 ("No particular expertise of the [ABCC] bears on the analysis of what constitutes a transfer of a license," so no deference is due such an analysis). Moreover, where the ABCC's decision rests on a conclusion of law, the review remains de novo. Brown-Forman Corp., 65 Mass. App. Ct. at 504.

I. The ABCC erred when it found that Craft violated 204 C.M.R. § 2.08 because the regulation was implicitly repealed when the Legislature repealed G.L. c. 138, § 25A(b).

The ABCC's finding that Craft violated 204 C.M.R. § 2.08, which prohibits wholesalers from inducing retailers to purchase particular brands by giving

money or things of value,[2] was an error of law and exceeded its statutory authority. The Legislature repealed a statute prohibiting the same conduct in 1970 and thereby expressed its judgment that inducements from wholesalers to encourage the purchase of alcoholic beverages should not be prohibited.

The ABCC's regulation of inducements was authorized prior to 1970. In 1933, the Massachusetts Legislature enacted the Liquor Control Act, G.L. c. 138, after Prohibition was repealed. The Liquor Control Act established a three-tier system distribution system so that manufacturers sell products to wholesalers and wholesalers sell those products to retailers. To implement the Liquor Control Act, the ABCC promulgated a set of fifty regulations in 1935. One of the regulations, Regulation 47, was the precursor to 204 C.M.R. § 2.08, prohibiting

---

[2] The regulation provides:

> No licensee shall give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.

licensees from giving things of substantial value to induce the purchase of particular kinds or brands of alcoholic beverages. Because the Liquor Control Act did not expressly prohibit inducements, the ABCC likely based its adoption of Regulation 47 under its general authority to carry out the provisions of the Act under G.L. c. 138, **§** 24. [R.A. 1643-51.]

In 1946, the Legislature enacted St. 1946, c. 304, now codified as G.L. c. 138, § 25A, to govern the sales conduct and trade practices between wholesalers and retailers. As the Legislature made clear in the emergency preamble to § 25A, recounted by the Appeals Court in the leading § 25A case,

> Whereas, the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods and other inducements to favored licensees contributes to a disorderly distribution of alcoholic beverages; and
>
> Whereas, the deferred operation of this act would delay the proper regulation thereunder of the alcoholic beverage industry and be contrary to the interests of temperance, therefore this act is hereby declared to be an emergency law necessary for the immediate preservation of the public convenience.

St. 1946, c. 304; Van Munching Co. v. ABCC, 41 Mass. App. Ct. 308, 310-11 (1996).[3] The Legislature intended § 25A to control suppliers' and wholesalers' transactions by limiting particular and specific trade practices in order to promote temperance and an orderly market. Section 25A set forth two methods to achieve this goal: first, it prohibited price and credit discrimination, and second, it prohibited discounts, rebates, free goods, and inducements. St. 1946, c. 304.

In 1970, the Legislature revisited § 25A removing some of the limits placed on trade practices and deleted clause (b) in its entirety "thereby repealing the law relative to discount in the sale of alcoholic beverages." St. 1970, c. 140, § 1; see also Mass. Gen. Laws Ann. c. 138, § 25A, Ed. Note 1 (West). This act was titled: "An Act relative to the filing of schedules of prices of alcoholic beverages and repealing the law relative to discounts in the sale of such beverages." St. 1970, c. 140 (emphasis added). The title shows that the Legislature sought to remove any prohibition on providing discounts in the

[3] Related materials from the State Archives are in the record appendix. [R.A. 1415-20.]

wholesale of alcoholic beverages. See Anheuser-Busch, Inc. v. ABCC, 75 Mass. App. Ct. 203, 208 (2009).

The effect of this repeal was aptly described in Van Munching when the Appeals Court rejected the ABCC's attempt to prohibit a supplier from offering a discount program:

> We reject the commission's efforts to construe § 25A out of context, ignoring its antidiscrimination purpose and viewing it as defining in a comprehensive manner all permissible (and by its omissions, all impermissible) discount programs. Section 25A neither explicitly nor implicitly proscribes the discount program at issue. If § 25A "were interpreted in the manner urged by the commission, [it] would in effect be enlarged to include something which the Legislature, either by inadvertence or design, omitted therefrom." M.H. Gordon & Sons, Inc. [v. ABCC], 371 Mass. [584] at 589 [(1976)].
>
> As the trial court judge noted, the legislative history of § 25A supports this conclusion. In its pre-1970 version, there was a subsection (b) of § 25A which provided that "[n]o licensee . . . shall . . . [g]rant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement, except a discount not in excess of two per centum for quantity of alcoholic beverages except wines, or a discount not in excess of five per centum for quantity of wines." (footnote omitted). In 1970, the Legislature repealed this paragraph, which had expressly regulated discounts and allowed only one type of discount. The Legislature at the same time left intact subsection (a), dealing with nondiscrimination. In so doing, the Legislature eliminated the limitations on quantity-based discounts. The commission's decision here would in essence improperly revive and write back into § 25A that which the Legislature chose to repeal. However, portions of a statute which have been omitted are instead properly to be considered as annulled.

> Victoria, Inc. v. [ABCC], 33 Mass. App. Ct. 507, 511 (1992).

Van Munching Co., 41 Mass. App. Ct. at 310-11 (alternations original). In short, the Legislature repealed the prohibition on wholesalers giving discounts, rebates, allowances, and other inducements.

The next year, the Legislature added a second paragraph to § 25A, "relative to price discrimination by a sale below list or quotation price" requiring wholesalers to post their prices and hold them for thirty days. G.L. c. 138, § 25A, Ed. Note 2 (West). This "post-and-hold" provision was invalidated as illegal based on antitrust principles in 1998. Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41 (D. Mass. 1998) aff'd sub nom Shore Corp. v. Sullivan, 158 F.3d 51 (1st Cir. 1998); see also Whitehall Co. v. Merrimack Valley Distrib. Co., 56 Mass. App. Ct. 853, 854 & n.3 (2002) (discussing the effect of Canterbury Liquors). Neither the Legislature nor the ABCC have acted to replace § 25A's invalidated post-and-hold provision or its parallel regulations.

In short, G.L. c. 138, § 25A, the only statute concerning trade practices, is partially repealed and partially invalidated. Section 25A no longer prohibits

wholesalers from granting "directly or indirectly, any discount, rebate, free goods, allowance or other inducement." Nor after the invalidation of the post-and-hold requirements, must a wholesaler hold prices for thirty days; rather wholesalers can change prices as they desire based on their own business judgment. The only remaining statutory restraint on trade practices is § 25A's anti-discrimination language. See Miller Brewing Co. v. ABCC, 56 Mass. App. Ct. 801, 807 (2002). As a result, 204 C.M.R. § 2.08's ban on inducements is invalid because it contradicts legislative intent. Saccone v. State Ethics Com., 395 Mass. 326 (1985); see also Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'").

Stated differently, the Legislature's repeal of G.L. c. 138, § 25A(b), which prohibited a licensee from granting a retailer "any discount, rebate, free goods, allowance or other inducement" also implicitly invalidated the regulation prohibiting a wholesaler for giving "money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract

for the purchase of any particular brand or kind of alcoholic beverages." Without legislative authority to prohibit inducements, the ABCC Decision finding Craft liable for violating § 2.08 cannot stand.

The ABCC is likely to argue that Regulation 47 was promulgated before the enactment of G.L. c. 138, § 25A, based on its general authority under G.L. c. 138, § 24, and therefore § 25A's partial repeal has no effect on the effect of the regulation. However, the subsequent legislative pronouncement still invalidates the regulation. The Legislature has spoken and has revoked any prohibition on incentives other than price discrimination. Fundamentally, 204 C.M.R. § 2.08 is invalid as ultra vires because it contradicts legislative intent. Saccone v. State Ethics Com., 395 Mass. 326 (1985). Since 1970, the ABCC may no longer prohibit a licensee from giving a retailer a "discount, rebate, free goods, allowance or other inducement." See Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'").

Massachusetts courts have consistently held that agency regulations are invalid when they are

inconsistent with or exceed the authority conferred by statute. "An administrative agency has no inherent or common law authority to do anything." Comm'r of Revenue v. Marr Scaffolding Co., 414 Mass. 489, 493 (1993). "The [agency's] authority . . . is derived from either express or implied statutory authority." Gillette Co. v. Comm'r of Revenue, 425 Mass. 670, 678 (1997). This Court recently held: "Regulations are invalid when the agency utilizes powers neither expressly nor impliedly granted by statute. Nor may regulations validly be promulgated where they are in conflict with the statutes or exceed the authority conferred by the statutes by which such [agency] was created." Pepin v. Div. of Fisheries & Wildlife, 467 Mass. 210, 221-22 (2014) (internal quotation marks and citations omitted) (alteration original). Put another way, "[a]n administrative agency promulgates regulations to 'implement or interpret the law enforced or administered by it,' and 'has only the powers and duties expressly or impliedly conferred on it by statute.'" Smith-Pena v. Wells Fargo Bank, N.A. (In re Smith-Pena), 484 B.R. 512, 525 (Bankr. D. Mass 2013) (holding a Massachusetts regulation invalid for exceeding its statutory authority), citing G.L. c.

30A, § 1(5); Matter of Elec. Mut. Liab. Ins. Co., 426 Mass. 362, 366 (1998) (citation omitted).

Invalidating regulations as contrary to statutory authority is nothing new. In 2012, the Appeals Court found a Department of Mental Retardation regulation defining mental retardation invalid because it was inconsistent with the authorizing legislation. Tartarini v. Dep't of Mental Retardation, 82 Mass. App. Ct. 217, 222 (2012). In Bierig v. Everett Square Plaza Assoc., the Appeals Court held a Massachusetts Housing Finance Agency regulation and contract conflicted with the governing statute and therefore granted summary judgment invalidating the regulation. 34 Mass. App. Ct. 354, 365-66 (1993), F.A.R. den'd, 415 Mass. 1105.

This Court has also regularly invalidated regulations enforced by agencies on grounds that they were not supported by or exceeded statutory authority. E.g., Spaniol's Case, 466 Mass. 102, 111 (2013) (finding Department of Industrial Accidents regulation 452 C.M.R. § 1.02 invalid and reversing agency's decision allowing an insurer to withhold up to 22% of an employee's compensation award to offset the insurer's payment of the attorney's fees); Smith v.

Comm'r of Transitional Assistance, 431 Mass. 638, 653-54 (2000) (invalidating a financial eligibility test promulgated by the Department of Transitional Assistance because it effectively bypassed the statutory factors to be considered when determining whether to extend a recipient's benefits); Massachusetts Hosp. Ass'n v. Dept. of Med. Sec., 412 Mass. 340, 342-43 (1992) (invalidating a regulation promulgated by the Department of Medical Security that limited the amount of "bad debt" for which a hospital could receive reimbursement when statute merely authorized the DMS to establish "criteria" for assessing a hospital's collection efforts).

Although no Massachusetts appellate decision specifically invalidated a regulation based on the repeal of a statute governing the same conduct, in a parallel context, other states have specifically held that the repeal of a statute invalidates regulations promulgated under it and that those regulations can no longer be enforced. In S.C. Dep't of Nat. Res. v. McDonald, 626 S.E.2d 816, 818 (S.C. Ct. App. 2006), a South Carolina court held that a regulation prohibiting hunting over bait on locations outside wildlife management areas was no longer enforceable.

The regulation's enabling legislation was no longer in effect as enacted and the only intact provision of the statute authorized the Department of Natural Resources to regulate hunting only on wildlife management area lands. Because the violations at issue concerned a defunct prohibition, convictions under the regulation were improper. Id. at 820. Similarly, in City of Montpelier v. Barnett, 49 A.3d 120, 131 (Vt. 2012), the Vermont Supreme Court overturned an injunction against the recreational use of a pond because it concluded that a 1926 Board of Health regulation became invalid in 1989 after the Vermont Legislature repealed both the authorization to create such orders and the prohibition on violating such orders. Id. The Vermont Supreme Court reviewed the law of several jurisdictions and summarized:

> The common law rule is that when a statute is repealed its repeal reaches back in time to eliminate any authority that existed under the statute. See Gilman v. Morse, 12 Vt. 544, 552 (1840) ("As a general rule the repeal of a law puts an end to that which was created directly by the law itself."); Wieslander v. Iowa Dep't of Transp., 596 N.W.2d 516, 522 (Iowa 1999) ("The repeal of a statute typically destroys the effectiveness of the statute, and the repealed statute is deemed never to have existed."); 1A N. Singer & J. Singer, Sutherland Statutes & Statutory Construction § 23:34, at 552-53 (7th ed. 2009) ("Repeal of a statute . . . destroys the effectiveness of the repealed act in futuro and divests the right to

> proceed under the statute. Except as to proceedings past and closed, the statute is considered as if it has never existed."). This rule applies to a grant of regulatory authority, meaning that the repeal of the authority to issue orders or regulations normally repeals those orders or regulations already issued. See United States v. Fortier, 342 U.S. 160, 161-62, 72 S. Ct. 189, 96 L. Ed. 179 (1951) (per curiam) (holding that repeal of statutory authority to impose price restrictions operated as a repeal of restrictions already in place); Osborn Funeral Home, Inc. v. La. State Bd. of Embalmers, 194 So. 2d 185, 188 (La. Ct. App. 1967) ("[T]he authority purportedly conferred by the former statute upon defendant board to adopt the rules and regulations assailed by plaintiff no longer exists . . . . Therefore, the rules and regulations [of the board] have no basis for their existence and, in fact, no longer exist or have any pertinence."); In re Brown, 903 A.2d 147, 151 (R.I. 2006) (holding that repeal of the governor's power to issue orders to place questions on the ballot meant that orders issued prior to the repeal of the governor's authority were no longer binding); S.C. Dep't of Natural Res. v. McDonald, 367 S.C. 531, 626 S.E.2d 816, 819 (S.C. Ct. App. 2006) ("[T]he question is whether the repeal of . . . the statute referenced during the promulgation . . . operates as a repeal of the regulation itself. We hold that it does.").

Id.

In Spaniol's Case, 466 Mass. at 110, this Court established a two-part analysis for determining whether a duly promulgated regulation is a valid exercise of authority. "First, using conventional tools of statutory interpretation, we consider 'whether the Legislature has spoken with certainty on the topic in question, and if we conclude that the statute is unambiguous, we give effect to the

Legislature's intent.'" Id., quoting Goldberg v. Bd. of Health, 444 Mass. 627, 632-33 (2005). "Second, if the Legislature has not directly addressed the pertinent issue and the statute is capable of more than one rational interpretation, we proceed to determine whether the agency's interpretation may 'be reconciled with the governing legislation.'" Id., quoting Goldberg, 444 Mass. at 633.

Here, in analyzing whether 204 C.M.R. § 2.08 is a valid exercise of regulatory authority, the first step resolves the question and requires invalidation; the Legislature has spoken with certainty on this topic. The Legislature's repeal of G.L. c. 138, § 25A(b), which prohibited a licensee from granting a retailer "any discount, rebate, free goods, allowance or other inducement" also implicitly invalidated the regulation, whether identified as Regulation 47 or 204 C.M.R. § 2.08, prohibiting a wholesaler to give "money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages."

The Appeals Court discussed this precise topic concerning discounts and rebates of alcoholic beverages and confirmed the Legislative intent to repeal the prohibition in holding that the ABCC's prohibition of a discount program "would in essence improperly revive and write back into § 25A that which the Legislature chose to repeal." Van Munching Co. v. ABCC, 41 Mass. App. Ct. 308, 310-11 (1996). Because the Legislature has spoken on this issue, 204 C.M.R. § 2.08 is invalid. The regulation conflicts with and is not authorized by its enabling statutes. Thus, the ABCC's holding that Craft violated § 2.08 must be vacated.

The Superior Court largely accepted this argument, but held that § 2.08 was limited to instances of price discrimination. [R.A. 1624-25.] Nonetheless, it held that when the regulation was viewed through the lens of § 25A, the ABCC properly found a violation. This circular logic only confuses an already complex and inconsistently applied legal landscape.

Because there is no legislative support for 204 C.M.R. § 2.08 and because the Legislature acted to repeal a statutory analog, the regulation is invalid

and the ABCC incorrectly found that Craft violated its prohibitions.

II. The ABCC did not find sufficient facts to establish a violation of G.L. c. 138, § 25A.

A. The ABCC failed to make out a prima facie case showing a violation of § 25A.

Section 25A(a) now prohibits a wholesaler from

> Discriminat[ing], directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, . . . between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality[.]

To find a prima facie violation of § 25A, the ABCC must find that:

(1) a licensee,

(2) discriminated (directly or indirectly),

(3) in price, in discounts of payment or in discounts on quantity of merchandise sold,

(4) between one retailer and another retailer, purchasing alcoholic beverages,

(5) which bore the same brand or trade name, and

(6) were of like age and quality.

Stated differently, the ABCC had to show both that Craft sold a particular product at a discount to one licensee, and that it sold the same product at a higher price to another licensee. Moreover, after the invalidation of the post-and-hold pricing requirement, there is no prohibition on a wholesaler changing

prices for products at any time. Thus, to violate § 25A, there is a seventh requirement, namely that the two sales at different prices occur at the same time. Comparing transactions from January 1, 2013 to January 15, 2013 would be of no moment because a wholesaler is entitled to change its prices.

The ABCC did not find facts establishing a prima facie violation of § 25A. The ABCC Decision makes no findings of fact or rulings of law that (1) Craft (2) discriminated (3) by providing select rebates (4) to one retailer and not another as to purchases of beer (5) bearing the same brand or trade name, (6) of like age and quality, (7) with respect to contemporaneous transactions. Craft's admission that some rebates were given and that not everyone was offered the rebates does not prove discrimination or a violation of § 25A. As a result, the ABCC Decision must be vacated because the facts, as conceded by Craft and found by the ABCC, do not constitute a prima facie violation of § 25A without a showing that another retailer purchased the same brand items but did not pay the same price. Casa Loma, Inc. v. Alcoholic Beverages Control Comm'n, 377 Mass. 231, 234 (1979) ("It is a common tenet of statutory construction that, wherever possible, no

provision of a legislative enactment should be treated as superfluous.").

The ABCC held that Craft's admission that it offered rebates to some retailers or marketing companies and not others was sufficient evidence of price discrimination, even without evidence that Craft sold the same brands contemporaneously at different prices to different retailers or that the retailers, other than one, received any rebates. An admission of belief of wrongdoing is insufficient to trigger liability without proving a prima facie case. Agencies engaged in prosecutorial conduct cannot find violations without evidence satisfying each required element. Without proof of each element of price discrimination – two simultaneous sales of the same products at different prices – the § 25A violation cannot stand because it is not supported by substantial evidence. Embers of Salisbury, Inc. v. ABCC, 401 Mass. 426, 428 (1988); see also Griffin's Brant Rock Package Store, Inc. v. ABCC, 12 Mass. App. Ct. 768, 660 (1981) ("Substantial evidence is more than just some evidence to support the conclusion of the administrative agency.").

The Superior Court accepted this finding, holding that "[n]o matter when the transactions occurred, then, some retailers had the benefit of a lower net price (after rebate) than other retailers." [R.A. 1629.] The ABCC never made such a finding. There was no finding by the ABCC or evidence before the ABCC that the prices paid by the identified retailers were lower than prices paid by other retailers for the same products. The ABCC's finding of price discrimination is therefore unsupported by substantial evidence.

B. The ABCC also failed to show that the alleged rebates and payments went to licensees, as opposed to marketing companies.

In holding that Craft violated § 25A and 204 C.M.R. § 2.08, the ABCC asserted that "[Craft] admittedly offered rebates to retail licensees." [A.R. 258.] Even if giving rebates to retail licensees was illegal, this conclusion is not supported by the ABCC's own factual findings or record evidence. The ABCC Decision does not find that Craft offered rebates to any specific retail licensees; rather it finds that

Craft transacted with "certain Retailers' management/marketing companies."[4] [R.A. 246.]

This distinction between the recipients of the rebates is critical, as the ABCC acknowledged in later ruling on charges against five retailers based on the same investigative report and documentary evidence. In four of these five cases, the ABCC found no evidence that Craft's rebates to the Third Parties went to the licensed retailers and therefore found no violations. [R.A. 1552-84.] Nonetheless, the ABCC penalized Craft for providing rebates to these retailers – even though (with one exception) it provided no rebates to licensed retailers. Reaching conflicting decisions on the same record constitutes arbitrary and capricious conduct. Retirement Bd. of Somerville v. CRAB, 38 Mass. App. Ct. 673, 676-79 (1995).

C. The payment of rebates does not constitute price discrimination.

Moreover, § 25A(a) only prohibits certain classes of discrimination. A supplier cannot discriminate in

[4] The record evidence demonstrates that Craft paid three rebates to a particular licensee in the amount of $8,420. [R.A. 389, 394, 398.] If this is the only basis for a violation, instead of the ABCC Decision's broad findings, this matter should be remanded to the ABCC for reconsideration of Craft's penalty.

price, time of payment, and quality of merchandise. The regulation of rebates – the supposed wrongdoing at issue here – was repealed with § 25A(b) in 1970. "[A] basic tenet of statutory construction [is] that a statute must be construed 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" Bankers Life & Cas. Co. v. Comm'r of Ins., 427 Mass. 136, 140 (1998) (quoting 2A B. Singer, Sutherland Statutory Construction 46.06 (5th ed. 1992)). It follows that if the Legislature previously prohibited both price discrimination and the giving of rebates, it could not have meant to include the giving of rebates as a form of price discrimination. Craft is only accused of giving rebates and not of changing the front-line price paid by retailers. Therefore, the ABCC did not find sufficient facts to warrant a § 25A violation.

III. The ABCC's holding conflicted with subsequent holdings based on the same facts and was thus arbitrary and capricious.

Under G.L. c. 30A, § 14(7)(g), this Court may set aside the ABCC Decision if it "was arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law."

"[A]n agency action supported by substantial evidence may nonetheless be arbitrary and capricious." Retirement Bd. of Somerville v. CRAB, 38 Mass. App. Ct. 673, 676-77 (1995), citing, Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 284 (1974). In Retirement Board of Somerville, the Appeals Court held that a state agency acted arbitrarily and capriciously in granting retirement benefits when an earlier, separate determination based on the same record concluded otherwise. Id. at 678-79. Specifically, in 1987, the CRAB declined to grant benefits in a particular case because the record's submissions and findings were inadequate to make a determination and instead the CRAB asked for further records. Id. at 677. After a year, the CRAB was informed that there were no further records available. Then, after an inexplicable four-year wait, on the original record, the CRAB granted the benefits. It offered no explanation why information which was essential to its decision in 1987 based on the same record was "no longer considered essential [at a different time]." Id. 678-79. The Appeals Court correctly held that "an agency final adjudication that essentially contradicts an earlier interim

determination made on the same record, with no reason cited, or subsidiary findings made, explaining or supporting the change" is arbitrary and capricious and must be reversed. Id.

The present case is another instance of an agency final adjudication that contradicts a different determination made on the same record in a related proceeding. In this case, the ABCC's holding that Craft violated 204 C.M.R. § 2.08 contradicts its subsequent decisions on the same record in which it found insufficient evidence that four of five retailers violated 204 C.M.R. § 2.08.

The ABCC issued a decision, dated July 29, 2016, dismissing the charges against one such retailer, Poe's Pub, Inc. d/b/a Estelle's. [R.A. 1552.] In this decision, the ABCC, relying on the same Report submitted against Craft, found that the licensee was managed by the Wilcox Hospitality Group, Inc. [R.A. 1553.] In findings virtually identical to those in the Craft Decision, the ABCC found that Craft paid Wilcox Hospitality Group, Inc., which managed five other licensed retailers, two payments of $20,000 to obtain "20 committed draft lines at Wilcox's [licensed retailer] establishments." Yet the ABCC found that

"there is insufficient evidence that [Poe's Pub] violated 204 C.M.R. § 2.08." [R.A. 1553.] This was because

> while it is clear and apparently undisputed that Wilcox received $20,0000.00 as a bribe for 20 dedicated tap lines in Wilcox-managed restaurants, there is nothing in the record that shows this specific Licensee was "[permitted] to be given" money . . . . The record is devoid of any circumstantial evidence that any of the $20,000.00 paid by Craft to Wilcox made its way from Wilcox to Poe's Pub . . . or even evidence that the checks from Craft to Wilcox delivered by McCoy were dropped off at Poe's Pub . . . . Nothing links Poe's Pub specifically to this scheme.

[R.A. 1555.]

The ABCC issued similar decisions dismissing charges against three other retailers. [R.A. 1557-74.] Of the five retailers it charged based on the same investigative report used to charge Craft, the ABCC only found that one, Rebel Restaurants, Inc. d/b/a Jerry Remy's, violated 204 C.M.R. § 2.08. The ABCC held that there was sufficient evidence to support a violation because Rebel Restaurants, Inc., a retail licensee, directly received $8,420 in payments from Craft and these payments were specifically for the purpose of having Rebel carry Craft's brands. [R.A. 1577-84].

In light of these five subsequent decisions relying on the same record, this Court should hold that the ABCC acted arbitrarily and capriciously in finding that Craft violated 204 C.M.R. § 2.08. In dealing with Craft, the ABCC made absolutely no distinction between Craft's payments to non-licensee management companies and actual retail licensees even though it later admitted that "[a]n essential element of 204 C.M.R. § 2.08 is that a [retail] licensee . . . 'permit[s] to be given' something of value." [R.A. 1561, 1567, 1573.] Instead, the ABCC held that Craft "engaged in a pervasive illegal enterprise involving numerous retailers and corporations that spanned at least five years, spending approximately $120,000 to pay kickbacks to § 12 retail licensees throughout the Boston area . . . ." [R.A. 263.] The ABCC's Decision against Craft found a violation of 204 C.M.R. § 2.08 with respect to each and every payment made to the third-party management companies. This cannot be reconciled with its decisions finding insufficient evidence for violations of 204 C.M.R. § 2.08 with respect to four of five retail licensees. By the ABCC's own subsequent admission, the most that the

record showed was payments of $8,420 to one licensee, not $120,000 to a variety of licensees.

Subsequently, earlier this year, the ABCC again addressed an alleged violation of 204 C.M.R. § 2.08. In re August A. Busch & Co. of Massachusetts (ABCC Apr. 17, 2018), available at https://www.mass.gov/files/documents/2018/04/24/Medford_August%20A%20Busch%20Co.%20violation_4-17-18.pdf. In that case, a licensed wholesaler assisted its parent company, a beer manufacturer, with providing retail licensees draught towers and coolers. The ABCC held that the wholesaler neither "gave" nor "permit to given" things of value because the wholesaler acted only as a facilitator for the transaction between the retailer and the manufacturer. This is a very narrow interpretation of the word "give" and discounted the substantial effort expended by the wholesaler. This scattershot approach to enforcement of 204 C.M.R. § 2.08 further demonstrates the ambiguity of the statute and the difficulty of applying it in light of the repeal of § 25A.

The ABCC's contradictory decisions are a text book case of arbitrary and capricious agency decision making. The decisions demonstrate that the ABCC used

one legal standard in the Craft case but a different standard in five subsequent decisions on the same facts. It also resulted in vastly different outcomes on the same set of facts; Craft was suspended for fifteen months while four of the five charged retailers received no penalty, and the one remaining received an eighteen-day suspension with three days to serve. This irrational outcome undermines public confidence in ABCC's objective decision making and suggests that "the agency has acted for reasons that are extraneous to the prescriptions of the regulatory scheme," based on an "ad hoc agenda." Fafard v. Conserv. Comm'n, 41 Mass. App. Ct. 565, 567-68 (1996). Standing alone, this arbitrary and capricious action requires the ABCC Decision suspending Craft for fifteen months, with ninety days to serve, be set aside.

IV. The ABCC's secret and ex parte reliance on its own non-public records under the guise of administrative notice violated Craft's due process rights.

Under G.L. c. 30A, § 12, "[i]n conducting adjudicatory proceedings . . . agencies shall afford all parties an opportunity for full and fair hearing." Section 11 requires agencies to notify parties in

advance if it intends to consider evidence outside of that presented to it, including evidence from its own files. § 11(4), (5).

Boiled down to their essence, these provisions of the Administrative Procedures Act simply require that, "If an agency wishes to rely on a fact, that fact must be established by evidence in the record." Arthurs v. Bd. of Registration in Med., 383 Mass. 299, 310 (1981). "The agency is thus prohibited from using as evidence any secret records, investigative reports, or other documents in its possession, but which the agency does not choose to offer into evidence to be made a part of the agency record in the adjudicatory proceeding." Gerald A. McDonough, 38 Mass. Practice: Administrative Law and Practice § 10:25 (Westlaw 2017). Section 12(4) "is a valuable statutory provision which operates in practice to protect parties dealing with state administrative agencies from sloppy or unfair agency practices in relying upon records, investigative reports, or documents in its possession as evidence in an adjudicatory proceeding." Id. The Civil Service Commission, for example, erred in considering testimony given by an expert witness in a different Commission proceeding, without notifying

the parties and giving them an opportunity to contest and respond to that evidence. See Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 691 (2012).

Here, the ABCC violated due process and the G.L. c. 30A's statutory provisions because, after the close of evidence at the hearing and without any notice to Craft, the ABCC took administrative notice of numerous facts in the "Commission Files." Specifically, the ABCC took administrative notice of twenty-two matters concerning the commonality of corporate officers of certain licensees and their third-party management companies and drew conclusions critical to its decision from those facts. [R.A. 789-1366.] It appears the ABCC considered this information in an attempt to plug the evidentiary gap it identified in its later decisions (and addressed above) in which it found insufficient evidence that Craft's payments to non-licensee management companies actually went to licensees. The ABCC, after taking administrative notice of the commonality of officers of certain licensees and their third party management companies, inferred that all payments made by Craft to management companies actually went to the § 12 licensees they

managed when it found that Craft violated 204 C.M.R. § 2.08 with regard to every payment. [R.A. 263.]

Craft did not challenge the facts as alleged in the Report before the ABCC. This was a strategic decision; as argued herein, the facts in the Report do not set forth prima facie violations of law, and the laws at issue are invalid or do not apply to the alleged conduct. Had the ABCC informed Craft that it intended to look beyond the Investigators' Report in determining whether Craft committed a violation, Craft likely may have chosen to proceed with a full evidentiary hearing instead of stipulating to the administrative record in order to disprove the ABCC's improper inferences.[5] The burden was on the prosecuting party, here the ABCC and its investigators, to prove every required element of the allegedly illegal act. The ABCC violated Craft's due process rights when it

---

[5] The Superior Court discounted this argument because it was made "without sworn support." Affidavits are not typical in agency appeals under G.L. c. 30A, § 14. Moreover, what Craft would have done had different information been provided is not the proper basis of an affidavit – it is not something that can be stated based on personal knowledge. The fact that Craft was deprived of its right to make an informed decision about how to defend itself in light of all of the information the agency considered is prejudice in and of itself.

found Craft liable based conclusions drawn from secret evidence that Craft was not permitted to rebut or refute. The ABCC acted unfairly, violated Craft's due process, and violated the law, when, after it closed the record, it conducted an ex parte investigation and relied on secret and disputable facts without notice to Craft or any opportunity to respond to this evidence.

The ABCC's reliance on a secret review of its own non-public files without providing notice to Craft is both fundamentally unfair as well as a violation of due process and the Administrative Procedure Act's statutory provisions. The ABCC's secret ex parte investigation undermined Craft's argument that the evidence presented at the hearing was insufficient as a matter of law. Moreover, Craft could have disputed these facts if given notice and an opportunity to respond. In any case, these frailties make any inferences drawn on them (and specifically, the ABCC's inference that funds paid to management companies went to licensees) unreasonable because the information upon which the inference is based is unreliable. The ABCC undermined the adversarial process and integrity of its Decision itself.

Perhaps most egregiously, while the ABCC was conducting this secret ex parte investigation without allowing Craft any rebuttal or cross-examination, it refused to take administrative notice of certain corporate records Craft sought to introduce following the hearing. [R.A. 1387-1409.] Craft attempted to introduce these public corporate records to counter an erroneous suggestion made by one Commissioner at the hearing that Craft was affiliated with the Third Parties or assisted in their creation. [R.A. 1410.]

The ABCC's violation of § 11 of the Administrative Procedures Act should result in this Court setting aside its decision. Atkinson's, Inc. v. ABCC, 15 Mass. App. Ct. 325, 326-27 n.4 (1983). The ABCC's ex parte investigation was unfair and improper:

> any party aggrieved as a result of an agency taking judicial notice of certain contested facts which—and particularly where evidence has been introduced into the record tending to disprove the truth of the facts judicially noticed—would be entitled to raise such an issue on judicial review under G.L. c. 30A, § 14 to invalidate the decision as based upon an error of law, or as arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

Gerald A. McDonough, 38 Mass. Practice: Administrative Law and Practice § 10:28 (Westlaw 2017). Accordingly,

the ABCC’s Decision should be invalidated on these grounds as well.

Conclusion

For the foregoing reasons, Craft requests that this Court set aside the decision of the ABCC, or alternatively, remand the matter to the ABCC for further consideration. Further, Craft requests that the Court determine that the penalty, including the fine, was unlawful and require it to be reduced, refunded or, alternatively, recalculated (and reduced and refunded). Finally, Craft asks the Court to grant such other and further relief as may be necessary and appropriate.

CRAFT BEER GUILD, LLC d/b/a
CRAFT BREWERS GUILD
By its attorneys,

J. Mark Dickison
(BBO# 629170)
Caroline O'Connell
(BBO# 640271)
Joshua M. D. Segal
(BBO# 678367)
Lawson & Weitzen, LLP
88 Black Falcon Avenue
Boston, MA 02210
Telephone: (617) 439-4990
Facsimile: (617) 439-3987

Certification of Compliance with Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Joshua M. D. Segal, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass.R.A.P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass.R.A.P. 16(e) (references to the record);

Mass.R.A.P. 16(f) (reproduction of statutes, rules, regulations);

Mass.R.A.P. 16(h) (length of briefs);

Mass.R.A.P. 18 (appendix to the briefs); and

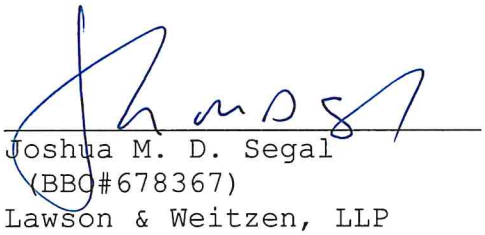
Mass.R.A.P. 20 (form of briefs, appendices, and other papers).

Joshua M. D. Segal
(BBO#678367)
Lawson & Weitzen, LLP
88 Black Falcon Avenue
Boston, MA 02210

Certificate of Service

I hereby certify, under the penalties of perjury, that I have made service, on this date, of the Brief of Appellant Craft Beer Guild, LLC d/b/a Craft Brewers Guild as well as the Record Appendix in three volumes. Service was made upon counsel for the ABCC by hand delivery, on September 14, 2018 to the following address:

Kirk G. Hanson, Esq.
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108



Joshua M. D. Segal
(BBO#678367)
Lawson & Weitzen, LLP
88 Black Falcon Avenue
Boston, MA 02210
617-439-4990

Addendum

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

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

CRAFT BEER GUILD LLC D/B/A CRAFT BREWERS GUILD
170 MARKET STREET
EVERETT, MA 02149
LICENSE#: WI-298
VIOLATION DATE: 03/18/2015
HEARD: 09/02/2015

Craft Beer Guild LLC d/b/a Craft Brewers Guild (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, § 19. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Wednesday, September 2, 2015, regarding alleged violations of:

1) 204 CMR 2.08: No licensee shall give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.
2) M.G.L. C. 138, §25A: No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall: Discriminate, directly or indirectly, in price, in discounts for time of payment, or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name of like age and quality.

Prior to the commencement of the hearing, the Licensee stipulated to the violations alleged in Investigator Velez's Report.

The following documents are in evidence:

1. Investigator Velez's Investigative Report dated March 18, 2015;
2. Bank On It (3 pgs);
3. Bank On It (2 pgs);
4. Bank On It (4 pgs);
5. Wilcox Hospitality Group 1 (3 pgs);

Phone: 617.727.3040 • Fax: 617.727.1258 • Office: 239 Causeway Street, Boston, MA 02114 • Web: www.mass.gov/abcc

6. Wilcox Hospitality Group 2 (2 pgs);
7. The Briar Group 1 (5 pgs);
8. The Briar Group 2 (4 pgs);
9. The Briar Group 3 (2 pgs);
10. Fifth Avenue Productions 1 (3 pgs);
11. Rebel Restaurant Group, Inc. 1 (4 pgs);
12. Rebel Restaurant Group, Inc. 2 (4 pgs);
13. Rebel Restaurant Group, Inc. 3 (3 pgs);
14. The Glynn Hospitality Group 1 (1 pg);
15. The Glynn Hospitality Group 2 (1 pg);
16. The Glynn Hospitality Group 3 (2 pgs);
17. Price Postings from Beverage Journal, January – December 2013;
18. Price Postings from Beverage Journal, January December 2014; and
19. Licensee's Stipulation of Facts.

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

The Commission took Administrative Notice of the Licensee's file.

FINDINGS OF FACT

1. Craft Beer Guild, LLC, d/b/a Craft Brewers Guild ("Craft" or "Licensee") is a Massachusetts licensed § 18 wholesaler located at 170 Market Street, Everett, MA.
2. Craft came into existence in 2005, as a result of a merger between Snapple Beverages of Boston, LLP and L. Knife & Son, Inc. ("L. Knife"). (Commission File; Testimony)
3. L. Knife is the sole owner of Craft. (Commission Files)
4. Gerald Sheehan is the sole manager of Craft. (Commission Files)
5. Craft distributes approximately 200 craft beer brands, including but not limited to beer from Brooklyn Brewery, Ipswich Ale Brewery, Sierra Nevada Brewing Company, Magic Hat Brewing Company, Lagunitas Brewing Company, Allagash Brewing Company, Pretty Things Beer & Ale Project Inc., Cisco Brewers Inc., Yuengling Brewery, Smuttynose Brewing Company, Wachusett Brewing Company, Brewery Ommegang, Weihenstephaner US, and Oskar Blues Brewery. ("Craft Brands").
6. Pretty Things Beer and Ale Project Inc., ("Pretty Things") has never held a license to manufacture alcoholic beverages in Massachusetts[1]. (Commission Files)
7. However, Pretty Things' malt beverages are among the products that Craft distributed. (Exhibit 1)
8. On or about October 13, 2014, Dan Paquette, one of the owners of Pretty Things Beer and Ale Project, Inc. posted comments on Twitter alleging that certain licensed Massachusetts Alcoholic Beverages Suppliers (presumably farmer-brewers licensed under § 19B, and certificate of compliance holders licensed under § 18B) (collectively "Suppliers"), and Massachusetts Wholesalers licensed under § 18 were providing unlawful payments to Massachusetts on-premises retailers licensed under § 12 in

[1] However, Pretty Things did hold a Massachusetts Wholesalers License that was issued on July 28, 2015. It was not renewed for calendar year 2016.

exchange for the retailers ("Retailer or collectively "Retailers") carrying Craft Brands in their licensed premises. (Exhibit 1, Testimony)

9. As a result of Mr. Paquette's complaints, Commission investigators began investigating these allegations. The investigation spanned several months, required multiple interviews with employees and representatives of Massachusetts alcoholic beverages licensees and involved a thorough review of an extensive paper trail documenting the allegations and licensees implicated. (Exhibit 1, Testimony)
10. On October 16, 2014, Chief Frederick Mahony and Investigator Nicholas Velez interviewed Dan Paquette and his wife, Martha Paquette. (Exhibit 1, Testimony)
11. Mrs. Paquette told the investigators that Wilcox Hospitality Group, Inc. ("Wilcox") was using a "pay-to-play" scheme with their tap lines. Specifically, Mrs. Paquette told the investigators that Craft was paying the Briar Group, LLC ("Briar") in exchange for placement of Craft Brands in Briar Group establishments. (Exhibit 1)
12. In support of this allegation, Mrs. Paquette provided the investigators with an invoice that Craft sent to Pretty Things. The invoice revealed that Craft was invoicing and receiving payment from licensed farmer-brewers as reimbursement for payments Craft had made to retail licensees on their behalf for product placement. (Exhibit 1, Testimony)
13. When Mrs. Paquette received the invoice, she emailed Craft and requested clarification regarding the contents of the bill. Craft did not respond to her question but instead indicated that Pretty Things did not have to pay the invoice. (Exhibit 1, Testimony)
14. As a result of this information, on several occasions beginning in October, 2014, Chief Frederick Mahony, and Investigators Caroline Wilichoski, and Nicholas Velez went to Craft's licensed premises and interviewed several Craft employees regarding these allegations. (Exhibit 1)
15. Michael Bernfeld has been Craft's General Manager since 2005. Craig Corthell is the Sales Manager, Pat McCoy is the Director of On-Premises Sales, and Bethany DiCristofaro is the Office Manager. (Exhibit 1, Testimony)
16. Mr. McCoy has been with Craft for three years as the Director of On-Premises Sales. His immediate supervisors are Mr. Corthell and Mr. Bernfeld. (Exhibit 1)
17. Craft employs several sales representatives, including Dan Cronin and Mike Maccure. (Exhibit 1)
18. Initially, when Investigator Wilichoski asked Mr. Corthell what the terms "brand allocation," "marketing support," and "menu programming," signified in the Pretty Things invoice, Mr. Corthell and other Craft representatives denied any knowledge of the meaning of the terms. (Exhibit 1, Testimony)
19. After continued questioning, Mr. Corthell told Investigator Wilichoski that, "the terms are interchangeable and mean the same thing" and is related to the printing of menus. However, when Investigator Wilichoski asked if Craft prints menus, Mr. Corthell said, "no." (Exhibit 1, Testimony)
20. Finally, Mr. Corthell admitted that that the $20 "rebate" offered was actually a "kickback" to Briar for committed Craft Brand tap lines in its Retail establishments. (Exhibit 1, Testimony)
21. Mr. Corthell went on to say that Craft has been paying Briar a $20 "rebate" per keg twice a year for the last three years, in exchange for Briar putting Craft Brands on Briar's Retailers' menu. (Exhibit 1, Testimony)

22. Mr. Corthell acknowledged that Craft has similar agreements with Wilcox, Remy's Fenway Group, LLC ("Remy's"), the Glynn Hospitality Group ("Glynn"), and the Lyons Group, LTD ("Lyons"). (Exhibit 1, Testimony)
23. Beginning sometime in 2013 and continuing until the time of the complaints, Craft negotiated and implemented a series of kickback schemes between itself, certain Suppliers, multiple Retailers, and certain Retailers' management/marketing companies, including Briar, Wilcox, Glynn, Fifth Avenue Productions ("Fifth Avenue"), Rebel Restaurant Group ("Rebel"), Bank On It, and Lyons (collectively "Third Parties").
24. None of these Third Parties have alcoholic beverages licenses in Massachusetts.
25. Mr. McCoy has been Craft's primary negotiator in support of these schemes. (Exhibit 1, Testimony)
26. An overview of the schemes are as follows:
    a. Craft negotiated a payment structure with each Third Party in exchange for the Retailers placing Craft Brands in its on-premises retail establishments. Typically, the negotiated prices ranged from $1000 to $1500 per draft line keg.
    b. Craft would either provide a sample invoice to the Third Party for use or the Third Party would use its own invoice.
    c. The invoice indicated that Craft was being billed for services rendered to it such as "marketing support," "printing of menus," "promotional services," or some other similar services to Craft.
    d. In an effort to obfuscate and create distance between the Retailers and Craft, the Retailers never invoiced Craft directly. Instead, the Third Parties fraudulently invoiced Craft. These Third Parties all have similar characteristics. They do not hold alcoholic beverages licenses, are identified as either management or marketing companies for the Retailers, and have the exact same or common group of corporate officers and beneficial interest holders as the Retailers. In the case of Fifth Avenue and Bank On It, there are no employees or payroll.
    e. Once invoiced, Craft paid the fee for services never performed. In turn, Craft invoiced the Suppliers for reimbursement of the kickbacks paid. Sometimes the Suppliers would fully reimburse Craft, other times they would partially reimburse Craft. (Exhibit 1,Testimony, Commission Files)
    f. Craft never performed or intended to perform any of the services detailed in the invoice. These invoices were actually pay-offs to participating Retailers to sell Craft Brands in its licensed premises for having committed tap lines for the Craft Brands.
    g. Often a Craft employee would hand deliver the payments to an employee at the Retailer's licensed premises. (Exhibit 1)
27. Mr. McCoy went on to describe Craft's agreement with Wilcox where Wilcox invoiced Craft twice, each time for a $10,000 payment. Craft paid Wilcox a total of $20,000.00 for kickbacks labeled as "marketing support." (Exhibit 1, Testimony)
28. Once Mr. McCoy was finished providing an overview of the kickback scheme for Wilcox, he began describing the terms of the scheme involving Fifth Avenue and Remy's. (Exhibit 1, Testimony)
29. Apparently Fifth Avenue is the "marketing company" for Jerry Remy's Fenway Restaurant on Boylston Street. Rebel is the "marketing company" for Jerry Remy's Seaport Location. Craft paid Fifth Avenue approximately $2,000 per draft brand, per

year and Remy's had four draft lines for an equivalent value of $8,000.00 per year. (Exhibit 1, Testimony)

30. Mr. McCoy then described Craft's agreement with Glynn where Craft paid Glynn approximately $20,000, or $1,000.00 per draft line, in exchange for committed draft lines. (Exhibit 1, Testimony)
31. Mr. McCoy went on to discuss the scheme involving Lyons. Mr. McCoy stated that he and Lyons made an agreement for product placement of Craft Brands of $1000.00 per draft line, an additional agreement for a payment of $1,500.00 to $1,800.00 per draft line for "Yuengling Beer" to be placed at Lyons Restaurants, and another agreement of $15.00 per barrel of beer sold in Lyons restaurants. (Exhibit 1, 3)
32. Craft, through both Mr. Bernfeld and Mr. Corthell, admitted that it knew these payments were in violation of the Commission regulation regarding inducements. (Exhibit 1)
33. By Craft's own admission, these kickbacks/rebates were not posted in the Beverage Journal or reported to the Commission and were not available to all retail licensees. (Exhibit 1, Testimony)
34. After reviewing several documents, including invoices that Ms. DiCristofaro provided, the investigators scheduled interviews with the Retailers and Third Parties Craft had been paying off. (Exhibit 1, Testimony)

The Briar Group, LLC ("Briar")

35. The Briar Group, LLC[2], is the management company[3] for the following § 12 on-premises licensees:
    - Adare, Inc., d/b/a Ned Devine's;
    - FHM Hospitality, Inc., d/b/a Anthem;
    - Dunboy, Inc., d/b/a MJ O'Connor's;[4]
    - Green Briar Tavern, Inc., d/b/a The Green Briar;[5]
    - Galway, Inc., d/b/a The Harp;[6]
    - Northern Avenue Hospitality Inc., d/b/a District Hall;[7] and
    - Seaport Hospitality, Inc., d/b/a the Weston Hotel.[8] (Exhibit 1)

---

[2] Austin M. O'Connor is the manager of Briar Group, LLC. (Exhibit 1)

[3] There is nothing in the Commission files approving this relationship. (Commission Files)

[4] Austin M. O'Connor is the President, Treasurer, and Secretary of Adare, Inc., FHM Hospitality Inc., and Dunboy Inc. Austin M. O'Connor, Austin F. O'Connor, and Margaret O'Connor are listed as Directors for these entities. (Exhibit 1, Commission Files)

[5] Secretary of Commonwealth filings indicate that Austin F. O'Connor is the President, Treasurer, and a Director of Green Briar Tavern, Inc. Austin M. O'Connor is listed as the Secretary for the entity, and Margaret O'Connor is listed as a Director, however Commission files contradict and indicate that Margaret O'Connor is the entity's Secretary. (Exhibit 1, Commission Files)

[6] Secretary of Commonwealth filings indicate that Austin M. O'Connor is the President, Treasurer, Secretary, and a Director of Galway Inc. Margaret M. O'Connor and Austin F O'Connor are also listed as Directors of the entity however Commission files contradict and indicate Austin F. O'Connor is the President, Treasurer, and a Director of Galway, Inc. Commission files also indicate Margaret O'Connor is the Secretary and a Director of the entity. (Exhibit 1, Commission Files)

[7] Austin M. O'Connor is the President, Treasurer, Secretary, and Director of Northern Avenue Hospitality, Inc. (Exhibit 1, Commission Files)

36. As the management company, Briar is responsible for managing the licensed premises including managing human resources, payroll and ordering alcohol. (Exhibit 1)
37. Tom Shea is Briar's Chief Operating Officer. Dessie Kerins has been employed by Briar for more than 20 years, and was responsible for Briar's liquor purchases in 2013 and 2014. (Exhibit 1, Testimony)
38. Mr. Kerins is Mr. McCoy's direct contact at Briar.
39. Initially when the Investigators questioned Mr. Kerins about the terms "brand allocation," "marketing support," and "menu programming," Mr. Kerins refused to answer the questions, provide an explanation, or reveal his contact at Craft. (Exhibit 1, Testimony)
40. Instead, Mr. Kerins forwarded the information to Mr. O'Connor and said Mr. O'Connor would provide all the requested information. (Exhibit 1, Testimony)
41. Commission Investigators conducted several interviews both in person and over the phone over the course of the next several months with Briar's representatives. (Exhibit 1, Testimony)
42. For approximately 3-4 years, Craft and Briar had an agreement whereby Craft would pay Briar so that Briar's licensees would carry Craft's products. (Exhibit 1)
43. Mr. Kerins and Mr. McCoy admitted that the agreement required Craft to pay Briar $20.00 per keg to support a rotational draft program, in exchange for Briar selling Craft's Brands. Craft made these payments twice a year. Every six months, Craft would send a spreadsheet with the number of kegs sold to Briar, and Briar would create a fake invoice based on that spreadsheet and send it to Craft for payment. (Exhibit 1, Testimony)
44. Craft instructed Briar to label the invoices for kickbacks as either "brand allocation," "menu support," "marketing support," or "menu programing." (Exhibit 1, Transcript)
45. Paying this kickback guaranteed that Craft would have a committed draft line for Craft Brands at Briar's Retailers. (Exhibit 1)
46. As of the end of 2014, Craft and Briar had a committed draft line agreement, which required Craft to pay-off Briar twice a year. (Exhibit 1)
47. Mr. McCoy hand delivered the checks to Mr. Kerins. (Exhibit 1, Testimony)
48. An example that illustrates this kickback scheme is contained in three invoices from Briar to Craft. (Exhibits 1, 8, Testimony)
49. The first invoice from Briar to Craft, dated December 15, 2013, was for $2,860, and indicated it was for "Marketing." (Exhibits 1, 8)
50. A Check Request Form created by Craft indicated that a check should be issued to Briar for $2,860 for the period of July 1 – December 13, 2013. This Form signaled that it was for "Programming" and specified:
    i. "$300 Ipswich,
    ii. 1,220 Sierra,
    iii. 100 Magic,
    iv. 280 Lagunitas,
    v. 120 Allagash,
    vi. 80 L. Hans,
    vii. 120 Pretty Things and
    viii. 640 Cisco." (Exhibits 1, 8)

[8]Austin M. O'Connor is the President, Treasurer, and Secretary of Seaport Hospitality Inc. Austin F. O'Connor and Margaret O'Connor are the Directors. (Exhibit 1, Commission Files)

51. Handwritten markings state "Pat McCoy to hand deliver." A related spreadsheet indicating retail accounts, address, brands, and "sum" was dated December 16, 2013. (Exhibit 1, 8)
52. On December 15, 2013, Briar invoiced Craft in the amount of $2860 for "marketing" and on December 30, 2013, Craft issued check # 012105, to Briar for the entire amount. (Exhibits 1, 8)
53. On March 24, 2014, Briar invoiced Craft $10,500, for "Marketing Support Yuengling." The invoice specified:
    a. "1 MJ (Park Plaza),
    b. 2 MJ (Westin), 3 Green Briar,
    c. 4 Ned Devines,
    d. 5 Harp,
    e. 6 Lenox/Solas,
    f. 7 Anthem." (Exhibits 1, 9)
54. Mr. Bernfeld and Mr. Corthell explained that the March 24, 2014, invoice for "Marketing Support Yuengling" was payment to Briar in exchange for Briar Retailers carrying Yuengling. This invoice was based on a fee of $1,200 or $1,500 per draft line. (Exhibit 1)
55. On April 15, 2014, Craft issued check # 013458 to Briar for $10,500. (Exhibit 1, 9)
56. On July 2, 2014, Craft invoiced Briar for $4,700, indicating it was for "Marketing Support," from January 1 – June 30, 2014, with an itemization, per licensee managed by Briar, of beer brands and the number of units sold, as well as an indication of a "rebate" of $20 per keg. (Exhibit 1, 7)
57. A Check Request Form produced by Craft indicated that Craft should pay Briar $4,700 for "Brand Allocation" and "P. McCoy to hand deliver." Handwritten markings state "Lagunitas Trade Spend, 459957, $570." (Exhibit 7)
58. Craft issued check # 014723 in the amount of $4,700 to Briar on July 24, 2014. (Exhibits 1, 7)

The Wilcox Group, Inc. ("Wilcox")

59. The Wilcox Hospitality Group, Inc.[9] is the management company[10] for the following § 12 on-premises licensees:
    a. (a) Dot Boy, Inc.[11], d/b/a The Lower Depths;
    b. (b) Montanus, Inc.[12], d/b/a Bukowski Tavern;
    c. (c) Poe's Pub, Inc.[13], d/b/a Estelle's; and

[9] Gordon Wilcox is the President, Treasurer, Secretary, and a Director of the Wilcox Hospitality Group, Inc. (Exhibit 1)

[10] There is nothing in the Commission files approving this relationship. (Commission Files)

[11] Secretary of Commonwealth filings indicate that Gordon Wilcox is the President and a Director of Dot Boy, Inc. Peter Cuplo is listed as the Treasurer and a Director of the entity. Suzanne Samowski is listed as the Secretary and a Director of the entity.

[12] Secretary of Commonwealth filings indicate that Gordon Wilcox is the President, and a Director of Montanus, Inc., Suzanne Samowski, is listed as the entity's Treasurer, Secretary, and a Director, however, Commission files contradict and indicate that Maureen Montanus is the President and Treasurer of Montanus, Inc. Commission files also indicate Sean Simmons is the entity's Secretary and that the Directors of the entity are Gordon Wilcox and John A. Gardner III. (Exhibit 1, Commission Files)

d. (d) Tip Tap Room, Inc.[14], d/b/a Tip Tap Room. (Exhibit 1)

60. Mr. Wilcox is the owner of eight restaurants. He previously had 20 to 35 draft lines of Craft Brands in his licensed establishments. (Exhibit 1, Testimony)
61. Mr. Wilcox also stated that in previous years Craft had offered "1 on 10 or 2 on 10" discounts per keg. Mr. Wilcox did not like this methodology because it was problematic for accounting purposes. (Exhibit 1, Testimony)
62. As a result, Mr. Wilcox spoke with Mr. McCoy regarding creating a "better" scheme. (Exhibit 1)
63. On behalf of Craft, Mr. McCoy offered Mr. Wilcox $1,000 per draft line for up to 20 lines. However, Mr. Wilcox balked at the terms and instead countered that all of his draft lines (up to 35) be committed, in order for him to agree to the terms. (Exhibit 1, Testimony)
64. In addition, Mr. Wilcox wanted to control his draft lines and wanted 10% of sales. (Exhibit 1, Testimony)
65. Mr. McCoy then countered and offered a $20,000 payment for 2013. When Mr. Wilcox asked Mr. McCoy how he would receive the money, Mr. McCoy told Mr. Wilcox to invoice Craft and label it "marketing services." (Exhibit 1, Testimony)
66. After Craft and Wilcox reached a mutually satisfactory agreement on the payoff terms, Wilcox invoiced Craft.
67. After extensive negotiating between Craft and Gordon Wilcox regarding a proper kickback, they agreed upon $1,000 per draft line, for a total of $20,000 for 20 draft lines, in 2013. (Exhibit 1)
68. On May 29, 2013, Craft received its first invoice from Wilcox in the amount of $10,000. The invoice detailed "Marketing Services" for the periods January 1, 2013 through March 31, 2013 and April 1, 2013 through June 30, 2013. (Exhibit 1, Testimony)
69. The first invoice was issued by Wilcox on May 29, 2013, in the amount of $10,000, indicating "Marketing Services" for the period of January 1, 2013, through March 31, 2013, and April 1, 2013, through June 30, 2013. Handwritten markings on the invoice stated "Lagunitas $7,000, Magic $1,000, Trosage $1,000, Smutty $1,000." (Exhibits 1, 5)
70. A Check Request Form produced by Craft indicated that a check should be issued to Wilcox for $10,000, for "Marketing/Menu Support, Allocation of Brand Support Listed," "Magic Hat Trade Spend, $1,000.00, 459943," "P. McCoy to hand deliver." (Exhibits 1, 5)
71. Craft issued check # 211001, on June 20, 2013, for $10,000, to Wilcox. (Exhibits 1, 5)
72. Mr. McCoy hand delivered a check for $10,000.00 to Chris Sheridan at the Rattlesnake, Bar and Grille, a Wilcox Restaurant. (Exhibit 1, Testimony)
73. Mr. Wilcox identified Mr. Sheridan as the Rattlesnake's manager[15] and Wilcox's Beer Manager. (Exhibit 1, Testimony)

---

[13] Secretary of Commonwealth filings indicate that Gordon Wilcox is the President, Treasurer, Secretary, and sole Director of Poe's Pub Inc., however, Commission files contradict that and indicate that Peter J. Culpo is the Treasurer and a Director of Poe's Pub Inc. and that Sean Simmons is the Secretary and a Director for the entity. (Exhibit 1, Commission Files)

[14] Gordon Wilcox is the President, Treasurer, Secretary, and a Director of Tip Tap Room, Inc. Joseph Priscella and Gary McDonough are Directors of the entity. (Exhibit 1, Commission Files)

[15] Commission records indicate that John A. Gardner, III is the approved license manager for the Rattlesnake.

74. On November 21, 2013, Craft received its second invoice in the amount of $10,000 again for "Marketing Services" for the periods of July 1, 2013, through September 31, 2013, and October 1, 2013, through December 31, 2013. (Exhibit 1, Testimony)
75. The second invoice from Wilcox to Craft, dated November 21, 2013, in the amount of $10,000, was also for "Marketing Services," this time for the period of July 1, 2013, through September 31, 2013, and October 1, 2013, through December 31, 2013, and stated, "Brooklyn . . . Trade Spend $1500." This invoice also had blacked out handwritten markings. (Exhibits 1, 6)
76. Craft issued check # 011825 on December 5, 2013, for $10,000 to Wilcox. (Exhibit 1, 6)
77. Mr. McCoy again hand delivered a check for $10,000.00 to Chris Sheridan at the Rattlesnake, Bar and Grille. (Exhibit 1, Testimony)
78. Early in 2014, Mr. McCoy and Mr. Wilcox had a subsequent conversation regarding the terms for the 2014 kickbacks. Mr. Wilcox wanted Craft to pay Wilcox 10% of the purchase price for all Craft products bought by Wilcox restaurants. (Exhibit 1)
79. Mr. McCoy estimated that Wilcox restaurants purchase approximately $600,000.00 per year from Craft and that 10% of sales would be approximately $60,000.00 in 2014. (Exhibit 1)
80. As a result, McCoy stated that Craft declined to make this agreement. (Exhibit 1)
81. In 2014, Craft wanted to pay Wilcox approximately $500 less per draft line and as a result, the parties never reached an agreement. (Exhibit 1, Testimony)
82. At one point, Lower Depths had twelve draft lines, of which five to six were for Craft products, and Craft supplied 80% of Dot Boy bottled beer. (Exhibit 1)
83. Bukowski Tavern had six to twelve lines of its twenty tap lines for Craft products. (Exhibit 1)

Glynn Hospitality Group ("Glynn")

84. Glynn Hospitality Group[16] is the management company[17] for the following § 12 on-premises licensees:
    a. (a) 955, LLC, d/b/a Dillon's[18];
    b. (b) Friar Ventures, LLC d/b/a Hurricane O'Reilly's[19];
    c. (c) One Hundred Seventy-Three Milk St., Inc., d/b/a Coogan's Bluff[20];
    d. (d) A.T.G. Inc., d/b/a Cleary's[21];

[16] Christine M. Freeman is the President and sole Director of Glynn Hospitality Group. Michael T. Glynn is listed as the entity's Treasurer and Neil Glynn is listed as the Secretary. (Exhibit 1)
[17] There is nothing in the Commission files approving this relationship.
[18] Neil Glynn is the Manager of 955, LLC. (Exhibit 1, Commission Files)
[19] Secretary of Commonwealth filings indicate that Kelly G. Laurence is the Manager of Friar Ventures, LLC, however, Commission files contradict that and indicate that Neil Glynn is the Manager of Friar Ventures, LLC. (Exhibit 1, Commission Files)
[20] Secretary of Commonwealth filings indicate that Christine Freeman is the President of One Hundred Seventy-Three Milk St., Inc. Michael Glynn is listed as the Treasurer and a Director of the entity. Neil Glynn is listed as the Secretary and a Director of the entity, which contradicts Commission files that indicate Christine Freeman is both the President and a Director of One Hundred Seventy-Three Milk St., Inc. Commission files also indicate that Brendan Glynn is the Secretary and a Director of the entity. Other Directors listed in the Commission files are Michael Glynn, Neil Glynn, Kelly Glynn, and Patrick Glynn. (Exhibit 1, Commission Files)
[21] Secretary of Commonwealth filings indicate that Christine Freeman is the President and a Director of A.T.G., Inc. The Treasurer of the entity is Patrick Glynn and the Secretary is Anne T. Glynn. (Exhibit 1)

e. (e) The Black Rose, Inc., d/b/a The Black Rose[22]; and
f. (f) 111, LLC, d/b/a Brownstone[23]. (Exhibit 1)

85. Craft offered Glynn $39,000 in "promotional money" to place 22 Craft Brands on Glynn's various menus and draft lines. Over the course of the year some brand items were swapped out for others. (Exhibits 1, 14-16)
86. Although Mr. Glynn occasionally had contact with Mr. McCoy, Louis Luna, an employee of Glynn, was the primary person working with Mr. McCoy. (Exhibit 1, Testimony)
87. Mr. Luna provided Mr. McCoy with blank Glynn Invoices, which Craft completed. (Exhibit 1, Testimony)
88. Mr. McCoy delivered Glynn's checks to Mr. Luna at Dillon's. (Exhibit 1, Testimony)
89. A May 9, 2013 Glynn Invoice was labeled "menu support within timeframe of: January – June 2013" with "targeted locations" of Brownstone, Clery's, Dillon's, Granary Tavern, Sterling's, Black Rose, Coogan's, Hurricane's, and Jose McIntyre's. The invoice indicated 1500 units at $9 per unit, for a total of $13,500. On May 9, 2013, Mr. Luna approved the invoice. (Exhibits 1, 14)
90. A second invoice, dated October 24, 2013, from Glynn to Craft was labeled "menu support within timeframe of: July – December 2013" with "targeted locations" of Brownstone, Clery's, Dillon's, Granary Tavern, Sterling's, Black Rose, Coogan's, Hurricane's, and Jose McIntyre's. The invoice indicated "1500 units" at $8 per unit, for a total of $12,000. Mr. Luna approved the invoice the same day. (Exhibits 1, 15)
91. On April 2, 2014 Glynn issued a third invoice to Craft labeled "Dft Menu Support Within Timeframe of: 2014," with "targeted locations" of Brownstone, Clery's, Dillon's, and Coogan's. It indicated 1500 units at $9 per unit, for an amount of $13,500. Mr. Luna approved the invoice that day. (Exhibits 1, 16)
92. A "Check Request Form" produced by Craft indicated that a check should be issued to Glynn for $13,500. The form indicated payments were for "menu support 2014," to Dillon's, Clery's, Brownstone, and Coogan's, with the following payments: "$4,500 Lagunitas, $3,000 Oskar Blues, $1,500 Wachusett, $1,500 Cisco, $1,500 Brooklyn and $1,500 Magic Hat." It designated "Pat McCoy to hand deliver." (Exhibits 1, 16)

Fifth Avenue Productions ("Fifth Avenue") & Rebel Restaurant Group ("Rebel")

93. Remy's Fenway Group, LLC, d/b/a Jerry Remy's Sports Bar & Grille ("Jerry Remy's Fenway") has four signatories listed with the Secretary of the Commonwealth: Jerry Remy, John O'Rourke, Larry Garnick, and John Mascia. John Mascia is the former Manager of Remy's Fenway Group, LLC. (Exhibit 1, Testimony)
94. Fifth Avenue[24] is the marketing company for Jerry Remy's Fenway. Fifth Avenue has no employees and generates no payroll. It is not, and has never been, a corporation or LLC registered with the Secretary of the Commonwealth of Massachusetts. (Exhibit 1)

---

[22] Secretary of Commonwealth filings indicate that Christine Freeman is the President, Treasurer, and a Director of The Black Rose Inc. Anne T. Glynn is the Secretary for the entity however Commission files contradict and indicate that she is also a Director of The Black Rose Inc. along with Philip Sweeney. (Exhibit 1, Commission Files)

[23] Michael T. Glynn is the Manager of 111, LLC. (Exhibit 1, Commission Files)

[24] John Mascia claims to be the sole officer of Fifth Avenue and that the function of Fifth Avenue is restaurant consulting, marketing, and startup operations of restaurants. (Exhibit 1)

95. Mr. Mascia is Mr. McCoy's contact at Jerry Remy's Fenway. Mr. Mascia initiated an agreement where Craft would pay Fifth Avenue $10,000 for draft "brand placement" at Jerry Remy's. (Exhibit 1)
96. Craft has paid Fifth Avenue approximately $2,000 per draft brand, per year, for four draft lines for an equivalent value of $8,000 per year. (Exhibit 1)
97. On September 10, 2013, Fifth Avenue issued an invoice to Craft, for $10,000, labeled "Jerry Remy's (Boylston St.) Marketing Service 2013, menu programming for 2013 Baseball Season. Brooklyn (2), Cisco, Wachusett, Pretty Things." (Exhibits 1, 10)
98. The $10,000 payment was in exchange for Jerry Remy's keeping in place existing Craft draft lines.[25] (Exhibits 1, 10)
99. A "Check Request Form" produced by Craft indicates that a check should be issued for $10,000 to Fifth Avenue, further indicating the following: "$500.00 Brooklyn Sorachi Ace, $500.00 Ommegang, $3,000.00 Cisco Grey Lady, $3,000 Brooklyn Lager, $2,500 Wachusett Green Monstah, $250.00 Pretty Things, $250.00 Weihenstephaner, Menu programming 2013." It also indicated, "plz mail directly to vendor." (Exhibits 1, 10)
100. On September 19, 2013, Craft issued check # 010776 in the amount of $10,000 to Fifth Avenue. (Exhibits 1, 10)
101. Remy's Management, LLC, d/b/a Jerry Remy's on Seaport Boulevard in Boston ("Jerry Remy's Seaport") has the same four signatories as Jerry Remy's Fenway. (Exhibit 1)
102. Rebel is the marketing company for Jerry Remy's Seaport.[26]
103. An invoice dated July 8, 2013, for $2,680 from Rebel to Craft was issued for "Jerry Remy's Seaport: Marketing/Menu Support January 2013 to June 2013." (Exhibits 1, 11)
104. A Check Request Form produced by Craft denoted that a check should be issued to Rebel for $2,680 for the first half of 2013 "programming." It further indicated, "$1,040.00 Wachusett, $700.00 Cisco, $660.00 Sierra, $140.00 Brooklyn and $140.00 Smuttynose" and "Pat McCoy to hand deliver." (Exhibits 1, 11)
105. A related spreadsheet indicated that Jerry Remy's should receive a rebate of $20 per unit of Craft beer as listed on the July 8, 2013, invoice. (Exhibits 1, 11)
106. Craft issued check # 211443, dated July 18, 2013, for $2,680 to Rebel. (Exhibits 1, 11)
107. An invoice issued from Rebel to Craft on December 17, 2013, for "Jerry Remy's Seaport: Marketing/Menu Support from July 1, 2013 to December 16, 2013." (Exhibits 1, 12)
108. A Check Request Form produced by Craft indicated that a check should be issued to Rebel for $2,660 for July to December 16th, 2013, "programming." It also indicated "$1,060.00 Wachusett, $760.00 Cisco, $420.00 Sierra, $220.00 Brooklyn and $200.00 Smuttynose." Special instructions included, "Pat McCoy to hand deliver." (Exhibits 1, 12)

---

[25] Mascia initially told investiga tors that the $10,000 was to pay servers to pass out flyers during baseball games and for marketing support, and he denied it was for dedicated draft lines. When Chief Investigator Mahony informed Mascia that Craft representatives had informed them that the $10,000 was paid in return for existing draft lines to remain in place, Mascia stated that the agreement may have been for draft lines to stay, but did not recall. (Exhibit 1)

[26] Neither the exhibits nor testimony presented at the hearing indicate who owns Rebel. The Commission makes the reasonable inference that Rebel is the marketing company for Jerry Remy's Seaport based on the invoices introduced as exhibits at the hearing and based on their handling of Jerry Remy's Seaport's beer orders, which are nearly identical to the other marketing companies in this matter.

109. A spreadsheet dated December 17, 2013, indicated that Jerry Remy's received a $20 rebate per unit sold. (Exhibits 1, 12)
110. Craft issued check # 012085, dated December 30, 2013, in the amount of $2,660 to Rebel. (Exhibits 1, 12)
111. A final invoice, dated July 2, 2014, was issued by Rebel to Craft in the amount of $3,080 for "Jerry Remy's Seaport: Marketing/Menu Support from January 1, 2014, to June 30, 2014." (Exhibits 1, 13)
112. A Check Request Form produced by Craft indicated that the check should be issued to Rebel for $3,080 with the following specifications: "$1840 Wachusett Contribution, $760.00 Cisco Contribution, $280.00 Sierra Contribution and $200.00 Brooklyn Contribution." (Exhibits 1, 13)
113. Craft issued check # 014637 for $3,080.00 to Rebel on July 17, 2014. (Exhibit 13)

Lyons Group ("Lyons")

114. Lyons Group, LTD[27], is the management company[28] for the following § 12 on-premises licensees:
   a. Game On Fenway, LLC d/b/a Game On;
   b. Food for Thought Dining, LLC d/b/a Mass Ave. Tavern;
   c. Lucky's Airport, LLC d/b/a Lucky's;
   d. Hynes Fine Dining, LLC d/b/a Towne Stove & Spirits;
   e. BB Social Club, LLC d/b/a Back Bay Social Club;
   f. Congress Fine Dining, LLC d/b/a Lucky's;
   g. Game On Airport, LLC d/b/a Game On Sports Café;
   h. Bleacher Bar, LLC d/b/a Bleacher Bar[29];
   i. Kings Bowl of Dedham, LLC d/b/a Kings[30];
   j. Ipswich Entertainment, Inc.[31] d/b/a La Verdad;
   k. Newbury Fine Dining Limited Partnership[32] d/b/a Sonsie; and
   l. Concorde Entertainment, Inc. d/b/a Lansdowne Pub/Bill's Bar.[33] (Exhibit 1)

---

[27] Patrick Lyons is the President and a Director of Lyons Group, LTD. Edward Sparks is the Treasurer, Secretary, and a Director of the entity. (Exhibit 1)
[28] There is nothing in the Commission files approving this relationship. (Commission Files)
[29] Edward Sparks and Patrick Lyons are the Managers of Game On Fenway, LLC, Food for Thought Dining, LLC, Lucky's Airport, LLC, Hynes Fine Dining, LLC, BB Social Club LLC, Congress Fine Dining, LLC, Game on Airport, LLC, and Bleacher Bar, LLC. Westfield Concession Management, Inc. has an approved management agreement with Lucky's Airport, LLC and Game on Airport, LLC (Exhibit 1, Commission Files)
[30] Secretary of Commonwealth filings indicate that Edward Sparks, Patrick Lyons, and LLC Management Company, Inc. are the Managers of Kings Bowl of Dedham, LLC, however, Commission files contradict that and indicate that LLC Management Company, Inc. is not a Manager of the entity. (Exhibit 1, Commission Files)
[31] Secretary of Commonwealth filings indicate that Patrick Lyons is the President and a Director of Ipswich Entertainment Inc. Edward Sparks is listed as the entity's Treasurer, Secretary, and a Director. (Exhibit 1) However, Commission files contradict that and indicate that Lyons is the President and a Director of Ipswich Entertainment, Edward Sparks is the Treasurer and a Director, Edward J. Latessa is the Secretary/Clerk and a Director, and Seth Greenberg is a Director. (Commission Files)
[32] Commission files indicate that the partners listed for Newbury Fine Dining Limited Partnership are Newbury Fine Dining, Inc. and Edward Sparks. (Commission Files)

115. On November 18, 2014 at approximately 12:45 p.m., Investigators Wilichoski and Velez interviewed Edward Sparks and Lyons Vice President of Operations Steven Coyle. (Exhibit 1, Testimony)
116. Patrick T. Lyons is the president and director of Lyons and Bank On It, and Edward J. Sparks is the treasurer and secretary of Lyons and Bank On It. (Exhibit 1, Testimony)
117. Bank On It, LLC is the marketing and promotional company for Lyons. It conducts promotion, advertising, marketing, and media buys. Bank On It has no employees and no payroll. (Exhibit 1, Testimony)
118. Steven Coyle, Vice President of Operations for Lyons or an administrative assistant from Lyons issued all the invoices from Bank On It to Craft. (Exhibit 1)
119. Mr. McCoy is Mr. Coyle's contact at Craft. At some point in 2013, Craft thought Mr. McCoy offered a $20 rebate program per keg in exchange for Lyons placing Lagunitas, Smuttynose, Wachusett, Cisco, and Magic Hat (as a combination) ("Other Products") in Lyons restaurants. Mr. McCoy advised Mr. Coyle to invoice Craft for menu development or menu placement. (Exhibit 1, Testimony)
120. Lyons has not been offered rebates by any other wholesaler. (Exhibit 1, Testimony)
121. Craft also entered into a separate agreement with Bank On It for Yuengling products. Mr. McCoy went to Mr. Coyle's office and met with him multiple times before Yuengling came into Massachusetts. Mr. McCoy told Mr. Coyle that he wanted Lyons to carry Yuengling and place Yuengling products in Lyons restaurants. Craft gave Lyons a rebate for selling kegs of Yuengling (Exhibit 1, Testimony)
122. On April 28, 2013, Bank On It invoiced Craft for Yuengling products in the amount of $12,000.00. Invoice number 391 indicates that the invoice was for Yuengling Support" with "Entertainment and Menu Support" for "Lansdowne Pub, Game On (Kenmore), Game On (Airport), Mass Ave. Tavern, Bleacher Bar, Kings, Back Bay Social Club, La Verdad (new location), Bill's Bar, Lucky's (Airport) and Lucky's (S. Boston)." The $12,000 was paid to have the Craft brand Yuengling placed in Lyons restaurants. Twelve Lyons restaurants carry Yuengling, for $1,000 per draft. (Exhibits 1, 3)
123. Craft issued check # 013688 in the amount of $12,000 to Bank On It on May 1, 2014. (Exhibits 1, 3)
124. Bank On It issued its first invoice based on this arrangement for the Other Products to Craft on June 10, 2013, for $7,000. The invoice, number 436, indicated that it was for "Menu Development & Support" and further indicated that it was for Game On, Mass. Avenue Tavern, Sonsie, Towne Stove & Spirits, Back Bay Social Club, and Lansdowne Pub. (Exhibits 1, 2, Testimony)
125. A Check Request Form from Craft noted that a check should be issued to Bank On It for $7,000. It indicated $5,500 for "Magic Hat participation menu," $1,000 for "Lagunitas participation menu," and $500 for "Cisco participation menu." McCoy was to hand deliver the check. (Exhibits 1, 2)
126. Craft issued check # 210971 in the amount of $7,000 to Bank On It on June 26, 2013. (Exhibits 1, 2)

[33] Secretary of Commonwealth filings indicate that Patrick Lyons is the President and a Director of Concorde Entertainment, Inc. Edward Sparks is listed as the entity's Treasurer, Secretary, and a Director, however, Commission files contradict that and indicate that John Lyons is the Secretary of Concorde Entertainment, Inc. (Exhibit 1, Commission Files)

127. A third invoice was dated July 3, 2014, for $3,345. The invoice indicated that it was for January to June 2014, for "BBL Rebate Program – Menu Support." This invoice was for Craft paying Lyons a fee of $15 per barrel of beer sold in Lyons restaurants. The brands placed included Lagunitas, Smuttynose, Wachusett, Cisco, and Magic Hat. Coyle would then bill Craft either quarterly or every six months. (Exhibits 1, 4)
128. A Check Request Form was produced by Craft, noting that a check should be issued to Bank On It for $3,345, as well as an indication it was for "Brand Allocation is listed on attached document" and "Lagunitas Trade Spend . . . $870," and had handwritten marking indicating "P. McCoy to hand deliver." (Exhibits 1, 4)
129. A spreadsheet produced by Craft indicated a total of 223 units of beer, each multiplied by $15, for a total of $3,345. (Exhibits 1, 4)
130. Craft issued check # 014527 in the amount of $3,345 to Bank On It on July 10, 2014. (Exhibits 1, 4)
131. None of these "rebates" were offered to any other retailers. (Exhibit 1, Testimony)

DISCUSSION

The Licensee has admitted to the facts introduced at the hearing and in the Investigator's Report, Exhibit 1. However, it argues that its conduct does not violate M.G.L. c. 138, § 25A, or 204 C.M.R. 2.08. The Commission has considered each allegation against the Licensee and each defense the Licensee raises. After a thorough review, the Commission finds that there is sufficient evidence that the Licensee violated both M.G.L. c. 138, § 25A, and 204 C.M.R. 2.08.

VIOLATION OF M.G.L. C. 138, § 25A

The Licensee has been charged with a violation of M.G.L. c. 138, § 25A ("§ 25A"). While it does not dispute that it was offering rebates or discounts, the Licensee challenges that § 25A no longer prohibits wholesalers from granting discounts, rebates, free goods, allowances, or other inducements because certain portions of § 25A have been either repealed or invalidated by case law.

From 1946 to 1970, § 25A read as follows:

> Section 25A. No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall –
>
> (a) Discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity or merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality;
> (b) Grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement, except a discount not in excess of two per centum for quantity of alcoholic beverages except wines, or a discount not in excess of five per centum for quantity of wines.

The Legislature repealed subsection (b) in its entirety in 1970. A year later, in 1971, the Legislature amended § 25A to read as follows:

> Section 25A. No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall –
>
> (a) Discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity or merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality;
>
> *[There is no clause (b).]*
>
> All price lists or price quotations made to a licensee by a wholesaler shall remain in effect for at least thirty days after the establishment of such price list or quotation. Any sale by a wholesaler of any alcoholic beverages at prices lower than the price reflected in such price list or quotation within such thirty day period shall constitute price discrimination under this section.

In 1998, the U.S. District Court for Massachusetts held that the 1971 addition to § 25A, the so-called "post and hold" clause, as well as related regulations 204 CMR 6.01-6.07 were in violation of the Sherman Antitrust Act and were invalidated. Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41 (1998); Canterbury Liquors & Pantry v. Sullivan, 999 F. Supp. 144 (1998); Whitehall Co. Ltd. v. Merrimack Valley Distrib., 56 Mass. App. Ct. 853, n. 3 (2002).

Accordingly, all that legally remains of § 25A is the following language:

> Section 25A. No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall –
>
> (a) Discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity or merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality[.]

M.G.L. c. 138, § 25A.

With that legislative background in mind, the issue before the Commission is whether the Licensee violated the current version of § 25A. "The subject of s. 25A is discrimination . . . ." Van Munching Co., Inc. v. Alcoholic Beverages Control Comm'n, 41 Mass. App. Ct. 308, 310 (1996). The Licensee was not charged with having a rebate program. If it had been, this would not have been a proper charge. See id. (§ 25A "does not address the legality of discounts based on sales between a wholesaler and a retailer") citing Cellarmaster Wines of Mass., Inc. v. Alcoholic Beverages Control Comm'n, 27 Mass. App. Ct. 25, 27-28 (1989). Instead, the Licensee has been charged with a violation of § 25A for discrimination in two different forms: (1) not offering its rebates to all retail licensees; and (2) to the retail licensees who did get these rebates, they were not all offered the same rebate. The Licensee has admitted to these two facts, but argues they are not contemplated under § 25A as it reads today.

"From its inception . . . § 25A has been firmly tethered to the goal of protecting the public through the strict regulation of the distribution and sale of alcoholic beverages . . . ." Miller Brewing Co. v. Alcoholic Beverages Control Comm'n, 56 Mass. App. Ct. 801, 807 (2002). Indeed, in enacting § 25A in 1946, the Legislature stated its intended goals:

> Whereas, the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods and other inducements to favored licensees contributes to a disorderly distribution of alcoholic beverages; and
> Whereas, the deferred operation of this act would delay the proper regulation thereunder of the alcoholic beverage industry and be contrary to the interests of temperance, therefore this act is hereby declared to be an emergency law necessary for the immediate preservation of the public convenience.

1946 Mass. Acts c. 304. "Given the articulated purpose of eliminating differential treatment of 'favored licensees,' § 25A can reasonably be construed as prohibiting even minor discrepancies in prices" offered by wholesalers to their retail clients. Miller, 56 Mass. App. Ct. at 807. And as the Appeals Court has previously held, the definition of "price" should not be construed narrowly, but rather includes all forms of financial benefits. See, e.g., id. at 806 ("'[i]t is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price'"), quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980). Undoubtedly, a rebate is an inseparable part of the price the retail licensees were paying to the Licensee, as it ultimately reduces the price of beer purchased by retail licensees from the wholesaler. Therefore, any issue of discrimination in the offering of, or implementation of, rebate programs falls under the purview of § 25A.

The Licensee admittedly offered rebates to retail licensees in the Briar Group, the Wilcox Group, Glynn Hospitality Group, the Lyons Group, and two Jerry Remy's licensed establishments. No other retail licensees were offered this rebate that effectively reduced the cost of beer purchased from the Licensee by these retail licensees. But even to certain retail licensees that accepted the rebates, they were not offered the same rate: while Briar Group licensees and Jerry Remy's Seaport received $20 per keg rebate, Lyons Group licensees only received $15 per keg rebate. While Wilcox Group licensees received $1,000 per draft line; Glynn licensees received $1,500 per draft line; and Jerry Remy's Fenway received $2,000 per draft line. These rebates clearly benefitted "favored licensees," by offering them monetary rebates on their purchases from the Licensee. Then, to those selected favored licensees, the Licensee offered different rebate amounts, constituting discrepancies in the final price and therefore price discrimination. Accordingly, the Commission is convinced that the Licensee violated M.G.L. c. 138, § 25A.

VIOLATION OF 204 C.M.R. 2.08

The Licensee contends that because subsection (b) of M.G.L. c. 138, § 25A, was repealed in 1970, 204 C.M.R. 2.08 must necessarily be invalidated because the Commission's legislative authority to issue regulations regarding inducements was repealed with the repeal of subsection (b). The Commission is confident that 204 C.M.R. 2.08 is a valid regulation and that the Licensee did violate it.

When a Licensee seeks to facially challenge the validity of a Commission regulation, the Licensee bears the burden to prove to the Commission that the regulation is invalid. Entergy Nuclear Generation Co. v. Dept. of Environmental Protection, 459 Mass. 319, 329 (2011); Mass. Federation of Teachers v. Dept. of Education, 436 Mass. 763, 771 (2002). In doing so, the Licensee must overcome the strong presumption that the regulation at issue is valid. Commonwealth v. Maker, 459 Mass. 46, 49-50 (2011); Doe, Sex Offender Registry Bd. No.

3844 v. Sex Offender Registry Bd., 447 Mass. 768, 775 (2006); Supreme Malt Products Co. v. Alcoholic Beverages Control Comm'n, 334 Mass. 59, 61-62 (1956).

Where an administrative agency is vested with broad authority to effectuate the purposes of an act "'the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."'" Levy v. Bd. of Registration and Discipline in Medicine, 378 Mass. 519, 524 (1979), quoting Consolidated Cigar Corp. v. Dept. of Public Health, 372 Mass. 844 (1977). It has long been understood and undisputed that the Commission's regulatory authority is broad and comprehensive. See BAA Massachusetts, Inc. v. Alcoholic Beverages Control Comm'n, 49 Mass. App. Ct. 839, 842 (2000) ("Regulation of the liquor industry in Massachusetts is comprehensive and pervasive. The powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad"), quotations omitted; see also, e.g., Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613 (1956); Johnson v. Martignetti, 374 Mass. 784, 793 (1978). This broad regulatory authority is found not only in specific statutes, but also by reading M.G.L. c. 138 as a whole. Johnson v. Martignetti, 374 Mass. 784, 789 (1978) (must read M.G.L. c. 138 as a whole); Cleary v. Cardullo's, Inc., 347 Mass. 337, 349 (1964) (same).

An analysis of the validity of 204 C.M.R. 2.08 must begin with its legislative history. Prior to 1970 the Commission had issued its own set of regulations, including Regulation 47, regarding inducements:

> No licensee shall give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.

As discussed supra, § 25A(b), which addressed inducements, was repealed by the Legislature in 1970. Eight years later, in 1978, the Commission promulgated 204 C.M.R. 2.08 – the regulation at issue -- which bears the same language as prior Regulation 47.

Although § 25A(b) was repealed, the promulgation of 2.04 C.M.R. 2.08 was not an ultra vires exercise of the Commission's regulatory power, and nothing that the Licensee argues contradicts this conclusion.

It is unreasonable to assume that the Commission promulgated its 1978 regulation based on a statute repealed eight years earlier. Instead, the only logical conclusion is that the Commission did not promulgate this regulation under § 25A(b), but rather relied on the broad regulatory authority granted by M.G.L. c. 138, § 24, to promulgate regulations "for clarifying, carrying out, enforcing and preventing violation of . . . [the] method of carrying on the business of any licensee, . . . for the proper and orderly conduct of the licensed business . . . ." M.G.L. c. 138, § 24. This conclusion is supported by the fact that many other parts of the Commission's regulations were promulgated under M.G.L. c. 138, § 24. This includes 204 C.M.R. 2.05(5), which was promulgated under § 24 because it "[r]egulates activities on licensed premises . . . ." Massachusetts Office of the Secretary of State, "Regulation Filing" (June 19, 1992 and December 19, 1992), 204 C.M.R. 10, and 204 C.M.R. 19.03(2), 19.04(1), & 19.04(2). Massachusetts Office of the Secretary of State, "Regulation Filing" (June 19, 1992). The

Commission's reliance on § 24 for the passage of other Commission regulations reflects a logic that would continue with the passage of 204 C.M.R. 2.08.

Furthermore, while the language of M.G.L. c. 138, § 24, is broad, and does not use words specifically as to inducements, "'an agency's powers 'are shaped by its organic statute taken as a whole and need not necessarily be traced to specific words.'" Mass. Federation of Teachers v. Bd. of Education, 436 Mass. 763, 773 (2002), quoting Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 770 (1980); accord Grocery Mfrs. of Am., Inc. v. Dept. of Public Health, 379 Mass. 70, 75 (1979) (authority for regulation need not be pinpointed to specific statutory authority). The Commission here looked to its indisputably broad powers to promulgate a regulation addressing the "method of carrying on the business of any licensee," M.G.L. c. 138, § 24. The Commission's power to promulgate the regulation is also consistent with the purpose of the Alcoholic Beverages Control Commission, which is the "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages," M.G.L. c. 10, § 71, and with the intent of Chapter 138, which is "to serve the public need and . . . to protect the common good." New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 785, 788 (1981), quoting M.G.L. c. 138, § 23. Likewise, the Commission seeks to "promote temperance, . . . to stabilize the package store business, to avoid price wars and cut throat competition, . . . instill more observance for the law in those engaged in the business and . . . better protect the public . . . ." See Supreme Malt Products Co., Inc. v. Alcoholic Beverages Control Comm'n, 334 Mass. 59, 62 (1956); accord Kneeland Liquor, Inc. v. Alcoholic Beverages Control Comm'n, 345 Mass. 228, 233 (1962).

204 C.M.R. 2.08 relates to the conduct of a business in handling and selling alcoholic beverages, and it was unquestionably written to "avoid price wars and cut throat competition," Supreme Malt Products Co., 334 Mass. at 62. Without it, a wholesaler could otherwise bribe or otherwise unfairly influence a retailer to carry one product to the exclusion of another, which could result in a manipulation of the market by powerful wholesalers and distributors, hurting smaller businesses and resulting ultimately in a deterioration of the three-tier system. Heublein Inc. v. Capital Distrib. Co. 434 Mass. 698 (2001); Pastene v. Alcoholic Beverages Control Comm'n, 401 Mass. 612 (1988).

Several regulations have arisen from § 24 that necessarily reflect the broadness of its scope and support the conclusion that 204 C.M.R. 2.08 was validly promulgated under § 24. See 204 C.M.R. 2.05(5), 10, 19.03(2), 19.04(1), 19.04(2); Universal Machine Co. v. Alcoholic Beverages Control Comm'n, 301 Mass. 40 (1938) (regulation regarding cleaning of bar glasses properly promulgated under M.G.L. c. 138, § 24, because it addressed the conduct of the business in selling alcoholic beverages). Based on the foregoing analysis, the Commission is convinced that 204 C.M.R. 2.08 is a valid regulation promulgated under the Commission's broad regulatory authority pursuant to § 24.

Returning to the charge against the Licensee, 204 C.M.R. 2.08 prohibits a Licensee from giving or permitting to be given money or something of substantial value in an effort to induce any person to: (1) persuade or influence any other person to purchase or contract for the purchase or any particular brand or kind of alcohol, or (2) persuade or influence any person to refrain from purchasing or contracting for the purchase of any particular brand or kind of alcohol. The Commission's interpretation of its own regulations is entitled to substantial deference.

eVineyard Retail Sales- Massachusetts, Inc. v. Alcoholic Beverages Control Comm'n, 450 Mass. 825, 826 (2008).

The Licensee admits that it provided money to its employees for them to distribute to retail licensees in order to induce the retail licensees to sell certain brands of beers that the Licensee sold, sometimes directly to the retail licensees.[34] However, the Licensee maintains it did not violate this regulation because three parties must be involved in the inducement. No matter how one looks at it, three parties necessarily were involved in these inducements. By giving money to an employee (McCoy, in many cases) for use in inducing a retail licensee to carry Craft brands, there were three parties: the Licensee, the Licensee's employee providing the money, and the retail licensee.[35] Where a marketing company was engaged in the transaction, there were also three parties: the Licensee, the marketing company, and the retail licensee. The Licensee also admitted at the hearing that the alcohol supplier would routinely reimburse the Licensee, either in whole or in part, for these inducements, which would also necessarily involve three parties: the supplier, the Licensee, and the retail licensee. Therefore, no matter how the facts behind this charge are read, and to the extent that three parties are required to be part of this transaction, there were three parties involved. Accordingly, the Licensee violated 204 C.M.R. 2.08.

The regulation is not void for vagueness.

The Licensee also contends that even if it did violate 204 C.M.R. 2.08, the regulation is so vague that the Licensee was unaware that it was violating the regulation. "The vagueness doctrine is a function of due process, which requires that a law provide fair notice of what it prohibits or requires so that persons of common intelligence may conform their conduct to the law." Schoeller v. Board of Registration of Funeral Directors and Embalmers, 463 Mass. 605, 611 (2012). "A law is void for vagueness if persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864, 873 (1983), quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). 204 C.M.R. 2.08 is not unconstitutionally vague.

"[L]aws which merely regulate business activities need not contain criteria as precise and definite as laws which affect First Amendment freedoms. . . . Similarly, statutes that do not define or relate to criminal conduct need not be drawn as precisely as statutes that touch upon criminal acts. . . . [If] neither First Amendment freedoms nor criminal conduct are concerned . . . we limit our vagueness analysis to whether [the statute or regulation] is unconstitutionally vague as applied in [the particular] case. . . ." Caswell, 387 Mass. at 873; Gurry v. Bd. of Public Accountancy, 394 Mass. 118, 127 (1985); Aristocratic Restaurant of Mass, Inc. v. Alcoholic Beverages Control Comm'n, 374 Mass. 547, 552 (1978). "[If] the statute merely regulates business activity . . . we need not consider whether the statute might be unconstitutionally vague in other circumstances." LaPointe v. License Bd. of Worcester, 389 Mass. 454, 460–461 (1983). A finding of a violation of a license issued to a licensee under M.G.L. c. 138 is not penal or criminal in nature. Such a violation is not designed to punish the licensee, but rather to protect

[34] The Licensee concedes that money was exchanged, and not something else of substantial value, so the question of what is something of substantial value is left for another day.

[35] Of course, more than one employee for both the Licensee and retail licensee could be involved in this transaction.

the public health, welfare, and safety. See, e.g., Gurry, 394 Mass. at 127 (revocation of physician's license not penal or criminal in nature); Deluty v. Comm'r of Ins., 7 Mass. App. Ct. 88, 91 (1979) (revocation of insurance broker's license not criminal proceeding).

The Licensee raises no First Amendment challenges to 204 C.M.R. 2.08, nor is it a penal or criminal regulation; therefore, the only question is whether 204 C.M.R. 2.08 is unconstitutionally vague *as applied to the Licensee*. And the answer is apparent: no, it is not unconstitutionally vague. The Commission cannot ignore the facts to which the Licensee has admitted, which in and of themselves prove the regulation was not vague as applied to the Licensee. Management at Craft, Bernfeld and Corthell, both admitted to Investigators that they were aware that providing these kickbacks was illegal under 204 C.M.R. 2.08. (Exhibit 1). The Licensee would instruct its retail licensees to bill Craft for the kickbacks (either per keg or per draft line) using generic terms such as "Marketing," "Menu Support," and "Programming," terms which Craft admits were interchangeable because they all meant the same thing – "kickbacks." (Exhibit 1). Sometimes Craft would go so far as to create the invoices for the retail licensees themselves. Not only that, but Craft worked with several sham marketing companies set up by retail licensees – companies that had no employees or payroll -- with the sole purpose of Craft paying kickbacks while evading being caught in violation of 204 C.M.R. 2.08. This obvious knowledge on the part of the Licensee alone must result in a rejection of the Licensee's notice argument as it was clearly not vague as applied to the Licensee as it admitted that it knew its conduct was unlawful under 204 C.M.R. 2.08.

The regulation is not being selectively enforced.

Finally, while the Commission has not charged a violation of 204 C.M.R. 2.08 in recent memory, that fact in no way diminishes the validity of the regulation. "The validity or effect of an ordinance does not depend on the lack of success of enforcement or the diligence of city officials." Brockton Police Ass'n v. City of Brockton, 57 Mass. App. Ct. 671, 674 (2003), citing Doris v. Police Comm'r. of Boston, 374 Mass. 443, 449 (1978). While there is nothing to indicate that the Investigative Division has neglected to routinely enforce 204 C.M.R. 2.08, "[t]he right of the public to have the liquor laws properly administered cannot be forfeited by the action of its officials." New City Hotel Co. v. Alcoholic Beverages Control Comm'n, 347 Mass. 539, 542 (1964). "It would indeed be a most serious consequence if we were to conclude that the inattention or inactivity of government officials could render a statute unenforceable and thus deprive the public of the benefits or protections bestowed by the [regulation]." Doris, 374 Mass. at 449. Therefore, while Craft is the first licensee to be charged under 204 C.M.R. 2.08 in some time, that is irrelevant to the question of whether the Licensee violated the regulation. And it did.

CONCLUSION

Although this Licensee has no prior violations of Chapter 138 or Commission regulations, the Commission finds that the Licensee engaged in a pervasive illegal enterprise involving numerous retailers and corporations that spanned at least five years, spending approximately $120,000 to pay kickbacks to § 12 retail licensees throughout the Boston area, and went to great lengths to hide its knowingly unlawful conduct. The legislature, in enacting M.G.L. c. 138, § 25A, and the Commission, in promulgating 204 C.M.R. 2.08, intended to protect the public and promote fairness in the sale and distribution of alcoholic beverages in Massachusetts by preventing powerful wholesalers and distributors from being able to inequitably manipulate the alcoholic beverages market in Massachusetts. The Licensee's actions undermine this fundamental purpose of the statutory and regulatory scheme, and impede the fair market in the alcoholic beverages industry.

Based on the evidence, the Commission finds the Licensee violated:

1) 204 CMR 2.08: No licensee shall give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.
2) M.G.L. C. 138, §25A: No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall: Discriminate, directly or indirectly, in price, in discounts for time of payment, or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name of like age and quality.

On the first violation, 204 C.M.R. 2.08, the Commission suspends the license for fifteen (15) months, with ninety (90) days to be served and the balance of 12 months held in abeyance for two years provided no further violations of Chapter 138 or Commission Regulations occur.

On the second violation, M.G.L. C. 138, § 25A, the Commission suspends the license for fifteen (15) months with ninety (90) days to be served and the balance of 12 months held in abeyance for two years provided no further violations of Chapter 138 or Commission Regulations occur. This suspension is to run concurrently with the penalty imposed for 204 C.M.R. 2.08.

In total the Commission suspends the license for a period of ninety (90) days to be served, and the balance of 12 months to be held in abeyance for a period of two (2) years, provided no further violations of Chapter 138 or Commission Regulations occur.

The members of the alcoholic beverages industry in Massachusetts are hereby admonished that if, for any reason, any member of the alcoholic beverages industry in Massachusetts, or any individual who purports to act on behalf of a member of the alcoholic beverages industry in Massachusetts, engages in similar conduct that creates a systemic illegality, this Commission shall take similar, severe enforcement action to eliminate any violation as well as the cause of such conduct.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Kathleen McNally, Commissioner _____

Elizabeth A. Lashway, Commissioner _____

Dated: February 11, 2016

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.

This document is important and should be translated immediately.
Este documento es importante y debe ser traducido inmediatamente.
Este documento é importante e deve ser traduzido imediatamente.
Ce document est important et devrait être traduit immédiatement.
Questo documento è importante e dovrebbe essere tradotto immediatamente.
Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.
这份文件是重要的，应立即进行翻译.

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Nicholas Velez, Investigator
Caroline A. O'Connell, Esq. via facsimile 617-439-3987
Mark Dickison, Esq. via facsimile 617-439-3987
Administration, File

07.03

10/2

17

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.: 1684CV00809

CRAFT BEER GUILD, LLC d/b/a
CRAFT BREWERS GUILD
Plaintiff,

v.

ALCOHOLIC BEVERAGES CONTROL
COMMISSION,
Defendant.

9/29/17 Afe hearing
Daniel Cross-Motion
allowed, see memo of
this date.

Notice sent
10/02/2017
J. M. D.
L. & W.
C. A. O.
J. M. S.
K. G. H.

(sc)

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Craft Beer Guild, LLC d/b/a Craft Brewers Guild makes this motion under Mass. R. Civ. P. 12(c) and Superior Court Standing Order 1-96 for judgment on the pleadings setting aside the February 11, 2016 decision of the Alcoholic Beverages Control Commission, or alternatively, remanding the matter to the ABCC for further consideration. Further, the plaintiff requests that the Court determine that the penalty, including the fine, was unlawful and require it to be reduced, refunded or, alternatively, recalculated (and reduced and refunded). Finally, Craft asks the Court to grant such other and further relief as may be necessary and appropriate. In support of this motion, Craft submits the accompanying Memorandum of Law and a separately bound volume of exhibits.

Craft Beer Guild, LLC d/b/a
Craft Brewers Guild,
By its attorneys,

J. Mark Dickison (BBO#629170)
MDickison@lawson-weitzen.com
Caroline O'Connell (BBO#640271)
coconnell@lawson-weitzen.com
Joshua M.D. Segal (BBO# 678367)
JSegal@lawson-weitzen.com
Lawson & Weitzen, LLP
88 Black Falcon Avenue, Suite 345
Boston, MA 02210
(617) 439-4990
(617) 439-3987 (fax)

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party by mail X hand ____ telecopier, on 3/31/17

07.03

10/2

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 1684CV00809

CRAFT BEER GUILD, LLC d/b/a CRAFT BREWERS GUILD,

Plaintiff,

v.

ALCOHOLIC BEVERAGES CONTROL COMMISSION,

Defendant.

Notice sent
10/02/2017
J. M. D.
L. & W.
C. A. O.
J. M. S.
K. G. H.

(sc)

ALCOHOLIC BEVERAGES CONTROL COMMISSION'S OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

9/29/17 Cross Motion allowed, See Memo of this date.

MAURA HEALEY
ATTORNEY GENERAL

Kirk G. Hanson, BBO# 655534
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, MA 02108
(617) 963-2974
Kirk.Hanson@state.ma.us

June 9, 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-809-D

Notice sent
10/02/2017
J. M. D.
L. & W.
C. A. O.
J. M. S.
K. J. H.

CRAFT BEER GUILD, LLC d/b/a
CRAFT BREWERS GUILD,
Plaintiff,
vs.

ALCOHOLIC BEVERAGES CONTROL COMMISSION
Defendant.

(sc)

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff Craft Beer Guild, LLC d/b/a/ Craft Brewers Guild ("Craft") is appealing an adjudicatory decision, dated February 12, 2016 ("Decision") of the Alcoholic Beverages Control Commission ("ABCC" or "Commission") under G. L. c. 30A, § 14. After the ABCC filed the Administrative Record (A.R.) and a Supplemental Administrative Record (S.A.R.) on September 22, 2016, Craft filed its "Plaintiff Craft Beer Guild, LLC d/b/a/ Craft Brewers Guild's Motion for Judgment on the Pleadings" ("Motion") on June 29, 2017, pursuant to Superior Court Standing Order 1-96 as amended.[1] After a hearing on the Motion on September 12, 2017, at which the Court heard from both parties, the Court **DENIES THE MOTION**.

[1] Craft has not helped its cause by filing a brief with what appears to be less than 12-point font, in violation of Superior Court Rule 9A(a)(5). As predicted in the Court's endorsement of March 20, 2017, this added verbiage has only resulted in diverting focus and attention from Craft's strongest arguments.

BACKGROUND

Craft is a wholesaler of alcoholic beverages licensed under G.L. c. 138, § 18. It distributes about 200 craft beer brands to, among others, retailers such as restaurants and bars licensed under G.L. c. 138, § 12 for consumption of alcohol. In October 2014, one of the owners of a Crafts-distributed brand tweated allegations that its brand had been removed from the tap at Boston location because Massachusetts suppliers and wholesalers were making unlawful payments to retail licensees in exchange for those retailers carrying Craft brands. The Commission began an investigation, which lasted about seven months and resulted in a Violation Report.

The Violation Report led to administrative charges against Craft for violation of the price discrimination law (G.L. c. 138, § 25A(a)) and of 204 Code Mass. Regs. § 2.04(1), quoted below. The ABCC had not previously brought such a proceeding against any licensee under § 2.08.

During the proceedings, Craft stipulated to the facts in the Violation Report. After adjudicatory hearings, the ABCC found that Craft violated 204 CMR 2.08 and G.L. c. 138, § 25A. Based on the stipulated facts, the Commission found that in 2013 and 2014, Craft negotiated and implemented a series of schemes between itself, numerous retail licensees and certain third-party management companies that managed the retail licensees. Craft negotiated payment arrangements with the third-party management companies in exchange for tap lines committed to Craft brands at retail licensees that those companies managed. Generally, the payments were either on the basis of $1,000 to $2,000 per draft line payable every six months or rebates paid every six months of $15 or

$20 per keg. The third party management companies issued invoices to Craft billing for fictitious services that were never performed. Once invoiced, Craft would pay the fictitious service fee to the management company. Craft paid at least $120,000 during the pendency of this scheme.

The rebates and payments were not reported to the Commission or reported in the Boston Beverage Journal. They were not available to all retail licensees. Even among those who received rebates, not all licensees received the same level of rebate or payment.

The ABCC found two violations, for which it imposed the following penalties:

> On the first violation, 204 C.M.R. 2.08, the Commission suspends the license for fifteen (15) months, with ninety (90) days to be served and the balance of 12 months held in abeyance for two years provided no further violations of Chapter 138 of Commission Regulations occur.
>
> On the second violation, M.G.L. c. 138, § 25A, the Commission suspends the license for fifteen (15) months with ninety (90) days to be served and the balance of 12 months held in abeyance for two years provided no further violations of Chapter 138 or Commission Regulations occur. This suspension is to run concurrently with the penalty imposed for 204 C.M.R. 2.08.

Craft avoided serving the suspension by paying a $2,623,466.70 fine in lien of suspension pursuant to G.L. c. 138, §23. It timely appealed the decision by filing a complaint in this court on March 10, 2016.

DISCUSSION

Under Section 14(7) of G. L. c. 30A, this Court may reverse, remand, or modify an agency decision if the substantial rights of any party may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, is arbitrary and capricious or unwarranted by facts found by the agency, or is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(c)-(g). The appealing party bears the burden of

demonstrating the invalidity of the agency decision. See Bagley v. Contributory Ret. Appeal Bd., 397 Mass. 255, 258 (1986).

I.

Craft first challenges the finding that it violated 204 Code Mass. Regs. § 2.08. It argues that this finding was based on two errors of law and lacked substantial evidence. The substantial evidence argument depends heavily upon accepting Craft's view of the law.

A.

First, Craft argues that the Legislature withdrew any statutory authority for that regulation when it repealed G.L. c. 138, § 25A(b).

As amended by St. 1946, § 304, section 25A contained two clauses. The first, which remains in effect, prohibits price discrimination. The second, later repealed, provided:

> No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall ---
> * * *
> (b) Grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement, except a discount not in excess of two per centum for quantity of alcoholic beverages except wines, or a discount not in excess of five per centum for quantity of wines.

The overlap between clause (b) and the regulation in question is obvious:

> No licensee shall give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.

204 Code Mass. Regs. § 2.08. The ABCC enacted the predecessor of this regulation, then known as Regulation 47, at some time after enactment of St. 1946, c. 304, but before

1970. The Court agrees with Craft that it is logical to infer that the ABCC relied upon § 25A to adopt this regulation, although there is no reason to believe that it relied solely upon paragraph (b).

By its terms, Regulation 47 had the capacity to serve as a tool to implement the price discrimination prohibition of §25A(a) if inducements were part of a price discrimination scheme. This was consistent with the entire legislative purpose in 1946. The emergency preamble to St. 1946, § 304 found that "[t]he practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods and other inducements **to favored licensees** contributes to a disorderly distribution of alcoholic beverages" and that deferred operation of the amendment would "delay the proper regulation thereunder of the alcoholic beverage industry and be contrary to the interests of temperance . . .." [emphasis added]. The concept of inducements to favored licensees was therefore central to section 25A as amended. There is no reason to believe that this policy applied only to clause (b).

By St. 1970, c. 140, § 1, the Legislature struck out clause (b) of G.L. c. 138, § 25A. It did not strike or amend clause (a). The title of the 1970 amendment reads: "An act relative to the filing of schedules of prices of alcoholic beverages and repealing the law relative to discounts in the sale of such beverages." The title of this act may "act as an aid for the application of its test." Anheuser-Busch, Inc. v. ABCC, 75 Mass. App. Ct. 203, 208 (2009). In the title the words "the law" refer to out clause (b) of G.L. c. 138, § 25A. The Legislature meant to repeal the rule against all discounts beyond those expressly allowed in that clause. There is no reason to believe that it intended to allow discounts (or rebates) employed in a price discrimination scheme. The decision not to

repeal clause (a) of G.L. c. 138, § 25A proves that it did not. As amended, "Section 25A . . . "does not address the legality of discounts based on sales between a wholesaler and a retailer." See generally Van Munching Co. v. Alcoholic Beverages Control Commission, 41 Mass. App. Ct. 308, 310-311 (1996) (quoting motion judge). "The subject of § 25A is discrimination . . .." Id. (no allegation that the licensee in that case engaged in price discrimination).

There is apparently no other legislative history for the 1970 Act. No statement by the Legislature or the ABCC addresses the continued validity of 204 Code Mass. Regs. § 2.08. If complete repeal of that regulation were intended, it is strange that there is no record of any attempt to repeal it, or even any request by regulated industry members to do so. Silence may reflect an understanding by the public and private sectors most involved at the time that the 1970 Act did not require repealing the regulation. Nevertheless, the repeal of former G.L. c. 138, § 25A(b) would be meaningless if the ABCC could simply prohibit all discounts by regulation. See generally Van Munching Co., 41 Mass. App. Ct. 308, 310-311 (1996). The Court agrees with Craft that the 1970 Act therefore implicitly but necessarily withdrew all authority for a broad regulation that prohibited discounts generally.

Importantly, however, that conclusion arises not from any express legislative statement but only by implication. The scope of this implied repeal necessarily requires consideration not only of what was repealed, but also what was retained. In asserting complete invalidation of the regulation, Craft skips this logical step. Repeal does not necessarily mean that the Legislature intended to preclude application of the regulation as

written to, for instance, § 25A(a) which was not repealed. The Court must ask whether implied repeal of the regulation was total or partial.

A regulation is invalid on its face only if it cannot be applied lawfully to any set of facts. Cf. Massachusetts Coalition for the Homeless v. Department of Transitional Assistance, 422 Mass. 214, 226-227 (1996) (distinction between validity of a regulation on its face and as-applied). The question is whether 204 Code Mass. Regs exceeded the ABCC's "statutory authority" and therefore is "arbitrary and capricious on [its] face in that [it] would by definition be unrelated to the achievement of any statutory goals." Mass. Fed'n of Teachers, AFT, AFL-CIO v. Board of Education, 436 Mass. 763, 776 (2002) (citation omitted; emphasis added). More precisely, the Court must determine whether 204 Code Mass. Regs. §2.08 is related to achieving "any" statutory goals, not just whether it served the repealed statutory goals of former § 25A(b).

In this case, unlike Van Munching, the relevant facts include ABCC's allegation and finding of price discrimination under G.L. c. 138, § 25A(a). The Legislature never intended to preclude regulatory enforcement of the anti-discrimination prohibition. The 1970 Act left § 25A(a) intact. When applied in the context of price discrimination, 204 Code Mass. Regs. §2.08 therefore does not conflict with the 1970 repeal. On the contrary, when so applied, it regulates an area specifically preserved in 1970, even as the Legislature repealed clause (b) of the same section. As will be seen, it answers some of Craft's objections to the finding of a § 25A(a) violation. It serves an important and meaningful purpose, for example, in articulating what practices, by which licensees, qualify as methods by which licensees might perpetrate price discrimination. It makes clear that, for purposes of determining discrimination, the retail price may reflect

discounts, deductions or credits. See, e,g., M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control, 371 Mass. 584, 591 (1976) ("'Price' means the actual amount paid to the supplier for goods furnished to the buyer."); G.L. c. 138, § 25D(d) (calculation of price accounts for "all discounts . . . and all rebates."). Section 2.08 is therefore not invalid in all its applications, even though it does lack any force independent of G.L. c.138, § 25A(a) (and perhaps other specific statutes where discounts may provide the means to violate the law). The Court therefore rejects Craft's argument that 204 Code Mass. Regs. §2.08 exceeds the ABCC's authority when, as here, the agency enforces the statutory prohibition on price discrimination.

For its part, ABCC attempts to save the entire regulation under its general regulatory authority. It is not clear that it needs to make this argument, or that the argument is consistent with the position that the Commission took in the Decision. The Decision states: "The Licensee was not charged with having a rebate program. If it had been, this would not have been a proper charge." Decision at 17 (A.R. 188). It appears that the ABCC, as an agency, has interpreted the Legislative amendments to eliminate a free-standing prohibition on rebates, unless tied to price discrimination (or perhaps some other existing statutory prohibition).

The ABCC has "general supervision of the conduct of the business of . . . selling alcoholic beverages." G.L. c. 10, § 71. See Howard Johnson Co. v. Alcoholic Beverages Control Commission, 24 Mass. App. Ct. 487, 49 1(1987). It also has "comprehensive powers of supervision over licensees." Id. See also Cellarmaster Wines of Massachusetts, Inc. v. Alcoholic Beverages Control Commission, 27 Mass. App. Ct. 25, 27 (1989). Under G. L. c. 138, § 24 the ABCC has broad authority to adopt regulations

"not inconsistent with the provisions of this chapter for clarifying, carrying out, enforcing and preventing violation of, all and any of [c. 138's] provisions for inspection of the premises and method of carrying on the business of any licensee . . . [and] for the properly and orderly conduct of the licensed business." When, as here an agency has broad statutory authority, it "has a wide range of discretion in establishing the parameters of its authority pursuant to the enabling legislation." Levy v. Board of Registration and Discipline in Medicine, 378 Mass. 519, 524 (1979); Casa Loma v. Alcoholic Beverages Control Commission, 377 Mass. 231, 235 (1979).

The ABCC's interpretation of the broad authorizations in G.L. c. 10, § 71 and G.L. c. 138, § 24 is entitled to deference. The Supreme Judicial Court recently said:

> We review the validity of a policy adopted by an agency charged with implementing and enforcing State statutes under the same two-part framework used to determine whether regulations promulgated by an agency are valid. Franklin Office Park Realty Corp. v. Commissioner of the Dep't of Envtl. Protection, 466 Mass. 454, 459-460 (2013). First, we employ "the conventional tools of statutory interpretation" to determine "whether the Legislature has spoken with certainty on the topic in question." Goldberg v. Board of Health of Granby, 444 Mass. 627, 632–633 (2005). Where the court determines that a statute is unambiguous, we will reject any agency interpretation that does not give effect to the Legislative intent. Franklin Office Park Realty Corp., supra at 460.
>
> If we conclude that "the Legislature has not directly addressed the issue and the statute is capable of more than one rational interpretation, we proceed to determine whether the agency's interpretation may be reconciled with the governing legislation" (quotation and citation omitted). Biogen IDEC MA, Inc. v. Treasurer & Receiver Gen., 454 Mass. 174, 187 (2009). We defer to the agency's interpretation insofar as it is reasonable. Franklin Office Park Realty Corp., 466 Mass. at 460. Statutory interpretation, however, is ultimately the duty of the courts, and the "principle of according weight to an agency's discretion . . . is one of deference, not abdication, and this court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable" (quotations and citation omitted). Moot v. Department of Envtl. Protection, 448 Mass. 340, 346 (2007), S.C., 456 Mass. 309 (2010).

ENGIE Gas & LNG LLC v. Department of Public Utilities, 475 Mass. 191, 197-198 (2016).

When it comes to a general prohibition on any "discount, rebate, free goods, allowance or other inducement" within the meaning of former G.L. c. 138, § 25A(b), the "Legislature has spoken with certainty." Id. Since the 1970 repeal has no meaning if such a general prohibition may be adopted by regulation, the Legislature has directly addressed – and prohibited – such a general prohibition. To apply 204 Code Mass. Regs. § 2.08 to prohibit discounts regardless of price discrimination "would in essence improperly revive and write back into §25A that which the Legislature chose to repeal." Van Munching Co., 41 Mass. App. Ct. at 310-311. It would exceed the ABCC's authority for that reason, and also because such a broad reinstatement of the repealed provision would be "inconsistent with the provisions of" G.L. c. 138 within the meaning of G.L. c. 138, § 24.

In fact, construing the ABCC's power in this fashion appears consistent with the Decision. The agency has justified continued reliance on 204 Code Mass. Regs. §2.08 because "without it a wholesaler could otherwise bribe or otherwise unfairly influence a retailer to carry one product to the exclusion of another, which could result in a manipulation of the market by powerful wholesalers and distributors, nurting small businesses and resulting ultimately in a deterioration of the three-tier system." Decision at 20 (A.R. 191). This suggests that something more than discounting is required, such as a restraint of trade or other anti-competitive behavior, such as a boycott or price discrimination, which are independently unlawful. In those contexts, 204 Code Mass.

Regs. §2.08 survives. Nothing in the repeal of § 25A(b) implies otherwise or even addresses those contexts.

Because 204 Code Mass. Regs. §2.08 is only valid in this case as a means to enforce G.L. c. 138, § 25A(a), however, the finding that Craft violated the regulation duplicates the finding that Craft violated the statute.[2] It does not appear, however, that this duplication prejudiced Craft's. The ABCC imposed the same length of suspension for each violation, with the same amount of time to be served concurrently. The payment in lieu of suspension was calculated based upon a single 90 day suspension period. A single finding of violation would not have altered the impact upon Craft in any respect. A party may not prevail based on alleged procedural error if it cannot show that its "substantial rights . . . may have been prejudiced" due to the error. G.L. c. 30A, §14(7). Solimeno v. State Racing Commission, 400 Mass. 397, 406 (1987); New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 787-788 (1981). The Court's ruling that, for all present and future purposes, ABCC must treat the statutory and regulatory violation as a single violation therefore suffices to make Craft whole, without need for a remand to recalculate any penalty.

B.

The discussion in part A above reduces the importance of Craft's next argument: that 204 Code Mass. Regs. §2.08 was properly promulgated. To the extent that the

---

[2] In criminal cases, where the government imposes punishment based upon two, duplicative violations of law, the lesser finding and penalty are vacated unless each violation requires a proof of an element that the other does not. Cf. Commonwealth v. Vick, 454 Mass. 418 (2009) (relying not only upon double jeopardy but also due process). After repeal of § 25A(b), violation of 204 Code Mass. Regs. §2.08 requires proof of price discrimination; violation of G.L. c. 138, § 25A(a) does not require proof of any element not included within the regulation.

regulation retains validity, the Court finds that it was duly promulgated, even though not re-promulgated in 1978 as the Decision claims, imprecisely (at 19; A.R. 190).

In 1973 and 1975, ABCC provided the Secretary of State's Regulations Division a compilation of agency regulations it believed were in effect. Among those regulations was "Regulation 47," which as noted above had the same language as 204 Code Mass. Regs. §2.08. The special edition of the Massachusetts Register published by the Secretary in 1978 included Regulation 47, but re-designated it as 204 Code Mass. Regs. §2.08. The Court agrees with Craft that this publication did not satisfy the notice, hearing and comment requirements for a new regulation. G.L. c. 30A, §§ 2, 3. Rather, it fulfilled the mandate of G.L. c. 30A, § 6A, requiring that, "[p]rior to publication of the first issue of the Massachusetts Register the state secretary shall first cause to be published all currently effective agency regulations in a special publication of the Massachusetts Register to be designated as the "Code of Massachusetts Regulations."

To qualify for publication under § 6A, Regulation 47 had to be a "currently effective" ABCC regulation. That publication, being in the Massachusetts Register, was entitled to a presumption of validity:

> The publication in the Massachusetts Register of a document creates a rebuttable presumption (1) that it was duly issued, prescribed, or promulgated; (2) that all the requirements of this chapter and regulations prescribed under it relative to the document have been complied with; and (3) that the text of the regulations as published in the Massachusetts Register is a true copy of the attested regulation as filed by the agency.

G.L. c. 30A, § 6 (eighth paragraph). Moreover, the "contents of the Massachusetts Register shall be judicially noticed . . .." Id. (tenth paragraph). See Mass. Guide to Evid. § 202 (1)(a) (mandatory judicial notice).

Craft has adopted an argument made by Rebel in a parallel case arising out of the same facts that the use of the word "documents" in the eighth paragraph of § 6 distinguishes between the words "documents" and "regulation." According to this argument, a "document" does not include a regulation for this purpose, but instead limited to "all notices filed in accordance with sections two and three." This conclusion is said to flow from the reference in § 6 (second paragraph) to publication of "documents."[3] While it may be that a pre-existing regulation published solely under § 6A does not meet the second paragraph's reference to "all regulations filed in accordance with section five," the second paragraph's clause (4) encompasses within the concept of "documents" "any other item or portion thereof which the state secretary deems to be of sufficient public interest." Certainly, a pre-existing, in-force regulation that must be published under § 6A qualifies as an "item" which is "of sufficient public interest." The words "which the state secretary deems" does not suggest otherwise; the fact that § 6A is mandatory simply means that the state secretary was required to deem the pre-existing regulation to be "of sufficient interest." It follows that Regulation 47, designated 204 Code Mass. Regs. §2.08, was a document entitled to a rebuttable presumption under § 6 "that it was duly issued, prescribed, or promulgated" and to mandatory judicial notice by the Court.

---

[3] That paragraph reads: "There shall be published in the Massachusetts Register the following documents: (1) executive orders, except those not having general applicability and legal effect or effective only against state agencies or persons in their capacity as officers, agents or employees thereof; (2) all regulations filed in accordance with section five; (3) all notices filed in accordance with sections two and three, except that the secretary may summarize the content of any notice filed; provided, however, that he indicate that the full text of the notice may be inspected and copied in the office of the state secretary during business hours; and (4) any other item or portion thereof which the state secretary deems to be of sufficient public interest."

No evidence before the ABCC or the Court suggests any defect in adoption of Regulation 47 under pre-30A law. Through affidavit and research of the 1978 Massachusetts Register, Craft and Rebel have indeed rebutted the Decision's statement that 204 Code Mass. Regs. §2.08 was actually promulgated under G.L. c. 30A, §§ 2, 3 in 1978. They have presented no evidence, however, that the publication in the first edition of the Massachusetts Register in 1978 was erroneous or, in particular, that Regulation 47 was not then a "currently effective agency regulation[]." Without rebuttal evidence, the presumption of validity prevails. Therefore, 204 Code Mass. Regs. §2.08 is a currently effective regulation with the limited scope described in part A, above.

II.

Craft also challenges the finding of a § 25A price discrimination violation on several grounds.

A.

Craft argues that the ABCC did not find sufficient facts to establish a violation of § 25A. That section provides in relevant part:

> No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall:
>
> (a) Discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality; . . ..

As Craft correctly observes, this offense has six explicit statutory elements:

1. A licensee;
2. Discriminated, directly or indirectly;
3. In price, in discounts of payment or in discounts on quantity of merchandise sold;

4. Between one wholesaler and another wholesaler or between one retailer and another retailer, purchasing alcoholic beverages;
5. Which bore the same brand or trade name; and
6. Were of like age and quality.

Craft claims that a seventh element is implied in the statute. Since a wholesaler may change prices for products at any time, it argues that "the two sales at two different prices must occur at the same time." Craft Mem. at 16. As an example, it claims that comparing transactions two weeks apart "would be of no moment because a wholesaler is entitled to change its prices." Id.

The concept of discrimination is not so limited. The discrimination must involve similarly situated retailers, but neither the statute, nor logic, sets any strict requirement of precisely contemporaneous sales.[4] In this case, for instance, the ABCC found that rebates were not available to all retailers. No matter when the transactions occurred, then, some retailers had the benefit of a lower net price (after rebate) than other retailers. That is, by definition, discrimination. The ABCC also found that the rebates were intended as an inducement to favor particular brands. Though not conclusive, this intent supports an inference of price discrimination to produce that result. The ABCC's findings on these point rule out any suggestion that Craft simply raised its prices in neutral fashion.

Craft also implies that there is yet another, eighth, requirement for a § 25A(a) violation, namely that "the alleged rebates and payments went to licensees, as opposed to

[4] In other contexts, the question is not whether comparators were treated differently on the same day, but whether circumstances were sufficiently similar to warrant an inference of unlawful discrimination. See Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 130 (1997) (For employment discrimination purposes, a comparator must be similarly situated with respect to performance, qulaifications and conduct without differentiating or mitigating facts that would distinguish their situations).

marketing companies." The statutory language quoted above provides no support for any such element. Craft suggests that the ABCC applied this element when it ruled:

> [Craft] admittedly offered rebates to retail licensees in the Briar Group, the Wilco Group, Glynn Hospitality Group, the Lyons Group, and two Jerry Remy's licensed establishments. No other retail licensees were offered this rebate.

The Commission elaborated on this finding by stating that Craft entered into transactions with "certain Retailers' management/marketing companies" and that there was a concerted effort to "create distance between the Retailers and Craft."

This argument does not exonerate Craft. For one thing, there is evidence and a finding that Rebel holds a retail license and that Craft paid Rebel $ 8,420 directly in a check made out to Rebel Restaurant Group but cashed by Rebel. To that extent, the finding of violation is uncontested. For another thing, monetary consideration paid to a closely-related third party in exchange for acts by the retailer is still consideration to both (as commonly recognized in, for instance the third-party beneficiary doctrine in contracts law[5]). The ABCC was well within the concept of "price discrimination" and § 25A(a) in finding that this type of arrangement amounted to discrimination on the basis of price.

Finally, if there is any doubt about that economic and legal principle, 204 Code Mass. Regs. §2.08 removes it. Perhaps confirming the ABCC's longstanding expertise on the typical structure of price discrimination schemes, the facts in this case align perfectly with the regulation's description of the participants in an unlawful transaction of this type: "No licensee [Craft] shall give or permit to be given money or any other thing

---

[5] See Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535 (1979) (recognizing right of an intended third-party beneficiary to sue on a contract). Cf. also Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922, 924-926 (1st Cir. 1984) (Breyer, J.) (A company who pays for services rendered to a third party is not a "third force" for purposes of anti-trust law, but is treated, along with the recipient, as the purchaser).

of substantial value [rebates] in any effort to induce any person [certain Retailers' management/marketing companies] to persuade or influence any other person [retail licensees] to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages." As applied in this case, the regulation simply makes explicit the basic economic principle described in the preceding paragraph of this Memorandum. That application of the regulation is entirely reasonable and consistent with the statutory prohibition against price discrimination. Indeed, it closed the very loophole that Craft tried to employ. And it is consistent with the language of § 25A, which prohibits discrimination whether accomplished "directly *or indirectly*" (emphasis added), as, for instance, through a closely-related third party management company.

Craft's last argument on this point is that payment of rebates does not constitute price discrimination. Its reasoning is an offshoot of the earlier argument about the 1970 repeal of § 25A(b), which explicitly prohibited, among other things, "rebates." Craft reasons that if rebates were prohibited by § 25A(b), then it would have been superfluous to prohibit price discrimination by rebate in § 25A(a). See Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-376 (2000) ("In interpreting statutes, none of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute .... If a sensible construction is available, [the court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results.").

Among the flaws in this argument is that the Legislature could have concluded that repeal of § 25A(b) would not open the door to price discrimination because §25A(a) was already broad enough to prohibit discrimination in price through the device of rebates. Another flaw is that discrimination in "price" ordinarily would include all aspects of price, including the net price after rebate. See M.H. Gordon & Son, Inc, 371 Mass. at 591 (quoted above). Thus, for instance, even credit terms are reasonably viewed as a component of price. Miller Brewing Company v. Alcoholic Beverages Control Commission, 56 Mass. App. Ct. 801, 806-807 (2002) ("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 . . . to their wholesalers. The different credit terms offered by Miller to one of its six Massachusetts wholesalers fall within this category."), citing St. 1946, c. 304, preamble (quoted above). Rebates easily fall within this concept. A third flaw in Craft's position stems from the obvious legislative purpose and historical policy to prohibit price discrimination, without limitation as to method. The principal rule is that "[i]n discerning a statute's meaning, '[w]e interpret the words used in a statute with regard to both their literal meaning and the purpose and history of the statute within which they appear.'" Atlanticare Medical Center v. Commissioner of the Division of Medical Assistance, 439 Mass. 1, 6 (2003). Finally, this is an area where the ABCC has substantial expertise warranting deference to its of interpreting the price discrimination that the Legislature trusted to the agency's supervision and enforcement.

III.

Craft argues that the ABCC was arbitrary and capricious in exonerating retailers while finding Craft liable based upon the same scheme. See Retirement Board of Somerville v. Contributory Retirement Appeal Board, 38 Mass. App. Ct. 673, 676-77 (1995) ("an agency final adjudication that essentially contradicts an earlier interim determination made on the same record, with no reason cited, or subsidiary findings made, explaining or supporting the change" is arbitrary and capricious).

There is no contradiction here. In the case of Rebel, the ABCC did find a violation, based upon its receipt of $8,420 from Craft. The decisions regarding the other retailers turned upon whether any of those licensees were "[permitted] to be given" money. The distinction between Craft and those retailers was fundamental: Craft paid or allowed to be paid money; the four retail licensees did not. There is nothing arbitrary and capricious about this. Nor is there any legal inconsistency. As the ABBC held (170 Milk Street Decision at 10), "An essential element of 204 CMR §2.08 is that a licensee gives or 'permit[s] to be given,' in this case, money, as part of the inducement." The fact that Craft violated the law by giving month to marketing managers without giving money to retailers does not mean that the retailers themselves paid money or permitted money to be paid. Each case properly turned upon the proof, or lack thereof, concerning the licensee's own conduct.

IV.

Craft argues procedural error by the ABCC, which took administrative notice of certain records in its files without complying with G.L. c. 30A, § 11(5), which provides in relevant part:

> Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

See Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 691 (2012). The ABCC does not (and could not) seriously contest its violation of this provision, because it never gave the parties notice and an opportunity to contest the facts of which it took notice. It is no small thing to deprive private parties of their rights under this law.

Despite the violation, Craft is not entitled to relief without showing prejudice to its substantial rights. The Court set forth the governing principles in part I, above. Here, as Craft concedes, "the ABCC never expressly made findings on this point . . .." It claims that the ABCC apparently inferred that all payments went to § 12 licensees, but that is speculation. What is clear is that, as a matter of law, the Decision does not turn on whether payments went to retailers, as opposed to the parent companies, as discussed above.

Craft also claims, without sworn support, that it "very well may have chosen to proceed with a full evidentiary hearing" if it had known that ABCC intended to consider the documents in its files. The Court does not accept this unsupported assertion, particularly where the administratively-noticed facts did not bear on the facts supporting the violations. While Craft points to some discrepancies between the Commission's files (as described in the Decision) and those of the Secretary of State, those discrepancies are literally footnotes to a Decision that survives without those footnotes. Craft does not argue that any of the judicially-noticed facts were materially wrong or that a contested hearing had any real prospect for a different outcome. Nor, even as to discrepancies does

it assert an interest in arguing that it was the Commission's files that were in error, and not those in the Secretary of State's office. The most basic point is that, if Craft had a substantial basis to contest the inculpatory facts, it would not have stipulated to them, and nothing before this Court suggests that prior notice about the Commission's use of its own files would change that.

V.

Craft argues that the fifteen month suspension, with 90 days to serve, was "arbitrary and capricious and a violation of due process because it was the only time in at least 25 years that 204 CMR § 2.08 was enforced against a wholesaler and was a total departure from its past enforcement and penalty practice." Mem. at 26. That rationale does not even address the finding of price discrimination. As noted above, striking the finding of violation of 204 CMR § 2.08 would not affect Craft's substantial rights, because the ABCC imposed precisely the same sanction, concurrently, for price discrimination.

As a penalty for violation of § 25A,[6] the Decision appears unassailable. An agency has "particularly broad" powers when it is "fashioning remedies and setting enforcement policies." Boston Preservation Alliance, Inc. v. Sec'y of Env. Affairs, 396 Mass. 489, 498 (1986) (non-30A case). Where an agency imposes a penalty for violation of a law it is charged with enforcing, the reviewing court cannot "interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh"; rather it may interfere "only . . . in the most extraordinary of circumstances." Vaspourakan, Ltd. v.

[6] For that matter, these same principles would apply to the violation of the regulation as well.

ABCC, 401 Mass. 347, 355 (1987), quoting Levy v. Board of Registration in Medicine, 378 Mass. 519, 529 (1979). See also Sugarman v. Bd. of Registration in Medicine, 422 Mass. 338 (1996). Fitzgerald v. Board of Registration in Veterinary Medicine, 399 Mass. 901, 907 (1987) and cases cited; Bill v. Board of Registration of Chiropractors, 394 Mass. 779, 782-783 (1985).

There is nothing extraordinary about this case. While it is true that the ABCC had not enforced 204 Code Mass. Regs. § 2.08 in recent memory, this was a price discrimination case. Craft does not contest that the prohibition on price discrimination is well-known and actively enforced. Craft was on notice of its exposure.[7] The imposition of a 90 day suspension is not shown to be out of line with other suspensions. The argument that Craft's payment in lieu of suspension was much higher than in other cases merely reflects the economic reality that Craft's business was much larger than other licensees who served 90 days suspensions. Craft was under no obligation to make the payment as opposed to serving the penalty. The Court has no good reason – let alone a showing of "extraordinary circumstances" -- to vacate the penalty in this case.

VI.

Finally, Craft challenges the method of calculating the payment in lieu of suspension on the ground that it should not have had to include gross receipts from out-of-state (New Hampshire) operations along with its Massachusetts revenues. The Legislature has authorized payment of a financial penalty in lieu of suspension on the following terms:

---

[7] Indeed, as the ABCC found, Craft's employees initially disclaimed knowledge of the rebates before finally admitting the truth. The scheme itself involved invoices for fictitious services. There was no serious question that Craft knew about the illegality of price discrimination and sought to hide it.

> The commission may accept from any licensee or holder of a certificate of compliance under this chapter an offer in compromise in lieu of suspension of any license or certificate of compliance previously suspended by the commission. A licensee or holder of certificate of compliance may petition the commission to accept such an offer in compromise within twenty days following notice of such suspension. The fine in lieu of suspension, when an offer in compromise is accepted, shall be calculated in accordance with the following formula: Fifty per cent of the per diem gross profit multiplied by the number of license suspension days, gross profit to be determined as gross receipts on alcoholic beverage sales less the invoiced cost of goods sold per diem. No such fine, in any event, shall be less than forty dollars a day. Any sums of money so collected by the commission shall be paid forthwith into the general fund of the state treasury.

G.L. c. 138, § 23. The statute does not specify whether "gross profit" and "gross receipts on alcoholic beverages" is limited to Massachusetts profits and receipts.

The ABCC never took a position on that question. Craft never asked it to. Instead, Craft contacted the ABCC's general counsel, who instructed Craft to include gross profits from both Massachusetts and New Hampshire operations. Craft decided to pay the fine without asking the full commission to take a position on this question. To be sure, time was short, but Craft could, at a minimum, made a request for Commission action and, in the event of an adverse decision (or failure to decide) could have asked the Court for a stay or other relief. See Massachusetts Fine Wines & Sprits, LLC v. Alcoholic Beverages Control Commission, Suffolk Superior Court Civil Action No. 2017-3120-C (Memorandum of Decision and Order On Plaintiff's Motion for Stay of Suspension; February 6, 2017) (Wilkins, J.) (staying suspension and requiring payment of § 23 amount into escrow unless ABCC refused to stipulate to terms of escrow) at 12-14.

The Court only has authority to review a "final decision" in an adjudicatory proceeding under G. L. c. 30A, §14. Town of East Longmeadow v. State Advisory Commission, 17 Mass. App. Ct. 939, 940 (1983) (rescript); See Fitchburg v. DPU, 394 Mass. 671, 677 (1985) (discussing "final" in G.L. c. 25, §5). The statements of agency

counsel are not an agency decision, let alone a final one. Samuels Pharmacy, Inc. v. Board of Registration in Pharmacy, 390 Mass. 583, 591 (1983) (statements of the Board's executive secretary did not amount to action by the Board warranting declaratory judgment review); Stop & Shop Companies, Inc. v. Board of Registration in Pharmacy, 394 Mass. 1008 (1985) (rescript). That rule applies not only to c. 30A, but also to certiorari and declaratory judgment actions. The Court therefore lacks jurisdiction to consider this issue.

Even if the Court has jurisdiction, one thing is clear. The amount of a fine for violation of Massachusetts law does not raise questions of extraterritoriality or effect upon the license to do business in another state, as Craft suggests. Calculations of a penalty that account for the licensee's overall ability to pay are rationally related to imposing a sufficiently stiff sanction to deter misconduct.

CONCLUSION

For the above reasons:

1. The Plaintiff Craft Beer Guild, LLC d/b/a/ Craft Brewers Guild's Motion for Judgment on the Pleadings is DENIED.
2. The Defendant's Cross-Motion for Judgment on the Pleadings is ALLOWED.
3. Judgment shall enter for the defendant dismissing the complaint and affirming the Decision of the Alcoholic Beverages Control Commission, dated February 12, 2016

Dated: September 29, 2017

Douglas H. Wilkins
Associate Justice, Superior Court

ALM GL ch. 30A, § 11

Current through Act 217 of the 2018 Legislative Session.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE III LAWS RELATING TO STATE OFFICERS (Chs. 29 - 30B) > TITLE III LAWS RELATING TO STATE OFFICERS (Chs. 29 — 30B) > Chapter 30A State Administrative Procedure (§§ 1 — 25)

§ 11. Adjudicatory Proceedings; Conduct of Proceedings.

In addition to other requirements imposed by law and subject to the provisions of section ten, agencies shall conduct adjudicatory proceedings in compliance with the following requirements:—

(1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

(2) Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross–examination of witnesses.

(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross–examine witnesses who testify, and to submit rebuttal evidence.

(4) All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in paragraph (5) of this section. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

(5) Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

(7) If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision, if adverse to any party other than the agency, shall be made only after (a) a tentative or proposed decision is delivered or mailed to the parties containing a statement of reasons and including determination of each issue of fact or law necessary to the tentative or proposed

decision; and (b) an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials who are to render the final decision. The agency may by regulation provide that, unless parties make written request in advance for the tentative or proposed decision, the agency shall not be bound to comply with the procedures of this paragraph.

(8) Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so. Parties to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal. A copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each party and to his attorney of record.

History

1954, 681, § 1.

ALM GL ch. 138, § 25A

Current through Act 217 of the 2018 Legislative Session.

Annotated Laws of Massachusetts > PART I ADMINISTRATION OF THE GOVERNMENT (Chs. 1 - 182) > TITLE XX PUBLIC SAFETY AND GOOD ORDER (Chs. 133 - 148A) > TITLE XX PUBLIC SAFETY AND GOOD ORDER (Chs. 133 — 148A) > Chapter 138 Alcoholic Liquors (§§ 1 — 78)

§ 25A. Licensees — Discrimination Prohibited.

No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall—

(a) Discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality;

(b)[Deleted.]

All price lists or price quotations made to a licensee by a wholesaler shall remain in effect for at least thirty days after the establishment of such price list or quotation. Any sale by a wholesaler of any alcoholic beverages at prices lower than the price reflected in such price list or quotation within such thirty day period shall constitute price discrimination under this section.

History

1946, 304; 1970, 140, § 1; 1971, 494.

End of Document

The Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
239 Causeway Street Boston, MA, 02114

Regulations

204 CMR 2.00:
REGULATIONS OF THE ALCOHOLIC BEVERAGES
CONTROL COMMISSION

204-2.08: Inducements

No licensee shall give or permit to be given money or any other thing of substantial value in any effort to induce any person to persuade or influence any other person to purchase, or contract for the purchase of any particular brand or kind of alcoholic beverages, or to persuade or influence any person to refrain from purchasing, or contracting for the purchase of any particular brand or kind of alcoholic beverages.

204 CMR 2.00