

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**SUPERIOR COURT  
CIVIL ACTION  
NO. 17-3132-C**

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**MASSACHUSETTS FINE WINES & SPIRITS, LLC  
d/b/a TOTAL WINE & MORE,  
Plaintiff,  
vs.**

**ALCOHOLIC BEVERAGES CONTROL COMMISSION  
Defendant.**

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**MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFF’S MOTION FOR STAY OF SUSPENSION**

The plaintiff Massachusetts Fine Wines & Spirits, LLC d/b/a/ Total Wines & More (“Total Wine”) is appealing three adjudicatory decisions, all dated January 18, 2017 (“Decisions”) of the Alcoholic Beverages Control Commission (“ABCC”) under G. L. c. 30A, § 14.<sup>1</sup> When Total Wine filed this appeal on January 30, 2017, it also filed “Plaintiff’s Emergency Motion to Stay Suspension of Liquor License Pending Judicial Review” (“Motion”). After a hearing on the Motion on February 3, 2017, at which the Court heard from both parties, the Court **ALLOWS THE MOTION WITH CONDITIONS** for the reasons set forth below.

**BACKGROUND**

Total Wine operates two retail liquor stores pursuant to licenses granted under G. L. c. 138, § 15 for sale of alcoholic beverages to be consumed off-premises. Total Wine

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<sup>1</sup> Total Wines also seeks declaratory relief under G.L. c. 231A invalidating the ABCC regulation and interpretation involved in this case.

opened its store at 321 Speen Street, Natick (“Natick Store”) in November 2015. It opened a store at 1 Mystic View Road, Everett (“Everett Store”) in May 2016.

From November 1, 2015 to December 31, 2015 and May 11, 2016 to June 30, 2016, the Natick Store sold alcohol at prices less than the cost displayed on the first invoice issued by the distributor to the retailer. The same practice occurred at the Everett store from May 1, 2016 through June 30, 2016. In both cases, Total Wines later received credits for volume discounts available to all retailers who purchase sufficient quantity, known as Cumulative Quantity Discounts (“CQDs”). It did so after purchasing enough product to earn entitlement to the CQDs. At the time of the ABCC’s investigation at both stores in May and June 2016, Total Wine could not produce a credit invoice upon request by the investigator. The credit invoices do not reference the original invoices, making it unclear whether the credit was applied to the original sale, or whether Total Wine will receive a credit for future purchases.

The investigation led to administrative charges against Total Wines for violation of 204 Code Mass. Regs. § 2.04(1), which reads:

(1) No holder of a license issued under M.G.L. c. 138, § 15 shall sell or offer to sell any alcoholic beverages at a price less than invoiced cost. Cost is defined as net cost appearing on the invoice for said alcoholic beverage. The use of any device, promotion or scheme which results in the sale of alcoholic beverages at less than invoiced cost is prohibited.

The Decision interprets “invoiced cost” as referring to the first invoice issued for the product, although at oral argument the ABCC agreed that an amended invoice could also qualify as “the invoice for said alcoholic beverage.” There is no amended invoice in this case. The ABCC had not previously brought such a proceeding against any retailer on the theory that any credit had to be reflected on the retailer’s first invoice in order to be

considered part of “the invoice” under § 2.04(1). After adjudicatory hearings, the ABCC imposed an 11-day suspension at the Natick store, with 3 days to be served and 8 days suspended, starting on March 22, 2017, as well as an 8-day suspension for the Everett store, with 2 days to be served (6 days suspended) starting on March 15, 2017.

## DISCUSSION

### **I.**

The Court has the power to stay an agency decision pending judicial review, “upon such terms as it considers proper.” G. L. c. 30A, § 14(e). It applies the same standard to a motion to stay an agency decision that the Court would apply to motion to stay court proceedings pending appeal, namely consideration of the “likelihood of success on appeal, and irreparable harm such that the balance of hardships cuts in favor of a stay.”

Care and Protection of Patience, 81 Mass. App. Ct. 1137 (2012) (Rule 1:28 Decision).

The factors regulating the issuance of a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the stay applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Board of Education v. Boston, 386 Mass. 103, 107 n.7 (1982). “One ... is not entitled to seek [injunctive] relief unless the apprehended danger is so near as at least to be reasonably imminent.” Shaw v. Harding, 306 Mass. 441, 449-50 (1940).

A party seeking to enjoin governmental action must also ordinarily show that “the relief sought will [not] adversely affect the public.” Tri-Nel Mgt. v. Bd. of Health of

Barnstable, 433 Mass. 217, 219 (2001), citing Commonwealth v. Mass CRINC, 392 Mass. 79, 89 (1984).

## II.

Though the issue is complex, the Court ultimately concludes that Total Wines has a substantial likelihood of success on the merits.

Under Section 14(7) of G. L. c. 30A, this Court has limited powers to review the ABCC's decision. It 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).

This case turns on interpretation of the phrase "invoiced cost" in § 2.04(1). The regulation expressly defines "cost" as "net cost appearing on the invoice for said alcoholic beverage." Reference to "the invoice," in the singular may reasonably be taken to mean that there must be one invoice showing the initial price and the discount. The Commission found Total Wines in violation of the regulation because the first invoice did not reflect the retailer's claimed final price. There was in fact no invoice that reflected the claimed final price. At least as a matter of administrative convenience, and as a means to avoid ambiguous or confusing schemes that obscure the net price of any particular bottle of liquor, the requirement of a single invoice may be reasonable as an initial matter.

Total Wines points out that the regulation refers to the “net cost.” The Court preliminarily agrees that this means that 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.”) That does not, however, necessarily imply that the regulation contemplates considering those matters, if not reflected on a single invoice.

Purely as a matter of construction of the regulatory text, without more, the ABCC’s approach is very likely to prevail. Not only does it faithfully interpret the plain meaning of the words, but “considerable deference is due” ABCC’s construction of its own regulations. See Town of Brookline v. Commissioner of DEQE, 398 Mass. 404, 411 (1986); Boston Preservation Alliance, Inc. v. Sec’y of Env. Affairs, 396 Mass. 489, 495 (1986) (EOEA interpretation of MEPA regulations). Since there is no argument about the facts, or the existence of substantial evidence to support the ABCC’s findings, a ruling that the agency applied a reasonable and appropriate interpretation of the regulation initially appears to undercut Total Wines’ assertion that it is likely to succeed.

Recognizing this challenge, Total Wines attacks two fundamental bases for ABCC’s approach. First, it calls into question the ABCC’s use of a suspension proceeding to announce its interpretation for the first time. It also challenges the validity of the regulation itself – or at least the lawfulness of the construction that ABCC has placed on the regulatory language.

It is indeed troubling that the Commission seeks to impose its interpretation of § 2.04 for the first time in a proceeding that imposes a penalty upon Total Wines. Advance

notice of rules is an essential aspect of due process, at least when the government seeks to punish. Cf. Commonwealth v. McGhee, 472 Mass. 405, 414 (2015) (“Penal statutes must define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited.”) (quotation marks and citations omitted). At least some of the punished conduct in this case occurred before the ABCC announced its interpretation – and all of it presumably occurred before the Decision adopted this interpretation as the agency position. While this argument was developed more at oral argument than in the briefing, Total Wines has some likelihood of success in challenging the non-suspended portions of the suspension on this basis.

Total Wines’ second challenge raises more complex and fundamental issues. It is true that 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, 491 (1987). The ABCC 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). While Total Wines cites G. L. c. 138, § 24 for the proposition that the ABCC has the power to regulate maximum prices, but not minimum prices, that same section gives the ABCC much broader authority to adopt regulations “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). Here, the statute does not determine the questions in this case with certainty. The ABCC's interpretation of these broad words is not arbitrary or unreasonable.<sup>2</sup>

Since G.L. c. 138, §25C prohibits sale “at a price less than the minimum consumer resale price then in effect,” it is reasonable for the ABCC to adopt regulations to police violations, which is closely, if not inextricably, linked to sales below new cost – exactly what §2.04 addresses. General supervision of the alcoholic beverages industry may also reasonably include prohibition against predatory pricing – the practice of selling temporarily below cost for the purpose of driving competitors out of the market. Moreover, there may be other justifications. The regulation at issue is one of four paragraphs appearing in 204 Code Mass. Regs. § 2.04, entitled “Sales.” Total Wines focuses upon the economic and competitive features of the regulation, but, like other

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<sup>2</sup> The Supreme Judicial Court recently elaborated:

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 Env'tl. 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 Env'tl. 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).

parts of § 2.04, the overall prohibition upon below-cost pricing and promotions in § 2.04(1) arguably promotes temperance.

Still, ABCC's interpretation in this case makes § 2.04 somewhat of a blunt instrument. There is no below-cost sale, and no predatory pricing if the ultimate cost to the retailer does not exceed net cost on all applicable invoices. To limit consideration to the first-issued invoice ignores that fact. The ABCC's approach is therefore overbroad. Moreover, the agency's Decisions in this case, if continued as agency policy, have a significant anti-consumer feature. They guarantee that no consumer will benefit from lower prices – i.e. passing along volume discounts to the consumer -- until the distributor issues a single (perhaps amended) invoice reflecting all discounts. That amended invoice may never appear, because a distributor often may have no reason to issue one.

These policy considerations are not for judicial consideration in the usual case, because the agency has authority to resolve them as long as it acts rationally. The rational basis test for economic regulation is among the most lenient known to administrative law. See above, p. 6 n. 2. At this point, it does not appear that Total Wines has a likelihood of success under the rational basis test. Only if grounds exist for more searching judicial inquiry does the likelihood of success shift in its favor.

Antitrust preemption accomplishes that shift, at least for purposes of a stay. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341-42 (1987) (In certain circumstances, federal anti-trust statutes preempt state liquor regulation); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (same). Preemption turns not only on federal statutes, but also upon the Supremacy Clause of the United States Constitution, Article VI. If possible, 2.04 must be construed to avoid constitutional conflict with the



federal anti-trust laws, as supreme law of the land. See Commonwealth v. McGhee, 472 Mass. 405, 413 (2015) (“Doubts as to a statute’s constitutionality “should be avoided if reasonable principles of interpretation permit doing so.””) (citations omitted); Verocchi v. Commonwealth, 394 Mass. 633, 638 (1985) (“we must construe a statute so as to avoid “constitutional difficulties, if reasonable principles of interpretation permit it.”), quoting School Comm. of Greenfield v. Greenfield Educ. Ass’n, 385 Mass. 70, 79 (1982). The Court applies this principle here, because the Legislature and state agencies presumably intend to avoid violating the Supremacy Clause, at least where the federal law is so prominent as the federal anti-trust laws. Cf. Simas v. Quaker Fabric Corp., 6 F.3d 849, 854 (1<sup>st</sup> Cir. 1993) (ERISA preemption of a state statute “involve[es] the constitutionality of a state statute” for purposes of allowing the Attorney General, as intervenor-appellant, to raise an issue not briefed by a party).<sup>3</sup>

Section 2.04(1), as ABCC construes it, allows wholesalers effectively to set resale prices by stating prices in their invoices. This is vertical price-fixing, albeit arguably subject to rule of reason analysis, rather than per se invalidation under the anti-trust laws. Cf. 324 Liquor Corp., 479 U.S. at 342. Moreover, the fixed price in this case does not reflect the ultimate net cost of goods, after application of all discounts, allowances, etc. To divorce the “invoiced price” from the actual ultimate price means that the Commonwealth does not regulate the reasonableness of the price to the consumer; it only polices the initial invoice price. The United States Supreme Court has “struck down state statutes that were deemed to direct and implement private conduct replicating resale price maintenance schemes.” Massachusetts Food Association v. Massachusetts Alcoholic

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<sup>3</sup> There is room for debate whether pre-emption is a statutory question or a constitutional one. When dealing with the federal anti-trust laws, that distinction should make no practical difference for purposes of construing statutes and regulations.

Beverages Control Commission, 197 F.3d 560, 565 (1<sup>st</sup> Cir. 1999), citing Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373 (1911).

The Commonwealth's implementation of a vertical price-fixing scheme unrelated to the ultimate cost to the retailer would be exempt from antitrust scrutiny if it falls within the "state action" exception established by Parker v. Brown, 317 U.S. 341 (1943). See Massachusetts Food Association, 197 F.3d at 563-566; Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41 (D. Mass. 1998).

It is open to question whether the Commonwealth has "clearly articulated" the "first invoice" or "one invoice" policy. That policy does not appear in any statute or even expressly in section 2.04. It did not appear until the Decisions in this case. Total Wines has some likelihood of success in showing that the Decisions fail this first prong of the test.

Second, antitrust preemption rules require that, when the State displaces or limits price competition, it must actively supervise the resulting prices. The Supreme Court has "instructed courts to determine whether states which in effect authorize a form of price fixing both have the power to prevent abuses and also exercise that power." Canterbury Liquors, 16 F. Supp. 2d at 50, citing FTC v. Ticor Title Ins. Co., 504 U.S. 621, 637-38 (1992). If the ABCC simply relies upon the wholesaler's first invoice, there is no way to prevent abuses. The same is true if it requires proof of an amended invoice, which may never issue. The administrative convenience accomplished by these rules does not appear to suffice under the state action antitrust exemption.

The Court stresses that it is not saying that the ABCC lacks authority to impose minimum prices or to enforce rules against below-cost or predatory pricing. A similar

distinction appears in Canterbury Liquors, 16 F. Supp. 2d at 51 (Contrasting the Commission's lack of power to review or revise wholesale liquor prices "for example, with M.G.L. c. 138, § 25C, which requires the filing of minimum consumer prices for alcoholic beverages and Commission approval as 'not being excessive, inadequate or unfairly discriminatory' before those consumer prices can go into effect."). Indeed, there are other ways to accomplish equivalent administrative convenience. Nothing, for instance, appears to preclude the ABCC from demanding that retailers themselves do the burdensome work, including real-time correlation of invoices with each product they sell, and retention of records and accountings to document compliance with a net cost floor on retail prices.

If there is a reasonable interpretation of Section 2.04 that avoids the serious Supremacy Clause issues raised by the Commission's interpretation, then the Court should adopt it, under the statutory principles described above. Section 2.04's reference to "net cost" suggests that such an interpretation is possible, because net cost cannot always be determined from a single invoice. Reading the regulation to require that an invoice only counts if it shows the "net cost" is overly literal. If read that literally, it incorrectly assumes that there is always a single invoice that reflects "net cost." It also fails to reflect either the true concept of "net cost" or the statutory and regulatory purposes of preventing below-cost sales and predatory pricing. Reasonably construed, § 2.04's reference to "the invoice" looks to the ultimate invoiced price. Viewed in contract terms (which truly establishes net cost), "the invoice" refers the price terms of the entire contract between wholesaler and retailer, as established not only by the initial invoice but

by all amendments thereto affecting “net cost,” including subsequent invoices that include discounts or other adjustments that lead to the net price.

As a preliminary matter, then, Total Wine has proven a high degree of success in showing that the ABCC lacks power to interpret § 2.04 in a way that precludes credit for discounts received and credited before Total Wine prices its products.

### **III.**

The balance of harms also weighs in favor of Total Wines, because harm to the company is irreparable, and because the Court can and does mitigate any significant harm to the ABCC and the public interest by imposing “terms it considers proper.” G.L. c. 30A, § 14(3).

If Total Wines serves a suspension, there is no way to restore its profits (and the wages of its employees) if it prevails on appeal. Those consequences are truly irreparable, because, even though the harm is economic, the Commonwealth cannot be sued to recover the losses. Moreover, it appears that, if Total Wines opts to pay a financial penalty in lieu of suspension (G.L. c. 138, § 23, quoted below), the ABCC will require it to waive its appeal. Again, the harm is irreparable, because the funds would be paid into the Commonwealth’s treasury and could not be refunded without legislative appropriation.

The ABCC argues that its interpretation, as the agency charged with enforcing the Alcohol Beverages Control laws, serves the public interest. The court can fully protect that interest pending a decision on the merits by requiring Total Wines to comply with that interpretation until otherwise ordered. Total Wines has agreed to do so, while reserving its right to seek a preliminary injunction against that interpretation. Based upon

oral argument, the Court considers the ABCC's interpretation as requiring a single invoice that reflects all pricing components, whether that be the first invoice or an amended invoice.

The ABCC and Commonwealth have an interest – a public interest – in ensuring prompt and certain enforcement of the alcoholic beverages control laws. That does not necessarily require a suspension. The Legislature has recognized that, at least in some circumstances, payment of a financial penalty in lieu of suspension may serve the public interest:

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 Court cannot compel the ABCC to accept a financial compromise. However, to the extent that an immediate payment into escrow may serve the public interest in imposing a prompt and certain financial consequence, the Court can preserve a significant measure of the public interest the ABCC seeks to serve. The Court's stay therefore includes such a condition.

### **CONCLUSION**

For the above reasons, the Motion to Stay is **ALLOWED** on the following conditions:

1. The Court stays the ABCC's three decisions, each dated January 18, 2017, to the extent that they imposed and did not suspend suspensions of the Plaintiff Massachusetts Fine Wines & Spirits LLC d/b/a/ Total Wine & More's Natick and Everett G. L. c. 138, § 15 liquor licenses (licenses Nos. 076800021 and 038200102 respectively) until further order of the Court. The stay is subject to the terms set forth in the following paragraphs. The Court does not otherwise suspend the Decisions.
2. Massachusetts Fine Wines & Spirits, LLC d/b/a/ Total Wines & More shall comply with the ABCC's interpretation of 240 Code Mass. Regs. §2.04(1) articulated in the Decisions dated January 18, 2017, unless and until the Court issues a preliminary injunction, decides the case on the merits, or otherwise enters a further order. For purposes of this order, that interpretation requires that Total Wines not sell below the cost of the initial invoice for the product unless the seller issues an amended invoice reflecting, on that single invoice, all components of the price, including discounts, allowances, rebates, etc.
3. Massachusetts Fine Wines & Spirits, LLC d/b/a/ Total Wines & More shall pay into escrow an amount equal to the fine in lieu of suspension calculated pursuant to G. L. c. 138, § 23 within five days after both of the following occur: (i) the parties agree upon an escrow agent and upon written terms of the escrow, (ii) the ABCC stipulates in writing that payment into escrow will not waive the plaintiff's right to appeal the Decisions dated January 18, 2017 and (iii) the plaintiff stipulates in writing that, if the ABCC ultimately prevails in this case (including the resolution of any appeal), the ABCC may choose whether (A) to accept the escrow amount, plus any interest or (B) to refund that amount plus interest to the plaintiff and impose the suspensions.
4. ABCC need not agree to the terms of paragraph 3 above, in which case Total Wines need not comply with paragraph 3 by making a payment or otherwise.
5. The schedule for filing the record and briefing the Motion for Judgment on the Pleadings is expedited. Notwithstanding Superior Court Standing Order 1-96, the following deadlines shall apply:
  - a. The Commonwealth shall file the administrative record on or before March 7, 2017.
  - b. The Plaintiff shall serve its motion for judgment on the pleadings on or before March 24, 2017.
  - c. The Defendant shall serve its response to the motion for judgment on the pleadings on or before April 18, 2017.

Dated: February 6, 2017

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Douglas H. Wilkins  
Associate Justice, Superior Court