

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. SJC-12654

No. 2018-P-0038

MASSACHUSETTS FINE WINES AND SPIRITS, LLC,
Appellee

v.

ALCOHOL BEVERAGES AND CONTROL COMMISSION,
Appellant

ON APPEAL FROM SUPERIOR COURT FOR SUFFOLK COUNTY

**BRIEF FOR AMICUS CURIAE MASSACHUSETTS PACKAGE
STORE ASSOCIATION, INC.**

Damien C. Powell, Esq.
BARRETT & SINGAL, P.C.
One Beacon Street,
Suite 1320
Boston, MA 02108
(617) 720-5090
dpowell@barrettsingal.com

Attorney for *Amicus Curiae*

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INTERESTS OF AMICUS CURIAE

Since 1942, the Massachusetts Package Store Association ("MassPack") has served as a trade organization whose membership consists primarily of hundreds of independent retail package stores. MassPack was created to provide a unified voice for independent retailers on legislative and regulatory matters, especially those relating to control of the sale of alcohol and the maintenance of public welfare and safety. MassPack's mission to educate and protect is particularly relevant, because the three-tier system of alcoholic beverage regulation has been repeatedly challenged for over a decade by both national and state interests seeking increased revenues by blending the tiers, expanding their businesses, and undercutting the governing framework administered through G. L. c. 138, which is legislatively intended to sustain public safety and welfare through strict regulation.

MassPack has over 750 members, including stores of all sizes. The impact MassPack members have on the Massachusetts economy is material. In Massachusetts, the direct retail sales of the beverage alcohol

industry equate to over \$19 billion in total economic activity. John Dunham & Associates. 2016 Economic Impact Study of America's Beer, Wine and Spirits Retailers. New York, July 2016. Establishments that sell alcohol off premises employ as many as 139,685 people and generate an additional 60,759 jobs in supplier and ancillary industries. Id. Businesses selling alcohol in Massachusetts, along with their supplier and ancillary industries, pay over \$8 billion in wages and benefits each year. Id. The package stores industry and its employees pay over \$1.08 billion in state and local taxes, and an additional \$1.84 billion in federal taxes. Id.

MassPack and its members have a substantial interest in this appeal. Although this case involves a dispute between the Appellant Alcoholic Beverages Control Commission ("ABCC" or "Commission") and the Appellee, Massachusetts Fine Wines and Spirits, LLC d/b/a Total Wine & More ("Total Wine"), the Superior Court's decision calls into question the retail package store industry's long-standing interpretation of 204 Code Mass. Regs. § 2.04(1), and the industry's established customs and practices.

SUMMARY OF ARGUMENT

The purpose of Section 2.04(1) is to provide clarity and guidance to alcohol retailers and enforcement officials about the permissible pricing practices for the sale of alcohol in the retail marketplace. The ABCC - who created this regulation and who is charged with enforcing it - is best suited to interpret its meaning. The ABCC did so in a principled way that is consistent with Section 2.04(1)'s plain language, as well as the long-standing industry custom and practice.

The Superior Court, however, rejected the ABCC's reasonable interpretation, choosing instead to interpret Section 2.04(1) in a manner that is not grounded in the regulatory language. Instead of providing clarity - which existed under the ABCC's interpretation - the Court's interpretation creates confusion, to the detriment of retailers and the public. The Court's interpretation will deliver a critical blow to the ABCC's ability to enforce the Commonwealth's liquor laws and will lead to a host of other negative consequences, including anti-competitive conduct in the marketplace and a decrease in competition.

MassPack submits this *Amicus* Brief in support of Appellant ABCC's appeal from the final judgment. To avoid repeating arguments advanced by the ABCC, MassPack focuses on three issues.

First, the ABCC's interpretation is consistent with the plain language of Section 2.04(1) and the meaning of "net cost appearing on the invoice." See Section I, infra. Under this reasonable interpretation, a retailer is prohibited from selling alcohol at a price below the net cost reflected on the invoice that the retailer has at the time of its retail sale. This interpretation is in line with the industry custom and practice concerning cumulative quantity discounts ("CQDs"). Retailers have interpreted "net cost appearing on the invoice" to mean the net cost appearing on the wholesaler's invoice that accompanies the delivery of the alcohol. And retailers have not factored CQDs into the retail price because they are future credits that are often uncertain and are not reflected on the wholesaler's invoice.

Second, the policies underlying Section 2.04(1) and the Liquor Control Act favor the ABCC's interpretation. See Section II, infra. These

policies include prohibiting anti-competitive pricing practices, preventing alcohol abuse, preventing the concentration of power in the liquor industry, and preserving the ability of small, independent liquor retailers to compete.

Lastly, the Superior Court's interpretation disrupts the long-standing industry practice and creates uncertainty regarding how retailers are to treat CQDs when calculating retail price. See Section III, infra. That interpretation will result in a marketplace in which enforcement of the minimum pricing laws will be nearly impossible. This in turn will lead to anti-competitive behavior that is harmful to *Amicus* and its members, as well as to the public.

ARGUMENT

I. The Commission's interpretation of Section 2.04(1) is reasonable and consistent with industry custom and practice

The Commission's interpretation of Section 2.04(1) is consistent with the plain language of the regulation and is not arbitrary or unreasonable.

Section 2.04(1) provides:

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 plain meaning of this regulation is readily ascertainable from this unambiguous language. A retailer cannot sell at a price less than invoiced cost. "Cost" is expressly defined as the "net cost appearing on the invoice." (emphasis added.) And an "invoice" is commonly understood to mean "[a]n itemized list of goods or services furnished by a seller to a buyer, us[ually] specifying the price and terms of sale; a bill of costs." Black's Law Dictionary 1675 (10th ed. 2014). This language is clear and uncomplicated. The two sentences in Section 2.04(1), when read together, make clear that the net cost must be documented on an invoice "for said alcoholic beverage" in the retailer's possession at the time that beverage is offered for sale. This is precisely how the Commission has interpreted this regulation and precisely how retail package stores have long conducted business.

The Commission's interpretation is consistent with bedrock principles of statutory interpretation. "All the words of a statute are to be given their ordinary and usual meaning. . . ." City of Worcester

v. Coll. Hill Properties, LLC, 465 Mass. 134, 138-39 (2013); see also 2A Sutherland Statutory Construction § 46:1 (7th ed.) ("Where a statutory provision is clear and unambiguous, and not unreasonable or illogical in its operation, a court may not go outside the statute to give it a different meaning."); People To End Homelessness, Inc. v. Develco Singles Apartments Associates, 339 F.3d 1, 5 (1st Cir. 2003), quoting Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998) ("When the language of a statute is plain and admits of no more than one meaning . . . the sole function of the courts is to enforce the statute according to its terms").

Moreover, "the Commission's interpretation and application of a statutory provision entrusted to it for enforcement are entitled to appropriate respect." Anheuser-Busch, Inc. v. Alcoholic Bevs. Control Comm'n., 75 Mass. App. Ct. 203, 209 (2009). Thus, when the Commission's interpretation and application is reasonable, a Court should not supplant the Commission's enforcement function with its own judgment. Id.; Casa Loma, Inc. v. Alcoholic Bevs. Control Comm'n., 24 Mass. App. Ct. 708, 711-12 (1987).

The Court overlooked these principles in finding the Commission's interpretation of its own regulation arbitrary and capricious, and failed, as it was required, to "give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). Instead, the Court improperly substituted its own judgment for the reasonable and experienced judgment of the Commission.

The Court's exclusive focus on the phrase "net cost" rendered the entire qualifying phrase, "appearing on the invoice," utterly meaningless. The Court's interpretation is inconsistent with the tenets of statutory interpretation and reads out of the regulation its explicit requirement that the net cost be documented on an invoice at the time the retailer offers the alcohol for sale. Chin v. Merriot, 470 Mass. 527, 537 (2015) ("we give effect to all words of a statute, assuming none to be superfluous").¹

¹In this case, Total Wine had calculated the net cost by deducting CQDs that it had "earned" even though it had not yet received a documented credit invoice that reflected these credits or received the actual credits. Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Bevs. Control Comm'n, 34 Mass.L.Rptr. 379, 380 (2017).

This Court's decision in Anheuser-Busch, Inc. v. Alcoholic Bevs. Control Comm'n., 75 Mass. App. Ct. 203 (2009), is instructive. In that case, Anheuser-Busch and its affiliate AB MA challenged the ABCC's cancellation of AB MA wholesaler's license to sell unlimited kinds of alcoholic beverages. At issue was the meaning of grandfathering language included in a 1971 amendment to G. L. c. 138, § 18B. Section 18B generally prohibited a foreign manufacturer like Anheuser from having an affiliate like AB MA that held a wholesaler's license. The grandfathering language, however, provided that nothing in the statute "shall prohibit a certificate holder . . . from continuing to hold a license under [§18]" provided certain conditions were met.

AB MA held a wholesaler's license for beer and wine prior to the enactment of Section 18 and was therefore protected by the grandfather provision. In 2006, AB MA was awarded a broader, all alcoholic beverages wholesaler's license. When the Commission later took away this all alcoholic beverages license under G. L. c. 138, § 18B, AB MA argued that the grandfather provision protected it because a holder of "a license under [§18]" meant that its possession of a

beer and wine license prior to the 1971 amendment preserved its entitlement to procure an all alcoholic beverages license after the amendment.

The Court rejected the argument, finding that such an interpretation would require the court "to convert the phrase 'a license' to 'any license' to engage in wholesale activity. Id. at 207. In reaching this decision, the Court noted that such an interpretation could conflict with the intent of the Legislature, which "was presumably aware of the two distinctive wholesaler licenses and could have used the alternative wording if it had intended to." Id.

Here, as in Anheuser-Busch, Inc., the Commission reasonably interpreted Section 2.04(1)'s reference to "the invoice" in the singular form to mean the actual invoice that distributors provide to retailers at the time of delivery. This invoice is often the only documentary evidence reflecting the cost of the alcohol that the retailer has at the time the retailer offers it for sale.² In contrast, the Court's

² Indeed, a separate section of the Alcoholic Beverages Control Commission's regulations requires that the person delivering alcohol carry "an invoice or sales slip" containing specific information. 204 Code Mass. Regs. § 2.05(3).

interpretation of "the invoice" to mean any set of invoices or other documents, regardless of when delivered, is inconsistent with the regulatory language and is unreasonable under these circumstances.

Moreover, the Commission was presumably aware at the time it promulgated Section 2.04(1) that retailers sometimes received subsequent credit statements from wholesalers. Cf. Anheuser-Busch, Inc., 75 Mass. App. Ct. at 207. If the Commission had intended to include these later credits in the calculation of cost, it would not have used the phrase "net cost appearing on the invoice."

For these reasons, the Commission's interpretation of Section 2.04(1) was not arbitrary and capricious. In fact, it is the only interpretation that is consistent with the regulatory language.

II. The purposes of the Massachusetts Liquor Control Act and Section 2.04(1) favor the Commission's interpretation and continuing the current industry practice

It is well settled that the "Commission is entitled to all rational presumptions in favor of its

interpretation of its own [regulation]" so long as there is "a rational relation between its decision and the purpose of the regulations it is charged with enforcing." Fafard v. Conservation Comm'n, 41 Mass. App. Ct. 565, 572 (1996); see also Anheuser-Busch, Inc., 75 Mass. App. Ct. at 208-09. Here, the Court took an unreasonably narrow view of the purpose of Section 2.04(1) and failed to recognize the connection between the Commission's interpretation and the legitimate purposes that Section 2.04(1) serves.

In rejecting the Commission's interpretation, the Court stated:

With respect to the minimum price of alcoholic beverage products sold at the retail level, the case law is clear that the Legislature has consistently sought to block predatory practices such as 'price cutting and loss-leader selling' in the industry. This is, unmistakably, the animating purpose of Section 2.04(1), and the interpretation and enforcement of the regulation must be examined through this prism.

Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Bevs. Control Comm'n, 34 Mass.L.Rptr. at 381 (internal citations omitted).

From this conclusion, the Court found that the Commission's interpretation of Section 2.04(1) bore no rational relationship to this legislative policy of prohibiting anti-competitive pricing practices.

The Court's analysis is flawed because prohibiting anti-competitive pricing practices is not the only purpose animating Section 2.04(1). Intoxicating liquor is one of the most heavily regulated products because excessive use and underage consumption can have severely negative impacts on individuals and society. Because of the potential detrimental impacts and the States' overarching interest in protecting the public, States have particularly wide latitude to regulate the liquor industry under the Twenty First Amendment. See Granholm v. Heald, 544 U.S. 460, 488-89 (2005) ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system"); Johnson v. Martignetti, 374 Mass. 784, 791 (1978).

In Massachusetts, the statutory scheme regulating all major aspects of the liquor industry is set forth in the Massachusetts Liquor Control Act. G. L. c.

138. This statutory scheme is designed to achieve several purposes, which include preventing the concentration of power in the liquor industry, preventing monopolies, preventing predatory pricing, preventing overconsumption, and preserving the right of small, independent liquor dealers to do business. Johnson, 374 Mass. at 792.

To ensure these policy goals are achieved, the Massachusetts Liquor Control Act grants wide-reaching authority to the Commission to adopt regulations consistent with these purposes. G. L. c. 138, § 24. Specifically, G. L. c. 138, § 24 grants the Commission broad 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."

Like the entire statutory scheme itself, Section 2.04(1) is reasonably designed to achieve several purposes, including preventing overconsumption, preventing monopolies and predatory pricing, and preserving small independent package stores. See Johnson, 374 Mass. at 791. The Court overlooked these

other animating purposes, and rejected, without explanation, the Commission's contention that Section 2.04(1) is designed to promote temperance.

Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Bevs. Control Comm'n, 34 Mass.L.Rptr. at 381 n. 8.³ By misconstruing the animating purposes of Section 2.04(1), the Court examined this issue through the wrong prism.

In addition, the Commission's interpretation of Section 2.04(1) does bear a rational relationship to these policy goals. Interpreting "the invoice" to mean the wholesaler's bill of costs enables the Commission to detect price gouging and loss leader selling by requiring that retailers have documentary evidence reflecting the net cost at the time of the retail sale. In other words, when the Commission is investigating a possible minimum price violation,

³With no explanation, the Court stated that it "does not credit the Commission's contention that Section 2.04(1) is to any meaningful degree designed to ensure that alcohol not be made overly available (through lower prices) to customers." Although the Court relied on Johnson and quoted from it, it omitted the Johnson court's references to the other animating policy purposes of "promoting temperance" and "preserving the right of small, independent liquor dealers to do business." Johnson, 374 Mass. at 792.

under the Commission's interpretation, the investigator can efficiently and effectively determine compliance by comparing the wholesaler's invoice to the retail price.

The Commission's interpretation also protects the rights of independent retailers by mandating a uniform documentation requirement. Instead of requiring that every retailer develop a system for tracking future credits and applying them on a real-time basis to the ever-changing inventory on their shelves, the Commission simply requires retailers to determine their price based on the net cost on the wholesaler's invoice.

The Commission's interpretation also promotes temperance by ensuring an effective enforcement mechanism. This, in turn, safeguards against below-cost alcohol entering the marketplace. It is widely recognized that alcohol consumption increases as price decreases, and that a correlation exists between increased consumption and adverse health and safety outcomes.⁴ Thus, through a reasonable interpretation

⁴See Chaloupka, Grossman & Saffer, The Effects of Price on Alcohol Consumption and Alcohol-Related Problems, Alcohol Research and Health Vol. 26, No. 1 (2002), <http://pubs.niaaa.nih.gov/publications/arh26->

that allows for effective investigation and enforcement, the Commission can advance these important public safety policy goals.

III. The Court's interpretation will have profoundly negative effects on the retail package store industry

This case has ramifications that extend well beyond the dispute between Total Wine and the ABCC. If the Superior Court's decision is affirmed, it will alter the established custom and practice in the retail package store industry relating to the treatment of cumulative quantity discounts ("CQDs"), and there will be ambiguity and uncertainty over how the minimum retail price is to be determined. It will also make enforcement of the minimum price laws nearly

1/22-34.pdf; Elder, Lawrence, Ferguson, The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms, Am J Prev Med. (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3735171/>; Yu & Chaloupka, The Effects of Prices on Alcohol Use and its Consequences, 34(2) ALCOHOL RES. HEALTH 236-45, (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3860576/>; Johns Hopkins Bloomberg School of Public Health, Strategizer 55: Regulating Alcohol Outlet Density, an Action Guide, <http://www.cadca.org/sites/default/files/resource/files/strat55.pdf>.

impossible, creating the real possibility of price manipulation and harm to retailers and consumers.

The Court found that "[t]he Commission's disregard of the substantive realities of transactions between alcoholic beverage wholesalers and their retail merchants renders its decision in this case arbitrary and capricious." *Massachusetts Fine Wines & Spirits, LLC v. Alcoholic Bevs. Control Comm'n*, 34 Mass.L.Rptr. at 382. Yet the Commission is far better equipped to take these substantive realities into consideration, and in fact it was the Court - distanced and remote from these realities - that failed to consider them.

A. The Court's interpretation would create an ambiguous and confusing regulatory scheme

The Court held that it did not matter that Total Wine had not actually received the CQD credit or even documentation from the wholesaler reflecting the future credit. Instead, according to the Court, Total Wine could use the future credit in determining the retail price because it had ordered the requisite quantity of cases under the wholesaler's CQD promotion. This interpretation upends years of custom and practice in the retail package store industry and

creates confusion about how CQD credits should be applied going forward.

To understand the impact of the Court's interpretation, a brief description of how CQD programs operate in practice is necessary. A CQD is "[a] discount based on all the purchases made during a specified period from a vendor or wholesaler." Glossary of Retail Terminology, 2A I.R.M. Abr. & Ann. § 4.43.1-21. Wholesalers typically offer CQDs over a promotional period, often lasting one to six months. They often offer graduated credits, with the amount of the future credit increasing when higher quantity thresholds are ordered. Retailers are usually permitted to place incremental orders during the promotional period that are accumulated for purposes of determining the future credit. Under CQD promotions, the ultimate credit earned by the retailer is provided by the wholesaler at the end of the promotional period.

The following example illustrates the type of the uncertainties created by the Court's interpretation:

A wholesaler offers a 3-month CQD program that provides that retailers will receive a \$1 credit per case if they buy 100 cases, and a \$2 credit per case

if they buy 200 cases. All credits are provided after the conclusion of the 3-month program.

- In month 1, ABC Retailer orders 50 cases.
- In month 2, when ABC Retailer has 10 cases left in stock, it orders 50 additional cases. This entitles ABC Retailer to a \$100 future CQD credit.
- In month 3, when ABC Retailer has 20 cases left in stock, it orders 100 additional cases. This entitles ABC Retailer to a \$200 future CQD credit.

Under the Court's interpretation, it is unclear how a retailer is to apply these future credits in calculating the retail cost. For example, after ABC Retailer's order in month 2, can it apply the entire \$100 future credit to the 60 cases it will have (10 cases left in stock plus 50 new cases), or can it only apply \$60 of this \$100 future credit because it only has 60 cases left? In addition, can ABC Retailer immediately apply this credit to the 10 cases it has in stock at the time it places its second order, or does it need to wait until the second order is delivered?

Similarly, how much of the \$200 future credit can ABC Retailer apply to its inventory in month 3? And at what point can ABC Retailer apply the future credit? Does it need to wait for delivery of the additional 100 cases or can it immediately apply the future credit to the 20 cases it has in stock? This simple example shows how the Court's interpretation will create more questions than it answers and will generate great confusion and uncertainty.

The Court's interpretation also fails to consider that the CQD quantity thresholds and credit amounts do not always remain fixed during a CQD program's promotional period. Often, when a brand of alcohol is not selling as well as expected, a wholesaler will attempt to increase sales by reducing the quantity threshold or increasing the credit amount in the middle of the promotional period.⁵ In this situation, it is unclear how retailers would determine the net cost or how the Commission would enforce the minimum pricing laws under the Court's interpretation.

⁵ For example, midway through a CQD promotion, a wholesaler that originally offered a \$1 per case credit for 100 cases may change the promotion to a \$2 per case credit for 50 cases.

An important part of the Commission's role is to inject uniformity and clarity into the regulation of alcoholic beverages. See G. L. c. 138, § 24. The Court decision undermines this role, to the great detriment of retail package stores and the alcohol beverage industry as a whole.

B. The Court's interpretation would make enforcement of minimum pricing laws nearly impossible

The Commission has extremely broad supervisory powers over "the conduct of the business of . . . selling alcoholic beverages" G. L. c. 10, § 71; see Howard Johnson Co. v. Alcoholic Bevs. Control Comm'n, 24 Mass. App. Ct. 487, 491 (1987); see also Cellarmaster Wines of Massachusetts, Inc. v. Alcoholic Bevs. Control Comm'n, 27 Mass. App. Ct. 25, 27 (1989). It also has "comprehensive powers of supervision over licensees." G. L. c. 138, § 23.

The Court's interpretation significantly impairs the Commission's ability to exercise these supervisory powers. CQD credits are often undocumented at the time of the retail sale because wholesalers do not provide credit statements until the conclusion of the promotional period. As a result, there is no practical method for an ABCC investigator to determine

the net cost during an inspection.⁶ This is particularly problematic from an enforcement perspective because the ABCC is already overwhelmed and understaffed.⁷ Put simply, the ABCC will not be able to enforce the minimum pricing laws under the Court's interpretation.

- C. The Court's interpretation will lead to price manipulation, which will likely lead to lower priced alcohol and increased consumption

Relatedly, the interpretation adopted by the Court, if affirmed, would create the potential for unfair price manipulation by retailers. As the examples in section III.A, supra, demonstrate, the Court's interpretation creates ambiguity and removes

⁶Tellingly, in this case, Total Wine could not provide the credit invoices upon request by investigators.

⁷The Commission currently has 14 investigators who handle, on average, 320 to 500 complaints per year. Alcoholic Beverages Control Commission of Massachusetts: Task Force Report at 94, (December 18, 2017), available at <https://www.mass.gov/files/documents/2017/12/28/Alcohol%20Task%20Force%20Report%200.pdf>. On average, each complaint takes 4 to 6 weeks to investigate. Id. These investigations are in addition to the approximately 300 registrations, applications and renewals per week that these investigators must address, as well as the notices of thousands of other violations that the Commission receives each year. Id.

the requirement that net cost is documented on an invoice at the time of the retail sale.

The Court's interpretation also fails to recognize that a CQD credit that is initially "earned," because a retailer ordered the requisite quantity, is not always received by the retailer. For example, retailers sometimes engage in a practice referred to as "bill and hold," in which a retailer orders the requisite quantity of cases to lock in a price and achieve a future CQD credit, but then has the wholesaler hold off on delivery of a portion of the order. In these "bill and hold" cases, retailers sometimes later cancel the undelivered portion of the order after realizing they do not need the additional inventory. Thus, while they may have initially "earned" the future CID credit by ordering the requisite quantity, they may not ultimately receive it because of the subsequent order cancellation.

This is another example of why the Commission's interpretation, requiring invoiced documentation at the time of sale, is reasonable and appropriate, and the Court's is not. Under the Court's interpretation, it is unclear whether a retailer in this "bill and hold" situation could apply the CQD credits at the

time of the initial order and partial delivery. This ambiguity would inevitably lead to abuse in the form of unfair price manipulation, which will hurt competition and ultimately the consumer.

D. The Court's interpretation would create new administrative burdens on retailers

Traditionally, Massachusetts retailers have not considered or factored future CQD credits into their determination of the net cost for purposes of retail pricing. Their business models have been based on this understanding, as have their long-term investments.

If the Court's interpretation prevails, retailers would be forced to track future credits they have not yet received and set up accounting systems that would tie, on an instantaneous basis, these credits to their everchanging inventory. This would add additional costs and represent a seismic shift in the way business is done. Although large retailers like Total Wine may be able to afford this, many others likely will not, and these new administrative costs will likely lead to less competition in the marketplace.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Commission's brief, MassPack respectfully requests that the Court reverse the decision of the Superior Court.

June 12, 2018

Respectfully submitted,

/s/ Damien C. Powell
Damien C. Powell, Esq.
(BBO #664200)
BARRETT & SINGAL, P.C.
One Beacon Street,
Suite 1320
Boston, MA 02108
(617) 720-5090
dpowell@barrettsingal.com

Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I, Damien C. Powell, hereby certify that on June 12, 2018, I filed a true and accurate copy of the foregoing document through the Electronic Filing Service Provider and served the foregoing document upon the following counsel by electronic and overnight mail:

Thomas R. Kiley, Esq.
(BBO #271460)
Cosgrove, Eisenberg & Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110-2600
617-330-7775
tkiley@ceklaw.net

Samuel M. Furgang, Esq.
(BBO #559062)
Assistant Attorney General
Government Bureau
One Ashburton Place, 20th Floor
Boston, MA 02114
617-963-2678
Samuel.Furgang@state.ma.us

/s/ Damien C. Powell
Damien C. Powell, Esq.
(BBO #664200)

**MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K)
CERTIFICATION**

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of brief.

/s/ Damien C. Powell
Damien C. Powell, Esq.
(BBO #664200)
BARRETT & SINGAL, P.C.
One Beacon Street,
Suite 1320
Boston, MA 02108
(617) 720-5090
dpowell@barrettsingal.com

Attorney for *Amicus Curiae*