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Alcoholic Beverages Control Commission
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Chairman

NO. 25E-1335

CLASSIC WINE IMPORTS INC.
Petitioner,

v.

CONSTELLATION BRANDS INC.
Respondent.
HEARD: 3/23/2018

MEMORANDUM AND ORDER ON
RESPONDENTS' MOTION FOR SUMMARY DECISION AND
PETITIONER'S OPPOSITION

Classic Wine Imports Inc. ("Classic") is a Massachusetts wholesaler aggrieved at the refusal of Constellation Brands, Inc. ("CBI") to ship The Prisoner; Saldo; Cuttings; Blindfold; and Thorn wine brands ("Brand Items") to Classic.

On August 3, 2016, pursuant to the mandate in M.G.L. c. 138, § 25E, the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") issued an order to CBI to makes sales of the Brand Items to Classic pending the Commission's determination of the petition on the merits.

On October 30, 2017, CBI filed the instant Motion for Summary Decision (the "Motion") regarding the above-referenced Petition arguing that under § 25E and applicable case law, CBI should not be required to sell the Brand Items to Classic, specifically because CBI, who had not sold the Brand Items to Classic for six months prior to its refusal to sell date, is not an agent of the predecessor supplier Huneeus Vintners LLC ("HV") and HV-PWC LLC ("PWC") and that there is no continuing affiliation between them; that there was no assignment of distributor arrangements or agreements; and that no facts support an attempted circumvention of § 25E.

On November 22, 2017, Classic filed an Opposition to the Motion and Cross-Motion for Summary Decision (the "Cross-Motion"), asserting CBI is required to sell the Brand Items to Classic because CBI purposefully structured its acquisition of the Brand Items so as to circumvent § 25E and because there was a continuing affiliation between CBI and the former brand owners.

On December 26, 2017, CBI filed a Reply brief. A hearing on the Motion and Cross-Motion was held on March 23, 2018. On July 27, 2018, CBI filed a Supplemental Reply related to the Superior Court's recent decision of Martignetti Grocery Co., Inc d/b/a Carolina Wine Co. v. Constellation

Brands, Inc, et al, No. 1784CV02712 (Mass. Super. Ct. June 25, 2018) (Connolly, J.).[1] After the hearing and in consideration of the exhibits, affidavits, and arguments provided by the parties, the Commission makes the following findings of fact and rulings of law.

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

FINDINGS OF FACT

1. Classic, a division of the Martignetti Companies, is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18. (Ex. 1 to Aff. of Peter Grupp ("Grupp Aff.") at ¶ 1; 10/27/17 Affidavit of Garth Hankinson ("Hankinson Aff.") at ¶ 8; Affidavit of Anthony Bova II at ¶ 6)

2. CBI is in the business of manufacturing, producing, and distributing a number of beer, wine, and spirits brands and holds Massachusetts Certificates of Compliance ("CoCs"). (Hankinson Aff. at ¶¶ 1, 3)

3. Franciscan Vineyards Inc. ("Franciscan") is a wholly owned subsidiary of CBI. (Hankinson Aff. at ¶ 4)

4. Prior to April 29, 2016, HV and PWC owned the Brand Items, and for a period of time prior to June 6, 2016, including during the six months prior to June 6, 2016, HV sold the Brand Items to Classic. (Ex. A to Hankinson Aff. (APA); Ex. 1 to Grupp Aff. at ¶ 3)

5. On April 5, 2016, Franciscan (as Buyer) and HV and PWC (together, the "Sellers") entered into an Asset Purchase Agreement (the "APA") whereby as of April 29, 2016, Franciscan acquired the Brand Items from the Sellers. (Ex. A to Hankinson Aff.; Hankinson Aff. at ¶ 4) In summary, the APA included the sale of the Brand Items including recipes, intellectual property, advertising, goodwill, authorizations, inventory, and certain assumed contracts. (Ex. A to Hankinson Aff.) The APA closed for approximately $285,000,000.00.[2] (Hankinson Aff. at ¶ 6)

6. Franciscan did not purchase or assume any of the Sellers' distribution agreements or arrangements. Id. at ¶ 7(a).

7. Franciscan did purchase as part of the APA and APA Amendment certain limited contracts, which included grape purchase agreements, several custom processing agreements, several marketing agreements with marketing vendors, a barrel lease, packaging materials, and a non-compete and settlement agreement between HV and third parties from whom HV had previously purchased The Prisoner brand item. Id. at ¶¶ 7(b), n.3. Franciscan only assumed the liabilities arising on or after the closing relating to the assumed contracts. Id.

8. Franciscan and HV along with HV's member Agustin F. Huneeus also entered into a Winemaking Consulting Agreement on April 29, 2018, which consists of two types of

[1] Classic did not oppose the submission of the Supplemental Reply.

[2] The Commission's references to the APA hereinafter include all exhibits as well as the Amendment to the APA, which was executed on April 29, 2016. (Ex. A to Hankinson Aff.)

temporary transitional services: consulting services and license/brand ambassador services.

a. The consulting services were set to expire on or before December 31, 2017 and included, in summary, the following types of services: assisting with winemaking, production, and storage of the Brand Items; training and instruction on blending techniques and other aspects of production; assisting with fruit and bulk wine selection; assisting with bottling, bottling schedules, and other bottle services; assisting with Franciscan's direct-to-consumer and e-commerce teams with respect to the Brand Items; assisting with a potential redevelopment of Franciscan's visitor center to incorporate the Brand Items; consulting with Franciscan's farm teams with respect to growing operations; and consulting with Franciscan concerning new production development. (Hankinson Aff. at ¶ 18; Ex. A to Hankinson Aff. at CB 000134-135)

b. The license/brand ambassador services were set to expire on or before April 29, 2018 and included, in summary, the following services: use of the names of HV and Agustin F. Huneeus for limited marketing purposes and Agustin F. Huneeus to assist Franciscan in certain brand transition and brand ambassador services by participating in meetings and other events identified by Franciscan. (Hankinson Aff. at ¶ 19; Ex. A to Hankinson Aff. at CB 000136-137)

9. With respect to the consulting services, HV's winemaker, Jen Beloz, had meetings and telephone calls with Franciscan following the Wine Consulting Agreement regarding the production process and winemaking techniques for the Brand Items. (CBI's Ans. to Ints. No. 19)

10. With respect to the license/ambassador services, Augustin F. Huneeus met with Franciscan for lunch in May 2016 for about 60-90 minutes where they discussed the launch of the tasting room. (Hankinson Aff. at ¶ 19)

11. Upon the closing of the APA, the "Sellers retained no ownership rights or interest in the [Brand Items, and the] Sellers no longer distributed, sold, advertised, or supplied any wholesalers or distributors with the Brands." (Hankinson Aff. at ¶ 7(e))

12. Likewise, "[t]here are no common employees, managers, officers, or directors of Sellers and [CBI]. Sellers have no rights or obligations regarding the sales, distribution, or wholesaler network of the Brands; no rights or interest in the Brand names, including any contingent or reversionary right or interest; and receive no compensation for current sales of the Brands." Id. at ¶ 14.

13. Prior to entering into the APA, CBI and the Sellers entered into a non-binding indication of interest on February 6, 2016, which proposed as part of the sale of the Brand Items that between the closing and December 31, 2018, CBI would appoint HV as either CBI's exclusive broker or exclusive national distributor for the sale of the Brand Items. (Ex. 4 to Grupp Aff.) The proposed broker/distributor agreement was to be terminable by CBI on 90 days notice. Id. The non-binding indication of interest was not incorporated into the APA. (Ex. A to Hankinson Aff.)

14. Likewise, a March 2016 draft of the APA contemplated a broker agreement whereby HV would have been the exclusive broker of the Brand Items through December 31, 2018, unless terminated sooner by CBI. (Ex. 6 to Grupp Aff. (6/29/17 Hankinson Aff.) at ¶ 4(b); Ex. 5 to Grupp Aff. at CB 00478)

15. However, around that same time, CBI determined that it, "wanted greater control over the Brand and the Broker Agreement would have given too much control over Brand growth and expansion to HV rather than to CBI. CBI also has a distribution system in place nationwide and could readily undertake distribution of the Brand." (Ex. 6 to Grupp Aff. (6/29/17 Hankinson Aff.) at ¶ 4(b); Ex. 7 to Grupp Aff. (Hankinson Depo.) at 26) Consequently, CBI informed HV that the Broker Agreement would be removed from the APA, and it was. See id.

16. By the time the final APA was executed, the APA had increased in cost by 50 million dollars. The increase in price was due in large part to the removal of the earnout component in the original structure, and there was no direct value given to the removal of the broker agreement. (Ex. 7 to Grupp Aff. at 26-27)

17. The final, executed APA provides that it is the entire agreement. As the APA states, "[a]ny and all previous agreements and understandings between or among the parties regarding the subject matter hereof, whether written or oral . . . are superseded by this Agreement and the agreements referred to or contemplated herein . . ." (Ex. A to Hankinson Aff. (APA) at § 13.1 (CB00114))

18. Following the APA, Franciscan now produces, markets, and sells the Brand Items, and CBI, Franciscan's parent, sells and distributes the Brand Items. (CBI's Ans. to Ints. No. 17) Franciscan appointed CBI as its exclusive agent for the Brand Items with full authority to appoint distributors and brokers, register products, and post prices for the Brand Items. (Hankinson Aff. at ¶ 7(f); Ex. 3 to Grupp Aff.)

19. On July 6, 2016, CBI added the Brand Items for distribution by Horizon Beverage Company ("Horizon") as CBI has had Horizon distribute numerous other products since May 1, 2012. (CBI's Ans. to Ints. No. 3(f); Ex. D to Hankinson Aff.)

20. CBI notified Martignetti on June 6, 2016 that it would not make sales of the Brand Items to Martignetti or any of its divisions, which includes Classic. (Ex. C to Hankinson Aff.)

DISCUSSION

CBI argues that summary decision should be granted because CBI never made regular sales of the Brand Items to Classic within the six months preceding its refusal to sell date of June 6, 2016 and that there is no ground for imputing the § 25E obligations to CBI. Classic has responded by arguing that the Commission must deny CBI's Motion and instead grant its Cross-Motion because CBI structured its acquisition of the Brand Items so as to circumvent § 25E and there was a continuing affiliation between CBI and the former brand owner.

Summary decision is appropriate only where there are no genuine issues of material fact in dispute and where the moving party is entitled to judgment as a matter of law. Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006); Branded-New England Co. v. Beringer Wine Estates

Co., 25E-1145 (ABCC Decision May 24, 2000). Material facts are those that are substantive in nature and affect the result of the case. Carey, 446 Mass. at 278. Where the parties' rights and obligations are set forth in contracts, the interpretation of those contracts is a question of law, not an issue of fact. See Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 287 (2007) ("interpretation of a contract is a question of law for the court. Whether a contract is ambiguous is also a question of law."); United Liquors, LLC v. Heaven Hill Distilleries, Inc., 25E-1284 (ABCC Decision January 6, 2015; heard April 16, 2014).

Section 25E provides in relevant part, that "[i]t shall be an unfair trade practice and therefor[e] unlawful for any manufacturer, winegrower, farmer-brewer, importer or wholesaler of any alcoholic beverages, to refuse to sell, except for good cause shown, any item having a brand name to any licensed wholesaler to whom such manufacturer, winegrower, farmer-brewer, importer or wholesaler has made regular sales of such brand item during a period of six months preceding any refusal to sell." G. L. c. 138, § 25E. The purpose of § 25E is to "redress economic imbalances in the relationships between wholesalers and their suppliers." Pastene Wine & Spirits Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 612, 618-619 (1988); see also Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 716-717 (1988) (characterizing § 25E as "a vehicle by which the [C]ommission may reconcile the competing equities between suppliers and wholesalers of liquor in the Commonwealth"). Specifically, the legislature adopted § 25E to "counteract a tendency toward vertical integration in the liquor distribution industry." Pastene, 401 Mass. at 618-619. Nevertheless, § 25E does not achieve this goal by imposing inequities upon suppliers. Id.

Obligations under § 25E are particular to individual suppliers. Brown-Forman Corp. v. Alcoholic Beverages Control Comm'n, 65 Mass. App. Ct. 498, 499 (2006). Thus, § 25E does not generally require suppliers to continue to sell to wholesalers with whom an "unaffiliated predecessor" did business. Id.; see also Heublein, Inc. v. Capital Distributing Co., 434 Mass. 698, 701-702 (2001) (holding supplier who acquired predecessor's assets in arm's-length transaction not subject to predecessor's § 25E obligations); Pastene, 401 Mass. at 619 (holding alcohol manufacturer's acquisition and liquidation of independent importer not basis for imputing importer's § 25E obligations to manufacturer). This limitation in the scope of § 25E accommodates alcohol suppliers' legitimate need to carefully select the wholesalers with whom they deal. Heublein, 434 Mass. at 704 (noting existence of "legitimate business reasons for a new supplier . . . to want to evaluate its prospective wholesalers for the six-month trial period provided by . . . § 25E"); Seagram, 401 Mass. at 717, citing Union Liquors Co. v. Alcoholic Beverages Control Comm'n, 11 Mass. App. Ct. 936, 938 (1981) ("Persons in a highly sensitive, closely scrutinized business (such as the liquor business) have need to know about and appraise the persons behind corporations with whom they are doing business").

In some circumstances, however, the law imputes a supplier's § 25E obligations to its successor - even though the successor itself has not sold to the wholesaler - to prevent evasion of the protections of § 25E. Gilman & Sons., Inc. v. Alcoholic Beverages Control Comm'n, 61 Mass. App. Ct. 916, 917 (2004), citing Heublein, 434 Mass. at 704. The courts and Commission have recognized imputation of a predecessor supplier to a successor predecessor in limited circumstances:

(1) "where the new supplier is an agent of the previous supplier," Brown-Forman Corp. v. Alcoholic Beverages Control Comm'n, No. 03-1684, 2004 WL 1385495, at *4 (Mass.

Super. June 14, 2004); or where there is a continuing affiliation between the prior supplier and the new supplier, Heublein, 434 Mass. at 704;

(2) "where the previous supplier has assigned distribution rights to the new supplier," Brown-Forman Corp., 2004 WL 1385495, at *4; accord Heublein, Inc. v. Alcoholic Beverages Control Comm'n, 30 Mass. App. Ct. 611, 614-616 (1991); and

(3) where a transfer has occurred for "the specific purpose of circumventing § 25E," accord Heublein, 434 Mass. at 706; Pastene, 401 Mass. at 616.

There is no dispute that CBI did not make regular sales of the Brand Items to Classic in the period of six months preceding the refusal to sell date of June 6, 2016. Therefore, the question is whether the particular facts in this case give rise to the imputation of HV's § 25E obligations. Classic asserts that there has been an imputation of § 25E obligations relative to the first and third circumstances listed above— that there was a continuing affiliation between CBI and HV and that CBI structured its acquisition of the Brand Items so as to circumvent § 25E. As detailed below, the Commission finds that the facts of this case do not give rise to the imputation of the predecessor supplier's § 25E obligations to the new supplier, and therefore, the Commission grants summary decision for CBI.

There is no evidence of a continuing affiliation between HV and CBI.

Classic asserts that CBI and HV had a continuing affiliation such that HV's obligation was imputed to CBI because of the Winemaking Consulting Agreement. CBI denies that there is any evidence of a continuing affiliation or agency relationship between itself and HV.

A successor supplier takes on its predecessor's § 25E obligations where there is a "continuing affiliation or agency relationship" between the suppliers. Brown-Forman, 65 Mass. App Ct. at 500 (quoting Heublein, 434 Mass. at 706). "Although there is no settled definition of 'continuing affiliation' . . . the prevailing thinking . . . is that the standard is met when either predecessor and successor have an agency relationship or when successor acquires predecessor's rights by contractual assignment or through joint venture." Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. 258 at *6 (Super. Ct. July 16, 2014). The Appeals Court has evaluated the existence of a continuing affiliation or agency relationship for the purposes of § 25E by reference to general principles of agency, focusing on the suppliers' relationship with respect to the successor's sales to wholesalers. See Brown-Forman, 65 Mass. App. Ct. at 507 (stating "relevant inquiry" in imputation of § 25E obligations is whether successor supplier was predecessor's agent "for the discrete purpose of making regular sales . . . to downstream customers"). "Tellingly, the courts have adopted a vocabulary in applying Section 25E which suggests that mere contractual 'connections' or business 'dealings' will fall short of the kind of 'affiliation' required for imputation purposes." Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. 258 at *6 n. 7.

"An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf of and for the benefit of the principal, and subject to the principal's control." Beam Spirts & Wine, LLC, 32 Mass. L. Rptr. *7, quoting Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 742 (2000). As the Superior Court has explained in the § 25E context,

> The Restatement (Second) of Agency (1958) identifies the existence of a fiduciary duty from agent to principal regarding matters within the scope of the agency, the

> power of the agent to alter legal relationships between the principal and third parties, and the right of the principal to control the agent's conduct with respect to matters within the purview of the agency as essential characteristics of an agency relationship.

Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. 258 at *7.

There is no continuing affiliation between HV and CBI, and therefore, HV's § 25E obligations should not be imputed to CBI. The Winemaking Consulting Agreement (the "Winemaking Agreement") that the Sellers and Franciscan entered into in conjunction with the APA was temporary and limited in scope. The Commission concludes that the Winemaking Agreement was a transitional agreement. "Courts have held that properly-drafted and implemented transitional agreements do not, without more, constitute the type of continuing affiliation or agency relationship which would subject a purchaser-distributor to § 25E obligations." United Liquors, LLC v. Haven Hill Distilleries, Inc. (ABCC Decision April 16, 2014). Here, the Winemaking Agreement did not allow the Sellers to provide input or control in the selection of distributors or downstream customers. (Hankinson Aff. at ¶¶ 14, 7); see Brown-Forman, 65 Mass. App. Ct. at 507 (stating "relevant inquiry" in imputation of § 25E obligations is whether successor supplier was predecessor's agent "for the discrete purpose of making regular sales . . . to downstream customers"). There is no evidence that following the execution of the APA that the Sellers retained any rights or obligations regarding the sales, distribution, or wholesaler network of the Brand Items. See id. Moreover, it is not evidence of a continuing affiliation between the former supplier company and new supplier company where the brand's creator, individually on his/her own, continues to assist with the marketing of the brand following an asset purchase sale agreement. See Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. at *9; Martignetti Grocery Co., Inc. d/b/a Carolina Wine Co. v. ABCC, No. 2017-02712, *10 (Mass. Super. Ct. June 25, 2018) (Connolly, J.) (stating that "the continued involvement of a brand's creator for a limited time period does not create a containing (sic) affiliation between the brand's previous and current suppliers"). The Winemaking Agreement here not impose § 25E obligations on CBI.

Classic points to the Commission's decision in Martignetti Grocery Co., Inc., d/b/a Carolina Wine Company v. Pine Ridge Winery, LLC d/b/a Crimson Wine Group Ltd. and Seghesio Wineries, Inc., 25E-1285 (ABCC Decision Nov. 20, 2013). In Pine Ridge, Seghesio sold its Brand Items to Crimson through an asset purchase agreement. Simultaneously, Seghesio and Crimson entered into a temporary Interim Winery Management Agreement ("Interim Agreement") because Crimson did not hold the necessary permits and licenses required to conduct the winemaking operations, nor did it hold a permit to export the Brands Items to Massachusetts. Then Crimson used Seghesio's CoC for several months. In finding a violation of § 25E the Commission determined that (1) there was a continuing affiliation because as part of their Interim Agreement, Crimson used Seghesio's CoC and Crimson hired 55-60 of Seghesio's employees, including the main winemaker and CEO of the Brand; and (2) Crimson also expressly assumed the sales liabilities of Seghesio in the APA.

Pine Ridge is distinguishable from the instant case for several reasons, including because here, there is no evidence that CBI hired any of HV's employees or that HV otherwise retained an indefinite role in the management and operation of the production and sale of the Brand Items. There is no evidence that CBI and HV have common managers, officers, or directors. Also, CBI did not use HV's certificates of compliance. (Hankinson Aff. at ¶¶ 14, 7) In contrast, in Pine

Ridge, the Seghesio family's involvement with the brand was not temporary—the Seghesio family retained a "significant role" in the "management and operation of the licensed business." Pine Ridge, at 10; see also United Liquors, LLC v. Haven Hill Distilleries, Inc. (ABCC Decision April 16, 2014) (finding no basis to impute § 25E obligations where under the transitional agreement, the seller-supplier would "produce, process, and bottle" the brand items at its own facilities for at least one year).

As CBI urges, the present case is more analogous to Martignetti Grocery Co., Inc. d/b/a Carolina Wine Co. v. ABCC, No. 2017-02712 (Mass. Super. Ct. June 25, 2018) (Connolly, J.). In that case, the parties to an asset purchase agreement also entered into transitional agreements, which were in effect for limited periods of time and related to the production, blending, and bottling of certain wines as well as for consultation on the production and marketing of the subject brand items. The Superior Court affirmed the Commission's decision that there was no imputation of § 25E obligations. See Martignetti Grocery Co., Inc. d/b/a Carolina Wine Co. v. ABCC, No. 2017-02712, at *8 (Mass. Super. Ct. June 25, 2018) (Connolly, J.). (stating that "[a]ll four agreement[s] were temporary, and none of them allowed Copper Cane to retain the level of shared control required to impute § 25E obligations."). As in that case, in the present case, the Winemaking Agreement is for a temporary period of time and does not afford HV shared control of the Brand Items.

Furthermore, any indication of an agency relationship is absent from the record. Upon the closing of the APA, HV retained no control, rights, or powers over CBI or the Brand Items following the APA. (Hankinson Aff. at ¶¶ 14, 7) The APA was "made at arm's length and there was no evidence before the commission of any agency relationship or continuing affiliation" between CBI/Franciscan and the Sellers, and therefore, HV's § 25E obligations cannot be imputed to CBI. See Heublein, 434 Mass. at 707-708.

The parties to the APA did not purposefully structure it so as to circumvent § 25E.

There is no evidence that Franciscan/CBI structured the APA so as to evade § 25E. Classic asserts that the removal of the broker agreement section from the APA shortly before it was executed evidences an effort by CBI to evade § 25E. The Commission finds that argument without merit.

There is no evidence that CBI removed the broker agreement from the final APA in an effort to circumvent § 25E. CBI stated that it determined that it, "wanted greater control over the Brand" and that its own nationwide "distribution system . . . could readily undertake distribution of the Brand [Items]." (Ex. 6 to Grupp Aff. (6/29/17 Hankinson Aff.) at ¶ 4(b); Ex. 7 to Grupp Aff. (Hankinson Depo.) at 26) As the Supreme Judicial Court has stated, "structuring the execution of an arm's-length acquisition to ensure that [the new supplier has the opportunity to evaluate its prospective wholesalers does] not convert the purpose of the transaction to one intended to circumvent § 25E." Heublein, 434 Mass. at 704.

Classic urges that the case of Martignetti Grocery Co. v. Vintners International Co., Inc. (ABCC Decision April 22, 1991) is on point, but that case is distinguishable. Vintners involved the acquisition by Vintners of certain products through the acquisition all of the stock of Seagram's subsidiaries. At the outset, Vintner's principals intended to, "review all existing wholesaler relationships, with the purpose of reducing the number of wholesalers . . . [and that] was a significant element of Vintner's strategy, included in the business plan used to obtain financing

for the transaction." In Vintners, not only was there evidence of agency and assignment, but there was evidence that, "Vintner's plan to establish a new distribution network, and its plan to terminate the existing supplier network were subsidiary, but material, considerations of [] Vintners' purchase of the [subsidiaries] from Seagram. The reorganization was intended to improve the new distributor's revenues by in part evading the old distributor's 25E obligations." Martignetti Grocery Co. v. Vintners International Co., Inc. (ABCC Decision April 22, 1991). In contrast to Vintners, there is no evidence in the present case that the way in which the products were to be distributed was a material consideration in the purchase of the Brand Items or that the APA, "was intended to improve the new distributor's revenues by in part evading the old distributor's 25E obligations." See id.

The final, executed APA does not contain the broker agreement, and the APA provides that it is the entire agreement. As the APA states, "[a]ny and all previous agreements and understandings between or among the parties regarding the subject matter hereof, whether written or oral . . . are superseded by this Agreement and the agreements referred to or contemplated herein . . ." (Ex. A to Hankinson Aff. (APA) at § 13.1 (CB00114)) "Where the writing shows on its face that it is the entire agreement of the parties and 'comprises all that is necessary to constitute a contract, it is presumed that they have placed the terms of their bargain in this form to prevent misunderstanding and dispute, intending it to be a complete and final statement of the whole transaction." Bendetson v. Coolidge, 7 Mass. App. Ct. 798, 802-803 (1979) (quoting Glacking v. Bennett, 226 Mass. 316, 319-320 (1917).

The fact that the parties earlier considered a broker agreement with HV does not, on its own, evidence an intention to circumvent § 25E.[3] Moreover, from a policy standpoint, this is the logical result. As CBI states in its Reply brief, "[i]f any discussion between the parties to an APA regarding the predecessor supplier distributing the Brands after the deal closes automatically led to a finding that the successor supplier circumvented § 25E even if that term was not made part of the final deal, the negotiating parties would be incentivized against ever considering this possibility in the first place." (CBI's Reply brief at 10)

The Commission concludes that there is no evidence that the APA occurred for the specific purpose of circumventing § 25E.

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[3] Classic points to the short timeframe between the earlier draft containing the broker agreement (March 2016), and the date of the executed APA (April 5, 2016) as well as the fact that the price of the APA jumped 50 million dollars as evidence that CBI attempted to circumvent § 25E. The Commission is not persuaded. CBI decided to remove the broker agreement because it, "wanted greater control over the Brand and the Broker Agreement would have given too much control over Brand growth and expansion to HV rather than to CBI. CBI also [recognized that it] has a distribution system in place nationwide and could readily undertake distribution of the Brand." (Ex. 6 to Grupp Aff. (6/29/17 Hankinson Aff.) at ¶ 4(b); Ex. 7 to Grupp Aff. (Hankinson Depo.) at 26) With regard to the increase in price of the acquisition, the increase in price was due in large part to the removal of the earnout component in the original structure, and there was no direct value given to the removal of the broker agreement. (Ex. 7 to Grupp Aff. at 26-27)

HV did not assign distribution rights to CBI.

It is undisputed that HV did not assign distribution rights to Franciscan/CBI. Consequently, § 25E obligations cannot be imputed to CBI on that basis.

There is no genuine issue of material fact.

The parties agree that is no genuine issue of material fact. The facts at issue primarily are based on the contracts entered into between the Sellers, Franciscan/CBI, and Agustin Huneeus. The Commission's interpretation of the contracts is a question of law, not an issue of fact. See Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 287 (2007) ("interpretation of a contract is a question of law for the court"). The Commission finds no ambiguity in the contracts, but even if it did, "whether a contract is ambiguous is also a question of law." See id. Likewise, the Commission finds no genuine issue of material fact with regard to the parties' supporting affidavits and documentation.

The Commission concludes that CBI is not an agent of HV; there has been no continuing affiliation between them; there was no assignment of distributor arrangements or agreements; and no facts support an attempted circumvention of § 25E.

CONCLUSION

There was no six-month course of dealing in the Brand Items between Classic and CBI, and Classic has no reasonable expectation of proving that HV's § 25E obligations should be imputed to CBI.

CBI's Motion for Summary Decision is **ALLOWED,** and Classic's Cross-Motion for Summary Decision is **DENIED**.

The matter is dismissed and the Commission's previous order to ship is DISSOLVED effective October 11, 2018.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner _____

Jean M. Lorizio, Chairman _____

Dated: September 11, 2018

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.

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