

***Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358***

Jean M. Lorizio, Esq.
Chairman

NO. 25E-1343

RUBY WINES, INC.
Petitioner,

v.

**CONSTELLATION BRANDS, INC. &
CHARLES SMITH WINERY**
Respondents.

HEARD: 3/21/2019

**MEMORANDUM AND ORDER ON
CONSTELLATION BRANDS, INC.'S MOTION FOR SUMMARY DECISION AND
PETITIONER'S OPPOSITION**

Ruby Wines, Inc. ("Ruby") is a Massachusetts wholesaler aggrieved at the refusal of Constellation Brands, Inc. ("CBI") and Charles Smith Winery¹ ("CS Wines") to ship the Kung Fu Girl, Velvet Devil, Eve, Boom, Boom! and Chateau Smith wine brands ("Brand Items") to Ruby.

On November 18, 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 and CS Wines to make sales of the Brand Items to Ruby pending the Commission's determination of the petition on the merits.

On September 17, 2018, 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 Ruby, specifically because CBI, who had not sold the Brand Items to Ruby for six months prior to its refusal to sell date, is not an agent of the predecessor supplier K Vintners LLC ("KV") 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 October 2, 2018, Ruby filed an Opposition to the Motion Summary Decision (the "Opposition"), asserting that there is evidence of a continuing affiliation between the predecessor supplier and CBI, that the affidavit of Garth Hankinson ("Hankinson") filed by CBI is not based

¹ The correct corporate name of the co-respondent is Charles Smith Wines LLC.

on Hankinson's personal knowledge, and that the Commission should order additional discovery be conducted because the Commission does not have enough facts to decide the case.

A hearing on the Motion and its Opposition was held on March 21, 2019. After the hearing and in consideration of the exhibits, affidavit, 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. Ruby is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18.
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. On or about October 5, 2016, CBI as buyer entered into an Asset Purchase Agreement ("APA") with CS Wines and KV as sellers (the "Sellers"), and, solely for the purposes of §§ 7.1, 7.2, 7.7, 7.8, 7.9, and Article XI, Charles Smith individually ("Mr. Smith"). (Hankinson Aff. at ¶ 4; APA² at Constellation 0001, 0006, 0055, 0056) The APA had a closing date of October 19, 2016. (Hankinson Aff. at ¶ 7)
4. As set forth in the APA, CBI purchased from the Sellers, among other things, the Acquired Assets, which include: (a) Proprietary Brand Assets, (b) Other Intangible Property, (c) Inventory, (d) Assumed Contracts, and (e) various other legal rights, including attorney-client privilege and attorney work product. (Hankinson Aff. at ¶ 5; APA at Constellation 0006-0007, 0010-0012, 0015) In summary,
 - a. The Proprietary Brand Assets include all rights to (1) recipes and blending procedures for the Brand Items, (2) intellectual property in the Brand Items, (3) advertising and promotional materials for the Brand Items, (4) goodwill associated with the Brand Items, (5) claims, damages, or other violation of the Proprietary Brand Assets, and (6) legal files and materials related to the Brand Items. (APA, at Constellation 0012)
 - b. Other Intangible Property includes the authorizations necessary to utilize the Acquired Assets. (APA, at Constellation 0011)
 - c. Inventory includes blended and unblended bulk wine, the bailment inventory, unlabeled case goods, raw materials, current vintage packaging supplies, and retail sales merchandise and supplies and point of sale materials. (APA, at Constellation 0010)
 - d. Assumed Contracts are those that are listed on Schedule 2.1(a). (APA, at Constellation 0007)

² The APA is attached as Exhibit A to the Affidavit of Garth Hankinson.

5. Under the APA, CBI only assumed certain of those liabilities arising on or after the closing date of October 19, 2016 which related to the Brand Items. (Hankinson Aff., at 6(d); APA, at Constellation 0007)
6. The APA provides that as consideration for the Acquired Assets, CBI was to pay a closing payment as well as an “earn-out payment”—a one-time payment if CBI achieves certain sales goals in 2019. (APA, at Constellation 0018-0024)
7. Pursuant to § 13.2 of the APA, CBI assigned its right to purchase and receive the Proprietary Brand Assets and a Trademark Agreement³ (the “Trademark Agreement”) to its wholly owned subsidiary, CBZ, LLC (“CBZ”). (Hankinson Aff. at ¶ 6(h); APA at Constellation 0051, 0062-0065)
8. On October 12, 2016, pursuant to § 13.2 of the APA, CBI notified CS Wines and KV of its assignment to CBZ. (APA, at Constellation 0051; Ex. B to Hankinson Aff.)
9. Attached to the APA are various agreements between the parties, which took effect on October 19, 2016, namely, the:
 - a. Assignment and Assumption Agreement (Proprietary Brand Assets) between the Sellers and CBZ in recognition of CBI’s assignment to CBZ of the Proprietary Brand Assets and the Trademark Agreement; Sellers here assigned their rights, title, and interest in the Proprietary Brand Assets and the Trademark Agreement to CBZ; (Hankinson Aff. at ¶ 6(l); APA, at Constellation 0062-0065)
 - b. Assignment of Trademarks between CS Wines and CBZ whereby CS Wines agreed to assign all of its rights, title, and interest in its trademarks (registered and common law) for the Kung Fu Girl, Velvet Devil, Boom, Boom!, and Chateau Smith brand items, and CBZ agreed to accept the assignment. (APA, at Constellation 0066-0073)
 - c. Assignment of Trademarks between KV and CBZ whereby KV agreed to assign all of its rights, title, and interest in its trademarks for the Eve brand items, and CBZ agreed to accept the assignment. (APA, at Constellation 0074-0078)
 - d. Confidentiality and Invention Assignment Agreements between Mr. Smith, CBI, and CBZ and between CBI, CBZ, and other independent contractors who developed or assisted in the development of certain inventions related to the Brand Items. (APA, at Constellation 0102-0119)
 - e. Services Agreement between CBI, CS Wines, KV, and Mr. Smith whereby CS Wines and KV agreed to provide consulting services to CBI with respect to “wine-making supervisory, sales and marketing and brand ambassador services” regarding the Brand Items. The reasoning behind the Services Agreement was to maintain and improve the value of the Brand Items. (APA, at Constellation 0079)

³ The Trademark Agreement is dated October 20, 2008 and is between Mr. Smith, KV, and Yakov Bromberg d/b/a Doyna, Ltd. (APA at Constellation 0062)

10. The Services Agreement, commenced on October 19, 2016 and has an expiration date of December 31, 2019, unless earlier terminated. (Hankinson Aff. at ¶ 21; APA, at Constellation 0088)
11. In summary, the consulting services under the Services Agreement include the Sellers assisting CBI in the following areas related to the Brand Items: (1) winemaking, production, and storage; (2) selection of fruit and bulk wine; (3) bottling; (4) imagery and trade dress; (5) direct-to-consumer and e-commerce teams; (6) additional sales and marketing services; (7) consulting with the farming teams; (8) creation of new products; and (9) other tasks and services. (APA, at Constellation 0080-0081)
12. Brand ambassador services under the Services Agreement include, “(1) providing reasonable brand transition and brand ambassador services, (2) participating in meetings with trade customers (distributors and key retail accounts) and other events identified by the Company and (3) [Mr. Smith] making himself reasonably available for pictures, photos, videos and similar marketing collateral for” the Brand Items. (APA, at Constellation 0083)
13. The Services Agreement also provided that, “[e]ach Consultant [ie, CS Wines and KV] and [Mr.] Smith shall be providing the Services under this Agreement strictly as an independent contractor and no Consultant, [Mr.] Smith, or any employee or representative of any Consultant is or shall be deemed to be employed by [CBI]. Nothing in this Agreement is intended to create any association, partnership, joint venture, or employment relationship between the parties.” (APA, at Constellation 0088)
14. The Services Agreement provides that Mr. Smith will make himself available to provide or supervise the consulting services but that the consulting services may be performed by another employee of CS Wines and KV who has experience with the Brand Items and is acceptable to CBI. (APA, at Constellation 0081)
15. As a result of the assignment agreements summarized above, effective October 19, 2016, CBZ became the owner of the Proprietary Brand Assets. (Hankinson Aff., at ¶ 6(m))
16. Also on October 19, 2016, CBZ appointed CBI as “the exclusive agent for the [Brand Items] in all the States of the United States and in the District of Columbia, with full authority to appoint distributors and brokers, register products and post prices as may be required by law.” (Ex. C to Hankinson Aff.)
17. On or about November 3, 2016, Constellation notified Ruby that it had acquired the right to sell the Brand Items in Massachusetts and that it would not be selling them to Ruby. (Hankinson Aff., at ¶ 9)
18. CBI had an existing distribution agreement with Horizon Beverage Company, and on November 7, 2016, CBI added the Brand Items to that agreement. (Ex. E to Hankinson Aff.)
19. Neither the APA nor any of the agreements attached to it which took effect on October 19, 2016 allowed CS Wines, KV, or Mr. Smith to provide input or control in the selection of CBI’s distributors or downstream customers. (Hankinson Aff., at ¶¶ 17, 27; APA)

20. In an interview Mr. Smith gave after the APA was announced, Mr. Smith stated that he “will continue to make the five wines to ensure continuity in quality and . . . will remain completely focused on the rest of [his] portfolio,” of other brands. (Ex. A to Opposition) Mr. Smith also states in the article that “we will work closely with the Constellation team as they build out their future plans.” *Id.*

SUMMARY DECISION STANDARD

The Commission operates under the Informal “Fair Hearing” Rules promulgated under 801 C.M.R. 1.02 in matters arising under M.G.L. c. 138, § 25E. Although not specified in the Informal Rules, parties may file motions pursuant to 801 C.M.R. 1.02(7)(c) governing “special requests.” Because § 25E matters are complex, the Commission tracks the summary decision protocol laid out in the Formal Rules under 801 C.M.R. 1.01(7)(h) in order to promote regularity and efficiency with its procedures. Because the Formal Rule relies on the courts’ interpretation of Mass. R. Civ. P. 56, so too does the Commission.

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). “[A] fact is ‘material’ when it ‘might affect the outcome of the suit under the governing law.’” Dennis v. Kaskel, 79 Mass. App. Ct. 736, 741 (2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

It is clear that “a party moving for summary [decision] in a case in which the opposing party will have the burden of proof at trial is entitled to summary [decision] . . . if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of the party’s case.” Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); see United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014). If the moving party meets its burden, then it becomes the nonmoving party’s burden “to respond by ‘set[ting] forth specific facts showing that there is a genuine issue for trial.’” Kourouvacilis, 410 Mass. at 716 (quoting Mass.R.Civ.P. 56(e)). The nonmoving party cannot defeat the motion for summary decision by “rest[ing] on [its] pleadings and mere assertions of disputed facts” LaLonde v. Eissner, 405 Mass. 207, 209 (1989). The nonmoving party “must respond and allege specific facts which would establish the existence of a genuine issue of material fact” Pederson v. Time, Inc., 404 Mass. 14, 17 (1989); see Michalak v. Boston Palm Corp., 2004 WL 2915452, at * 2 (Mass. Super. Ct. Sept. 17, 2004) (providing that “[t]he non-moving party must oppose the motion with admissible evidence on the issue in order to defeat the summary judgment motion”). The failure of the nonmoving party to prove an essential element of its case “renders all other facts immaterial” and mandates summary decision in favor of the moving party. Kourouvacilis, 410 Mass. at 711.

SECTION 25E REQUIREMENTS

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. 135, § 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, quoting 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. Charles E. Gilman & Sons., Inc. v. Alcoholic Beverages Control Comm’n, 61 Mass. App. Ct. 916, 917 (2004). The courts and Commission have recognized imputation of a predecessor supplier to a successor supplier 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. Ct. June 14, 2004); or where there is a continuing affiliation between the prior supplier and the new supplier, Heublein, 434 Mass. at 706;
- (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,” Brown-Forman Corp., 2004 WL 1385495, at *4; accord Heublein, 434 Mass. at 704; Pastene, 401 Mass. at 616.

There is no dispute that CBI did not make regular sales of the Brand Items to Ruby in the period of six months preceding November 3, 2016. Therefore, the question is whether the particular facts in this case give rise to the imputation of the prior supplier’s⁴ § 25E obligations.

There is no evidence of a continuing affiliation between the Sellers/ Mr. Smith and CBI.

Ruby asserts that the Sellers/ Mr. Smith had a continuing affiliation with CBI such that the prior supplier’s obligation was imputed to CBI. CBI denies that there is any evidence of a continuing affiliation or agency relationship.

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 Spirits & 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.

⁴ While Ruby named CS Wines as the predecessor supplier, CBI notes that KV was the prior CoC holder and therefore Ruby’s prior supplier. (Hankinson Aff., at n.3) Regardless of whether the prior supplier was CS Wines or KV, this decision remains the same.

A question is raised as to whether there is a continuing affiliation, particularly where the Sellers provided some temporary consulting and brand services pursuant to the Services Agreement. (Opposition, at 5) The Services Agreement that CBI, CS Wines, KV, and Mr. Smith entered into in conjunction with the APA was temporary and limited in scope. The Commission concludes that the Services 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, none of the agreements entered into allowed CS Wines, KV, or Mr. Smith to provide input or control in the selection of CBI’s distributors or downstream customers. (Hankinson Aff., at ¶¶ 17, 27; APA); 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 or Mr. Smith retained any rights or obligations regarding the sales, distribution, or wholesaler network of the Brand Items.⁵ 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”).⁶ The Services Agreement here does not impose § 25E obligations on CBI.

Ruby 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

⁵ The APA provides for both a price-certain closing payment as well as a one-time payment if CBI reaches its sales goals in 2019. (APA, at Constellation 0018-0024) The Commission has previously found that this type of anticipated closing payment based on sales does not create a continuing affiliation between the parties to the APA. See Classic v. Joto Sake LLC and Kobrand Corp., 25E-1347, at 11 (ABCC Decision January 24, 2019).

⁶ In Martignetti Grocery Co., Inc. d/b/a Carolina Wine Co. v. ABCC, No. 2017-02712 (Mass. Super. Ct. June 25, 2018) (Connolly, J.), the parties to an asset purchase agreement 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 Services Agreement is for a temporary period of time and does not afford KV, CS Wines, or Mr. Smith shared control of the Brand Items.

Crimson did not hold the necessary permits and licenses required to conduct the winemaking operations, nor did it hold a permit to export the Brand 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 used KV's or CS Wines' CoCs to import the Brand Items into Massachusetts or that CBI hired any of the KV's or CS Wines' employees. Furthermore, CBI did not assume the liabilities of KV or CS Wines; CBI only assumed certain of those liabilities arising on or after the closing date of October 19, 2016 which related to the Brand Items. (Hankinson Aff., at 6(d); APA, at Constellation 0007); 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).

Furthermore, any indication of an agency relationship is absent from the record. Upon the closing of the APA, the Sellers retained no ownership rights or interest in the Brand Items. (Hankinson Aff. at ¶ 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 and the Sellers. See Heublein, 434 Mass. at 707-708. Likewise, the Services Agreement specifically provides that, "[n]othing in this Agreement is intended to create any association, partnership, joint venture, or employment relationship between the parties." (APA, at Constellation 0081)

CBI met its burden on summary decision of showing that Ruby has no reasonable expectation of proving an essential element of its case-- a continuing affiliation between CBI and the prior supplier. Consequently, it became Ruby's burden to respond and show that there are "specific facts showing that there is a genuine issue for trial." Kourouvacilis, 410 Mass. at 716 (quoting Mass.R.Civ.P. 56(e)). In support of Ruby's Opposition, Ruby attached an article from the Forbes.com website which describes the CBI acquisition of the Brand Items and includes an interview of Mr. Smith by the same author. In the interview, Mr. Smith states that he "will continue to make the five wines to ensure continuity in quality and . . . will remain completely focused on the rest of [his] portfolio," of other brands. (Ex. A to Opposition) Mr. Smith also states in the article that "we will work closely with the Constellation team as they build out their future plans." Id. Ruby asserts that these statements, and other similar ones, "show a substantial continuing affiliation, one that involves the downstream sales of the [B]rand [I]tems." (Opposition, at 5) Ruby is not correct. The Services Agreement addresses how during the transitional period CS Wines, KV, and Mr. Smith would provide consulting services as to winemaking, sales and marketing, and brand ambassador services relative to the Brand Items. (APA, at Constellation 0079) Ruby's article does not satisfy Ruby's burden of opposing summary decision.⁷ See

⁷ Ruby also asks the Commission to order CBI to provide additional discovery and allow Ruby to take the deposition of Mr. Smith. (Opposition, at 6) The Commission already addressed this issue in its Order of July 19, 2018. To the extent Ruby is asking the Commission to reconsider its July 19, 2018 order, that request is denied.

Kourouvacilis, 410 Mass. at 711 (providing that the failure of the nonmoving party to prove an essential element of its case “renders all other facts immaterial” and mandates summary decision in favor of the moving party).

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

There is no evidence that the parties to the APA structured it so as to evade § 25E, and the parties here do not argue otherwise.

The prior supplier did not assign distribution rights to CBI.

It is undisputed that neither KV nor CS Wines assigned distribution rights to CBI, and the parties do not argue otherwise. Consequently, § 25E obligations cannot be imputed to CBI on that basis.

There is no genuine issue of material fact.

CBI’s Motion relies on the Affidavit of Garth Hankinson and various agreements and letters, which are cited above. Ruby asserts that Hankinson does not attest to having personal knowledge of some of the facts to which he attests in his affidavit. (Opposition, at 4-6) Consequently, Ruby argues that CBI’s Motion should be denied for that reason alone. The Commission treats Ruby’s argument as a motion to strike Hankinson’s affidavit.

An affidavit shall be based on “personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Mass.R.Civ.P. Rule 56(e). Here, Hankinson states that he is “familiar with and has personal knowledge of the facts and circumstances surrounding the negotiation and execution of the arms-length [APA].” (Hankinson Aff., at ¶ 4) Most of Hankinson’s affidavit focusses on the APA and its attached agreements. However, in paragraph 26 of his affidavit, Hankinson also attests to Mr. Smith’s activities after the APA was executed.⁸ Hankinson does not state that he has any personal knowledge of Mr. Smith’s involvement with CBI after the APA was executed, and Hankinson’s title does not shed any light on the issue. Id. Consequently, the Commission strikes paragraph 26 of Hankinson’s affidavit.

The facts at issue primarily are based on the contracts entered into between the Sellers and CBI. CBI attached the relevant contracts to the Hankinson Affidavit. 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. Furthermore, the Commission finds no genuine issue of material fact with regard to Hankinson’s affidavit and the parties’ other supporting documentation.

⁸ That sentence states that Mr. Smith has only attended approximately four marketing or industry events in the two years since the Services Agreement was executed and that Mr. Smith on three occasions contributed to articles about the Brand Items. (Hankinson Aff., at ¶ 26)

The Commission concludes that CBI is not an agent of either of the Sellers; 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

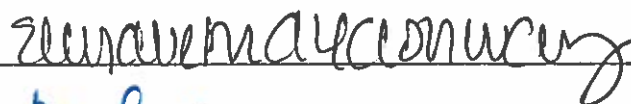
There was no six-month course of dealing in the Brand Items between Ruby and CBI, and Ruby has no reasonable expectation of proving that the prior supplier's § 25E obligations should be imputed to CBI.

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

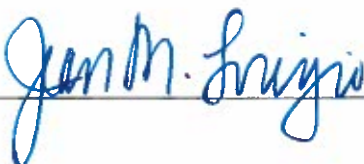
The matter is dismissed, and the Commission's previous Ship Order is DISSOLVED effective 30 days from the date of this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth A. Lashway, Commissioner



Jean M. Lorizio, Chairman



Dated: May 6, 2019

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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cc: William Coyne, Esq. via email
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