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Alcoholic Beverages Control Commission
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Chairman

NO. 25E-1347

CLASSIC WINE IMPORTS, INC.
Petitioner,

v.

JOTO SAKE, LLC &
KOBRAND CORPORATION
Respondents.
HEARD: 10/04/2018

MEMORANDUM AND ORDER ON
RESPONDENT KOBRAND CORPORATION'S
MOTION FOR SUMMARY DECISION

Classic Wine Imports, Inc. ("Classic") is a Massachusetts wholesaler aggrieved at the refusal of Joto Sake, LLC ("Joto") and Kobrand Corporation ("Kobrand"), to ship certain sake brands, namely, Joto, Chikurin, Eiko Fuji, Hou Shu, Seikyo, Shichi Hon Yari, Taihekai, Watari Bune, Yuki No Basha, and Yuri Masamune (the "Brand Items") to Classic.

On February 7, 2017, pursuant to the mandate in M.G.L. c. 138, § 25E, the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") issued an order to Joto and Kobrand to makes sales of the Brand Items to Classic pending the Commission's determination of the petition on the merits (the "Ship Order").

On March 30, 2018, Kobrand filed the instant Motion for Summary Decision ("Kobrand's Motion") regarding Classic's § 25E Petition arguing that under § 25E and applicable case law, Kobrand should not be required to sell the Brand Items to Classic, specifically because Kobrand, who never made sales to Classic prior to the Ship Order, is not an agent of the predecessor importer Joto; that there is no continuing affiliation between them; that there was no assignment of wholesale distribution arrangements or agreements; and that no facts support an attempted circumvention of § 25E. Kobrand filed along with its Motion the Affidavit of Robert DeRoose and other supporting documents.

On April 20, 2018, Classic filed an Opposition to the Motion and Cross-Motion ("Classic's Motion") asserting that Joto's § 25E obligations should be imputed to Kobrand because there was an assignment of distribution rights and a continuing affiliation between Kobrand and Joto. In support of its Opposition, Classic filed ten exhibits, including the deposition transcript of Robert DeRoose of Kobrand.

On September 28, 2018, Kobrand filed its Reply. After a hearing on October 4, 2018 and in consideration of the exhibits 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. The Commission took administrative notice of the contents of the Commission files for Classic, Kobrand, and Joto.

FINDINGS OF FACT

1. Classic is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18 with a place of business in Taunton, Massachusetts. (Classic's Verified § 25E Petition, at ¶ 1)

2. Kobrand is in the business of marketing and importing wine and spirits in the United States and is located in Purchase, New York. (Affidavit of Robert DeRoose, at ¶ 2; Ex. 3 to Grupp Aff., at ¶ 3)

3. Kobrand holds a certificate of compliance ("COC") with the ABCC under M.G.L. c. 138, § 18B. (DeRoose Aff., at ¶ 3)

4. Joto is a supplier of alcoholic beverages with a place of business in New York, NY and for several years was a supplier/importer of premium sake products, namely each of the Brand Items. (Ex. 3 to Grupp Aff., at ¶¶ 2, 4)

5. The Brand Items are produced by various Japanese brewers (collectively, the "Brewers"). Between 2005-2012, Joto and each of the Brewers entered into Importation and Distribution Agreements relative to the Brand Items. (Ex. 2 to Motion at Answer No. 3; APA[1], at Kobrand 0054-0146, 0028) The Importation and Distribution Agreements were first amended in October 2016 and, with respect to certain other Brewers, again in January 2017. (APA, at Kobrand 0063-0162)

6. The Importation and Distribution Agreements each appointed Joto as the "sole and exclusive distributor, promoter, representative and marketer" of the Brand Items and provided that Joto "shall be responsible for distributing and arranging for the sale of the [Brand Items] to the trade and consumers in the [United States] and may appoint such distributors, sub-distributors and brokers for the Products in the [United States] as it deems appropriate." (Ex. 9 A-H to Grupp Aff.)

7. In late October and early November 2016, Joto obtained the consents from certain Brewers to assign the Importation and Distribution Agreements from Joto to Kobrand. (APA, at Kobrand 0063-0162; DeRoose Aff., at ¶ 6(d)). The consent letter, which was drafted in the form of a letter from the President of Joto, Henry Sidel, provides,

> Joto Sake has reached an agreement to be acquired by Kobrand Corporation. Kobrand will be hiring me as their

[1] Both Kobrand and Classic filed copies of the APA with their motions. Kobrand's copy is found at Exhibit A to DeRoose's Affidavit, which is Exhibit 1 to the Motion. Classic's copy is found at Exhibit 2 to Grupp's Affidavit, which is filed with the Cross-Motion. Kobrand's copy includes all of the APA's exhibits and attachments, and therefore, the Commission references that copy.

> Sake Portfolio Manager. Thus, there will be no change to our operations. I am kindly asking that you confirm your consent to this transfer. By signing below, you are agreeing to Joto Sake LLC transferring its Import Agreement with you to Kobrand Corporation. All of the terms of our Import Agreement would remain binding between you and Kobrand. I thank you for your cooperation and I look forward to continued success with you.

(APA, at Kobrand 0064)

8. In early December 2016, almost all of the Brewers of the Brand Items[2] appointed Kobrand as "the primary source" and "exclusive agent" for the Brand Items in the United States, giving Kobrand the authority to "approve brand labels, to appoint distributors, and to post prices in all states of the USA." (APA, at Kobrand 0054-0146; DeRoose Aff., at ¶ 6(d))

9. Kobrand and Joto entered into an Asset Purchase Agreement ("APA") which became effective on December 9, 2016 and closed on December 29, 2016. (APA, at Kobrand 0007; DeRoose Aff., at ¶¶ 4-5) Pursuant to the APA, Kobrand purchased Joto's "Purchased Assets," among other things, for $2,300,000. Id. Pursuant to the APA, the payment of the $2,300,000 was made partly in cash and partly over the course of five years (between 2018-2022). Those subsequent, partial payments were to increase or decrease depending on profitability of the Joto assigned agreements. (APA, at § 1(d))

10. "Purchased Assets" are defined in the APA to include the Inventory, Assumed Agreements, Intellectual Property, Licenses (only those transferrable to Kobrand), accounts receivable, and business records of Joto. Those terms are then defined in the APA as follows:
    a. Inventory: "all bottled sake products and all directly related packaging materials," as listed on Exhibit A to the APA;
    b. Assumed Agreements: "the agreements and contracts (and all associated rights thereunder) listed on . . . Exhibit B;"
    c. Intellectual Property: "the intellectual property assets listed . . . on Exhibit C;"
    d. Business: "all governmental authorizations and permits and all pending applications therefore or renewals thereof, in each case relating exclusively to [Joto's] sake/beverage business;"
    e. Licenses: licenses, "only to the extent transferable to Kobrand" as listed on Exhibit D;

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[2] There is no evidence before the Commission that the brewers of the Joto brand sakes or Eiko Fuji Brewing Co. appointed Kobrand as "the primary source" and "exclusive agent" for the Brand Items in the United States. (APA, at Kobrand 0054-0146) The brewers of the "Joto" brand sakes did not appoint Kobrand as the exclusive U.S. importer because they had no right to-- the Joto brand sakes are manufactured by certain Japanese brewers that have no ownership or intellectual property rights over the Joto brand sakes. (Ex. 2 to Motion, at 2-3; APA, at Kobrand 0067, 0157) Joto Sake LLC owned the Joto brand sakes but sold its rights to the brand to Kobrand as part of the Asset Purchase Agreement. (APA, at Kobrand 0007, 0026-0027, 0067)

f. A/R: "all accounts/receivables, the current amount of which as of 11/30/16, are listed in Exhibit E, and which shall be updated as of the Closing Date;" and
g. Business Records: "copies of all books and records exclusively related to the operations of the Business, including client and customer lists and records, referral sources, research and development reports and records, production reports and records, sake/beverage blend composition details and records; service and warranty records, equipment logs, operating guides and manuals, financial and accounting records, creative materials, advertising materials, promotional materials, studies reports, correspondence, and other similar documents and records, as listed in Exhibit F. . ."

(APA, at §1(a); DeRoose Aff., at ¶ 5)

11. Kobrand did not assume, purchase, or assign any of Joto's distributor agreements or arrangements with any of Joto's downstream customers, including Classic. (DeRoose Aff., at ¶ 6(a))

12. Pursuant to an Assignment and Assumption Agreement, dated December 29, 2016, which was made Exhibit G to the APA, Kobrand assumed from Joto the Importation and Distribution Agreements and letter agreements that Joto had with Japanese Brewers for the Brand Items (the "Assumed Agreements"). See id. at ¶¶ 6(b), (c); Ex. G to APA at Kobrand 0040-0043. None of the Assumed Agreements related to the selection of wholesalers, and the Assumed Agreements were the only contracts that Kobrand assumed of Joto's. See id.

13. Kobrand did not assume "any liability or obligation of [Joto], whether arising out of or relating to [Joto's] ownership or operation of the Business and the Purchased Assets prior to [December 29, 2016]," "except those liabilities initially arising after [December 9, 2016] with respect to the Assumed Agreements." (APA, at Kobrand 0007-8)

14. Joto retained all of its obligations and liabilities related to the Assumed Agreements, which arose or were incurred, or which were required to be performed, prior to December 9, 2016.[3] Id. at Kobrand 0040-41; 0007-8.

15. As of the closing, Joto no longer imported, distributed, sold, advertised, or supplied any wholesaler or distributors with the Brand Items, as Joto retained no ownership rights or interest in the Purchased Assets. (DeRoose Aff., at ¶ 6(h))

16. Joto has no ownership interest in Kobrand, and Kobrand has no ownership interest in Joto. (DeRoose Aff., at ¶ 8)

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[3] There appears to be a discrepancy between language in the APA and in the Assignment and Assumption Agreement as to when Kobrand took over liabilities and obligations related to the Assumed Agreements—the APA gives the date of December 9, 2016 (the effective date of the APA), and the Assignment and Assumption Agreement gives the date of December 29, 2016 (the effective date of the Assignment and Assumption Agreement). The discrepancy is not germane to the issue at hand in the instant matter, but nonetheless, the Commission cites here the December 9, 2016 date given that the Assignment and Assumption Agreement provides that where there is a discrepancy, the APA controls. (APA, at Kobrand 0007, 0041).

17. Kobrand exclusively has the right to select market, sell, and select sub-distributors and wholesalers for the Brand Items in the United States, without input from anyone, including Joto or the Japanese manufacturers. Id. at ¶ 6 (i).

18. As of the closing of the APA, Joto had approximately eighteen shareholders, one of whom was Joto's President, Henry Sidel. (Ex. 2 to Motion, at 9)

19. As part of the APA, Kobrand hired Sidel. (DeRoose Aff., at ¶ 10; APA, at Kobrand 0050, 0064) Kobrand was also authorized to hire other Joto employees, and it did hire one additional Joto employee, Ryan Mellinger. (DeRoose Aff., at ¶ 10)

20. Sidel is the General Manager of Kobrand's sake business and reports to DeRoose. His role is akin to a brand manager for the sake business. Id. at ¶ 11. Sidel "calls on some accounts [and] interfaces with the training of distributors." (Ex. 1 to Grupp Aff., at 20) He receives a salary and benefits as are provided to other Kobrand employees. (Ex. 2 to Grupp Aff., at Kobrand 0050) Sidel is not a shareholder of Kobrand. (Ex. 2 to Motion, at 9)

21. Mellinger is the Regional Manager at Kobrand for northeastern and north central United States. (DeRoose Aff., at ¶ 11)

22. Neither Sidel nor Mellinger have any input or authority with regard to the selection of downstream wholesalers. Id. at ¶ 12. In particular, Sidel was not involved in Kobrand's decision to use Horizon as the distributor of the Brand Items. (Ex. 1 to Grupp Aff., at 22)

23. Kobrand has other employees whose roles include the sake business, including: regional managers for other regions of the country; market managers; group managers; sales representatives; and marking and logistics staff members, some of whom report to Sidel and others who report to other Kobrand management employees. (DeRoose Aff., at ¶ 11)

24. Prior to acquiring the Brand Items, Kobrand had never previously marketed, imported, or otherwise distributed sake products. (Ex. 1 to Grupp Aff., at 11)

25. Since the APA, Kobrand has developed its sake business by expanding its sake product offerings to those beyond the Brand Items. (DeRoose Aff., at ¶ 11)

26. Before the APA was executed, Joto represented to Brewers that Joto was going to be acquired by Kobrand and that there would be no change to the operations. See supra ¶ 7; APA at Kobrand 0064, 0078.

27. However, given the change of Sidel's personal role from Joto to Kobrand, there were changes to the business operations after the APA. (Ex. 1 to Grupp Aff., at 34) There are three sake specialists who report to Sidel at Kobrand, and Sidel reports to DeRoose. Id. at 28; DeRoose Aff., at ¶ 11.

28. On January 25, 2017, Kobrand notified the ABCC that it was the new importer for the Brand Items. Id. at ¶ 13.

29. Kobrand appointed Horizon Beverage Company as the exclusive distributor for the Brand Items, effective January 1, 2017. Id. at ¶ 14; Ex. C to DeRoose Aff. The date of the

appointment letter is January 26, 2017. (Ex. C to DeRoose Aff.) In the letter, Kobrand referred to the Brand Items as the "Joto Sake brands." Id.

30. For each state, except one, Kobrand appointed the wholesalers with whom it does business for its other brands. That one exception, which was not in Massachusetts, was a wholesaler that was conflicted out because of its sale of other sake products. Id. at ¶ 12.

31. Classic filed its verified § 25E petition with the Commission on February 1, 2017 after Joto and Kobrand refused to fill purchase orders Classic had placed with them after January 1, 2017. (Ex. 3 to Grupp Aff., at ¶ 6)

32. Kobrand's first sale date of a shipment to Classic of the Brand Items was March 1, 2017 in response to the Commission's February 7, 2017 Ship Order. Kobrand made its first sale to Horizon of the Brand Items on April 10, 2017. Id. at ¶¶ 15, 18.

33. Kobrand's sales of the Brand Items to Classic and Horizon have been with its own COC. Id. at ¶ 16.

34. Since the APA took effect, Kobrand has held itself out as the "successor in interest to Joto Sake." (Ex. 7 to Grupp Aff.) Kobrand's President and CEO, Robert DeRoose, refers to Kobrand's sake division and portfolio of sake products as "Joto" and carries a business card that says "Joto." (Ex. 1 to Grupp Aff., at 26-27, 29)

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)). 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. United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014); see Lumber Mut. Ins. Co. v. Zoltek Corp., 419 Mass. 704, 707 (1995) (stating that "[t]he interpretation of a written contract . . . is a question of law, not of fact.").

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 Kobrand did not make regular sales of the Brand Items to Classic in the period of six months preceding its refusal to sell in January 2017. Therefore, the question is whether the particular facts in this case give rise to the imputation of Joto's § 25E obligations to Kobrand.

DISCUSSION

There is no basis for imputing Joto's § 25E obligations to Kobrand.

There is no dispute that there was no agency relationship between Joto and Kobrand and no attempt to circumvent § 25E. The issues raised by Classic are whether there was a continuing affiliation between Joto and Kobrand and whether there was an assignment of distribution rights so as to impute Joto's § 25E obligations to Kobrand. The Commission takes each of those issues in turn, as set forth below.

The parties agree that there is no genuine issue of material fact. The facts at issue primarily are based on the contracts entered into between Kobrand and Joto and each of them with the Brewers. 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. Consequently, disposition of this case by summary decision is appropriate.

Continuing affiliation:

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 v. Alcoholic Beverages Control Comm'n, No. 13-02229-C, 2014 WL 4082142, at *6 (Mass. Super. Ct. July 16, 2014). "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, 2014 WL 4082142, *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, 2014 WL 4082142, at *7. The Appeals Court has discussed the elements of joint venture:

> [t]he key requirement in finding [the] existence [of a joint venture] is an intent to associate. . . Factors indicating such an intent include an agreement among the participants for joint profits and a sharing of losses; a contribution of money, assets, talents, etc., to a common undertaking; a joint property interest in the subject matter of the venture; and a right to participate in the control of the venture.

Mass. Prop. Ins. Underwriting Ass'n v. Georgaklis, 77 Mass. App. Ct. 358, 361-362 (2010) (quoting Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 623-624 (1990)).

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, 2014 WL 4082142, at *6 n. 7.

In the instant case, the parties do not suggest that there was an agency relationship or joint venture between Joto and Kobrand, and the Commission agrees that there is no evidence of either. Joto has no ownership interest in Kobrand, and Kobrand has no ownership interest in Joto. (DeRoose

Aff., at ¶ 8) There is no evidence that Joto or Kobrand had any right to direct, manage, or control the operations of the other prior to the APA. Likewise, there is no evidence that following the APA, Joto had any involvement with the distribution of the Brand Items. Furthermore, none of the joint venture factors listed above exist in the present case.

Instead, Classic argues that a continuing affiliation is established, in part, through the way in which Kobrand held itself out as the successor to Joto. (Opposition, at 9-13) Classic points to the fact that before the APA, Joto informed its suppliers that it was going to be acquired by Kobrand and that there would be no change in the operations once Kobrand took over.[4] Following the APA, Kobrand referred to its sake division as Joto, and Kobrand's CEO carried a business card that said "Joto."[5] Also, Kobrand hired Joto's President, Henry Sidel, as the General Manager of its sake business and also hired one additional Joto employee, Ryan Mellinger, as the Regional Manager at Kobrand for northeastern and north central United States.

Classic argues that these facts evidence a de facto merger between Joto and Kobrand and consequently that there was an imputation of § 25E obligations to Kobrand under the doctrine of successor liability. (Opposition, at 11-12) Massachusetts follows traditional corporate law principles that when one corporation acquires the assets of another, liabilities of the seller are not imposed on the buyer, except where, "(1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a de facto merger or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor." Cargill, Inc. v. Beaver Coal & Oil Co., Inc., 424 Mass. 356, 359 (1997). In determining whether a de facto merger occurred, courts consider,

> whether (1) there is a continuation of the enterprise of the seller corporation so that there is continuity of management, personnel, physical location, assets, and general business operations; whether (2) there is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation, whether (3) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and whether (4) the purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Cargill, Inc., 424 Mass. at 359-360.

Here, the facts do not add up to a finding of a de facto merger between Joto and Sidel. First, there was no "continuity of management, personnel, physical location, assets, and general business operations." See id. While Sidel appears to have a significant role with Kobrand's sake line, he

[4] However, there were changes to the business operations after the APA, and Sidel's personal role changed from Joto to Kobrand. (Ex. 1 to Grupp Aff., at 34) There are three sake specialists who report to Sidel at Kobrand, and Sidel reports to DeRoose. Id. at 28; DeRoose Aff., at ¶ 11.

[5] Some of the Brand Items have the name "Joto" in them, as they were previously owned by Joto.

was one of only two employees hired from Joto by Kobrand. "[T]he fact that [Sidel] had an . . . affiliation with each of [Joto and Kobrand] will not, by any sort of transitive property, supply the connective tissue for an affiliation between [Joto and Kobrand]." See Beam Spirits & Wine, LLC v. Alcoholic Beverages Control Comm'n, No. 13-02229-C, 2014 WL 4082142, at *9 (Mass. Super. Ct. July 16, 2014). Kobrand has other employees, who were not formerly from Joto, whose roles include the sake business, namely: regional managers for other regions of the country; market managers; group managers; sales representatives; and marking and logistics staff members, some of whom report to Sidel and others who report to other Kobrand management employees. (DeRoose Aff., at ¶ 11) Furthermore, Joto's physical location is in New York, New York, while Kobrand's is in Purchase, New York. (Ex. 3 to Grupp Aff. at ¶¶ 2, 3) In terms of the assets and business operations, Joto's exclusive line of business was importing and supplying premium sake products. Id. at ¶ 4. Kobrand, on the other hand, imported and supplied a wide-range of premium alcoholic beverages and in acquiring the Brand Items, Kobrand expanded its business to sake products. (Ex. 1 to Grupp Aff., at 8-9, 11) In fact, since the APA, Kobrand has developed its sake business by expanding its sake product offerings to those beyond the Brand Items. (DeRoose Aff., at ¶ 11) Also, while a portion of the purchase price is being paid out over the course of five years (between 2018-2022) and increased or decreased depending on the profitability of the purchased business, the Commission is persuaded that this fact is not evidence of a de facto merger or continuing affiliation between Joto and Kobrand. (APA, at Kobrand 0008-0009); see American Paper Recycling Corp. v. IHC Corp., 707 F.Supp.2d 114 (1st Cir. 2010) (finding no de facto merger where company whose assets were purchased received a substantial sum of cash as well as a nominal interest in the shares of the purchasing company's parent as consideration for the asset purchase).

Second, there was no continuity of shareholders resulting from the APA. "In determining whether a de facto merger has occurred, courts pay particular attention to the continuation of management, officers, directors and shareholders." Cargill, Inc., 424 Mass. at 360. "[C]ontinuity of shareholders is one of the 'key requirements' for application of the de facto merger doctrine." American Paper Recycling Corp. v. IHC Corp., 707 F.Supp.2d 114, 121 (1st Cir. 2010) (citing Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984)). Joto had eighteen shareholders at the time of the signing of the APA, one of whom was Sidel. (Ex. 2 to Motion, at 9) None of Joto's shareholders overlap with Kobrand's shareholders. Id. Moreover, there is no evidence that there was an overlap in Joto's and Kobrand's officers and directors.

As to the third factor, there is no evidence that Joto has liquidated or dissolved.[6]

Lastly, the question is whether the purchasing corporation (Kobrand) assumed the obligations of the seller (Joto) ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. Cargill, Inc., 424 Mass. at 359-360. The APA is clear that Kobrand did not assume, "any liability or obligation of [Joto], whether arising out of or relating to [Joto's] ownership or operation of the Business and the Purchased Assets prior to the Closing Date," "except those liabilities initially arising after [December 9, 2016] with respect to the Assumed Agreements." (APA, at Kobrand 0007-8)

[6] Counsel suggested at the hearing that Joto is winding down, but there is no evidence before the Commission on that issue.

Classic cites 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) (the "Pine Ridge" case), but that case is distinguishable. In Pine Ridge, Seghesio sold its Brand Items to Crimson. 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. The Commission found 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 Kobrand only hired two of Joto's employees and there is no evidence that Joto otherwise retained an indefinite role in the management and operation of the production and sale of the Brand Items, and Kobrand did not use Joto's certificates of compliance. In Pine Ridge, the Seghesio family retained a "significant role" in the "management and operation of the licensed business." Pine Ridge, at 10. In contrast, here there is also no evidence that Joto and Kobrand have common stockholders, officers, or directors.

The Commission concludes that there was not a de facto merger between Joto and Kobrand and no imputation of § 25E obligations to Kobrand under the doctrine of successor liability. There is no other evidence upon which to conclude that a continuing affiliation exists in this case.

Assignment

Relying on the case of Heublein, Inc. v. Alcoholic Beverages Control Comm'n, 30 Mass. App. Ct. 611, 616 (1991), Classic argues that Joto's § 25E obligations should be imputed to Kobrand because Joto assigned its distribution rights to Kobrand. Kobrand responds arguing that Heublein is distinguishable and that more recent and relevant cases lead to a finding of no imputation on the basis of assignment. The Commission agrees with Kobrand.

In Heublein, Inc. v. Alcoholic Beverages Control Comm'n, 30 Mass. App. Ct. 611, 616 (1991), several wholesalers, which for years had purchased certain liquor products from Austin-Nichols & Co., Inc., complained that Heublein, Inc., the successor importer, refused to sell the products to them. In May 1985, Heublein acquired from Austin-Nichols' parent corporation the sole distribution rights to the products, and a new joint venture owned by both Austin-Nichols and Heublein became the producer of the subject liquor. Three months later, Heublein notified the subject wholesalers that it would not sell the products to them. Heublein, Inc., 30 Mass. App. Ct. at 615. The Commission determined that Heublein had also acquired the § 25E obligations, and the Commission therefore ordered Heublein to make sales in the regular course of business to the petitioning wholesalers. See id. at 612-613; Kelly-Dietrich, Inc. v. Austin-Nichols Co., Inc. (ABCC Decision April 15, 1986). On appeal, the Superior Court affirmed, and then the Appeals Court also affirmed. The Appeals Court looked to the fact that Heublein held itself out as having reached an agreement to act as the sole sales agent for the Austin-Nichols products and also that Heublein described the transaction as an "assignment" of the products to Heublein. See Heublein, Inc., 30 Mass. App. Ct. at 615-616.

The facts in Heublein are distinguishable from those in the present case because in Heublein, there was a joint venture and an admitted assignment.[7] In the present case, there was no joint venture. Additionally, the facts in the instant case are in line with more recent case law, as set forth below, leading to a conclusion that there was no contractual assignment of the § 25E obligations.

In L. Knife & Son, Inc. v. Alcoholic Beverages Control Comm'n, 81 Mass. App. Ct. 1106 (2001) (issued pursuant to Rule 1:28), a manufacturer of Mexican beer, FEMSA, granted the exclusive rights to distribute its brands in the United States to Wisdom Import Sales Company, LLC ("Wisdom"). L. Knife & Son, Inc., 81 Mass. App. Ct. at *1. FEMSA and Wisdom entered into a joint venture with Canadian brewer Labatt. Id. Later, Wisdom transferred its distribution rights to Labatt USA, LLC ("Labatt USA") in exchange for a membership interest in the joint venture. Id. Labatt USA sold the brands to the plaintiffs. Id. When the joint venture was later dissolved, Labatt USA assigned its right to distribute the brands back to Wisdom. Id. Wisdom then assigned the exclusive right to distribute the brands to Heineken, who would not sell to the plaintiff wholesalers.[8] Id. In finding that there was no imputation of § 25E obligations on the basis of assignment, the appeals court stated that,

> [a]lthough pursuant to the . . . assignment and assumption agreement, Wisdom and the Mexican manufacturers agreed to assume all of Labatt USA's "liabilities and obligations," the agreement covered liabilities "arising or accruing" on or after the closing date. Labatt USA's § 25E obligations to the wholesalers arose before that date. Moreover, the § 25E "obligation," strictly speaking a statutory limitation on wholesaler termination, was not the type of liability subject to general contractual assumption. Because Wisdom and the Mexican manufacturers never assumed the § 25E obligations by contract, it follows that Heineken, as assignee of the contract rights and duties, incurred no liability to the wholesalers on that basis.

Id. at *3.

In the present case, Kobrand assumed from Joto the Assumed Agreements-- the Importation and Distribution Agreements and letter agreements that Joto had with Japanese Brewers for the Brand Items. (DeRoose Aff., at ¶¶ 6(b), (c); Ex. G to APA at Kobrand 0040-0043) As in L. Knife, none

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[7] Note that the Commission recently relied upon Heublein, Inc. v. Alcoholic Beverages Control Comm'n, 30 Mass. App. Ct. 611, 616 (1991) in finding an imputation of § 25E obligations on the basis of assignment. See Ruby Wines, Inc. v. Treasury Wine Estates and Bronco Wine Co., 25E-1336 (ABCC Decision, Aug. 2, 2018). However, in that case, the subject asset purchase agreement specifically obligated the successor producer/supplier to use the former producer/supplier's Massachusetts wholesaler for a period of two years. See id.

[8] The agreement between Wisdom and Heineken gave Heineken the "sole right and exclusive discretion in decisions relating to the selection, appointment and/or termination of wholesalers,' except that termination of any of the top thirty wholesalers by volume requires Wisdom's prior written consent." L. Knife & Son, Inc. v. Alcoholic Beverages Control Comm'n, No. 09-1803-D, 2010 WL 5553349, at *2 (Mass. Super. Aug. 12, 2010).

of the Assumed Agreements dictate the selection of wholesalers. In fact, the Importation and Distribution Agreements give the importer the authority to "appoint such distributors, sub-distributors and brokers for the Products in the [United States] as it deems appropriate." (Ex. 9 A-H to Grupp Aff.)

Likewise, the limitation of liability provision in the instant case is similar to that in L. Knife. Here, Kobrand did not assume "any liability or obligation of [Joto], whether arising out of or relating to [Joto's] ownership or operation of the Business and the Purchased Assets prior to [December 29, 2016]," "except those liabilities initially arising after [December 9, 2016] with respect to the Assumed Agreements." (APA, at Kobrand 0007-8) Joto retained all of its obligations and liabilities related to the Assumed Agreements, which arose or were incurred, or which were required to be performed, prior to December 9, 2016. Id. at Kobrand 0040-41; 0007-8.

In sum, here there was no specific contractual assignment of the § 25E obligations in the APA, and consequently, Joto's § 25E obligations cannot be imputed to Kobrand under a theory of assignment. The Commission finds that there was no assignment of distribution rights or obligations so as to impute § 25E.

CONCLUSION

The Commission concludes that Kobrand did not make, "regular sales of [the Brand Items] during a period of six months preceding [the January 2017] refusal to sell," and there is no basis for imputing Joto's § 25E obligations to Kobrand. See G. L. c. 138, § 25E.

Kobrand'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 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 _____

Kathleen McNally, Commissioner _____

Dated: January 24, 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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