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Chairman

NO. 25E-1353

BOSTON WINE CO., LTD. D/B/A WINEBOW BOSTON
Petitioner,

v.

PASTERNAK WINE IMPORTS, LLC and
ESPRIT DU VIN FINE WINE MERCHANTS
Respondents.
HEARD: 8/21/2018

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

Boston Wine Co., Ltd. d/b/a Winebow Boston ("Winebow") is a Massachusetts wholesaler aggrieved at the refusal of Pasternak Wine Imports, LLC ("Pasternak") and Esprit Du Vin Fine Wine Merchants ("Esprit"), to ship Thomas George Wines and Noble Tree Wines brands (the "Brand Items") to Winebow.

On March 13, 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 Pasternak and Esprit to makes sales of the Brand Items to Winebow pending the Commission's determination of the petition on the merits (the "Ship Order").

On June 29, 2018, Esprit filed the instant Motion for Summary Decision (the "Motion") regarding Winebow's § 25E Petition arguing that under § 25E and applicable case law, Esprit should not be required to sell the Brand Items to Winebow, specifically because Esprit, who never made sales to Winebow prior to the Ship Order, is not an agent of the predecessor supplier Pasternak; 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. Filed along with the Motion was the Affidavit of Jeff Popkin, a redacted version of the APA, and a January 9, 2017 letter from the supplier of the Brand Items appointing Esprit.

On July 30, 2018, Winebow filed an Opposition to the Motion (the "Opposition") asserting that Pasternak's § 25E obligations should be imputed to Esprit and the Commission does not have the authority to dispose of this case by summary decision. In support of its Opposition, Winebow attached as an exhibit its verified Petition, which initiated this matter. A few days later, on August

3, 2018, Winebow filed the Affidavit of Tony Morello along with purchase orders and sales documents.

On August 15, 2018, Esprit filed its Reply along with two decisions and the Affidavit of Frank Vella.[1]

After a hearing and 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 all three parties.

FINDINGS OF FACT

1. Winebow is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18 with a place of business in Somerville, Massachusetts. (Ex. A to Opposition, at ¶ 1; Commission Files)

2. At all relevant times, Pasternak was in the business of importing, marketing, promoting, selling, and distributing wine, and marketing, promoting, selling, and distributing other alcoholic beverages in the United States. (Ex. A to Affidavit of Jeff Popkin ("Popkin Aff."), at Esprit 0010)

3. For years, Pasternak sold the Brand Items to wholesaler Winebow. (Ex. A to Opposition, at ¶¶ 2, 4)

4. The Brand Items are produced by Westside Winery, LLC ("Westside Winery"). (Ex. A to Opposition, at ¶ 4; Popkin Aff., at ¶ 4)

5. Esprit is in the business of importing, marketing, promoting, selling, and distributing luxury wine products from wine regions worldwide. (Popkin Aff., at ¶ 2)

6. Esprit holds various Massachusetts Certificates of Compliance ("CoCs"). (Popkin Aff., at ¶ 3)

7. Pursuant to the terms of a written asset purchase agreement ("APA") dated December 7, 2016, and effective as of December 30, 2016, between Esprit as buyer and Pasternak as seller, Esprit purchased from Pasternak, among other things, all of Pasternak's right, title,

[1] Neither party challenged the timing of the other party's affidavits that were submitted after Winebow filed its Opposition. Both the affidavits of Tony Morello and Frank Vella were filed before the hearing on the Motion. Winebow suggested at the hearing that Frank Vella is not an Esprit employee and therefore not qualified. However, Winebow did not seek to strike Vella's affidavit, and Vella states under the pains and penalties of perjury that he is, "familiar with and [has] personal knowledge of or [has] been provided information believed to be true regarding the sales of the Brand Items following the December 30, 2016 closing of the Asset Purchase Agreement that is the subject of this case." (Vella Aff. at ¶ 3) Moreover, the information provided in Vella's affidavit is not contested by Winebow. The Commission accepts the affidavits of Morello and Vella.

and interest in and to various wine items, including the Brand Items, free and clear of any and all encumbrances. (Popkin Aff., at ¶ 6 (a); Ex. A to Popkin Aff., at Esprit 0019-0021).

8. Prior to the APA, Pasternak had importation and/or distribution relationships with twelve suppliers, one of which was Westside Winery. (Popkin Aff., at ¶ 6(b); Ex. A to Popkin Aff., at Esprit 0010)

9. In accordance with the APA, Pasternak was required to inform its suppliers of the APA and that the suppliers would need to find replacement importers and/or distributors by April 1, 2017. (Popkin Aff., at ¶ 6(c); Ex. A to Popkin Aff., at Esprit 0010).

10. Suppliers who entered into an import and/or distribution agreement with Esprit became "Qualified" under the APA. (Popkin Aff., at ¶ 6(e); Exhibit A to Motion, at Esprit 0010, 0016) As for any suppliers not Qualified as of December 30, 2016, Esprit and Pasternak were to continue to try to persuade them to become Qualified, even after the closing. (Popkin Aff., at ¶ 6(f); Exhibit A to Popkin Aff., at Esprit 0010, 0020)

11. Following the APA closing date, Esprit and Pasternak held additional "Subsequent Closings" as more suppliers became Qualified. This allowed Esprit more time post-closing to negotiate importation and distribution deals with former Pasternak suppliers. In those Subsequent Closings, Esprit purchased Pasternak's inventory and certain other assets with respect to such newly-Qualified suppliers. (Popkin Aff., at ¶ 6(g); Ex. A to Popkin Aff., at Esprit 0010, 0042-0043)

12. The only contracts that Esprit assumed were purchase orders relating to Goods On Order Or In Transit. (Ex. A to Popkin Aff. at Esprit 0189) Such contracts were not related to distributors or distribution rights. See id. Goods On Order Or In Transit is defined in the APA as, "all wine Inventory ordered by [Pasternak] in the ordinary course of business prior to the Closing Date but not yet delivered to Seller as of the Closing Date that is identified on Schedule 3.07(f) as Eligible Inventory." (Ex. A to Popkin Aff. at Esprit 0014)

13. On January 9, 2017, about a week after the APA became effective, Westside Winery, by way of letter to Esprit, appointed Esprit as the exclusive importer of the Brand Items in the United States, making Westside Winery Qualified. (Popkin Aff., at ¶ 13; Ex. B to Popkin Aff.)

14. Section 5.13 of the APA provides that with regard to specific brands (which are elsewhere defined to include, among others, the Thomas George brand wines) that were not Qualified as of the date the APA was signed, Esprit would "operate, administer and manage, on behalf of [Pasternak], the Business insofar as it pertains to the Transition Brands." Section 5.13 continues to state that, "[Pasternak] shall sell goods relating to such Transition Brands exclusively to [Esprit] for resale by [Esprit] on behalf of [Pasternak]" and that "[Esprit] shall resell goods relating to Transition Brands at the Resale Price and shall be entitled to retain the difference between the Resale Price and Seller Cost of the resold goods as compensation for the Transition Operations that [Esprit] conducts on behalf of [Pasternak]." (Popkin Aff. at Ex. A, § 5.13, Esprit 0037, 0038) The Transition Brands are defined as the core brands (one of which includes the Thomas George brand wines) that

had not become Qualified at the completion of the closing of the APA. (Ex. A to Popkin Aff., at Esprit 0012, 0017, 0054)

15. No arrangement or agreements between Pasternak and any of its distributors or wholesalers, including Winebow, were purchased by or assigned to Esprit. (Popkin Aff., at ¶ 7(a)) Pasternak did not assign its sales and distribution agreement with Westside Winery, the supplier of the Brand Items, to Esprit. See id. at ¶ 7(b).

16. As of the effective date of the APA, or after any applicable Subsequent Closing, Pasternak no longer imported, distributed, sold, advertised, or supplied any wholesalers or distributors with the Brand Items. (Popkin Aff., at ¶ 9)

17. Esprit notified Winebow in March 2017 that the Brand Items would no longer be sold to Winebow. (Popkin Aff., at ¶ 14)

18. The first time Esprit sold the Brand Items to Winebow was in March 2017, pursuant to the Commission's Ship Order. (Vella Aff., at ¶ 7)

19. There is no evidence that Pasternak sold the Brand Items to Winebow after December 2016. (Morello Aff. at Ex. 2)

20. Purchase orders and invoices reflect that Winebow ordered the Brand Items in October 2016 through March 2017 and that Pasternak filled the orders that were made in October, November, and December 2016, while Esprit began filling orders in March 2017. (Ex. 1 & 2 to Morello Aff.)

21. Pasternak and Esprit have never had any ownership interest in each other. (Popkin Aff., at ¶ 11)

22. Pasternak renewed its CoC that pertains to the Brand Items (License #: CC-LIC-024223; Record #: 2017-000048-CC-REN) for 2017, but that CoC pertained not only to the Brand Items but also to numerous other brands that are not a subject of this case. (Commission File)

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 Heublien, 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 Esprit did not make regular sales of the Brand Items to Winebow in the period of six months preceding the refusal to sell date of March 2017. Therefore, the question is whether the particular facts in this case give rise to the imputation of Pasternak's § 25E obligations to Esprit.

DISCUSSION

The evidence

As the moving party, the initial burden on summary decision is Esprit's. See Kourouvacilis, 410 Mass. at 716. Esprit may meet its burden by showing that Winebow has no reasonable expectation of producing evidence on an essential element of its case. See id. Esprit filed the affidavits of Popkin and Vella as well as the APA, albeit in redacted form. The Commission has no reason to doubt the facts as presented in the affidavits. Winebow presented the affidavit of Tony Morello, Winebow's sole director, who attached and verified purchase orders and invoices related to the Brand Items, which do not call into question the facts as set forth by Popkin and Vella. Winebow also attached its verified Petition as an exhibit, but while claims in a verified complaint "are ordinarily considered equivalent to sworn evidence," a plaintiff may be required "to go beyond the pleadings, that is, to utilize affidavits, answers, or admissions in the hunt for genuine material factual issues." See Cataldo Ambulance Service, Inc. v. City of Chelsea, No. 954406, 1996 WL

1185091, at *2 (Mass. Super. Ct. Dec. 5, 1996) (denying plaintiff's cross motion for summary judgment).

With regard to the APA that Esprit attached to the Motion, Winebow argues that there are substantial redactions in it and that the redactions present a genuine issue of material fact. Winebow fails to explain how the redacted version of the APA presents a genuine issue of material fact or counter the redacted version with a less redacted version. Esprit responds that it filed a redacted version of the APA because the parties to this case never entered into a confidentiality agreement.[2] (Popkin Aff., at n.1) Indeed, Winebow never sought a copy of the APA from Esprit. As the Superior Court recently stated in a similar case involving Winebow in similar procedural circumstances, "[t]he problem, however, is that Winebow never moved to compel production of an unredacted agreement, sought a protective agreement that would have allowed disclosure of the missing information, or moved to strike the affidavit or redacted contract. A motion to strike is required, if the opposing party challenges the admissibility of the proponent's affidavit at the summary judgment stage. . . Filing a timely motion is not just a technicality; it allows the time and opportunity for the moving party to address the problem." Boston Wine Co., Ltd. d/b/a Winebow Boston v. Alcoholic Beverages Control Comms'n, No. 18-567-D, at 7-8 (Mass. Super. Ct. Mar. 26, 2018). The same issues exist in the instant matter. Here, as in Winebow's March 2018 Superior Court case, there is no evidence that the "non-disclosure ... gives rise to an inference of cover-up, [and therefore,] the absence of evidence through redaction does not count as evidence in favor of the petitioner . . ." See id. at 9. Consequently, the Commission relies on the facts as presented by Esprit. The Popkin and Vella affidavits and the APA meet Esprit's initial burden on summary decision by showing that Winebow, "has no reasonable expectation of proving [its] case." Kourouvacilis, 410 Mass. at 716.

The burden then shifts to Winebow to advance specific facts that establish a genuine issue for trial. See id. The documentation attached to Morello's affidavit shows that Winebow ordered the Brand Items in October 2016 through March 2017 and that Pasternak filled the orders that were made in October, November, and December 2016, while Esprit began filling orders in March 2017. (Ex. 1 & 2 to Morello Aff.) The sales documents do not establish a genuine issue for trial. Consequently, Winebow's failure to prove an essential element of its case, "renders all other facts immaterial" and mandates summary decision in favor of Esprit. See Kourouvacilis, 410 Mass. at 711. Nonetheless, the Commission explains as follows why substantively there is no basis for imputing Pasternak's § 25E obligations to Esprit. Contrary to Winebow's contentions, (1) there was no joint venture/agency relationship between Pasternak and Esprit, (2) Pasternak never assigned its distribution rights to Esprit, and (3) there is no evidence that Esprit began selling the Brand Items for the specific purpose of circumventing § 25E.

[2] Winebow never served discovery in this matter, and therefore, there was no impetus for the parties to enter into a confidentiality agreement, which parties to § 25E cases often do.

There is no basis for imputing Pasternak's § 25E obligations to Esprit.

Joint venture/agency/continuing affiliation

Winebow asserts that § 5.13 of the APA evidences a joint venture and agency relationship between Pasternak and Esprit and therefore that § 25E obligations should be imputed to Esprit.[3] See Opposition, at 7-11. Section 5.13 of the APA provides, in summary, that with regard to specific brands (which are referred to as the "Transition Brands" and elsewhere defined to include, among others, the Thomas George brand wines) that were not Qualified as of the date the APA was signed, Esprit would "operate, administer and manage, on behalf of [Pasternak], the Business insofar as it pertains to the Transition Brands." Section 5.13 continues to state that, "[Pasternak] shall sell goods relating to such Transition Brands exclusively to [Esprit] for resale by [Esprit] on behalf of [Pasternak]" and that "[Esprit] shall resell goods relating to Transition Brands at the Resale Price and shall be entitled to retain the difference between the Resale Price and Seller Cost of the resold goods as compensation for the Transition Operations that [Esprit] conducts on behalf of [Pasternak]." (Popkin Aff. at Ex. A, § 5.13) Esprit argues that § 5.13 is inapplicable to the Brand Items and that in any event, there was no joint venture between Pasternak and Esprit because neither Esprit nor Pasternak sold the Brand Items to Winebow between the time of the APA's closing date (December 30, 2016) and March 15, 2017, when Esprit fulfilled an order to Winebow in response to the Commission's Ship Order. See Reply, at 5-6; Vella Aff., at 7, 10.

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

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[3] Winebow argues that the Commission should apply New York law because the APA contains a New York choice of law provision. (Opposition, at 8-10; Ex. A to Popkin Aff., at § 9.10, Esprit 0051). Consequently, Winebow defines "joint venture" and "agency" under New York law. The subject terms, "joint venture" and "agency," are legal principles that are repeatedly considered in § 25E cases in determining whether the obligations of the former supplier/distributor should be imputed to the new supplier/distributor. While the Commission disagrees with Winebow that the Commission should automatically rely upon New York law in defining these terms, the Commission notes that "courts will make a choice-of-law determination only when there is an actual conflict of laws and where application of the differing rules would lead to varying results. Thus, if there is no conflict . . ., there is no need to choose. Similarly, where there is a distinction in respect of a particular rule, but that distinction will have no effect on the result, there is no need to choose." Donald J. Savery, et al, 46 Mass. Prac., Federal Civil Practice § 8:4 (2d ed., Dec. 2017). Here, there is no conflict between the Massachusetts and New York definitions of "joint venture" and "agency," and given that this case involves the application of a Massachusetts statute, the Commission cites Massachusetts law applying that statute to the facts at hand. Notably, the same provision of the APA which states that the APA "shall be governed by, and construed and enforced in accordance with" New York law also states that "[a]ll actions, claims and disputes arising out of or relating to this Agreement shall be heard and determined by the Commercial Division of the Supreme Court in Nassau County, New York or a federal court in Nassau County, New York . . ." (Ex. A to Popkin Aff., at § 9.10, Esprit 0051) Winebow seeks enforcement of the first provision (applying New York law) while disregarding the second (having the case heard in New York). Certainly, the statute is clear that the ABCC has jurisdiction over § 25E matters at the outset. M.G.L. c. 138, § 25E.

(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)).[4]

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 APA establishes that following the effective date (December 30, 2016), Pasternak and Esprit would work together to try to get Pasternak's suppliers of various brands to contract with Esprit. (Popkin Aff., at ¶ 6(f); Exhibit A to Popkin Aff., at Esprit 0010, 0020) With regard to the Brand Items, Esprit contracted with Westside Winery about a week after the effective

[4] See supra n.3 and compare to New York joint venture law as summarized in the Opposition at 8-9.

date of the APA, becoming the exclusive importer of the Brand Items in the United States. (Popkin Aff., at ¶ 13; Ex. B to Popkin Aff.) There is no evidence that Pasternak actually took any steps to assist Esprit in becoming appointed by Westside Winery as the new exclusive importer in the United States. Additionally, although Winebow sent purchase orders to Pasternak and Esprit after December 30, 2016, there is no evidence that Pasternak or Esprit filled those orders, until Esprit, acting under the Ship Order, sent the Brand Items to Winebow on March 15, 2017. (Morello Aff. at Ex. 1 & 2) Consequently, it cannot be said that with regard to the Brand Items, that Pasternak and Esprit participated in a joint venture, as there is no evidence that they shared in profits/losses, contributed to a common undertaking, had a joint property interest, or that Pasternak controlled the Brand Items after the APA took effect. See Mass. Prop. Ins. Underwriting Ass'n, 77 Mass. App. Ct. at 361-362. Likewise, Pasternak's and Esprit's relationship and agreement with regard to the transition of *other* suppliers and *other* brands did not create an agency relationship that would cause imputation of § 25E with regard to the Brand Items. 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"); Beam Spirits & Wine, LLC, 2014 WL 4082142, at *6 n. 7 ("mere contractual 'connections' or business 'dealings' will fall short of the kind of 'affiliation' required for imputation purposes."); Charles E. Gilman & Sons, Inc. v. Alcoholic Beverages Control Comm'n, 61 Mass. App. Ct. 916 (2004) (certain transitional services between buyer and seller for an interim period of time following an arms-length agreement may not create an imposition of § 25E).

Assignment

The Commission agrees with Esprit that Pasternak did not assign any of its distribution rights to Esprit. See Heublein, Inc. v. Alcoholic Beverages Control Comms'n, 30 Mass. App. Ct. 611, 616 (1991) (where the former supplier assigned its distribution rights to a new supplier, new supplier was found to have assumed the former supplier's § 25E obligations). In the present case, the only contracts that Esprit assumed were purchase orders relating to Goods On Order Or In Transit. (Ex. A to Popkin Aff. at Esprit 0189) Such contracts were not related to distributors or distribution rights. See id. Goods On Order Or In Transit is defined in the APA as, "all wine Inventory ordered by [Pasternak] in the ordinary course of business prior to the Closing Date but not yet delivered to Seller as of the Closing Date that is identified on Schedule 3.07(f) as Eligible Inventory." (Ex. A to Popkin Aff. at Esprit 0014) Thus, this relates to inventory that Pasternak had purchased from its suppliers but had not yet received from them prior to the signing of the APA. The APA provides that Esprit would assume these items from Pasternak, once received, and would pay for them. In any event, the Goods On Order Or In Transit provision does not relate to assignment of distribution to wholesalers (which would likely impute § 25E obligations) but instead relates to the purchase by Esprit of items Pasternak ordered, but had not yet received, from its suppliers. Consequently, the Commission finds that there was no assignment of distribution rights or obligations so as to impute § 25E.

Intent to circumvent

There is no evidence that Pasternak intended to circumvent § 25E by entering into the APA with Esprit. Winebow argues that because, in its opinion, Esprit and Pasternak participated in a joint venture or agency relationship, there must have been an intent to circumvent § 25E. Furthermore, Winebow states that Esprit has not offered proof that it did not intend to circumvent § 25E.

Additionally, Winebow points to the fact that in 2017, Pasternak continued to hold CoCs, enabling it to continue to ship into Massachusetts. (Opposition, at 13-14) Winebow states that, "[i]t is certainly conceivable that Pasternak and Esprit engineered the transition of the Brands to Esprit in order to circumvent its obligations to sell those Brands to Winebow and instead will work with other wholesalers, in violation of the protections offered under § 25E." (Opposition, at 14)

Winebow's first two arguments are not based on facts, which are necessary to defeat a motion for summary decision. "Speculation and surmise, even when coupled with effervescent optimism that something definite will materialize further down the line, are impuissant in the face of a properly documented summary judgment motion." Roche v. John Hancock Mutual Life Ins. Co., 81 F.3d 249, 253 (1st Cir. 1996); see Gencarelli v. Comm. of Mass., No. WOCV200801793D, 2012 WL 1994733, at *2 (Mass. Super. Ct. March 20, 2012) ("[u]nsubstantiated conjecture is insufficient to defeat summary judgment" (citing Glidden v. Maggio, 430 Mass. 694, 697 (2000)). Likewise, it is not Esprit's burden to prove a negative.

With regard to Winbow's argument that Pasternak's 2017 CoCs evidence Pasternak's intent to continue to sell inside Massachusetts, there is no evidence of an intent to circumvent § 25E. The Commission has reviewed Pasternak's CoC renewals for 2017, and the CoC that pertains to the Brand Items (License #: CC-LIC-024223; Record #: 2017-000048-CC-REN) was also for numerous other brands that are not the subject of this case. (Commission File) There is no evidence to suggest that Pasternak renewed that CoC for 2017 for the purpose of selling the Brand Items as opposed to the other items listed in the price posting.

Winebow has not met its burden of showing that there is a genuine issue for trial on the question of whether there was an intent to circumvent § 25E. Moreover, contrary to Winebow's assertions, the question of whether there was an intent to circumvent § 25E is appropriate for motions for summary decision. The Commission regularly determines on motions for summary decision whether there has been an intent to circumvent § 25E, and the courts often consider this issue on appeal. See Beam Spirits & Wine, LLC v. Alcoholic Beverages Control Comm'n, No. SUCV201302229C, 2014 WL 7506345, at *9-10 (Mass. Super. Ct. Aug., 18, 2014) (reversing Commission's order on motion for summary decision which had found an intent to circumvent § 25E).

Commission's authority to dispose of § 25E cases by summary decision:

In addition to arguing that Pasternak's § 25E obligations should be imputed to Esprit, Winebow, in opposing the Motion, argues that it would be procedural error to dispose of this case by motion because the Commission did not contemplate such disposition in any of its prior procedural orders in this case, including the Ship Order. Winebow states that it never consented to disposing of the case by summary decision and that the Commission should permit Winebow to present its side of the story at a full hearing on the merits.

The Informal Fair Hearing Rules do allow for motions, and Commission precedent is clear that the Commission will contemplate motions for summary decision in § 25E cases. See supra, at 5. Indeed, § 25E cases regularly are disposed of by summary decision. As the Superior Court recently acknowledged,

> [n]othing in [the] language [of § 25E] mentions, let alone requires, an evidentiary hearing. A motion for summary decision under 801 Code Mass. Regs. 1.01(7)(h) is a perfectly lawful means to resolve an administrative matter that presents no disputed facts. The word "hearing" itself does not preclude holding a motion hearing, as opposed to an evidentiary one. Indeed, Mass. R. Civ. P. 56(c) contemplates a "hearing," but certainly does not require an evidentiary hearing, where the whole point is to determine whether a trial is warranted. The ABCC had every right to proceed in the same way, by conducting a motion hearing, rather than an unnecessary evidentiary proceeding.

Boston Wine Co., Ltd. d/b/a Winebow Boston v. Alcoholic Beverages Control Comm'n, No. 18-567-D, at 6-7 (Mass. Super. Ct. Mar. 26, 2018). The Commission concludes that it has the authority to dispose of § 25E cases by means of summary decision and that the facts of this particular case lend themselves to such a disposition.

CONCLUSION

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

Esprit's Motion for Summary Decision is **ALLOWED**.

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: October 25, 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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cc: William A. Kelley, Esq. via email
Mary O'Neal, Esq. via email
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