



The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

NO. 25E-1281

UNITED LIQUORS, LLC

v.

BEAM GLOBAL SPIRITS & WINE, INC.

HEARD: 05/02/2012

MEMORANDUM AND ORDER
ON RESPONDENT'S MOTION FOR SUMMARY DECISION
REGARDING APPLICATION FOR RELIEF PURSUANT TO G.L. c. 138 §25E

This was a hearing before the Alcoholic Beverages Control Commission (Commission) on the Respondent's Motion for Summary Decision filed by Beam Global Spirits & Wine, Inc. (hereinafter "the Supplier" or "the Respondent" or "BEAM") in an action filed by United Liquors, LLC (hereinafter "the Applicant" or "the Petitioner" or "UNITED") seeking relief under M.G.L. Ch. 138 §25E.

History of the Case

On March 18, 2011, BEAM notified UNITED in writing that BEAM had "acquired the Skinny Girl Cocktail brand and business." BEAM went on to say that, Skinny Girl Cocktails, LLC ("SGC") had advised BEAM that UNITED had been representing the SGC brand as part of SGC's distribution network. BEAM subsequently informed UNITED that BEAM would no longer sell "Skinny Girl Cocktails" products to UNITED.

On April 1, 2011, the Petitioner who is a licensed wholesaler/importer, filed an application for relief (Application) under G.L. c. 138, §25E ("§25E") against the Respondent. The Application requested that the Commission order BEAM to continue making sales of Skinny Girl prepared Margaritas (the "Margaritas") and/or Skinny Girl brand ready to drink cocktails (the "Skinny Girl Brands"), to the Petitioner. These are alcoholic beverages brand items within the meaning of §25E.

On or about April 7, 2011, the Commission issued a Notice of Filing of M.G.L. c. 138, §25E Petition and Pre-Hearing Order requiring the Respondent to continue to make sales of the "Skinny Girl Margarita" to Petitioner in the regular course, pending determination of the matter

on the merits, as mandated by M.G.L. c. 138 §25E. On February 2, 2012, the Respondent filed a Motion for Summary Decision, a Memorandum in Support of Motion for Summary Decision and An Affidavit in Support of its Motion for Summary Decision. Pursuant to its order, the Commission considers this matter under the Informal Rules of Adjudicatory Procedure.¹

On March 28, 2012², the Petitioners filed an Opposition to BEAM's Motion for Summary Decision and an Affidavit Authenticating Materials Supporting UNITED's Opposition to BEAM's Motion for Summary Decision. On May 2, 2012, the Commission held a hearing regarding the Motion for Summary Decision.

The parties agree that the alcoholic beverages at issue are the same product that UNITED purchased from BEAM's predecessor well in excess of the required six month period under §25E. Further, there is no dispute that BEAM has sold the Margaritas to UNITED pursuant to a Commission Order. Therefore, BEAM has not created obligations under M.G.L. c. 138, §25E to UNITED by simply complying with the Commission's Order.

Thus, the question presented is whether, based on these facts, that the Commission can order BEAM under M.G.L. c. 138, §25E to sell the Margaritas and Skinny Girl Brand Items to UNITED.

Based on the evidence presented, the Commission makes the following findings of fact and rulings of law.

FACTS

1. Bethenny Frankel created the Margaritas sometime before September 2009.
2. Ms. Frankel has been identified as a renowned natural foods chef, author of the New York Times bestseller, *Naturally Thin (Unleash Your Skinnygirl and Free Yourself From a Lifetime of Dieting)*, author of a second book released on or about December 2009, *The Skinnygirl Dish*, and a star of a television reality series.
3. Ms. Frankel created her own recipe for a margarita during the first season of the television reality show in which she was one of the stars. Ms. Frankel's recipe for her creation was the subject of many inquiries as viewers and other inquiring minds wanted to know the recipe for Ms. Frankel's "Skinnygirl Margarita."
4. Ms. Frankel recognized the business opportunity presented by a low-calorie, all-natural, prepared margarita for people who are concerned about calories and ingredients but still want to consume a cocktail. Ms. Frankel began shopping her creation to distributors.

¹ The Respondent indicated that this motion was filed pursuant to the applicable Formal Rules of Adjudicatory Procedure promulgated at 8.01 C.M.R. 1.00, et seq.,. These rules do not apply to this, or any other § 25E proceeding before the Commission. In the *Notice of Filing of M.G.L. c. 138, § 25E Petition and Pre-hearing Order* dated April 7, 2011 and issued by the Commission for this matter, the Commission explicitly stated that hearings are held under 801 C.M.R. §§ 1.02 and 1.03, the Informal Rules of Adjudicatory Procedure.

² On February 9, 2012, the Petitioner filed a Stipulation of the Parties for Extension of Time for the Response By Petitioner to Respondent's Motion for Summary Decision. The Commission allowed the Stipulation.

5. Ms. Frankel began collaborating with David Kanbar. Mr. Kanbar, a former executive at a distilled spirits company, is experienced in the beverage alcohol industry. With Mr. Kanbar's assistance, his employer had previously sold an alcoholic beverages brand to another distilled spirits company.
6. Ms. Frankel and Mr. Kanbar entered into an agreement and formed the company Skinny Girl Cocktails, LLC ("SGC"). Thereafter, the first shipments of the Margaritas were made. In the first six (6) months, a few thousand cases were sold.
7. UNITED began making regular purchases of the Margaritas in October 2009. UNITED purchased these brand items directly from SGC.
8. In early 2010, Marc D. Taub, the President of the national distributor Palm Bay International, Inc. ("Palm Bay"), pursued the distribution rights for the Margaritas. David S. Taub is the Chairman and Chief Executive Officer of Palm Bay. As a result of these efforts, Palm Bay obtained the distribution rights for the Margaritas.
9. Once Palm Bay obtained the distribution rights for the Margaritas, UNITED purchased the Margaritas from them, in excess of six (6) months before BEAM's refusal to sell.
10. Demand for the Margaritas was great. During the term of the distribution agreement for the Margaritas between Palm Bay and Ms. Frankel and Mr. Kanbar, orders for the product increased ten-fold to the point that demand exceeded supply. In the summer of 2010, the product was sold out. The demand in New England could not be met. The demand in California went unmet despite the fact that California was identified as the largest market for margaritas.
 - (a) At UNITED demand for the Margaritas skyrocketed in a single year: in January 2011, sales increased 7250% over sales in January 2010.
 - (b) UNITED sold 294 cases in January 2011 compared to 4 cases in January 2010.
 - (c) In February 2011 sales increased 320% over sales in February 2010.
 - (d) UNITED sold 374 cases in February 2011 compared to 89 cases in February 2010.
 - (e) March 2011 sales increased 384% over sales in March 2010.
 - (f) UNITED sold 1956 cases in March 2011 compared to 404 cases in March 2010.
11. UNITED projected that its 2011 annual sales of the Margaritas would reach 20,000 cases, compared to sales in calendar year 2009 which totaled 175 cases and sales in calendar year 2010 that totaled 7242 cases.
12. On March 8, 2011, SGC assigned to BB Endeavors, LLC ("BBE") all of its rights, title and interest in a series of trademarks both inside and outside the United States. Bethenny Frankel signed this document in her stated capacity of managing member of BBE.

13. SGC reserved to itself and did not assign any right, title and interest in the trademarks as they pertain to alcoholic beverages, other than beer.³ These trademarks were used with many goods that were primarily, in the United States, identified as non-alcoholic beverage cocktail mixes, prepared non-alcoholic cocktails⁴, and various paraphernalia for the preparation and service of both alcoholic and non-alcoholic cocktails.
14. On that same day, March 8, 2011, SGC assigned to BBE an undivided 50% interest in the Skinnygirl logo for \$5,000.00. The agreement allowed that each party, at its sole and exclusive discretion, had the right to further license and/or assign its interest.
15. On March 17, 2011, JBB signed various agreements to purchase the Margaritas from many individuals, who are identified in the Asset Purchase Agreement. The agreements are dated March 17, 2011 (unless otherwise specified below) and include:
 - i) an *Asset Purchase Agreement* among Skinny Girl Cocktails LLC (“SGC”), BB Endeavors, LLC (“BBE”), SGC Kanbar LLC, Bethenny Frankel individually, David A. Kanbar individually, Marc D. Taub individually, David S. Taub, individually, and Jim Beam Brands Co. (“JBB”)(95 pages);
 - ii) Schedules to Asset Purchase Agreement (67 pages);
 - iii) an *Inventory Purchase Agreement* between Jim Beam Brands Co. and Palm Bay International, Inc. (29 pages);
 - iv) an *Endorsement and Services Agreement* between Jim Beam Brands Co. and BB Endeavors LLC f/s/o Bethenny Frankel (24 pages);
 - v) an *Escrow Agreement* among Jim Beam Brands Co., Skinny Girl Cocktails LLC and U.S. Bank National Association (22 pages including attached exhibits);
 - vi) an *Assignment and Assumption Agreement* between Skinny Girl Cocktails LLC and Jim Beam Brands Co. (5 pages);
 - vii) an *Assignment, Assumption and Consent Agreement* among Skinny Girl Cocktails LLC, Jim Beam Brands Co., and Maison des Futailles Limited Partnership (10 pages);
 - viii) an *Intellectual Property Assignment Agreement* between Skinny Girl Cocktails LLC and Jim Beam Brands Co.(11 pages);
 - ix) a *Trademark Assignment Agreement* dated March 8, 2011 between Skinny Girl Cocktails LLC and BB Endeavors, LLC (3 pages);
 - x) a *Copyright Assignment Agreement* dated March 8, 2011 between Skinny Girl Cocktails LLC and BB Endeavors, LLC (2 pages);

³ These goods were specifically identified as “Class 33 Goods” and defined in the agreement to be “those categories of goods currently classified under International Class 33 of the International Schedule of Goods and Services as ratified by the 9th Edition of the Nice Agreement on January 1, 2007. The scope of these “Class 33 Goods” were specifically identified in another document submitted in evidence to the Commission.

⁴ The oxymoronic use of this term is not lost on the Commission given the common understanding of the word “cocktail” in this context to be a mixed drink that contains at least three (3) ingredients, one of which must be a distilled spirit. The use of this term “cocktail” may raise issues of compliance that are not germane to the questions presented in this matter.

- xi) a *Skinnygirl Trademark Co-Existence Agreement* between Jim Beam Brands Co. and BB Endeavors, LLC (18 pages);
- xii) a *Noncompetition, Nondisclosure and Nonsolicitation Agreement* between Jim Beam Brands Co. and David A. Kanbar individually and SGC Kanbar LLC (10 pages);
- xiii) a second *Noncompetition, Nondisclosure and Nonsolicitation Agreement* (11 pages);
- xiv) a *Seller Parties Release Agreement* among Skinny Girl Cocktails LLC, BB Endeavors, LLC, SGC Kanbar LLC, Bethenny Frankel individually, David A. Kanbar individually, Marc D. Taub individually, David S. Taub, individually, and Jim Beam Brands Co. (9 pages).

16. On the same day, SGC signed a three-page *Bill of Sale*.
17. As part of the transaction, BEAM agreed to keep Ms. Frankel involved in the creative aspects of the SGC beverage alcohol business bought by BEAM.
18. Ms. Frankel's continuing participation in the beverage alcohol business purchased from SGC by BEAM was not limited to the Margaritas. Ms. Frankel continued participating in the Skinny Girl Brands and any newly developed products carrying the Skinny Girl marks (the "SGC MARKS").
19. JBB is a wholly owned subsidiary of Beam Global Spirits & Wine, LLC. Beam Global Spirits & Wine, LLC was formerly known as BEAM.⁵
20. JBB holds a certificate of compliance.
21. On March 17, 2011, SGC assigned to JBB eleven (11) agreements including the copyright assignment agreement dated March 8, 2011 between SGC and BBE.
22. On March 17, 2011, SGC assigned to JBB its intellectual property rights to trademark registrations for International Class 33 goods, copyright registrations and licenses and domain names and registrations for the Skinnygirl Marks.
23. That same day, March 17, 2011, JBB and BBE signed the Skinnygirl Trademark Co-existence Agreement. This agreement acknowledged that BBE "is the owner of certain rights in and to, and has used and is using, or intends to use, the Skinnygirl Marks" in connection with certain "products" other than alcoholic beverages. This agreement also acknowledged that "[BBE] has direct and indirect ownership interests in [SGC]."

⁵ M.G.L. c. 138, § 25B provides, in pertinent part, that "[n]o brand of alcoholic beverages shall be sold within the commonwealth to a wholesaler unless schedules, as provided by this section, are filed with the commission and are then in effect." Commission records show that the current master price schedule was filed on July 19, 2012 by BEAM for Jim Beam Brand Co. Additional price schedules for new items were similarly filed in August and September 2012.

24. Through this Trademark Co-existence Agreement, JBB and BBE agreed that JBB and its affiliates would have “the non-exclusive right to use the SKINNYGIRL Marks throughout the world in connection with “certain specified promotional items”. Among these items were various paraphernalia for the preparation and service of both alcoholic and non-alcoholic cocktails.
25. Yet, JBB and its affiliates alone would have the “exclusive right to use the SKINNYGIRL Marks throughout the world in connection with” alcoholic beverages and “non-alcoholic mixer versions of beverage alcohol products.”
26. An employee and manager of BEAM, Pryce Greenow, who was identified as the regional general manager of BEAM’s western United States business, described the transaction as “not a typical acquisition ... It’s more of a venture capital investment for us: high growth, early investment.”⁶
27. Mr. Greenow went on to say “[n]o one knows the brand better than Bethenny [Frankel], and we don’t want to break something we just bought. Plus, she gives us access to consumer feedback with just one tweet that would take us three months of focus groups to compile.”
28. BEAM pursued and executed this transaction to advance their business strategy to obtain better marketing and increase sales from Beam’s securing of a new product. The Margaritas were the first prominent product in an emerging sub-category of the market and Beam desired to maximize efficiencies in the sales of that product.
29. BEAM admits that on the date of the closing and for ten months thereafter Bethany Frankel continued to be affiliated and involved with the Margaritas and Skinny Girl Brands.
30. Moreover, BEAM may not change the formulation of the Margaritas or Skinny Girl Brands without Bethany Frankel’s consent. To do so, would violate the terms of the contract.
31. As a result, Bethany Frankel’s affiliation with, if not actual contractual control over, the Margaritas and Skinny Girl Brands continues for five years after the closing date. Ms. Frankel’s affiliation, if not contractual control, continues to and beyond the present date.

⁶ By regulation, “[n]o licensee shall make or permit to be made by his agent or employee, any false or misleading statement concerning other licensees, his products, or the conduct of his business.” 204 CMR 2.03(4). This regulation is applicable to holders of a certificate of compliance, like Jim Beam Brands Co.

DISCUSSION

Beam Arguments

BEAM advances four arguments why the Commission cannot under §25E order BEAM to make sales of the Margaritas and Skinny Girl Brands to UNITED.

- 1) First, BEAM argues that the §25E obligations to sell do not apply to BEAM because it never voluntarily sold the Margaritas to UNITED.
- 2) Second, BEAM argues BEAM was not and is not the agent of BEAM's Predecessor Supplier who sold the Margaritas to UNITED.
- 3) Third, BEAM argues that the §25E obligations to sell do not apply to BEAM because BEAM did not obtain a "mere assignment of distribution rights."
- 4) Fourth, BEAM argues that the §25E obligations to sell to UNITED do not apply to BEAM because there is no evidence that BEAM intended to circumvent §25E by entering into the transaction by which BEAM holds the right to sell the Margaritas. BEAM argues prior precedent from both the courts and the Commission to control the disposition of this matter in BEAM's favor.

United Arguments

UNITED argues that BEAM is required to make sales to UNITED because

- 1) there is a continuing affiliation as the Margaritas have always been under the control of Bethenny Frankel and her co-sellers including Skinny Girl Cocktails LLC, who assigned the distribution rights to intermediaries such as Palm Bay, which was owned by the Taubs;
- 2) that principles of agency require the §25E sales obligations to be imputed to BEAM; and
- 3) BEAM expressly assumed from BEAM's Predecessor Supplier, Palm Bay, its §25E obligations to sell to UNITED through the terms of an indemnification agreement contained in an inventory purchase agreement.

Since M.G.L. c. 138 §25E was enacted, a number of court decisions have been issued relative to the facts on which the Commission may order a successor supplier to sell brand items to wholesalers in Massachusetts. In Heublein, Inc. v. Capital Dist. Co., Inc., 751 N.E. 2d 410, the Supreme Judicial Court commented favorably on the Commission decision in United Liquors, Ltd. v. Brown Forman Corp. (ABCC Decision dated December 3, 1997.) The Brown Forman decision provides the legal history of 25E litigation cases and the backdrop for the analysis of this case. Prior 25E decisions considered (1) intentional circumvention, (2) assignments of distribution rights, (3) agency or continuing affiliation, (4) stock liquidation, (5) subsidiaries and, (6) asset purchases.

Thus, the Commission must examine the underlying transaction through which BEAM obtained the right to sell the Margaritas and Skinny Girl Brands. The Commission must review the evidence to ascertain whether there exists an agency relationship or continuing affiliation between BEAM and its predecessor following the completion of this transaction. Heublein, Inc.

v. Capital Dist. Co., Inc., 434 Mass. 698, 751 N.E. 2d 410 (2001). Heublein, Inc. v. Alcoholic Beverages Control Commission, 30 Mass. App. Ct. 611, 571 N.E. 2d 430 (1991).

Most recently, the Appeals Court approved a Commission Decision dismissing a §25E petition. In that case, the Commission found that the respondent never made any voluntary sales to the wholesaler, thus it was not subject to direct obligations under §25E. The Commission also found no basis to impute the sales obligations of any predecessor supplier to the respondent. L. Knife & Son, Inc. v. Alcoholic Beverages Control Commission, Memorandum And Order Pursuant To Rule 1:28 Dated December 21, 2011. The L. Knife case involved certain brands of Mexican beer. The nature of the transaction by which the supplier obtained the right to distribute these brands of Mexican beer gave no basis for the Commission to impute prior sales to that current supplier.

The Commission reviewed the use of intermediaries in Ruby Wines v. Champagne Louis Roederer and Vineyard Brand, Inc., (ABCC decision dated April 29, 1986) cited in United Liquors, Ltd. v. Brown Forman Corp., (ABCC decision dated December 3, 1997). In that case the Commission found that “Vineyard Brands sold products of Champagne Louis Roederer to Ruby Wines. Although Ruby made payments to Vineyard, which in return paid Roederer, shipment was directed from Roederer to Ruby.” The Commission found that since Vineyard was an agent of Roederer, Roederer was bound by the relationship established by Vineyard and must continue making sales to Ruby. Id.

The Commission has also reviewed agency relationships where a supplier uses an agent to sell to wholesalers and then cancels the agreement and sells the product directly. The Commission in these cases has found that the agent’s obligations were imputed to the supplier. See Classic Wine Imports, Inc. v. Sutter Home Winery, Inc. and Vintage Wine Merchants, Inc., (ABCC decision dated April 9, 1986).

In this present matter involving the Margaritas, the Commission found that Palm Bay obtained the distribution rights for the Margaritas and Skinny Girl Brands. The Commission also found above that the principals of Palm Bay, David Taub and Marc Taub, are among the identified sellers to Beam according to the Asset Purchase Agreement dated March 17, 2011.

In this proceeding regarding the Margaritas, the Commission is persuaded, and therefore finds, based on the documents submitted in support of the summary decision motion by BEAM that the motivation for this transaction was a business strategy to obtain better marketing and increase sales whereby BEAM would obtain the additional business of the first prominent product in an emerging sub-category of the market and the desire to maximize efficiencies in the sales of that product.

Where the Commission finds that the intent of a merger was to develop better marketing of the product by subsidiaries, the Commission found, and the Court upheld the finding that the intent of the parties was to circumvent §25E obligations. In the Martignetti Grocery Co., et al v. Vintners International Co. case, the Court found that where Vintners International, whose principals were former employees of Seagram and Sons, purchased all the stock of the subsidiaries from Seagram and Sons and then merged the companies into Vintners in order to reduce the number of wholesalers, this was done to circumvent the intent of §25E. See Cray

Burke Co., Inc. v. James B. Beam Distilling Co. and National Distillers Products Co., (ABCC Decision dated November 28, 1990.)

As the Commission noted in Brown Forman, the Commission's decisions interpreting §25E and the intent behind §25E state that simply changing the supplier of the product does not necessarily relieve the new supplier of the 25E obligations. The Commission has imputed 25E obligations to a new supplier that had not previously done business with a Massachusetts wholesaler when the following existed:

- a) an agency relationship or continuing affiliation between the prior supplier and the new supplier, See Kelly-Dietrich, Inc. et al, Ruby Wines, Inc., Classic Wine Imports, Inc., Martignetti Grocery Co, et al., Seacoast Distillers, Inc., et al., Cray Burke Co., Inc.;
- b) an assignment of the distribution rights from the prior supplier to the new supplier, See Kelly-Dietrich, Inc. et al, Martignetti Grocery Co, et al., Seacoast Distillers, Inc., et al., Cray Burke Co., Inc.;
- c) an intended circumvention of 25E obligations, See Martignetti Grocery Co, et al., Seacoast Distillers, Inc., et al.; or
- d) a combination of one of the above, See Kelly-Dietrich, Inc. et al, Martignetti Grocery Co, et al., Seacoast Distillers, Inc., et al., Cray Burke Co., Inc.

The Commission is also persuaded, and therefore finds, that there is a continuing affiliation between Messrs. Taub (the principals of Palm Bay who was the predecessor to BEAM), Ms. Frankel and Mr. Kandar (the brand owners), and BEAM. While SGC reserved to itself and did not assign any right, title and interest in the trademarks pertaining to alcoholic beverages, other than beer, it transferred to BBE all its right, title and interest in trademarks across the world, including in the United States. BEAM and BBE signed a trademark co-existence agreement that acknowledged that BEAM would have only the non-exclusive right to use the Skinny Girl trademarks. BEAM admitted through its employee and manager that the nature of this transaction was "more of a venture capital investment for [Beam]: high growth, early investment."

BEAM admits that on the date of the closing and for ten months thereafter Frankel continued to be affiliated and involved with the Margaritas. Frankel's control over the brand items continues for five years after the closing, a time period that includes the date of this decision, since BEAM may not change without Frankel's consent the formulation of the Margaritas, without violating the contract. This is a sufficient continuing affiliation for the Commission to conclude that the sales made by BEAM's predecessor supplier should be, and hereby are, imputed to BEAM.

The Motion for Summary Decision thus should be, and hereby is, DENIED. With the sales thus imputed to BEAM, BEAM must continue to make sales of the Margaritas to UNITED under § 25E. Sales by BEAM must continue until BEAM is able to refuse sales for good cause. Good cause is limited to the five reasons specified § 25E. Even when BEAM believes it has good cause to refuse sales, BEAM must comply with the procedural requirements of § 25E.

CONCLUSION

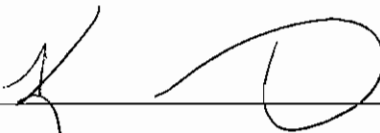
After determining the nature of the transaction by which BEAM holds the right to sell the Margaritas and the Skinny Girl Brands, the Commission is persuaded that there was and is a continuing affiliation between the principals of the predecessor suppliers to BEAM and BEAM as clearly proven in the documents.

The Motion For Summary Decision is DENIED. The Pre-Hearing Order that ordered Respondent to continue to make sales of the Skinny Girl Margaritas ("Margaritas") brand items to Petitioners remains in effect.

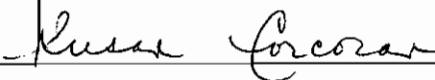
Yet, there was insufficient evidence submitted to the Commission to persuade it that United had the statutorily required six month course of dealing for the other brand items, viz., Skinny Girl brand ready to drink cocktails ("Skinny Girl Brands") brand items. Therefore, the Pre-hearing Order shall not apply to the "Skinny Girl Brands", other than the Margaritas.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim Gainsboro, Chairman



Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated in Boston, Massachusetts this 22nd day of May 2013.

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 days of receipt of this decision.

cc: Mary E. O'Neal, Esq., via Facsimile: 617-722-8101
Mark Dickison, Esq., via Facsimile: 617-439-3987
File