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

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25E-1282

HORIZON BEVERAGE COMPANY
v.
FOLEY FAMILY WINES
HEARD: 03/07/2012

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 (the "Commission") on the Motion for Summary Decision of the Respondent, Foley Family Wines (the "Supplier" or the "Respondent" or "Foley") in an action filed by Horizon Beverage Company (hereinafter the "Applicant" or the "Petitioner" or "Horizon") seeking relief under M.G.L. Ch. 138 §25E ("§25E").[1]

HISTORY OF THE CASE

On April 19, 2011, the Petitioner, a licensed wholesaler/importer, filed with the Commission a verified application for relief (the "Application") under §25E against the Respondent. The Application requested that the Commission order Foley, a certificate of compliance holder, to continue making sales of Chalk Hill wines, specifically Chalk Hill Chardonnay, Chalk Hill Sauvignon Blanc, Chalk Hill Estate Red, Chalk Hill Cabernet Sauvignon, Chalk Hill Merlot and Chalk Hill Pinot Gris, (the "Chalk Hill Brands") to the Petitioner. The Chalk Hill Brands are alcoholic beverages brand items within the meaning of §25E.

On or about April 27, 2011, the Commission issued a Notice of Filing of §25E Petition and Pre-Hearing Order requiring the Respondent to continue making sales of the Chalk Hill

[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. The Commission thus considers this matter with the Informal Rules of Adjudicatory Procedure applying.

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Brands to Horizon in the regular course, pending the Commission's determination of the matter on the merits as mandated by §25E.

Foley filed a Motion for Summary Decision, a Memorandum in Support of its Motion for Summary Decision and An Affidavit in Support of its Motion for Summary Decision. Thereafter, Horizon filed an Opposition to Foley's Motion for Summary Decision and an Affidavit Authenticating Materials Supporting Horizon's Opposition to Foley's Motion for Summary Decision and a Cross-Motion for Summary Decision. The Commission held a hearing on these motions.

The parties agree that the Chalk Hill Brands are the same product that Horizon purchased from Foley's predecessor, the Chalk Hill Estate Winery ("Chalk Hill"). Further, Foley did not claim to refuse to sell Horizon the Chalk Hill Brands for good cause within the meaning of §25E. Consequently, Foley did not issue any written notice refusing to sell the Chalk Hill Brands to Horizon due to good cause within the meaning of §25E.

In this matter, there are three possible scenarios presented that may result in Foley's obligation to sell under §25E. The first, is whether Foley made voluntary sales of the Chalk Hill Brands to Horizon for the six months required to create §25E obligations of Foley itself. If this requirement has not been met, then the second and thirds scenarios are presented. With these second and third scenarios, the Commission must examine the underlying transaction between Foley and Chalk Hill to determine whether there is a basis to impute to Foley the prior sales made by Chalk Hill. Under these scenarios, the Commission must ascertain (i) whether Foley assumed by contract the sales obligations of Chalk Hill, or (ii) whether an agency relationship or continuing affiliation exists between Foley and Chalk Hill following the completion of the transaction by which Foley holds the right to sell the Chalk Hill Brands.[2]

FINDINGS OF FACT

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

1. Horizon has been selling the Chalk Hill Brands since March, 2007. Horizon was appointed by Chalk Hill. At that time, Horizon was one of two Massachusetts wholesalers of the Chalk Hill Brands.

2. From approximately April 2008 until sometime after Foley's purchase of the Chalk Hill Brands, Horizon was the exclusive wholesaler of the Chalk Hill Brands.

3. In June of 2010, there were numerous articles in trade publications regarding Foley's acquisition of Chalk Hill. Subsequent to the announcement of Foley's acquisition of Chalk Hill, Horizon continued purchasing the Chalk Hill Brands.

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[2] Heublein, Inc. v. Capital Dist. Co., Inc., 434 Mass. 698 (2001). Heublein, Inc. v. Alcoholic Beverages Control Commission, 30 Mass. App. Ct. 611 (I991).

4. On July 29, 2010, Chalk Hill and Foley executed the Asset Purchase Agreement ("APA").[3]

5. The APA demonstrates that this transaction involved the outright purchase and sale of a 45,000 case winery, inventory, labels, equipment, 278 acres of vineyard, a main residence on the vineyard property, and other assets unrelated to the Chalk Hill wine business.

6. In Schedule 3.1(a) of the APA, Foley expressly assumed all distributor/wholesaler "relationships, appointments or agreements, whether written or oral" and Foley thus became responsible to "pay, perform, and discharge" the assumed contracts. However, the assumption language in Schedule 3.1(a) of the APA contained a limiting proviso, viz., "provided that such relationship is terminable at will or within thirty (30) days after [Foley's] notice of termination."

7. In the six-month period between August 2, 2010 and February 2, 2011, Horizon made purchases of the Chalk Hill Brands on three dates.

8. On August 14, 2010, Horizon purchased 56 cases of Chalk Hill Chardonnay 2008 (in 750 ml bottles), ("ITEM A"), 14 cases of Chalk Hill Cabernet Sauvignon 2005 (in 750 ml bottles), ("ITEM B"), and 14 cases of Chalk Hill Estate Red (in 750 ml bottles), (ITEM C").

9. On August 26, 2010, Horizon purchased 56 cases of ITEM A, 14 cases of ITEM B, and 56 cases of Chalk Hill Sauvignon Blanc 2008 (in 750 ml bottles), ("ITEM D").

10. On October 8, 2010, Horizon purchased 56 cases of ITEM A, 14 cases of ITEM B, and three cases of Chalk Hill Cabernet Sauvignon 2006 (in 375 ml bottles), ("ITEM E").

11. Horizon also continued to represent some of the Chalk Hill Brands at marketing and sales venues and events, with Foley's knowledge and consent.

12. During this period, Foley issued Horizon credits for some of the Chalk Hill Brands that were presented at such events, and for marketing materials and wine lists, as follows:
    - Boston Wine Tasting Event held on September 28, 2010, for unspecified brand items;
    - Springfield Country Club Luxury Wine Tasting Event held on September 30, 2010, for unspecified brand items; and
    - Nantucket, Martha's Vineyard and Cape Cod Volume Program in October 2010, for unspecified brand items.

[3] The redacted version of the APA between Foley and Chalk Hill and others is dated July 29, 2010.

13. Foley also processed credits for sample wine list printings, and depletion allowances in the months of September, October, November, and December 2010, and February, 2011 for Horizon's sales and marketing efforts.

14. "Depletions allowances" are discounts given by suppliers, like Foley, to wholesalers, like Horizon, based on the quantity of product sold by wholesalers to their customers.

15. Suppliers do not give depletion allowances upon purchase by a wholesaler, but rather sometime after the wholesaler sells the product to retailers.[4]

16. Horizon never curtailed its efforts to sell some of the Chalk Hill Brands, and at no time abandoned the Chalk Hill Brands.

17. On October 11, 2010, Foley notified Horizon that ITEM A had been "put on allocation" in Massachusetts. This brand item represented a substantial[5] percentage of Horizon's purchase and sale of the Chalk Hill Brands.

18. Moreover, Foley had reduced an order Horizon submitted in October 2010 for ITEM A, by approximately 35%, thereby reducing an order for 84 cases down to 56 cases.

19. The evidence shows that for the two prior purchases of ITEM A in August 2010, Horizon ordered only 56 cases of ITEM A in each purchase. No evidence was provided regarding Horizon's motivation for the increase of the order to 84 cases in October 2010.

20. Horizon was informed by Foley that the entire allocation for all of Massachusetts was 56 cases and Horizon placed an order for the entire allocation (i.e. 56 cases) in October 2010.

21. Horizon also understood that the new vintage Chardonnay would not be available until the spring of 2011.

22. No evidence was presented that Horizon placed any order for the Chalk Hill Merlot or the Chalk Hill Pinot Gris between August 2, 2010 and February 2, 2011.
23. No evidence was presented that Horizon placed any order for ITEM A, ITEM B, ITEM C, ITEM D or ITEM E between October 8, 2010 and February, 2011.

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[4] See Bureau of Alcohol, Tobacco and Firearms Industry Circular Number 87-2 (Dated April 13, 1987), published at http://www.ttb.gov/industry_circulars/archives/1987/87-02.html.

[5] As an example, in the 12 month period prior to notification by Foley of the allocation of the Chardonnay, Horizon's purchase of Chardonnay alone exceeded Horizon's purchase *of all the remaining products* constituting the Brands by more than 20%. The actual number of case involved in this 12 month period was not submitted into evidence. Without such facts, the Commission is left to speculate on the numbers, which the Commission will not do. Hence, the persuasiveness of this statistic alone is very limited.

24. Sometime after February 4, 2011, Horizon received, a letter from Foley dated February 4, 2011, notifying Horizon that a competitor wholesaler would be the exclusive distributor in Massachusetts.

25. Thereafter, on March 7, 2011, Horizon placed an order for 28 cases of ITEM A, 14 cases of ITEM D, and 14 cases of Chalk Hill Cabernet Sauvignon 2006, (in 750 ml bottles), ("ITEM F").

26. On or about March 10, 2011, Horizon received, an undated letter from Foley, entitled "Follow-up Regarding Previous Notice of Termination for Chalk Hill Wines (Brands)" in which Foley states that it would no longer provide any of the Chalk Hill Brands to Horizon. This §25E matter ensued.

DISCUSSION

Arguments

Foley argues that it has not made sales of the brand items to Horizon for the six months required by §25E, the obligation to sell under §25E does not run with the product, there is no basis to impute to Foley the prior sales made to Horizon by Foley's predecessor, viz., a) there is not agency relationship between Foley and Foley's predecessor, b) the transaction by which Foley obtained the right to sell the brand items was not a mere assignment of distribution rights, and c) the transaction by which Foley obtained the right to sell the brand items was not undertaken to circumvent §25E.

Horizon argues that Foley made sales of the brand items for the six month period required by § 25E and Foley therefore created its own obligation to continue sales to Horizon, and that even if Foley did not create its own §25E obligations, Foley's predecessor's obligations should be imputed to Foley given the business terms of the transaction by which Foley obtained the Brands.

FOLEY'S CREATION OF INDEPENDENT § 25E OBLIGATIONS

Under M.G. L. c. 138, §25E, it is an "unfair trade practice and therefor unlawful for any importer... 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 [supplier] has made regular sales of such brand item during a period of six months preceding any refusal to sell." For purposes of the statute, "good cause" for refusing to sell is limited to five grounds set forth in the second paragraph of §25E. See Seagram Distillers Co. v. Alcoholic Beverages Control Commn., 401 Mass. 713, 716 (1988); Union Liquors Co. v. Alcoholic Beverages Control Commn., 11 Mass. App. Ct. 936, 938 (1981).

The pertinent "six months" provision of §25E requires a regular course of dealing for a six month period before the obligation to continue sales attaches. Pastene Wine & Spirits Co., Inc. v. A.B.C.C., 401 Mass. 612, 620 (1988)("the Legislature intended that there be a regular course of dealing for a full six months before suppliers are obligated to continue sales to wholesalers.") Branded Liquors, Inc. v. Louis M. Martini Winery, (ABCC Memorandum dated January 23, 1990). The Commission has previously decided that where the entire course of sales of a product to a wholesaler consisted of two orders, one in June and the other in September, the transactions did not constitute a six-month course of dealing require by §25E and the supplier lawfully refused sales. Branded Liquors, Inc. v. Desnoes and Gedes, Ltd. and R.J. Imports Ltd. (ABCC Decision dated July 26, 1990). Thus, §25E is a forward looking statute commencing on the day the new supplier began operations. Section 25E is not retrospective. Pastene Wine & Spirits, supra, Id.

In this case, the evidence showed Foley sold sales of products to Horizon in August 2010 and October 2010. These three sales involved five different "brand items" within the meaning of §25E: (a) ITEM A; (b) ITEM B; (c) ITEM C; (d) ITEM D; and, (e) ITEM E. These three sales occurred within three months of the APA being executed. It wasn't until March that Horizon placed another order. This evidence is insufficient to persuade the Commission that there was a regular course of dealing for a full six months that created obligations for Foley to continue making sales to Horizon. Id.

The Commission is not persuaded that Foley's payment to Horizon of depletion allowances and re-imbursement expenses initially paid by Horizon to market, promote and sell the inventory already possessed by Horizon constitute sales to Horizon under §25E. The Commission holds that such payment of discounts characterized and labeled as "depletion allowances" and other re-imbursement expenses are required by the provisions of M.G.L. c 138, §25A, which prohibits direct or indirect discrimination against a wholesaler in price or discounts. A supplier's payments to a wholesaler of lawful discounts and other lawful marketing, promotion, and sales expenses are not sales of any brand items within the meaning of §25E.

Further, the Commission has consistently held that a supplier's obligation to sell under § 25E attaches to individual brand items. Whitehall Co. Ltd. v. Morgan Furze Ltd., (ABCC Decision dated August 1991); Whitehall Co. Ltd. v. Brown Forman Corporation, (ABCC Decision dated September 1993); Brockton Wholesale Beverage Co. Inc., et al. v. Carillon Importers, Ltd., (ABCC Decision dated October 1993); Classic Wine Imports. Inc. v. Rosemount Estates, Inc., 25E-1163, (ABCC Decision dated January 20, 2000); See, e.g., Whitehall Co. Ltd. v. Heublein, 25E-1038, (ABCC Memorandum dated December 6, 1989); Brockton Wholesale Beverage Co. v. Carillon Importers Ltd., 25E-1023, (ABCC Memorandum dated January 10, 1993). M.S. Walker, Inc. v. Jim Beam Brands Company, (ABCC Memorandum and Order dated September 1, 2009). For the purposes of §25E, a "brand item" is identified by both the product in the container and the size of the container. There must be the required six month course of dealing proven by the wholesaler for each of the brand items for which the wholesaler seeks relief. Id.

In this case, the evidence is insufficient to persuade the Commission that there was the regular course of dealing for a full six months that created obligations of Foley to continue to

make sales to Horizon of any of the Chalk Hill Brands. Based on the evidence, the Commission finds that no orders were placed by Horizon for the merlot and Pinot Gris after August 2, 2010. The Commission further finds regarding the five brand items for which evidence of sales was presented that ITEM A and ITEM B were sold by Foley to Horizon only three times over three months and ITEM C, ITEM D and ITEM E were sold by Foley to Horizon only one time. This evidence is insufficient to persuade the Commission that there was the regular course of dealing for a full six months that created obligations of Foley to continue to make sales to Horizon.

IMPUTATION OF PRIOR SALES TO FOLEY

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, since M.G.L. c. 138 §25E was enacted. 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.

As the Commission noted in the 1997 Brown Forman decision referenced above, 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. v. Austin-Nichols Co., Inc., (ABCC decision dated April 15, 1986), Ruby Wines, Inc. v. Champagne Louis Roederer, et al. (ABCC decision dated April 29, 1986), Classic Wine Imports, Inc. v. Sutter Home Winery, Inc., et al., (ABCC decision April 9, 1986), Martignetti Grocery Co., et al v. Vintners International Co., Inc., et al. (ABCC decision dated April 22, 1991), Seacoast Distillers, Inc. et al v. Hiram Walker, (ABCC decision dated August 14, 1990), , Cray-Burke Co., Inc. v. James B. Beam Distilling Co. et al., (ABCC decision dated November 28, 1990);

b. an assignment of the distribution rights from the prior supplier to the new supplier, See Id., Martignetti Grocery Co, et al.,Id., Seacoast Distillers, Inc., et al., supra., Cray Burke Co., Inc.,supra.;

c. an intended circumvention of 25E obligations, See Martignetti Grocery Co, et al., supra., Seacoast Distillers, Inc., et al.,supra.; or

d. a combination of one of the above, See Kelly-Dietrich, Inc. et al, supra., Martignetti Grocery Co, et al.,supra., Seacoast Distillers, Inc., et al.,supra., Cray Burke Co., Inc., supra.

In order to determine if §25E obligations attach under these circumstances, the Commission must examine the underlying transaction through which Foley obtained the right to sell the Chalk Hill Brands. The Commission must review the evidence to ascertain whether Foley assumed the obligations to sell in the APA, whether this transaction was undertaken for the purpose of circumventing §25E, or whether there exists an agency relationship or continuing affiliation between Foley and its predecessor following the completion of this transaction. Heublein, Inc. v. Capital Dist. Co., Inc., 434 Mass. 698 (2001). Heublein, Inc. v. Alcoholic Beverages Control Commission, 30 Mass. App. Ct. 611 (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 based on the transaction 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. In L. Knife, there was no purchase of assets. A new supplier was appointed, however, "principles of joint venture and partnership law [did not bind] upstream suppliers ... to the co-venturer's ... 25E obligations by operation of law" and "the doctrine of partnership by estoppel" did not apply. L. Knife supra at p. 5-6.

In this case, there is no evidence of an agency relationship or continuing affiliation between Chalk Hill and Foley. There is no evidence that this transaction was a mere assignment of distribution rights. This transaction involved the outright purchase and sale of a 45,000 case winery, inventory, labels, equipment, 278 acres of vineyard, a main residence on the vineyard property, and other assets unrelated to the Chalk Hill wine business. There is no evidence that this transaction was initiated or structured for the purpose of circumventing §25E obligations.

Horizon argues that Foley is required to make sales to Horizon because Foley expressly assumed Chalk Hill's §25E obligations to sell to Horizon through the terms of the APA that specified what contracts Foley assumed from Chalk Hill. A review of the APA shows that in Section 3.1(a), Foley did expressly assume each contract identified in Schedule 3.1(a) of the APA.

In Schedule 3.1(a), Foley expressly assumed all distributor/wholesaler "relationships, appointments or agreements, whether written or oral" and Foley thus became responsible to "pay, perform, and discharge" the assumed contracts. Yet, this assumption language in Schedule 3.1(a) of the APA contained a limiting and, in this case, dispositive proviso, viz., "provided that such relationship is terminable at will or within 30 days after [Foley's] notice of termination." Schedule 3.1(a) Assumed Liabilities/Contracts to APA, July 29, 2010. G.L.c 138, §25E obligations are not terminable at will; rather, once established, they may only be terminated for good cause M.G.L. c. 138, §25E. Further, §25E obligations are not terminable after 30 days' notice; rather, the plain language of § 25E requires that notice of termination must be given at least 120 days prior to termination to comply with the plain language of § 25E. See Heineken U.S.A., Inc. v. Alcoholic Beverages Control Commission, supra (2004). Thus, §25E obligations do not fall within the assumed contracts, specifically Schedule 3.1(a) because they are not

terminable at will and may not be terminated after only 30 days' notice. The Commission is persuaded, and therefore finds, that there is no basis to impute to Foley the prior sales made to Horizon by Foley's predecessor Chalk Hill.

CONCLUSION

The Motion for Summary Decision filed by Foley should be, and hereby is, ALLOWED, effective July 11, 2013. Foley did not make sales for the required six months to create for itself obligations to sell the Chalk Hill Brands to Horizon. Upon examination of the transaction by which Foley obtained the right to sell the Chalk Hill Brands, there is no basis to impute to Foley the sales made by Foley's predecessor.

The Cross-Motion for Summary Decision filed by Horizon is DENIED, effective July 11, 2013.

The Pre-Hearing Order that ordered Foley to continue to make sales of the Chalk Hill Brands to Horizon is hereby vacated and dissolved, effective July 11, 2013.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim Gainsboro, Chairman

Kathleen McNally, Commissioner

Susan Corcoran, Commissioner

Dated in Boston, Massachusetts this 12th day of June 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 (30) days of receipt of this decision.

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File