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

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

NO. 25E-1284
UNITED LIQUORS, LLC
v.
HEAVEN HILL DISTILLERIES, INC. AND LUXCO INC.
HEARD: APRIL 16, 2014

The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Wednesday, April 16, 2014, to consider the Motion for Summary Judgment from petitioner United Liquors, LCC ("United").

FACTS

1. Heaven Hill Distilleries, Inc. ("Heaven Hill") is a producer and marketer of distilled beverages and liqueurs.

2. United Liquors, LLC ("United") is a Massachusetts licensed wholesaler of alcoholic beverages.

3. Luxco owned and produced a product line known as the "Admiral Nelson" brand of rums.

4. For many years, United marketed, distributed and made regular purchases of the Admiral Nelson brand of rums obtained from Luxco.

5. Admiral Nelson brand rums purchased and distributed by United, included Admiral Nelson's Premium Spiced Rum, Admiral Nelson's 101, Admiral Nelson's Premium Coconut Rum, and Admiral Nelson's Premium Cherry Rum (the "Brand").

6. Luxco entered into discussions to sell the "Admiral Nelson" brand of rums to Heaven Hill in early 2011.

7. A motivating factor for Heaven Hill's purchase of "Admiral Nelson" was its interest in adding a premium brand of rum to its portfolio of spirits.

8. On July 1, 2011 Luxco announced that it had agreed to sell the Admiral Nelson brand to Heaven Hill.

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9. Heaven Hill and Luxco executed an Asset Purchase Agreement ("APA") dated June 3, 2011 whereby Heaven Hill acquired certain limited assets of Luxco, including the Admiral Nelson brands.

10. The Luxco/Heaven Hill transaction for the Admiral Nelson sale was scheduled to close before July 31, 2011.

11. After the signing of the APA, Heaven Hill began to inform wholesalers that it had agreed to purchase the Admiral Nelson brand.

12. Heaven Hill also began to notify some existing wholesalers that Heaven Hill would not be using their services to distribute the Admiral Nelson brand.

13. On July 1, 2011, Heaven Hill informed United that, effective July 1, 2011, it had acquired the rights to the Admiral Nelson Brand, and that Heaven Hill would not be selecting United as an approved wholesaler of the Admiral Nelson brand in Massachusetts.

14. This notification effectively ended United's run as an Admiral Nelson's brand wholesaler in Massachusetts.

15. United filed this §25E petition with the Commission on July 6, 2011.

16. The Commission issued an order to ship on July 19, 2011.

17. The Asset Purchase Agreement (APA) specifically excluded most liabilities[1].

18. Section 3.10 expressly provides as a term of the transaction that "No Contracts [are] Assumed," and further, that, "Other than customer purchase orders, Purchaser shall not succeed without its consent to any liability under any agreement, arrangement, commitment, oral or written, of Seller...with ...Distributors...related to the Admiral Nelson Business."

19. The APA was deliberately structured to provide Heaven Hill with the freedom to select which wholesalers should, and would, carry the brands moving forward.

20. On June 2, 2011, one day before signing the APA, Heaven Hill's executives conducted a wholesaler analysis for the specific purpose of determining which wholesalers it should 'stay' with and which it should 'switch' from.[2]

21. This process produced a spreadsheet of all U.S. distributors with a column recommending whether Heaven Hill should 'switch' or 'stay' from any exiting distributor. Id.

22. With respect to United's entry on the spreadsheet, it was the lone entry that stated, "I guess we dual (sic)?"

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[1] Both the Asset Purchase Agreement and the Supply and Transitional Services Agreement were submitted by Heaven Hill as Exhibits A and B contained within its Motion for Summary Decision.

[2] See Affidavit of J. Mark Dickison, Exhibit 3.

23. Ultimately, Heaven Hill's Andy Shapiro concluded that "in all 'switch' scenarios we have to 'get something' and even when we stay…" [3]

24. Following the execution of the Asset Purchase Agreement (APA), Luxco and Heaven Hill executed a Supply and Transitional Services Agreement ("Transitional Agreement") dated July 1, 2011, which had a one year term, if it was not earlier terminated upon 30 days notice.

25. Under the Transitional Agreement, Luxco was to continue to have a relationship with Heaven Hill for a period of up to one year "to produce, process, and bottle" the Brand at the Luxco in St. Louis, Missouri. [4]

26. After July 1, 2011, and pursuant to the Transitional Agreement, Luxco "produced, processed, and bottled" the brand, and continued to fulfill the ordering and shipping on behalf of Heaven Hill for the Brand.

27. Luxco's involvement in the fulfillment and shipment of Massachusetts orders continued until October of 2011.[5]

28. During this transitional period, Luxco played an important role in facilitating Heaven Hill's transition into its newly acquired product line.

29. Heaven Hill and Luxco communicated during this time about ordering, shipment, and other matters of relevance to the Admiral Hill product line.

30. Luxco also did more on at least one occasion, as an email chain demonstrates that Luxco took collective action with Heaven Hill to modify and cancel United's orders in order to benefit Heaven Hill's preferred distributors.

31. Currently before the Commission is a Motion for Summary Judgment.

SUMMARY DECISION STANDARD

The standard for summary decision under the Massachusetts Administrative Procedures Act is the same as that used by the courts under Mass. R.Civ.P. 56; Cella, Administrative Law and Practice, 38 Mass. Prac. §423 at 714 (1986). That is, summary decision is appropriate if after reviewing the materials before the Commission, it is clear that there are "no genuine issues as to material fact," and the moving party is entitled to judgment as a matter of law. Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006). Material facts are those that are substantive in nature, and affect the result of the case. Id. "[S]ubstantive law will identify which facts are material." Id. quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[3] See Affidavit of J. Mark Dickison, Exhibit 3. The comment section on the spreadsheet corroborated this sentiment as it contains several entry's to the effect of, "Switch but make Young's pay". Id.

[4] See Section 3 (A) and Section 1, Definition of "Production Facility". In exchange for continuing to produce the Brand, Luxco would receive ongoing compensation based upon the amount of cases ordered by Heaven Hill. Section 4. In other words, in addition to any payments made under the Asset Purchase Agreement, Luxco continued to be paid for producing and bottling the Brand, with its amount of revenue dependent upon the amount of Heaven Hill's orders.

[5] See Affidavit of J. Mark Dickison, Exhibit 5. For instance, it was Luxco that actually cancelled all United's orders after the acquisition on July 1st, the date of the public announcement of the acquisition.

Summary Judgment shall be awarded to a moving party "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). In the context of a Motion for Summary Decision, the Commission is called upon to decide in reviewing the materials before the Commission, whether there are "no genuine issues as to material fact," and the moving party is entitled to judgment as a matter of law." Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006).

The moving party has the burden of convincing the Commission that summary decision is appropriate. DiPietro v. Sipex Corp., 69 Mass. App. Ct. 29, 30 (2007). It is clear that

> a party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment 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 that party's case. To be successful, a moving party need not submit affirmative evidence to negate one or more elements of the other party's claim. Kourovacilis v. General Motors Corp. 410 Mass. 706, 716 (1991).

Also, where, as in this matter, 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. Fay, Spooford & Thorndike, Inc. v. Massachusetts Port Authority, 7 Mass. App. Ct. 336, 340 (1979). After the moving party has established "the absence of a triable issue, the party opposing the motion 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).

DISCUSSION

M.G. L. c. 138, §25E, "makes it an unfair trade practice for a manufacturer (or other supplier), absent good cause, to refuse to sell a brand of alcohol to a wholesaler if the manufacturer has made regular sales of such brand to the wholesaler during the preceding six-month period." Heublein v. Capital Distributing Co., 34 Mass. 698, 699-700, (2001). See Heineken U.S.A. Inc. v. Alcoholic Beverages Control Commission, 62 Mass. App. Ct. 567, 568 n. 2, (2004). The statute was enacted, in part, "to redress economic imbalances in the relationship[s between] wholesalers and their suppliers." Pastene v. Alcoholic Beverages Control Commission, 401 Mass. 713, 716-716, (1988).

M.G.L. c. 138, §25E provides, in part:

> It shall be an unfair trade practice and therefore, unlawful for any manufacturer ... [or] 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 manufacturer ... or importer ... has made regular sales of such brand item during a period of six months preceding any refusal to sell.

Essentially, section 25E of Chapter 138 protects wholesalers by preventing manufacturers or suppliers from discontinuing the sale of alcoholic beverages without good cause.

The obligation to continue to sell brand items imposed by §25E is generally particular to the supplier that has made sales during the statutorily required six-month period. See Charles E. Gilman & Sons, Inc. v. Alcoholic Beverages Control Commission, 61 Mass. App. Ct. 916, 917-918, (2004). A supplier is not generally obligated by §25E to make sales to wholesalers with whom an unaffiliated predecessor did business. See Pastene v. Alcoholic Beverages Control Commission, 401 Mass. at 616, 619, (alcoholic beverage producer who acquired and liquidated its independent importer-supplier and began directly distributing its product did not succeed to importer's §25E obligations); Heublein, 434 Mass. at 699, 701-702, 751 N.E.2d 410 (supplier who acquired all assets and operations related to production and sale of product in arm's length transaction did not succeed to predecessor supplier's §25E obligations).

Generally speaking, a "supplier is not obligated under §25E to continue to make sales to those wholesalers with whom an unaffiliated predecessor did business." Brown-Forman Corporation v. ABCC, 65 Mass. App. Ct. 498 (2006); see also, L. Knife & Son, Inc. v. Alcoholic Beverages Control Commission, Appeals Court No. 10-P-2019. "Where, however, a 'continuing affiliation or agency relationship exists between the supplier and its predecessor, the Commission has construed c. 138, §25E, to allow for the imputation of obligations." Id. quoting Heublein, Inc. v. Capital Distributing Co., 434 Mass. 98, 706 (2001) ("Heublein"). The imputation of obligations under §25E can also occur where it is found that "a transfer of distribution rights is taken for the purpose of evading those obligations imposed by the statute." Brown-Forman Corporation v. ABCC, 65 Mass. App. Ct. 500 (2006).

I. Express Terms of §25E: Continuous Sales in Preceding Six Months

For §25E obligations of a seller-supplier to follow to a purchaser-supplier, the first inquiry under the statute is whether the manufacturer or importer (or other such supplier) accused of violating the statute has made continuous sales of "such brand items" in the preceding six month period, and not simply any six month period, prior to the refusal to sell. Beverages International, Ltd. v. Alcoholic Beverages Control Commission, 24 Mass. App. Ct. 708, 712-13 (1987). Further, the term "regular sales" requires that the supplier have made more than the occasional sale to the wholesaler in any previous six month period. Pastene v. ABCC, 401 Mass. 612, 619 (1988) ("we reject [the] argument that §25E should be construed to require some sales during any previous six month period for a supplier to be obligated to continue sales.") There is no evidence in the record that Heaven Hill ever sold the Brand to United, and there is no dispute as to same. Consequently, by its express terms, §25E obligations to continue sales do not apply to Heaven Hill.

II. Imputation of Obligation to Sell

Even if, by its express terms, §25E obligations do not apply to a succeeding supplier, the Commission

> may "impute" the section 25E sell obligation of a former supplier to a succeeding supplier. But the Commission may only do so where the successor supplier has a "continuing affiliation or agency relationship" with its predecessor, See Heublein, 434 Mass. At 706; Brown-Forman, 65 Mass. Appl. Ct. at 500, or where the Commission otherwise determines that the successor has undertaken a deliberate attempt to evade the obligations of Section 25E. See Heublein, 434 Mass. at 704 and n.l 1; Brown-Forman. 65

Mass. App. Ct. at 500 ("The rationale for imposing obligations under Section 25E is particularly compelling where the commission finds that a transfer of distribution rights was undertaken primarily for the purpose of evading those obligations imposed by the statute"). Beam Spirits & Wine v. ABCC, Suffolk Superior Court, Docket No. 13-02229-C.

The Commission shall address each of these grounds in turn.

(a) Continuing Affiliation/Agency Relationship

It is clear that, generally speaking, "a supplier is not obligated under Section 25E to continue to make sales to those wholesalers with whom an unaffiliated predecessor did business." Brown Forman, 65 Mass. App. Ct. at 499. Obligations under §25E may attach if there is a continuing affiliation or an agency relationship between the seller and purchaser of a brand or brands of alcoholic beverages. Heublein, Inc. v. Capital Distributing, 434 Mass. 98, 706 (2001).However, where there is no evidence that a continuing affiliation or agency relationship existed between a distributor and its predecessor, §25E obligations do not follow to the purchaser-distributor. Brown-Forman Corporation v. ABCC, 65 Mass. App. Ct. 500, 506 -510 (2006). This general exception to the general rule that §25E obligations do not follow from the seller to the buyer is "designed to foreclose extinguishment of Section 25E duty through corporate shell-games undertaken with evasion as the principle objective, and requires the Commission to conclude, based on substantial evidence, that the asset buyer and predecessor supplier enjoyed a 'continuing affiliation.'" Beam Spirits & Wine v. ABCC, Suffolk Superior Court, Docket No. 13-02229-C, at Page 13.

As to considering whether a continuing affiliation existed between Luxco and Heaven Hill, the record demonstrates that the two parties did sign a Transitional Agreement whereby Luxco was to continue to have a relationship with Heaven Hill for at least one year "to produce, process, and bottle" the Brand at the facilities of Luxco in St. Louis, Missouri. It must also be noted that the record indicates that the parties did, in fact, collaborate and take collective action pursuant to this Transitional Agreement following the transaction.

Courts have held that properly-drafted and implemented transitional agreements do not, without more, constitute the type of continuing affiliation or agency relationship which would subject a purchaser-distributor to §25E obligations. In Gilman v. ABCC, 61 Mass. App. Ct. 916 (2004), Appeals Court observed:

> [c]ertain transitional agreements between [the buyer] and the seller obligated the seller to assist [the buyer] in producing the brands of gin and scotch in question during an interim period. We agree with [the buyer] that there was substantial evidence to support the commission's conclusion that such obligations did not prevent [the buyer] from acquiring control over the brands and hence did not impute § 25E liability to [the buyer] under the theory of shared control. Gilman, Id. at 917-918.

That, in the instant case, Luxco produced, processed and bottled the brand, and that Luxco continued to do the ordering and shipping on behalf of Heaven Hill for the brand for some time following the transaction does not require imputation of §25E obligations. Furthermore, that Luxco and Heaven Hill collaborated numerous times during this transitional period is not

dispositive. It is clear that buyer and sellers may clearly enter into such agreements without running afoul of §25E. Gilman, Id. at 917. There must be a genuine issue as to material fact as to whether the asset buyer and predecessor supplier enjoyed a 'continuing affiliation.'" Beam Spirits & Wine v. ABCC, Suffolk Superior Court, Docket No. 13-02229-C, at Page 13.

No evidence has been presented that Luxco and Heaven Hill shared any ownership interest. No evidence has been presented that Luxco and Heaven Hill engaged in any activity beyond the term of the Transitional Agreement. That Luxco and Heaven Hill did engage in certain collective behavior during the terms of the Transitional Agreement is not determinative, and is not sufficient evidence to demonstrate a genuine issue of material fact as to agency or continuing affiliation. Gilman, Id. at 917.

To survive a Motion for Summary Decision, there must exist a genuine issue as to a material fact as to whether §25E obligations should be imputed under the theory of agency or control. A "successor supplier of alcoholic beverages does not become subject to §25E 'where the acquisition of the product assets and their distribution rights were made at arm's length and there was no evidence before the commission of any agency relationship or continuing affiliation between [the seller and the purchaser of the assets] following the completion of the sale ... unless some other principle of law imputes [the seller's] obligations to [the purchaser]." Gilman, Id. at 917; quoting Heublein v. Capital Distributing Co., 434 Mass. 698, 708 (2001).

United has not demonstrated evidence in the record which would permit the Commission to find that a genuine issue of fact exists as to imputation of §25E obligations through agency and/or continuing affiliation. While United has demonstrated that Luxco and Heaven Hill collaborated following and during the Transitional Agreement, there is no evidence before the Commission which would permit the Commission to conclude that there is a genuine issue of material fact as to agency or continued affiliation.

(b) Intended Circumvention of §25E

Next, the Commission must examine whether there are no genuine issues of material fact as to whether or not Heaven Hill and Luxco entered into the APA with the intent to avoid obligations under c. 138 §25E. Heaven Hill must demonstrate that there is no evidence that Luxco and Heaven Hill entered into the transaction with the intent to circumvent §25E obligations. In Heublein v. Capital Distributing Company, 434 Mass. 698 (2001), the SJC observed, in considering a claim of intentional circumvention of §25E obligations that:

> "[T]here was no evidence and, thus, no finding that [buyer] acquired [seller's brand] for the purpose of circumventing §25E. . . . . . . Seeking to avoid obligations under §25E, if any exist, is quite different [from] acquiring distribution rights for the specific purpose of circumventing §25E [Note 11]."

Accordingly, that one may seek to utilize the services of a different wholesaler after a transaction without violating §25E is clear. For the Commission to conclude that a disputed issue of material fact exists regarding intentional circumvention of §25E obligations, evidence must exist which could support a Commission decision that the transaction "was entered into with the specific purpose of circumventing §25E." Heublein, Id., at 704. In Heublein, the judge recognized that there are legitimate business reasons for a new supplier, who is not an agent of or

affiliated with the previous supplier, to want to evaluate its prospective wholesalers for the six-month trial period provided by the Legislature in §25E, and that structuring the execution of an arm's-length acquisition to ensure that possibility did not convert the purpose of the transaction to one intended to circumvent §25E. Heublein v. Capital Distributing Company, 434 Mass. 698 (2001).

As previously referenced, 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. Fay, Spooford & Thorndike, Inc. v. Massachusetts Port Authority, 7 Mass. App. Ct. 336, 340 (1979). That the Heaven Hill and Luxco transaction was structured in a fashion to avoid conveying 25E obligations does not create a triable issue of material fact, in that the Heublein case clearly demonstrates that "structuring the execution of an arm's-length acquisition to ensure that possibility did not convert the purpose of the transaction to one intended to circumvent §25E." Heublein, Id.

The Transitional Agreement called for processing, bottling, storing, and shipping of the product to United. There is no dispute that control over the sales of the product was in the control of Heaven Hill. That Heaven Hill and Luxco collaborated to make an attempt to stop an order from being shipped to United, likewise, does not create a sufficient basis for a triable factual dispute.

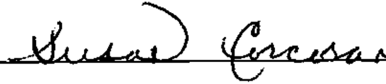
There is simply nothing in the record which would support the inference that Luxco and Heaven Hill's primary and dominant purpose in entering into an arm's-length APA was to "play a corporate shell game to extinguish United's Section 25E right to continued product sales from" Heaven Hill. See, Beam Spirits & Wine v. ABCC, Suffolk Superior Court, Docket No. 13-02229-C, at Page 22.

CONCLUSION

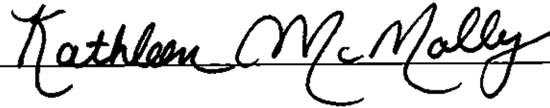
The Commission hereby determines there is no basis to attribute §25E obligations to Heaven Hill, and that Heaven Hill is entitled to judgment as a matter of law. The APA was designed and implemented in a fashion by which the distribution rights to the Captain Nelson Brand were not provided to Respondent. There is no factual basis to impute 25E obligations to the Respondent and the Motion for Summary Decision is ALLOWED. Pastene Wine & Spirits Co. v. Alcoholic Beverages Control Commission, 401 Mass. 621 (1988).

The petitions for relief under M.G.L. Ch. 138 §25E are DISMISSED. The Pre-Hearing Order that ordered Respondent to continue to make sales of the Admiral Nelson Brands to Petitioners is hereby DISSOLVED.

ALCOHOLIC BEVERAGES CONTROL COMMISSIO

Susan Corcoran, Commissioner 

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Kathleen McNally, Commissioner 

Dated: January 6, 2015

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: William J. Coyne, Jr. Esq. via facsimile 888-630-1377
J. Mark Dickison, Esq. via facsimile 617-439-3987
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