

The Commonwealth of Massachusetts

Department of the State Treasurer

Alcoholic Beverages Control Commission

Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

NO. 25E-1289
M.S. WALKER, INC.,
PETITIONER,

v.

THE WINE GROUP,
RESPONDENT
HEARD: 12/10/2015

MEMORANDUM AND ORDER
ON RESPONDENT'S MOTION FOR SUMMARY DECISION

M. S. Walker, Inc. ("Walker") is a Massachusetts Wholesaler aggrieved at the refusal of The Wine Group ("Wine Group"), a Massachusetts Certificate of Compliance holder, to ship to Walker the Trapiche and Falling Star wine brands (the "Brands"). On or about April 10, 2012, Walker filed its Petition pursuant to M.G.L. c. 138, § 25E ("§ 25E") against Wine Group. On May 2, 2012, pursuant to the mandate in § 25E, the Alcoholic Beverages Control Commission ("Commission") issued an order to Wine Group to make sales of the Brands to Walker pending the Commission's determination of the Petition on the merits.

Wine Group filed the instant Motion for Summary Decision regarding the above-referenced Petition on the grounds that there has never been a six-month course of dealing in the Brand Items between Wine Group and Walker; the transaction in which Wine Group acquired the right to sell the Brands was an arms-length asset purchase agreement; Wine Group did not expressly assume the distributorship liabilities of predecessor supplier Frederick Wildman & Sons, Inc. ("Wildman"); there was no affiliation, assignment or agency relationship between Wildman and Grupo Penaflor S.A. ("Grupo Penaflor") to Wine Group; and the transaction was not an attempt to circumvent § 25E. The Commission held a hearing on Thursday, December 10, 2015, regarding Wine Group's Motion for Summary Decision. After the hearing and consideration of the exhibits and arguments provided by the parties, the Commission makes the following findings of fact and rulings of law.

FINDINGS OF FACT

1. Wine Group is a California corporation that imports and distributes a number of widely-known wines and spirits. It holds a Massachusetts Certificate of Compliance issued pursuant to M.G.L. c. 138, § 18B. (Sutton Aff. ¶¶ 2, 3; TWG 1¹)
2. Grupo Penaflor is a company organized and existing under the laws of Argentina. (Sutton Aff. ¶ 6, TWG 1)
3. On December 15, 2011, Wine Group and Grupo Penaflor executed a Distribution Agreement (the “Distribution Agreement”). (Sutton Aff. ¶ 4; TWG 1-40)
4. Pursuant to the Distribution Agreement, effective April 1, 2012, Wine Group was appointed as the exclusive importer and distributor of the Trapiche wine brand and the Falling Star wine brand in the United States. (Sutton Aff. ¶ 5; TWG 1, 5)
5. The initial term was for five years, subject to earlier termination and extensions. (Sutton Aff. ¶ 5, TWG 6-9, 21-23).
6. According to the Distribution Agreement, Wine Group is responsible for the marketing, sale, and distribution of the Brands, which are produced by Grupo Penaflor and its affiliates. (Sutton Aff. ¶ 6; TWG 12-14)
7. The Distribution Agreement acknowledges that “no joint venture, partnership, franchise, or fiduciary duty has been created by this Distribution Agreement” (TWG 29)
8. Wine Group and Grupo Penaflor executed a First Amendment to the Distribution Agreement on March 21, 2012 (“First Amendment”). The First Amendment added additional products for which Wine Group was appointed the exclusive importer and distributor, and it amended volume targets for all the products, including the Brands, and termination-triggering events based on Wine Group’s failure to purchase stated quantities of the Brands. (Sutton Aff. ¶¶ 4, 7; TWG 41-46)
9. There was no relationship between Wine Group and Grupo Penaflor with respect to the Brands prior to the existence of the Distribution Agreement and subsequently the First Amendment, which established and governed the relationship of those parties with respect to the Brands. (Sutton Aff. ¶ 16)
10. Wine Group has never had any ownership interest in Grupo Penaflor, and Grupo Penaflor has never had any ownership interest in Wine Group. They have no common officers, managers, employees, or directors. There are no partnerships, joint ownerships, or joint ventures between the two or their subsidiaries or affiliates. (Sutton Aff. ¶¶ 17, 18)

¹ Several documents labeled as Exhibits are attached to John Sutton’s September 12, 2014, Affidavit. For those documents that have the Bates stamp prefix identifier of “TWG” will be cited as “TWG [page number].” Those Exhibits without Bates stamp page numbers will be cited as, “Mot. Ex. [Exhibit Letter].”

11. Wildman had distributed the Brands prior to Wine Group's appointment in the Distribution Agreement. The execution of the Distribution Agreement terminated Wildman's distribution rights to the Brands. (Sutton Aff. ¶ 8; Motion Ex. C)
12. Wine Group has never had any ownership interest in Wildman, and Wildman has never had any ownership interest in Wine Group. They have no common officers, managers, employees, or directors. There are no partnerships, joint ownerships, or joint ventures between the two or their subsidiaries or affiliates. (Sutton Aff. ¶¶ 9, 13; TWG 29)
13. At no time did Wine Group assume any debts, liabilities, or obligations of Wildman, nor did it hire any employees employed by Wildman. (Sutton Aff. ¶ 15)
14. On or about April 1, 2012, Wine Group purchased Wildman's remaining inventory of the Brands for monetary consideration. (Sutton Aff. ¶ 11; TWG 52-58)
15. Wine Group was not obligated as part of the Distribution Agreement to purchase Wildman's inventory of the Brands. (TWG 11)
16. Wine Group was informed of the identities of Wildman's wholesalers in order to permit Wine Group to notify those wholesalers with whom it did not wish to do business. Wine Group notified Walker by letter dated February 27, 2012, that it would begin importing and distributing the Brands, and that it planned to consolidate its wholesaler network in Massachusetts and Rhode Island with a single wholesaler, other than Walker. (TWG 6060)
17. Grupo Penaflor had no involvement in Wine Group's selection of wholesalers with respect to the Brands. (Sutton Aff. ¶ 19)
18. On or about April 10, 2012, Walker filed its § 25E Petition. (Commission File)
19. On May 2, 2012, pursuant to the mandate in M.G.L. c. 138, § 25E, the Commission issued an order to Wine Group to make sales of the Brands to Walker pending the Commission's determination of the petition on the merits. (Commission File)

DISCUSSION

Wine Group argues that there is no legal basis for the Commission to order Wine Group to continue sales of the Brands since there has never been a six month course of dealing in the Brands between Wine Group and Walker; the transaction by which Wine Group acquired the distribution rights to the Brands was an arms-length distribution agreement; there was no affiliation, assignment, or agency relationship between Wine Group and Wildman; and the transaction was not an attempt to circumvent the sales obligations under § 25E. Walker has responded by arguing that the Commission must deny Wine Group's Motion for Summary Decision because (1) the affidavit upon which it relies for the factual basis of its motion is insufficient, and (2) Wine Group has failed to meet its burden in showing no genuine issue of material fact that Wine Group does not have a continuing obligation under § 25E to sell the Brands to Walker.

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). Material facts are those that are substantive in nature and affect the result of the case. Carey, 446 Mass. at 278. 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).

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, citing 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. Gilman & Sons., Inc. v. Alcoholic Beverages Control Comm'n, 61 Mass. App. Ct. 916, 917 (2004), citing Heublein, 434 Mass. at 704. The courts and Commission have recognized imputation of a predecessor supplier to a successor predecessor in limited circumstances:

“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. June 14, 2004); or where there is a continuing affiliation between the prior supplier and the new supplier, Heublein, 434 Mass. at 704; “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 where a transfer has occurred for “the specific purpose of circumventing §25E,” accord Heublein, 434 Mass. at 706; Pastene, 401 Mass. at 616.

Walker does not appear to advocate that any of the ordinary grounds for imputation are present. Therefore, the Commission will only briefly address the recognized methods of imputation as they apply here. Wine Group is not, nor ever has it been, an agent for Wildman, neither did Wildman assign its distribution rights of the Brands to Wine Group. Wine Group obtained the exclusive distribution rights to the Brands from Grupo Penaflor in an arms-length transaction, which thereby terminated Wildman’s distributorship rights. Then, the only exchange that took place between Wine Group and Wildman was an arms-length transaction whereby Wine Group bought the remaining Brands that Wildman had in its possession at or about the time when Wildman had been terminated as the Brands’ distributor and Wine Group had been appointed exclusive distributor. (Sutton Aff. ¶ 11; TWG 52-58). Wine Group was not required by its Distribution Agreement with Grupo Penaflor to purchase the remaining inventory from Wildman. Wine Group has never had any ownership interest in Wildman, and Wildman has never had any ownership interest in Wine Group. (Sutton Aff. ¶ 9). Wildman has never had anything to do with Wine Group’s importation, sale, distribution, marketing, or selection of wholesalers with respect to the Brands. (Sutton Aff. ¶ 12). There are no partnerships, joint ownerships, or joint ventures between Wine Group or its subsidiaries/affiliates, and Wildman, and its subsidiaries/affiliates. (Sutton Aff. ¶ 13). At no time did Wine Group assume any debts, liabilities, or obligations of Wildman, nor did it hire any Wildman employees. (Sutton Aff. ¶ 15). Ultimately, there is nothing, and has never been anything, connecting Wildman and Wine Group regarding the Brands other than this arms-length transaction wherein Wine Group bought the remainder of the Brand products from Wildman. This single transaction does not rise to the level of an agency relationship or an ongoing affiliation such that Wildman’s distribution is imputed to Wine Group. And the record is completely absent any indication that it was Wildman, and not Grupo Penaflor, that assigned the distribution rights of the Brands to Wine Group.

While Walker does not appear to dispute the lack of recognized grounds for imputation, it argues that Wine Group has not met the summary decision standard for two reasons. First, it contends that Wine Group has “not shown the absence of a genuine issue of fact by competent evidence” because Attorney Sutton’s affidavit filed in support of Wine Group’s Motion is factually insufficient and without a basis of personal knowledge regarding Grupo Penaflor’s relationship with Wine Group (Walker Response at 1). Second, “[e]ven if the Sutton affidavit were competent, it does not address the issue of 25E obligations held by Grupo Penaflor, acquired while its brand items were being purchased by Walker through Wildman” and that Wine Group has not sustained its burden “of showing that there is no factual issue under any ground for imputation under G.L. c. 138, § 25E” (Walker Response at 2, 3).

Attorney Sutton's Affidavit

"Affidavits in support of motions for summary [decision], among other things, 'shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence. . . .'" TLT Const. Corp. v. A. Anthony Tappe & Associates, Inc., 48 Mass. App. Ct. 1, 11 (1999), quoting Mass. R. Civ. P. 56(e).² Rule 56(e) sets forth three requirements for affidavits either supporting or opposing a motion for summary judgment. Such affidavits: (1) shall be made on personal knowledge; (2) shall set forth such facts as would be admissible in evidence; and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. These guidelines are "unambiguous." Madsen v. Erwin, 395 Mass. 715, 720 (1985). Affidavits must set forth specific facts; vague and general allegations are "wholly inadequate." First Nat'l Bank of Boston v. Ibarra, 47 Mass. App. Ct. 660, 663 (1999). Walker contends that Wine Group has provided inadequate evidence in support of its motion because Attorney Sutton's affidavit is insufficient.

Walker ignores the fact that affidavits are not required for motions for summary decision before the Commission. See 801 CMR 1.01(7)(h) (under the Formal Rules, which the Commission generally follows for motions for summary decision, ". . . the Party may move, with or without supporting affidavits, for summary decision on the claim or defense").

Regardless, Attorney Sutton's affidavit meets all three requirements for the filing of an affidavit as the factual basis for a motion for summary decision under Mass. R. Civ. P. 56(e). Attorney Sutton has personal knowledge of the statements he has made in his affidavit. See Sutton Aff. ¶ 4 ("I am familiar with the facts and circumstances surrounding the negotiation and execution of the Distribution between Wine Group and Grupo Penaflor, S.A. . . ."). Attorney Sutton's statements in his affidavit are made of his own personal knowledge, and show "affirmatively that the affiant would have been competent to testify to any of the critical matters at trial." Federal Home Loan Mortgage Corp. v. Kauppinen, 2015 WL 7354164, n. 4 (Mass. App. Ct. Unpublished Memo and Order pursuant to Rule 1:28) (Nov. 9, 2015), citing Stanton Industries v. Columbus Mills, 4 Mass. App. Ct. 793 (1976). Attorney Sutton averred facts as opposed to conclusory allegations or statements made on "information and belief." See Dattoli v. Hale Hospital, 400 Mass. 175, 178 (1987); Polaroid Corp. v. Rollins Environmental Services, Inc., 416 Mass. 684, 696 (1993); Botschafter v. FDIC, 33 Mass. App. Ct. 595, 596-597 (1992). He does not rely on hearsay nor does he express any speculative opinion or legal opinion. See Botschafter, 33 Mass. App. Ct. at 596-597; Museum of Fine Arts v. Beland, 432 Mass. 540, 543 (2000). Above all, his factual recitation is specific, and its contents would be admissible in evidence at a hearing before the Commission. See Building Comm'r of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. 709, 720 (2000); Baldwin v. Mortimer, 403 Mass. 142, 144 (1988).

Ultimately, Attorney Sutton's affidavit provides an adequate factual basis, arising from his own personal knowledge, to sustain Wine Group's burden to show that there was no ongoing affiliation or agency relationship, or assignment of rights, between the predecessor distributor, Wildman, and the successor distributor, Wine Group.

² Both Rule 56 and the Formal Rules contemplate situations where affidavits are unnecessary. 801 C.M.R. 1.01(7)(h); Music & Games, Inc. v. McCarthy, 9 Mass. App. Ct. 906, 906 (1980).

Wine Group's Burden on All Possible Theories of Liability

Walker makes a related claim that “[e]ven if the Sutton affidavit were competent, it does not address the issue of 25E obligations held by Grupo Penaflor, acquired while its brand items were being purchased by Walker through Wildman” and that Wine Group has not sustained its burden “of showing that there is no factual issue under any ground for imputation under G.L. c. 138, § 25E” (Walker Response at 2, 3).

Wine Group would not have the burden of proof at any evidentiary hearing on the merits of Walker's petition. “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.” United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014); accord Wheatley v. American Tel. & Tel. Co., 418 Mass. 394, 397 (1994); Branded-New England Co. v. Beringer Wine Estates Co., 25E-1145 (ABCC Decision May 24, 2000).

“[T]he opposing party cannot rest on [its] pleadings and mere assertions of disputed facts to defeat the motion for summary [decision].” LaLonde v. Eisner, 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); accord United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014). 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 v. General Corp., 410 Mass. 706, 711 (1991).

As discussed supra, Wine Group has shown that Walker has no reasonable expectation of proving imputation of the predecessor distributor's § 25E obligations to its successor. Wine Group has adequately shown that there was no ongoing affiliation or agency relationship between Wildman and Wine Group, or an assignment of rights from Wildman to Wine Group.

What is left is Walker's assertion that Wine Group has not sufficiently addressed the relationship between Grupo Penaflor and Wine Group. While Walker expends significant time in pointing to potential areas of control by Grupo Penaflor over Wine Group, Walker itself has openly speculated whether the relationship between Grupo Penaflor and Wine Group is even relevant for § 25E purposes.³ Wine Group is only responsible for demonstrating there is no genuine issue of material fact “on every *relevant* issue.” Pederson v. Time, Inc., 404 Mass. 14, 17 (1989) (emphasis added). As the Superior Court has affirmed, when considering any agency relationship, the only relationship that matters is whether “the new supplier is an agent of the previous supplier,” Brown-Forman Corp., 2004 WL 1385495 at *4; accord Charles E. Gilman & Sons v. Alcoholic Beverages Control Comm'n, 61 Mass. App. Ct. 916, 917 (2004); Pastene Wine & Spirits v. Alcoholic Beverages Control Comm'n, 401 Mass. 612, 618 (1988); Beam

³ Walker, through counsel, acknowledged at the hearing on this Motion that even if there were an agency relationship between Grupo Penaflor and Wine Group, there is an issue of “whether this agency is relevant” to a § 25E inquiry.

Spirits & Wine, LLC v. Alcoholic Beverages Control Comm'n, 32 Mass. 1. Rptr. 433 at *6, C.A. No. 13-2229C (Aug. 18, 2014) (Gordon, J.), or whether “the previous supplier has assigned distribution rights to the new supplier.” Brown-Forman Corp., 2004 WL 1385495, at *4; accord Heublein, Inc., v. Alcoholic Beverages Control Comm'n, 30 Mass. App. Ct. 611, 614-616 (1991). Because the relationship between Grupo Penaflor and Wine Group is not relevant to a § 25E inquiry, Wine Group was not responsible for showing that there is no factual issue in the relationship between Grupo Penaflor and Wine Group.

CONCLUSION

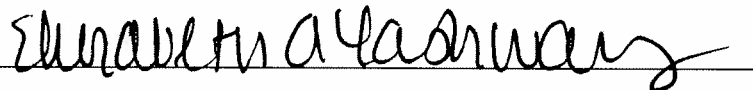
The Commission concludes that there has never been a six-month course of dealing in the Brand Items between Wine Group and Walker; there was no ongoing affiliation or agency relationship, or assignment of rights, between Wildman and Wine Group; there was no intent to circumvent § 25E; and Walker has no reasonable expectation of proving that Wildman's § 25E obligations should be imputed to Wine Group.

Wine Group's Motion for Summary Decision is **ALLOWED**.

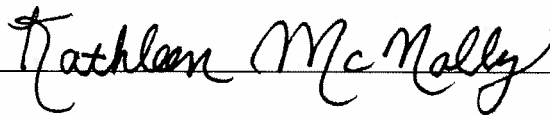
The matter is dismissed and the Commission's previous order to ship is **DISSOLVED** effective May 20, 2016.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: May 20, 2016

You have the right to appeal this decision to the Superior Court 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: Mary O'Neal, Esq.
William Coyne, Esq.
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