



*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*

**NO. 25E-1293**

**UNITED LIQUORS, LLC**

**v.**

**CONSTELLATION BRANDS, INC.**  
**HEARD: 04/10/2013**

**MEMORANDUM AND ORDER ON  
RESPONDENT'S MOTION TO DISMISS**

United Liquors, LCC ("UNITED"), is a Massachusetts wholesaler aggrieved at the refusal of Constellation Brands, Inc. ("CONSTELLATION"), a Massachusetts Certificate of Compliance holder, to ship to UNITED Arbor Mist® Frozen Wine Cocktails. On or about June 20, 2012, UNITED filed its Petition pursuant to M.G.L. c. 138, §25E ("§25E") against CONSTELLATION. On or about June 26, 2012, pursuant to the mandate in §25E, the Commission issued an order to Constellation to make sales of the Arbor Mist® Frozen Wine Cocktails to UNITED pending the Commission's determination of the petition on the merits.

CONSTELLATION filed a Motion To Dismiss ("MTD") regarding the above-referenced petition for relief under General Laws Chapter 138, §25E on the grounds that UNITED did not ever previously purchase the brand items which are the subject matter of the Order to Ship. After a hearing and consideration of the exhibits and the arguments provided by the parties, the Commission makes the following findings of fact and rulings of law.

FACTS

1. UNITED is a wholesaler of alcoholic beverages with a usual place of business in Braintree, Massachusetts.
2. CONSTELLATION is a supplier of alcoholic beverages with a usual place of business at 116 Buffalo Street, Canandaigua, New York.
3. CONSTELLATION over the course of many years developed, marketed, and manufactured the Arbor Mist® wine brand.
4. At present, CONSTELLATION manufactures approximately 14 different varieties of their wine product (as well as a fifteenth seasonal flavor): Blackberry Merlot, Cranberry Twist White Merlot, Exotic Fruits White Zinfandel, Island Fruits Pinot Grigio, Melon White Zinfandel, Mixed Berry Pinot Noir, Orchard Fruits Chardonnay, Peach Chardonnay, Pomegranate Berry Pinot Noir, Sangria Zinfandel, Strawberry White Zinfandel, Tropical Fruits Chardonnay, White Pear Pinot Grigio, Winter Berry Merlot, and Mango Strawberry Moscato.

5. UNITED has purchased, for a period of time well in excess of six months, CONSTELLATION's "traditional wine products", including three varieties of Blackberry Merlot, White Pear Pinot Grigio and Strawberry White Zinfandel being flavored wine<sup>1</sup> in a bottle, sold in either 750 ml (equivalent to 3 servings<sup>2</sup>) or 1.5 liter (equivalent to 6 servings) glass bottles.
6. In or about May 2012, CONSTELLATION issued a press release entitled, "Arbor Mist® Launches Frozen wine Cocktails: One of America's Favorite Wine Brands is Now Available in Freezable 10-ounce Pouches." This press release stated, in relevant part, that "America's number one wine with fruit brand, Arbor Mist®, ushers in spring with the announcement of a new and innovative way to enjoy its great-tasting wines: frozen! Known for its crisp and refreshing wines with natural fruit flavors, Arbor Mist® is introducing three easy to enjoy frozen wine cocktails in single-serve 10-ounce pouches – Blackberry Merlot, White Pear Pinot Grigio and Strawberry White Zinfandel. These brand new frozen wine cocktails are available nationwide just in time for outdoor entertaining for a suggested retail price of \$1.99."
7. On or about June 7, 2012, UNITED placed a purchase order with CONSTELLATION for the frozen wine cocktails, including those products bearing the names of Blackberry Merlot, White Pear Pinot Grigio and Strawberry White Zinfandel.
8. UNITED had never previously purchased the frozen wine products because prior to its launch in the Spring of 2012, CONSTELLATION had never sold the frozen wine products to anyone.
9. On or about June 11, 2012, CONSTELLATION refused to fulfill UNITED's order for the frozen wine cocktails bearing the names Blackberry Merlot, White Pear Pinot Grigio and Strawberry White Zinfandel.
10. CONSTELLATION's Arbor Mist® frozen wine cocktails ("Frozen Cocktails") differ significantly from the Arbor Mist® flavored wines ("Traditional Products").
11. An essential differentiating characteristic is that the Frozen Cocktails were developed and are intended to be consumed in a frozen state, whereas the Traditional Products are not.
12. As such, the Traditional Products should not be consumed in a frozen state because even if the contents of the bottle could be frozen, it would not have the same organoleptic<sup>3</sup> characteristics as the Frozen Cocktails. Furthermore, the Frozen

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<sup>1</sup> They are: Cranberry Twist White Merlot, Strawberry White Zinfandel, Exotic Fruits White Zinfandel, Blackberry Merlot, Mixed Berry Pinot Noir, Pomegranate Berry Pinot Noir, Sangria Zinfandel, Melon White Zinfandel, Island Fruits Pinot Grigio, Orchard Fruits Chardonnay, Peach Chardonnay, Tropical Fruits Chardonnay, White Pear Pinot Grigio, and Mango Strawberry Moscato. Konopka Affid. ¶ 2

<sup>2</sup> The Commission notes that there are 25.36 ounces in a 750 ml bottle thus making three (3) servings a generous, if not intemperate, serving size of over 8 ounces. The Commission is mindful that a single serving of wine generally contains 4-5 ounces per serving, with a 5 ounce serving regularly labeled as "generous." But serving sizes of 4-5 ounces per serving are with wines that contain over 12 % alcohol by volume. The products involved in this case contain only 6 % alcohol by volume. Thus, the description of a 750 ml bottle as containing only 3 servings is not as intemperate as first appears.

<sup>3</sup> i.e., affecting an organ, especially a sense organ.

Cocktails are not meant to be consumed “as is”, and would not be pleasant or flavorsome in their unfrozen state.

13. In addition, unlike the Traditional Products, the Frozen Cocktails’ pouches are packaged in a single-serving pouch, and intended to be (and principally are) hung, with a punch hole in the top provided. The Traditional Products are package in 750 ml bottles with screw top caps.
14. Another differentiating characteristic the Frozen Cocktails possess is a unique stabilizing system that has been added to the pouches.
15. This system enables the Frozen Cocktails to be frozen into a wine, “slush-type” product that can be consumed with a straw or spoon.
16. Moreover, the Frozen Cocktails, are much sweeter, and the levels of or volume of flavor concentrates is much greater, than those contained in the Traditional Products.
17. The Frozen Cocktails were purposefully manufactured this way because flavors and aromas diminish when a food or beverage is cold; therefore, the flavor systems have been increased.
18. Another differentiating characteristic is that the Frozen Cocktails are substantially higher in calories, sugars and carbohydrates than the Traditional Products.
19. As illustrated below, the nutrient levels and ingredients for the Traditional Products and Frozen Cocktails are different:

Beverage	Calories (per 8 oz. serving)	Sodium (mg.)	Carbohy- drates (g.)	Sugars (g.)	Packaging
Strawberry White Zinfandel Flavored Wine	160	20	20	13	750 ml or 1.5 liter frosted bottles with clear label and screw top closure
White Pear Pinot Grigio Flavored Wine	150	10	2	13	750 ml or 1.5 liter frosted bottles with clear label and screw top closure
Blackberry Merlot Flavored Wine	160	10	21	21	750 ml or 1.5 liter frosted bottles with clear label and screw top closure
Strawberry White Zinfandel Frozen Wine Cocktails	290	10	50	45	multilayer pouch; pouch states "freeze and enjoy". Must be frozen for 5 hours, and pouch gently squeezed to mix ingredients, and squeezed into a receptacle to consume with a spoon or a straw. Additional ingredients <i>not</i> contained in the flavored wine: maltodextrin, guar gum, and dextrose.
White Pear Pinot Grigio Frozen Wine Cocktails	310	15	53	50	multilayer pouch; pouch states "freeze and enjoy". Must be frozen for 5 hours, and pouch gently squeezed to mix ingredients, and squeezed into a receptacle to consume with a spoon or a straw. Additional ingredients <i>not</i> contained in the flavored wine: maltodextrin, guar gum, and dextrose.
Blackberry Merlot Frozen Wine Cocktails	320	15	55	53	multilayer pouch; pouch states "freeze and enjoy". Must be frozen for 5 hours, and pouch gently squeezed to mix ingredients, and squeezed into a receptacle to consume with a spoon or a straw. Additional ingredients <i>not</i> contained in the flavored wine: maltodextrin, guar gum, and dextrose.

## DISCUSSION

Under M.G. L. c. 138, §25E, it is an "unfair trade practice and therefor unlawful for any . . . importer . . . of any alcoholic beverage to refuse to sell, except for good cause shown, any item having a brand name to any licensed wholesaler to whom such . . . importer . . . 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).

It is undisputed among the parties that none of the statutory grounds for refusing to sell are at issue. The present case involving the Frozen Cocktails presents the question whether UNITED meets the standards for relief under §25E for this brand item, viz., the Frozen Cocktails. CONSTELLATION argues that the Frozen Cocktails are a newly produced brand item and as such are not within the provisions of §25E because there is no previous course of dealing with any wholesaler, including UNITED.

The protections afforded by §25E apply only to specific individual "brand items" which the wholesaler has purchased from the supplier within the past six months, and does not apply to all "brand items" that a supplier may offer for sale while doing business with a particular wholesaler. M.S. Walker v. Jim Beam Brands Company, No. 25E-1272 (ABCC Decision dated September 1, 2009); See also Classic Wine Imports, Inc. v. Rosemount Estates, Inc., 25E-1163 (ABCC Decision dated January 20, 2000). Thus, the Commission has consistently held that this continued sales requirement does not apply to new products as long as they do not replace protected items because the protection of §25E is specific to each brand item. Whitehall Co. Ltd. v. Heublein, ABCC Memorandum dated December 6, 1989. See Brockton Wholesale Beverage Co. Inc. v. Carillon Importers Ltd. ABCC Memorandum dated January 10, 1989 (25E obligations attach to individual brand items); Brockton Wholesale Beverage Co. Ltd. et. al. v. Carillon Importers Ltd., ABCC Memorandum dated August 10, 1993 ("Refusal to ship a new product line extension without more does not constitute a violation of law or fair trade practices."); Classic Wine Imports, Inc. v. Rosemount Estates, Inc. Et. Al. ABCC Decision dated January 20, 2000 ("M.G.L. c. 138, §25E obligations do not apply to a new brand item.").

The Whitehall Co. Ltd. case involved Heublein's refusal to sell Almaden White Zinfandel, Almaden White Granache and Almaden Sauvignon Blanc to Whitehall. The three products were bottled in 1.5 liter teardrop bottles and were not vintage dated. Id. Heublein had previously sold to Whitehall Almaden Premium Wines, which consisted of White Zinfandel and Sauvignon Blanc that were bottled in 1.5 liter standard bottles and vintage dated. Heublein discontinued these premium wines. Id. The Commission held that the Almaden Granache was a new product, so Heublein was not required to make sales of the product to Whitehall. Id. However, as to the White Zinfandel and Sauvignon Blanc, the Commission said that this was a case of old wine in new bottles, and ordered Heublein to sell the White Zinfandel and Sauvignon Blanc to Whitehall. Id.

The Commission's decision issued over thirteen (13) years ago in Classic Wine Imports,

Inc., supra, dismissed the §25E petition that sought to require the respondent to make sales of a brand item that the respondent had not previously sold to the petitioner. Rosemont had sold Classic Rosemont Estate wines, including Merlot and Cabernet, to Classic for many years. Rosemont added a new Wine to its list, Cabernet-Merlot blend, which is a combination of Merlot varietal of wine and Cabernet Sauvignon varietal of wine. The Commission held that the Cabernet-Merlot was a new brand item, not subject to pre-existing §25E obligations.<sup>4</sup> 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).

The Commission has held consistently that a new brand item is not subject to §25E obligations to sell. In this case, although, the “Arbor Mist®” name is used in the both the Traditional Products as well as the recently released Frozen Cocktails, there are substantial differences in the content of the product and the packaging design.<sup>5</sup>

The substantial differences in content between the products in this case are as follows:

- a. Calories: Frozen Cocktail has 130 calories more (a 123% increase)
- b. Carbohydrates: Frozen Cocktail contains 30 grams more (a 166 % increase),
- c. Sugars: Frozen Cocktail contains 32 grams more (a 246% increase)

While the experience of consuming the frozen wine product in an unfrozen state may be less than rapturous, it can be consumed unfrozen, and is an alcoholic beverage within the meaning of M.G.L. c. 138. However, the ingredients of the frozen wine product differ substantially from the pre-existing wine products and this creates a distinction with a legal difference under M.G.L. c. 138, §25E.

As the Frozen Cocktails have several characteristics and properties that distinguish them from the Traditional Products, the Commission finds that the Frozen Cocktails are a new product. Therefore, the Commission holds that the Arbor Mist® Frozen Wine Cocktails are new items under M.G.L. c. 138, §25E. On the facts of this case, no §25E obligations were created by or exist for CONSTELLATION to sell these brand items to UNITED.

### CONCLUSION

Based on the above, the Arbor Mist® Frozen Wine Cocktails are new brand items. Effective June 21, 2013, the Motion To Dismiss filed by Constellation Brands, INC is ALLOWED. The matter is dismissed as of June 21, 2013 and the Commission's previous order to ship is dissolved effective June 21, 2013.

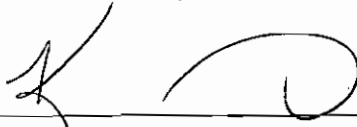
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<sup>4</sup> The language of the statute is "any item having a brand name."

<sup>5</sup> The Commission reiterates that the design in and of itself does not make the product a new brand item. The Commission has stated in the past just having a new bottle does not change the product. Whitehall Co. Ltd. v. Heublein, ABCC Memorandum dated December 6, 1989. (old wine new bottle).

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman

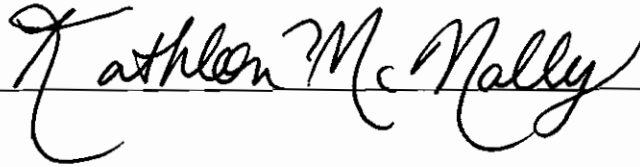


Susan Corcoran, Commissioner



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

Kathleen McNally, Commissioner



Dated: May 22, 2013

cc: J. Mark Dickison, Esq. via Facsimile 617-439-3987  
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