



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-1294
M.S. WALKER, INC.,
PETITIONER,
v.
CONSTELLATION BRANDS, INC.,
RESPONDENT
HEARD: 12/03/2015

MEMORANDUM AND ORDER ON
RESPONDENT'S MOTION FOR SUMMARY DECISION

M. S. Walker, Inc. ("Walker") is a Massachusetts Wholesaler aggrieved at the refusal of Constellation Brands, Inc. ("Constellation") a Massachusetts Certificate of Compliance Holder, to ship to Walker Mark West wine products ("Brand Items"). On or about September 4, 2012, Walker filed its Petition pursuant to M.G.L. c. 138, § 25E ("§ 25E") against Constellation. On September 13, 2012, pursuant to the mandate in § 25E, the Alcoholic Beverages Control Commission ("Commission") issued an order to Constellation to make sales of the Brand Items to Walker pending the Commission's determination of the Petition on the merits.

Constellation 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 Constellation and Walker; the transaction in which Constellation acquired the right to sell the Brand Items from Purple Wine Company ("PWC") was an arms-length asset purchase agreement; Constellation did not expressly assume the distributorship liabilities of PWC; there was no affiliation, assignment or agency relationship between Constellation and PWC; and the transaction was not an attempt to circumvent § 25E.

The Commission held a hearing on Thursday, December 3, 2015, regarding Constellation'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. Constellation Brands, Inc. ("Constellation") is a Delaware corporation that manufactures, produces, and distributes alcoholic beverages. It holds seven Massachusetts Certificates of Compliance issued pursuant to M.G.L. c. 138, § 18B. (Fondiller Aff. ¶1, 3; Commission Files)
2. Constellation Brands U.S. Operations, Inc. ("CBUSO") is a wholly owned subsidiary of Constellation. (Fondiller Aff. ¶4)
3. CBUSO entered into an Asset Purchase & Sale Agreement ("APA") with Purple Wine Company, LLC ("PWC") involving one of its members, Derek Benham, on June 8, 2012, to purchase the Mark West ("Brand") wine brand ("Brand Business"). (Fondiller Aff. ¶¶4-5)
4. The APA was for CBUSO to purchase PWC's Acquired Assets, "mean[ing], collectively, (i) the Proprietary Brand Assets,¹ (ii) the Other Intangible Property, (iii) the Inventory, and (iv) the Assumed Contracts." (CB00105²)
5. "Other Intangible Property" includes "those Authorizations set forth on Schedule 3.11(b)" of the APA. (CB00108)
6. Authorizations are "any license, permit, consent, notice, registration, concession, franchise, certificate of authority or order, certificate of occupancy, certificate of approval, approval, authorization or any waiver of the foregoing, whether domestic or foreign." (CB00106)
7. Schedule 3.11(b) lists a Massachusetts Certificate of Compliance number C-9861, currently held by Purple Wine Co., LLC. (CB00193, 00195)
8. CBUSO also agreed to assume the following liabilities: "In connection with the purchase and sale of the Acquired Assets and on the terms and subject to the conditions of this Agreement, the Buyer hereby assumes and agrees to pay, satisfy, discharge, perform and

¹ "Proprietary Brand Assets" includes:

- all right, title, and interest to all formulae, recipes, blending procedures, and know how used in the production, sale, and marketing of the Brand and Brand Business;
- patents, copyrights, trademarks, service marks, bottle designs, and other designed used in the Brand Business;
- advertising campaigns, advertising and promotional materials for the Brand Business;
- trade secrets, inventions, models and intellectual property rights used in the operation of the Brand Business;
- all inventory for the Brand Business;
- all authorizations to utilize the assets being acquired; and
- certain specifically identified and described contracts ("Assumed Contracts") (CB00109)

² Documents with the Bates stamp prefix identifier of "CB" are attached at Exhibits A-C to the Affidavit of Ronald C. Fondiller, dated March 13, 2015.

fulfill when due in accordance with their terms, all of the Assumed Liabilities.” (CB00081)

9. Assumed Liabilities are “all liabilities under the Assumed Contracts arising out of the acts or omissions of the Buyer or its Affiliates on or after the Closing Date.” (CB00106)
10. The Assumed Contracts are “only those contracts, leases, and agreements listed on Schedule 1.1(a), subject to Section 1.2.” (CB00106)
11. Schedule 1.1(a) reflects that these Assumed Contracts are only related to grape growers and not related to distributors or distribution rights. (CB00153-155)
12. Closing on the APA took place on July 16, 2012. (Fondiller Aff. ¶5(b))
13. As of the closing date, PWC no longer distributed, sold, manufactured, produced, advertised, or supplied any wholesalers or distributors with the Brand Items. (Fondiller Aff. ¶5(c))
14. The Assumed Contracts purchased by CBUSO did not include any distributor or wholesaler agreements. The Assumed Contracts were instead limited to contracts with grape growers for grapes and wine. (Fondiller Aff. ¶5(e))
15. Also on June 8, 2012, CBUSO entered into a Storage, Blending & Bottling Agreement (“SBB Agreement”) with Sonoma Wine Company, LLC (“SWC”). (CB00493-526)
16. The SBB Agreement stated that SWC would “store Wine and blend, prepare, bottle, package, store and ship” for CBUSO “any Mark West finished case good wines” for the 2011 vintage only. (CB00493, CB00504-505)
17. Derek Benham, a member of PWC and also the CEO of SWC, signed the SBB Agreement on behalf of SWC. (CB00510, CB00526)
18. On July 19, 2012, Constellation and CBUSO notified Walker that CBUSO had acquired the Brand and had appointed its parent, Constellation, as the national and international distributor of the Brand Items, with authority to appoint distributors in all jurisdictions. (Fondiller Aff. ¶6, CB0009-11)
19. Walker was further notified that Constellation would not supply the Brand Items to it, or appoint Walker as a distributor of the Brand. This was to have no impact on other brands that Constellation distributed to Walker. (Fondiller Aff. ¶6, CB0009-11)
20. CBUSO and Constellation offered Walker consideration to release any claims alleging rights to distribute or to be appointed as a distributor, but Walker declined the offered consideration. (Fondiller Aff. ¶¶ 5j & 6, CB0009-11, CB00541-549)
21. In May 2012, Constellation entered into a distributorship agreement with Horizon Beverage Company, Inc., a Massachusetts wholesaler. (Fondiller Aff. ¶7)
22. On or about August 28, 2012, Walker filed its § 25E Petition. (Commission File)

23. On September 13, 2012, pursuant to the mandate in M.G.L. c. 138, § 25E, the Commission issued an order to Constellation to make sales of the Brand Items to Walker pending the Commission's determination of the petition on the merits. (Commission File)

DISCUSSION

Constellation argues that there is no legal basis for the Commission to order Constellation to continue sales of the Brand Items since there has never been a six-month course of dealing in the Brand Items between Constellation and Walker; the transaction by which Constellation acquired the rights to the Brand Items was an arms-length asset purchase agreement; there was no affiliation, assignment or agency relationship between Constellation and PWC; and the transaction was not an attempt to circumvent the sales obligations under § 25E. Walker has responded by arguing that the Commission must order Constellation to continue sales of the Brand Items because (1) Constellation expressly assumed PWC's obligations to continue shipping to Walker in the APA, and (2) Constellation remained in a continuing affiliation or agency relationship with PWC.³ In the alternative, Walker argues that Constellation's Motion should be denied because there are genuine issues of material fact as to these two points.

MOTION FOR SUMMARY DECISION STANDARD

The Commission operates under the Informal "Fair Hearing" Rules promulgated under 801 C.M.R. 1.02 in matters arising under M.G.L. c. 138, § 25E. Although not specified in the Informal Rules, parties may file motions pursuant to 801 C.M.R. 1.02(7)(c) governing "special requests." Because § 25E matters are complex, the Commission tracks the summary decision protocol laid out in the Formal Rules under 801 C.M.R. 1.01(7)(h) in order to promote regularity and efficiency with its procedures. Because the Formal Rule relies on the courts' interpretation of Mass. R. Civ. P. 56, so too does the Commission.

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).

"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 (2004); Branded-New England Co. v. Beringer Wine Estates Co., 25E-1145 (ABCC Decision May 24, 2000). "The

³ Walker does not dispute that there was not a six-month course of dealing in the Brand Items between Constellation and Walker.

nonmoving party cannot defeat the motion for summary [decision] by resting on its pleadings and mere assertions of disputed facts . . .” 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).

SECTION 25E OBLIGATIONS

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.” M.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.” Heublein, 434 Mass. at 707 (quoting Pastene, 401 Mass. at 618-619). Nevertheless, § 25E does not achieve this goal by imposing inequities upon suppliers. Id. (quoting Pastene, 401 Mass. at 618-619).

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, 434 Mass. at 701-702 (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.

There is no dispute that Constellation did not make sales of the Brand Items voluntarily to Walker for the requisite six-month period for Constellation to create its own § 25E obligations to sell to Walker. Similarly, there is no dispute that good cause to refuse sales within the meaning of § 25E does not exist. This case turns on whether the Commission is persuaded that Constellation either expressly assumed the sales obligations of PWC who preceded Constellation as the seller of the Brand Items or that there is a continuing affiliation between Constellation and PWC sufficient for the Commission to impute PWC's prior sales to Walker resulting in an obligation for Constellation to sell the Brand Items to Walker.

EXPRESS ASSUMPTION OF SALES OBLIGATIONS

Walker contends first that Constellation is obligated under § 25E to continue selling to it because Constellation expressly assumed the obligation to continue selling to Walker in the APA with PWC. Although the general rule is that, in a strict asset purchase transaction, the transferee corporation is not liable for the debts and liabilities of the transferor corporation, a transferee corporation can agree, expressly or impliedly, to assume the liabilities of the transferor corporation. Guzman v. MRM/Elgin, 409 Mass. 563, 566 (1991). “[W]hether a seller’s status under § 25E will be imputed to a buyer should be determined by the factors articulated in Pastene . . . and Heublein . . . and are unaffected by a buyer’s general contractual assumption of the seller’s liabilities under an arm’s-length asset purchase agreement.” Gilman, 61 Mass. App. Ct. at 917.

This was an arms-length transaction and Constellation did not contract – expressly or impliedly – to assume the obligation to continue selling to PWC’s contracted wholesalers. In the APA, Constellation agreed to assume the following liabilities: “[i]n connection with the purchase and sale of the Acquired Assets and on the terms and subject to the conditions of this Agreement, the Buyer hereby assumes and agrees to pay, satisfy, discharge, perform and fulfill when due in accordance with their terms, all of the Assumed Liabilities.” (CB00081). The APA defines Assumed Liabilities as, “all liabilities under the Assumed Contracts arising out of the acts or omissions of the Buyer or its Affiliates on or after the Closing Date” (CB00106). And the Assumed Contracts are “only those contracts, leases, and agreements listed on Schedule 1.1(a), subject to Section 1.2” (CB00106). A review of Schedule 1.1(a) (CB00153-155) reflects that these Assumed Contracts were only related to grape growers and not related to distributors or distribution rights. Contrast Martignetti Grocery Co., Inc., d/b/a Carolina Wine Company v. Pine Ridge Winery, LLC d/b/a Crimson Wine Group Ltd. and Seghesio Wineries, Inc., 25E-1285 (ABCC Decision November 20, 2013) (buyer of Brand Items expressly assumed seller’s obligations to wholesaler based on (1) assumption of “all Liabilities,” which included distributorship agreements, and (2) the APA’s language that buyer bought use of seller’s Certificate of Compliance which, unless there was an agency relationship, would have been illegal to contract for, reflecting intent to contract for agency relationship). Therefore, by the plain language of the APA, Constellation did not expressly assume an obligation to continue selling to PWC’s distributors.

CONTINUING AFFILIATION

A successor supplier takes on its predecessor’s § 25E obligations where there is a “continuing affiliation or agency relationship” between the suppliers, or it appears that a transfer of distribution rights was effected with the intent to evade § 25E. Brown-Forman, 65 Mass. App.

Ct. at 500, citing Heublein, 434 Mass. at 706. The Appeals Court has evaluated the existence of a continuing affiliation or agency relationship for the purposes of § 25E by reference to general principles of agency, focusing on the suppliers' relationship with respect to the successor's sales to wholesalers. See Brown-Forman, 65 Mass. App. Ct. at 507 (stating "relevant inquiry" in imputation of § 25E obligations is whether successor supplier was predecessor's agent "for the discrete purpose of making regular sales . . . to downstream customers").

Walker asserts that Constellation and PWC had a continuing affiliation such that PWC's obligation was imputed to Constellation. It raises two points that it claims supports a determination that Constellation and PWC have a continuing affiliation: (1) Constellation and SWC, with Derek Benham as its CEO, entered into a transitional agreement, namely the SBB Agreement; and (2) that Constellation used PWC's Certificate of Compliance ("CoC").

The SBB Agreement

As part of the APA, Constellation and SWC entered into a Storage, Blending, and Bottling Agreement, whereby SWC would store, blend, and bottle the Brand for Constellation (CB00121-CB00141). The SBB Agreement was for storing, blending, and bottling the 2011 vintage of the Brand only. While PWC and SWC are separate and distinct legal entities, Derek Benham, the sole voting member of PWC, is the CEO of SWC.

A successor supplier takes on its predecessor's § 25E obligations where there is a "continuing affiliation or agency relationship" between the suppliers, or it appears that a transfer of distribution rights was effected with the intent to evade § 25E. Brown-Forman, 65 Mass. App. Ct. at 500 (quoting Heublein, 434 Mass. at 706). "Although there is no settled definition of 'continuing affiliation' . . . the prevailing thinking . . . is that the standard is met when either predecessor and successor have an agency relationship or when successor acquires predecessor's rights by contractual assignment or through joint venture." Beam Spirits & Wine, LLC v. Alcoholic Beverages Control Comms'n, 32 Mass. L. Rptr. 258 at *6 (Mass. Suff. Sup. Ct. July 16, 2014).

Without more, a continuing affiliation cannot be assumed merely because Mr. Benham is a member of PWC and the CEO of SWC. See L. Knife & Son, Inc. v. Alcoholic Beverages Control Comm'n, 2010 WL 5553349 (August 12, 2010) (Hines, J.) ("[T]he mere fact that a particular supplier continues to manufacture and exercise some degree of control over the marketing of a product does not constitute grounds for imputing the manufacturer's § 25E obligations to an independent distributor"); Brown-Forman, 65 Mass. App. Ct. at 501, 508 (distributor not subject to manufacturer's § 25E obligations in absence of agency relationship). "Tellingly, the courts have adopted a vocabulary in applying Section 25E which suggests that mere contractual 'connections' or business 'dealings' will fall short of the kind of 'affiliation' required for imputation purposes." Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. 258 at *6 n. 7; Pastene, 401 Mass. at 612 & n.5 (distinguishing Commission decisions imputing § 25E obligations because "there is no finding of an agency relationship between [successor and predecessor suppliers] and no finding that there was an assignment of the rights to distribute products"). The only connection Constellation retained with PWC was through Derek Benham, who was the CEO of SWC – an entity separate and distinct from PWC. Derek Benham's roles do not create between Constellation and PWC the sort of continuing affiliation the courts or the Commission has recognized.

Constellation, therefore, is not subject to any § 25E obligations PWC incurred unless Constellation is acting as PWC's agent. L. Knife & Son, 2010 WL 5553349 at *5. And there was no agency relationship between Constellation and PWC. "An agency relationship is created when there is mutual consent, express or implied, that the agent is to act on behalf of and for the benefit of the principal, and subject to the principal's control." Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. *7, quoting Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 742 (2000). As the Superior Court has explained in the § 25E context,

The Restatement (Second) of Agency (1958) identifies the existence of a fiduciary duty from agent to principal regarding matters within the scope of the agency, the power of the agent to alter legal relationships between the principal and third parties, and the right of the principal to control the agent's conduct with respect to matters within the purview of the agency as essential characteristics of an agency relationship.

Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. 258 at *7. Any indication of an agency relationship is completely absent from the record. Constellation at no time had any ownership interest in PWC or vice versa, and neither Constellation or PWC had any right to direct, manage, or control the operations of the other, either before or following the APA. "Indeed, these two entities had nothing whatsoever to do with one another prior to [Constellation's] asset acquisition from [PWC]" Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. at *7; see also id. at *7-8.

Walker relies almost exclusively on the Commission's decision in Martignetti Grocery Co., Inc., d/b/a Carolina Wine Company v. Pine Ridge Winery, LLC d/b/a Crimson Wine Group Ltd. and Seghesio Wineries, Inc., 25E-1285 (ABCC Decision November 20, 2013). However, like many § 25E cases, Pine Ridge was decided on a fact-specific record and is inapposite to the facts before the Commission on this motion. In Pine Ridge, Seghesio sold its Brand Items to Crimson. Simultaneously, Seghesio and Crimson entered into a temporary Interim Winery Management Agreement ("Interim Agreement") because Crimson did not hold the necessary permits and licenses required to conduct the winemaking operations, nor did it hold a permit to export the Brands Items to Massachusetts. Then Crimson used Seghesio's CoC for several months. The Commission found that there was a violation of § 25E because (1) there was a continuing affiliation because as part of their Interim Agreement, Crimson used Seghesio's CoC, Crimson hired 55-60 of Seghesio's employees, the main winemaker and founder of the Brand became employed by Crimson; and (2) Crimson had also expressly assumed the sales liabilities of Seghesio in the APA.⁴ In the present case, other than having the SBB Agreement (notably not with PWC but with a completely legally distinct entity, SWC), none of the other facts here are similar to Pine Ridge.

Instead, this is more akin to Beam Spirits & Wine, LLC, wherein Skinnygirl Margarita products were bought by Beam Spirits & Wine, LLC from Skinnygirl Cocktails, LLC, a company formed in part by celebrity creator Bethenny Frankel. As part of the APA, Frankel retained "aspects of product control for a period of time following the sale's closing, and . . . the overall transaction contemplated a substantial ongoing role for Frankel in the marketing of Skinnygirl Margarita

⁴ The APA involved the purchase of certain assets of Seghesio and specifically excluded the acquisition of liabilities, other than certain specifically listed liabilities, which did not include wholesaler distribution obligations under § 25E.

going forward.” Beam Spirits & Wine, LLC, 32 Mass. L. Rptr. at *9. Beam then refused to distribute Skinnygirl Margarita brand items to United Liquors, LLC, who had previously received the brand items from Skinnygirl Cocktails, LLC’s prior distributor, Palm Bay. Despite this connection of Frankel pre- and post-acquisition, the Superior Court found that “[e]ven if these facts constituted a basis for finding a continuing affiliation between Frankel and Beam, there is no evidence that would allow Frankel to be substituted for Palm Bay for Section 25E imputation purposes Neither Frankel nor [her new corporation] ever supplied Skinnygirl Margarita products to United; and, whatever her degree of control over the brand pre- and post-acquisition, there is no evidence that Frankel had any kind of legal or contractual connection to Palm Bay.” *Id.* Here, too, while Derek Benham maintained an interest in both PWC and SWC, nothing establishes an ongoing affiliation between Constellation and PWC.

Constellation’s Alleged Use of PWC’s Certificate of Compliance

Walker also maintains that there is a genuine question of material fact as to whether Constellation used PWC’s Certificate of Compliance (“CoC”) in order to ship to its Massachusetts distributors, thus establishing an ongoing affiliation at least for some certain period of time.

Walker first maintains that the APA reflects that Constellation intended to use PWC’s CoC. It points to the fact that CBUSO contracted to purchase all Acquired Assets, which “means, collectively, (i) the Proprietary Brand Assets, (ii) the Other Intangible Property, (iii) the Inventory, and (iv) The Assumed Contracts.” (CB00105). Other Intangible Property “means all Authorizations necessary to utilize the Acquired Assets and enjoy the benefits of the Brand Business, including, without limitation, those Authorizations set forth on Schedule 3.11(b).” (CB00108). Authorizations are “any license, permit, consent, notice, registration, concession, franchise, certificate of authority or order, certificate of occupancy, certificate of approval, approval, authorization or any waiver of the foregoing, whether domestic or foreign.” (CB00106). Schedule 3.11(b) of Authorizations includes “[v]arious alcoholic beverage licenses and permits from . . . Massachusetts” with a Massachusetts license number of “C-9861.” (CB00193, 195).

While these citations, read in isolation, could rise to the level of an ongoing affiliation or agency relationship between Constellation and PWC, it ignores Sections 3.4 and 3.11 of the APA, wherein PWC would transfer all of its Authorizations except as otherwise prohibited. Here, a transfer of a CoC in Massachusetts without approval from the Commission would be prohibited and therefore the express terms of the APA exclude the transfer of the CoC to Constellation.

Walker’s fallback argument hinges on the fact that is unknown on the record what CoC was used to ship the Brand Items to Massachusetts during the period of the SBB Agreement. It then points to Section 5.2 of the SBB Agreement wherein it argues that the SBB Agreement contemplated Constellation’s use of SWC’s CoC. Section 5.2 states:

Should [Constellation] so request in writing, SWC shall ship Products either to [Constellation] or directly to [Constellation]’s customers. All shipments of Products by SWC from the Production Facility to [Constellation] or [Constellation]’s customers shall be F.O.B. Production Facility and on a first-in, first-out basis. To the maximum extent permissible under applicable laws, rules

and regulations, [Constellation] shall receive shipments of any Products sent to [Constellation] at a bonded facility of [Constellation] in California designated to SWC, and [Constellation] shall submit shipping instructions to SWC accordingly. SWC shall schedule all trucking for such shipment of the Products to [Constellation] or to [Constellation]'s customers in accordance with the shipping instructions delivered by [Constellation] or in accordance with the procedures set forth on Schedule C, as applicable. [Constellation] shall be responsible for selection of the carrier(s) and for paying all trucking and related transportation costs and insurance.

(CB00126). At argument on the Motion, Constellation informed the Commission that it had three of its own CoCs at the time in question, and that it had turned over to Walker all of its spreadsheets showing that the Brand was bottled and shipped from SWC's facility to one of Constellation's three facilities and that specifically all of Massachusetts distributors' Brand products came from one of Constellation's CoC facilities. The only Brand products shipped from SWC directly to Constellation's customers were in states without the same legal requirements as Massachusetts.

Because Walker cannot establish an ongoing relationship with PWC through Derek Benham's involvement in both PWC and SWC, even if Constellation did use SWC's CoC, that action would still not establish *an ongoing affiliation with PWC*. See The SBB Agreement, *supra*. [Emphasis supplied.] In any event, Walker's speculation as to whether products were delivered from SWC directly to Massachusetts distributors has been met "by countervailing materials" by Constellation, United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014), such that Walker has failed to "allege specific facts which would establish the existence of a genuine issue of material fact." Pederson, 404 Mass. at 17; accord United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014).

CONCLUSION

The Commission concludes that the transaction in which Constellation acquired the right to sell the Brand Items from PWC was an arms-length transaction, and Constellation did not expressly or impliedly assume the obligation to continue selling the Brand Items to PWC's contracted wholesalers. Moreover, there was no affiliation, assignment or agency relationship between Constellation and PWC, and the transaction was not an attempt to circumvent § 25E.

Constellation's Motion for Summary Decision is **ALLOWED**.

The matter is dismissed and the Commission's previous order to ship is **DISSOLVED** effective March 12, 2016.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner Elizabeth A Lashway

Kathleen McNally, Commissioner Kathleen Mc Mally

Dated: February 11, 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.

This document is important and should be translated immediately.
Este documento es importante y debe ser traducido inmediatamente.
Este documento é importante e deve ser traduzido imediatamente.
Ce document est important et devrait être traduit immédiatement.
Questo documento è importante e dovrebbe essere tradotto immediatamente.
Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.
这份文件是重要的，应立即进行翻译。

cc: William Coyne, Esq. via email
Mary O'Neal, Esq. via email
File