

*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Chairman

NO. 25E-1348

CLASSIC WINE IMPORTS, LLC. F/N/A CLASSIC WINE IMPORTS, INC.
Petitioner,

v.

**PASTERNAK WINE IMPORTS, LLC and
ESPRIT DU VIN FINE WINE MERCHANTS**
Respondents.
HEARD: 8/19/2020

**MEMORANDUM AND ORDER ON
RESPONDENTS' MOTION FOR SUMMARY DECISION AND
PETITIONER'S OPPOSITION**

Classic Wine Imports, LLC, f/n/a Classic Wine Imports, Inc. ("Classic") is a Massachusetts wholesaler aggrieved at the refusal of Pasternak Wine Imports, LLC ("Pasternak") and Esprit Du Vin Fine Wine Merchants ("Esprit")¹, to ship the following wine brands: Guy Saget, Los Vascos, Valdo Brut, Dashwood, Caro, Legende Bordeaux, Thomas George, Chateau Mulonniere, Fumanelli, Aussieres, Paul Cheneau, Champagne Barons de Rothchild and Goldwater (the "Brand Items") to Classic.

On February 7, 2017, pursuant to the mandate in M.G.L. c. 138, § 25E, the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") issued an order to Pasternak and Esprit to makes sales of the Brand Items to Classic pending the Commission's determination of the petition on the merits (the "Ship Order").

On November 27, 2019, Esprit filed the instant Motion for Summary Decision (the "Motion") regarding Classic's § 25E Petition arguing that under § 25E and applicable case law, Esprit should

¹ Please note that SMT Acquisitions LLC previously conducted business under the name SMT Acquisitions LLC d/b/a Esprit du Vin but has updated its legal name to SMT Acquisitions d/b/a Taub Family Selections. SMT Acquisitions LLC updated its d/b/a name with the Massachusetts Alcoholic Beverages Control Commission ("Commission") on or around October 10, 2018. For the sake of clarity, however, SMT Acquisitions LLC will be referred to throughout this memorandum.

not be required to sell the Brand Items to Classic, specifically because Esprit, who never made sales to Classic prior to the Ship Order, is not an agent of the predecessor supplier Pasternak; that there is no continuing affiliation between them and that there was no assignment of distributor arrangements or agreements. Filed along with the Motion was the Affidavit of Badr Benabdessadek and attached as Exhibit A to Mr. Benabdessadek's Affidavit is a copy of the Asset Purchase Agreement between Pasternak and Esprit (the "APA").

Also on November 27, 2019, Classic filed its Second Motion to Compel Production of Documents.

On December 18, 2019, Classic filed an Opposition to Esprit's Motion (the "Opposition") asserting that Pasternak's § 25E obligations should be imputed to Esprit and that an evidentiary hearing should be scheduled after which the Commission could decide the matter on its merits. In support of its Opposition, Classic attached seven exhibits:

1. Classic's Application for Relief Under G.L. C. 138, §25E;
2. A Redacted Copy of the APA;
3. Receipt, dated 8/6/2018;
4. Transcript of Deposition of Frank Vella;
5. Letter re: Extension of Transition Operations pursuant to Asset Purchase Agreement, dated 12/7/2016;
6. Transcript of Deposition of Badr Benabdessadek;
7. Bill of Sale, dated 8/6/2018.

On January 8, 2019, Esprit filed its Reply along with Exhibit A: Esprit's Opposition to Classic's Second Motion to Compel.

The Commission held a hearing on August 19, 2020, regarding Classic's Second Motion to Compel, Esprit's Opposition, Esprit's Motion for Summary Decision and Classic's Opposition.

On March 24, 2022, the Commission issued a Memorandum and Order Denying Classic's Second Motion to Compel Production of Documents.

After a hearing and consideration of the exhibits and arguments provided by the parties, the Commission makes the following findings of fact and rulings of law.

There is one (1) audio recording of this hearing.

FINDINGS OF FACT

1. Classic is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18 with a place of business in Taunton, Massachusetts. (Ex. 1 to Opposition, at ¶ 1)
2. At all relevant times, Pasternak was in the business of importing, marketing, promoting, selling, and distributing wine, and marketing, promoting, selling, and distributing other alcoholic beverages in the United States. (Ex. A to Badr Benabdessadek Affidavit ("Benabdessadek Aff."), at Esprit 0010)
3. For years, Pasternak sold the Brand Items to wholesaler Classic. (Ex. 1 to Opposition, at ¶ 4)

4. The Brand Items are produced by SA Saget La Perriere, Les Domaines Barons De Rothschild (Lafite) ("DBR"), Spumanti Vlado SRL, Foley Family Wines, Ltd., Westside Winery, LLC, Cantine Marchesi Fumanelli, Giro Ribot SL. and Societe Champenoise Des Barons & Associes. (Benabdessadek Aff." at ¶ 5)
5. Esprit is in the business of importing, marketing, promoting, selling, and distributing luxury wine products from wine regions around the world. (Benabdessadek Aff. at ¶ 2)
6. Esprit holds multiple Massachusetts Certificates of Compliance ("CoCs"). (Benabdessadek Aff. at ¶ 3)
7. Pursuant to the terms of a written asset purchase agreement ("APA") dated December 7, 2016, and effective as of December 30, 2016, between Esprit as buyer and Pasternak as seller, Esprit purchased from Pasternak, among other things, all of Pasternak's right, title, and interest in and to various wine items, including the Brand Items, free and clear of any and all encumbrances. (Benabdessadek Aff., at ¶ 8 (a); Ex. A to Benabdessadek Aff., at Esprit 0019-0021).
8. Prior to the APA, Pasternak had importation and/or distribution relationships with at least twelve suppliers, including the suppliers of the Brand Items. (Benabdessadek Aff., at ¶ 8 (b); Ex. A to Benabdessadek Aff., at Esprit 0010)
9. Esprit is no longer authorized to import or distribute any Brand Items from the following producers: Foley Family Wines, Ltd., Westside Winery, LLC, and Societe Champenoise Des Barons & Associes. As a result, Esprit is not currently the United States importer or a United States Distributor of the following Brand Items: Dashwood, Goldwater, Thomas George, or Champagne Barons de Rothschild. (Benabdessadek Aff. At ¶ 6)
10. In accordance with the APA, Pasternak was required to inform its suppliers of the APA and that the suppliers would need to find replacement importers and/or distributors by April 1, 2017. (Benabdessadek Aff., at ¶ 8(c); Ex. A to Benabdessadek Aff., at Esprit 0010).
11. Suppliers who entered into an import and/or distribution agreement with Esprit became "Qualified" under the APA. (Benabdessadek Aff., at ¶ 8(e); Exhibit A to Benabdessadek Aff., at Esprit 0010, 0016) As for any suppliers not Qualified as of December 30, 2016, Esprit and Pasternak were to continue to try to persuade them to become Qualified, even after the closing. (Benabdessadek Aff., at ¶ 8(h); Exhibit A to Benabdessadek Aff., at Esprit 0010, 0027)
12. Following the APA closing date, Esprit and Pasternak held additional "Subsequent Closings" as more suppliers became Qualified. This allowed Esprit more time post-closing to negotiate importation and distribution deals with former Pasternak suppliers. In those Subsequent Closings, Esprit purchased Pasternak's inventory and certain other assets with respect to such newly-Qualified suppliers. (Benabdessadek Aff., at ¶ 8 (i); Ex. A to Benabdessadek Aff., at Esprit 0010, 0042-0043)
13. The only contracts that Esprit assumed were purchase orders relating to Goods On Order Or In Transit. (Ex. A to Benabdessadek Aff. at Esprit 0022, 0029, 0189) Such contracts were not related to distributors or distribution rights. See id. Goods On Order Or In Transit

is defined in the APA as, "all wine Inventory ordered by [Pasternak] in the ordinary course of business prior to the Closing Date but not yet delivered to Seller as of the Closing Date that is identified on Schedule 3.07(f) as Eligible Inventory." (Ex. A to Benabdessadek Aff. at Esprit 0014)

14. Esprit and DBR entered into a written distribution agreement, dated December 7, 2016, and Esprit became the sole United States importer, seller, and marketer of the DBR Brands as of January 1, 2017. (Benabdessadek Aff. At ¶ 8 (g); Ex. A to Benabdessadek Aff., at Esprit 0010, 0011, 0212-0225)
15. The first Subsequent Closing took place on March 8, 2017, concerning the Brand Items of the following suppliers: SA Saget La Perriere, Spumanti Valdo S.r.L., Cantine Marchesi Fumanelli and Westside Winery, Inc. (Benabdessadek Aff. at ¶ 12)
16. The second Subsequent Closing took place on August 6, 2018, concerning the Brand Items of the following suppliers: Foley Family Wines, Limited and Giro Ribot, S.L. (Benabdessadek Aff. at ¶ 13)
17. Any assets Esprit purchased from Pasternak at the Subsequent Closings are defined in the APA as "Subsequent Closing Date Purchased Assets." The Closing Date Purchased Assets and Subsequent Closing Date Purchased Assets are collectively referred to in the APA as Purchased Assets. (Ex. A to Benabdessadek Aff., at Esprit 0020-0021)
18. Esprit began importing, and with respect to sales of Brand Items in Massachusetts, distributing the Brands of a supplier once Esprit received an authorization letter from any such supplier to act as that supplier's United States importer, with the right to appoint distributors throughout the United States. Every authorization letter set an effective date for Esprit's appointment. (Benabdessadek Aff. at ¶ 15)
19. In some instances, given the amount of time and resources required from Esprit to negotiate a final written importation/distribution agreement with each supplier, the distribution agreement was not finalized and signed until some time after Esprit received the authorization letter. The result was that Esprit imported and distributed certain Brands beginning on/around a set time (i.e., upon the effective date of the authorization letter) before that Brand's supplier Qualified under the APA (i.e., upon the execution of a written importation/distribution agreement). (Benabdessadek Aff. at ¶ 16)
20. No arrangement or agreements between Pasternak and any of its distributors or wholesalers, including Classic, were purchased by, or assigned to Esprit. (Benabdessadek Aff., at ¶ 19(a))
21. Esprit had no obligation to hire, or offer to hire, any employees of Pasternak under the APA. (Ex. A to Benabdessadek Aff., at Esprit 0035)
22. Section 5.13 of the APA provides that with regard to specific brands that were not Qualified as of the date the APA was signed, Esprit would "operate, administer and manage, on behalf of [Pasternak], the Business insofar as it pertains to the Transition Brands." Section 5.13 continues to state that, "[Pasternak] shall sell goods relating to such Transition Brands

exclusively to [Esprit] for resale by [Esprit] on behalf of [Pasternak]" and that "[Esprit] shall resell goods relating to Transition Brands at the Resale Price and shall be entitled to retain the difference between the Resale Price and Seller Cost of the resold goods as compensation for the Transition Operations that [Esprit] conducts on behalf of [Pasternak]." (Ex. A to Benabdessadek Aff. at § 5.13, Esprit 0037, 0038) The Transition Brands are defined as the core brands that had not become Qualified at the completion of the closing of the APA. (Ex. A to Benabdessadek Aff., at Esprit 0012, 0017, 0054)

23. Esprit and Pasternak did not engage in any of the Transition Operations described in APA §5.13 with respect to sales of any of the Brand Items in Massachusetts. (Benabdessadek Aff. At ¶ 26)
24. Esprit did not make any sales of any Brand Items to any Massachusetts wholesaler on behalf of or for the benefit of Pasternak, either pre- or post-closing. Pasternak did not make any sales of any Brand Items to any Massachusetts wholesaler on behalf of or for the benefit of Esprit, either pre- or post-closing. (Benabdessadek Aff. At ¶ 25)
25. Esprit notified Classic in January of 2017 that the Brand Items would no longer be sold to Classic. (Benabdessadek Aff. at ¶ 28)
26. The first time Esprit sold the Brand Items to Classic was pursuant to the Commission's February 7, 2017, Ship Order. (Benabdessadek Aff., at ¶ 30)
27. There is no evidence that Pasternak sold the Brand Items to any wholesaler after December 2016. (Benabdessadek Aff. at ¶ 20)
28. Pasternak and Esprit have never had any ownership interest in each other. (Benabdessadek Aff. at ¶ 22)
29. The APA and the agreements to which it refers therein represent a fully integrated agreement. (Ex. A to Benabdessadek Aff., at Esprit 0051)

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). "[A] fact is 'material' when it 'might affect the outcome of the suit under the governing law.'" Dennis v. Kaskel, 79 Mass. App. Ct. 736, 741 (2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). 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); see Lumber Mut. Ins. Co. v. Zoltek Corp., 419 Mass. 704, 707 (1995) (stating that “[t]he interpretation of a written contract . . . is a question of law, not of fact.”).

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.” Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); see United Liquors, LLC v. Heaven Hill Distilleries (ABCC Decision April 16, 2014). If the moving party meets its burden, then it becomes the nonmoving party’s burden “to respond by ‘set[ting] forth specific facts showing that there is a genuine issue for trial.’” Kourouvacilis, 410 Mass. at 716 (quoting Mass.R.Civ.P. 56(e)). The nonmoving party cannot defeat the motion for summary decision by “rest[ing] on [its] pleadings and mere assertions of disputed facts” LaLonde v. Eissner, 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); see Michalak v. Boston Palm Corp., 2004 WL 2915452, at * 2 (Mass. Super. Ct. Sept. 17, 2004) (providing that “[t]he non-moving party must oppose the motion with admissible evidence on the issue in order to defeat the summary judgment motion”). 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, 410 Mass. at 711.

SECTION 25E REQUIREMENTS

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

- (1) "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. Ct. June 14, 2004); or where there is a continuing affiliation between the prior supplier and the new supplier, Heublein, 434 Mass. at 706;
- (2) "where 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); and
- (3) where a transfer has occurred for "the specific purpose of circumventing §25E," Brown-Forman Corp., 2004 WL 1385495, at *4; accord Heublein, 434 Mass. at 704; Pastene, 401 Mass. at 616.

There is no dispute that Esprit did not make regular sales of the Brand Items to Classic in the period of six months preceding the refusal to sell date of March 2017. Therefore, the question is whether the particular facts in this case give rise to the imputation of Pasternak's § 25E obligations to Esprit.

DISCUSSION

The evidence

As the moving party, the initial burden on summary decision is Esprit's. See Kourouvacilis, 410 Mass. at 716. Esprit may meet its burden by showing that Classic has no reasonable expectation of producing evidence on an essential element of its case. See id. Esprit filed the affidavit of Benabdessadek as well as the APA. The Commission has no reason to doubt the facts as presented in the affidavit. Classic has presented transcripts of the depositions of Frank Vella and Badr Benabdessadek, neither of which call into question the facts as set forth by Benabdessadek. Classic also attached its verified Petition as an exhibit, but while claims in a verified complaint "are ordinarily considered equivalent to sworn evidence," a plaintiff may be required "to go beyond the pleadings, that is, to utilize affidavits, answers, or admissions in the hunt for genuine material factual issues." See Cataldo Ambulance Service, Inc. v. City of Chelsea, No. 954406, 1996 WL 1185091, at *2 (Mass. Super. Ct. Dec. 5, 1996) (denying plaintiff's cross motion for summary judgment).

The Commission relies on the facts as presented by Esprit. The Benabdessadek affidavit and the APA meet Esprit's initial burden on summary decision by showing that Classic, "has no reasonable expectation of proving [its] case." Kourouvacilis, 410 Mass. at 716. As a result, the burden then shifts to Classic to advance specific facts that establish a genuine issue for trial. See id.

The documentation attached does not establish a genuine issue for trial. As a result, Classic's failure to prove an essential element of its case, "renders all other facts immaterial" and mandates summary decision in favor of Esprit. See Kourouvacilis, 410 Mass. at 711. Nevertheless, the Commission explains as follows why substantively there is no basis for imputing Pasternak's § 25E obligations to Esprit. Contrary to Classic's contentions, (1) there was no joint venture/agency relationship between Pasternak and Esprit, (2) Pasternak never assigned its distribution rights to Esprit, and (3) there is no evidence that Esprit began selling the Brand Items for the specific purpose of circumventing § 25E.

There is no basis for imputing Pasternak's § 25E obligations to Esprit.

Joint venture/agency/continuing affiliation

Classic asserts that the APA, Subsequent Closings, and deposition testimony document the fact that Pasternak was acting as importer of The Brands after the acquisition closed. Classic points to the Transition Operations as laid out in § 5.13 of the APA and argues this evidences a joint venture and agency relationship between Pasternak and Esprit and therefore that § 25E obligations should be imputed to Esprit. See Opposition, at 8-10. Section 5.13 of the APA provides, in summary, that with regard to specific brands (which are referred to as the "Transition Brands") that were not Qualified as of the date the APA was signed, Esprit would "operate, administer and manage, on behalf of [Pasternak], the Business insofar as it pertains to the Transition Brands." Section 5.13 continues to state that, "[Pasternak] shall sell goods relating to such Transition Brands exclusively to [Esprit] for resale by [Esprit] on behalf of [Pasternak]" and that "[Esprit] shall resell goods relating to Transition Brands at the Resale Price and shall be entitled to retain the difference between the Resale Price and Seller Cost of the resold goods as compensation for the Transition Operations that [Esprit] conducts on behalf of [Pasternak]." (Ex. A. to Benabdessadek Aff., at Esprit 0012, 0017, 0054) Esprit argues that Esprit and Pasternak did not engage in any of the transition Operations described in APA § 5.13 with respect to sales of any of the Brand Items in Massachusetts. (Benabdessadek Aff. at ¶ 26)

A successor supplier takes on its predecessor's § 25E obligations where there is a "continuing affiliation or agency relationship" between the suppliers. 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 Comm'n, No. 13-02229-C, 2014 WL 4082142, at *6 (Mass. Super. Ct. July 16, 2014). "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, 2014 WL 4082142, *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, 2014 WL 4082142, at *7. The Appeals Court has discussed the elements of joint venture:

[t]he key requirement in finding [the] existence [of a joint venture] is an intent to associate. . . Factors indicating such an intent include an agreement among the participants for joint profits and a sharing of losses; a contribution of money, assets, talents, etc., to a common undertaking; a joint property interest in the subject matter of the venture; and a right to participate in the control of the venture.

Mass. Prop. Ins. Underwriting Ass'n v. Georgaklis, 77 Mass. App. Ct. 358, 361-362 (2010) (quoting Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 623-624 (1990)).²

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"). "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, 2014 WL 4082142, at *6 n. 7.

In the instant case, the APA establishes that following the effective date (December 30, 2016), Pasternak and Esprit would work together to try to get Pasternak's suppliers of various brands to contract with Esprit. (Benabdessadek Aff., at ¶ 8(h); Exhibit A to Benabdessadek Aff., at Esprit 0010, 0027) With regard to the Brand Items, Esprit and DBR entered into a written distribution agreement on December 7, 2016, and Esprit became the sole United States importer, seller, and marketer of the DBR Brands effective January 1, 2017. (Benabdessadek Aff. At ¶ 8 (g); Ex. A to Benabdessadek Aff., at Esprit 0010, 0011, 0212-0225) As for the remaining Brand Items, soon after the closing on the APA, Esprit received authorization letters from suppliers to act as that supplier's United States importer and two Subsequent Closings followed in March of 2017 and August of 2018. (Benabdessadek Aff. at ¶ 12 - ¶ 16) There is no evidence of any involvement by Pasternak after the closing of the APA. There is no evidence that Pasternak and Esprit participated in a joint venture with regard to the Brand Items, as there is no evidence that they shared in profits/losses, contributed to a common undertaking, had a joint property interest, or that Pasternak controlled the Brand Items after the APA took effect. See Mass. Prop. Ins. Underwriting Ass'n, 77 Mass. App. Ct. at 361-362. Likewise, Pasternak's and Esprit's possible relationship and agreement

with regard to the transition of *other* suppliers and *other* brands in *other* states did not create an agency relationship that would cause imputation of § 25E with regard to the Brand Items. 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”); Beam Spirits & Wine, LLC, 2014 WL 4082142, at *6 n. 7 (“mere contractual ‘connections’ or business ‘dealings’ will fall short of the kind of ‘affiliation’ required for imputation purposes.”); Charles E. Gilman & Sons, Inc. v. Alcoholic Beverages Control Comm’n, 61 Mass. App. Ct. 916 (2004) (certain transitional services between buyer and seller for an interim period of time following an arms-length agreement may not create an imposition of § 25E).

Assignment

The Commission agrees with Esprit that Pasternak did not assign any of its distribution rights to Esprit. See Heublein, Inc. v. Alcoholic Beverages Control Comm’n, 30 Mass. App. Ct. 611, 616 (1991) (where the former supplier assigned its distribution rights to a new supplier, new supplier was found to have assumed the former supplier’s § 25E obligations). In the present case, the only contracts that Esprit assumed were purchase orders relating to Goods On Order Or In Transit. (Ex. A to Popkin Aff. at Esprit 0189) Such contracts were not related to distributors or distribution rights. See *id.* Goods On Order Or In Transit is defined in the APA as, “all wine Inventory ordered by [Pasternak] in the ordinary course of business prior to the Closing Date but not yet delivered to Seller as of the Closing Date that is identified on Schedule 3.07(f) as Eligible Inventory.” (Ex. A to Popkin Aff. at Esprit 0014) Thus, this relates to inventory that Pasternak had purchased from its suppliers but had not yet received from them prior to the signing of the APA. The APA provides that Esprit would assume these items from Pasternak, once received, and would pay for them. In any event, the Goods On Order Or In Transit provision does not relate to assignment of distribution to wholesalers (which would likely impute § 25E obligations) but instead relates to the purchase by Esprit of items Pasternak ordered, but had not yet received, from its suppliers. Consequently, the Commission finds that there was no assignment of distribution rights or obligations so as to impute § 25E.

Intent to circumvent

There is no evidence that Pasternak intended to circumvent § 25E by entering into the APA with Esprit, and Classic does not argue there was such an intentional circumvention.

Commission’s authority to dispose of § 25E cases by summary decision:

In addition to arguing that Pasternak’s § 25E obligations should be imputed to Esprit, Classic, in opposing the Motion, argues that a full hearing on the merits is warranted in this matter.

The Informal Fair Hearing Rules do allow for motions, and Commission precedent is clear that the Commission will contemplate motions for summary decision in § 25E cases. See *supra*, at 5. Indeed, § 25E cases regularly are disposed of by summary decision. As the Superior Court acknowledged,

[n]othing in [the] language [of § 25E] mentions, let alone requires, an evidentiary hearing. A motion for summary decision under 801 Code Mass. Regs. 1.01(7)(h) is a perfectly lawful means to resolve

an administrative matter that presents no disputed facts. The word "hearing" itself does not preclude holding a motion hearing, as opposed to an evidentiary one. Indeed, Mass. R. Civ. P. 56(c) contemplates a "hearing," but certainly does not require an evidentiary hearing, where the whole point is to determine whether a trial is warranted. The ABCC had every right to proceed in the same way, by conducting a motion hearing, rather than an unnecessary evidentiary proceeding.

Boston Wine Co., Ltd. d/b/a Winebow Boston v. Alcoholic Beverages Control Comm'n, No. 18-567-D, at 6-7 (Mass. Super. Ct. Mar. 26, 2018). The Commission has the authority to dispose of § 25E cases by means of summary decision and finds the facts of this case lend themselves to such a disposition.

CONCLUSION

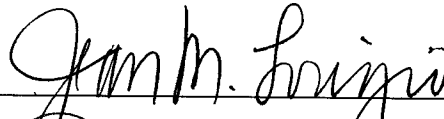
The Commission concludes that Esprit did not make, "regular sales of [the Brand Items] during a period of six months preceding the refusal to sell," and there is no basis for imputing Pasternak's § 25E obligations to Esprit. See G. L. c. 138, § 25E.

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

The matter is dismissed, and the Commission's previous Ship Order is **DISSOLVED** effective 30 days from the date of this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Deborah Baglio, Commissioner



Dated: May 25, 2022

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

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cc: J. Mark Dickison, Esq. via email
Michael J. Rossi, Esq. via email
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