



*Commonwealth of Massachusetts*  
*Alcoholic Beverages Control Commission*  
*95 Fourth Street, Suite 3*  
*Chelsea, MA 02150*

**Jean M. Lorizio, Esq.**  
Chairman

**NO. 25E-1356**  
**SARAIVA ENTERPRISES, INC.,**  
**Petitioner**

**v.**

**HEINEKEN USA, INC., FIVE POINTS TRADING CO.,**  
**and SOCIEDADE CENTRA DE CERVEJAS E BEBIDAS S.A.,**  
**Respondent**

**MEMORANDUM AND ORDER ON**  
**RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Saraiva Enterprises, Inc. ("Saraiva") is a Massachusetts wholesaler aggrieved at the refusal of Heineken USA, Inc. through its affiliate Five Points Trading Company ("Five Points"), to ship Sagres beer (the "Brand Item") to Saraiva. On April 3, 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 Five Points to make sales of the Brand Item to Saraiva pending the Commission's determination of the petition on the merits.

On May 23, 2018, Five Points filed the instant Motion for Summary Decision (the "Motion") regarding the above-referenced petition arguing that under § 25E and applicable case law, Five Points should not be required to sell the Brand Item to Saraiva, specifically because Five Points made no sales of the Brand Item to Saraiva in the six month period prior to the refusal to ship and no grounds exist for imputation of any predecessor supplier's § 25E obligations to Five Points. Along with its Motion, Five Points submitted the Saraiva/Milton's Assignment Agreement, the Saraiva/SCC Distribution Agreement, the Five Points Distribution Agreement and the SCC/HBBV Trademark License Agreement, as well as the Affidavit of Julie Kinch.

On June 29, 2019, Saraiva filed an Opposition to Five Points' Motion for Summary Decision ("Opposition") asserting that Five Points is obligated to sell the Brand Items to Saraiva due to the assignment of distribution rights, a continuing affiliation and agency relationship between Five Points and the predecessor supplier, and an attempted circumvention of § 25E. Woven into the body of its Opposition, Saraiva included excerpts from the transcripts of a recorded conversation between Charles Littlefield and the principals of Saraiva, excerpts from the Affidavit of Fred Saraiva, and excerpts from the transcripts of the depositions of Richard Wright, Charles Littlefield, Fred Saraiva and Jose Saraiva.

The Commission held a hearing on October 2, 2018, regarding Five Point Trading Company'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. Five Points Trading Co. ("Five Points"), a division of Heineken USA, Inc. ("HUSA"), imports and distributes certain alcoholic beverages including the Brand Item. (Appendix, Tab 1) HUSA holds a Massachusetts Certificate of Compliance. (Commission Records)
2. Heineken Brouwerijen B.V. ("HBBV") is a company incorporated and organized under the laws of the Netherlands and located in Amsterdam. (Kinch Aff. ¶ 6<sup>1</sup>)
3. Sociedade Central de Cervejas e Bebidas, S.A. ("SCC") of Vialonga, Portugal is incorporated in and organized under the laws of Portugal. SCC has been continuously manufacturing and producing Sagres beer in Portugal since 1940. (Kinch Aff. ¶ 4)
4. Saraiva Enterprises, Inc. ("Saraiva") is a licensed Massachusetts wholesaler/importer. (Commission Records)
5. Milton's Distributing Co., Inc. ("Milton's") is a licensed Massachusetts wholesaler/importer. (Commission Records)
6. Beginning in approximately March of 2007, Saraiva began purchasing the Brand Item from Milton's. (Appendix, No. 3)
7. On December 10, 2010, Saraiva entered into an Assignment Agreement with Milton's regarding the importation of Sagres beer. (Appendix, Tab 3)
8. The Assignment Agreement between Milton's and Saraiva assigned and transferred to Saraiva all of Milton's rights as the exclusive importer for Massachusetts, Rhode Island and Pennsylvania. (Appendix, Tab 3)
9. Also, on December 10, 2010, Saraiva entered into a distribution agreement with SCC which authorized Saraiva as the exclusive distributor of the product in Massachusetts, Pennsylvania and Rhode Island. (Kinch Aff., Exhibit A)
10. On June 26, 2017, SCC and HBBV entered into a written Trade Mark License Agreement. Said agreement confirmed an oral agreement which had been in place since January 1, 2012. (Kinch Aff, Exhibit C)
11. The Trade Mark License Agreement authorized HBBV to sell, market, and distribute Sagres, amongst other products owned by SCC, and to appoint sub-distributors in the territory, including the United States. (Kinch Aff, Exhibit C)

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<sup>1</sup> The affidavit of Julie Kinch is located in Five Points' Appendix of Documents submitted in support of its Motion for Summary Decision (the "Appendix"), No. 2.

12. By letter, dated July 27, 2016, Saraiva was informed of SCC's intent to terminate their distribution agreement. Said termination was to become effective on December 31, 2016.<sup>2</sup> (Kinch Aff., Exhibit D)
13. On January 1, 2017, Five Points and HBBV executed a Distribution Agreement (the "Distribution Agreement"). (Kinch Aff., Exhibit B)
14. Five Points appointed Horizon Beverage Company as Distributor for the Sagres Brand effective January 18, 2017. (Appendix, No. 6)
15. Five Points has never had common officers, directors, managers or employees with either SCC or HBBV. No stock of SCC or HBBV is owned by Five Points. Five Points has never had any joint ventures or partnerships with SCC or HBBV. Kinch Aff. ¶¶ 7, 8)
16. SCC is the predecessor supplier. (Kinch Aff., Exhibit A)

### SUMMARY DECISION STANDARD

In matters arising under M.G.L. c. 138, § 25E, the Commission operates under the Informal "Fair Hearing" Rules promulgated under 801 C.M.R. 1.02. Although not specified in the Informal Rules, parties may file motions pursuant to 81 C.M.R. 1.02(7)(c) governing "special requests." Given that § 25E matters are complex, and in an effort to promote regularity and efficiency with its procedures, the Commission follows the summary decision protocol laid out in the Formal Rules under 801 C.M.R. 1.01(7)(h). 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 Decisions April 16, 2014) If the moving party meets its burden, then it becomes the nonmoving party's burden "to respond by 'set[ting] forth

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<sup>2</sup> Saraiva states that the letter of termination was not received until October 31, 2016. According to Saraiva's distribution agreement with SCC, 1-month notice was required prior to terminating the agreement. Even if the letter was received at the end of October, more than 1 month's notice was provided.

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). Instead, 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. 138, § 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 supplier’ 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”).

There are circumstances wherein the law imputes a supplier’s § 25E obligations to its successor – even though the successor itself has not sold to the wholesaler – to prevent the 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 the Commission have recognized imputation of a predecessor supplier's obligations 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, 204 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 evidence before the Commission that Five Points made any sales of the Brand Item to Saraiva in the six-month period preceding the refusal to sell date of December 31, 2016. As such, the Commission must determine whether the facts in this case give rise to the imputation of SCC's § 25E obligations to Five Points.

## DISCUSSION

### Continued Affiliation/Agency Relationship

The "relevant inquiry" regarding imputation of § 25E obligations is whether the successor supplier was the predecessor supplier's agent "for the discrete purpose of making regular sales ... to downstream customers." See Brown-Forman, 65 Mass. App. Ct. at 506. "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). "A key characteristic of agency relationships is the principal's right to control 'what the agent shall or shall not do before the agent acts, or at the time when he acts, or both.'" Id. (quoting Restatement (Second) of Agency § 14 comment a (1958); L. Knife & Son, Inc. v. Alcoholic Beverages Control Comm'n, 201 WL 5553349.

It is Five Points' contention that the documented facts support its assertion that neither an agency relationship nor a continuing affiliation exists. Saraiva argues that an agency relationship between Five Points and SCC exists because they are affiliates and subsidiaries of the Heineken Group. Saraiva offers no evidence of such a relationship between Five Points and SCC or HBBV. In fact, the Distribution Agreement specifically states otherwise:

In executing this agreement, HUSA shall be an independent contractor and act in its own name and for its own risk and account without any right to represent HBBV in any manner whatsoever. This agreement shall not, and shall not be deemed to, constitute a partnership, joint venture, or agency between the Parties, nor shall HUSA have any right or authority to assume, create or incur any liability or obligation of any kind against, in the name of, or on behalf of HBBV.

## Distribution Agreement, Clause 10.2

“While not dispositive, an express contractual disclaimer of an agency relationship constitutes some evidence of the nonexistence of such a relationship.” Brown-Forman, 65 Mass. App. Ct. at 508 (citing Theos & Sons, 431 Mass. at 744).

Saraiva makes a further claim, again without offering any evidence to support it, that SCC, HBBV and HUSA are in an agency relationship because their interests are “intertwined” as parent company and subsidiaries. Five Points disputes this allegation and responds by pointing to its response to Saraiva’s Interrogatories wherein it is stated that Five Points is a division of Heineken USA, Inc. Heineken USA, Inc. is a wholly-owned subsidiary of Heineken U.S. Holdings, Inc., which is a wholly-owned subsidiary of Heineken International V.V., which is a wholly-owned subsidiary of Heineken N.V. (Appendix, Tab 1)

Saraiva suggests that the Commission should look to the relationship amongst all the parties listed in the above facts section. Five Points responds by stating that the Commission should consider only the relationship between predecessor supplier, SCC, and successor supplier, Five Points. Five Points also directs the Commission to several cases dealing with corporate form, one of which was Scott v. NG US 1, Inc., 450 Mass. 760 wherein the Massachusetts Supreme Court in speaking about corporate law held that “One of the basic tenets of that body of law is that corporations – notwithstanding relationships between or among them – ordinarily are regarded as separate and distinct entities.” Scott v. NG US 1, Inc., 450 Mass 766.

With regards to the existence of an agency relationship or a continuing affiliation, the Court, and therefore the Commission, has examined whether the successor supplier is the predecessor’s agent “for the discrete purpose of making regular sales ... to downstream customers.” Brown-Forman, 65 Mass. App. Ct. 507 (quoting Heublein, 434 Mass. at 706).

Five Points cites to the plain language of the Distribution Agreement which states Five Points alone selects the wholesaler with whom business is conducted. SCC has no involvement.

“HUSA shall have the exclusive right and authority to select and appoint duly licensed third parties (e.g., licensed distributors, licensed wholesalers, licensed brokers, etc.) (“sub-distributors”) to whom the Product may be sold in all of the states of the Territory.”

## Distribution Agreement, Clause 1.2

There is no evidence that SCC retained control over Five Points, and most importantly, there is no evidence that SCC controlled Five Points’ choice of downstream wholesalers.

Saraiva further asserts that a continuing affiliation exists because of the relationships amongst the “Heineken Group” companies, alleging that the former supplier and successor supplier are either one and the same, or at the very least affiliated. The Commission is not persuaded that is the case. In fact, the evidence indicates otherwise.

As attested to by Julie Kinch, Five Points has never had common officers, directors, managers or employees with either SCC or HBBV. No stock of SCC or HBBV is owned by Five Points. Five Points has never had any joint ventures or partnerships with SCC or HBBV. (Kinch Aff., at ¶¶ 7, 8)

Assignment  
Circumvention of § 25E

There is no evidence of any assignment. Saraiva asserts that there was an assignment of rights from SCC to HBBV, and HBBV in turn assigned its rights to HUSA. The contracts in this case do not support that assertion. Saraiva further argues assignment on the basis that these are three affiliated companies within the Heineken Group and that all are controlled by the same parent company, Heineken N.V.

There is no evidence of any attempt to circumvent § 25E obligations. Saraiva argues that given the relationship between Five Points and HUSA, the parties were seeking to circumvent § 25E in an effort to increase parent company profits.

The Commission is not persuaded by Saraiva's arguments regarding either an assignment or an attempted circumvention of § 25E. Facts are necessary to defeat a motion for summary decision and here Saraiva's arguments regarding assignment and/or efforts to circumvent § 25E are not based on fact. "Speculation and surmise, even when coupled with effervescent optimism that something definite will materialize further down the line, are impuissant in the face of a properly documented summary judgment motion." Roche v. John Hancock Mutual Life Ins. Co., 81 F. 3d 249, 253 (1<sup>st</sup> Cir. 1996); see Gencarelli v. Comm. of Mass., No. WOCV200801793D, 2012 WL 1994733, at \*2 (Mass. Super. Ct. March 20, 2012: ("[u]nsubstantiated conjecture is insufficient to defeat summary judgment" (citing Glidden v. Maggio, 430 Mass. 694, 697 (2000))). At the same time, it is not Five Points' burden to prove a negative.

Saraiva fails to offer any evidence supporting either claim, and the evidence before the Commission suggests otherwise. As such the Commission finds that there was no assignment of distribution rights or obligations so as to impute § 25E obligations, and no attempted circumvention of § 25E.

## CONCLUSION

The Commission finds that there are no genuine issues of material fact in dispute. Saraiva has failed to prove an essential element of its case and Five Points is entitled to judgment as a matter of law.

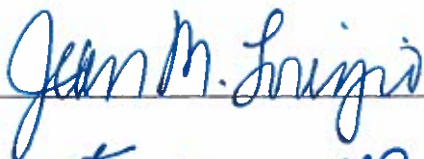
The Commission concludes that there has never been a six-month course of dealing involving the Brand Item between Saraiva and Five Points; there was no ongoing affiliation or agency relationship; there was no assignment of rights between SCC and Five Points; there was no intent to circumvent § 25E; and Saraiva has no reasonable expectation of proving § 25E obligations should be imputed to Five Points.

Five Points' Motion for Summary Decision is **ALLOWED**.

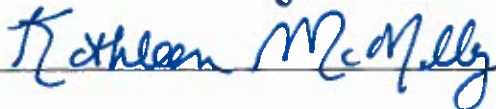
The matter is dismissed, and the Commission's previously issued Ship Order is **DISSOLVED** effective 30 days from date of this decision.

## **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Jean M. Lorizio, Chairman



Kathleen McNally, Commissioner



Dated: September 27, 2019

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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