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

Jean M. Lorizio, Esq.
Chairman

No. 25E-1358

RUBY WINES, INC.
Petitioner,

v.

CALERA VINEYARDS &
DUCKHORN VINEYARDS
Respondents

HEARD: 5/23/19

MEMORANDUM AND ORDER ON
DUCKHORN WINE COMPANY'S MOTION FOR SUMMARY DECISION
AND RUBY'S MOTION TO STRIKE

Ruby Wines, Inc. (the "Petitioner" or "Ruby") is a Massachusetts wholesaler aggrieved at the refusal of Calera Wine Company[1] ("Calera") and Duckhorn Wine Company[2] ("Duckhorn"), to ship the Calera brand wines (the "Brand Items") to Ruby. Ruby filed its Application for Relief under G.L. c. 138, § 25E (the "Petition") with the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") on September 18, 2017.

On September 22, 2017, pursuant to the mandate in M.G.L. c. 138, § 25E, the Commission issued an order to Duckhorn and Calera to make sales of the Brand Items to Ruby pending the Commission's determination of the petition on the merits (the "Ship Order").

On April 8, 2019, Duckhorn filed a Motion for Summary Decision (the "Motion") regarding Ruby's § 25E Petition arguing that under § 25E and applicable case law, Duckhorn should not be required to sell the Brand Items to Ruby. Filed along with the Motion was the Affidavit of Alicia Cronbach[3] and various exhibits.

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[1] Calera was named "Calera Vineyards" in the Petition, however, documents reflect that its proper name is "Calera Wine Company." (Exhibit 1. A. to the Motion for Summary Decision) Calera has not made an appearance in this matter.

[2] Duckhorn Wine Company was incorrectly named "Duckhorn Vineyards" by Ruby in the Petition. (Motion, at 1)

[3] Cronbach's affidavit is attached as Exhibit 1 to the Motion. Ruby has filed a motion to strike Cronbach's affidavit, as set forth below. See infra, at 11.

On April 23, 2019, Ruby filed an Opposition to Duckhorn's Motion for Summary Decision (the "Opposition") with exhibits.

After a hearing and in 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. Ruby is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18.

2. Duckhorn is in the business of manufacturing and producing wines, including the Duckhorn brand. (Cronbach Aff., at ¶ 1)[4]

3. At all relevant times hereto, Duckhorn has held a Massachusetts Certificate of Compliance ("CoC") under M.G.L. c. 138, § 18B. See id. at ¶ 2.[5]

4. Calera, a California limited partnership, was involved in the production, processing, storage, sales, and marketing of wine. (Exhibit 1. C. to Motion, at Duckhorn 183)

5. On August 15, 2017, Calera along with Mt. Harlan Vineyard LLC and Josh, Chloe, Duggan, and Silvie Jensen (collectively, the "Seller"), entered into an asset purchase agreement (the "APA") with Duckhorn to sell to Duckhorn certain land, improvements, appurtenant rights, approvals, plans, inventory, personal property, intellectual property, contracts, and records. (Exhibit 1. A. to Motion, at Duckhorn 16) In particular, Calera sold the rights to produce, market, and sell the Brand Items. See id. at Duckhorn 16-19.

6. The APA defines "contracts" as "[t]hose service, maintenance, management, distribution, and other contracts, leases and agreements related to the operation and management of the Business or Real Property set forth on Exhibit E subject to the terms thereof, (the "Assumed Contracts"). (Exhibit 1. A. to Motion, at Duckhorn 19)

7. Exhibit E to the APA, titled "Assumed Contracts," lists thirteen written agreements, five oral agreements, three distributors of wines bottled for the Japanese market, and the Seller's twenty-four brokers/distributors in the United States. The Massachusetts distributor is listed as Ruby. With regard to the U.S. distributors, Exhibit E provides that "Seller has not entered into any written distribution agreements with its distributors. Some of the distributors are located in 'franchise' states where termination may be limited by local law. No determination has been made of Seller's possible legal relationships with distributors under state laws." (Exhibit 1. B. to Motion, at Duckhorn 92-94)

8. The "Assumed Liabilities" definition in the APA provides that "Buyer hereby assumes and agrees to pay, perform and discharge, to the extent not theretofore performed, paid or discharged, all liabilities and/or obligations of Seller (a) arising after the Closing Date (as defined in Section 9.1- Closing) under any and all Assumed Contracts other than any liability or obligation in respect of any Assumed Contract arising out of or directly or

[4] Ruby does not seek to strike ¶ 1 of Cronbach's affidavit.
[5] Ruby does not seek to strike ¶ 2 of Cronbach's affidavit.

indirectly relating to any breach, default or action or omission of Seller occurring prior to the Closing and (b) associated with or arising out of the termination of any distributor of Seller at the request of Buyer, provided that any such payment made to a terminated distributor, to the extent that such payments are made by Seller, shall have received prior approval by Buyer (collectively, the 'Assumed Liabilities')." (Exhibit 1. A. to Motion, at Duckhorn 21)

9. The "Liabilities" provision in the APA sets forth that "[t]he Business and the Purchased Assets are not subject to any Indebtedness, liability, obligation, contract or commitment other than as disclosed on Section 5.5 of the Disclosure Schedule or in the Financial Statements and except such liabilities and obligations arising from the Assumed Contracts as described in Exhibit E which liabilities and obligations are not as a result of a default or breach thereof." Id. at Duckhorn 29.

10. The parties to the APA also entered into an Assignment of Contracts, which provides that the Seller "assigns, grants, conveys and transfers to [Duckhorn] all of [Seller's] rights, title and interest in the Assumed Contracts, free of all Liens and in accordance with Section 1.1 of the Asset Purchase Agreement, and [Seller] hereby accepts such assignment, grant, conveyance and transfer." (Exhibit 1. B. to Motion, at Duckhorn 132)

11. Schedule I to the Assignment of Contracts is the list of "Assumed Contracts," which is duplicative in its entirety of Exhibit E. Id. at 137-139; see supra ¶ 7.

12. In conjunction with the closing of the APA, Duckhorn and Calera entered into an Interim Services Agreement, which provides in relevant part that:

    a. Duckhorn would apply for the necessary permits for operating the winery business (the "Business");
    b. Until Duckhorn obtained the necessary permits, Calera would continue to operate the Business;
    c. Calera would rent the premises from Duckhorn for a term expiring on the date Duckhorn's necessary permits were issued;
    d. Duckhorn would grant to Calera a license to use the trademarks in connection with Calera's obligations under the Interim Services Agreement;
    e. Duckhorn agreed to:
        i. Employ personnel necessary to operate the Business;
        ii. Operate, maintain, and keep in good operating order all equipment;
        iii. Receive, store, and ferment all wine grapes delivered to the premises;
        iv. Receive, store, and maintain all bulk wines stored at the premises;
        v. Receive, store, and maintain inventories of packaging materials;
        vi. Maintain accurate records;
        vii. Pay costs and expenses related to the Business;
        viii. Take reasonable action to enforce or prosecute collection of debts;

ix. Receive purchase orders;

x. Sell case goods;

xi. File or hire a suitable compliance company to file monthly reports to shipment states;

xii. Employ or hire a suitable bookkeeper;

xiii. Take any other steps reasonably necessary to operate the Business; and

xiv. Comply with all federal, state, and local laws and regulations;

f. Calera would sell products in the tasting room, and Duckhorn would sell case goods to Calera as needed;

g. "With respect to case goods to be sold to distributors or brokers . . . [Duckhorn] shall receive orders on [Calera's] behalf unless and until such time [Duckhorn] has licenses in place, in any or all states, to fulfill orders without [Calera's] licenses, a determination that will be made at [Duckhorn's] sole discretion. . . [Duckhorn] will sell [Calera] case goods as necessary to fulfill orders. . . [Duckhorn] will arrange for shipment and delivery on behalf of [Calera]."

h. Duckhorn's duties under the Interim Services Agreement were to be as an independent contractor and not as an employee of Calera. Duckhorn and its employees were not to be deemed employees, partners, joint venturers, or agents of or with Calera;

i. The term of the Interim Services Agreement was from August 15, 2017 for six months or until the time Duckhorn received all of its permits, if that time was earlier than six months. (Exhibit 1. C. to Motion, at Duckhorn 183-196)

13. Also on August 15, 2017, Josh Jensen ("Jensen") entered into a Consulting Agreement with Mallard Holdco, LLC ("Mallard"). (Exhibit 1. D. to Motion, at Duckhorn 174; Cronbach Aff., at ¶ 11)[6] The Consulting Agreement relates to Mallard and its affiliated entities and provides that Jensen was appointed to the Board of Managers of Mallard and that Jensen agrees to attend regular meetings of the Board as well as participate in activities identified by the Board, including: an introductory trip to Asia, an annual/semi-annual trip to Japan, three to four high profile events a year, three to four DTC[7] consumer events per year within driving distance of Calera Winery, and media interviews as requested but not to exceed fifteen per year. (Exhibit 1. D. to Motion, at Duckhorn 174-182)

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[6] Cronbach states in her affidavit that Mallard is Duckhorn's parent. Ruby has filed a motion to strike the majority of Cronbach's affidavit, including that statement, on the basis that Cronbach did not attest to having personal knowledge of those asserted facts. See Motion to Strike; infra at 11-12. However, despite Ruby's efforts to strike Cronbach's statement that Mallard is Duckhorn's parent, Ruby, in its Opposition, blends Mallard and Duckhorn into a single entity by asserting that Jensen became a "member of the Duckhorn board of directors," when in fact Jensen became a member of the Mallard board of directors. (Opposition, at 6-7; Exhibit 1. D. to Motion, at Duckhorn 174)

[7] "DTC" is not defined, but the Commission assumes it to be an acronym for "direct-to-consumer."

14. The Consulting Agreement also provides, in part, for:

    a. A salary of $125,000 per year;

    b. Restrictions on releasing confidential information or competing with Mallard's "business;"

    c. Jensen to be an independent contractor, "and that nothing contained in this Agreement is intended, or shall be construed, to constitute you as the employee, agent, partner or joint venture of the company or its Affiliates or as constituting the exercise by the Company or any of its Affiliates of control or direction over the manner or method by which you perform the services which are the subject of this Agreement;" and

    d. Termination at any time by Mallard, upon Jensen's resignation, or upon Jensen's death. (Exhibit 1. D. to Motion, at Duckhorn 174-182)

15. Before the APA, Calera sold the Brand Items to Ruby for distribution in Massachusetts. (Exhibit 1. B. to Motion, at Duckhorn 92-94)

16. Following execution of the APA, Duckhorn decided not to distribute the Brand Items to Ruby and did not do so until after the Ship Order issued in this case.

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'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, 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 Heublien, 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 Duckhorn did not make regular sales of the Brand Items to Ruby in the period of six months preceding the refusal to sell date. Therefore, the question is whether the particular facts in this case give rise to the imputation of Calera's § 25E obligations.

DISCUSSION

Whether there was an assignment.

One of the primary questions in this matter is whether there was an assignment to Duckhorn of Calera's unwritten distribution agreement with Ruby thereby creating an imputation of Calera's § 25E obligations to Duckhorn. Under the heading of "Assumed Contracts," both Exhibit E to the APA and Schedule I to the Assignment of Contracts list, in part, the Seller's twenty-four brokers/distributors in the United States, including Ruby as the Massachusetts distributor. (Exhibit 1. B. to Motion, at Duckhorn 92-94, 137-139) With regard to the U.S. distributors, Exhibit E and Schedule I provide that "Seller has not entered into any written distribution agreements with its distributors. Some of the distributors are located in 'franchise' states where termination may be limited by local law. No determination has been made of Seller's possible legal relationships with distributors under state laws." Id. Despite that language, given that Ruby's relationship with Calera as the Massachusetts distributor is listed under the heading of "Assumed Contracts" and "Assignment of Contracts," the Commission is left questioning the intent of the parties with regard to Calera's oral distribution agreement with Ruby. The Commission is persuaded that there is an issue of fact as to the intent of Calera and Duckhorn with regard to the Assumed Contracts section of the APA and the separate Assignment of Contracts agreement.

"If a contract is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment. . . Where, however, the contract . . . has terms that are ambiguous, uncertain, or equivocal in meaning,' the intent of the parties may depend on disputed facts requiring a trial." Cardone v. Boston Regional Medical Center, Inc., 60 Mass. App. Ct. 179, 186 (2003) (quoting Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002). "Only when an agreement is 'reasonably and clearly susceptible' to more than one interpretation is it deemed to be ambiguous." Siebe, Inc. v. Louis M. Gerson Co., Inc., 74 Mass. App. Ct. 544, 549 (2009) (quoting W.P. Assocs. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994)). "Where, as here, 'intent is at the

core of a controversy, summary judgment seldom lies." Bray v. Community Newspaper Co., Inc., 67 Mass. App. Ct. 42, 43 (2006) (quoting Madden v. Estin, 28 Mass. App. Ct. 392, 395 (1990)).

The Commission finds that Exhibit E to the APA and Schedule I to the Assignment of Contracts are "reasonably and clearly susceptible to more than one interpretation." Cardone, 60 Mass. App. Ct. at 186 (internal quotation omitted). Exhibit E and Schedule I are ambiguous as to whether Calera assigned its distribution agreement with Ruby to Duckhorn. The intent of the parties is an issue of material fact that shall be determined at a hearing, not upon summary decision. Consequently, summary decision is denied on the issue of assignment.

Whether there was a continuing affiliation between Calera and Duckhorn.

Duckhorn asserts that summary decision should be granted for it because there was no continuing affiliation or agency relationship between Calera and Duckhorn. In support of this argument, Duckhorn argues that there is no evidence that Calera exercised any control over Duckhorn's selection of Massachusetts wholesalers and that neither the Interim Services Agreement nor the Consulting Agreement create an agency relationship or continuing affiliation between Duckhorn and Calera. (Motion, at 9-11)

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). The "relevant inquiry" in imputation of § 25E obligations is whether the successor supplier was the predecessor's agent "for the discrete purpose of making regular sales . . . to downstream customers." See id. 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." Id., (quoting Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 742 (2000). As the Appeals Court summarized, "§ 14, comment, a, of the Restatement (Second) of Agency provides that an essential characteristic of an agency relationship is the right of a principal to control 'what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times." Id. at 507.

Duckhorn points to the case of Martignetti Grocery Co., Inc d/b/a Carolina Wine Co. v. Constellation Brands, Inc., (ABCC Decision 25E-1324, July 26, 2017) as analogous to the instant case. In that case, the parties to an asset purchase agreement also entered into transitional agreements, which were in effect for limited periods of time and related to the production, blending, and bottling of certain wines as well as for consultation on the production and marketing of the subject brand items. The Commission granted summary decision for Constellation finding that the terms of the interim agreements did not create a continuing affiliation. Martignetti then appealed to the Superior Court, which affirmed the Commission's decision that there was no imputation of § 25E obligations. See Martignetti Grocery Co., Inc. d/b/a Carolina Wine Co. v. ABCC, No. 2017-02712, at *8 (Mass. Super. Ct. June 25, 2018) (Connolly, J.). (stating that "[a]ll four agreement[s] were temporary, and none of them allowed [the seller] to retain the level of shared control required to impute § 25E obligations.").

As in that case, in the present case, the Interim Services Agreement provided for the Seller to continue to operate the winery business for a temporary period of time. (Exhibit 1. C., at Duckhorn183-188) Furthermore, Duckhorn was not to be deemed an employee, partner, joint venture, or agent of or with Calera. (Exhibit 1. C. to Motion, at Duckhorn 191-192) "Courts have

held that properly-drafted and implemented transitional agreements do not, without more, constitute the type of continuing affiliation or agency relationship which would subject a purchaser-distributor to § 25E obligations." United Liquors, LLC v. Haven Hill Distilleries, Inc. (ABCC Decision April 16, 2014); see Beam Spirits & Wine, LLC, No. 13–02229–C, 2014 WL 4082142, at *6 n. 7 (Mass. Super. July 16, 2014) (providing that "mere contractual 'connections' or business 'dealings' will fall short of the kind of 'affiliation' required for imputation purposes"). The Commission is persuaded that the Interim Services Agreement, like the agreements in the Martignetti d/b/a Carolina Wine case, did not create a continuing affiliation between Calera and Duckhorn.

However, the Martignetti d/b/a Carolina Wine case differs from the instant case because of the terms of the Consulting Agreement. Pursuant to the Consulting Agreement, Josh Jensen, the founder of Calera, became a member of the board of directors of Mallard, has an annual salary, and continues to consult. Unlike the Interim Services Agreement, the Consulting Agreement has no specific end point, but the agreement may be terminated at any time by Mallard, by Jensen's resignation, or upon Jensen's death. (Exhibit 1. D. to Motion, at Duckhorn 176)

Ruby asserts that the instant case is more analogous to 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 Nov. 20, 2013). 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 denied Crimson's motion for summary decision, finding that Seghesio's prior sales obligations could be imputed to Crimson because: (1) there was a continuing affiliation given that as part of their Interim Agreement, Crimson used Seghesio's CoC and Crimson hired 55-60 of Seghesio's employees, including the main winemaker and CEO of the Brand; and (2) Crimson also expressly assumed the sales liabilities of Seghesio in the APA.[8]

Unlike in Pine Ridge, in the instant case, Duckhorn did not use Calera's CoC to import the Brand Items into Massachusetts, as it had its own CoC. (Cronbach Aff., at ¶ 2) With regard to hiring any of Calera's employees, Ruby points to news articles released at the time of the APA, which state that, "[a]ll key personnel, including Winemaker Mike Waller, will remain with the winery." (Press Release, Aug. 15, 2017, attached to Coyne Aff. in Opp. to Motion) However, this statement does not evidence that the key personnel would remain with the winery after the term of the Interim Agreement, a six month period. Unlike in Pine Ridge, there is no evidence before the Commission that Duckhorn hired Calera's employees.

The instant case differs from those discussed above in that here, the founder of Calera became a director Mallard. Assuming arguendo, that Mallard is Duckhorn's parent as Duckhorn states, the next question, as raised by Ruby, is whether there was an imputation of § 25E obligations on the basis of a de facto merger. (Opposition, at 7-8; see supra n. 6) Massachusetts follows traditional corporate law principles that when one corporation acquires the assets of another, liabilities of the

[8] 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.

seller are not imposed on the buyer, except where, "(1) the successor expressly or impliedly assumes liability of the predecessor, (2) the transaction is a *de facto merger* or consolidation, (3) the successor is a mere continuation of the predecessor, or (4) the transaction is a fraudulent effort to avoid liabilities of the predecessor." Cargill, Inc. v. Beaver Coal & Oil Co., Inc., 424 Mass. 356, 359 (1997) (emphasis added). In determining whether a de facto merger occurred, courts consider,

> whether (1) there is a continuation of the enterprise of the seller corporation so that there is continuity of management, personnel, physical location, assets, and general business operations; whether (2) there is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation, whether (3) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and whether (4) the purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Cargill, Inc., 424 Mass. at 359-360.

Here, the facts as presented to the Commission in the summary decision papers do not add up to a finding of a de facto merger between Calera and Duckhorn. First, while Calera's physical location and assets were purchased by Duckhorn, there is no evidence that the employees of Calera were hired by Duckhorn following the term of the Interim Services Agreement or that the management stayed the same. In fact, even if Mallard is Duckhorn's parent, Jensen became an independent contractor and only one of the members of Mallard's board of directors. (Exhibit 1. D. to Motion, at Duckhorn 174-182)

Second, there is no evidence of continuity of shareholders resulting from the APA. "In determining whether a de facto merger has occurred, courts pay particular attention to the continuation of management, officers, directors and shareholders." Cargill, Inc., 424 Mass. at 360. "[C]ontinuity of shareholders is one of the 'key requirements' for application of the de facto merger doctrine." American Paper Recycling Corp. v. IHC Corp., 707 F.Supp.2d 114, 121 (1st Cir. 2010) (citing Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984)). While Mallard made Josh Jensen a director through the Consulting Agreement, there is no evidence as to the officers/directors/shareholders of Calera or Duckhorn or, therefore, any overlapping of officers/directors/shareholders between them.

As to the third factor, there is no evidence that Calera has liquidated or dissolved.

Lastly, the question is whether the purchasing corporation (Duckhorn) assumed the obligations of the seller (Calera) ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. Cargill, Inc., 424 Mass. at 359-360. The APA provides that the only liabilities or obligations that Duckhorn assumed were certain ones that arose after the closing date of the APA, August 15, 2017. (Exhibit 1. A. to Motion, at Duckhorn 21)

The facts as presented in the motion for summary decision papers do not evidence a de facto merger between Calera and Duckhorn.

Whether there was an attempt to circumvent § 25E.

There is no evidence that the parties structured the APA so as to circumvent § 25E, and the parties do not argue that they did.

MOTION TO STRIKE

Ruby filed a Motion to Strike the Affidavit of Alicia Cronbach on the basis that she only attests to having personal knowledge as to the facts and circumstances surrounding the negotiation and execution of the APA.[9] (Motion to Strike, at 3; Cronbach Aff. at ¶ 3) Cronbach is the Vice President and Deputy General Counsel of Duckhorn and testifies in her affidavit as to: the terms of the APA, Interim Services Agreement, and Consulting Agreement; the intent of the parties with regard to whether Duckhorn assumed any distributor relationships; the role Josh Jensen had following the execution of the APA and the Consulting Agreement; Duckhorn's decision to use its own Massachusetts wholesaler instead of using Ruby; there being no agency relationship or continuing affiliation between Calera and Duckhorn; and Duckhorn's sales to Ruby as being only pursuant to the Ship Order in this matter. (Cronbach Aff.)

An affidavit shall be based on "personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mass. R. Civ. P. Rule 56(e). Here, Alicia Cronbach states that she is "familiar with and has personal knowledge of the facts and circumstances surrounding the negotiation and execution of the Asset Purchase Agreement." (Cronbach Aff., at ¶ 3) The parties dispute the meaning of "execution"—Ruby argues that it only means the signing of the APA while Duckhorn asserts that it also means the implementation of the APA. Nonetheless, the Commission agrees with Ruby that the better evidence is the contracts at issue themselves. Furthermore, the Commission cannot determine the intent of the parties on a motion for summary decision. See Bray v. Community Newspaper Co., Inc., 67 Mass. App. Ct. 42, 43 (2006). Upon review of the affidavit, arguments made by the parties, and case law, the Commission has found as fact only those portions of Cronbach's affidavit that are cited in the Findings of Fact section above, all of which were not sought to be stricken by Ruby. See supra notes 4-6.

[9] The Motion to Strike was filed on April 23, 2019. Duckhorn filed an Opposition to the Motion to Strike on May 21, 2019. Ruby filed a Reply to the Opposition to the Motion to Strike on May 22, 2019. The Commission has considered all papers and arguments.

CONCLUSION

The Commission finds that Duckhorn and Calera did not structure the APA so as to circumvent § 25E and therefore ALLOWS so much of Duckhorn's Motion as it relates to the issue of circumventing § 25E. As for the issues of whether there was a continuing affiliation between Duckhorn and Calera and whether Calera assigned its unwritten distribution agreement with Ruby to Duckhorn, the Commission DENIES Duckhorn's Motion and concludes that a hearing under M.G.L. c. 138, § 25E, 801 CMR 1.02(10), and M.G.L. c. 30A, § 10 is warranted. The facts set forth above in the Findings of Fact section and the legal conclusions made in this Order are deemed established. See Mass. R. Civ. P. Rule 56(d).[10] The Commission directs the scheduling of an evidentiary hearing and for the parties to be prepared to present evidence on the following issues:

1. The intent of the parties relative to Exhibit E to the APA and Schedule I to the Assignment of Contracts;

2. Whether Duckhorn hired any of Calera's employees, in particular, the winemaker;

3. Josh Jensen's involvement with Duckhorn and the Brand Items following the execution of the APA, including time periods; and

4. Whether Mallard is Duckhorn's parent.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner _____

Jean M. Lorizio, Chairman _____

Kathleen McNally, Commissioner _____

Dated: August 30, 2019

[10] Rule 56(d) provides that "[i]f on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly. Mass. R. Civ. P. Rule 56(d).

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

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cc: William F. Coyne, Jr. Esq., via email
J. Mark Dickison, Esq. via email
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