



***Commonwealth of Massachusetts  
Alcoholic Beverages Control Commission  
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*Chairman*

**NO. 25E-1361**

**HORIZON BEVERAGE COMPANY, INC.**  
**Petitioner,**

**v.**

**VINTUS LLC**  
**Respondent.**  
**HEARD: 3/21/2019**

**MEMORANDUM AND ORDER ON  
RESPONDENT'S MOTION FOR SUMMARY DECISION AND  
PETITIONER'S CROSS MOTION FOR SUMMARY DECISION**

Horizon Beverage Company, Inc. ("Horizon") is a Massachusetts wholesaler aggrieved at the refusal of Vintus LLC ("Vintus"), to ship the Ornellaia, Attems, Luce, and Masseto wine brands ("Brand Items") to Horizon.

On November 1, 2017, pursuant to the mandate in M.G.L. c. 138, § 25E and in response to Horizon filing its petition, the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") issued an order to Vintus to make sales of the Brand Items to Horizon pending the Commission's determination of the petition on the merits.

On November 19, 2018, Vintus filed the instant Motion for Summary Decision (the "Motion") regarding the above-referenced petition arguing that under § 25E and applicable case law, Vintus should not be required to sell the Brand Items to Horizon, specifically because there are no grounds upon which to impute the M.G.L. c. 138, § 25E obligations upon Vintus, who had not sold the Brand Items to Horizon for six months prior to its refusal to sell date.

On December 14, 2017, Horizon filed an Opposition to the Motion and Cross-Motion for Summary Decision (the "Cross-Motion"), asserting that Horizon was not properly terminated and Vintus was not authorized to import and sell the Brand Items.

On February 20, 2019, Vintus filed a Reply brief. A hearing on the Motion and Cross-Motion was held on March 21, 2019. After the hearing and in consideration of the exhibits, affidavits, 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, and the Commission took administrative notice of the Commission's records of Vintus.<sup>1</sup>

### FINDINGS OF FACT

1. Frescobaldi (the "Brand Owner") is the majority beneficial interest holder of Italian entities Ornellaia e Masseto societa Agricola srl, Tenute di Toscana Distribuzione srl, and Marchesi Frescobaldi Societa Agricola srl and owner of the Attems, Luce, Ornellaia, and Masseto wine brands (the "Brand Items"). (Affidavit of Michael Quinttus, at ¶¶ 3-5)
2. For years, the Brand Owner used Folio Wine Partners ("Folio") of Napa, California as its United States importer of the Brand Items. Id. at ¶ 4; Affidavit of Michael Epstein, at ¶ 5. Folio in turn used wholesaler Horizon Beverage Company, Inc. ("Horizon") as its Massachusetts wholesaler for the Brand Items. (Epstein Aff., at ¶ 5)
3. In September/November 2017, Vintus, LLC ("Vintus"), an importer of alcoholic beverages, entered into Exclusive Distribution Agreements with Ornellaia e Masseto societa Agricola srl, Tenute di Toscana Distribuzione srl, and Marchesi Frescobaldi Societa Agricola srl, making Vintus the exclusive importer of the Brand Items effective January 1, 2018 for the United States, Puerto Rico, and the Caribbean, excluding duty-free markets. (Quinttus Aff., at ¶¶ 4, 5)
4. Vintus was concerned that during the last quarter of 2017, Folio, with no incentive to invest time, effort, and money on Brand Items it was about to lose, would not adequately support the Brand Items. (Quinttus Aff., at ¶ 6)
5. Consequently, Vintus approached Folio about purchasing most of Folio's inventory of the Attems, Luce, and Ornellaia Brands, and Folio agreed. Vintus paid Folio \$390,000, and Vintus began importing the Attems, Luce, and Ornellaia Brands effective October 1, 2017.<sup>2</sup> Id. at ¶ 7.
6. Vintus uses Classic Wine Imports, LLC ("Classic") as wholesaler for its entire portfolio in Massachusetts. On October 1, 2017, Vintus appointed Classic as the wholesaler for the Brand Items. Id. at ¶ 8.
7. On October 4, 2017, Vintus notified Horizon by letter that Vintus would not make sales of the Brand Items to Horizon. Id.; Ex. B to Cross-Motion.
8. The Brand Owner has no control over Vintus's selection of wholesalers, and neither did Folio. (Quintus Aff., at ¶ 9; Ex. B to Motion)
9. There is no common ownership between Vintus and the Brand Owner. Id.

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<sup>1</sup> Both parties voiced that they did not object to the Commission taking such administrative notice.

<sup>2</sup> There is no evidence before the Commission as to when Vintus began shipping any of the Brand Items into Massachusetts specifically. Vintus did not purchase the Masseto Brand from Folio because it is rare, and Folio already had sales commitments for that brand. (Quinttus Aff., at ¶ 6)

10. Vintus and the Brand Owner did not enter into a partnership or joint venture. (Ex. B to Motion at VIN0016)
11. Other than when Vintus purchased Folio's inventory of the Brand Items in order to sell the Brand Items starting in the last quarter of 2017, Vintus and Folio have had no business dealings, relationships, or transactions with each other. Vintus and Folio have no ownership interest in each other. Vintus does not employ any of Folio's former employees. Folio does not profit from Vintus's sales of the Brand Items. (Quinttus Aff., at ¶ 10)
12. Vintus and Folio were never parties to an assignment and assumption agreement. *Id.* at ¶ 11.
13. Vintus has only sold the Brand Items to Horizon pursuant to the Ship Order issued in this case. *Id.* at ¶ 12.
14. Since 2006, Vintus has had numerous certificates of compliance ("COC") issued by the ABCC pursuant to Massachusetts General Laws, Chapter 138, § 18B. Vintus has filed price postings listing the Brand Items for several of its COCs. Some of the shipping locations of those COCs were in Italy and some were in the United States. (Commission records)
15. The Exclusive Distribution Agreements for the Brand Items provide for the Brand Items to be shipped from Leghorn, Italy. (Ex. B to Motion at VIN0015, VIN0029, VIN0038, VIN0043, VIN0052, VIN0057, VIN0066)

### DISCUSSION

Summary decision is appropriate only where there are no genuine issues of material fact in dispute and where the moving party is entitled to judgment as a matter of law. Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006); Branded-New England Co. v. Beringer Wine Estates Co., 25E-1145 (ABCC Decision May 24, 2000). Material facts are those that are substantive in nature and affect the result of the case. Carey, 446 Mass. at 278. Where the parties' rights and obligations are set forth in contracts, the interpretation of those contracts is a question of law, not an issue of fact. See Eigerman v. Putnam Investments, Inc., 450 Mass. 281, 287 (2007) ("interpretation of a contract is a question of law for the court. Whether a contract is ambiguous is also a question of law."); United Liquors, LLC v. Heaven Hill Distilleries, Inc., 25E-1284 (ABCC Decision January 6, 2015; heard April 16, 2014).

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 suppliers’ legitimate need to carefully select the wholesalers with whom they deal. Heublein, 434 Mass. at 704 (noting existence of “legitimate business reasons for a new supplier . . . to want to evaluate its prospective wholesalers for the six-month trial period provided by . . . § 25E”); Seagram, 401 Mass. at 717, citing Union Liquors Co. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 936, 938 (1981) (“Persons in a highly sensitive, closely scrutinized business (such as the liquor business) have need to know about and appraise the persons behind corporations with whom they are doing business”).

In some circumstances, however, the law imputes a supplier’s § 25E obligations to its successor - even though the successor itself has not sold to the wholesaler - to prevent evasion of the § 25E protections. Gilman & Sons., Inc. v. Alcoholic Beverages Control Comm’n, 61 Mass. App. Ct. 916, 917 (2004), citing Heublein, 434 Mass. at 704. The courts and Commission have recognized imputation of a predecessor supplier to a successor predecessor 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. June 14, 2004); or where there is a continuing affiliation between the prior supplier and the new supplier, Heublein, 434 Mass. at 704;
- (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,” accord Heublein, 434 Mass. at 706; Pastene, 401 Mass. at 616.

There is no dispute that Vintus did not make regular sales of the Brand Items to Horizon in the six-month period preceding October 4, 2017. The question is whether Folio’s § 25E obligations were imputed to Vintus.

There are no grounds to impute Folio’s § 25E obligations to Vintus. There is no evidence of an agency, joint venture, partnership, or continuing affiliation between Vintus and Folio. (Quintus, at ¶ 10) Vintus simply paid Folio a sum for Folio’s remaining inventory of the Attems, Luce, and Ornellaia brands and the right to begin selling those brands a few months before the Exclusive Distribution Agreement with the Brand Owner took effect. Id. at 11. Likewise, there is no evidence that Folio assigned its distribution rights to Vintus or that Folio and Vintus made the agreement for the purpose of circumventing § 25E and avoiding sales to Horizon. Id.

Horizon does not assert that Folio's § 25E obligations were imputed to Vintus. Instead, Horizon argues that Vintus did not have the proper COC to ship the Brand Items from Leghorn, Italy as early as October 2017. Horizon further argues that without a proper COC for the Brand Items, Vintus had no standing to lawfully terminate Horizon. (Cross-Motion, at 8)

Horizon's argument raises the issue of whether Vintus violated Massachusetts General Laws, chapter 138, § 18B—regulating certificates of compliance – and/or the Commission's regulations. Such an enforcement issue is outside the scope of this § 25E case and does not have a bearing on whether Folio's § 25E obligations should be imputed to Vintus. Nonetheless, Vintus was an importer operating in Massachusetts with a § 18B COC before it came to the agreement with Folio in 2017, and there is no evidence before the Commission that Vintus in fact shipped any of the Brand Items into Massachusetts before it had the legal authority to do so.

#### CONCLUSION

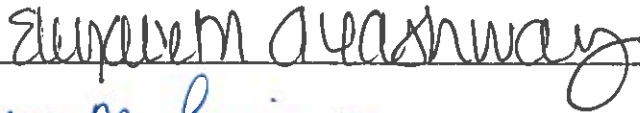
Vintus made no sales to Horizon of the Brand Items prior to the Ship Order, and Horizon has no reasonable expectation of proving that Folio's § 25E obligations should be imputed to Vintus.

Vintus's Motion for Summary Decision is **ALLOWED**, and Horizon's Cross-Motion for Summary Decision is **DENIED**.

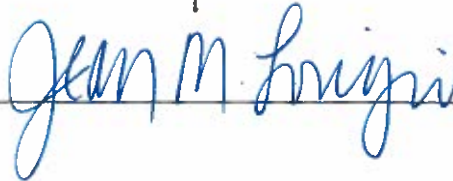
The matter is dismissed, and the Commission's previous order to ship is **DISSOLVED** effective 30 days from the date of this decision.

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth A. Lashway, Commissioner



Jean M. Lorizio, Chairman



Dated: April 4, 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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