Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358

Jean M. Lorizio, Esq.
Chairman

NO. 25E-1370

CLASSIC WINE IMPORTS, INC.
Petitioner,

v.

THE WINE GROUP, LLC
Respondents.
HEARD: 2/11/2020

MEMORANDUM AND ORDER ON RESPONDENT THE WINE GROUP'S MOTION FOR SUMMARY DECISION AND CLASSIC'S CROSS-MOTION FOR SUMMARY DECISION

Classic Wine Imports, Inc. ("Classic") is a Massachusetts wholesaler aggrieved at the refusal of The Wine Group, LLC ("TWG") to ship certain brands, namely, the "Seven Deadly" wines (the "Brand Items") to Classic.

On November 6, 2018, pursuant to the mandate in M.G.L. c. 138, § 25E, the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") issued an order to TWG to makes sales of the Brand Items to Classic pending the Commission's determination on the petition on the merits (the "Ship Order").

On November 18, 2019, TWG filed the instant Motion for Summary Decision ("Motion") arguing that under § 25E and applicable case law, TWG should not be required to sell the Brand Items to Classic, specifically because TWG, who never made sales to Classic prior to the Ship Order, is not an agent of the predecessor supplier Michael-David LLC and Phillips Farm, LLC ("Sellers"); that there is no continuing affiliation between them; that there was no assignment of wholesale distribution arrangements or agreements; and that no facts support an attempted circumvention of § 25E. TWG filed along with its Motion, the Affidavit of John Sutton and additional supporting documents.

On December 6, 2019, Classic filed its Opposition to the Motion and a Cross-Motion for Summary Decision ("Classic's Motion") asserting the Sellers' § 25E obligations should be imputed to Classic because there was a continuing affiliation between TWG and the Sellers. In support of its Opposition, Classic filed eight exhibits.

On December 27, 2019, TWG filed its Reply. After a hearing on February 11, 2020, 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. Classic is a Massachusetts wholesaler licensed under M.G.L. c. 138, § 18. (Classic's Verified § 25E Petition at 1)

2. The Wine Group is in the business of manufacturing, producing, and selling a variety of wine brands in the United States, with its principal place of business in Livermore, California. (Affidavit of John Sutton at 1[1])

3. TWG holds a number of certificates of compliance ("COC") issued by the ABCC under M.G.L. c. 138, § 18B. (Sutton Aff. at 3)

4. Michael-David LLC and Phillips Farm LLC ("Sellers") are limited liability companies formed under the laws of the State of California. (Asset Purchase Agreement (the "APA")[2] at TWG 00005)

5. TWG and the Sellers entered into an Asset Purchase Agreement on October 18, 2018 and the Closing took place on or about the same day. (Sutton Aff. at 4, 7d)

6. The "Purchased Assets" included the Sellers' right, title, and interest in and to the "rights, properties, and assets, either tangible or intangible, owned, used or held for use by the Sellers and their Affiliates that are associated exclusively with the Business [as defined to mean the marketing and sale of the Brand Items, known as the "Seven Deadly" wine brands]." These assets included:

    (i) all inventory of wine, whether bulk or bottled, from the [REDACTED] vintages, together with any non-wine retail inventory and packaging materials used in connection with the [REDACTED] vintages, which are held by or on behalf of the Sellers, in each case, with respect to the Business, including the inventory listed on Schedule 2.01(a)(i) (the "Purchased Wine);

    (ii) all grapes on the vines owned by the Seller sand their Affiliates which are contemplated to be used in the Business's production of approximately [REDACTED] of 2018 vintage wine for the Brands, consistent with past practice (the "Purchased Grapes");

---

[1] The Affidavit of John Sutton is Exhibit 1 to the Motion.

[2] Both The Wine Group and Classic filed copies of the APA with their motions. The Wine Group's copy is found at Exhibit A to Sutton's Affidavit, which is Exhibit 1 to the Motion. Classic's copy is found at Exhibit 3 to their Opposition and Cross-Motion. The Wine Group's copy includes all of the APA's exhibits and attachments, and therefore, the Commission references that copy.

(iii) all Intellectual Property owned, used or held for use that are related exclusively to the Business, including the trademarks "The Seven Deadly Zins", "Seven Deadly Red", "The Seven Deadly Sins", the image marks related to the Brand and all related goodwill (the "Business IP")

(iv) all marketing, advertising and point-of-sale materials related exclusively to the Business, including websites, social media accounts and distributor/DTT lists related to the Business;

(v) all labels, bottles and packaging materials exclusively used in the Business;

(vi) all rights of the Sellers under those contracts set forth on Schedule 2.01(a)(vi) (such Contracts, collectively, the "Assumed Contracts"); and

(vii) copies of all production records, financial records and other records, including those required by Law specifically used or held for use by the Sellers exclusively in connection with the operation of the Business.

(Sutton Aff., at 5, see Ex. A at TWG 00005, 00012-14)

7. Certain Excluded Assets were not purchased under the APA, including the Sellers' cash on hand, bank accounts, customer mailing lists, all brands of the Sellers other than the Brand Items, and Excluded Contracts. (Sutton Aff. at 7a, see Ex. A at TWG pp. 00013-14)

8. Excluded Contracts is defined in the APA as "all Contracts (including all distribution agreements) to which Seller is a party as of the date here on whether or not related to the Business, excluding any Assumed Contracts." (Sutton Aff. at 7b, see Ex. A at TWG 00008.)

9. The "Assumed Contracts" are identified on Schedule 2.01(a)(vi) of the APA and none are listed. (Sutton Aff. at 7b, see Ex. A at TWG 00174)

10. TWG and the Sellers entered into several Ancillary Agreements as closing deliverables under the APA. These agreements included a Bulk Wine Purchase Agreement, a Trademark License Agreement, and a Cross-License Agreement. (Sutton Aff. at 8, see Ex. A at TWG 00005.)

11. The APA and Ancillary Agreements constitute a fully integrated agreement. (Sutton Aff. at 7h, see Ex. A at TWG 00038.)

12. On October 19, 2018, TWG and Phillips Farm, LLC entered into a Bulk Wine Purchase Agreement ("BWPA"). (Ex. A to Sutton Aff. at TWG 00050 - 00060)

13. Pursuant to the BWPA, Phillips agreed to make, store, and deliver to TWG certain bulk wines for a limited period of time following the closing of the transactions contemplated in the APA. Id.

14. "Bulk Wine" is defined in the BWPA as:

> ...the vintage 2016, vintage 2017 and vintage 2018 wine made by [Phillips] and approved by [TWG] in accordance with this Agreement, consisting of at least 99% vintage specific wine for the applicable vintage, at least 95% Lodi appellated wine, and which wine shall look smell and taste and have objective characteristics (e.g. alcohol levels, residual sugar levels, acid levels, etc.) similar to recent vintages of (a) the Seven Deadly Zins brand wine, if such vintage 2016 and vintage 2017 bulk wine is intended by the Purchaser to be sold as Seven Deadly Zins brand wine, (b) the Seven Deadly Red brand wine, if such vintage 2016 and vintage 2017 bulk wine is intended by Purchaser to be sold as Seven Deadly Red brand wine and (c) the Zinfandel and Petite Sirah bulk wine used in Seven Deadly Zins and Seven Deadly Red at the same state of completion as the respective vintage 2018 wines will be in at the time Purchaser takes possession of such vintage 2018 Zinfandel and Petite Sirah bulk wines.

(Ex. A to Sutton Aff. at TWG 00050)

15. The parties entered into the BWPA "...to allow Phillips to advance production and blending of wine from vintages 2016, 2017 and 2018, and to deliver those three vintages to TWG when they were in the agreed-upon state of completion after the closing of the transaction. At the time of the closing, the bulk wine was in various stages of production and, as provided in the BWPA, Phillips agreed to complete specified, agreed-upon blending and finishing tasks to deliver the bulk wine to TWG. For the 2016 and 2017 vintages, TWG undertook additional blending, filtering, fining and other processes to complete the wine and prepare it for bottling." TWG was in the process of blending, finishing and bottling the 2018 vintage at the time Mr. Sutton's affidavit was signed. (Sutton Aff. at 9b)

16. Given the terms of the BWPA, Phillips was responsible for "all aspects of grape-growing/purchasing, winemaking, production, storage and delivery to [TWG] of the Bulk Wine, in each case in compliance with the terms of [the] Agreement, and all applicable federal, state, local and, if applicable, international rules, laws and regulations." (Sutton Aff. at 9c, see Ex. A at TWG 00052)

17. "TWG was entitled to have 'input on the wine blends throughout the winemaking process and [Phillips was required to] use their reasonable best efforts to accommodate [TWG's] input regarding the bulk wine.'" (Sutton Aff. at 9c, see Ex. A at TWG 00050)

18. The BWPA did not pertain to any vintage beyond 2018. Beginning with the 2019 vintage, TWG was solely responsible for producing and finishing the wine. As such, the BWPA has expired. (Sutton Aff. at 9f)

19. During the pendency of the BWPA, Phillips had no control with regards to the manufacture and production of the Brands other than under the BWPA, and Phillips had no control over the distribution of the Brands. (Sutton Aff. at 9g)

20. On October 19, 2018 Michael-David LLC and TWG entered into a Trademark License Agreement ("License Agreement"). (Ex. A to Sutton Aff. at TWG 00155 - 00167)

21. The Trademark License Agreement ("License Agreement") between Michael-David LLC and TWG granted TWG a non-exclusive, worldwide, fully paid, non-transferable license to use the trademarks, goodwill, and other intangible assets ("Licensed Marks") associated with another of the Sellers' brands, the Sins Line, which was not purchased under the APA. (Sutton Aff. at 10a, see Ex. A to Sutton Aff. at TWG 00155)

22. The Sins Line brand (including those known as "Gluttony," "Greed," "Lust," "Rage," and "Sloth") and the Brand Items "historically have been related thematically," and the Licensed Marks appear on certain promotional materials used to advertise and promote the Brand Items. (Sutton Aff. at 10b, see Ex. A to Sutton Aff. at TWG 00032, 00155)

23. The License Agreement allows TWG to continue to use the Licensed Marks on labels for the Brand Items as well as on certain promotional material used to advertise the Brand Items and terminates when TWG modifies the front label of the Brand Items, or ten years after the Closing, whichever occurs first. (Sutton Aff. at 10c, 10d, see Ex. A at TWG 00155, 00160)

24. According to the License Agreement, TWG and Michael-David are acting as independent contractors, not as agents, or as part of a joint venture. (Sutton Aff. at 10e, see Ex. A at TWG 00162)

25. Michael-David is not entitled to receive a separate royalty for TWG's use of the marks. (Sutton Aff. at 10f, see Ex. A at TWG 00156)

26. The License Agreement does not provide for any cross-marketing or promotional services and does not allow Michael-David any input or control whatsoever in the sales and marketing of the Brands. (Sutton Aff. at 10g)

27. On October 19, 2018 Phillips Farms, LLC and The Wine Group LLC entered into a Trademark License Agreement, also known as the Cross-License Agreement. (Ex. A to Sutton Aff. at TWG 00143-154)

28. The Cross-License Agreement allows Phillips to continue to use a trademark that TWG purchased in the APA (consisting of the number "7," combined with the letter "Z"), but that also appears on labels of certain Phillips brand wines that were not Purchased Assets under the APA. (Sutton Aff. at 11a, see Ex. A at TWG 00143.)

29. Phillips' license to use the mark expires as soon as it uses the last of its existing stock of labels and promotional materials bearing the licensed mark. (Sutton Aff. at 11b, see Ex. A at TWG 00143, 147)

30. The Cross-License Agreement also expressly provides that TWG and Phillips are acting thereunder as independent contractors and not as agents, partners or as a joint venture. (Sutton Aff. at 11c, see Ex. A at TWG 00149, 00150)

31. TWG is not entitled to receive a royalty for Phillips' use of the marks. (Sutton Aff. at 11d, see Ex. A at TWG 00144)

32. As of October 18, 2018, the Closing Date of the APA, neither Michael-David nor Phillips, the Sellers, retained any ownership interest or rights in the Brands, the Business, or the Purchased Assets. (Sutton Aff. at 12)

33. As of October 18, 2018, the Closing Date of the APA, the Sellers no longer distributed, sold, advertised, or supplied any wholesalers or distributors with the Brand Items. (Sutton Aff. at 13)

34. By letter, dated October 23, 2018, TWG notified Classic it had become the owner and Primary American Source of Supply for the Brands, effective October 19, 2018, and it intended to consolidate the Brands with its existing wholesaler and broker network in Massachusetts effective immediately. TWG notified Classic it would be unable to accept any orders for the Brands. (Sutton Aff. at 14, see Ex. B at TWG 00169)

35. Horizon Beverage Company, Inc. ("Horizon") and TWG have had a business relationship and Horizon is TWG's preferred distributor. On October 22, 2018, TWG appointed Horizon as distributor of the Brands in Massachusetts. (Sutton Aff. at 15, see Ex. C at TWG 00170)

36. On or about November 5, 2018, Classic filed its verified § 25E Petition alleging that "well in excess of six months prior to [TWG's] refusal to sell," Classic made regular purchases of the Brands from the Sellers. (Classic's Verified § 25E Petition)

37. On November 6, 2018, the Commission issued its Ship Order requiring TWG to ship the Brands to Classic. TWG has complied. (Sutton Aff. at 16)

38. Since October 18, 2018, neither Phillips nor Michael-David has had any control or role in the production, marketing, distribution, or sale of the Brand Items, other than the limited extent provided for in the BWPA. (Sutton Aff. at 18)

39. TWG, in its sole discretion, determines which distributors and/or wholesalers it will engage to distribute the Brands. (Sutton Aff. at 19)

40. No representatives, agents or employees of Phillips have been involved in the distribution or marketing of the Brands or the selection of wholesalers for the Brands in the United States since the Closing in October of 2018. (Sutton Aff. at 20)

41. TWG has not reported and does not report to any representative of Phillips with respect to the current marketing, pricing, and distribution of the Brands. (Sutton Aff. at 21)

42. Neither Michael-David nor Phillips receive compensation for current sales of the Brand Items or have any contingent or reversionary right or interest in the Brands. (Sutton Aff. at 22)

43. The only post-closing payment Phillips or Michael-David has or may receive under the APA was limited to the payment of $3.3 million paid on August 8, 2019, following delivery of the last of the 2018 vintage Bulk Wine. This was a one-time payment and not related to profits arising out of distribution agreements in any way. (Sutton Aff. at 23)

44. Phillips does not have, and never had, an ownership interest in TWG, and TWG does not have, and never had, an ownership interest in Phillips. (Sutton Aff. at 24)

45. There were not any joint ownerships, partnerships, or joint ventures between TWG and Phillips before this transaction, and there have been none since. (Sutton Aff. at 25)

46. There are not any common employees, managers, officers or directors of Phillips and TWG, and TWG did not hire any Phillips or Michael-David employees after the Closing. (Sutton Aff. at 26)

47. TWG has its own network of distributors in the United States and had no need to assume any distribution agreements from Phillips. (Sutton Aff. at 27)

48. Since the Closing of the APA, there have not been any meetings or communications between TWG and Phillips with respect to distribution of the Brands in Massachusetts or regarding the composition of the Massachusetts wholesaler network, or the termination of particular wholesalers. (Sutton Aff. at 28)

DISCUSSION

The Wine Group argues that summary decision should be granted because TWG never made regular sales of the Brand Items to Classic in the six months preceding the refusal to sell, and that there are no grounds for imputing § 25E rights to TWG. In support of its argument, TWG states that TWG is not an agent of Michael-David and/or Phillips, the Sellers; there is no continued affiliation between them; there was no assignment of distributor arrangements or agreements; and there are no facts supporting an attempted circumvention of § 25E.

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.").

Section 25E, in relevant part, provides 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").

However, in some circumstances 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.

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.

There is no dispute that TWG did not make regular sales of the Brand Items to Classic in the 6-month period preceding its refusal to sell in October of 2018. Therefore, the Commission must determine whether the particular facts in this case give rise to the imputation of the Sellers' § 25E obligations to TWG.

Classic acknowledges that there was no assignment of distribution rights between the Sellers and The Wine Group, and no attempt to circumvent § 25E. The issue raised by Classic is that of an agency relationship or continuing affiliation between the Sellers and The Wine Group which it contends gives rise to the imputation of the Sellers' § 25E obligations to The Wine Group.

Continuing affiliation:

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 Spirts & 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)).

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.

Here, it was not suggested an agency relationship or joint venture existed between the Sellers and The Wine Group. The Commission concurs that there is no evidence of either. The Wine Group has no ownership interest in Phillips, and Phillips has no ownership interest in TWG. (Sutton Aff. at 24) There were no joint ownerships, partnerships, or joint ventures between TWG and Phillips before the transaction, and none since. (Sutton Aff. at 25) There are no common employees, managers, officers, or directors of Phillips and TWG and TWG did not hire any employees of the Sellers after the closing. (Sutton Aff. at 26) There is no evidence that TWG or the Sellers had any right to direct, manage, or control the operations of the other prior to the APA. Likewise, there is no evidence that following the APA, the Sellers had any involvement with the distribution of the Brand Items. None of the joint venture factors referenced above exist in the instant case.

Instead, Classic argues that a continuing affiliation is established through the ancillary transition agreements entered into as closing deliverables under the APA. The transition agreements include a Bulk Wine Purchase Agreement, a Trademark License Agreement and a Cross-License Agreement. (Sutton Aff. at 8) Classic asserts that because the agreements are of a duration of more than six months, a continuing affiliation exists. Classic, however, does not offer any decision or case law to support such a claim.

TWG relies on the decision in Martignetti Grocery Co., Inc. v. Alcoholic Beverages Control Commission at No. 18-P-1258, 2019 WL 6875505, (Mass. App. Ct. Dec. 17, 2019). In Martignetti, "[i]n August 2015 Constellation and Copper Cane entered into an asset purchase agreement, whereby Constellation purchased all of Copper Cane's assets and inventory associated with the Meiomi brand, including all trade secrets, brand names, designs, procedures, good will, and its existing stock of wine in all states of production." Martignetti Grocery Co., Inc. v. Alcoholic Beverages Control Commission at No. 18-P-1258, 2019 WL 6875505, (Mass. App. Ct. Dec. 17, 2019), ¶ 4. In addition, Constellation "...assumed certain contracts Copper Cane had with grape growers. At the same time, the parties entered into a number of transitional agreements to ensure the uninterrupted production and consistent quality of the brand through the transition in ownership." Id. Martignetti argued "...that the transitional agreements in which Copper Cane and Wagner agreed to complete the production of the 2014 vintages for Constellation, to consult

for a two-year period in the production and marketing of the brank, and for Wagner to allow use of his name and likeness, amount to a "continuing affiliation."' Id. at ¶ 9.

The Appeals Court in Martignetti concluded, "[t]he transitional agreement did not leave Copper Cane, which had sold the brand to Carolina for more than six months, in the position of controlling Constellations' sales of the brand to downstream customers. Although Copper Cane and Wagner continued to be involved in winemaking, bottling, and advertising, such activities are not indicative of the type of continuing affiliation that would require Constellation to assume the Copper Cane's § 25E obligations to its Massachusetts wholesalers." Martignetti at No. 18-P-1258, 2019 WL 6875505, (Mass. App. Ct. Dec. 17, 2019) at ¶ 15.

TWG argues the transition agreements in Martignetti were more substantive than in the instant matter, yet the Commission and the court found no continuing affiliation. TWG explains that the transitional agreements in this case allowed for the uninterrupted production and consistent quality of the Brand Items; and contends said agreements were limited in time and scope; and in no way impute the § 25E liability of the Sellers to TWG as the agreements did not give the Sellers any input as to distribution of the Brand Items.

There is no evidence upon which to conclude that a continuing affiliation exists in this case.

The Commission does not find a continuing affiliation between the Sellers and TWG such that the Sellers' 25E obligations should be imputed to TWG.

There is no basis for imputing the Sellers' § 25E obligations of the Sellers to The Wine Group.

CONCLUSION

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

The Commission concludes that TWG did not make regular sales of the Brand Items in the period of six months preceding the October 2018 refusal to sell, there is no continuing affiliation or agency relationship, no assignment of rights and no intent to circumvent § 25E. There is no basis for imputing the Sellers' § 25E obligations to TWG.

TWG's Motion for Summary Decision is **ALLOWED**, and Classic's Cross-Motion for Summary Decision is **DENIED**.

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 _____

Crystal Matthews, Commissioner _____

Dated: January 11, 2023

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.

This document is important and should be translated immediately.
Este documento es importante y debe ser traducido inmediatamente.
Este documento é importante e deve ser traduzido imediatamente.
Ce document est important et devrait être traduit immédiatement.
Questo documento è importante e dovrebbe essere tradotto immediatamente.
Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.
这份文件是重要的，应立即进行翻译.
यह दस्तावेज़ महत्वपूर्ण है और इसका तुरंत अनुवाद किया जाना चाहिए
Dokiman sa a enpòtan epi li ta dwe tradwi touswit
'Đây là tài liệu quan trọng và cần được dịch ngay'
ឯកសារនេះសំខាន់ណាស់ ហើយត្រូវបកប្រែជាបន្ទាន់។

2018-023666-ad-enf

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