

Arbitrator:

Judge Terry Friedman (Ret.)
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Place of Arbitration: Santa Monica, California

Date of Final Award: October 21, 2015

The undersigned Arbitrator, having been designated by the parties pursuant to California Business & Professions Code section 25000.2(f), and having read and considered the submissions, documentary and testimonial proof, arguments and allegations of the parties, finds and concludes and issues this Final Award, as follows:

I. INTRODUCTION AND PROCEDURAL STATEMENT

Claimants Beauchamp Distributing Company (“Beauchamp”) and Classic Distributing & Beverage Group, Inc., (“Classic”) are the successor distributors and Respondent Mission Beverage Company (“Mission”) is the former distributor of Pabst Blue Ribbon beers in certain territories in Los Angeles, California.

The Arbitrator issued Scheduling Order (“Sch O”) No. 1 (May 26, 2015), Sch O No. 2 (August 31, 2015) and Sch O No. 3 (September 9, 2015), establishing procedures for this Arbitration. The Arbitrator issued an Order Re: Respondent’s Objection to Arbitration (June 25, 2015), denying the Motion. The Arbitrator also denied Claimants’ oral Motion to Exclude Respondents’ Expert’s lost enterprise valuation, which was made at the plenary Arbitration Hearing (“Hearing”).

The parties exchanged information.

The Arbitration Hearing was conducted on September 8 – 9, 2015

Each side offered documentary evidence at the Hearing, and such evidence was admitted as follows: Exhibits (“X”) 1-60 were admitted without objection, X61 was admitted over Claimants’ objection solely for rebuttal and impeachment and X62 was not admitted. Each side called and cross-examined these witnesses: John Anderson, Michael Mazzoni, Gregory Nachtwey, Brad Scott, John Thomas and Doug Yingling.

Court Reporter Leesa Durrant, CSR No. 11899, transcribed the Hearing.

At the conclusion of the presentation of testimony on September 9, 2015, the parties stated that they had no further evidence to offer, whereupon the undersigned Arbitrator declared the evidentiary portion of the Hearing closed. The parties orally stipulated to present oral closing arguments on September 9, 2015 and to file simultaneous closing briefs on September 18, 2015. The parties each requested to file a Reply to the other side's Closing Brief, and the Replies were filed September 23, 2015. The parties orally stipulated that a Final Award would be due 30 days thereafter, on October 23, 2015. The Arbitrator issued an Interim Award on October 6, 2015, directing the parties to file supplemental reports by October 19, 2015, which they did. Claimants filed an Objection to Respondent's supplemental report on the ground that it improperly provided information beyond the Interim Award's directive. Respondent presented oral argument against the Objection in a teleconference conducted October 20, 2015. The Objection is overruled.

II. FACTS

The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. Facts not pertinent or necessary to the Award are omitted. In preparing this statement of facts, the Arbitrator considered all testimony and admitted documentary evidence. To the extent that this recitation differs from any party's position, that is the result of the Arbitrator's determinations as to credibility, determinations of relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

A. The Parties

Mission began as a beverage distributor in 1978. It has distributed Pabst beer products in Los Angeles since at least 1981, and was Pabst's largest distributor in the territory. Pabst and Mission entered numerous distributorship agreements over the years, the most recent of which was the Distributorship Agreement of January 16, 2009 ("2009 Distributorship Agreement"). X3. By 2014, Mission distributed over [REDACTED] packages of Pabst beers in Los Angeles to more than [REDACTED] retailers. At that time, Pabst was Mission's second biggest supplier of beverages. [REDACTED]

Mission also distributes Heineken beers in the territory, and distributed approximately [REDACTED] packages in 2014. Previously, Mission distributed Coors beers. It sold that distributorship on October 24, 2008 for [REDACTED] at a time it was distributing approximately [REDACTED] cases annually. The sale price represented a multiple of [REDACTED] times Mission's trailing (prior) 12 months gross profit. [REDACTED] X1.

Beauchamp and Classic also are beverage distributors in Los Angeles. In May 2014, Thomas, the Executive Vice-President of Classic, sent a written offer to Anderson, offering to purchase Mission's distribution rights at a multiple of [REDACTED] times the trailing 12 months. [REDACTED]

B. Pabst Termination of Mission

Blue Ribbon Intermediate Holdings, LLC ("Pabst") purchased Pabst Brewing Company in November 2014. X20. On February 6, 2015, Pabst gave written notice to Mission that, pursuant to California's alcohol beverage successorship statute, B&P §25000.2, and the 2009 Distributorship Agreement, it was commencing termination of Mission as the distributor of its brands in the Los Angeles territory. X25. Pabst identified Claimants and Harbor Distributing as its new distributors and provided their contact information. [REDACTED]

Thomas sent Anderson an email on February 19, 2015, offering to pay Mission [REDACTED] times gross profit for the distribution rights. X26. Anderson responded the next day saying his attorney advised him not to speak with anyone about Pabst at that time. X28. Anderson further informed Thomas on February 27, 2015 that his attorney was talking only with Pabst's counsel. X28. Then, on March 6, 2015, Anderson told Thomas that Mission did not plan on selling its Pabst distribution rights. X30.

[REDACTED]

Mission filed a Complaint against Pabst in the Los Angeles Superior Court on April 15, 2015, alleging that Pabst had breached the 2009 Distributorship Agreement ("LASC Action"). Exhibit B to Mission Objection to Arbitration. The Court denied Mission's Ex Parte Application for a TRO and an OSC Why a Preliminary Injunction Should Not Issue. Exhibit D to Claimant's Opposition to Mission's Objection. That action remains pending.

C. Other Mission Distributorship Purchase Agreements

Mission and [REDACTED] entered an Asset Purchase Agreement on April 23, 2012, whereby Mission sold its rights to distribute [REDACTED] brands for [REDACTED]. The purchase price was [REDACTED] times Mission's gross profit on sales of [REDACTED] products for the 12 months ending February 29, 2012. [REDACTED] X8.

Mission entered Purchase Agreements on February 26, 2014 and March 31, 2014 with [REDACTED], whereby Mission sold certain of its rights to distribute [REDACTED] for a total of [REDACTED]. The purchase price in each Purchase Agreement was [REDACTED] times Mission's gross profit on sales of [REDACTED] for the trailing 12 months. [REDACTED] X16&17.

III. DISCUSSION

A. The Pleadings

Claimants filed a Demand for Arbitration Before JAMS on March 27, 2015, which attached an Arbitration Demand, dated March 24, 2015 (collectively "Demand"). The Demand invoked the arbitration process set forth in B&P §25000.2 to determine the fair market value of the affected distribution rights. Respondent filed a Response and Cross-Claim for breach of contract and breach of the implied covenant of good faith and fair dealing on March 31, 2015. With permission of the Arbitrator, Mission responded by filing an Objection to Arbitration on June 5, 2015.

B. Applicable Law

B&P §25000.2 governs this arbitration along with the JAMS Comprehensive Arbitration Rules and Procedures ("JAMS Rules"). The parties reserved their rights to object to application of California law regarding civil procedure and evidence, but neither made any such objections. Sch. O No. 1, ¶5.

The following is a summary of the relevant law that is applicable to the contested issues. Law that is not necessary to decide a contested issue is omitted.

"B&P §25000.2 has a narrow scope, setting forth a procedure for determining the fair market value of distribution rights when a successor beer manufacturer acquires brands, gives notice of its intent to cancel an existing distribution agreement, and designates a successor distributor." *Maita Distributors, Inc. v. DBI Beverage, Inc.*, 667 F.Supp. 2d 1140, 1150 (N.D. Cal. 2009). B&P §25000.2 provides, in pertinent part:

(a)(2): "Affected distribution rights' means the distribution rights to the product held by the existing beer wholesaler prior to the acquisition of the right to manufacture, import, or distribute the product by the successor beer manufacturer."

(a)(6): "Fair market value' includes all elements of value, including, but not limited to, goodwill."

(d): The successor manufacturer's designee shall negotiate with the existing wholesaler to determine the fair market value of the affected distribution rights. The designee and the existing wholesaler shall negotiate in good faith.

(e): The existing wholesaler shall continue to distribute the product as immediately before the successor manufacturer acquired its rights until compensation is agreed to or awarded pursuant to this statute.

(f): If the designee and the existing wholesaler are unable to mutually agree on the fair market value of the affected distribution rights within 30 days of the existing wholesaler's receipt of the notice pursuant to (c), the designee or the existing wholesaler shall initiate arbitration against each other to determine the issue of compensation for the fair market value of the affected distribution rights . . . Upon submission to arbitration, the arbitration shall be the means of determining compensation to the existing wholesaler for the fair market value of the affected distribution rights, and the fair market value of the affected distribution rights shall be the purpose of the arbitration unless the parties agree otherwise. The arbitrator shall permit third-party discovery and additional discovery

between wholesalers, but no discovery may be permitted against a manufacturer. . .

(g): If the existing wholesaler does not receive timely compensation under this statute, it shall remain the distributor as immediately before the successor manufacturer acquired its rights.

“The objective of statutory interpretation is to ascertain and effect legislative intent.” Words of a statute should be given their plain, commonplace meaning. A prescribed meaning given by the Legislature to precise terms is binding. *Ferguson v. Workers’ Compensation Appeals Board* (1995) 33 CA4th 1613, 1619. If the statutory language is clear and unambiguous there is no need for a court to construe it or to consider legislative intent. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 C4th 358, 369. When a statute is ambiguous, a court may examine a variety of extrinsic aids, including the history and background of the statute and its apparent purpose. *Hughes v. Board of Architectural Examiners* (1998) 17 C4th 763, 775. A dictionary is a proper source. *E.W. Bliss Co. v. Superior Court* (1989) 210 CA3d 1254, 1258, fn. 2. When a statute includes terms that courts have previously construed there is a near irresistible presumption that the Legislature “intended them to have the same ‘precise and technical’ meanings given by the courts.” *Hughes v. Pair* (2009) 46 C4th 1035, 1046.

C. Analysis

This analysis addresses only the central issues and determinations which the Arbitrator considers necessary to decide this case. The essence of this dispute is determining which valuation method should be used and the time period of that valuation. Once those questions are decided, the appropriate method and time period can be applied.

1. Witnesses

All the percipient witnesses – Anderson, Scott, Thomas and Yingling – were knowledgeable and credible. For the most part, their testimony was consistent. There were a few instances in which the parties’ respective executives had different perspectives, but none regarded significant or decisive matters.

By contrast, with a few exceptions, the expert witnesses offered starkly different opinions. Each expert was qualified, but in different ways. Claimants’ expert Nachtwey is a highly impressive business valuator. His experience is wide across many industries and is grounded in his strong academic credentials. X44. Nachtwey has never testified in a B&P §25000.2 proceeding, though he has valued beer distributorships in litigation, as well as in the context of mergers and acquisitions. Mission’s expert Mazzoni has worked in the beer industry for 43 years. He has vast experience valuing brand distribution rights and testifying about them in federal and state courts. X45.

Nachtwey neither has nor has ever had a business relationship with Claimants. [REDACTED]

It is notable that the experts agreed that if the gross profit multiple method is used to value Mission’s Pabst distributorship rights, an offer of [REDACTED] or [REDACTED] times gross profit is generally consistent

with industry standards. The critical differences in the experts' opinions reflect the contested issues in this matter. First, they disagreed regarding the valuation method that should be used. Second, they they disagreed regarding the proper time period to value.

a. Claimants' Expert Nachtwey

It was Nachtwey's initial opinion that the Fair Market Value for Mission's distribution rights of Pabst as of the Valuation Date was [REDACTED]. In reaching that opinion, Nachtwey used the following definition of Fair Market Value:

"the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."

Nachtwey used four generally accepted valuation methods. His two primary methods were the Comparable Transactions Method (for Guideline Private Distribution Rights), to which he gave 60% weight, and the Discounted Cash Flow Method, to which he gave 30% weight. Secondarily, he used and gave 5% weight to the Comparable Transactions Method (for Guideline Private Firms) and to the Capital Market Method (for Guideline Public Firms). The resulting gross profit multiple of Nachtwey's valuation is [REDACTED]. X44. Nachtwey used a valuation date of July 31, 2015, as he was instructed to do by Claimants' counsel.

To apply the Comparable Transactions Method, Nachtwey examined 31 distribution rights sales agreements, of which 22 were provided by the parties. Nachtwey assumed that all 31 analyzed transactions included goodwill, which he testified is a "given" in his field. He selected the median valuation multiple of value to gross profit for these private beer distribution rights transactions because that is the beer wholesaling industry standard approach. He also considered Mission's last 12 months level of gross profit as of the Valuation Date. That produced a valuation of Mission's Pabst Distribution rights of [REDACTED]. *Id.* Nachtwey initially did not consider any other transactions, such as a 2010 transaction between Classic and Ace regarding Tsingtao beers, which used a [REDACTED] multiple, nor did he consider a transaction involving Crown at a [REDACTED] multiple, a transaction involving Anchor Steam at a [REDACTED] multiple or one involving Firestone Walker at a [REDACTED] multiple. He testified that had he included those transactions, his ultimate median multiple probably would have been somewhat higher. Nachtwey also testified that had he used 2014 data for Mission, rather than a July 31, 2015 valuation date, his valuation would have gone up modestly.

Nachtwey's Discounted Cash Flow or Income Approach analyzes the stream of benefits Mission would expect to receive, the timing of that receipt and the risk borne. He concluded that the intrinsic value after applying a 10% net marketability and control discount is [REDACTED]. *Id.*

Nachtwey calculated his secondary valuations to be [REDACTED] for the Comparable Transaction Method for Guideline Private Firms and [REDACTED] for the Capital Market Method for Guideline Public Firms. *Id.*

[REDACTED] After calculating his four valuations, Nachtwey weighted them, which produced his initial [REDACTED] valuation. *Id.*

As directed by the Initial Award, Nachtwey's supplemental report considered the Tsingtao, Crown, Anchor Steam and Firestone transactions and used a 2014 valuation date. This increased his valuation to [REDACTED].

b. Mission's Expert Mazzoni

It was Mazzoni's initial opinion that the Fair Market Value of Mission's Affected Distribution Rights was [REDACTED]. This valuation represented the difference as of December 31, 2014 between Mission's [REDACTED] value with the Affected Distribution Rights and its calculated [REDACTED] value without those Rights. Mazzoni relied on the definition of "affected distribution rights" in B&P §25000.2(a)(2) and the definition of "fair market value" in B&P §25000.2(a)(6). Mazzoni considered the "affected distribution rights" to be unique to Mission, as granted and governed by the 2009 Distribution Agreement. He viewed Mission not to be a willing seller because it had refused prior offers by Classic to purchase its Pabst distribution rights at a [REDACTED] and [REDACTED] multiple. X45.

Mazzoni considered goodwill separately in his valuation. He found that Pabst had received the benefit of considerable goodwill generated by Mission over many years and that the transfer of the Pabst brands would cause erosion of that goodwill, which would negatively impact Mission. Mazzoni used Mission's 2014 sales and financial results for two reasons. First, B&P §25000.2(a)(2) defines "affected distribution rights" as those rights held by Mission "prior to" the acquisition of the right to manufacture or distribute the product by Pabst in November 2014. Second, Pabst's termination notice to Mission in February 2015 adversely impacted Mission's sales and financial results causing 2015 to be an unreliable indicator of Mission's performance. *Id.*

Mazzoni's supplemental report prepared in response to the Interim Award presented a valuation of [REDACTED]. To reach that amount, Mazzoni considered two additional publicly-reported transactions from Kentucky involving the Spaten brand which Respondent offered into evidence (X62), but were not admitted, and based his ultimate calculation on mean values rather than median values.

2. Valuation Method

Determination of the proper valuation method is governed by B&P §25000.2. Mission believes that because the statute expressly states that fair market value includes all elements of value, including goodwill, valuation must take into account its unique attributes and the impact of its loss of the distribution rights. Claimants disagree, asserting that the statute calls for valuation of Mission's Pabst distribution rights, not the effect on Mission of its loss of those rights.

B&P §25000.2 does not define "fair market value." Instead, the statute merely sets forth what "fair market value" includes. This language is not clear. Thus, the Arbitrator must look to extrinsic sources to ascertain the statute's intent. Claimants point to Black's Law Dictionary and other other dictionaries that define "fair market value" as the price a willing buyer would pay a willing seller in an arms' length transaction. Likewise, several statutes have adopted this definition. Revenue & Tax Code §110(a); Code of Civil Procedure §1263.320(a); B&P §22977.2(a)(2)(B). This fact, however, begs the question why the Legislature did not expressly adopt the definition in B&P

§25000.2. California courts have adopted a comparable definition of “fair market value” in other statutes. *Gallois v. West End Chemical Co.* (1960) 185 CA2d 765, 774-775.

The most significant guide to what the Legislature intended regarding “fair market value” in B&P §25000.2 is the legislative history of the statute. The State Assembly Committee on Governmental Organization analysis of SB 574, the bill that enacted the statute, reported that the bill was sponsored by the California Beer Beverage Distributors (CBBB) to provide a “structured process to insure the timely payment of fair and market-based compensation for the transfer of brands between wholesalers.” CBBB also pointed out that the bill was modeled on state laws in Indiana, Wisconsin and Kentucky, which were workable, efficient and equitable. The bill’s author’s office reiterated these points. Exh. A to Claimant’s Post-Arbitration Brief. The Senate Third Reading analysis of SB 574 restated the same points. *Id.* SB 574 passed both Houses unanimously. These analyses make clear that the Legislature adopted B&P §25000.2 to establish market-based compensation for the transfer of brands between beer wholesalers.

Even though the other state statutes upon which B&P §25000.2 was modeled expressly defined “fair market value” while California did not, the fact that the Legislature knowingly modeled its statute on the Indiana, Kentucky and Wisconsin statutes offers further support for the interpretation that the Legislature intended the standard definition of “fair market value.”

Finally, the most convincing testimony about goodwill in the beer distribution industry was that it is typically included in the concept of “fair market value,” even though it is rarely discussed or quantified separately. Documentary evidence further reinforced this interpretation.

Mazzoni’s initial valuation method improperly considered the effect on Mission of its loss of the Pabst distribution agreement. Nothing in B&P §25000.2 provides for consideration of lost enterprise value. It is the value of the distributorship that matters, not the *effect* of the loss of the distributorship.

Based on this analysis, the Arbitrator finds that Nachtwey’s valuation method is the proper one. Nevertheless, it was odd that Nachtwey initially did not analyze the Tsingtao, Crown, Anchor Steam or Firestone transactions that might have increased his valuation. To assure a fair valuation that does not rely on cherry-picked comparables, those transactions must be incorporated into the data to be used to compute the median multiple. Nachtwey did incorporate those transactions in his supplemental report. Mazzoni’s supplemental report included two publicly-reported transactions from Kentucky involving the Spaten brand even though the Interim Award directed the experts to consider only the Tsingtao, Crown, Anchor Steam or Firestone transactions. Mazzoni’s supplemental report also used a mean multiple rather than a median multiple, however, there was no evidence or argument at the Hearing regarding use of a mean multiple. The Arbitrator finds that there is no evidentiary basis to consider either the Spaten transactions or use of a mean multiple.

3. Valuation Date

B&P §25000.2 does not expressly establish the date of valuation. Claimants’ position is that the date should be current, i.e., July 31, 2015, based on the most recent trailing twelve month’s gross profit. By contrast, Mission argues for using 2014 data.

B&P §25000.2(a)(2), which defines the “affected distribution rights,” states that the distribution rights to be valued are those held by the existing beer wholesaler *prior to* the acquisition of the right to manufacture, import, or distribute the product by the successor beer manufacturer. As applied here, this language reasonably means that the valuation must be for the time period before Pabst acquired its rights, which occurred in November 2014. Claimants make a valid point that the industry standard of using the most recent trailing twelve month’s gross profit should be adopted. Were B&P §25000.2 silent on valuation date, as Claimants contend, it would make sense to adopt the industry standard. However, the statute is not silent. Rather, B&P §25000.2(a)(2) is plainly understood to establish that the date of valuation must precede the new manufacturer’s acquisition of rights.

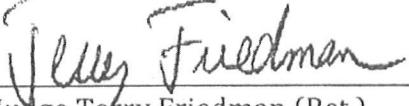
The most reasonable approach is to use 2014 data to value the affected distribution rights according to the fair market value definition adopted above. However, neither expert’s initial report did so. Nachtwey used the wrong date – July 31, 2015 – to compute value according to the correct standard. Mazzoni used the correct date but conducted an improper valuation. Their supplemental reports did use the correct valuation standard and date as directed by the Interim Award.

IV. CONCLUSION

As discussed above, the Arbitrator finds and declares, as follows:

1. The proper valuation method to value Mission’s rights to distribute Pabst products is Claimants’ gross profit multiple valuation method.
2. The proper valuation date to use in calculating Mission’s rights to distribute Pabst products is December 31, 2014.
3. Based on the proper valuation method and valuation date, the valuation of Mission’s rights to distribute Pabst products is [REDACTED].
4. This Final Award contains no findings, declarations or damages determinations regarding Mission’s cause of action in the LASC Action that Pabst breached the 2009 Distributorship Agreement.
5. This Final Award may be produced and disclosed in the LASC Action as agreed by Claimants and Respondent, or subject to a further order by the undersigned Arbitrator.

Dated: October 21, 2015



Judge Terry Friedman (Ret.)
Arbitrator