

United States District Court  
For the Northern District of California

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E-FILED on 12/18/09

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MUSSETTER DISTRIBUTING, INC., a  
California corporation,  
  
Plaintiff,  
  
v.  
  
DBI BEVERAGE INC., a Tennessee  
corporation,  
  
Defendant.

No. C-09-03112 RMW

ORDER DENYING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT'S CROSS-  
MOTION FOR SUMMARY ADJUDICATION  
AND SETTING CASE MANAGEMENT  
CONFERENCE

[Re Docket Nos. 33 and 35]

Plaintiff's motion for summary judgment and defendant's cross-motion for summary adjudication came on for hearing before the court on September 4, 2009. The sole and dispositive issue raised in each motion is the legal interpretation to be given to California Business & Professions Code Section 25000.2(f)'s 40-day time period for initiating arbitration to determine compensation for the fair market value of beer distribution rights. Having considered the papers submitted by the parties and the arguments of counsel, and for good cause appearing, the court concludes that the 40-day time period is not jurisdictional and defendant did not forfeit the right to

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S  
CROSS-MOTION FOR SUMMARY ADJUDICATION No. C-09-03112 RMW  
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1 arbitrate by initiating arbitration two days late. Therefore, defendant's motion is granted and  
2 plaintiff's cross-motion is denied.

3 Mussetter Distributing is the existing distributor under a contract with Miller Brewing  
4 Company. In 2007, however, Miller and Coors Brewing Company formed a joint venture,  
5 MillerCoors LLC, and Miller assigned to MillerCoors the rights to its brands and the distribution  
6 contract at issue in this case. On September 2, 2008, MillerCoors issued a notice of intent to  
7 terminate the distributor agreement under Business and Professions Code Section 25000.2 and  
8 designated DBI Beverage as the new distributor within the territory. Section 25000.2 is a statute  
9 adopted in 2007 to provide an expedited method to determine the fair market value of the beer  
10 distribution rights to be paid to an existing distributor whenever a "successor beer manufacturer"  
11 terminates an existing distributor in favor of a successor distributor.<sup>1</sup> Forty-two days after Mussetter  
12 received the notice of intent to cancel, DBI sought to initiate arbitration under Section 25000.2.  
13 This litigation ensued.

14 The present lawsuit involves both a constitutional challenge to and the interpretation of  
15 Section 25000.2. The present motions, however, raise but a single issue: the interpretation and  
16 effect of Section 25000.2(f)'s 40-day period in which to initiate arbitration. DBI did not initiate  
17 arbitration until forty-two days after Mussetter received the notice of termination.

18 Under the Act, the parties were required to negotiate in good faith to determine the fair  
19 market value of the affected distribution rights. § 25000.2(d). The Act provides that if no agreement  
20 is reached within 30 days, then "the successor beer manufacturer's designee *or* the existing beer  
21 wholesaler *shall initiate arbitration* against each other to determine the issue of compensation for  
22 the fair market value of the affected distribution rights *no later than 40 days after the existing beer*  
23 *wholesaler's receipt of the successor beer manufacturer's notice . . . .*" § 25000.2(f) (emphasis  
24 added).

25 \_\_\_\_\_  
26 <sup>1</sup> In the terminology of the Act, the brewer is a "beer manufacturer;" a successor brewer is the  
27 "successor beer manufacturer;" the existing beer distributor is the "existing beer wholesaler;" and the  
28 successor distributor is the "successor beer manufacturer's designee." Cal. Bus. & Prof. C.  
§25000.2(a). For convenience, this order will sometimes refer to the "existing distributor" and the  
"successor distributor."

1 Mussetter argues that the 40-day period "is an absolute deadline, and thus acts as a condition  
2 precedent to arbitration." Motion at 4. Mussetter further argues that because DBI failed to meet the  
3 deadline, the statute does not apply and Mussetter cannot be forced to arbitrate. *Id.* citing *Wagner*  
4 *Constr. Co. v. Pacific Mechanical Corp.*, 41 Cal.4th 19, 30 (2007). Mussetter thus contends that  
5 DBI's failure to seek arbitration in the 40-day period prescribed by the statute constitutes a forfeiture  
6 of the right to compel arbitration. Motion at 5, citing *Platt Pacific, Inc. v. Andelson*, 6 Cal.4th 307,  
7 321 (1993).

8 DBI contends that the 40-day statutory period is not jurisdictional, that both parties were  
9 required by statute to initiate arbitration, that arbitration is mandatory, and that interpreting the 40-  
10 day period as jurisdictional so as to preclude arbitration if the deadline were not strictly met would  
11 frustrate the purposes of the statute. DBI also distinguishes *Wagner* by pointing out that the case  
12 merely noted that a failure to demand arbitration within a time set by statute may constitute a  
13 waiver, "[b]ut the court did not conclude that statutory time limits are absolute bars to arbitration. . .  
14 ." Opp. at 8. Further, the actual holding in *Wagner* is that it was up to the arbitrator to determine if  
15 the statute of limitations on the underlying claims were barred by the statute of limitations. The case  
16 was remanded to the trial court to determine whether the plaintiff had waived arbitration by failing  
17 to request it within a reasonable time as required by the applicable statute. The court held that the  
18 trial judge had erred by looking at whether the underlying claims were timely. *Wagner*, 41 Cal. 4th  
19 at 1035. *Wagner* did not hold that a right to arbitrate is automatically forfeited if demand is not  
20 made within a specified contractual or statutory time period.

21 DBI places a heavy emphasis on the purported mutuality of the obligation to arbitrate, for  
22 example, arguing that Mussetter cannot seek to avoid arbitration because it too failed to initiate  
23 arbitration within the statutory time frame. While Section 25000.2(f) provides that the existing  
24 distributor or the designee shall initiate arbitration, Section 25000.2(b) identifies only the successor  
25 beer manufacturer and its designees as parties who "shall comply" with the statute. Nevertheless,  
26 other sections impose obligations on both the existing and successor distributor, such as Section  
27 25000.2(f) requiring both to act in good faith including initiating arbitration if the parties are unable  
28 to agree on the fair market value of the distribution rights.

1 The legislative history identified by DBI shows that there was a concern that a lack of  
2 timetables could result in drawn-out arbitration, as well as a concern that the proposed language did  
3 not "explicitly spell out that binding arbitration is the only remedy. . . ." RJN Ex. D at 4.<sup>2</sup> In  
4 response to this concern, however, the immediately resulting amendments were the addition of the  
5 40-day period (along with others), but the proposed statutory language continued to provide that  
6 either the existing distributor or the designee "may" initiate arbitration. RJN Ex. D at 4. The  
7 permissive "may" did not become the mandatory "shall" until sometime later, when SB 169 was  
8 dropped and the proposed legislation was incorporated into what was then pending as SB 574. The  
9 materials submitted by the parties offer no explanation for this change in the Senate Bills or for the  
10 substantive change in proposed language.

11 DBI also argues that the legislative purpose underlying the 40-day time frame is to protect  
12 against protracted arbitration and not to create a jurisdictional bar to the arbitration:

13 The Senate added the 40-day time period to initiate arbitration, the overall 180-day  
14 time period imposed on the arbitration, and the time periods provided for exchange of  
15 discovery in the arbitration in response to concern over the open-ended nature of the  
16 arbitration scheme and the potential for drawn out arbitration. Thus, the majority of  
17 time periods set forth in the statute, including the 40-day time period, were added  
18 specifically to ensure against protracted arbitration – not to create jurisdictional bars  
19 to arbitration. The 40-day limit is not a condition precedent, and Mussetter's  
20 interpretation of the state as including such a bar would defeat the entire purpose of  
21 the statute, i.e., to require that the parties arbitrate as quickly as possible for their own  
22 sake and for the sake of the State's consumers.

23 Opp. at 9 (citations to legislative history omitted).

24 Finally, DBI cites to *Engalla v. Permanente Medical Group*, 15 Cal.4th 951 (1997), for the  
25 proposition that a delay in commencing arbitration does not necessarily constitute a waiver.  
26 *Engalla*, however, is not directly on point since it involved an analysis of a waiver of arbitration by  
27 conduct inconsistent with the right to arbitrate, as opposed to a waiver arising from a missed  
28 statutory deadline. DBI also cites as support *Long v. Century Indemn. Co.*, 163 Cal.App.4th 1460,  
1474 (2008), which holds that where a statute provides for mandatory arbitration of a dispute, even  
conduct that may constitute a contractual waiver cannot confer jurisdiction on the courts to hear a

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<sup>2</sup> DBI's request that the court take judicial notice of certain legislative history documents (Docket No. 38) is granted.

1 dispute that must by statute be arbitrated. Opp. at 12 n.6. While DBI is correct that *Long* does not  
2 provide a right to litigate issues that the legislature has mandated be decided by arbitration, *Long*  
3 does not suggest that a party who fails to comply with a statutory deadline may nonetheless invoke a  
4 statutory regime which it has failed to timely invoke.

5 Here, in contrast to *Wagner*, the statute does specify a time limit in which to act: no later  
6 than 40 days after the existing distributor's receipt of the successor manufacturer's notice. Section  
7 25000.2(f) provides:

8 If the successor beer manufacturer's designee and the existing beer wholesaler are  
9 unable to mutually agree on the fair market value of the affected distribution rights  
10 within 30 days of the existing beer wholesaler's receipt of the successor beer  
11 manufacturer's notice pursuant to subdivision (c), the **successor beer**  
12 **manufacturer's designee or the existing beer wholesaler shall initiate arbitration**  
13 **against each other to determine the issue of compensation for the fair market value of**  
14 **the affected distribution rights *no later than 40 days after the existing beer***  
15 **wholesaler's receipt of the successor beer manufacturer's notice** pursuant to  
16 subdivision (c). Upon submission to arbitration, the arbitration shall be the means of  
17 determining compensation to the existing beer wholesaler for the fair market value of  
18 the affected distribution rights, and the fair market value of the affected distribution  
19 rights shall be the purpose of the arbitration unless the parties agree otherwise.

20 (emphasis added). The statutory language is clear in imposing a 40-day deadline within which to  
21 commence arbitration: the parties "shall initiate arbitration . . . no later than 40 days after" receipt of  
22 the termination notice. The language appears mandatory, not permissive. This interpretation is  
23 bolstered by the fact that there is no language authorizing the 40-day deadline to be adjusted, unlike  
24 other provisions in the statute that allow the specified deadlines to be adjusted by agreement or for  
25 good cause. See § 25000.2(f)(7), (f)(8), and (f)(4)(B).

26 However, there is no consequence specified for failure to timely initiate arbitration as  
27 contrasted with the provision expressly providing that a party who does not participate in the  
28 arbitration hearings waives all rights it would have had in the arbitration. § 25000.2(f)(9). Nothing  
in the legislative history addresses the consequence of a party's failure to meet the 40-day deadline.  
This silence, coupled with the expressly articulated waiver where a party refuses to participate in the  
arbitration hearing, suggests that there is no consequence to a party's failure to meet the deadline  
absent a showing of prejudice by the delay. This seems reasonable given that both parties are  
required to initiate arbitration if they do not reach agreement on fair market value within the time



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16 **Dated:** 12/18/09

17 TER  
18 **Chambers of Judge Whyte**