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IN THE SUPREME COURT OF OHIO

Esber Beverage Company, Appellant, v. Labatt USA Operating Company, LLC, et al., Appellees.	: : : : : : : : :	On Appeal from the Stark County Court of Appeals, Fifth Appellate District Court of Appeals Case Nos. 2011CA00113 & 2011CA00116 Ohio Supreme Court Case No. 12-0941

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ESBER BEVERAGE COMPANY

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal presents a statutory issue that is of public and great general interest relating to the enforceability of written distribution agreements under the Ohio Alcoholic Beverages Franchise Act, R.C. §§1333.82 et seq. ("the Act" or "OABFA"). Specifically, this case raises a question of first impression under the Act: does R.C. 1333.85(D) authorize a successor manufacturer to terminate without just cause a written distribution agreement that it has *itself* assumed? The answer to this question is of exceptional statewide importance because it affects the continued enforceability of every written franchise agreement held by local distributors throughout the State, and because of the unique role that the State plays under the Twenty-First Amendment in regulating the sale and distribution of alcoholic beverages within its borders.

In contravention of the express protections of local distributors set forth in the OABFA, the Fifth District's Opinion below gives successor manufacturers the power to voluntarily enter into a written franchise agreement, and then terminate that agreement without just cause. Until the Fifth District issued its opinion in this case, no court had ever allowed a successor manufacturer to use R.C. 1333.85(D) to terminate a franchise relationship that the successor manufacturer itself established with the distributor.

As more fully discussed below, the Fifth District's Opinion rests on a misreading of R.C. 1333.85(D) that casts aside well-established rules of statutory construction and fails to give effect to language that was purposefully inserted by the Ohio General Assembly into the same section. The Opinion undermines both a distributor's bargained-for contractual rights, as well as rights created by the General Assembly. Accordingly, this case raises an issue requiring resolution by this Court to insure that the lower courts are applying and interpreting the OABFA as intended by the Ohio General Assembly, and to insure that local distributors receive the protections of the Act envisioned by the General Assembly.

In *Tri-County Dist., Inc. v. Canandaigua Wine Co.,* 68 Ohio St.3d 123 (1993), this Court stated that, unless a successor manufacturer itself assumes or enters into a written franchise agreement with its predecessor's distributor or allows its predecessor's distributor to distribute the newly acquired brands for a period of time specified in R.C. 1333.83 so as to create a statutory franchise relationship, the Act's prohibitions do not apply and the successor manufacturer is permitted to terminate the distributor without cause or compensation under the common law. In direct response to the circumstances at issue in *Canandaigua*, during the pendency of that case, the Ohio General Assembly added R.C. 1333.85(D) to require prompt notice of termination and, more importantly, compensation to those distributors that do not have a written or statutory franchise with a successor manufacturer under R.C. 1333.83. Section 1333.85(D) was clearly adopted to provide additional protections to distributors that did not have an established franchise relationship, not to grant any new statutory rights to manufacturers. When the General Assembly included in Section D language providing that a statutory "franchise relationship is established" by operation of law if the successor manufacturer does not exercise its right to terminate within 90 days, it confirmed that the scope of that Section is limited to those circumstances in which the successor manufacturer has not already itself entered into or assumed a written agreement with the distributor.

Nonetheless, two decades after the enactment of R.C. 1333.85(D) and amidst an unprecedented number of mergers and acquisitions among the world's brewers,[1] out-of-state

[1]In July 2008, InBev N.V./S.A of Belgium entered into an agreement to acquire Anheuser-Busch Companies, Inc., the largest brewer in the United States, for $52 billion. That same year, Miller Brewing Company and Coors Brewing Company, the nation's second and third largest

manufacturers such as Labatt USA Operating Company ("Labatt USA") are wrongfully asserting that, with every transfer of brands, R.C. 1333.85(D) grants a successor manufacturer an unfettered statutory right to terminate its predecessor's distributors without just cause, regardless of whether the successor manufacturer has *itself* assumed or entered into a written franchise agreement with the distributor.

Without review by this Court, the Fifth District Court of Appeals decision below will establish wide-reaching legal precedent that the Act and R.C. 1333.85(D) authorizes a successor manufacturer to enter into or assume a written franchise agreement with a distributor and then terminate that agreement without cause. That unsupported proposition is in direct conflict with R.C. 1333.83's preference that a manufacturer enter into a written agreement with a distributor.

Further, because the Fifth District interpreted the first sentence of R.C. 1333.85(D) in isolation and failed to give effect to the third sentence of the same section, the decision below creates an anomaly whereby a statutory franchise "is established" automatically by operation of law whenever a written agreement that has been entered into or assumed by the successor manufacturer is not terminated within 90 days. A successor manufacturer could therefore elect not to terminate a written franchise agreement to avoid payment of diminished value compensation required by the statute and then, under the decision below, supplant a written agreement that is less favorable to the manufacturer with a statutory franchise that would be established by operation of law after 90 days. This result is also in direct contravention of the Legislature's preference for written agreements over statutorily-imposed franchise relationships and effectively eviscerates the opportunity for distributors to negotiate into their contracts terms that are more favorable than the minimum statutory protections, like Esber had done here.

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brewers, entered into a joint venture in order to compete against Anheuser-Busch. All three then attempted to terminate longtime Ohio distributors, relying upon R.C. 1333.85(D).

It is critical, therefore, for this Court to accept jurisdiction to decide this important statutory issue. Section 1333.85(D) should be interpreted as it is written, not to permit a successor manufacturer to terminate without a cause a written agreement that it has itself entered into or assumed. If permitted to stand, the Fifth District's decision undermines bargained for contractual rights and potentially nullifies every arms-length contract negotiated by Ohio's distributors.

Accordingly, Esber Beverage Company ("Esber") respectfully requests that this Court exercise its discretionary jurisdiction to resolve this important question of statutory interpretation and dispel the unfounded notion that R.C. 1333.85(D) creates an unfettered statutory right in a successor manufacturer to terminate a written distribution agreement that it has *itself* voluntarily assumed.

STATEMENT OF THE CASE AND FACTS

Esber Beverage Company is one of the oldest family-owned, continuously operated beverage wholesalers in Ohio, founded in 1937 by Dave and Helen Esber and currently operated by second and third generations. Headquartered in Canton since its inception, Esber has seventy local employees and is a long-standing contributor to the greater Stark County community. Over the last seventy-five years, Esber has built a complete portfolio of beer and wine products to supply to its customers and to become the premier beverage distributor in Stark County and surrounding areas.

Labatt beer is the largest volume imported beer in Northeast Ohio. For more than fifty years, Esber has been the exclusive distributor of Labatt products[2] in Stark and surrounding counties and it has dedicated incalculable time, effort and money in developing the distribution and sales of the Labatt products. As a direct result of Esber's efforts, Labatt has become the

[2] The Labatt products distributed exclusively by Esber include Labatt Blue, Labatt Blue Light, Labatt Canadian Ale, Labatt Ice, John B. Labatt Classic, and Sterling and Honey.

second largest beer supplier in Esber's portfolio. Neither Labatt USA nor any of its predecessors have ever attempted to terminate Esber for cause.

The viability of Esber's business is predicated upon its ability to provide customers with a complete portfolio of alcoholic beverages, and the Labatt products are an essential component of that portfolio. Many retail and on-premise accounts rely upon Esber as the exclusive distributor of the high volume Labatt brands, and this reliance naturally leads many accounts to purchase additional items from Esber's portfolio. Thus, a high profile brand like Labatt is critical to Esber's overall sales.

If the Labatt brands were lost, Esber could not obtain comparable Canadian brands; because the other two major Canadian beers are distributed by a competitor, Esber would not be able to acquire another Canadian import, and the top three Canadian beers would then be monopolized by a single distributor. The loss of a lynchpin brand has the potential to put a local, family-owned distributor out of business.

Because of the importance of the Labatt products, Esber has now fought twice to preserve its long-standing distribution rights to those products. In 2005, the international parent company for the Labatt products (InBev S.A./N.V. of Belgium, or "InBev") merged two subsidiaries into a third (InBev USA), which then attempted to terminate Esber without cause. The Fifth District Court of Appeals determined that the Act prohibited the termination of Esber's franchise without cause. *Esber v. InBev USA LLC,* 5th Dist. No. 2006CA00113, 2007-Ohio-927.

After that favorable decision and five months of negotiations, on November 30, 2007, Esber entered into a written franchise agreement with InBev USA governing Esber's continued right to distribute the Labatt products ("the Agreement"). The Agreement was markedly different than the standard agreement utilized by InBev USA with its other distributors and it contained terms very favorable to Esber. The Agreement appointed Esber as the exclusive distributor of the Labatt products in ten counties for an indefinite term. Evidencing the parties' intention that the Agreement would be binding upon InBev USA's successors-in-interest, Esber specifically negotiated for the Agreement to provide for termination by InBev USA and its successors only upon the occurrence of one of ten specifically enumerated "material breaches" not cured by Esber within 45 days, none of which have ever been asserted in this case.

In July 2008, InBev entered into an agreement to purchase Anheuser-Busch Companies, Inc. Then, in November 2008, the United States filed a complaint alleging that this purchase would violate antitrust laws by substantially reducing competition for the sale of beer in certain New York metropolitan areas. See, *U.S. v. InBev N.V./S.A.*, United States District Court for the District of Columbia Case No. 08-CV-1965, Complaint, dated November 14, 2008 (ECF #1). The final judgment entered in that antitrust case required InBev to divest itself of InBev USA.

KPS is a private equity firm that aggressively outbid thirty competitors for the right to acquire certain assets of InBev USA. KPS created an indirect, wholly owned subsidiary, Labatt USA to acquire the Labatt products and related assets pursuant to a purchase agreement effective March 13, 2009. It is undisputed that, as part of this transaction, Labatt USA expressly assumed the distribution arrangements with various wholesalers throughout the United States, <u>including the Agreement between InBev USA and Esber</u>. Indeed, Labatt USA admitted below that immediately upon its acquisition of the InBev USA assets, Labatt USA and Esber began operating as a manufacturer and distributor under the Agreement.[3]

Despite its voluntary acceptance of a written franchise agreement with Esber, on May 15, 2009, Labatt USA sent a letter to Esber asserting that it intended to terminate Esber without cause

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[3]Labatt USA's Post-Hearing Memorandum, p. 8 ("The Distribution Agreement * * * governed Esber's relationship with InBev USA LLC up until the time InBev USA LLC transferred it to Labatt USA Operating Co, LLC on March 13, 2009. The Distribution Agreement also governed Esber's relationship with Labatt USA Operating Co., LLC from March 13, 2009 until May 15, 2009, when Esber was terminated.")

pursuant to R.C. 1333.85(D) and 1333.851. Labatt USA subsequently admitted that it terminated Esber and thirteen other Ohio distributors without cause solely to consolidate distribution of its newly acquired brands into the distribution network of a sister company. (Labatt USA could not claim that its assumption of InBev USA's franchise agreements created inefficiencies, because, as a newly created company, Labatt USA did not have an existing distribution network of its own). A manufacturer is prohibited by the Act from terminating a distributor solely for purposes of consolidation. *Esber Beverage Company v. The Wine Group, Inc.*, 2012-Ohio-1215, ¶28. Thus, Labatt USA is relying upon a misapplication of R.C. 1333.85(D) in an attempt to accomplish something that it cannot otherwise do lawfully under the Act.

As a result, Esber initiated costly and time-consuming litigation, this time to enforce Esber's enhanced distribution rights set forth in the Agreement that was expressly assumed by InBev USA. Based upon the express statutory language, as well as the legislative history and intent, the trial court determined that R.C. 1333.85(D) does not grant a successor manufacturer the right to terminate a distributor without just cause when the successor has *itself* entered into or assumed a written distribution agreement with its predecessor's distributor:

> This Court is more persuaded that 1333.85(D) only applies when a successor manufacturer is not bound by a written agreement under 1333.83. Once the parties entered into the Distribution Agreement, 1333.85(D) does not apply. The most logical conclusion is that the notice and compensation protections of 1333.85(D) only apply when a distributor is not protected by the Act under 1333.83—in the absence of a written agreement and distribution for less than ninety days. *** Based upon the legislative history of protecting distributors, it would appear that 1333.85(D) was enacted for the purpose of providing protection to the unprotected: at will distributors following transfer of brand to a successor manufacturer. This Court is required to interpret 1333.85(D) in a manner consistent with the provisions of the act.

Judgment Entry, pp. 14-15.

On appeal, the Fifth District Court of Appeals reversed the trial court by looking at the first sentence of R.C. 1333.85(D) in complete isolation, ignoring the third sentence of that section, and ignoring well-established principles of statutory construction. The Fifth District concluded that R.C. 1333.85(D) is unambiguous and "there is no need to resort to other methods of statutory interpretation such as legislative history or reading the statute *in pari materia*…" ¶¶33, 35.

Esber now seeks to appeal that decision court's decision because it ignores well-established rules of statutory construction and undermines the enforceability of every alcoholic beverage distributor contract in Ohio.

Argument in Support of Propositions of Law

Proposition of Law: The Ohio Alcoholic Beverage Franchise Act does not permit a successor manufacturer to terminate a distributor without cause when the successor manufacturer has itself entered into or assumed a written contract with the distributor.

A. The plain language of R.C. 1333.85(D) makes clear that successor manufacturers possess termination rights only in situations where no written franchise agreement exists between the manufacturer and the distributor.

The issue is whether the OABFA permits a successor manufacturer to terminate a distributor without cause when the successor manufacturer has itself established a franchise relationship by voluntarily assuming or entering into a written contract with the distributor. Given the language of R.C. 1333.85(D) and the statutory intent of the OABFA, the Court should accept jurisdiction of this case to declare that, when a successor manufacturer *itself* voluntarily assumes its predecessor's written contract, or enters into its own contract with the distributor, the Act does not permit that successor manufacturer to terminate the distributor without cause.

Ohio's state and federal courts have all recognized that manufacturers have superior bargaining power over Ohio's local beer and wine distributors. *Canandaigua*, 68 Ohio St.3d at 128; *Hill Distributing Co. v. St. Killian Importing Co.*, No. 2-11-CV-706, 2011 WL 3957255, *4 (S.D. Ohio 2011). In recognition of an inherent balance of power, Ohio courts have uniformly determined that the clear purpose of the OABFA is to remedy the lack of equal economic bargaining power between Ohio's alcoholic beverage wholesalers and out-of-state alcoholic beverage manufacturers by "grant[ing] Ohio beer and wine distributors unique protections." See *InBev USA LLC v. Hill Distributing Co.*, Case No. 2:05CV-00298, 2006 U.S. Dist. Lexis 97423, *10-11 (S.D. Ohio, April 3, 2006).

Legislative intent provides guidance for how the OABFA must be interpreted. As this Court recently reiterated, when construing a statute, the Court's "paramount concern is the legislative intent in enacting the statute. To determine intent, we look to the language of the statute and the purpose that is to be accomplished by it." *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, ¶19. Further, "this court construes a statute as a whole and gives it such interpretation as will give effect to *every word and clause* in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Id.* (emphasis added). "[A] court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State ex rel. Coble v. Lucas County Board of Elections, et al.*, 130 Ohio St.3d 132, 2011-Ohio-4550, ¶29 (citation omitted). To determine this legislative intent, "significance and effect should be accorded to *every word, phrase, sentence and part thereof*, if possible." *State v. Wilson*, 77 Ohio St.3d 334, 336-337 (1997) (emphasis added); see also R.C. 1.47(B).

Here, the statute to be interpreted is R.C. 1333.85(D), which is a key provision of the OABFA. The Fifth District refused to apply principles of *in pari materia* and it specifically failed to give effect to the third sentence of §1333.85(D): "If notice is not received within this ninety-day period, a **franchise relationship** *is established* between the parties." (emphasis added). This unambiguous provision clearly provides that a minimally protective "franchise relationship" is established, by operation of statute, after 90 days, and it necessarily presupposes that a franchise relationship does not already exist between the successor manufacturer and the distributor. If there is already a written agreement between the successor manufacturer and the distributor, then there would be no reason for a franchise relationship to *be established* by operation of law after 90 days and this language in the statute would be superfluous. The only circumstance under which a franchise relationship "is established" after 90 days under the Act is in the absence of a written agreement.

This interpretation does not offend a successor manufacturer's freedom of contract. Under §1333.83, a manufacturer becomes bound by the Act only when it enters into a written agreement with a chosen distributor or when it allows distribution of its brands by a chosen distributor for 90 days or more. Similarly, under 1333.85(D), a successor manufacturer is bound to a distributor only in limited circumstances: a successor manufacturer can freely assume a written agreement with its predecessor's distributor or, in the absence of a written agreement, a successor manufacturer has up to 90 days to determine whether it desires to establish a franchise relationship with its predecessor's distributor before one will be imposed by operation of law. Thus, a successor manufacturer that voluntarily assumes its predecessor's distribution agreements, like Labatt USA here, cannot argue that it did not have or exercise the freedom to contract.

B. The legislative intent to provide protection to small business distributors is clear when that section is read in pari materia with R.C. 1333.83.

Esber's proposed interpretation of the Act is the only interpretation that is consistent with the purpose and spirit of the Act and with the legislature's intended meaning.

Prior to the enactment of the OABFA in 1974, manufacturers controlled the terms of distribution, and there was no statutory prohibition against termination without just cause. Following its enactment, manufacturers were required by §1333.83 to enter into written distribution agreements that were governed by the Act, and termination without cause was expressly prohibited by §1333.85. Initially, oral distribution agreements were not governed by the Act and remained terminable without cause under the common law.

In 1985, the Ohio legislature extended the protections of the Act to certain (but not all) distributors with oral agreements, adding the following language to R.C. §1333.83:

> When a distributor of beer or wine for a manufacturer, or the successors or assigns of the manufacturer, distributes the beer or wine for six months or more ***without a written contract*****, a franchise relationship is established between the parties,** and sections 1333.82 to 1333.87 of the Revised Code apply to the manufacturer, its successors or assigns, and the distributor.

Notably, after the 1985 amendments, certain distributors remained outside of the Act's protections and were thus still subject to termination without cause under the common law. Specifically, a distributor distributing for a manufacturer *or its successor* without a written contract for less than six months remained "unprotected" by the Act.

Section 1333.83's gap in protection was specifically recognized by this Court in *Tri-County Dist., Inc. v. Canandaigua Wine Co.*, 68 Ohio St.3d 123 (1993). There, Canandaigua acquired Guild Wineries' product line *but refused to assume its predecessor's written distribution agreements*. Canandaigua instead supplied products to Guild's distributors pursuant to written terms and conditions of sale that expressly disclaimed a "manufacturer-distributor" relationship. Prior to allowing distribution for six months, Canandaigua terminated Guild's distributors without cause, and numerous distributors sued, seeking protection under the Act.

In upholding the Guild distributor terminations, this Court determined that the successor manufacturer was not governed by the just cause prohibitions of the Act because Canandaigua had not *itself* entered into a franchise relationship with any of the distributors under R.C. §1333.83, either by written agreement or by allowing distribution for six months. "[T]he threshold question * * * concerns whether a franchise relationship exists between the [distributor] and Canandaigua. Resolution of this issue requires consideration of R.C. 1333.83." The *Canandaigua* decision makes clear that a predecessor manufacturer's franchises are not automatically "inherited" by a successor manufacturer by operation of the OABFA (unlike in other states). Unless a successor manufacturer *itself* enters into a franchise relationship with its predecessor's distributors—either by written agreement or by allowing distribution for the statutory period, the Act's prohibitions do not apply and the successor manufacturer is permitted to terminate the distributor without cause under the common law. Although not decided by the *Canandaigua* Court, the converse of *Canandaigua* is now at issue and must likewise be true—if a successor manufacturer *itself* assumes or enters into a written agreement with a distributor, the Act's prohibitions do apply and the distributor cannot be terminated by the successor manufacturer without cause.

As a result of this Court's decision in *Canandaigua*, numerous Ohio distributors were terminated under the common law without cause and, importantly, without compensation for their long-time investment in the brands at issue. The legislature is presumed to be cognizant of the case law which has evolved around a given statute. *South v. Toledo Edison Co.*, 32 Ohio App.3d 24, 513 N.E.2d 800, 803-804 (1986). Canandaigua's purposeful circumvention of the Act prompted the enactment of several additional statutory protections in favor of Ohio's distributors.

Shortly after the *Canandaigua* cases were filed, the General Assembly amended R.C. §1333.83 to prohibit waiver of the Act by agreement, precluding a manufacturer or its successor from exempting its written agreements from the Act's just cause provisions like Canandaigua had done. Amd. Sub. S.B. 284 (eff. 5-20-92). While this amendment precluded a manufacturer or its successor from exempting its written agreement from the Act, long-time distributors without written agreements were still likely to find themselves without any statutory protection after a transfer of brands if the successor manufacturer ceased distribution within six months after its acquisition and prior to the imposition of a statutory franchise under §1333.83.

Recognizing the continued vulnerability of these "unprotected" distributors, the Ohio General Assembly again amended §1333.85 to add sub-section (D). Am. Sub. House Bill 725 (eff. 4-16-93). This amendment imposed notice and compensation requirements in favor of unprotected distributors that did not otherwise exist pursuant to contract or statute. Following the enactment of §1333.85(D), when a distributor without a written agreement was subject to termination under the common law following a transfer of brands, the successor manufacturer was required to provide prompt[4] written notice of its selected common law option — "termination, non-renewal or renewal" — and, more importantly, was required to compensate the terminated distributor for its loss of the brands.

In *Canandaigua*, this Court specifically noted that the 1993 amendment addressed the "situation" presented in that case, although the statutory amendment was not retroactively applicable to the case before it. *Canandaigua*, 68 Ohio St.3d at 129, fn.1. Thus, the circumstances prompting the enactment of R.C. §1333.85(D) clearly and conclusively demonstrate that its purpose was to provide additional protections to *distributors*. There is nothing about these circumstances that would support the argument that §1333.85(D) was intended to grant a successor manufacturer a statutory right to terminate a written contract that it has *itself* voluntarily assumed. Indeed, there was no written contract subject to the Act in *Canandaigua*—that was the distributors' dilemma. Section 1333.85(D) instead recognizes that a successor manufacturer, like Canandaigua, who *itself* is not bound by a written contract or statutory franchise, may (or may not) opt under the common law to terminate its predecessor's distributors. Section 1333.85(D) simply has no application where a

[4]At the time that §1333.85(D) was adopted, §1333.83 provided that a statutory franchise would arise after distribution without a written contract for six months or more. Sub-section (D) required notice of "termination, nonrenewal or renewal" *within 90 days*, after the transfer of brands, thus shortening the time that an unprotected distributor might continue to invest in the brands prior to being terminated. This requirement of prompt notice was enacted in favor of distributors.

successor manufacturer has *itself* voluntarily assumed its predecessor's written distribution agreements and thereby, by operation of §1333.83, become bound by the prohibitions against termination without just cause.

The conclusion that R.C. §1333.85(D) applies only to a distributor without a written contract is further confirmed by subsequent amendments to the Act. In 1994, the General Assembly again amended the Act in favor of Ohio's distributors, reducing the statutory franchise period set forth in §1333.83 from six months to 90 days:

> "When a distributor of beer or wine for a manufacturer, or the successors or assigns of the manufacturer, distributes the beer or wine for ~~six months~~ NINETY DAYS or more without a written contract, **a franchise relationship *is established*** ***.

See Am. Sub. Senate Bill 209, eff. 11/9/94. Section 1333.85(D) was simultaneously amended to **add** the following mirror language (in bold):

> Any notice of termination or nonrenewal of the franchise to a distributor of the acquired product or brand shall be received at the distributor's principal place of business within the ninety-day period. **If notice is not received within this ninety-day period, a franchise relationship *is established* between the parties.**

Id. (emphasis added). Sections 1333.83 and 1333.85(D) were the only provisions of the Act amended by Senate Bill 209, which was specifically intended "to make changes relating *to the establishment of a franchise relationship* between manufacturers and distributors of alcoholic beverages." *Id.*

This Court has held that where two statutory sections become "effective at the same time and relating to the same subject matter * * *, they are *in pari materia*, must be construed together and any apparent contradictions reconciled if possible." *Brown v. Martinelli*, 66 Ohio St.2d 45, 49 (1981). Thus, applicable rules of statutory construction compel the conclusion that the parallel language utilized by the legislature in Sections 1333.83 and 1333.85(D) indicates that *both* sections address the establishment of a franchise relationship in the absence of a written contract. No plausible reason exists that the Legislature would have made clear that, under R.C. 1333.85(D), a statutory franchise relationship is created after ninety days unless the provision applies only to those situation when a written franchise relationship was not already in place.

Accordingly, based on the plain language of R.C. 1333.85(D) and the rules of statutory interpretation, the OABFA does not permit a successor manufacturer to terminate a distributor without cause when the successor manufacturer has itself established a franchise relationship by voluntarily assuming or entering into a written contract with the distributor.

CONCLUSION

If the decision below is allowed to stand, out-of-state successor manufacturers will continue to wield Revised Code §1333.85(D) as a sword, permitted to terminate each and every of their predecessors' distributors without just cause, even when the successor manufacturer has *itself* assumed or entered into a written franchise with the distributor. The Fifth District's decision therefore deprives Ohio distributors of the full benefits of the OABFA.

Further, even if a successor manufacturer chooses *not* to terminate its predecessor's written franchises (perhaps to avoid payment of diminished value compensation), a necessary consequence of the lower court's decision is that a written franchise will be automatically supplanted by a statutory franchise. This result is in direct contravention of the legislature's mandated preference in R.C. 1333.83 for written agreements over statutorily-imposed franchises and the opportunity for Ohio distributors to negotiate into their contracts more favorable terms than the minimum statutory protections.

Accordingly, this Court should accept jurisdiction of this appeal so that it can protect those Ohio distributors that have written franchise agreements with successor manufacturers as intended by the Ohio General Assembly.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ESBER BEVERAGE COMPANY

Plaintiff-Appellee

-vs-

LABATT USA OPERATING COMPANY, LLC, et al.

Defendants-Appellants

JUDGES:
William B. Hoffman, P.J.
Sheila G. Farmer, J.
Julie A. Edwards, J.

Case Nos. 2011CA00113 and 2011CA00116

<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Civil Appeal from Stark County Court of Common Pleas Case No. 2009CV03142

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JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Edwards, J.

{¶1} Appellants, Labatt USA Operating Co.; KPS Capital Partners, L.P.; North American Breweries, Inc.; Douglas Tomlin; and Superior Beverage Group, Ltd., appeal a judgment of the Stark County Common Pleas Court in favor of appellee Esber Beverage Company.

STATEMENT OF FACTS AND CASE

{¶2} Appellant KPS Capital Partners, L.P. (KPS) is a Delaware limited partnership in the business of providing management and investment services to private equity funds. Investment funds managed by KPS own North American Breweries Holdings, LLC, which in turn owns 100% of North American Breweries, Inc. (NAB). Labatt USA Operating Co. is an indirect, wholly owned subsidiary of NAB. Appellant Doug Tomlin is regional sales director of appellant Labatt USA Operating Co. Superior Beverage Group (Superior) is a family-owned distributor of alcoholic beverages located in Youngstown, Ohio, which distributed the Genesee brands of beer for NAB. Appellee Esber Beverage Company (Esber) is a family-owned beer and wine distribution business located in Canton, Ohio, which distributed Labatt products in certain counties in Ohio.

{¶3} Esber has distributed the Labatt brands since the 1950's. Prior to 1995, Esber acquired the Labatt products from the Labatt Brewing Company Ltd. (LBCL), a Canadian company. In 1995, Interbrew, a Belgian brewer, purchased LBCL and acquired control of the Labatt brands. Interbrew merged with AmBev in 2004 to form InBev N.V./S.A. At the time of the 2004 merger, Labatt products were imported to the

United States by an entity called Labatt USA LLC, which is not the same company as appellant Labatt USA Operating Co.

{¶4} Following the Interbrew/AmBev merger, InBev N.V./S.A. merged Labatt USA LLC with Beck's North America into a third subsidiary, Latrobe Brewing Company, and renamed the merged company InBev USA L.L.C. As of January 1, 2005, Esber acquired the Labatt brands from InBev USA (hereinafter, InBev) for distribution in Stark and surrounding counties. InBev notified Esber that it was terminating Esber's franchise pursuant to R.C. 1333.85(D) because InBev was a "successor manufacturer" within the meaning of the statute and therefore had ninety days to terminate the franchise. Esber challenged the termination and this Court ultimately concluded that InBev was not a successor manufacturer, but rather the merger that took place was "more accurately defined as a restructuring and renaming of its U.S. business operations, with no products changing ownership control." *Esber Beverage Co. v. InBev USA* LLC, Stark App. No. 2006CA00113, 2007-Ohio-927, ¶66.

{¶5} On November 30, 2007, InBev and Esber negotiated a new distribution agreement. This agreement appointed Esber as the exclusive distributor of Labatt products in ten Ohio counties for an indefinite term. Esber had the right of first refusal "to be appointed to carry any new brands or extensions of existing Brands that are produced in Canada or are imported into the United States by Supplier [InBev] or any successor in interest . . ." Distribution Agreement, §8(a)(i-x).

{¶6} In July of 2008, InBev agreed to acquire Anheuser-Busch Companies, Inc. The United States Justice Department filed an anti-trust suit against InBev in November, 2008. To resolve the lawsuit, InBev agreed to transfer the Labatt brands to another entity with the ability to compete in the relevant markets. InBev agreed to sell the Labatt brands and related assets to a KPS affiliate. The Labatt brands were transferred to Labatt USA Operating, a KPS affiliate formed to acquire InBev's assets related to the Labatt brands. Labatt USA Operating became a subsidiary of NAB, which also owned High Falls Operating Co., LLC, which distributed Genesee brands. Superior was the distributor of Genessee brands in the same general market where Esber distributed Labatt brands.

{¶7} Shortly after acquiring the Labatt brands, NAB invited both Esber and Superior to make a presentation regarding each distributor's ability to distribute both the Labatt and Genesee brands in the relevant market. NAB decided to use Superior to distribute both Labatt and Genesee and notified Esber of its decision to terminate Esber's distribution agreement on May 15, 2009.

{¶8} Esber filed the instant action on August 14, 2009, for declaratory judgment, injunctive relief and compensatory damages, alleging breach of contract, promissory estoppel, tortious interference with business relations, conspiracy and antitrust violations.

{¶9} On December 1, 2009, the trial court granted Esber's motion for a preliminary injunction, which allowed Esber to continue to distribute Labatt products during the pendency of the lawsuit. On cross-motions of the parties for summary judgment, the trial court granted partial summary judgment to Esber, finding that appellants were bound by the terms of the distribution agreement and that appellants did not have the right to terminate the agreement pursuant to R.C. 1333.85(D). The court found that R.C. 1333.85(D) did not apply because Labatt USA Operating had assumed the distribution agreement entered into between InBev and Esber and had no superseding statutory right to terminate the agreement. The court further found that even if R.C. 1333.85(D) did apply, Labatt USA Operating was not a successor manufacturer within the meaning of the statute. Judgment Entry, November 29, 2010.

{¶10} In May of 2011, Esber voluntarily dismissed its remaining claims. The trial court issued a final appealable order on May 12, 2011, which incorporated the November 29, 2010 judgment.

{¶11} Appellants Labatt USA Operating Co. ; KPS Capital Partners, L.P.; North American Breweries, Inc.; Douglas Tomlin filed a notice of appeal in case number 2011CA00113, assigning the following errors:

{¶12} "I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT NONE OF THE APPELLANTS 'CAN PROVE THAT THEY WERE MANUFACTURERS AT THE TIME OF THE PURCHASE OF THE ASSETS.'

{¶13} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT CONCLUDED THAT THE APPELLANTS WERE REQUIRED TO BE MANUFACTURERS AT THE TIME OF THE PURCHASE OF ASSETS TO QUALIFY AS A 'SUCCESSOR MANUFACTURER' UNDER R.C. SECTION 1333.85(D).

{¶14} "III. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE SALE OF ASSETS FROM INBEV USA, L.L.C. TO APPELLANT LABATT USA OPERATING CO, LLC WAS NOT A 'CHANGE IN CORPORATE STRUCTURE, BUT SIMPLY THE SAME TYPE OF RESTRUCTURING OR TRANSFER DISAPPROVED OF BY THE FIFTH DISTRICT IN *ESBER V. INBEV*' AND, THEREFORE, APPELLANT LABATT USA

OPERATING CO, LLC IS NOT A SUCCESSOR MANUFACTURER UNDER R.C. SECTION 1333.85(D).

{¶15} "IV. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT R.C. SECTION 1333.85(D) DOES NOT APPLY WHEN A PREDECESSOR'S WRITTEN DISTRIBUTION AGREEMENT IS TRANSFERRED TO A SUCCESSOR MANUFACTURER.

{¶16} "V. THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT TO APPELLANTS."

{¶17} Appellant Superior filed a notice of appeal in Case Number 2011CA00116, assigning the following errors:

{¶18} "I. THE TRIAL COURT ERRED AS A MATER OF LAW IN ITS NOVEMBER 29, 2010, JUDGMENT ENTRY, BECAUSE LABATT USA OPERATING COMPANY, LLC IS A 'SUCCESSOR MANUFACTURER' AND IT PROVIDED TIMELY NOTICE OF TERMINATION TO ESBER UNDER R.C. 1333.85(D).

{¶19} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS NOVEMBER 29, 2010 JUDGMENT ENTRY, BECAUSE A SUCCESSOR MANUFACTURER MAY TERMINATE A DISTRIBUTOR UNDER R.C. 1333.85(D) IF A DISTRIBUTOR HAS A WRITTEN FRANCHISE AGREEMENT WITH THE PRIOR MANUFACTURER, AND A WRITTEN FRANCHISE AGREEMENT MAY NOT LIMIT THE SUCCESSOR MANUFACTURER'S RIGHT TO TERMINATE DISTRIBUTORS UNDER R.C. 1333.85(D).

{¶20} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING INJUNCTIVE RELIEF IN ITS NOVEMBER 29, 2010 JUDGMENT ENTRY AND ITS

DECEMBER 1, 2009 JUDGMENT ENTRY, AS CORRECTED ON DECEMBER 10, 2009, BECAUSE, IN THE EVENT OF A WRONGFUL TERMINATION, OHIO'S ALCOHOLIC BEVERAGE FRANCHISE ACT PROVIDES FOR MONETARY DAMAGES, NOT INJUNCTIVE RELIEF."

{¶21} This Court consolidated the appeals for purposes of the trial court record and oral argument only on July 1, 2011. However, because the parties raise the same issues and both appeals originate from the same trial court case, we hereby consolidate the cases for purposes of opinion and judgment entry as well.

{¶22} This case concerns the propriety of a summary judgment entered by the trial court. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ. R. 56(C) which provides in pertinent part: "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶23} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates that the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶24} It is upon this standard that we review the appellants' assignments of error.

Case No. 113 – IV; Case No. 116- II

{¶25} We address these assignments of error first because both raise error as a matter of law in the trial court's conclusion that R.C. 1335.85(D) does not apply in the instant case because appellants assumed InBev's written distribution agreement with Esber, an agreement which was for an indefinite term and purported to bind a successor in interest to InBev. If the trial court correctly determined that the statute did not apply, we need not reach the issue of whether Labatt USA Operating is a successor manufacturer within the meaning of the statute.

{¶26} The Ohio Alcoholic Beverage Franchise Act, R.C. 1333.83 et seq., governs the franchise relationships between manufacturers and distributors of alcoholic beverages, including beer, within the State of Ohio. Under R.C. 1333.85, a franchise cannot be terminated absent prior consent unless just cause exists and notice is provided. R.C. 1333.85(A) lists three situations which always constitute just cause: (1) voluntary bankruptcy; (2) involuntary bankruptcy; or (3) loss of liquor permits. R.C. 1333.85(B) lists four situations which never constitute just cause: (1) failure of a party to take action that would result in a violation of federal or state law; (2) restructuring, other than in bankruptcy, of a manufacturer's business; (3) unilateral alteration of the franchise by a manufacturer for a reason unrelated to any breach of the franchise or violation of R.C. 1333.82 and 1333.86; and (4) "a manufacturer's sale, assignment, or other transfer of the manufacturer's product or brand to another manufacturer over which it exercises control." R.C. 1333.85(C) governs how a manufacturer and distributor should deal with excess inventory in case of termination.

{¶27} R.C. 1333.85(D) is an exception to the general rule requiring just cause. Under the terms of subsection (D), if a successor manufacturer "acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer," then it may terminate, via written notice, a previous manufacturer's franchise agreements within 90 days of the date of the acquisition. R.C. 1333.85(D). Upon termination, the "distributor shall sell and the successor manufacturer shall repurchase the distributor's inventory of the terminated or nonrenewed product or brand" at the "laid-out cost to the distributor including freight and cartage." R.C. 1333.85(C) and (D). The successor manufacturer must also compensate the distributor "for the diminished value of the distributor's business that is directly related to the sale of the product or brand terminated." R.C. 1333.85(D). The value of directly related business includes, but is not limited to, "the appraised market value of those assets of the distributor principally devoted to the sale of the terminated ... product or brand and the goodwill associated with that product or brand." R.C. 1333.85(D).

{¶28} Appellee argues that R.C. 1333.85(D), when read in pari materia with R.C. 1333.83, is only intended to address the situation where there is an absence of a written agreement between the parties. Because in the instant case appellants assumed the written distribution agreement InBev entered into with appellee, appellee argues that appellants did not have a right to terminate such agreement under R.C. 1333.85(D).

{¶29} R.C. 1333.85(D) states in pertinent part:

{¶30} "If a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer, the successor manufacturer, within ninety days of the date of the merger, acquisition, purchase, or assignment, may give written notice of termination, nonrenewal, or renewal of the franchise to a distributor of the acquired product or brand. Any notice of termination or nonrenewal of the franchise to a distributor of the acquired product or brand shall be received at the distributor's principal place of business within the ninety-day period. If notice is not received within this ninety-day period, a franchise relationship is established between the parties."

{¶31} R.C. 1333.83 states in pertinent part:

{¶32} "When a distributor of beer or wine for a manufacturer, or the successors or assigns of the manufacturer, distributes the beer or wine for ninety days or more without a written contract, a franchise relationship is established between the parties, and sections 1333.82 to 1333.87 of the Revised Code apply to the manufacturer, its successor or assigns, and the distributor."

{¶33} However, there is no need to resort to other methods of statutory interpretation such as legislative history or reading the statute in pari materia when the language of the statute is unambiguous. *State v. Robinson*, 124 Ohio St.3d 76, 919 N.E.2d 190, 2009-Ohio-5937, ¶31. In the instant case, R.C. 1333.83 specifically refers to the situation when there is not a written contract between the parties. On the other hand, R.C. 1333.85(D) does not include the language used in R.C. 1333.83 concerning the lack of a written contract. Rather, R.C. 1333.85(D) gives the successor manufacture a right of termination of a "franchise." Franchise is defined by R.C. 1333.82(D) to include a contractual relationship:

{¶34} "'Franchise' means a contract or any other legal device used to establish a contractual relationship between a manufacturer and a distributor."

{¶35} In the instant case, the contractual relationship between the manufacturer and Esber was established by a contract and thus falls within the definition of "franchise" as used in R.C. 1333.85(D). By the plain language of the statute, a successor manufacturer had ninety days within which to provide Esber with notice of termination of the franchise. By the plain language of the statute, such right of termination does not apply solely to arrangements when there is no written agreement between the parties. The statute clearly gives a successor manufacturer a narrow window of time in which to determine whether it wants to keep the franchise agreements with distributors it assumed from its predecessor, or whether it wants to terminate such agreements with distributors. Failure of the manufacturer to terminate an agreement within ninety days establishes a franchise agreement between these two parties that can only be altered by compliance with the just cause provisions found earlier in the Act.

{¶36} The fourth assignment of error in Case No. 11-113 and the second assignment of error in Case No. 11-116 are sustained.

Case No. 113 - I, II, III; Case No. 116 - I

{¶37} In these assignments of error, appellants argue that the court erred in finding Labatt USA Operating Co. was not a successor manufacturer under R.C. 1333.85(D).

{¶38} Appellants first argue that the court erred in finding that Labatt USA Operating Co. was not a "manufacturer" prior to its purchase of Labatt brands from InBev, and therefore did not qualify as a successor manufacturer under the statute.

{¶39} The trial court held:

{¶40} "Simply stated, since at this point none of the Defendants can prove that they were manufacturers at the time of the purchase of the assets, they do not qualify as successor manufacturers."

{¶41} R.C. 1333.82(B) defines manufacturer:

{¶42} "(B) 'Manufacturer' means a person, whether located in this state or elsewhere, that manufactures or supplies alcoholic beverages to distributors in this state."

{¶43} R.C. 1333.85(D) provides in pertinent part:

{¶44} "If a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer, the successor manufacturer, within ninety days of the date of the merger, acquisition, purchase, or assignment, may give written notice of termination, nonrenewal, or renewal of the franchise to a distributor of the acquired product or brand."

{¶45} Appellee's argument is that only a "successor manufacturer" can take advantage of the right to terminate a franchise agreement for no reason, and, pursuant to R.C. 1333.85(D) an entity must be a "successor manufacturer" at the time it acquires the brand of alcoholic beverage from another manufacturer. Appellee argues that Labatt USA Operating Co. was not a "manufacturer" at the time it acquired the Labatt brand, and therefore, could not be a "successor manufacturer." A "manufacturer" under R.C. 1333.82(B) is an entity that supplies alcoholic beverages to distributors in this state. Therefore, appellee argues that, because Labatt USA Operating Co. was created for the purpose of supplying the Labatt brands and it was not supplying anything to anyone until it acquired the Labatt brands (and the franchise agreement), Labatt USA Operating Co. was not a "successor manufacturer" at the time it acquired the Labatt brands. While we acknowledge that a strict reading of the statutory language leads to the position argued by appellee, we find such a strict reading of the definition of "manufacturer" also leads to a conclusion that is illogical and could not have been the intent of the drafters. We do not find that the statutes intended to treat a business's right to terminate a franchise differently based on whether the business was created for the purpose of supplying a brand of alcohol to distributors or whether the business which acquired the brand was an existing supplier. In either situation, the entity would be faced with making business decisions on how to operate most efficiently. We, therefore, interpret R.C. 1333.82(B) to include as a "manufacturer" one who manufactures or supplies alcoholic beverages to distributors in this state or is in the business of manufacturing or supplying alcoholic beverages to distributors in this state.

{¶46} The trial court further found that appellants did not meet the definition of "successor" provided by R.C. 1333.85(D):

{¶47} "From the evidence submitted thus far, this Court finds it disturbing to discover the 'ring around the rosy' actions of KPS, NAB and Labatt USA operating which demonstrate a series of contradictory positions and raises the issue as to whether these purchases and sales were a 'shell game' and thus a sham. In fact, these acts resemble the '*restructuring*' actions that concerned the Fifth District in *Esber v. InBev*. It is paralyzing that in a blink of an eye, Labatt USA Operating now owns or controls Labatt USA.

{¶48} "More importantly, in reviewing the exhibits provided by Esber, both Labatt USA Operating and Labatt USA appear to be the same entities. A close examination of the two invoices provided to the Court notes that on the billing invoices for both Labatt corporate offices on December 8, 2008 (before sale) and September 9, 2009 (after sale), it reflects the identical address, telephone number, corporate office and language in the warranty. As a result, it doesn't appear that there is any change in the corporate structure, but simply the same type of *restructuring* or transfer disapproved of by the Fifth District in *Esber v. InBev*." Judgment Entry, November 29, 2010.

{¶49} In *Esber v. InBev*, supra, this Court found that a merger was more accurately defined as a restructuring and renaming of InBev N.V./S.A.'s U.S. business operations, with no products changing ownership control. 2007-Ohio-927 at ¶66. Similarly, in *Esber Beverage Co. v. Heineken USA, Inc.*, Stark App. No. 2011CA00033, 2011-Ohio-5939, we found that the assignment or transfer of a manufacturer's product or brand to another manufacturer over which it exercises control, in order to manipulate the date of a transaction to circumvent the 90 day notice provision in R.C. 1333.85(D) did not meet the requirements of the statute. Id. at ¶25.

{¶50} However, in the instant case, it is clear that there was a transfer of ownership and control of the Labatt brands from InBev to Labatt USA Operating Co., effective March 13, 2009. There is no evidence that InBev and Labatt USA Operating Co. are under common control. While InBev used "Labatt USA" as a trade name prior to the sale of the Labatt brands, InBev sold its assets related to the Labatt products to Labatt USA Operating. The common use of the trade name "Labatt USA" does not make InBev and Labatt USA Operating the same entity any more than two people sharing the same name are the same person. InBev was required to divest itself of the Labatt brands to settle the federal antitrust suit, and the federal court specifically found that there was no evidence of any secret agreement or that the sale is in any way a sham. Unlike *Esber v. Inbev,* supra, and *Esber v. Heinenken*, supra, the evidence is undisputed that there was in fact a complete sale of all assets related to the Labatt brands. The trial court erred in finding that Labatt USA Operating was not a successor manufacturer within the meaning of R.C. 1333.85(D).

{¶51} Assignments of error I, II, and III in Case No. 11-113 and assignment of error I in Case No. 11-116 are sustained.

Case No. 113 - V

{¶52} Appellants argue that the court erred in failing to grant summary judgment in their favor. Because we have found as a matter of law that R.C. 1333.85(D) gave appellants the right to terminate the distribution agreement with Esber, the trial court should have granted summary judgment to appellants on the issue of their right to terminate the contract pursuant to statute. The fifth assignment of error in Case No. 113 is sustained.

Case No. 116 - III

{¶53} Appellant Superior argues that the trial court erred in granting injunctive relief to Esber because only money damages are available pursuant to the statute.

{¶54} This Court has recently rejected this argument:

{¶55} "In *Tri–County Wholesale Dist. v. The Wine Group,* No. 2:10–cv–693 (S.D.Ohio Sept. 2, 2010), the United States District Court for the Southern District of Ohio, addressed the same argument as HUSA asserts herein. The Court found:

{¶56} "'The Franchise Act contemplates suits for 'damages *or other relief.*' Ohio Rev. Code § 1333.87 (emphasis added). Moreover, numerous courts have issued injunctions preserving the rights of distributors under the Franchise Act until the merits could be fully litigated, a fact that presumably has not escaped the Ohio General Assembly's notice. *See, e.g., InBev USA LLC v. Hill Distrib. Co.,* No. 2:05–cv–298 (S.D.Ohio Mar. 31, 2005) (granting temporary restraining order); *Esber Beverage Co. v.*

Labatt USA Operating Co., No.2009CV03142 (Stark Cty. Ohio Com. Pl. Dec. 1, 2009) (granting preliminary injunction).' *Id.* at *2. We agree.

{¶57} "Based upon the language of R.C. 1333.87, we find the trial court did not err in granting injunctive relief to Esber." *Esber Beverage Co. v. Heineken USA, Inc.*, Stark App. No. 2011CA00033, 2011-Ohio-5939, ¶29-31.

{¶58} The third assignment of error in Case No. 116 is overruled.

{¶59} The summary judgment of the Stark County Common Pleas Court is reversed. This case is remanded to that court for further proceedings according to law.

By: Edwards, J.

Hoffman, P.J. and

Farmer, J. concur

Julie A. Edwards

William B. Hoffman

Sheila G. Farmer

JUDGES

JAE/r1220

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ESBER BEVERAGE COMPANY	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LABATT USA OPERATING COMPANY, LLC, et al.,	:	
Defendants-Appellants	:	CASE NOS. 2011CA00113 and 2011CA00116

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is reversed and remanded to the trial court for further proceedings. Costs assessed to appellee.

Julie A. Edwards

William B. Hoffman

Sheila G. Farmer

JUDGES

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ESBER BEVERAGE COMPANY Plaintiff-Appellee - vs - LABATT USA OPERATING COMPANY, LLC, et al., Defendants-Appellants	:	JUDGMENT ENTRY CASE NO. 2011CA00113 & 2011CA00116

Appellee Esber Beverage Company has filed an application for en banc consideration pursuant to App. R. 26(A)(2) which provides in pertinent part:

"(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

"(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's

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decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

"(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App. R. 30(A). In the case of any sua sponte designation of a case for en banc consideration, the order designating the case for en banc consideration shall also vacate the original panel decision in the case and, if applicable, any decision on an application for reconsideration. A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

"(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App. R. 26(A)(2)(c) and, if so vacated, shall be reentered."

Appellee has also filed an application for reconsideration simultaneously to the application for en banc consideration in a single document as required by App. R. 26(A)(2)(c).

Appellee has not demonstrated that this panel's decision conflicts with a prior panel's decision on a dispositive issue and that consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

Appellee argues that in the instant case we found R.C. 1333.85 to be clear and unambiguous, while in this Court's prior decision in *Esber Beverage Co. v. InBev USA LLC*, 5th Dist. No. 2006CA00113, 2007-Ohio-927, we found the same statute to be ambiguous.

Appellee's claim that our decision in the instant case is in conflict with *InBev* is without merit. *In InBev*, we found that R.C. 1333.85 was not entirely clear and unambiguous concerning the definition of the term "successor manufacturer." In the instant case, we found that R.C. 1333.85(D) is clear and unambiguous regarding the issue of whether "franchise" as defined by the statute included both written and oral agreements.

Because our decision is not in conflict with *InBev*, *supra*, appellee's motion for en banc reconsideration is overruled.

Appellee argues that this court should reconsider our decision because the "practical result of the Court's interpretation of the Act will have significant negative consequences that were not likely intended by this Court." Appellee argues that our interpretation of R.C. 1333.83 and R.C. 1333.85(D) interferes with its right to contract.

Appellee also argues that this Court committed an obvious error in failing to find R.C. 1333.85 to be ambiguous.

Pursuant to App.R. 26(A), a party may file an application for reconsideration of an appellate court decision. The standard for reviewing such an application is whether the application "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 523 N.E.2d 515, paragraph one of the syllabus.

"An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1996), 112 Ohio App.3d 334, 336, 678 N.E.2d 956.

In the instant case, appellee disagrees with the conclusions reached by this Court in our opinion. Appellee does not call our attention to an obvious error in our decision or raise an issue that we failed to consider. Rather, appellee simply restates arguments made to this court on direct appeal regarding the ambiguity of the statute, and argues that we should reconsider our decision because appellee is unhappy with the practical result of the decision. Accordingly, the motion to reconsider is overruled. Costs to appellee.

IT IS SO ORDERED.

Julie A. Edwards

William B. Hoffman

Sheila G. Farmer

JUDGES

JAE/rad/rmn