

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

12-0941

Ohio Supreme Court Case No. _____

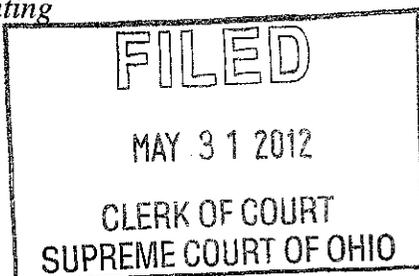
MEMORANDUM OF AMICI CURIAE TRAMONTE DISTRIBUTING COMPANY, MUXIE DISTRIBUTING AND BEVERAGE DISTRIBUTORS, INC. IN SUPPORT OF JURISDICTION

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae Tramonte Distributing Company (“Tramonte”), Muxie Distributing (“Muxie”) and Beverage Distributors, Inc. (“Beverage”) submit this brief in support of Esber Beverage Company’s Memorandum in Support of Jurisdiction.

This case is one of public and great general interest because the Fifth District’s decision alters the delicate balance of interests created by the Ohio General Assembly in the Ohio Alcoholic Beverage Franchise Act (“the Act” or “OABFA”). As discussed below, the OABFA is a protectionist statute that favors Ohio’s local distributors. However, the decision of the lower court deprives Ohio distributors of the full benefits of the OABFA by allowing a successor manufacturer to terminate a written franchise agreement without cause even though the manufacturer has *itself* assumed the written franchise agreement. This Court should accept jurisdiction of this appeal to stop the efforts of manufacturers to undercut the Ohio General Assembly’s efforts to protect local businesses, Ohio’s alcoholic beverage distributors.

Amici Curiae are three Ohio distributors. Tramonte is an Ohio corporation with its principal place of business in Akron, Ohio, and is a distributor of alcoholic beverages under O.R.C. § 1333.82(C). Founded in 1940 by Giacomo Tramonte, and now operated by his descendants, Tramonte solicits, markets, and delivers beverages to over 1,575 restaurants, taverns, and grocery/convenience stores in a territory that covers 5 Ohio counties centered around Summit County. Tramonte employs approximately 75 people. Tramonte has invested millions of dollars and thousands of hours in marketing beverages and brands of various manufactures of alcoholic beverages, with which it has long-standing franchise agreements.

Muxie is located in Belmont County, Ohio, and is a distributor of beer brands manufactured by Miller, Coors and Anheuser-Busch. Muxie has been in business since the 1950's. They employ 25 people on a full and part time basis.

Similarly, Beverage is an Ohio corporation with its principal place of business in Cleveland, Ohio. Beverage has distributed alcoholic beverages, including beer, for many manufacturers in Cuyahoga and other Ohio counties since 1933. Beverage has many long-standing franchise agreements with alcoholic beverage manufactures, many going back decades. Beverage employs approximately 150 people to promote these brands and service its customers. Beverage has invested millions of dollars and untold hours to develop the market for the brands and manufacturers it represents.

The Amici Curiae are intimately familiar with the efforts of Ohio's distributors to guarantee that consumers have access to a wide selection of beer and wine at reasonable prices, while also complying with the State's extensive regulation of alcoholic beverages. The beer distribution market is highly competitive. A distributor is required to make substantial monetary and time investments in the brands that it distributes. The beer or wine manufacturer expects that its distributor will build-up a clientele for the brands, grow market share, represent the brands in the marketplace, and otherwise act as a partner for the manufacturer in Ohio.

According to the Wholesale Beer & Wine Association of Ohio ("WBWAO"), Ohio's beer and wine distributors are vital to the State's economy. Distributors employ more than 4,500 Ohio residents. See, <http://associationdatabase.com/aws/WBWAO/pt/sp/consumerbenefits>. According to the WBWAO, "a 2008 study showed distributors paid more than \$200 million in wages; collected more than \$54 million in excise taxes for the state; and paid more than \$75 million in business and payroll taxes." *Id.* Even more than their direct employees, Ohio

distributors “support an additional 26,000 jobs in affiliated industries, generating nearly \$800 million in wages and \$23 billion in economic activity.” *Id.*

However, the decision of the Fifth District Court of Appeals threatens the continued viability of many of Ohio’s distributors because it will allow successor manufacturers to ignore distributors’ bargained-for contracts. Amici Curiae ask this Court to take jurisdiction of this case to preserve the fundamental fairness and protections created by the Ohio General Assembly in the OABFA.

ARGUMENT

Following Prohibition, state governments have the exclusive authority to regulate alcohol distribution and sales within their own borders. States have imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within the State. *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796, citing, Skilton, *State Power Under the Twenty-First Amendment*, 7 Brooklyn L.Rev. 342, 345-346 (1938); L. Harrison & E. Laine, *After Repeal: A Study of Liquor Control Administration* 43 (1936).

Ohio, like many states, has adopted a legislative scheme that regulates the sale and importation of alcoholic beverages through a three-tier system that requires separate licenses for producers, wholesalers, and retailers. See, e.g., R.C. Chapters 4301-4399. As recognized by the United States Supreme Court, “[t]he Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. * * * We have previously recognized that the three-tier system itself is unquestionably legitimate.” *Granholm v. Heald*, 544 U.S. 460, 488-489 (2005).

The three-tier distribution system insures that the beer and wine market is extraordinarily competitive: “Thousands of brewers and vintners can bring their products to market at Ohio's some 23,000 retail outlets at fair market prices. Consumers benefit by having the choice between the largest international brands and the smallest craft brands, all on the same store shelf, restaurant list and bar.” <http://associationdatabase.com/aws/WBWAO/pt/sp/consumerbenefits>.

As part of the State of Ohio’s regulations and implementation of the three-tier system, the Legislature has determined that the distributors play a unique and important role in helping the State achieve its policy goal of carefully regulating alcoholic beverage distribution. This determination led to the enactment of the Ohio Alcoholic Beverage Franchise Act (“OABFA”). Ohio courts have uniformly determined that “[t]he clear purpose of the Ohio Alcoholic Beverages Act 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 vs. Hill Distributing Co., et al*, Case No. 2:05CV-00298 (S.D. Ohio, April 3, 2006); *Beverage Distrib., Inc. v. Miller Brewing Co.*, 2011 WL 1113282, at *5 (S.D. Ohio March 22, 2011) (“Although the Act imposes some reciprocal duties on manufacturers and distributors, when viewed in its entirety, the obvious thrust of the Act is to protect Ohio distributors”).

The OABFA “is designed in part to protect distributors from certain practices of beverage manufacturers. It recognizes that distributors often have substantial investment in their businesses, including the physical assets and real property used to distribute the manufacturer’s products, and that to allow a manufacturer unilaterally to terminate a franchise agreement puts the franchise distributors at great risk of harm....”

Beverage Distrib., Inc. v. Miller Brewing Co., 2009 WL 1542730, at * 5 (S.D. Ohio June 2, 2009) (“Like other franchise acts ***, the Alcoholic Beverage Franchise Act is designed in part to protect distributors from certain practices of beverage manufacturers”).

In recent years, many long-time local, family-owned beverage distributors in Ohio have been besieged by a multitude of unlawful terminations by international, conglomerate manufacturers seeking to increase profits through consolidation. Distributors throughout Ohio have lost their ability to distribute certain brands, or been forced to pursue costly and time-consuming litigation in order to prevent the loss of lynchpin brands. Between 1984 and 2002, the number of nationwide licensed wholesalers dropped from 1,600 to 600. *Granholm*, citing *Riekhof & Sykuta, Regulating Wine by Mail*, 27 Regulation, No. 3, pp. 30, 31 (Fall 2004), available at <http://www.cato.org/pubs/regulation/regv27n3/v27n3-3.pdf>. The continued viability of many of Ohio's distributors is threatened as a result of the continued efforts of manufacturers to consolidate the industry by moving to just a few Ohio distributors; this trend toward single state-side distributors collapses the three-tier system and defeats the State's interest in implementing the OABFA.

In light of these efforts by manufacturers, Amici Curiae are concerned about any efforts to limit the effectiveness of the OABFA. The decision of the Fifth District Court of Appeals contradicts the language and intent of the OABFA, ignores the legislative purpose and intent, and unfairly favors manufacturers over the bargained for contractual rights of local distributors.

Accordingly, Amici Curiae urges this Court to accept jurisdiction of the appeal filed by the Esber Beverage Company to analyze the OABFA and to declare that the Act does not permit a successor manufacturer to terminate a distributor without cause when the successor manufacturer has assumed a written contract with the distributor.

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Certificate of Service

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