ORIGINAL

IN THE SUPREME COURT OF OHIO

ESBER BEVERAGE COMPANY,	:	Ohio Supreme Court Case No. 12-0941
Appellant,	:	
vs.	:	On Appeal from the Stark County Court of Appeals, Fifth Appellate District
LABATT USA OPERATING COMPANY, LLC, et al.,	:	Court of Appeals Case Nos. 2011CA00113 and 2011CA00116
Defendants-Appellants.	:	

MEMORANDUM OF LABATT USA OPERATING CO, LLC, KPS CAPITAL PARTNERS, L.P., NORTH AMERICAN BREWERIES, INC. AND DOUG TOMLIN IN OPPOSITION TO JURISDICTION

James B. Niehaus (0020128) (Counsel of Record)
jniehaus@frantzward.com
Olivia L. Southam (0085476)
osoutham@frantzward.com
FRANTZ WARD LLP
2500 Key Tower, 127 Public Square
Cleveland, OH 44114-1304
Phone: 216-515-1660
Fax: 216-515-1650

Paul J. Pusateri (0067949)
ppusateri@milliganpusateri.com
MILLIGAN PUSATERI CO., LPA
4684 Douglas Circle
Canton, Ohio 44718
(330) 526-0770; (216) 330-409-0249 fax

Counsel for Appellees Labatt USA Operating Co, LLC, KPS Capital Partners, L.P., North American Breweries, Inc. and Doug Tomlin

Charles R. Saxbe
Sarah D. Morrison
Taft Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215-3413

Stephen W. Funk
Roetzel & Andress, LPA
222 S. Main St., Suite 400
Akron, Ohio 44308

Lee E. Plakas, Esq.
Gary A. Corroto, Esq.
Tzangas, Plakas, Mannos & Raies, Ltd.
220 Market Avenue, S., 8th Floor
Canton, Ohio 44702

Stanley R. Rubin, Esq.
437 Market Avenue North
Canton, Ohio 44702

Counsel for Appellant Esber Beverage Company

James L. Messenger, Esq.
Richard J. Thomas, Esq.
Henderson Covington Messenger Newman & Thomas Co., LPA
6 Federal Plaza Central, Suite 1300
Youngstown, Ohio 44503

Counsel for Appellee Superior Beverage Group Ltd.

John P. Maxwell
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA
158 N. Broadway
New Philadelphia, Ohio 44663

Counsel for Amicus Curiae Tramonte Distributing Company

Tracey Lancione Lloyd
Lancione Lloyd and Hoffman
3800 Jefferson Street
Bellaire, Ohio 43906

Counsel for Amicus Curiae Muxie Distributing

David W. Alexander
Emily E. Root
Squire Sanders (US) LLP
41 South High Street, Suite 2000
Columbus, Ohio 43215

Counsel for Amicus Curiae Beverage Distributors, Inc.

EXPLANATION OF WHY THIS CASE IS *NOT* OF PUBLIC OR GREAT GENERAL INTEREST

Appellant Esber Beverage Company ("Esber") asks this Court to interpret the Ohio Alcoholic Beverages Franchise Act (the "Act" or "OABFA"), R.C. 1333.82 et seq., in a way that not only contravenes the plain meaning of the Act, but also benefits **only** Esber, and benefits Esber *only in this case*. For those reasons, this case is not of public or great general interest, and appellees Labatt USA Operating Co, LLC, North American Breweries, Inc., KPS Capital Partners, L.P. and Doug Tomlin (collectively "Labatt USA") oppose Esber's request for jurisdiction.

Although Labatt USA strongly disagrees with Esber's convoluted interpretation of the Act, the simple fact is that, even if Esber's interpretation were correct, a ruling in favor of Esber on appeal would benefit only Esber. Esber's interpretation of the Act requires the Court to contort plain statutory language and disregard the General Assembly's clear intent. Reversing the Fifth District Court of Appeals' decision, moreover, would not offer any protection to other Ohio distributors, but would merely cause successor manufacturers to alter the structure of their acquisitions to avoid the anomalous outcome sought by Esber in this case.

COUNTERSTATEMENT OF THE CASE AND FACTS

The facts giving rise to this case are unusual, and unlikely to occur again. This case has its genesis in the decision by the Antitrust Division of the United States Department of Justice to challenge the acquisition of the Anheuser-Busch Companies by InBev N.V./S.A. The Antitrust Division decided to challenge the transaction because, as originally contemplated, the merged entity would have a large share of the market in upstate New York. To resolve that challenge, InBev N.V./S.A. agreed to sell the right to manufacture and import into the United States the

Labatt Brands[1] of beer. In a transaction that closed in March 2009, Labatt USA Operating Co, LLC acquired the Labatt Brands and various other assets and liabilities from InBev USA, a subsidiary of InBev N.V./S.A. Although Labatt USA had originally contemplated acquiring the stock of InBev USA, the final transaction was structured as an asset acquisition. As part of that asset acquisition, Labatt USA assumed various distribution agreements between InBev USA and numerous distributors around the country, including a distribution agreement between InBev USA and Esber.

At the time Labatt USA acquired the Labatt Brands from InBev, one of Labatt USA's affiliates had recently acquired the Genesee Brands[2] of beer. To compete effectively against the much larger brewers, such as MillerCoors and InBev/Anheuser-Busch, Labatt USA needed to consolidate the distribution of the two brands (Genesee and Labatt) into a single distributor in each market in Ohio.

Shortly after it acquired the Labatt Brands, Labatt USA invited each distributor in Ohio, including Esber, to make a presentation regarding the distributor's ability to represent both the Labatt and Genesee Brands. In response, Esber urged Labatt USA to retain it as the distributor for the Labatt Brands, to rely on Ohio Revised Code Section 1333.85(D) to terminate Superior Beverage Company ("Superior") as the distributor of the Genesee Brands and to appoint Esber as the distributor for the Genesee Brands in the markets then being serviced by Esber. Section 1333.85(D) provides, in part:

> 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

[1] The "Labatt Brands" are the Labatt Blue, Labatt Blue Light, Labatt Canadian Ale, Labatt Ice, John B. Labatt Classic, Sterling and Honey brands of beer.

[2] The "Genesee Brands" of beer are Genesee Cream Ale and the Dundee Ales and Lagers.

> 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.

R.C. 1333.85(D).

Notwithstanding Esber's urging, Labatt USA decided to continue using Superior as its distributor for the Genesee Brands, to rely on Section 1333.85(D) to terminate Esber and to appoint Superior as the distributor for the Labatt Brands in the markets then being serviced by Esber. Labatt USA notified Esber of this decision within 90 days of acquiring the Labatt Brands. Esber responded by filing this action.

Although Esber alleged numerous claims in its complaint, and presented multiple arguments to the Court of Appeals, Esber limits this appeal to the argument that Section 1333.85(D) only applies when the successor manufacturer acquires an "oral" franchise from the predecessor manufacturer, but not when the successor manufacturer acquires a "written" franchise. The Fifth District Court of Appeals rejected that argument, holding that:

> 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.

(Fifth Dist. App. Decision, at ¶ 35.)

For the reasons explained below, and as the Court of Appeals concluded, Esber's position is meritless and, regardless, this case is not one of public or great general interest.

Argument in Opposition to the Proposition of Law

I. Section 1333.85(D) applies regardless of how the successor manufacturer acquires the franchise.

As an initial matter, even if this Court were to credit Esber's novel interpretation of Section 1333.85(D), the proposition of law would apply only to a narrow set of facts – namely, an asset acquisition in which the acquiring manufacturer specifically assumes the predecessor's written contracts. Esber's interpretation thus fails to account for the broader scope of Section 1333.85(D), which, by its terms, applies whenever a successor manufacturer acquires the "stock or assets" of another manufacturer, and regardless of whether the acquisition was accomplished "through merger or acquisition."

In the present case, Labatt USA acquired the assets of InBev USA, and assumed InBev's written distribution agreements.[3] Esber argues that, because the asset acquisition included written agreements, Section 1333.85(D) does not apply. As a practical matter, however, this position makes little sense. If this Court were to credit Esber's proposition, successor manufacturers acquiring written distribution agreements could ensure that the termination provisions in Section 1333.85(D) applied simply by altering the form of an acquisition. For example, if InBev USA had been merged into Labatt USA, Labatt USA would have assumed the written distribution agreements as a matter of law. *See* R.C. 1701.82(A)(3). That form of transaction would clearly fall within the scope of Section 1333.85(D). *See* R.C. 1333.85(D) (Successor manufacturer has right to terminate when it "acquires . . . all of the . . . assets of another manufacturer through merger"). Similarly, if Labatt USA had acquired the stock of InBev USA, rather than its assets, Labatt USA would have acquired ownership of an entity that

---

[3] The assignment and assumption of the written distribution agreements was specifically required as part of the settlement of the antitrust claims.

was a party to an existing written distribution agreement. As between Esber and InBev USA, nothing would have changed. The written contract would have remained in existence and Esber would have continued to purchase the Labatt Brands from the same legal entity from whom it had been purchasing the Labatt Brands. Nevertheless, the termination provisions of Section 1333.85(D) would still apply. *See* R.C. 1333.85(D) (Successor manufacturer has right to terminate when it "acquires all . . . of the stock . . . of another manufacturer").

Esber's proposition of law elevates form over substance. Under Esber's interpretation, if the form of the transaction is an asset acquisition in which written distribution agreements are specifically assumed, Section 1333.85(D) does not apply. But, if the form of the transaction is a merger or stock acquisition, Section 1333.85(D) will apply, even if the successor manufacturer is assuming written distribution agreements.

In sum, Esber's proposition of law is not of public or great general interest because, even if adopted by this Court, it would only benefit Esber – and only in this case. If accepted, Esber's proposition of law would allow Esber to continue distributing the Labatt Brands, but neither Esber nor any other distributor will benefit from Esber's proposition of law in the future. Successor manufacturers can easily avoid Esber's proposition of law by structuring future acquisitions as mergers or stock transactions, or merely by declining to assume the written distribution agreements as part of an asset deal. Thus, Esber's proposition of law offers no protection to distributors in the future, but merely places an arbitrary limitation on the ways in which manufacturers can structure acquisitions or sales.

II. The Act does not distinguish between oral and written franchises.

Moreover, Esber's proposition of law is unpersuasive because it requires this Court to create a distinction that does not exist in the statutory language. Specifically, Esber argues that

Section 1333.85(D) of the Act only applies to oral franchises, and does not apply when a successor manufacturer assumes a written distribution agreement. This distinction between "oral" and "written" franchises, however, does not appear in Section 1333.85(D). In fact, that distinction is directly refuted by the definition of "franchise" in Section 1333.82(D), which defines a "franchise" to be "a contract or any other legal device used to establish a contractual relationship between a manufacturer and a distributor," without differentiating between oral and written contracts.

III. Esber complains that the Fifth District refused to apply the principles of *in pari materia*, but then Esber ignores those very same principles.

Esber's proposition of law also requires the Court to ignore the plain language of most of Section 1333.85(D). The key to Esber's entire argument is on page 9 of its Memorandum when it says:

> The Fifth District refused to apply principles of *in pari materia* and it specifically failed to give effect to the third sentence of §133.85(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.

In other words, Esber's argument is that the third sentence of Section 1333.85(D) requires the conclusion that Section 1333.85(D) only applies in situations in which a "franchise" does not exist between a "successor manufacturer" and a "distributor." If that were the correct interpretation of Section 1333.85(D), then the entire section has no meaning.

In its entirety, Section 1333.85(D) states:

> 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. If the successor manufacturer complies with the provisions of this division, just cause or consent of the distributor shall not be required for the termination or nonrenewal. Upon termination or nonrenewal of a **franchise** pursuant to this division, the distributor shall sell and the successor manufacturer shall repurchase the distributor's inventory of the terminated or nonrenewed product or brand as set forth in division (C) of this section, and the successor manufacturer also shall 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 or not renewed by the successor manufacturer. The value of the distributor's business that is directly related to the sale of the terminated or nonrenewed product or brand shall include, but shall not be limited to, the appraised market value of those assets of the distributor principally devoted to the sale of the terminated or nonrenewed product or brand and the goodwill associated with that product or brand.

(emphasis added). If, as Esber argues, the third sentence "necessarily presupposes that a franchise relationship does <u>not</u> already exist between the successor manufacturer and the distributor," then the reference to a "franchise" in the first, second and fourth sentences makes no sense. Esber wants this Court to read the third sentence in isolation, and ignore the plain meaning of the Section as a whole.[4] The proper interpretation of the third sentence is that, if notice is not received within the 90 day period, a franchise relationship that cannot be terminated without just cause is established between the parties.

[4] Esber might argue that the term franchise, as used elsewhere in Section 1333.85(D), means the franchise between the distributor and the predecessor manufacturer. That interpretation, however, results in the anomalous situation of a stranger to "a contractual relationship between a manufacturer and a distributor," *see* R.C. 1333.82(D), being given the right to terminate that contractual relationship. Moreover, it ignores the fact that, once the brands have been transferred, the predecessor manufacturer has cause to terminate the franchise. *See, e.g., Freedman Truck Center, Inc. v. General Motors Corporation,* 784 F. Supp. 167, 172 (D. N.J. 1992) (manufacturer had good cause to terminate a franchise because the manufacturer no longer distributed the products at issue); *Carolina Truck & Body Company v. General Motors Corporation*, 102 N.C. App. 262, 268 (N.C. App. 1991); *St. Joseph Equipment v. Massey-Ferguson, Inc.,* 546 F. Supp. 1245, 1248 (W.D. Wis. 1982).

IV. Esber's Proposition of Law is inconsistent with the intent of Section 1333.85(D).

Section 1333.85(D) was enacted in response to Canandaigua's acquisition of Guild Wineries in 1991. *See Tri-County Distributing, Inc. v. Canandaigua Wine Company*, 68 Ohio St. 3d 123 (1993). Canandaigua purchased some of Guild's assets, but did not acquire any of Guild's distribution agreements. Several Ohio distributors, including Esber, then sued to force Canandaigua to honor their distribution agreements. The lower courts split on the issue. *Compare Esber Beverage Company v. Canandaigua Wine Company,* 1992 Ohio App. LEXIS 5973 (5th Dist. 1992) (dismissing Esber's claim that a franchise existed with Canandaigua), *with Tri-County Distributing, Inc. v. Canandaigua Wine Company,* 1992 Ohio App. LEXIS 3054 (7th Dist 1992) (upholding Tri-County's claim that a franchise existed with Canandaigua). This Court ruled that Canandaigua had no liability to the distributors who had a franchise relationship with Guild Wineries. Upon acquisition of the Guild brands, Canandaigua was free to do business with, or not to do business with, any of the existing distributors. In other words, although Canandaigua acquired the Guild brands, it did not automatically acquire the franchises associated with those brands.

Prior to this Court's ruling in the *Tri-County* case, however, the General Assembly enacted Section 1333.85(D). The purpose of Section 1333.85(D) was to strike a balance between requiring a successor manufacturer to do business with the existing distributors (the result sought by Esber, and other distributors, in their lawsuits against Canandaigua) and permitting a successor manufacturer to decide how best to distribute its products (the result which occurred as a result of this Court's ruling in *Tri-County*). In Section 1333.85(D), the General Assembly reached a compromise: A successor manufacturer would be permitted to decide how best to distribute its products, but only if it compensated any distributors who were adversely affected by the successor manufacturer's decision to move the brands.

To make sure that manufacturers could not avoid the compensation obligation in Section 1333.85(D), the General Assembly sought to cast a wide net. Thus, Section 1333.85(D) applies when a successor manufacturer acquires either the "stock" **or** "assets" of another manufacturer. Section 1333.85(D) applies regardless of whether the acquisition was accomplished through "merger" **or** "acquisition." Section 1333.85(D) also applies even if the successor manufacturer acquires or is the assignee of just a particular product or brand of alcoholic beverage, rather than the whole business of the predecessor manufacturer.

To impose the compensation obligation on the successor manufacturer, the General Assembly created a statutory scheme in which the franchise now essentially "runs with the brands." A successor manufacturer cannot avoid the obligation to compensate a distributor who loses the franchise merely by not assuming the franchise as part of the acquisition. A successor manufacturer who acquires the brands now also acquires the franchise. That is why each sentence of Section 1333.85(D) references either directly or implicitly a "franchise." The franchise is imposed on the successor manufacturer by operation of law regardless of the manner by which the successor manufacturer acquired the franchise. Pursuant to Section 1333.85(D), therefore, the franchise is terminable without cause for 90 days after the acquisition regardless of the manner by which the successor manufacturer acquired the franchise. The Act simply does not limit the right to terminate depending on the form of the transaction by which the franchise is acquired. Esber's proposition of law is inconsistent with that clear intent of the statutory language.

CONCLUSION

Sections 1333.82 to 1333.87 are known as the "Ohio Alcoholic Beverages Franchise Act" – not the "Esber Franchise Protection Act." This Court should not accept Esber's invitation to contort the language of OABFA merely to protect Esber in an isolated situation. Instead, the Court should decline to accept jurisdiction in this case.

James B. Niehaus

James B. Niehaus (0020128)
jniehaus@frantzward.com
Olivia L. Southam (0085476)
FRANTZ WARD LLP
2500 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 515-1660; (216) 515-1650 fax

Paul J. Pusateri (0067949)
MILLIGAN PUSATERI CO., LPA
4684 Douglas Circle
Canton, Ohio 44718
(330) 526-0770; (216) 330-409-0249 fax

Counsel for Defendants Labatt USA Operating Co, LLC, KPS Capital Partners, L.P., North American Breweries, Inc. and Doug Tomlin

CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum of Labatt USA Operating Co, LLC, KPS Capital Partners, L.P., North American Breweries, Inc. and Doug Tomlin in Opposition to Jurisdiction* was sent by ordinary U.S. mail, postage prepaid, this 27th day of June 2012, to the following:

Charles R. Saxbe
Sarah D. Morrison
Taft Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215-3413

Stephen W. Funk
Roetzel & Andress, LPA
222 S. Main St., Suite 400
Akron, Ohio 44308

Lee E. Plakas, Esq.
Gary A. Corroto, Esq.
Tzangas, Plakas, Mannos & Raies, Ltd.
220 Market Avenue, S., 8th Floor
Canton, Ohio 44702

Stanley R. Rubin, Esq.
437 Market Avenue North
Canton, Ohio 44702

Counsel for Appellant Esber Beverage Company

James L. Messenger, Esq.
Richard J. Thomas, Esq.
Henderson Covington Messenger Newman & Thomas Co., LPA
6 Federal Plaza Central, Suite 1300
Youngstown, Ohio 44503

Counsel for Appellee Superior Beverage Group Ltd.

John P. Maxwell
Krugliak, Wilkins, Griffiths & Dougherty Co., LPA
158 N. Broadway
New Philadelphia, Ohio 44663

Counsel for Amicus Curiae Tramonte Distributing Company

Tracey Lancione Lloyd
Lancione Lloyd and Hoffman
3800 Jefferson Street
Bellaire, Ohio 43906

Counsel for Amicus Curiae Muxie Distributing

David W. Alexander
Emily E. Root
Squire Sanders (US) LLP
41 South High Street, Suite 2000
Columbus, Ohio 43215

Counsel for Amicus Curiae Beverage Distributors, Inc.

James B Niehaus

Counsel for Appellees Labatt USA Operating Co, LLC, KPS Capital Partners, L.P., North American Breweries, Inc. and Doug Tomlin