ORIGINAL

IN THE SUPREME COURT OF OHIO

ESBER BEVERAGE COMPANY,	:	
Appellant,	:	Case No. 2012-0941
v.	:	On Appeal from the Stark County Court of Appeals, Fifth Appellate District, Case Nos. 2011CA00113 & 2011CA00116
LABATT USA OPERATING CO., LLC *et al.*,	:	
Appellees.	:	

REPLY BRIEF OF APPELLANT ESBER BEVERAGE COMPANY

Charles R. Saxbe (0021952)
rsaxbe@taftlaw.com
Stephen C. Fitch (0022322)
Counsel of Record
sfitch@taftlaw.com
TAFT STETTINIUS & HOLLISTER LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413
(614) 221-2838/*fax (614) 221-2007*

Counsel for Appellant Esber Beverage Company

Stephen W. Funk (0058506)
sfunk@ralaw.com
ROETZEL & ANDRESS, LPA
222 S. Main St., Suite 400
Akron, Ohio 44308
(330) 849-6602/*fax (330) 376-4577*

Counsel for Appellant Esber Beverage Company

Lee Plakas
lplakas@lawlion.com
Gary Corroto
gcorroto@lawlion.com
Tzangas, Plakas, Mannos & Raies, Ltd.
220 Market Avenue South, Eighth Floor
Canton, OH 44702
(330) 455-6112/*fax (330) 455-2108*

Stanley R. Rubin (0011671)
437 Market Avenue North
Canton, OH 44702
(330) 455-5206/*fax (330) 455-5200*

Counsel for Appellant Esber Beverage Company

FILED
FEB 25 2013
CLERK OF COURT
SUPREME COURT OF OHIO

David W. Alexander (0017156)
Emily E. Root (0076378)
Squire Sanders (US) LLP
41 South High Street, Suite 2000
Columbus, Ohio 43215
(614) 365-2801/*fax* (614) 365-2499
david.alexander@squiresanders.com
emily.root@squiresanders.com

Counsel for Amicus Curiae Beverage Distributors, Inc.

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 (0046702)
Lancione Lloyd and Hoffman
3800 Jefferson Street
Bellaire, Ohio 43906
(740) 676-2034 /*fax* (740) 676-3931
traceylloyd@comcast.net

Counsel for Amicus Curiae Muxie Distributing Co., Inc.

James B. Niehaus (0020128)
jniehaus@frantzward.com
Olivia L. Southam (0085476)
osoutham@frantzward.com
Frantz Ward, LLP
2500 Key Tower, 127 Public Square
Cleveland, OH 44114-1304
(216) 515-1660/*fax* (216) 515-1650

Paul J. Pusateri (0067949)
ppusateri@milliganpusateri.com
Milligan Pusateri Co., LPA
4684 Douglas Circle
Canton, OH 44178
(330) 526-0770/*fax* (330) 408-0249

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

James L. Messenger (0009549)
jmessenger@hendersoncovington.com
Richard J. Thomas (0038784)
rthomas@hendersoncovington.com
Jerry R. Krzys (0078013)
jkrzys@hendersoncovington.com
Henderson, Covington, Messenger, Newman & Thomas Co., L.P.A.
6 Federal Plaza Central, Suite 1300
Youngstown, Ohio 44503
(330) 744-1148/*fax* (330) 744-3807

Counsel for Appellee Superior Beverage Group, Ltd.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY TO APPELLEES' ARGUMENTS 3

A. This Court Should Reject Appellees' Argument That The Plain Language Of R.C. 1333.85(D) Compels The Conclusion That A Successor Manufacturer Has The Statutory Right To Terminate A Franchise Relationship That It Has Established With A Distributor By Written Contract. 3

B. The Court Should Reject The Argument That R.C. § 1333.85(D) Creates An "Exception" To The General Rule That A Manufacturer Cannot Terminate A Franchise Relationship Without Just Cause 9

C. Esber's Proposition of Law Applies Whenever A Successor Manufacturer Acquires The Brands Subject To The Terms Of A Written Franchise Agreement. 13

D. The Court Should Not Disregard The Legislative History Surrounding The Adoption Of R.C. § 1333.85(D) 14

E. The Court Should Reject Appellees' New Factual Argument That Labatt Did Not "Enter Into" or "Assume" A Written Contract With Esber Beverage 15

F. The Recent Sale Of KPS's Membership Interest in NAB Is Not Relevant To This Appeal. 17

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Brown v. Martinelli, 66 Ohio St.2d 45 (1981) 8

Esber Beverage Co. v. Labatt USA Operating Company, LLC, 5th Dist. Nos. 2011CA00113 & 2011CA00116, 2012-Ohio-1183 (March 12, 2012) 16

Family Medicine Foundation v. Bright, 96 Ohio St.3d 183, 2002-Ohio-4034 14

Maita Distributors, Inc. of San Mateo v. DBI Beverage, Inc., 667 F. Supp.2d 1140 (N.D. Cal. 2009) 5

State ex rel. Carna v. Teays Valley Local School Dist. Bd. Of Edn., 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193 3

State ex rel. Coble v. Lucas Cty. Board of Elections, 130 Ohio St.3d 132, 2011-Ohio-4550, 956 N.E.2d 282 3

Tri-County Distributing, Inc. v. Canandaigua Wine Company, Inc., 68 Ohio St.3d 123, 1993-Ohio-239, 623 N.E.2d 1206 ..... 1, *passim*

Tri-County Wholesale Distributors, Inc. v. The Wine Group, Inc. No. 2:10-cv-693, 2010 WL 3522973 (S.D. Ohio Sep. 2, 2010), *aff'd*, 2012 WL 2478357 (6th Cir. June 29, 2012) 18

Statutes

R.C. 1333.83 ..... 1, *passim*

R.C. 1333.85 12

R.C. 1333.85(B)(3) 18

R.C. 1333.85(D) ..... 1, *passim*

INTRODUCTION

In their Merit Briefs, Appellees Labatt USA Operating Co. ("Labatt") and Superior Beverage Co. ("Superior") do not dispute that there are two mechanisms provided in R.C. 1333.83 by which a manufacturer becomes subject to a protected franchise relationship with a distributor under the Ohio Alcoholic Beverages Franchise Act ("the Act" or "the OABFA"): (1) by entering into a written contract with the distributor or (2) by distributing beer and wine, without a written contract, for more than 90 days. (Superior Brief, p. 17); (Labatt Brief, pp. 1-2). Appellees likewise acknowledge that this Court confirmed the scope of R.C. 1333.83 in *Tri-County Distributing, Inc. v. Canandaigua Wine Company, Inc.*, 68 Ohio St.3d 123, 1993-Ohio-239, 623 N.E.2d 1206, wherein it held that Canandaigua had the *common law right to terminate* its predecessor's distributors without cause or compensation only because Canandaigua had *not* established its own franchise relationship with its predecessor's distributors and thus was not bound by the just cause provisions of the Act. (*See* Labatt Brief, pp. 1-2). As Labatt itself concedes, R.C. 1333.85(D) was enacted in response to the *Canandaigua* litigation. *Id.* This is a critical concession that should not be overlooked by this Court.

In *Canandaigua*, this Court held that the "threshold question" in any OABFA case is "whether a franchise relationship exists" between a manufacturer and a distributor under R.C. 1333.83. This long-standing statutory framework was not altered by the adoption of R.C. 1333.85(D). If a successor manufacturer (or any manufacturer) itself becomes subject to a franchise relationship by written contract or by distributing beer or wine, without a written contract, for more than 90 days, then the manufacturer becomes bound by the just cause provisions of the Act. Appellees do not dispute this fact in their Briefs. Rather, Appellees argue that R.C. 1333.85(D) was intended by the General Assembly to create a statutory exception to

the general rule in favor of successor manufacturers by affirmatively granting them "a completely new statutory right" to terminate a binding, written franchise agreement that the successor manufacturer has itself assumed or entered into with a distributor. (Labatt, pp. 1-2); (Superior Brief, p. 22).

Appellees' argument is contrary to the plain language of R.C. 1333.85(D) and undermines the Act's clear preference in favor of written, privately-negotiated agreements between manufacturers and distributors. The General Assembly's response to the circumstances present in *Canandaigua* was <u>not</u> to grant successor manufacturers a new statutory termination right they did not need (because the common law already supplies it). Rather, as discussed in Esber's Merit Brief, R.C. 1333.85(D) was adopted to provide new statutory protections to distributors who, like those in *Canandaigua*, do not have a protected franchise relationship with a successor manufacturer following a transfer of brands and are thus subject to termination without just cause under the common law. Specifically, R.C. 1333.85(D) expressly conditioned a successor manufacturer's common law rights on its provision of expedited "written notice of termination, nonrenewal or renewal" and, more importantly, in the event of termination or nonrenewal, provided such distributors with a statutory remedy of diminished value compensation that was not otherwise available under the common law.

The Court therefore should reject Appellees' argument that R.C. 1333.85(D) was intended to grant a new statutory right of termination in favor of successor manufacturers. By its terms, application of R.C. 1333.85(D) is limited to those circumstances in which a successor manufacturer has a common law right of "termination, nonrenewal or renewal," and thus applies when, and only when, brands are transferred by any means without a written franchise agreement. Conversely, R.C. 1333.85(D) has no application where, like here, brands are

transferred with a written franchise agreement, because the distributor continues to be protected from termination without just cause. Accordingly, the Court should reject Appellees' arguments and adopt Esber's proposition of law.

REPLY TO APPELLEES' ARGUMENTS

A. This Court Should Reject Appellees' Argument That The Plain Language Of R.C. 1333.85(D) Compels The Conclusion That A Successor Manufacturer Has The Statutory Right To Terminate A Franchise Relationship That It Has Established With A Distributor By Written Contract.

Appellees both argue that the language of the statute is "clear and unambiguous," and that the Court need only examine the plain language of R.C. 1333.85(D) to conclude that the statute "permits a successor manufacturer to terminate a predecessor's distributor regardless of whether the distributor's franchise agreement is directly binding upon the successor manufacturer." (Labatt Brief, pp. 9-10); (Superior Brief, pp. 13-14). In making this argument, however, both Labatt and Superior do not dispute that this Court "must look at the four corners of the enactment to determine the intent of the enacting body," "must give effect to every word and clause in the statute," and "should avoid that construction which renders a provision meaningless or inoperative." *State ex rel. Coble v. Lucas Cty. Board of Elections*, 130 Ohio St.3d 132, 2011-Ohio-4550, 956 N.E.2d 282, ¶ 29; *State ex rel. Carna v. Teays Valley Local School Dist. Bd. Of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18-19 (citations omitted). In determining the meaning of R.C. 1333.85(D), therefore, the Court should not limit its inquiry only to the first sentence of the statute, in isolation, as the Fifth District erroneously did. Rather, the Court must examine *all* of the statutory language of R.C. 1333.85(D) and in the context of the statutory framework established by the Act as a whole.

Indeed, in their Briefs, Appellees acknowledge that the first sentence of R.C. 1333.85(D) imposes a <u>notice</u> requirement on a successor manufacturer following a transfer of brands.

(Superior Brief, p. 16); (Labatt Brief, p. 11). The plain language of that provision provides that a 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." *See* R.C. 1333.85(D) (emphasis added). Importantly, the common law does not require that the successor manufacturer give advance or prompt notice of termination to a distributor. Thus, prior to the enactment of R.C. 1333.85(D), a successor manufacturer could allow distribution for up to six months and then, as Canandaigua had done, terminate its predecessor's distributors without cause on the eve of a protected statutory franchise relationship being established between them under R.C. 1333.83. By providing that "*written notice of* termination, nonrenewal or renewal" must be given within 90 days after a brand acquisition, the General Assembly expressly conditioned a successor manufacturer's existing common law options of "termination, nonrenewal or renewal" on the provision of expedited written notice, effectively cutting the duration of those common law options in half for the benefit of unprotected distributors.

Nonetheless, Appellees argue that the requirement of written notice in the first sentence of R.C. 1333.85(D) was actually intended by the General Assembly to grant a successor manufacturer "a completely new statutory right" to terminate any written franchise agreement that the successor manufacturer has itself assumed from its predecessor, regardless of its terms. (Superior Brief, p. 22). The plain language of R.C. 1333.85(D) does not support Appellees' argument. The General Assembly presumably could have expressly provided that a successor manufacturer "may terminate without just cause" any written franchise that has become legally binding upon it, <u>but it did not do so</u>. While the distinction between "may *give written notice of* termination, nonrenewal or renewal" and "may terminate without cause" may seem slight, that

distinction cannot be disregarded, especially when Appellees' position relies upon a strict and isolated construction of the language in the first sentence of R.C. 1333.85(D).

Indeed, at least one district court has recognized this distinction as decisive, determining that the mere imposition of statutory notice and compensation requirements upon a successor manufacturer in the event of a transfer of brands "does not grant a successor beer manufacturer the right to terminate existing contracts" and thus "a successor is bound by the terms of the contracts it has assumed." *Maita Distributors, Inc. of San Mateo v. DBI Beverage, Inc.*, 667 F.Supp.2d 1140, 1146-1148 (N.D. Cal. 2009). The reasoning of this case applies equally here. The statutory notice and compensation requirements imposed by R.C. 1333.85(D) circumscribe a successor manufacturer's *common law* options of "termination, nonrenewal or renewal;" they do not, as Appellees contend, expressly grant a successor manufacturer a new statutory right to vitiate a binding and enforceable contract.

The General Assembly's inclusion of the word "renewal" in the first sentence confirms that R.C. 1333.85(D) conditions existing common law options rather than grants a new statutory right. "Renewal" simply refers to the successor manufacturer's common law option *not* to terminate. However, in order to adopt Appellees' interpretation of R.C. 1333.85(D), this Court would have to find that the "may give written notice of *** renewal" language also creates a new statutory *right of renewal* <u>enforceable against an unwilling distributor</u>. Even if there could be such a thing under the Act, this interpretation would yield unnecessary and unintended results. Further, if, as Appellees argue, the Act now requires that "franchises run with the brands," then a successor manufacturer would not need a statutory right of *renewal*, as the franchises will have already automatically renewed under Appellees argument. (*See* Labatt Brief, p. 2). Thus, because the plain language "may give notice of" cannot be interpreted to grant a new statutory

right of renewal, the same language cannot be interpreted to grant a new statutory right of termination. Thus, Appellees' plain language argument must fail.

Contrary to Appellees' interpretation, the language actually used by the General Assembly in R.C. 1333.85(D) determines the scope of its application. R.C. 1333.85(D) operates to require written notice to the predecessor's distributors only *if,* following a transfer of brands by any means, *a successor manufacturer has the option of "termination, nonrenewal or renewal."* This Court's decision in *Canandaigua* makes clear (and Appellees concede) that a successor manufacturer has a common law option of "termination, nonrenewal or renewal" of its predecessor's distributor *only if* the successor manufacturer itself is not bound by a written franchise agreement after a transfer of brands and *only until* the successor manufacturer itself allows the distributor to distribute the newly acquired brands for ninety days without a written agreement. It follows then, by operation of its plain language, R.C. 1333.85(D) applies only when brands are transferred without a written contract.

This interpretation of the first sentence of R.C. 1333.85(D) is also supported by the plain language of the third sentence of R.C. 1333.85(D). Indeed, it is the <u>only</u> interpretation of the first sentence that can be reconciled with and give full effect and meaning to the language purposefully utilized by the General Assembly in the third sentence. In their Briefs, Appellees acknowledge that the addition of the third sentence to R.C. 1333.85(D) was the result of simultaneous amendments to both R.C. 1333.83 and R.C. 1333.85(D), and they further concede that, by virtue of their identical language, these *provisions* "address the same situation" and "fulfill[] the same purpose." (Superior Brief, p. 16); (Labatt Brief, p. 11).[1] In particular, under

[1] Labatt incorrectly states that the subject language – a "franchise relationship is established" – in R.C. 1333.83 "was added to ABFA at the same time as Section 1333.85(D)." (Labatt Brief, p. 11). *Since 1985*, R.C. 1333.83 has provided that "a franchise relationship is established"

both provisions, the common law relationship between a distributor and a manufacturer, or its successor, is transformed into a protected statutory franchise relationship after the manufacturer or its successor distributes beer or wine for more than ninety days. Critically, this transformation is necessary and occurs, under R.C. 1333.83 and R.C. 1333.85(D), only in the absence of a written agreement between a distributor and a manufacturer or its successor. This must be true because, if a written agreement already exists between the distributor and the manufacturer, or its successor, then there is no need to "establish" a protected franchise relationship between them by operation of statutory law. Accordingly, R.C. 1333.85(D) must only apply, like the last sentence of R.C. 1333.83, when there is no written franchise agreement between the successor manufacturer and a distributor.

Here, Appellees fail to explain how their interpretation of the Act gives literal effect to the "a franchise relationship is established" language in the third sentence of R.C. 1333.85(D). While Labatt argues that "the third sentence of Subsection (D) *** fills the gap when a successor manufacturer does not give 'written notice of termination, nonrenewal, or renewal of a franchise to a distributor,'" it fails to acknowledge that there is no gap, and there is no need for the imposition of a franchise relationship *by operation of statute*, if the successor manufacturer is already subject to a written franchise agreement with the distributor. On the other hand, despite its acknowledgement that R.C. 1333.83 and R.C. 1333.85(D) were simultaneously amended so

---

following a specified duration of distribution without a written contract. Initially, R.C. 1333.83 provided that a statutory franchise was established when a manufacturer allowed a distributor to distribute six months or more without a written contract. In 1994, R.C. 1333.83 was again amended in favor of distributors to provide that "a franchise relationship is established" after only 90 days without a written contract. At the same time, R.C. 1333.85(D) was amended to add mirror language. Thus, both amendments were intended to address when a statutory franchise is established *in the absence of a written agreement.*

as to contain *identical* language, Superior inexplicably asserts that one provision applies in the absence of a written agreement, but the other does not. (Superior Brief, p. 22).

This meritless argument ignores well-established rules of statutory construction, which require that these provisions be construed together. *See Brown v. Martinelli*, 66 Ohio St.2d 45, 49 (1981). More importantly, Superior's interpretation creates an anomaly that clearly was not intended by the General Assembly. Under Appellees' interpretation of R.C. 1333.85(D), if a successor manufacturer bound by a written distribution agreement elects not to provide notice of termination or nonrenewal within 90 days after its brand acquisition, then a statutory franchise "is established" under the third sentence of 1333.85(D), and the privately-negotiated *written* franchise agreement, no matter what its terms, is replaced with an *unwritten* statutory franchise supplying only the minimum statutory terms and conditions. A successor manufacturer could thus avoid payment of diminished value compensation by not terminating within 90 days but nonetheless replace the written franchise agreement (which may be more favorable to the distributor) with an unwritten, minimally protective statutory franchise. Yet, this is the very interpretation and result advocated by Appellees and adopted by the Court of Appeals below.

Appellees essentially concede that R.C. 1333.83 establishes a clear statutory preference for written agreements between a manufacturer and a distributor, setting forth privately-negotiated and agreed upon terms and conditions of distribution. (Labatt Brief, p. 11); (Superior Brief, p. 17). Indeed, the *only* circumstance in which the General Assembly is willing to establish a minimally-protective franchise relationship by operation of law is in the *absence* of a written agreement. Yet, in making their statutory arguments, Appellees fail to explain why the General Assembly would establish a statutory franchise relationship between a successor manufacturer and a distributor in the third sentence of R.C. 1333.85(D), if they are already

bound by a written franchise agreement. In light of the General Assembly's clear preference for written agreements, therefore, there is simply no support for an interpretation of R.C. 1333.85(D) that would subvert a privately-negotiated, written agreement with a minimally protective statutory franchise. Because the third sentence of R.C. 1333.85(D) yields an unintended result when a written contract already exists between a successor manufacturer and a distributor, the plain language of (D) should not be construed to apply when brands are transferred with a written agreement.[2]

B. The Court Should Reject The Argument That R.C. § 1333.85(D) Creates An "Exception" To The General Rule That A Manufacturer Cannot Terminate A Franchise Relationship Without Just Cause.

In support of their argument that R.C. 1333.85(D) creates a "new statutory right of termination" without cause, Appellees rely on legislative intent, asking this Court to find that the General Assembly intended to create an "exception to the general rule" in favor of successor manufacturers. (Labatt Brief, p. 1). As discussed below, however, a successor manufacturer has never been automatically subject to the general rule following a transfer of brands. Thus, Labatt must argue that the Act was amended to require that a successor manufacturer assume its predecessor's franchises and, at the same time, to grant a new statutory right to terminate them. In particular, Labatt argues:

> In response to the Canandaigua situation, the General Assembly amended ABFA to *essentially have the franchise run with the brands* when a successor

[2] As a red herring, Appellees note that, upon NAB's request, Esber made a presentation as to its ability to distribute the Genesee brands of Labatt USA's sister company. (Labatt Brief, p. 6; Superior Brief, p. 9, fn. 5.) The uncontroverted evidence establishes that Esber's President, Dave Esber, did so believing that the subject brands were *not* subject to a written distribution agreement and were therefore subject to termination without cause upon their transfer to NAB. (Third Affidavit of Dave Esber, ¶¶ 7-8, A-121-122.) Thus, Esber's compliance with NAB's request is completely consistent with Esber's position herein that R.C. 1333.85(D) does not apply when brands are transferred, as in this case, *with* a written agreement.

> manufacturer acquires brands from another manufacturer. Rather than force the successor manufacturer do business with the existing distribution network, however, the General Assembly added Subsection (D) to Section 1333.85, which *created an exception to the general rule* and permits a successor manufacturer to terminate franchise without just cause.

(Labatt Brief, p. 2) (emphasis added). This argument should be rejected for two reasons.

First, there is absolutely no support in the statutory language for the proposition that the Act was amended in order to impose a manufacturer's franchises upon its successor as a matter of law. Contrary to Superior's assertions that "there was nothing addressing a successor situation" prior to the enactment of R.C. 1333.85(D), the General Assembly made clear in 1985 that a manufacturer's statutory franchise would not be automatically inherited by the successor when it amended R.C. 1333.83 to provide that a statutory franchise relationship is only established if "the manufacturer, *or the successor* or assigns," forces a distributor to distribute without a contract for six months (now ninety days) or more. R.C. 1333.83 (140 v. H 502, eff. 4/4/85). By its terms, this provision expressly provides that a statutory franchise established between a manufacturer and distributor by operation of law will *never* be imposed upon the successor manufacturer, no matter how the brands are transferred (including merger and stock acquisition). Rather, the successor manufacturer *itself* must allow distribution without a written contract for the required duration. Thus, unlike alcoholic beverage franchise statutes in other states, the OAFBA has *never required*, upon the transfer of brands from one manufacturer to another, that a successor manufacturer must also assume or inherit the statutory franchises of its predecessor.

Because the General Assembly has declined to impose a manufacturer's statutory franchises upon its successor by operation of statutory law, there is a "gap" in statutory protection whenever a brand is transferred without a written franchise agreement. Under those

circumstances, a successor manufacturer has the common law option of "termination, nonrenewal or renewal," so long as it exercises its option prior to the establishment of a new statutory franchise relationship under R.C. 1333.83. Thus, a successor manufacturer has a common law right to terminate a distributor without cause unless and until the successor manufacturer itself is bound by a written or statutory franchise. These are the precise circumstances present in *Canandaigua*, and there is nothing in R.C. 1333.85(D) that changes this long-standing statutory framework.

In this regard, Labatt does not dispute that R.C. 1333.85(D) was added by the General Assembly in direct response to the circumstances present in *Canandaigua*. (Labatt Brief, pp. 1-2). However, contrary to Appellees' interpretation, the General Assembly did not amend the Act to require that a manufacturer's franchises must be assumed by its successor; in that respect, the Act remained unchanged. Instead, the General Assembly added R.C. 1333.85(D) in order to fill the "gap" exposed in *Canandaigua* by providing new statutory relief to unprotected, at-will distributors who, following a transfer of brands, are subject to termination by a successor manufacturer under the common law without just cause or compensation. Indeed, Labatt recognizes that the "most important[]" aspect of R.C. 1333.85(D) is that terminated distributors will now be entitled to diminished value compensation, a remedy that was not available under the common law. (Labatt Brief, p. 2).

Second, Labatt's statutory argument should be rejected because it attributes inefficiency to the General Assembly that should not be presumed by this Court—*i.e.,* the mandate that a successor manufacturer assume its predecessor's franchises with the simultaneous grant of a right to terminate the inherited franchises. Nonetheless, Appellees must argue that a manufacturer's franchises "run with the brands," because it is critical to their ultimate contention

that R.C. 1333.85(D) "creates an exception to the general rule." In order for R.C. 1333.85(D) to create an exception in favor of successor manufacturers, however, this Court would have to find that successor manufacturers are subject to the general rule in the first instance. Because they are not, Appellees' contention must be rejected.

In their Briefs, Appellees also argue that the fourth sentence of R.C. 1333.85(D) "confirms" that (D) is an exception to the general rule. The Court should reject this argument. In the fourth sentence of R.C. 1333.85(D), the General Assembly simply recognizes a successor manufacturer's *existing* common law options of termination or nonrenewal — "just cause or consent of the distributor shall not be required for the termination or nonrenewal" — in order to expressly condition the exercise of these common law options upon the *newly imposed statutory notice requirement* — "*if* the successor manufacturer complies with the provision of this division" — *i.e.,* by providing expedited, written notice to its predecessor's distributor of its chosen common law option ("termination, non-renewal or renewal").

Similarly, the introductory language of R.C. 1333.85 does not support Appellees' contention. Instead, the newly imposed statutory notice requirement discussed above is one of the "except[ions]" referred to in the introductory language of R.C. 1333.85. Since the Act's original adoption in 1974, the introductory language of R.C. 1333.85 has required that a manufacturer provide 60 days *advance* written notice of termination. By amendment, section (D) requires that a successor manufacturer provide written notice of whether it intends to exercise its common law termination rights within 90 days *after* its acquisition of brands. Thus, contrary to Appellees' assertions, the introductory language of R.C. 1333.85—"[e]xcept as provided in divisions (A) to (D) of this section"—does not compel the conclusion that (D) is a wholesale exception to the general rule set forth in R.C. 1333.85.

C. Esber's Proposition Of Law Applies Whenever A Successor Manufacturer Acquires The Brands Subject To The Terms Of A Written Franchise Agreement.

Contrary to Appellees' assertions, Esber is not asking this Court to limit application of R.C. 1333.85(D) to only certain *transactions.* (Labatt Brief, pp. 3, 8); (Superior Brief, p. 20). Esber is instead asserting that the plain language of R.C. 1333.85(D) applies following *any* transfer of brands—whether by stock acquisition, merger, asset purchase or assignment—which results in the distributor being without a protected franchise and the successor manufacturer thus having common law options of "termination, nonrenewal or renewal." In this circumstance, R.C. 1333.85(D) operates to provide the unprotected distributor with the statutory protections of expedited notice and diminished value compensation.

This circumstance will occur after *every* transfer of brands where the predecessor manufacturer and a distributor have operated only under an unwritten, statutory franchise. This is true because R.C. 1333.83 makes clear that a *statutory* franchise established by operation of law is not automatically inherited by a successor and is instead established only in the event the successor itself allows distribution for 90 days or more without a written contract. Thus, a distributor with only an unwritten statutory franchise becomes unprotected and subject to common law termination without cause immediately upon a transfer of brands by any means, including merger and stock acquisition, and is thus in need of statutory protection.

Esber agrees, therefore, that the introductory language of R.C. 1333.85(D) was drafted broadly to provide protection to an unprotected distributor after a transfer of brands *by any means*. Nonetheless, R.C. 1333.85(D) only applies when a distributor is in need of statutory protections following such a transfer. Conversely, R.C. 1333.85(D) does not apply after *any* transfer that results in the distributor having a protected franchise relationship with the successor

manufacturer, because in that instance, the successor manufacturer does not have the common law option of "termination, nonrenewal and renewal" contemplated by the express language of R.C. 1333.85(D). This is a critical distinction that should not be overlooked by this Court. If a successor manufacturer acquires the brands subject to a written distribution agreement, there is nothing in R.C. 1333.83 or R.C. 1333.85(D) that requires the subversion of these privately-negotiated contract rights. Yet, Appellees are asking for a statutory interpretation amounting to a wholesale vitiation of privately-negotiated contracts, no matter what their terms. Given the General Assembly's stated preference for written franchise agreements, it should be concluded that the General Assembly would in fact prefer the enforcement of a binding and enforceable written franchise agreement over the imposition of a minimally-protective statutory franchise.

D. The Court Should Not Disregard The Legislative History Surrounding The Adoption Of R.C. 1333.85(D).

Recognizing that the legislative history works against their interpretation of the Act, Appellees repeatedly argue that R.C. 1333.85(D) is "unambiguous," and that the Court therefore need not to examine any legislative history in deciding its meaning. The Court should reject this argument as a matter of law. Under Ohio law, a statute is ambiguous "if the language of the statute is susceptible of more than one reasonable interpretation." *Family Medicine Foundation v. Bright*, 96 Ohio St.3d 183, 2002-Ohio-4034, ¶ 8. Here, Esber certainly has advanced an interpretation of R.C. 1333.85(D) that is both reasonable and consistent with the plain language of the statute as a whole. Esber's interpretation in fact was adopted by the trial court, and it is more consistent with the statutory framework established by R.C. 1333.83 and this Court's opinion in *Canandaigua*. Accordingly, given that the parties fully agree R.C. 1333.85(D) was adopted by the General Assembly in response to the *Canandaigua* litigation, this Court should

not disregard this important legislative history in determining whether Labatt USA has the statutory right to terminate Esber's written distribution agreement.

E. The Court Should Reject Appellees' New Factual Argument That Labatt Did Not "Enter Into" Or "Assume" A Written Contract With Esber.

In their Merit Briefs, Appellees now advance the argument that Labatt was permitted to terminate Esber's Distribution Agreement without cause because it never "entered into" or "assumed" a contractual relationship with Esber. (Labatt Brief, p. 15). These new factual arguments are meritless and should be rejected.

Labatt does not deny that it was required to,[3] and did in fact,[4] "acquire" Esber's Distribution Agreement when it purchased the Labatt brands from InBev USA. (*See* Labatt Brief, p. 15). In earlier briefing, Labatt USA acknowledged that it had "assumed" the Distribution Agreement,[5] and both the trial court and Fifth District Court of Appeals' decisions were based upon findings that Labatt had assumed the Esber Distribution Agreement when it

---

[3] It is undisputed that Labatt was required by the Antitrust Final Judgment to acquire all of InBev USA's wholesaler contracts for the Labatt brands in order to maintain continuity of distribution, and thus all of the wholesaler contracts were transferred from InBev USA to Labatt under the Amended and Restated Purchase Agreement, §2.1 "Purchase of Assets and Assumption of Liabilities." (*See* Affidavit of Raquel Palmer, ¶ 5, Supp. p. A-31); (Trial Court's Judgment Entry, dated 11/29/10, p. 13).

[4] In settlement of the *Esber v. InBev* litigation, Esber was able to negotiate a unique and favorable written distribution agreement with Labatt USA's predecessor, InBev USA. The record contains undisputed evidence that Esber and InBev USA intended for the Distribution Agreement to be binding upon InBev USA's successors. (Esber Aff. ¶13, Supp. A-4; Distribution Agreement, § 5(b), Supp. A-13) (granting Esber distribution rights for any new or extended brands supplied or imported by InBev USA or *any successor-in-interest*)). Irrespective of whether the Distribution Agreement itself required its assumption upon Labatt's acquisition of the Labatt brands, it is undisputed that Labatt did in fact acquire and become bound by the Esber Distribution Agreement.

[5] *See* Labatt USA's Fifth Dist. Appellate Brief, 5th Dist. Case No. 2009-CA-0034, p. 18 ("One difference between this case and the [Canandaigua] case is that in this case, Labatt USA Operating Co., LLC *assumed* a written distribution agreement that had existed between Esber and InBev USA LLC").

acquired the Labatt brands. *See Esber Beverage Co. v. Labatt USA Operating Company, LLC*, 5th Dist. Nos. 2011CA00113 & 2011CA00116, 2012-Ohio-1183, ¶¶ 9, 35 (March 12, 2012); Trial Court's Judgment Entry, dated Nov. 29, 2010, pp. 13, 17. Indeed, contrary to Superior's assertion that the Distribution Agreement terminated upon InBev USA's transfer of the brands, Labatt has *specifically admitted* in the proceedings below that the Distribution Agreement "governed Esber's relationship with Labatt" *after* the effective date of Labatt's acquisition of the Labatt brands, and it continues to do so today. (*See* Labatt USA's Post-Hrg. Memorandum, p. 8, Supp. A-138).[6]

No matter how Labatt's acquisition of the Distribution Agreement is characterized, however, the fact remains that, in accordance with the statutory framework set forth in the Act, upon its simultaneous acquisition of the Labatt brands and wholesaler contracts, Labatt became subject to a statutorily-protected franchise relationship with Esber that was subject to the just cause provisions of the Act. Accordingly, unlike the distributor in *Canandaigua*, Esber was <u>not</u>, following the transfer of brands to Labatt USA, an *unprotected* distributor who was without a written franchise agreement and subject to termination under the common law. Because, following the transfer of the Labatt brands and the Distribution Agreement, Labatt and Esber were subject to a protected franchise relationship, R.C. 1333.85(D) simply does not apply.

---

[6] With questionable standing to do so, Superior (not Labatt) contends that a waiver provision in the Distribution Agreement between Esber and Labatt bars the filing of this declaratory judgment action. (Superior Brief, pp. 24-25). This is a meritless argument that is not the subject of the present appeal. The waiver provision in the distribution agreement does not apply to this case because this declaratory judgment action is premised on Labatt's assumption of the Distribution Agreement and the resulting inapplicability of R.C. 1333.85(D), not a breach of the Distribution Agreement itself. Indeed, contrary to Superior's bald assertions, it is undisputed that Esber filed the Complaint herein on August 14, 2009, within 90 days of receiving the termination notice in May 2009. Accordingly, Superior's waiver argument is meritless and should be disregarded.

F. The Recent Sale Of KPS's Membership Interest in NAB Is Not Relevant To This Appeal.

In its Brief, Labatt notes that KPS has sold its membership interest in Labatt USA's parent company, NAB, to Cerverceria Costa Rica, S.A. ("CCR") (Labatt Brief, p. 7, fn. 7). Esber agrees with Labatt that this transaction does not moot this appeal. The CCR transaction is not part of the appellate record and is irrelevant to the legal issue presented by this appeal. Further, pursuant to the trial court's judgment entry incorporating the earlier grant of a preliminary injunction, Esber will continue to distribute the Labatt brands under the terms of the Distribution Agreement pending final determination *of this appeal*. Accordingly, we agree with Labatt that there continues to be a "live controversy" that has not been mooted by the recent sale of KPS's membership interest in NAB.

Further, the appeal is not moot because, as Labatt points out, CCR also claims to be a "successor manufacturer" with a statutory right to terminate the Distribution Agreement under R.C. 1333.85(D). That fact alone confirms this case is not moot, in that, unfortunately for Esber, the legal question presented by this appeal presents issues capable of repetition, yet evading review. Indeed, over the past eight years, three different corporate entities have attempted to terminate Esber's long-standing distribution of the Labatt brands alone, admittedly *without cause* and solely for the stated purpose of consolidation. The Court therefore should uphold Esber's long-standing distribution rights by holding that manufacturers cannot use R.C. 1333.85(D) a sword to terminate a valid and legally enforceable franchise agreement.

This is especially important because brand transfers among beer manufacturers were not generally routine when the General Assembly enacted R.C. 1333.85(D) in 1993, in order to provide unprotected distributors, like those in *Canandaigua*, with statutory compensation in the event of a common law termination following the transfer of brands. Now beer and wine

producers around the world are routinely engaging in mergers and acquisitions in order to compete on an international level. Even if it were true that the systematic elimination of all small, locally-owned distributors could significantly affect the bottom line of these large international alcoholic beverage conglomerates, the fact remains that termination for purposes of consolidation is specifically prohibited under the OABFA. *See* R.C. 1333.85(B)(3); *Tri-County Wholesale Distributors, Inc. v. The Wine Group, Inc.* No. 2:10-cv-693, 2010 WL 3522973 (S.D. Ohio Sep. 2, 2010), *aff'd*, 2012 WL 2478357 (6th Cir. June 29, 2012). Indeed, exercising its Twenty-First Amendment right and heightened interest in regulating the sale and distribution of alcohol within Ohio's borders, the General Assembly has repeatedly adopted legislation to protect the brand distribution rights of Ohio distributors against the economic self-interest and unequal bargaining power of large, out-of-state manufacturer and, importantly, to preserve the sanctity of the three-tier system of distribution. For every small, local distributor that is put out of business by operation under R.C. 1333.85(D), another more powerful distributor grows closer to becoming the *only* statewide distributor, and the three-tier system of distribution is jeopardized.

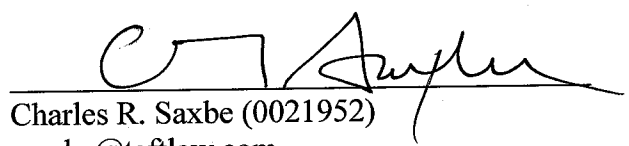
Nonetheless, every time there is a transfer of ownership interests in brands, successor manufacturers attempt to circumvent the prohibition against consolidation by terminating local distributors without cause under R.C. 1333.85(D), regardless of whether a successor manufacturer *itself* is bound by a written franchise agreement. Based upon the plain language of R.C. 1333.85(D) and the Act as a whole, this Court should hold that R.C. 1333.85(D) was enacted to provide unprotected distributors with a statutory remedy in the event that they are subject to common law termination following a transfer of brands, and that R.C. 1333.85(D) has no application where a successor manufacturer itself is already bound by a written contract

following the transfer of brands because the distributor in that circumstance is already protected by the Act from common law termination without cause. This Court should hold once and for all that R.C. 1333.85(D) was enacted to add another layer in the protective cloak of Ohio distributors, not as sword for out-of-state manufacturers to vitiate private, written distribution agreements.

CONCLUSION

For the reasons set forth above and in Esber's Merit Brief, this Court should adopt Esber Beverage's proposition of law and conclude 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.

Respectfully submitted,



Charles R. Saxbe (0021952)
rsaxbe@taftlaw.com
Stephen C. Fitch (0022322)
Counsel of Record
sfitch@taftlaw.com
TAFT STETTINIUS & HOLLISTER LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413
(614) 221-2838
(614) 221-2007 – Facsimile

Stephen W. Funk (0058506)
sfunk@ralaw.com
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
(330) 376-2700
(330) 376-4577 – facsimile

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant Esber Beverage Company was sent by ordinary U.S. mail, postage prepaid, to the following on February 25, 2013:

James B. Niehaus
Jennifer L. Whitney
Frantz Ward, LLP
2500 Key Tower, 127 Public Square
Cleveland, OH 44114-1304

Paul J. Pusateri
Milligan Pusateri Co., LPA
4684 Douglas Circle
Canton, OH 44178

James L. Messenger
Richard J. Thomas
Jerry R. Krzys
Henderson, Covington, Messenger,
Newman & Thomas Co., L.P.A.
6 Federal Plaza Central, Suite 1300
Youngstown, Ohio 44503

Lee E. Plakas
Gary A. Corroto
Tzangas, Plakas, Mannos & Raies, Ltd.
220 Market Avenue South, Eighth Floor
Canton, OH 44702

Stanley R. Rubin
437 Market Avenue North
Canton, OH 44702

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

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

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

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

Charles R. Saxbe
COUNSEL FOR APPELLANT,
ESBER BEVERAGE COMPANY

31345873.1