

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,
LABATT USA OPERATING CO., LLC <i>et</i>	:	Case Nos. 2011CA00113 & 2011CA00116
<i>al.</i> ,	:	
	:	
Appellees.	:	

APPELLANT'S MOTION FOR RECONSIDERATION AND/OR FOR
CLARIFICATION OF THE COURT'S OPINION, DATED OCTOBER 17, 2013

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*

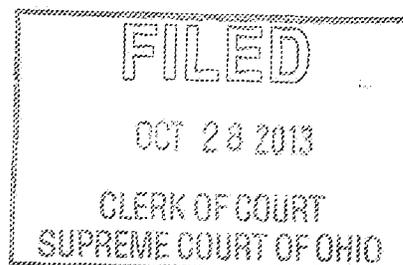
Stephen W. Funk (0058506)
sfunk@ralaw.com
ROETZEL & ANDRESS, LPA
222 S. Main St., Suite 400
Akron, Ohio 44308
(330) 849-6602/fax (330) 376-4577

*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*



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.*

MOTION FOR RECONSIDERATION AND/OR FOR CLARIFICATION

On October 17, 2013, this Court issued an Opinion in favor of Labatt USA Operating Company ("Labatt Operating") that permits a successor manufacturer to terminate *any* franchise, even the successor manufacturer's own franchise, following the transfer of a brand. *See Esber Beverage Co. v. Labatt USA Operating Co.*, 2013-Ohio-4544, 2013 WL 5647792 (Oct. 17, 2013). Appellant Esber Beverage Company ("Esber") files this Motion for Reconsideration and/or for Clarification because the Court's holding is overly broad and will result in a number of unintended consequences that are inconsistent with the reasoning of the Court's Opinion.

In Paragraph 1 of the Opinion, this Court held that R.C. 1333.85(D) was intended to permit "successor manufacturers to assemble their own team of distributors so long as the successor manufacturers provide timely notice and compensate those distributors who are not being retained." (Opinion, ¶ 1). This holding suggests that the Court intended to apply R.C. 1333.85(D) to a successor manufacturer who acquires the brands, but has not yet decided whether to accept or retain its predecessor's distributors. Indeed, the plain language of Section 1333.85(D) expressly applies upon the "transfer of *brands*," not a transfer of *franchises*, and thus recognizes that a successor manufacturer may acquire the brands without necessarily having to retain the predecessor's distributors. Accordingly, in Paragraph 1 of the Court's Opinion, this Court held that a successor manufacturer has the right to decide within 90 days whether to terminate, renew or non-renew the "*distributor's franchise*," *i.e.*, any written franchise agreement or statutory franchise relationship that has arisen by operation of law between the distributor and the predecessor manufacturer. (*Id.* at ¶ 1) (emphasis added). Under the Court's reasoning, however, once a successor manufacturer decides to retain a predecessor's distributor, then R.C. 1333.85(D) would no longer apply.

Notwithstanding this reasoning, the Court then proceeds in Paragraph 14 of its Opinion to hold that R.C. 1333.85(D) grants a successor manufacturer with the right to terminate any franchise, including a written contract that the successor manufacturer itself has assumed or entered into with a predecessor's distributor. (Opinion, ¶ 14). By so doing, the Court's Opinion appears to grant a successor manufacturer *who has voluntarily decided* to retain a particular distributor, and to become legally bound by the terms of a written distribution agreement, with the statutory right to turn around and terminate that very same agreement. Rather than limit the application of R.C. 1333.85(D) to the termination of the *distributor's* pre-existing franchise, therefore, Paragraph 14 of this Court's Opinion confers a new statutory right upon a successor manufacturer to terminate *its own* franchise, *i.e.*, the franchise that the successor manufacturer has voluntarily decided to establish with a predecessor's distributor.

This holding is inconsistent with the reasoning of Paragraph 1 and this Court's opinion in *Tri-County Distributing, Inc. v. Canandaigua Wine Co., Inc.*, 68 Ohio St.3d 123, 623 N.E.2d 1206 (1993). In *Canandaigua*, this Court held that the "threshold question" in any case under Ohio's Alcoholic Beverages Franchise Act ("ABFA") is "whether a franchise relationship exists" between a manufacturer and a distributor. *Tri-County Distributing, Inc. v. Canandaigua Wine Company*, 68 Ohio St.3d 123, 128, 1993-Ohio-239, 623 N.E.2d 1206. This is the leading Supreme Court case on how a "franchise relationship" can be established between a distributor and a manufacturer or its successor under the ABFA. Yet, *Canandaigua* is not discussed at all in the Court's Opinion, even though the parties agreed that R.C. 1333.85(D) was adopted by the General Assembly in direct response to the circumstances presented in *Canandaigua*. Moreover, this Court did not address the plain language of the third sentence of R.C. 1333.85(D), which provides that a "franchise relationship is established" between a successor manufacturer and a

distributor if a successor manufacturer does not provide “written notice of termination, nonrenewal, or renewal of the franchise to a distributor of the acquired product or brand” within 90 days, thereby demonstrating the General Assembly’s intent that R.C. 1333.85(D) applies only when a “franchise relationship” has not already been established between the distributor and the successor manufacturer under R.C. 1333.83 and this Court’s opinion in *Canandaigua*.

Given the importance of the issues to distributors across the State of Ohio, it is critical that this Court reconsider and/or clarify the language of its Opinion in order to resolve this internal inconsistency between Paragraphs 1 and 14 of the Opinion and to address how the Court’s ruling impacts the Court’s prior opinion in *Canandaigua* and the plain language of the third sentence in R.C. 1333.85(D). This Motion for Reconsideration does not seek to re-argue the points and authorities raised in the original briefs, but asks this Court to reconsider and/or to clarify its Opinion based upon the distinction between a successor manufacturer who acquires only the brands (but has not yet decided the distributors that it intends to retain, as Paragraph 1 provides) and a successor manufacturer who acquires the brands and voluntarily accepts and agrees to establish its own franchise with the predecessor’s distributor, as Labatt Operating did in this case. In this latter situation, the successor manufacturer will have exercised its option to retain its predecessor’s distributor and to establish its own franchise with the distributor. Yet, under the language set forth in Paragraph 14 of the Court's Opinion, it appears that the Court is not recognizing any distinctions at all, and has adopted a bright-line rule that would permit a successor manufacturer to terminate *any* franchise, including its own.

Indeed, as it currently stands, this Court's Opinion may result in a number of unintended consequences that are inconsistent with the reasoning set forth in Paragraph 1 of the Court's Opinion. This Court has held that a statute should be construed “to avoid unreasonable or absurd

results.” See *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 26 (courts construe statutes and rules to avoid unreasonable or absurd results) (citing *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, 838 N.E.2d 658, ¶ 28). Here, the bright-line standard established by Paragraph 14 of the Court's Opinion would appear to permit the termination of *any* written distribution agreement, no matter what its terms or the circumstances of its origin, as long as the termination occurs within 90 days following a transfer of brands. Under this bright-line rule, a successor manufacturer could enter into a brand new written agreement with its predecessor's distributor and then turn around and terminate that “franchise” 89 days later without just cause under R.C. 1333.85(D). This is clearly not a result contemplated by the General Assembly or the Act, as a whole, which, as this Court held in Paragraph 10 of its Opinion was adopted “to eliminate unfair practices by beer and wine manufacturers in their dealings with distributors.” (*Id.* at ¶ 10) (citation omitted).

The Court's Opinion also should be reconsidered and clarified because it has adopted an overly broad interpretation of R.C. 1333.85(D) that raises significant constitutional issues. See *Maita Distributors, Inc. of San Mateo v. DBI Beverage, Inc.*, 667 F. Supp.2d 1140, 1148 & n. 3 (N.D. Cal. 2009) (“[i]f the statute were interpreted to grant a right to cancel contracts that were otherwise terminable only for cause, it would appear that this would result in an unconstitutional impairment of contracts”). As this Court held in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, “[t]he freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry” and constitutionally protected by the Article I, Section 10, Clause 1 of the United States Constitution from a “state supreme court's interpretation of a state statute that infringes upon the right to contract.” *Id.* at ¶ 9. In particular, this Court stated:

The freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry, so much so that the United States Constitution specifically protects against state encroachment upon contracts. Clause 1, Section 10, Article I, United States Constitution. In order to protect the integrity of contracts, the United States Constitution gives the United States Supreme Court the authority to overrule a state supreme court's interpretation of a state statute that infringes upon the right to contract.

Id.

Here, the Court's interpretation of R.C. 1333.85(D) raises constitutional implications because it grants a successor manufacturer with the right to terminate *any* written franchise agreement following a transfer of brands, regardless of when or how the franchise agreement arose. *See Maita Distributors, Inc.*, 667 F. Supp.2d at 1148, n. 3 (construing similar notice and compensation provision as not granting a right to cancel existing contracts because “it would appear that this [interpretation] would result in an unconstitutional impairment of contracts”). Indeed, if this Court were to authorize a successor manufacturer to terminate its own existing contracts with a distributor in order to transfer the distributor’s franchise rights to another private distributor, it would raise a significant constitutional issue under the Takings Clause of the U.S. and Ohio Constitutions, even if the successor manufacturer were required to pay just compensation under the Act. As this Court has held, “it is axiomatic that the federal and Ohio constitutions forbid the state to take private property for the sole benefit of a private individual, even when just compensation for the taking is provided.”¹ *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 43 (internal citations omitted) (citing *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 2661 (2005)) (“it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another

¹ This constitutional safeguard applies not only to the taking of real property interests, but also to other forms of personal property. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998); *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003); *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

private party B, even though A is paid just compensation”). Thus, in order to avoid these constitutional issues, the Court should reconsider and/or clarify its Opinion.

CONCLUSION

This Court's Opinion not only applies to Esber's distribution agreement with Labatt Operating. It establishes a new, far-reaching precedent that, unless reconsidered and/or clarified by this Court, will permit the termination of a wide-range of written distribution agreements that are established between a successor manufacturer and a distributor. Given the importance of the issues presented and the precedential impact of the Court's opinion on the constitutional, statutory, and contractual rights of Ohio's distributors, Esber respectfully requests that this Court reconsider and/or clarify its Opinion, dated October 17, 2013, and hold that R.C. 1333.85(D) does not permit a successor manufacturer to terminate a written distribution agreement without just cause if the successor manufacturer has voluntarily decided to retain the distributor and to become subject to a written distribution agreement that does not permit termination without just cause.

Respectfully submitted,

 (0081158)
Stephen W. Funk (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
(330) 376-2700
sfunk@ralaw.com

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

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2013, a true and correct copy of the foregoing Motion for Reconsideration and/or for Clarification of Appellant Esber Beverage Company was sent by ordinary U.S. mail, postage prepaid, to the following counsel of record in this case:

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

Charles R. Saxbe (0021952)
Stephen C. Fitch (0022322)
Taft, Stettinius & Hollister LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413

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

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


Stephen W. Funk

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
Columbus, Ohio 43215


Stephen W. Funk