ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF APPELLEES LABATT USA OPERATING CO, LLC, KPS CAPITAL PARTNERS, L.P., NORTH AMERICAN BREWERIES, INC. AND DOUG TOMLIN IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION AND/OR FOR CLARIFICATION OF THE COURT'S OPINION, DATED OCTOBER 17, 2013

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MEMORANDUM

In its Motion For Reconsideration and/or for Clarification of the Court's Opinion, Dated October 17, 2013 ("Motion for Reconsideration"), Appellee Esber Beverage Company ("Esber") states: "This Motion for Reconsideration does not seek to re-argue the points and authorities raised in the original briefs . . . ." Motion for Reconsideration at 3. Contrary to this disclaimer, that is exactly what the Motion for Reconsideration does.

In its Motion for Reconsideration, Esber argues that R.C. 1333.85(D) distinguishes 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 distributors, as Labatt Operating did in this case." Motion for Reconsideration at 3. Esber, however, already made the same argument in its Merit Brief:

> R.C. 1333.85(D) applies, however, only to a successor manufacturer who *has not yet established* a franchise relationship with a local distributor, and thus does not apply where, as here, a successor manufacturer itself has established its own direct franchise relationship with its predecessor's distributor.

Merit Brief at 2-3.

In its Motion for Reconsideration, Esber argues:

> 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).

Motion for Reconsideration at 4. Esber made the identical argument in its Merit Brief when it claimed that the Court of Appeals erred because its ruling:

> created an anomalous result that would allow a successor manufacturer to establish a protected franchise relationship with a distributor under R.C. 1333.83, and then, without just cause, turn around and terminate that very same franchise relationship under R.C. 1333.85(D).

Merit Brief at 16.

As another example, Esber complains on page 2 of its Motion for Reconsideration that "this Court did not address the plain language of the third sentence of R.C. 1333.85(D)." Esber argued precisely that point in its Merit Brief when it claimed that "the Fifth District's interpretation of R.C. 1333.85(D) conflicts with the third sentence of R.C. 1333.85(D) . . . ." Merit Brief at 23.

This Court has already considered and rejected nearly every argument Esber makes in its Motion for Reconsideration. The one argument Esber now makes in its Motion for Reconsideration that it did not make in its Merit Brief, or in the Court of Appeals, or in the trial court, is that the Court's interpretation of R.C. 1333.85(D) results in an unconstitutional impairment of contract or an unconstitutional taking of property without due process.

Neither of these constitutional arguments was raised below, even though the case law Esber cites in support of both arguments predates this case. In fact, Esber cited to the *Maita Distributors* decision in its Merit Brief (pages 22 and 27), and cited that decision to both the trial court and the Court of Appeals, but never cited it for its new proposition that R.C. 1333.85(D) unconstitutionally impairs franchise agreements. Having failed to raise these arguments in the courts below, or in its assignment of error to this Court, Esber has waived its right to do so in a Motion for Reconsideration.

Even if Esber could raise its constitutional arguments at this juncture, those arguments have no merit. First, this Court has repeatedly rejected similar impairment of contract claims. *See, e.g., Doe v. Ronan* (2010), 127 Ohio St. 3d 188, 192; *Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St.3d 164, 168. As this Court explained in *Doe v. Ronan*:

> The Ohio Constitution provides that the "general assembly shall have no power to pass * * * laws impairing the obligation of contracts." Section 28, Article II, Ohio Constitution.

> This provision applies to contracts that "existed prior to the effective date of the statute [at issue in the litigation]." *Aetna Life Ins. Co. v. Schilling (1993), 67 Ohio St.3d 164, 168, 1993 Ohio 231, 616 N.E.2d 893*. In contrast, "contracts entered into *on or after* the effective date of [a statute] are subject to the provisions of the statute." (Emphasis sic.) Id.

Doe v. Ronan, supra, 127 Ohio St. 3d at 192. Because the franchise agreement at issue in this case was "entered into *on or after* the effective date of" R.C. 1333.85(D), application of the statute to the franchise is not an impairment of contract.

Second, Esber's argument that R.C. 1333.85(D) effects an unconstitutional taking is equally without merit. *See Tri County Wholesale Distributors, Inc. v. Labatt USA Operating Co.*, 2013 U.S. Dist. LEXIS 148832, *43 (S.D. Ohio 2013) ("the Court finds that Plaintiffs are unlikely to succeed on the merits of their argument that the application of *O.R.C. § 1333.85(D)* to written distribution contracts constitutes an unconstitutional taking under either the Ohio or United States Constitutions"). In *Tri County*, the plaintiffs made the identical argument that Esber now raises for the first time in its Motion for Reconsideration, i.e., that application of R.C. 1333.85(D) to written contracts results in an unconstitutional taking. The *Tri County* Court rejected that argument.

Initially, the *Tri County* Court disagreed that the termination of a franchise was analogous to "a traditional public function, namely, the taking of private property through eminent domain." *Id.* at 38. The Court noted that, "A private party's termination of a private contract . . . is not equivalent to a taking by eminent domain." *Id.* at *39.

Next, the *Tri County* Court rejected the argument that the existence of a statute authorizing the termination converted the termination into state action. The Court noted that, "taken to its logical extreme, Plaintiffs' argument would convert every contract dispute that finds its way into court into a government action. That cannot be the case." *Id.* at *41.

Finally, the *Tri County* Court ruled:

> to the extent the Distributors have a property interest in their alcoholic beverage franchises above and beyond that afforded by ordinary contract law, it stems from state law, i.e., from the Franchise Act.
>
> Because state law created and defined that enhanced property interest, the state legislature is likewise permitted to redefine its scope. Here, in authorizing a successor manufacturer to terminate a franchise upon payment of 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," *O.R.C. § 1333.85(D)*, the state legislature redefined a distributor's property interest in a franchise agreement and returned it to the common law norm. That redefinition of the property interest does not constitute a taking.

Id. at *42-43.

The Court's ruling in *Tri County* is consistent with the entire body of law applicable to whether governmental regulation that affects a *private* contract right actually constitutes a taking. Under that body of law, courts have been extremely hesitant to find legislation to constitute a taking, even where the legislation frustrates or even completely vitiates the right of a party to a private contract. R.C. 1333.85(D) does not amount to a taking under these well-established principles.

As the court in *Melo-Tone Vending v. United States*, 666 F.2d 687 (1st Cir. 1981), recognized, "Not every governmental act which interferes with, impairs or ultimately destroys property rights constitutes a taking of property for which compensation is due under the fifth amendment." In fact, most legislative actions that impact private contracts are not takings.

Courts analyzing the constitutionality of legislative actions that affect contracts consistently focus on whether the government action appropriates the private contract, or, instead, only incidentally affects the contract or frustrates contract performance. The latter does *not* constitute a taking. This analysis is rooted in the United States Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923). In *Omnia*, the plaintiff contracted

with Allegheny Steel to purchase steel plates at a very favorable price. Before Allegheny shipped the steel, however, the United States Congress passed legislation appropriating all of the steel from Allegheny and directing Allegheny not to comply with its contract with the plaintiff. The plaintiff claimed that the legislation destroyed the value of its contract and, therefore, resulted in an unconstitutional taking. The Supreme Court rejected that argument, reasoning that "[t]here are many laws and governmental operations which injuriously affect the value of or destroy property . . . but for which no remedy is afforded." *Id.* at 508-09. It distinguished between government action that directly appropriates a party's contractual right and government action that merely causes a consequential loss, and found that consequential loss is not compensable:

> [F]or consequential loss or injury resulting from lawful governmental action, the law affords no remedy. . . . If under any power, a contract or other property is taken for public use, the Government in liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable.

Id. at 510.

Courts in the years since *Omnia*, in analyzing whether a taking has occurred, have continued to focus on the distinction between direct appropriation and indirect, or consequential, impact on the contract. For example, in *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008), the plaintiff was in the business of providing airport security, and had contracts with various airlines to provide those services. Following the September 11th attacks, Congress passed legislation effectively transferring responsibility for airport security from the airlines to the government. As a result, the airlines terminated their contracts with the plaintiff. The plaintiff brought suit alleging that the legislation "rendered the contracts and the going concern value and goodwill associated with Huntleigh's security screening business worthless." *Id.* at 1379. In response, the government argued that the effects were indirect consequences of the

legislation and merely frustrated Huntleigh's interests. *Id.* at 1379. The court, citing *Omnia*, agreed and found no taking:

> [A]ny losses Huntleigh suffered were indirect, arising only as a consequence of ATSA's elimination of the airlines' security screening obligations. In other words, ATSA had the effect of "frustrating" Huntleigh's business expectations, which does not form the basis of a cognizable takings claim.

Id. at 1380.

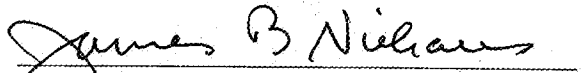
The Federal Circuit similarly found that there was no taking in *767 Third Ave. Assocs. v. United States*, 48 F.3d 1575 (Fed. Cir. 1995). In that case, the U.S. government froze the assets of the Republic of Yugoslavia which, at the time, was a tenant of the plaintiff. The Republic of Yugoslavia then terminated its lease with the plaintiff. The plaintiff sued, claiming that by freezing the assets, the government had effectively taken the value of the lease. Citing *Omnia*, the court found that "no taking occurs when, as occurred in this case, expectations under a contract are merely frustrated by lawful government action not directed against the takings claimant." *Id.* at 1581. It stated: "[T]he government here did not take action against Sage. It may have frustrated the achievement of Sage's contractual rights with [the Republic of Yugoslavia], but that did not amount to a taking." *Id.* at 1582.

This Court has applied a similar analysis, distinguishing a direct appropriation of an entity's property from action that merely affects the contractual rights of a party. In *Ohio Valley Advertising Corp. v. Linzell* (1958), 168 Ohio St. 259, the plaintiff had a contract with a property owner to erect advertising posters on the property, but the property was either appropriated or sold for use in highway or railroad improvements, and the state did not honor the plaintiff's contracts. The Court rejected the plaintiff's claim that its contractual rights had been taken. It found that the state had appropriated the land, not the plaintiff's contractual rights to advertise on the property. *Id.* at 262.

This Court's interpretation of R.C. 1333.85(D) does not constitute either an unconstitutional impairment or a taking. Esber's request for clarification on this new issue should be denied.

CONCLUSION

This Court should deny Esber's Motion for Reconsideration. Esber has merely repeated arguments already considered and rejected by this Court, or raised new arguments that were not raised below and that have been repeatedly rejected by other Courts.



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CERTIFICATE OF SERVICE

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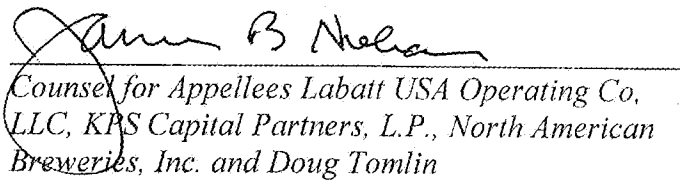

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