

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

RESPONSE OF DEFENDANT-APPELLEE SUPERIOR BEVERAGE GROUP, LTD.
 IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION
 AND/OR FOR CLARIFICATION

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**RESPONSE IN OPPOSITION TO MOTION
FOR RECONSIDERATION AND/OR FOR CLARIFICATION**

Esber's Motion for Reconsideration should be denied. A motion for reconsideration may not be used for "reargument of the case." Ohio S.Ct. Prac. R. 18.02(B). Beyond this prohibition, this Court's Rules of Practice and prior precedent offer little guidance on standards applicable to a motion for reconsideration. Nearly every appellate district, however, has adopted a general test for motions for reconsideration under which the application must call to the court "an obvious error in the decision or an issue that was not considered when it should have been considered." *State v. Crawford*, 1st Dist. No. C-030540, 2004 Ohio 4505, ¶3.¹ Esber's Motion for Reconsideration should be denied because: (1) it points to no obvious error or issue that this Court failed to consider, and it amounts to nothing more than an attempt to reargue the case; (2) it improperly attempts to raise constitutional issues that Esber failed to raise earlier in the case; and (3) this Court's interpretation of the Ohio Alcoholic Beverage Franchise Act, R.C. 1333.82 *et seq.* (the "Act") does not create constitutional contract impairment or takings issues.

1. Esber raises no obvious error or issue that this Court failed to consider, and its Motion for Reconsideration merely reargues the case.

The central issue in the Motion for Reconsideration is Esber's claimed distinction under the Act "between a successor manufacturer who acquires only the brands (but has not yet decided the distributors it intends to retain...) and a successor manufacturer who acquires brands

¹ See also *State v. Gillispie*, 2nd Dist. No. 24456, 2012 Ohio 2942, ¶9; *State v. Wheeler*, 4th Dist. No. 04CA1, 2005 Ohio 479, ¶7; *Sylvester v. Keister*, 5th Dist. No. 2010-CA-00078, 2011 Ohio 682, ¶2; *State v. Mendoza*, 6th Dist. No. WD-10-008, 2013 Ohio 755, ¶2; *State v. Gilbert*, 7th Dist. No. 08 MA 206, 2013 Ohio 4783, ¶3; *Cleveland Clinic Foundation v. Bd. of Zoning Appeals, City of Cleveland*, 8th Dist. No. 98115, 2012 Ohio 6008, ¶2; *State v. Fry*, 9th Dist. No. 23211, 2007 Ohio 3240, ¶2; *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. Nos. 11AP-64, 11AP-282, 2011 Ohio 6664, ¶2; *State v. Jones*, 11th Dist. No. 2001-A-0027, 2003 Ohio 621, ¶5; *BAC Home Loans Servicing, LP v. Kolenich*, 12th Dist. No. CA2012-01-001, 2013 Ohio 155, ¶7. The Third District does not appear to have considered or adopted a standard for reviewing a motion for reconsideration.

and voluntarily accepts and agrees to establish its own franchise with the predecessor's distributors." Motion for Reconsideration at p.3. Esber argued this exact issue in both its Merit Brief and Reply Brief. *See e.g.* Merit Brief at p.16 ("the plain language of R.C. 1333.85(D) does not permit a successor manufacturer who itself has established its own direct 'franchise relationship' to terminate that 'franchise relationship' without just cause"); Reply Brief at pp.13-14 ("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...").

Resolution of this issue in Esber's favor served as the primary basis for the trial court's decision, and the Fifth District Court of Appeals reversed after resolving the issue against Esber. This Court considered Esber's argument with respect to the claimed distinction, as evident from the following: "Esber asserts that the Ohio Alcoholic Beverage Franchise Act does not permit a successor manufacturer to terminate a distributor's franchise without just cause within the 90-day period when the successor manufacturer has itself entered into or assumed a written contract with the distributor. *We disagree.*" *Id.* at ¶14. Not only did this Court consider the claimed distinction, this Court rejected it.

Esber now seeks reconsideration by offering a factual premise far from the facts of this case. Esber now asserts that under this Court's decision "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 p.4. This case does not involve such facts. Defendant-Appellee, Labatt USA Operating Co., L.L.C. ("Labatt Operating") did not enter into a brand new franchise agreement with Esber and, in fact, no document exists that both Esber and Labatt Operating signed as parties. To the contrary, Labatt Operating entered an Asset Purchase Agreement with InBev

USA under which it agreed to purchase all assets relating to the Labatt brands.² This Court addressed a successor manufacturer transaction following an asset acquisition, not a successor manufacturer entering a brand new agreement with a distributor and then terminating the new agreement.

Assuming *arguendo* that Labatt Operating assumed Esber's franchise as a result of the asset acquisition (thus ignoring that Esber's franchise agreement was un-assumable), Esber Motion for Reconsideration continues to re-assert arguments while ignoring the illogical results thereof. As this Court recognized, the clear and unambiguous language of R.C. 1333.85(D) 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 as a result of the form of the transaction. This is evident from the references to stock acquisitions and mergers in R.C. 1333.85(D). A change in ownership of a company's stock does not render the company's contractual obligations non-binding upon the company. Similarly, the entity surviving a merger continues to be bound by the contractual obligations of the entity merged out of existence. *Morris v. Silvas*, 27 Ohio St.2d 26, 31, 272 N.E.2d 105 (1971); *RBS Citizens, N.A. v. Zigdon*, 8th Dist. No. 93945, 2010 Ohio 3511, ¶43, quoting *ASA Architects, Inc. v. Schlegel*, 75 Ohio St.3d 666, 672, 665 N.E.2d 1083 (1996), quoting R.C. 1701.82(A)(3).

The legislature is presumed to know the law when it included stock acquisitions and mergers in R.C. 1333.85(D). *Summit Beach, Inc. v. Glander*, 153 Ohio St. 147, 150, 91 N.E.2d 10 (1950). Knowing the law, the legislature expressly permitted a successor manufacturer to

² At no time was Labatt Operating bound by Esber's franchise agreement, because the franchise agreement provided that if InBev USA, for any reason, should "cease functioning as the United States Supplier of any one or more [of InBev USA's] Products, [Esber] agrees that...**this Agreement shall terminate immediately** but only with regard to such [InBev USA] Products that [InBev USA] ceases to import." In other words, Esber's franchise agreement was functionally un-assumable.

terminate pre-existing distributors following a stock acquisition or merger, as long as the successor manufacturer complied with the 90-day notice requirement and paid diminished value compensation. Termination is statutorily authorized even though existing franchise agreements are binding obligations on the successor manufacturer following a stock acquisition or merger. The fact that the legislature permitted termination of franchise agreements following a stock acquisition or merger completely dispenses with Esber's erroneous argument that R.C. 1333.85(D) does not permit a successor manufacturer to terminate the predecessor manufacturer's distributors if a franchise agreement is binding on the successor manufacturer. *See* Motion for Reconsideration at p.3; Merit Brief at p.17; Reply Brief at pp.13-14.

There is no internal inconsistency between paragraphs 1 and 14 of this Court's Opinion. Paragraph 1 refers to a transfer of "all...rights relating to a particular brand" and paragraph 14 refers to a "sale, merger, or acquisition." *Id.* R.C. 1333.85(D) references each of these transaction forms and permits termination in each case. As a practical matter, there is no difference, under R.C. 1333.85(D), between a stock acquisition or a merger (where a successor manufacturer automatically is bound by the predecessor's franchise agreements) and an asset acquisition, like that involved in this case, where a successor manufacturer acquires of all assets related to the distribution of particular brands, including the franchise agreements necessary for continued distribution of the brands. In each type of transaction included in the statute, successor manufacturers need a time to evaluate their distribution network (the 90-day termination period) and "assemble their own team of distributors." *Esber Beverage Co.*, 2013 Ohio 4544, ¶1. Holding that a successor manufacturer may not terminate a franchise agreement that is binding upon the successor manufacturer, as Esber continues to re-argue, would lead to

the illogical result of deleting the words “stock,” “merger” and “acquisition” from R.C. 1333.85(D).

Similarly, the full third sentence of R.C. 1333.85(D), which provides “[i]f notice is not received within this ninety-day period, a franchise relationship is established between the parties”, is not rendered meaningless by this Court’s interpretation of the statute. R.C. 1333.85(D) requires every successor manufacturer to provide notice to distributors of the termination or nonrenewal of the distributor’s franchise within 90 days following a merger, stock or asset acquisition, or brand purchase. The “franchise is established” language in R.C. 1333.85(D) addresses the establishment of a franchise when a successor manufacturer fails to comply with statutory requirements for written notice of how the successor manufacturer intends to treat a distributor’s franchise. If the successor manufacturer fails to give the required notice within 90 days, then R.C. 1333.85(D) ends the successor manufacturer’s ability to provide notice of termination or nonrenewal of a distribution agreement following one of the statutory transactions. Denying a successor manufacturer the right to terminate the franchise agreement based upon the form of the transaction, as Esber urges, is a result that flies in the face of R.C. 1333.85(D).

There also is no need to reconsider the Opinion to explore its impact on *Tri County Distrib., Inc. v. Canandaigua Wine Co., Inc.*, 68 Ohio St. 3d 123, 623 N.E.2d 1206 (1993). *Canandaigua* applied a prior version of R.C. 1333.83 in the context of a successor manufacturer transaction, and was decided before R.C. 1333.85(D) was enacted. As this Court recognized, R.C. 1333.85(D) now expressly governs franchises following successor manufacturer transactions. *Esber Beverage Co.*, 2013 Ohio 4544, ¶¶1, 14.

2. Esber abandoned its constitutional issues by failing to raise them earlier in the litigation.

Throughout these proceedings, Labatt Operating and Defendant-Appellee Superior Beverage Group, Ltd. (“Superior”) consistently argued that the plain language R.C. 1333.85(D) permits a successor manufacturer to terminate pre-existing distributors, even in the context of stock acquisitions and mergers – transactions where pre-existing franchise agreements automatically are binding obligations of the successor manufacturer. Esber was well-aware of any potential constitutional issues resulting if a court agreed with this interpretation of the statute. Esber did not raise any constitutional issues before the trial court or the Fifth District Court of Appeals. When the Fifth District Court of Appeals rendered its decision reversing the trial court, Esber likewise was aware of potential constitutional issues. Yet, Esber did not raise any constitutional issues to this Court. *See Esber Beverage Co.*, 2013 Ohio 4544, ¶8 (referencing Esber’s single proposition of law).

Only after the trial court, the Fifth District Court of Appeals, and this Court considered the parties’ arguments with respect to the interpretation of R.C. 1333.85(D), and only after this Court rendered its final decision, has Esber improperly raised new constitutional issues through its Motion for Reconsideration. This Court has previously considered a party’s attempt to raise “an entirely new argument” through a motion for reconsideration, and held that the new argument was “deemed to be abandoned.” *City of East Liverpool v. Columbian Cty. Budget Comm’n*, 116 Ohio St.3d 1201, 2007 Ohio 5505, 876 N.E.2d 575, ¶3. Ohio’s appellate courts have consistently agreed that it is improper to raise new arguments in a motion for reconsideration. *Deutsche Bank Nat’l Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011 Ohio

2959, ¶2.³ Reconsideration to explore Esber’s constitutional issues should be denied on this basis alone.

3. This Court’s interpretation of the Act does not create constitutional contract impairment or takings issues.

Even if Esber’s failure to raise constitutional issues prior to its Motion for Reconsideration is not an absolute bar to Esber’s attempt to raise such issues for the first time, reconsideration is unwarranted. Esber’s brand new argument is that this Court’s decision raises unconstitutional impairment of contracts and takings issues. Motion for Reconsideration at pp.4, 5. Esber’s Motion for Reconsideration should be denied, because this Court’s interpretation of the Act, as a matter of law, does not create any constitutional issues.

Both the Ohio and U.S. Constitutions prohibit legislatures “from impairing the obligations of contracts.” *Barnesville Edu. Ass’n OEA/NEA v. Barnesville Exempted Village Sch. Dist. Bd. of Edu.*, 7th Dist. No. 06 BE 32, 2007 Ohio 1109, ¶54, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, 797 N.E.2d 1256, ¶10. “In order to claim the legislation impaired the obligation of the contracts, the claimant must allege impairment of an *existing* contract by a *subsequent* law. *Id.*, emphasis added, citing *State ex rel City of Youngstown v. Jones*, 136 Ohio St. 130, 136, 24 N.E.2d 442 (1939). “Contracts entered into on or after the effective date of the disputed statute are not impaired and thus are not entitled to the protection of the Contract Clause.” *Id.*, citing *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St. 3d 164, 168, 1993 Ohio 231, 616 N.E.2d 893.

Here, Esber and InBev USA entered the franchise agreement at issue on November 30, 2007. *Esber Beverage Co.*, 2013 Ohio 4544, ¶2. R.C. 1333.85(D) first became effective on April

³ See also *Waller v. Waller*, 7th Dist. No. 04 JE 27, 2005 Ohio 5632, ¶3; *City of Akron v. Callaway*, 9th Dist. No. 22018, 2005 Ohio App. LEXIS 2558, *3; *The Waterford Tower Condo. Ass’n v. TransAmerica Real Estate Group*, 10th Dist. No. 05AP-593, 2006 Ohio 508, ¶13.

16, 1993, and the current version of the statute became effective on November 9, 1994. As Esber entered the franchise agreement after the effective date of R.C. 1333.85(D), as a matter of law, the franchise agreement is not impaired by the statute for purposes of the Contract Clause of the Ohio or U.S. Constitutions. *Barnesville Edu. Ass'n OEA/NEA*, 2007 Ohio 1109, ¶54, citing *Aetna Life Ins. Co.*, 67 Ohio St. 3d at 168.

Similarly, R.C. 1333.85(D) does not create any constitutional takings issues. A constitutional takings claim must involve state action or action under the color of state law. All that has happened here is that, after Labatt Operating acquired InBev USA's Labatt-brand-assets, it chose to terminate the relationship that InBev USA created with Esber. No one has "taken" Esber's contract rights. They have been terminated pursuant to Ohio law, which is incorporated into written franchise agreements. R.C. 1333.83.

There is no action in this case that can be construed as state action or action under the color of law. The United States Supreme Court addressed this point more recently in *American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999), when the Court stated that "[i]n cases involving extensive regulation of private activity, we have consistently held that 'the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.'" *Id.* at 52, internal citation omitted. A private party is "not held to constitutional standards unless 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself.'" *Id.*, citation omitted. The Court added further, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Id.*

The State of Ohio has done nothing but regulate the alcoholic beverage manufacturing, supply and distribution industry – an industry with a long history of government regulation in the

United States. The legislature has made the policy determination that, if a company elects to engage in this industry as a manufacturer or distributor of alcoholic beverages, it must have written agreements and the written agreements are subject to the terms of the Act. The legislature does not require a successor manufacturer to terminate pre-existing distributors; rather, its regulations merely permit a successor manufacturer to terminate pre-existing franchise agreements. When Esber accepted the Act's unique protections applicable to distributors, Esber was well aware of R.C. 1333.85(D) and that its franchise agreement is subject to the Act's provisions when it entered the franchise agreement. A successor manufacturer's exercise of that option, and a court's enforcement of the successor manufacturer's decision, does not constitute state action or action under the color of law for the purpose of a constitutional takings claim.

CONCLUSION

Esber raises no obvious error or issue that this Court failed to consider. Esber's request for reconsideration is nothing more than an attempt to re-argue its claim that successor manufacturers who are bound by pre-existing franchise agreements should not be permitted to terminate such franchise agreements. This Court has considered but rejected Esber's argument.

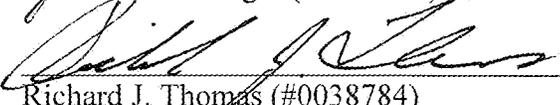
Likewise, reconsideration is not warranted to address Esber's constitutional arguments for the plain reason that Esber abandoned such constitutional arguments by waiting to raise them on reconsideration, yet, even if they were considered, the arguments are meritless.

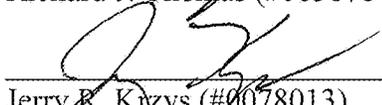
Esber's Motion for Reconsideration should be denied.

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The undersigned certifies that a true and accurate copy of the foregoing was served this
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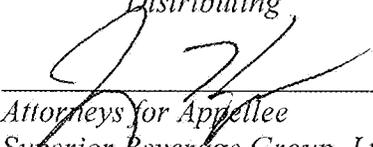
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