ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEES LABATT USA OPERATING CO, LLC, KPS CAPITAL PARTNERS, L.P., NORTH AMERICAN BREWERIES, INC. AND DOUG TOMLIN

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INTRODUCTION

As a general rule, the Ohio Alcoholic Beverages Franchise Act (the "Act" or "ABFA"), R.C. 1333.82 et seq., precludes a "manufacturer"[1] or "distributor"[2] from terminating a "franchise"[3] without just cause. *See* R.C. 1333.85. This appeal concerns a 1993 amendment to the Act that created an exception to that general rule.

The General Assembly amended ABFA in 1993 in response to a situation that arose after the Canandaigua Wine Company ("Canandaigua") acquired the assets of Guild Wineries and Distilleries ("Guild") in 1991. *See Tri County Distributing, Inc. v. Canandaigua Wine Company, Inc.*, 68 Ohio St. 3d 123, 129 n.1, 623 N.E.2d 1206, 1993 Ohio LEXIS 2668 (1993). After the acquisition, Canandaigua sent a letter to each of Guild's distributors advising them that Canandaigua was evaluating whether or not it would appoint them as a Canandaigua distributor but, in the interim, they could continue to purchase the former Guild products from Canandaigua. *Tri County*, 1993 Ohio LEXIS 2668, at *3. Canandaigua expressly stated that the letter was not intended to create a "franchise" under ABFA. *Id.* Afterward, Canandaigua notified several distributors that it would not enter into a franchise relationship with them. *Id.* at *6. The distributors sued in various courts, claiming that Canandaigua's letter gave rise to a "franchise" that could not be terminated without just cause. The trial courts and the intermediate appellate courts reached differing results. *See, e.g., Tramonte Distributing Co. v. Canandaigua Wine Co.*, 9th Dist. No. 15620, 1993 Ohio App. LEXIS 216. Ultimately, this Court decided that

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[1] The Act defines a "Manufacturer" as "a person, whether located in this state or elsewhere, that manufactures or supplies alcoholic beverages to distributors in this state." R.C. 1333.82(B).

[2] The Act defines a "Distributor" as "a person that sells or distributes alcoholic beverages to retail permit holders in this state, but does not include the state or any of its political subdivisions." R.C. 1333.82(C).

[3] The Act defines a "Franchise" as "a contract or any other legal device used to establish a contractual relationship between a manufacturer and a distributor." R.C. 1333.82(D).

Canandaigua's letter did not create a "franchise," and that Canandaigua had no continuing obligation to the distributors and no obligation to compensate them in any way for the loss of their distribution rights. *Tri County*, 68 Ohio St. 3d at 129; *see also Tramonte Distributing Co. v. Canandaigua Wine Co.*, 68 Ohio St. 3d 515, 628 N.E. 2d 1382 (1994).

In response to the Canandaigua situation, the General Assembly amended ABFA to essentially have the franchise run with the brands when a successor 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 a franchise without just cause. In part, Section 1333.85(D) provides:

> If a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer, the successor manufacturer, within ninety days of the date of the merger, acquisition, purchase, or assignment, may give written notice of termination, nonrenewal, or renewal of the franchise to a distributor of the acquired product or brand . . . . **If the successor manufacturer complies with the provisions of this division, just cause or consent of the distributor shall not be required for the termination or nonrenewal**. . . . .

R.C. 1333.85(D) (emphasis added).

Notably, a successor manufacturer's right to terminate without just cause is not unfettered. First, the successor manufacturer can exercise that right only within a 90-day window after the acquisition. *Id.* Second, and most importantly, the successor manufacturer must compensate any distributor with whom the successor manufacturer elects not to do business "for the diminished value of the distributor's business that is directly related to the sale of the product or brand terminated or not renewed by the successor manufacturer." *Id.* In other words, the General Assembly gave successor manufacturers a choice – either (1) continue to do business with the prior manufacturer's distributors, or (2) terminate them within a narrow window of time and compensate them for their resulting loss.

To prevent manufacturers from avoiding the compensation obligation, the General Assembly drafted Section 1333.85(D) to apply broadly, encompassing situations where:

> a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer . . . .

R.C. 1333.85(D). Thus, Subsection (D) applies any time a successor manufacturer acquires a particular product or brand of alcoholic beverage from another manufacturer, regardless of whether the successor manufacturer acquires the brands through a stock acquisition, membership acquisition, merger, asset acquisition or assignment. *Id.*

In this case, Appellant Esber Beverage Company ("Esber")[4] asks this Court to ignore the broad reach of Section 1333.85(D). Instead, Esber wants this Court to rule that Subsection (D) does not apply to stock acquisitions, or to membership acquisitions, or to mergers, or to assignments, or to any asset acquisition in which distribution agreements are assumed as part of the acquisition. In effect, Esber wants this Court to amend the first sentence of Subsection (D) to read as follows:

> If a successor manufacturer acquires all or substantially all of the ~~stock or~~ assets of another manufacturer through ~~merger or~~ acquisition ~~or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer~~, **and the successor manufacturer does not assume a written contract with the distributor,** the successor manufacturer, within ninety days of the date of the ~~merger,~~ acquisition, ~~purchase, or assignment,~~ may give written notice of termination, nonrenewal, or renewal of the franchise to a distributor of the acquired product or brand.

[4] Beverage Distributors, Inc., Muxie Distributing and Tramonte Distributing Company filed a joint amicus brief in support of Esber's proposition of law. That brief simply reiterates the arguments in Esber's Merit Brief and, therefore, requires no response separate from this brief.

The Fifth District Court of Appeals declined Esber's invitation to rewrite the statute. This Court should also reject Esber's request and affirm the Fifth District's decision.

STATEMENT OF THE FACTS

This case arose out of an unusual set of facts. In 2008, InBev N.V./S.A. ("InBev") entered into an agreement to merge with the Anheuser-Busch Companies ("Anheuser-Busch"). At the time, InBev was the ultimate parent of InBev USA L.L.C. ("InBev USA"), which was the entity that imported and distributed the Labatt Brands[5] of beer in the United States.

The United States Department of Justice filed suit to block the merger because the merged entity would dominate the beer market in upstate New York (a market in which the combined market share of the Labatt Brands and the Anheuser-Busch brands would exceed 40%). *See United States of America v. InBev N.V./S.A.*, No. 08-cv-1965, 2009 U.S. Dist. LEXIS 84787, *1–2 (D.D.C. Aug. 11, 2009) ("*U.S. v. InBev*"). To resolve that suit, InBev agreed to sell the Labatt Brands to a third party that would compete with Anheuser-Busch/InBev by continuing to manufacture and distribute the Labatt Brands in the United States. *Id.* at *23.

In March 2009, InBev sold the Labatt Brands to an affiliate of KPS, a private equity firm that, "through its portfolio company [North American Breweries ("NAB")], owns a variety of modest assets in the beer and malt brewing industries, including High Falls Brewing Company, LLC, a brewery with capacity to meet the demand for Labatt Beer in the U.S." *Id.* at *9. KPS formed Labatt USA Operating Co LLC ("Labatt USA") to acquire the assets from InBev USA.

To assure that Labatt USA could effectively compete with Anheuser-Busch/InBev, the Justice Department required InBev USA to assign to Labatt USA all distribution agreements for

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

the Labatt Brands throughout the United States as part of the sale. *Id.* at *7. Included among those agreements was a written agreement between Esber and InBev USA.

Esber participated in the *U.S. v. InBev* case, and sought to modify the final decree in that case to preclude Labatt USA from terminating Esber's franchise pursuant to Section 1333.85(D). In a letter to the Court, Esber noted:

> The requirement set forth in the Proposed Final Judgment that the Divested Assets include all rights pursuant to distributor contracts may not prevent the Acquirer [i.e., Labatt USA] from terminating the Labatt Distributors [defined to include Esber]. This issue is especially pronounced for the distributors in Ohio . . . . Certain state laws which protect distributors permit termination upon the sale of assets. Because of these laws, and the restrictions placed on the power of suppliers/manufacturers to terminate distributors, brand acquirers often terminate distribution contracts as a matter of course after an acquisition.

(*See U.S. v. InBev*, Docket Number ("D.N.") 21-2.) Esber then argued that the "Acquirer . . . [should] maintain the existing distribution network for a commercially reasonable period of time." (*Id.*) Of course, if that "commercially reasonable period of time" happened to be longer than 90 days, as Esber obviously hoped, then the effect of that requested requirement would be to prevent the Acquirer/"successor manufacturer" from exercising its rights under Section 1333.85(D) to terminate existing Ohio distributors, including Esber.

Ultimately, however, the *U.S. v. InBev* court considered and rejected Esber's argument, explaining:

> The government believes that it is unnecessary, and that it might even create counter-productive inefficiencies to require . . . that the existing distributor network be maintained . . . . These predictions, to which deference must be given, are not unreasonable. They are also the kinds of ordinary business decisions that the government and the acquirer are far better positioned to make than the court. Nor do the distributors' proposed modifications, which are largely self-serving, meaningfully improve on the Final Judgment's terms. And the "specific injur[ies]" alleged by the distributors – that they may lose their contracts or past investments in marketing Labatt – are best characterized as the normal risks of doing business, insufficient to raise actionable doubt into this public interest analysis.

U.S. v. InBev, 2009 U.S. Dist. LEXIS 84787, at *22–23.

Following the acquisition of the Labatt Brands by Labatt USA, NAB (an upstream parent of Labatt USA) notified all of its distributors in Ohio that, to compete effectively with much larger brewers such as Anheuser-Busch/InBev or MillerCoors, it needed to consolidate the distribution of both the Labatt Brands and the Genesee Brands[6] with the same distributor in each market. (Doug Tomlin Affidavit ("Tomlin Aff."), attached as Labatt S-001, at ¶¶ 10 –11; James Pendegraft Affidavit ("Pendegraft Aff."), attached as Labatt S-048, at ¶¶ 11–12.) Thus, all of the Labatt distributors were given the opportunity to explain why they should be awarded the Genesee Brands and all of the Genesee distributors were given the opportunity to explain why they should be awarded the Labatt Brands. (Tomlin Aff. at ¶¶ 4–7, Ex. A–C; Pendegraft Aff. at ¶ 12.)

Esber participated in the process, and urged NAB to use Section 1333.85(D) to terminate the Genesee distributors in Esber's territory, and move the Genesee Brands to Esber. (October 23, 2009 Tr., attached as Labatt S-052, at 78–80; Tomlin Aff. at ¶¶ 8–9, Exs. C–E.) NAB, however, ultimately decided to move the Labatt Brands to Superior Beverage Company ("Superior") and timely issued a notice to Esber that its franchise would be terminated pursuant to Section 1333.85(D). (Tomlin Aff. at ¶¶ 10–11; Pendegraft Aff. at ¶¶ 11–13).

Esber subsequently filed this suit. In the trial court, Esber sought to avoid termination by arguing that Labatt USA was not a successor manufacturer as that term is used in Section 1333.85(D). Esber also argued that, even if Labatt USA was a successor manufacturer, Labatt USA could not terminate Esber's franchise under Section 1333.85(D) because Labatt USA had

[6] The "Genesee Brands" of beer are Genesee Cream Ale and the Dundee Ales and Lagers. (Pendegraft Aff. at ¶ 2.)

assumed the written distribution agreement between Esber and InBev USA. The trial court granted summary judgment to Esber, ruling both that Labatt USA was not a successor manufacturer, and that it could not rely on R.C. 1333.85(D) to terminate Esber's franchise because it had voluntarily assumed the written agreement. *See Esber Beverage Co. v. Labatt UA Operating Co., LLC*, 5th Dist. Nos. 2011CA00113 & 2011CA00116, 2012-Ohio-1183, ¶ 9.

On appeal, the Fifth District Court of Appeals reversed. As an initial matter, it concluded that Labatt USA was a "successor manufacturer." *Id.* at ¶ 50. Esber has now abandoned its argument that Labatt USA is not a successor manufacturer and does not challenge that portion of the Fifth District's ruling in this appeal. As to the second issue, the Fifth District ruled:

> In the instant case, the contractual relationship between the manufacturer and Esber was established by a contract and thus falls within the definition of "franchise" as used in R.C. 1333.85(D). By the plain language of the statute, a successor manufacturer had ninety days within which to provide Esber with notice of termination of the franchise. By the plain language of the statute, such right of termination does not apply solely to arrangements when there is no written agreement between the parties. The statute clearly gives a successor manufacturer a narrow window of time in which to determine whether it wants to keep the franchise agreements with distributors it assumed from its predecessor, or whether it wants to terminate such agreements with distributors.

(*Id.* at ¶ 35.) Esber now appeals that ruling to this Court.[7]

[7] Recently, on December 11, 2012, while this appeal was pending, Cerverceria Costa Rica, S.A. ("CCR") acquired control of the Labatt Brands when it acquired all of KPS's membership interests in NAB. As a result, control of the Labatt Brands transferred from KPS to CCR, an unrelated company. CCR is now a successor manufacturer. *See Esber Beverage Co. v. Heineken USA, Inc.* (5th Dist. 2011), 2011-Ohio-5939, at ¶ 20. Although CCR believes that the termination initiated by Labatt USA while it was owned by KPS is valid, CCR has given notice that, in the event this Court concludes that the prior termination notice was not effective, it is terminating Esber's franchise for the Labatt Brands pursuant to Section 1333.85(D). The Labatt Appellees do not believe CCR's acquisition of the Labatt Brands and its subsequent termination notice moot this appeal because the resolution of this appeal will bear on any diminished-value payment by either Labatt USA or CCR.

ARGUMENT

As set forth below, Esber's proposition of law[8] is both inconsistent with the language of ABFA and inapplicable to the facts of this case. Instead, Appellees Labatt USA, KPS, NAB, and Doug Tomlin (the "Labatt Appellees") urge the Court to adopt the following proposition of law as the syllabus for this case:

> **Under Section 1333.85(D), a successor manufacturer may terminate any franchise, whether written or oral, that the successor manufacturer acquires or assumes in connection with the acquisition of a particular product or brand of alcoholic beverage by giving notice of termination that is received by the distributor within 90 days of the acquisition of the particular product or brand.**

A. Esber's proposition of law is inconsistent with the language of the statute.

Unlike the Labatt Appellees' proposed syllabus for this case, Esber's proposition of law cannot be reconciled with the plain language of the Act. Esber's proposition of law states that ABFA does not permit a successor manufacturer to terminate a distributor without cause if the successor manufacturer has "assumed a written contract with the distributor." (Appellant's Merit Br. at 11.) The fundamental problem with this position is that it focuses only on the structure of the acquisition that occurred in this case – an asset acquisition in which the successor manufacturer acquired all of the prior manufacturer's distribution agreements. Esber's proposition of law ignores the express scope of Section 1333.85(D), which applies not just to asset acquisitions, but also to stock acquisitions, membership acquisitions, mergers and assignment and assumption agreements.

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[8] Esber's proposition of law states: "The Ohio Alcoholic Beverages Franchise Act does not permit a successor manufacturer to terminate a distributor without cause when the successor manufacturer has itself entered into or assumed a written contract with the distributor." (Appellant's Merit Br. at 11.)

For example, if Labatt USA had acquired the Labatt Brands as a result of a merger with InBev USA, Labatt USA would have assumed InBev USA's written distribution agreement with Esber as a matter of law. R.C. 1701.82(A)(3); *see ASA Architects, Inc. v. Schlegel*, 75 Ohio St.3d 666, Syllabus, 664 N.E.2d 1083 (1996) ("A surviving corporation in a merger is liable for all obligations of a constituent corporation"); *see also Acordia of Ohio v. Fishel*, 133 Ohio St. 3d 356, 360, 978 N.E.2d 823 (2012) ("We emphasize that in accordance with R.C. 1701.82(A)(3), the surviving company possesses all assets and property and every interest in the assets and property of each constituent entity"). Under Esber's proposition of law, if Labatt USA had acquired the brands through a merger, Labatt USA would not be permitted to terminate Esber's franchise because Labatt USA would have voluntarily assumed the written franchise by voluntarily merging with InBev USA. Section 1333.85(D), however, specifically states:

> If a successor manufacturer acquires all or substantially all of the . . . assets of another manufacturer through merger . . ., the successor manufacturer, within ninety days of the date of the merger . . . may give written notice of termination . . . of the franchise to a distributor of the acquired product or brand.

Concluding, as the Fifth District did, that Esber's proposition of law cannot be reconciled with the first sentence of Section 1333.85(D) is not reading the first sentence in "isolation" – it is merely reading the unambiguous language as the General Assembly clearly intended. In other words, regardless of how the successor manufacturer acquires the franchise, and regardless of whether it is oral or in writing, Section 1333.85(D) applies.

B. The language of the statute is unambiguous, so resort to rules of statutory interpretation is not appropriate.

Esber argues at length that the rules of statutory interpretation require this Court to look beyond Section 1333.85(D) to determine its intent. Under well established Ohio law, however, "[r]ules for construing [statutory] language . . . may be employed only if the statute is ambiguous." *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007 Ohio 4838, 873 N.E.2d 872, ¶ 12 (citing *State v. Porterfield*, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690, ¶ 11); *see also Edwards v. Southeast Local School District Board Of Education*, 11th Dist. No. 2005-P-0057, 2007 Ohio 585, ¶ 29 (Feb. 9, 2007) ("If the wording of the statute is unambiguous, the court is obligated to apply the provision in accordance with the clear meaning of the words used; under such circumstances, no further steps to 'interpret' the statute can be taken.") (citing *Provident Bank v. Wood*, 36 Ohio St.2d 101, 304 N.E.2d 378 (1993)). In this case, the plain statutory language dictates that Section 1333.85(D) applies to Labatt USA's acquisition of the Labatt Brands and Esber's franchise. The Court, therefore, has no need to resort to any rules of statutory interpretation – the language is not ambiguous.

Esber incorrectly argues that the lower court's decision renders the third sentence of Section 1333.85(D) meaningless. That sentence provides, "If notice is not received within this ninety-day period, a franchise relationship is established between the parties." R.C. 1333.85(D). According to Esber, that provision must mean that Section 1333.85(D) only applies to situations in which the successor manufacturer has not somehow assumed or acquired a written distribution agreement. In making that argument, Esber once again overlooks the clear language in the first sentence, which provides, in part:

> If a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer, the successor manufacturer, within ninety days of the date of the merger, acquisition, purchase, or assignment, may give **written notice of termination, nonrenewal, *or renewal*** of the franchise to a distributor of the acquired product or brand.

R.C. 1333.85(D) (emphasis added). This "renewal" language contemplates that the successor manufacturer will give written notice to the distributors of whether or not their franchises will continue. The General Assembly, however, anticipated that some successor manufacturers will not give notice to the distributors as to whether or not the franchises would continue. In those circumstances, once 90 days has elapsed, "a franchise relationship is established between the parties." *Id.* In this regard, the third sentence of R.C. 1333.85(D) is comparable to the similar language in Section 1333.83 (which was added to ABFA at the same time as Section 1333.85(D)).

In part, Section 1333.83 provides:

> Every manufacturer of alcoholic beverages shall contract with or offer in good faith to its distributors a written franchise providing for, and specifying the rights and duties of both parties in effecting, the sale of the specified brands or products of the manufacturer.

R.C. 1333.83. This language is clear – manufacturers "shall" have written distribution agreements with their distributors. Nevertheless, the General Assembly anticipated that some manufacturers would fail to enter into written agreements with their distributors. For that reason, the General Assembly added the following language to Section 1333.83:

> When a distributor of beer or wine for a manufacturer, or the successors or assigns of the manufacturer, distributes the beer or wine for ninety days or more without a written contract, a franchise relationship is established between the parties, and sections 1333.82 to 1333.87 of the Revised Code apply to the manufacturer, its successor or assigns, and the distributor.

Id.

The third sentence of Subsection (D) fulfills the same purpose as the language in Section 1333.83 – it fills the gap when a successor manufacturer does not give "written notice of termination, nonrenewal, or renewal of the franchise to a distributor." R.C. 1333.85 (D). Because the language in Section 1333.85(D) is clear and unambiguous, this Court, like the Fifth District, should apply it as written.

C. Section 1333.85(D) is an exception to the general rule that a manufacturer cannot terminate a franchise without just cause.

Esber's argument overlooks the language at the beginning of Section 1333.85, which provides:

> Except as provided in divisions (A) to (D) of this section, no manufacturer or distributor shall cancel or fail to renew a franchise . . . for other than just cause . . . .

In other words, Subsection (D) is an **exception** to the general rule. The fourth sentence of Section 1333.85(D) confirms that point:

> If the successor manufacturer complies with the provisions of this division, just cause . . . shall not be required for the termination or nonrenewal.

R.C. 1333.85(D); *see also Esber Beverage Co. v. Heineken USA, Inc.*, 5th Dist. No. 2011CA00033, 2011-Ohio-5939, ¶ 18 (Nov. 14, 2011) ("R.C. 1333.85(D) is an exception to the general rule requiring just cause").

Section 1333.85(D) cannot be an exception unless, in its absence, the general rule would apply. For the phrase, "[e]xcept as provided in divisions (A) to (D) of this section," and for the fourth sentence of Subsection (D) to have any meaning, then a franchise must exist between the successor manufacturer and the distributor whose franchise is being terminated. Thus, Esber's argument that Subsection (D) only applies when no franchise exists between the successor manufacturer and the existing distributor makes no sense.

D. Esber's proposition of law is contrary to the public policy evident in ABFA.

While ABFA may have been enacted to address the unequal bargaining power between manufacturers and distributors, it is not a one-sided statute. For example, Section 1333.85 provides, in part:

> no manufacturer **or distributor** shall cancel or fail to renew a franchise or substantially change a sales area or territory without the prior consent of the other party for other than

> just cause and without at least sixty days' written notice to the other party setting forth the reasons for such cancellation, failure to renew, or substantial change.

(emphasis added). Similarly, R.C. 1333.86 provides:

> During the effective period of a franchise, **the distributor** shall maintain adequate physical facilities and personnel so that the product or brands of the manufacturer are at all times properly represented in the sales area of the distributor, the reputation and trade name of the manufacturer are protected, and the general public receives adequate servicing of the products or brands of the manufacturer. The distributor shall at all times act in good faith.

(emphasis added). Also, R.C. 1333.87 provides, in part:

> Any manufacturer or **distributor** who directly or through an officer, employee, or agent violates sections 1333.82 to 1333.86 of the Revised Code is liable to the party injured by such violation for all reasonable damages sustained by the party that are the proximate result of the unlawful act of the manufacturer or **distributor**, his officer, employee, or agent.

(emphasis added). In light of these provisions, it should be no surprise that the General Assembly adopted a balanced approach when it added Section 1333.85(D) to the Act. The General Assembly did not require successor manufacturers to do business with the prior manufacturer's distributors. Instead, it gave successor manufacturers the choice as to whether or not they would do business with the existing distributors.

The General Assembly did not assume that a successor manufacturer would have sufficient information about existing distributors prior to the acquisition to decide whether or not it wanted to do business with them as of the date of the acquisition. Rather than force successor manufacturers to make business decisions about their distribution network without adequate information, or force successor manufacturers to structure their transactions in a way that would give them the option to evaluate distributors before making their distribution decisions, the General Assembly gave all successor manufacturers a 90-day window in which to decide whether or not they wanted to do business with the existing distributors. The General Assembly gave all successor manufacturers, regardless of the form of the transaction, the option to terminate the franchises of the existing distributors, but only if the successor manufacturer then compensated the distributor for the loss of the franchise. *See* R.C. 1333.85(D).

Esber's proposition of law undercuts the balance the General Assembly sought in Section 1333.85(D). If adopted, Esber's proposition would force successor manufacturers to structure all of their transactions as asset acquisitions in which they specifically refuse to assume any distribution agreements with distributors in Ohio. Successor manufacturers who rely on the plain language in the first sentence of Section 1333.85(D), which references mergers and stock acquisitions, may be trapped with inefficient distribution networks in Ohio. While it may be a short term benefit to the existing distributors, manufacturers will likely redeploy their assets and efforts to lower cost markets – and invest their resources outside of Ohio. In the long term, therefore, no one benefits when manufacturers are trapped into inefficient distribution networks. The ability to structure an efficient distribution network is especially important for small manufacturers like Labatt USA. Collectively, Anheuser-Busch/InBev and MillerCoors, the two dominant players in the beer industry, control over 65% of the market. Smaller manufacturers like Labatt USA cannot afford to be saddled with inefficient distribution networks if they hope to effectively compete against the larger manufacturers.

ABFA was intended to level the playing field between manufacturers and distributors, not put manufacturers at a disadvantage in their efforts to compete with other manufacturers. Esber's proposition of law, which creates a trap for the unwary manufacturer, thus undercuts the intent of Section 1333.85(D), and should be rejected.

E. Esber's proposition of law is inapplicable to the facts of this case.

Esber's proposition of law is inapplicable to the facts of this case because it turns on whether a successor manufacturer "entered into" or "assumed" a written contract. *See* S.Ct. Prac. R. 6.2(B)(4). The facts in this case are that Labatt USA never "entered into" a contractual relationship with Esber. Instead, Labatt USA acquired Esber's distribution agreement, along with 461 other distribution agreements, when it acquired InBev USA's assets. Labatt USA never negotiated an agreement with Esber "specifying the rights and duties of both parties in effecting the sale of the specific brands or products of the manufacturer." R.C. 1333.83. This case does not present the situation in which a successor manufacturer acquired the operating assets of another manufacturer and then gave "written notice of . . . renewal of the franchise to a distributor of the acquired product or brand" as contemplated by the first sentence of Section 1333.85(D).

Esber's proposition of law might be accurate if revised to read as follows:

> The Ohio Alcoholic Beverages Franchise Act does not permit a successor manufacturer to terminate a distributor without cause when the successor manufacturer has **given written notice of renewal of the franchise to a distributor of the acquired product or brand within 90 days after the acquisition** ~~itself entered into or assumed a written contract with the distributor~~.

That revised proposition of law, however, does not apply to the facts in this case. Labatt USA never gave Esber notice that it was renewing the franchise. Labatt USA gave Esber the opportunity to makes its case for renewal, but Labatt USA ultimately decided not to renew Esber's franchise. The facts in this case demonstrate that if the franchise, whether written or oral, is acquired from another manufacturer, regardless of how it is acquired or assumed, then the successor manufacturer has a 90 day window to terminate or renew it.

CONCLUSION

Sections 1333.82 to 1333.87 are known as the "Alcoholic Beverages Franchise Act" – not the "Esber Franchise Protection Act." This Court need not contort ABFA's language to protect Esber in this isolated case. Instead, the Court should apply the clear and unequivocal language of Section 1333.85(D) and affirm the Fifth District's decision that that Labatt USA properly terminated Esber's franchise within the statutory 90-day period.

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CERTIFICATE OF SERVICE

A copy of the foregoing *Merit Brief of Appellees Labatt USA Operating Co, LLC, KPS Capital Partners, L.P., North American Breweries, Inc. and Doug Tomlin* was sent by ordinary U.S. mail, postage prepaid, this 4th day of February 2013, to the following:

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