

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

MILLERCOORS LLC,)

Plaintiff,)

v.)

Civil Action No. 3:12-cv-00659

CHESBAY DISTRIBUTING CO., INC.,)

SERVE:)

Charles C. Ricci)

Registered Agent)

3928 Cook Boulevard)

Chesapeake, Virginia 23323)

Defendant.)

FIRST AMENDED COMPLAINT

Plaintiff MillerCoors LLC (“MillerCoors”), by counsel, respectfully states as follows for its First Amended Complaint against Defendant Chesbay Distributing Co., Inc. (“Chesbay” or “Distributor”) seeking a declaratory judgment, specific performance, preliminary and permanent injunctive relief, damages, and costs and attorneys’ fees for Chesbay’s violation and attempted violation of the rights of MillerCoors as a trademark owner under the Trademark Act of 1946, as amended, 15 U.S.C. § 1101 *et seq.* (the “Lanham Act”), and for Chesbay’s breach of contract.

NATURE OF THE ACTION

1. MillerCoors owns the goodwill, names, logos, and trademark registrations (collectively, the “MillerCoors Trademark Assets”) associated with a portfolio of malt beverage brands (collectively, the “MillerCoors Brands”). Pursuant to a Distributor Agreement dated March 2, 2009, a copy of which is attached as **Exhibit A** (the “Distributor Agreement”), MillerCoors has licensed Chesbay to use the MillerCoors Trademark Assets in connection with

the wholesale distribution of the MillerCoors Brands in the following jurisdictions in the Commonwealth of Virginia: City of Chesapeake, City of Hampton, City of Newport News, City of Norfolk, City of Poquoson, City of Portsmouth, City of Virginia Beach, City of Williamsburg, James City County, and York County (collectively, the “Licensed Territory”).

2. Chesbay’s license to use the MillerCoors Trademark Assets in the Licensed Territory is contingent upon Chesbay’s compliance with the standards of quality and uniformity that MillerCoors seeks to have associated with the MillerCoors Trademark Assets and the MillerCoors Brands (the “MillerCoors Trademark Standards”). The Distributor Agreement expressly prohibits Chesbay from sublicensing the MillerCoors Trademark Assets and from assigning or otherwise transferring its license to use the MillerCoors Trademark Assets to third parties without the express prior written consent of MillerCoors. Consistent with MillerCoors’ rights as a trademark owner, the Distributor Agreement also prohibits Chesbay from assigning or otherwise transferring its distribution rights to the MillerCoors Brands without the express prior written consent of MillerCoors. In addition, the Distributor Agreement grants MillerCoors a right of first refusal (the “MillerCoors ROFR”) if Chesbay seeks to sell its business.

3. This action is necessitated by Chesbay’s attempt to enter into a transaction (hereinafter, the “Unlawful Transaction”) whereby Chesbay would—in derogation of the rights of MillerCoors as the owner of the MillerCoors Trademark Assets and in violation of the rights of MillerCoors under the Distributor Agreement:

- a. assign or otherwise transfer to another beer wholesaler Chesbay’s license to use the MillerCoors Trademark Assets in the Licensed Territory;
- b. assign or otherwise transfer to another beer wholesaler Chesbay’s right to distribute the MillerCoors Brands in the Licensed Territory;

c. deprive MillerCoors of the benefit of the MillerCoors ROFR under the Distributor Agreement; and

d. otherwise deprive MillerCoors of its ownership rights to the MillerCoors Trademark Assets and of its contractual rights under the Distributor Agreement.

4. As a result of Chesbay's attempt to enter into the Unlawful Transaction, MillerCoors seeks a declaratory judgment, specific performance, preliminary and permanent injunctive relief, damages, costs and attorneys' fees with respect to:

a. Chesbay's actual and/or attempted trademark infringement, unfair competition, and dilution of the MillerCoors Trademark Assets in violation of the Lanham Act;

b. Chesbay's actual and/or attempted breach of the Distributor Agreement.

PARTIES

5. Plaintiff MillerCoors is a limited liability company ("LLC") with its principal place of business located in Chicago, Illinois. The members of the LLC are Miller Brewing Company ("MBCO"), a Wisconsin corporation with its principal place of business located in Milwaukee, Wisconsin; and MC Holding Company LLC ("MC Holding"), a Colorado limited liability company. MC Holding is owned by Molson Coors Brewing Company ("Molson Coors"). Molson Coors is a Delaware corporation with its principal place of business located in Denver, Colorado. For purposes of 28 U.S.C. § 1332, MillerCoors is therefore a citizen of Wisconsin, Delaware, and Colorado.

6. Defendant Chesbay is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal place of business located in the City of Chesapeake. For purposes of 28 U.S.C. § 1332, Chesbay is therefore a citizen of Virginia.

JURISDICTION AND VENUE

7. This Court has jurisdiction over MillerCoors' claims for violation of the Lanham Act pursuant to 15 U.S.C. § 1121(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1338(a) and (b).

8. This Court has jurisdiction over MillerCoors' claims for breach of the Distributor Agreement pursuant to 28 U.S.C. § 1367(a).

9. The Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties, and the amount in controversy of this action exceeds \$75,000, exclusive of interests and costs.

10. This Court has general and specific personal jurisdiction over Chesbay because Chesbay has engaged in systematic and continuous contacts in the Eastern District of Virginia by doing business in this judicial district and by engaging in activity in the Eastern District of Virginia that gives rise to the claims asserted herein.

11. Venue is proper in the Eastern District of Virginia pursuant to 28 U.S.C. § 1391(a) because Chesbay resides in this judicial district, and a substantial part of the events or omissions giving rise to the claims sought herein occurred in the Eastern District of Virginia.

12. Venue is proper in the Norfolk Division pursuant to Local Rule 3(c) because a substantial part of the events giving rise to the claims occurred in the Norfolk Division, where Chesbay resides.

FACTS COMMON TO ALL COUNTS

**(MillerCoors' Ownership of and Licensing to Chesbay
of the MillerCoors Trademark Assets)**

13. MillerCoors is a brewery of beer and other malt beverage products that it sells to a network of independent distributors, including Chesbay, across the United States. MillerCoors

brews and sells a number of prominent beer brands, including Miller Lite, Coors Light, Blue Moon, and Peroni Nastro Azzurro.

14. Chesbay is the exclusive distributor of the MillerCoors Brands in the Licensed Territory. As such, Chesbay purchases the MillerCoors Brands from MillerCoors and sells them to on-premises retailers (such as restaurants and bars) and off-premises retailers (such as grocery stores) within the Licensed Territory.

15. A beer distributor like Chesbay plays a crucial role in MillerCoors' business and competitiveness because it is the exclusive "face" of the MillerCoors Brands in each territory in the country. The ability of MillerCoors to compete in any given territory, and across the United States, depends upon each distributor's ability to competitively promote, market, and sell the brands there. As a result, MillerCoors has a significant interest in who distributes its brands in every territory in the United States—including the Licensed Territory assigned to Chesbay pursuant to the Distributor Agreement.

16. MillerCoors grants beer wholesalers like Chesbay the right to distribute certain brands of beer and to use certain trademarks owned by MillerCoors Brands pursuant to written distributor agreements. MillerCoors uses the same form of distributor agreement for beer wholesalers throughout the United States. That form was used to generate the Distributor Agreement between MillerCoors and Chesbay at issue in this case.

17. The Distributor Agreement between MillerCoors and Chesbay licenses Chesbay to use the MillerCoors Trademark Assets in connection with the distribution of the MillerCoors Brands in the Licensed Territory. Certain names and logos comprising the MillerCoors Trademark Assets have been registered on the Principal Register of the U.S. Patent & Trademark

Office, and MillerCoors owns such registrations (collectively, the “MillerCoors Registered Trademarks”).

18. The MillerCoors Trademark Assets, including the MillerCoors Registered Trademarks (collectively, the “MillerCoors Trademarks”), are protected from infringement and unfair competition by the Lanham Act.

19. The Lanham Act prohibits any use of the MillerCoors Registered Trademarks by anyone except the registrant, *i.e.*, MillerCoors, and a “related company.” 15 U.S.C. §§ 1051, 1055. Section 45 of the Lanham Act defines “related company” as “any person who legitimately controls or *is controlled by*” the trademark owner “*in respect to the nature and quality of the goods or services in connection with which the mark is used.*” *Id.* § 1127 (emphasis supplied). Section 45 thus grants MillerCoors the *right* to control the quality of goods and services associated with the MillerCoors Registered Trademarks. In fact, Section 45 imposes upon MillerCoors an *affirmative duty* to do so. *Ky. Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977).

20. Under Section 45 of the Lanham Act, “it is the *control* of quality that a trademark owner is entitled to maintain.” *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104, 107 (4th Cir. 1991), *quoting el Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392 (2d Cir. 1986), *cert. denied*, 484 U.S. 817 (1987) (emphasis supplied). *See also Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F. Supp. 243, 279-80 (E.D. Pa. 1979), *aff’d*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Gilderhus v. Amoco Oil Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,650 (D. Minn. 1980).

21. Consistent with its rights and obligations as the owner of the MillerCoors Trademarks, MillerCoors retains the contractual right under its Distributor Agreement to control

the quality and uniformity of the goods and services associated with the MillerCoors Trademarks. The MillerCoors Trademarks are the “cornerstone” of the MillerCoors distribution system. *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff’d*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965). In the MillerCoors distribution system, “uniformity of product and control of its quality and distribution . . . causes the public to turn to [retailers] for the product.” *Id.* See also *Principe v. McDonald’s Corp.*, 631 F.2d 303, 309 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (“uniformity and predictability attracts customers”).

22. Consistent with MillerCoors’ Lanham Act rights and obligations as the owner of the MillerCoors Trademarks, the Distributor Agreement grants MillerCoors the right to control various aspects of Chesbay’s operations related to the quality and uniformity associated with the MillerCoors Trademarks by enforcement of the MillerCoors Trademark Standards. The Distributor Agreement therefore:

- a. contains an acknowledgment by Chesbay of MillerCoors’ “interest in protecting the goodwill of and ensuring the uncompromising quality that defines MillerCoors brands” (Section 1.1);
- b. incorporates “by reference the terms of the MillerCoors Distributor Standards” (Section 1.3);
- c. recognizes that “[t]he purpose of designating the [Licensed] Territory is to establish geographic boundaries within which [Chesbay] is accountable for quality control of Products and within which MillerCoors can evaluate [Chesbay]’s performance of its obligations under this Agreement and the Standards” (Section 2.1);

d. obligates [Chesbay] to “preserve and enhance the high quality image reputation, and goodwill of MillerCoors and the Products,” to “conduct its operations and perform quality control practices and procedures throughout the [Licensed] Territory in accordance with the Standards,” and to “observe all other requirements that MillerCoors may reasonably impose from time to time for the sale, delivery, merchandising, and responsible promotion of the Products” (Section 4.1), including obligations related to marketing (Section 4.1.1) and quality control (Section 4.1.6).

23. By signing the Distributor Agreement, Chesbay “acknowledge[d] that the trademarks, trade names, service marks, designs, brand names, labels, promotional slogans, and other trade designations MillerCoors uses in connection with all Products and other products sold or licensed to be sold by MillerCoors are and shall remain the sole and exclusive property of MillerCoors.” (Section 9.1).

**(MillerCoors’ Statutory and Contractual Rights to
Control the Identity of the Licensee of the MillerCoors Trademarks)**

24. Under Section 45 of the Lanham Act, MillerCoors has no obligation to license the MillerCoors Trademarks to any third parties. The Lanham Act grants MillerCoors the right to refuse to license the MillerCoors Trademarks altogether and to control use of the MillerCoors Trademarks by licensees. 15 U.S.C. § 1127; *Power Test Petroleum Distributors, Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97 (2d Cir. 1985). Indeed, forced licensure of the MillerCoors Trademarks is so inconsistent with the Lanham Act that it would effect an unconstitutional “taking” of MillerCoors’ federal trademark rights. *See Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (government disclosure of trade secrets effects a taking); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021,1027 (5th Cir. 1972) (taking trademarks violates Fifth Amendment); *Keebler*

Co v. Roivira Biscuit Corp., 624 F.2d 366, 372 (1st Cir. 1980) (trademark is a form of business property).

25. By signing the Distributor Agreement, Chesbay acknowledged that its license to use the MillerCoors Trademarks was “limited, non-assignable and non-transferable.” (Section 9.2).

26. Consistent with MillerCoors’ Lanham Act rights and obligations as the owner of the MillerCoors Trademarks, the Distributor Agreement imposes certain obligations upon Chesbay if it seeks to assign or otherwise transfer to another beer wholesaler the trademark license and beer distribution rights granted by the Distributor Agreement. These obligations are reflected in Section 8 of the Distributor Agreement, entitled “Changes in Control and Ownership of Distributor.”

27. By signing the Distributor Agreement, Chesbay acknowledged in Section 8.5 thereof “that MillerCoors has a legitimate interest in the identity of any successor to Distributor’s distribution rights with respect to the Products. . . . [A]ny sale, transfer of (i) distribution rights relating to any or all of the Products in any or all of the Territory or (ii) ownership of Distributor itself (either or both, a “Sale Transaction”), . . . shall be subject to all of the procedures, terms, and MillerCoors rights set forth in Sections 8.5, 8.6, 8.7, and 8.8”

28. Under Section 8.8 of the Distributor Agreement, if Chesbay negotiates a Sale Transaction with a third party, Chesbay “shall deliver to MillerCoors a bona fide nonbinding letter of intent (the “Letter of Intent”) within 5 days of signing the Letter of Intent and in any event at least 90 days prior to the proposed closing of any Sale Transaction with any third party.”

29. Under Section 8.8.3 of the Distributor Agreement, “upon receipt of the Letter of Intent, MillerCoors shall have the irrevocable right and option to purchase that portion of

Distributor's business that is the subject of the Letter of Intent upon those terms and conditions and for the purchase price . . . contained in such Letter of Intent. MillerCoors shall have 30 days after receipt of the Letter of Intent . . . to exercise its right and option, which exercise shall occur when written notice is given to Distributor. If MillerCoors exercises its right and option, Distributor shall promptly execute all documents reasonably required to complete the transfer of that portion of Distributor's business subject to the option to MillerCoors."

30. Section 8.11 of the Distributor Agreement provides that "MillerCoors may, in its sole discretion, assign any or all of its rights under Sections 8.6, 8.7, and 8.8 to a third party of its choosing, without recourse to MillerCoors."

31. Section 8.8.4 of the Distributor Agreement further provides that "Distributor may not enter into any agreement with a third party that would have the effect of depriving MillerCoors of its . . . right of first refusal under this Section 8.8 and shall promptly rescind or terminate any such agreement. Failure to comply with this provision shall subject Distributor to action under Section 10.2.7."

32. Under Sections 10.2 and 10.2.7 of the Distributor Agreement, MillerCoors may immediately terminate the Distributor Agreement upon the occurrence of any of the following, if Chesbay has failed to comply with all of the provisions of Section 8 of the Distributor Agreement: "any disposition of Distributor's business, change in control of Distributor or Distributor's business, encumbrance or impairment of Distributor's business or this Agreement, or completion of any Sale Transaction."

33. By signing the Distributor Agreement, Chesbay promised that it "will not in the future enter into . . . any agreement that would in any way limit or restrict MillerCoors['] ability to enforce any of its rights under this Agreement." (Section 5.5). The foregoing promise to

MillerCoors was among the many promises that Chesbay broke by entering into the Unlawful Transaction that prompted the commencement of this action.

**(Chesbay's Notice to MillerCoors of
Entry into the Unlawful Transaction)**

34. By way of a letter dated August 30, 2012 (“Chesbay’s Admission of Breach”), Chesbay first informed MillerCoors that it had entered into a binding Asset Purchase Agreement (the “Purchase Agreement”) on August 28, 2012 to sell its assets to another wholesale beer distributing company (the “Purchaser”). Chesbay’s Admission of Breach stated that Chesbay had not negotiated a letter of intent with the Purchaser before entering into the definitive Purchase Agreement as required by the Distributor Agreement. Chesbay included a copy of the executed Purchase Agreement with its August 30, 2012 Admission of Breach.

35. The Purchase Agreement sets forth a purchase price that well exceeds \$75,000 for Chesbay’s license and distribution rights under the Distributor Agreement.

36. The MillerCoors Trademarks that the Distributor Agreement licenses Chesbay to use in the Licensed Territory also have a value well in excess of \$75,000—as do the MillerCoors Brands that the Distributor Agreement authorizes Chesbay to distribute in the Licensed Territory.

37. The Purchase Agreement sets October 12, 2012 as the proposed date for the closing of the Unlawful Transaction.

38. The Purchase Agreement contains a number of provisions that directly conflict with the MillerCoors ROFR and various other provisions of the Distributor Agreement. For example, under Section 5.4 of the Purchase Agreement, Chesbay agreed to “[b]etween the date of this Agreement and the Closing Date, . . . deal exclusively with the Purchaser in connection with the sale of the Business. Neither the Seller, the Owners, nor any employee or representative of the Seller shall directly or indirectly, without the Purchaser’s prior written consent, solicit,

encourage or initiate any offer or proposal from, or engage in any discussions with, or provide any information to, any person other than the Purchaser and its affiliates, employees and representative, concerning any transaction involving the sale of the stock of the Seller of any of the Acquired Assets . . . nor shall the Seller, the Owners nor any employee or representative accept any proposal with respect to any Acquisition Transaction.”

39. The Purchase Agreement states that it is binding upon Chesbay.

40. By executing the Purchase Agreement, Chesbay has purportedly made a binding commitment to sell and transfer assets that are not limited to its own property. Rather, the Purchase Agreement purports to assign or otherwise transfer to the Purchaser certain rights that MillerCoors alone can transfer. These include the right to distribute the MillerCoors Brands and the license to use the MillerCoors Trademarks in the Licensed Territory.

41. By executing the Purchase Agreement, Chesbay also has contractually agreed to refuse to engage in any discussions with MillerCoors or its assignee regarding the sale. The Purchase Agreement thus deprives MillerCoors of its ROFR under Section 8.8.3 of the Distributor Agreement, in direct breach of Section 8.8.4 of the Distributor Agreement.

42. By letter dated September 6, 2012 (“MillerCoors’ Notice of Breach”), MillerCoors notified Chesbay that it had received Chesbay’s Admission of Breach and the executed Purchase Agreement. MillerCoors’ Notice of Breach further informed Chesbay that, by agreeing to the binding nature of the Purchase Agreement and the exclusivity obligation under Section 5.4 of the Purchase Agreement, Chesbay had breached various provisions of the Distributor Agreement—including the MillerCoors ROFR. MillerCoors’ Notice of Breach also informed Chesbay that, notwithstanding Chesbay’s breach, MillerCoors was considering whether to exercise the MillerCoors ROFR in accordance with the Distributor Agreement.

43. On September 12, 2012, MillerCoors exercised the MillerCoors ROFR in accordance with the Distributor Agreement. That same day, MillerCoors provided written notice to Chesbay that it would assign to OHMC LLC its right to purchase the assets of Chesbay's business that were the subject of the Purchase Agreement on substantially the same terms, conditions, and purchase price set forth in the Purchase Agreement. MillerCoors has since assigned this right under Section 8.8.3 to OHMC LLC, pursuant to Section 8.11 of the Distributor Agreement.

COUNT I

(Lanham Act Trademark Infringement and Unfair Competition)

44. MillerCoors hereby incorporates by reference the allegations of ¶¶ 1 through 43.

45. If Chesbay were to consummate the Unlawful Transaction, the Purchaser named in the Purchase Agreement would be engaged in trademark infringement in violation of Section 32(1) of the Lanham Act and unfair competition in violation of Section 43(a) of the Lanham Act. The Lanham Act does not permit the unlicensed use of the MillerCoors Trademarks by any third parties to which MillerCoors has not granted a trademark license, including the Purchaser.

46. MillerCoors, as the owner of the MillerCoors Trademarks, has the absolute right and indeed the affirmative duty, pursuant to Section 45 of the Lanham Act, to control the quality and uniformity of the goods and services associated with the MillerCoors Trademarks and the identity of beer wholesalers licensed to use the MillerCoors Trademarks in connection with distribution of the MillerCoors Brands.

47. Any attempt by the Purchaser to distribute the MillerCoors Brands and use the MillerCoors Trademarks in the Licensed Territory without the prior written consent of

MillerCoors would constitute trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

48. Any attempt by the Purchaser to distribute the MillerCoors Brands and use the MillerCoors Trademarks in the Licensed Territory without the prior written consent of MillerCoors would constitute unfair competition—including “false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of [the Purchaser’s] goods, services, or commercial activities by another person”—in violation of Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

49. MillerCoors has no obligation under the Lanham Act to license the MillerCoors Trademarks to the Purchaser.

50. Chesbay’s transfer and attempted transfer of its license to use the MillerCoors Trademarks causes and threatens to cause irreparable harm to MillerCoors, which is without an adequate remedy at law.

COUNT II

(Lanham Act Preemption of Inconsistent State Law)

51. MillerCoors hereby incorporates by reference the allegations of ¶¶ 1 through 50.

52. Any state law requirement that MillerCoors permit Chesbay to assign its license to use the MillerCoors Trademarks without the prior written consent of MillerCoors would be preempted by the Supremacy Clause and the Lanham Act.

COUNT III

(Breach of Contract)

53. MillerCoors hereby incorporates by reference the allegations of ¶¶ 1 through 52.

54. The foregoing conduct on the part of Chesbay constitutes breach of contract.

55. MillerCoors therefore seeks a declaratory judgment from the Court under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, decreeing as follows:

a. The MillerCoors ROFR granted pursuant to Section 8.8.3 of the Distributor Agreement is valid and enforceable;

b. MillerCoors properly exercised the MillerCoors ROFR and assigned it to MillerCoors' assignee, OHMC LLC;

c. OHMC LLC has the right to purchase that portion of Chesbay's business covered by the Purchase Agreement on substantially the same terms, conditions, and purchase price;

d. Chesbay is in breach of the Distributor Agreement; and

e. Chesbay must fulfill its obligations under Section 8.8.3 of the Distributor Agreement, including its obligations to promptly execute all documents reasonably required to complete the transfer to OHMC LLC of that portion of Chesbay's business covered by the Purchase Agreement.

56. MillerCoors and Chesbay are in doubt as to their rights under the Distributor Agreement.

57. An actual and justiciable controversy exists between MillerCoors and Chesbay that is capable of and ripe for determination by this Court.

58. MillerCoors has exercised the MillerCoors ROFR in accordance with Section 8 of the Distributor Agreement and notified Chesbay in writing that it has assigned to OHMC LLC its right to purchase certain assets of Chesbay's business. These include the distribution rights for the MillerCoors Brands and the license to use the MillerCoors Trademarks in the Licensed

Territory that are the subject of the Purchase Agreement on substantially the same terms, conditions, and purchase price set forth in the Purchase Agreement.

59. The MillerCoors ROFR granted by Section 8 of the Distributor Agreement is valid and enforceable.

60. MillerCoors has properly exercised the MillerCoors ROFR.

61. MillerCoors has properly assigned the MillerCoors ROFR.

62. Chesbay has purportedly deprived MillerCoors of the MillerCoors ROFR, in direct breach of Section 8.8.4 of the Distributor Agreement, by entering into a binding Purchase Agreement. In particular, Chesbay agreed in Section 5.4 of the Purchase Agreement to refuse to fulfill its obligations under Section 8.8.3 of the Distributor Agreement to promptly execute all documents reasonably required to complete the transfer of that portion of its business subject to the MillerCoors to MillerCoors' assignee, OHMC LLC.

63. MillerCoors has a practical interest in the declaration sought herein.

64. A declaratory judgment setting forth the respective rights of MillerCoors and Chesbay regarding this issue will serve a useful purpose in clarifying and settling the legal relations between MillerCoors and Chesbay at issue and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to this action.

65. Accordingly, the Court should declare as follows:

a. The MillerCoors ROFR granted pursuant to Section 8.8.3 of the Distributor Agreement is valid and enforceable;

b. MillerCoors properly exercised the MillerCoors ROFR and assigned it to MillerCoors' assignee, OHMC LLC;

c. OHMC LLC has the right to purchase that portion of Chesbay's business covered by the Purchase Agreement on substantially the same terms, conditions, and purchase price;

d. Chesbay is in breach of the Distributor Agreement; and

e. Chesbay must fulfill its obligations under Section 8.8.3 of the Distributor Agreement, including its obligations to promptly execute all documents reasonably required to complete the transfer to OHMC LLC of that portion of Chesbay's business covered by the Purchase Agreement.

66. Chesbay's breach of the Distributor Agreement entitles MillerCoors to the following additional relief in addition to a declaratory judgment: specific performance, preliminary and permanent injunctive relief, damages, costs, and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff MillerCoors LLC respectfully requests that the Court:

- a. enter judgment in favor of MillerCoors on its claims for violation of the Lanham Act and declare that Chesbay has no right to assign the MillerCoors Trademarks to the Purchaser, that the Purchaser has no right to use the MillerCoors Trademarks, that MillerCoors has no obligation to license the MillerCoors Trademarks to the Purchaser or approve Chesbay's attempted transfer to the Purchaser of Chesbay's license to use the MillerCoors Trademarks, and that any requirement of state law that would deprive MillerCoors of its rights under the Lanham Act would be preempted;
- b. award MillerCoors specific performance of the Distributor Agreement and preliminary and permanent injunctive relief to prevent violations of the Lanham Act, together with damages, costs, and attorneys' fees;

- c. enter judgment in favor of MillerCoors on its claims for breach of the Distributor Agreement and declare that the MillerCoors ROFR granted by Section 8.8.3 of the Distributor Agreement is valid and enforceable; that MillerCoors properly exercised and assigned that right to its assignee, OHMC LLC; that OHMC LLC has the right to purchase that portion of Chesbay's business covered by the Purchase Agreement on substantially the same terms, conditions, and purchase price; and that Chesbay must fulfill its obligations under Section 8.8.3 of the Distributor Agreement, including its obligations to promptly execute all documents reasonably required to complete the transfer to OHMC LLC of that portion of Chesbay's business covered by the Purchase Agreement;
- d. award MillerCoors specific performance of the Distributor Agreement, enter preliminary and permanent injunctive relief preventing Chesbay from breaching the Distributor Agreement, award MillerCoors any damages, costs, and attorneys' fees that it may incur as a result of Chesbay's breach; and
- e. award MillerCoors such other relief, both at law and in equity, as the Court may find just and proper.

Date: September 21, 2012

Respectfully submitted,

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