UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

The Bellas Company, et al.,

Plaintiffs,

v.

Pabst Brewing Company,

Defendant.

Case No. 2:10–cv–907

Judge Michael H. Watson

OPINION AND ORDER

This diversity action arises from the purported termination of alcoholic beverage distributor franchises governed by the Ohio Alcoholic Beverages Franchise Act ("ABFA" or "Act"), Ohio Rev. Code §§ 1333.82–1333.87. The issue presented is whether termination was proper under the Act and the parties' distributor agreements. Both sides move for summary judgment on the issue on a stipulated set of facts. For the reasons that follow, the Court grants Plaintiffs' motion for summary judgment and denies Defendant's motion for summary judgment.

I. STIPULATED FACTS

The parties stipulate the following facts:

1. Plaintiff the Bellas Company d/b/a Iron City Distributing ("Iron City") is an Ohio corporation with its principal place of business at 2670 Commercial Avenue, Mingo Junction, Ohio 43938. Iron City has distributed certain brands of beer ("the Iron City Pabst Brands") that are supplied by Pabst Brewing Company, and at all relevant times, Iron City has operated as the exclusive distributor of the Iron City Pabst Brands in the territory assigned to Iron City ("the Iron City Territory"). In 2001, Pabst Brewing Company and Iron City executed a written contract (the "Pabst-Iron City Contract") regarding Iron City's distribution of the Iron City Pabst Brands, which has been amended from time to time.

2. Plaintiff Tri-County Wholesale Distributors, Inc. ("Tri-County") is an Ohio corporation with its principal place of business at 1120 Oak Hill Avenue, Youngstown, Ohio 44501. Tri-County has been distributing certain brands of beer ("the Tri-County Pabst Brands") for Pabst Brewing Company, and at all relevant times, Tri-County has operated as the exclusive distributor of the Tri-County Pabst Brands in the territory assigned to Tri-County ("the Tri-County Territory"). Most recently in 2004, Pabst Brewing Company and Tri-County executed a written contract (the "Pabst-Tri-County Contract") giving Tri-County the exclusive right to distribute the Tri-County Pabst Brands in the Tri-County Territory, which has been amended from time to time.

3. Plaintiff R. L. Lipton Distributing Company ("Lipton") is an Ohio corporation with its principal place of business at 5900 Pennsylvania Avenue, Cleveland, Ohio 44137. Lipton has been distributing certain brands of beer ("the Lipton Pabst Brands") for Pabst Brewing Company, and at all relevant times, Lipton has operated as the exclusive distributor of the Lipton Pabst Brands in the territory assigned to Lipton ("the Lipton Territory"). Most recently in 2004, Pabst Brewing Company and Lipton executed a written contract (the "Pabst-Lipton Contract") giving Lipton the exclusive right to distribute the Lipton Pabst Brands in the Lipton Territory.

4. Plaintiff Esber Beverage Company ("Esber") is an Ohio corporation with its principal place of business at 2217 Bolivar Road, SW, Canton, Ohio 44706. Esber has been distributing certain brands of beer ("the Esber Pabst Brands") for Pabst Brewing Company, and at all relevant times, Esber has operated as the exclusive distributor of the Esber Pabst Brands in the territory assigned to Esber ("the Esber Territory"). Most recently in 2005, Pabst Brewing Company and Esber executed a written contract (the "Pabst-Esber Contract") giving Esber the exclusive right to distribute the Esber Pabst Brands in the Esber Territory.

5. At all relevant times, each of Iron City, Tri-County, Lipton, and Esber (collectively "Distributors") have been and are "distributors" as that term is defined in Ohio Rev. Code § 1333.82(C).

6. Distributors have performed pursuant to their respective contracts with Pabst Brewing Company and have engaged in the promotion, retail training, and sale of alcoholic beverages on behalf of Pabst Brewing Company as a result of their respective contracts with Pabst Brewing Company.

7. Defendant Pabst Brewing Company is a Delaware corporation with its principal place of business in 9014 Heritage Parkway, #308, Woodridge, Illinois 60517. Pabst Brewing Company was incorporated in 1924 and has continuously operated as a manufacturer and/or supplier of alcoholic beverage products, including beer, since that time. At all relevant times,

Pabst Brewing Company has also continued to own and control the Pabst Brands distributed by Iron City, Tri-County, Lipton, and Esber.

8. On June 25, 2010, Pabst Holdings, Inc. ("PHI") acquired all of the stock of Pabst Brewing Company from S&P Company pursuant to a Stock Purchase Agreement dated June 12, 2010. PHI was first formed on April 28, 2010. PHI does not have any employees. PHI has no assets other than the stock of Pabst Brewing Company.

9. The beer products that Pabst Brewing Company supplies to its distributors in Ohio are manufactured for Pabst Brewing Company through a contract with Miller Beverage Company ("the Miller Brewing Agreement"). Pabst Brewing Company is a signatory to the Miller Brewing Agreement. PHI is not a signatory to the Miller Brewing Agreement.

10. Before, on, and after June 25, 2010, Pabst Brewing Company has manufactured or supplied, and continues to manufacture or supply, alcoholic beverages to distributors in Ohio. Pabst Brewing Company is a "manufacturer" as that term is defined in Ohio Rev. Code § 1333.82(B). Pabst Brewing Company owns the Pabst Brands distributed by Iron City, Tri-County, Lipton, and Esber.

11. On September 15, 2010, Pabst Brewing Company sent a letter (the "September 15, 2010 Letter") to each of the Distributors, and to other distributors in the State of Ohio. The September 15, 2010 letter states, in part, the following:

> As you are aware, all of the shares of the Pabst Brewing Company ("PBC") were recently acquired by new ownership. This transfer was completed on June 25, 2010, and resulted in a complete change in ownership and control of the company. During the past sixty days, PBC has been working diligently to review route to market options with regard to its current distribution network in the state. After careful consideration we, unfortunately, must inform you of our decision to terminate [Distributor] as a Pabst Brewing Company distributor, and this letter serves as our formal notice of termination pursuant to O.R.C. Section 1333.85(D). Our decision was based on a number of factors including our assessment of wholesalers who we believe have a strong interest in our brands, who share the same business philosophy, and who are best prepared for both the short and long-term growth needs of the Pabst Brewing Company brands. Under Section 1333.85(D), PBC, under its new ownership, is allowed to terminate current wholesalers within 90 days from the date of acquisition of

> substantially all of the stock or assets of PBC. As long as notice of termination is received within 90 days, PBC is not required to show just cause or obtain consent of the wholesaler being terminated.

A true and accurate copy of the September 15, 2010 Letter sent to Iron City is attached [to the parties' Stipulations of Fact] as Exhibit A. Marc Kibbey, who signed the Letter on or about September 15, 2010, was the "Vice President, Network Development" of Pabst Brewing Company. On September 15, 2010, Mr. Kibbey was not an employee of PHI.

12. Iron City, Tri-County, and Esber received the September 15, 2010 Letter on September 16, 2010. Lipton received the September 15, 2010 Letter on September 17, 2010.

13. The sole basis on which Pabst Brewing Company relies to terminate Distributors' distribution franchises is the successor manufacturer provisions of Ohio Rev. Code § 1333.85(D) and § 1333.851.

14. None of the Distributors has consented to the termination of their franchises.

15. Distributors have received no notice of termination or correspondence that would purport to terminate Distributors' franchises other than the September 15, 2010 Letter.

16. All documents produced in this case by the parties are true and accurate copies of the original documents in the producing party's custody and control, are business records of the producing party, made at or near the time by, or from information transmitted by, a person with knowledge, are kept in the course of a regularly conducted business activity, and it is the regular practice of that business activity to make the document.

Stipulations of Fact, ECF No. 25.

II. STANDARD OF REVIEW

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The Court may grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Petty v. Metro. Gov't. of Nashville-Davidson Cnty.*, 538 F.3d 431, 438–39 (6th Cir. 2008).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, who must set forth specific facts showing that there is a genuine issue of material fact for trial, and the Court must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000); *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d. 479, 487 (6th Cir. 2006). The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Reeves*, 530 U.S. at 150–51. Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. 2009).

Thus, the central issue is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224,

III. DISCUSSION

Pabst Brewing Company ("Pabst") argues that its new owner, PHI, is a "successor manufacturer" within the meaning of Ohio Rev. Code § 1333.85(D), and PHI

is therefore entitled to terminate Plaintiffs' distributorships without consent or just cause. Plaintiffs contend that PHI does not qualify as a successor manufacturer for a variety of reasons, most of which entail the interpretation of the ABFA.

All but one of the parties' arguments would require the Court to construe Ohio Rev. Code § 1333.85(D), which states:

> 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. Any notice of termination or nonrenewal of the franchise to a distributor of the acquired product or brand shall be received at the distributor's principal place of business within the ninety-day period. If notice is not received within this ninety-day period, a franchise relationship is established between the parties. 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. Upon termination or nonrenewal of a franchise pursuant to this division, the distributor shall sell and the successor manufacturer shall repurchase the distributor's inventory of the terminated or nonrenewed product or brand as set forth in division (C) of this section, and the successor manufacturer also shall compensate the distributor 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. The value of the distributor's business that is directly related to the sale of the terminated or nonrenewed product or brand shall include, but shall not be limited to, the appraised market value of those assets of the distributor principally devoted to the sale of the terminated or nonrenewed product or brand and the goodwill associated with that product or brand.

Ohio Rev. Code § 1333.85(D). The Court finds it unnecessary to interpret the Act, however, because the matter turns on the provisions of the distributor agreements. In addressing that issue, the Court will assume, *arguendo*, that PHI is a successor manufacturer and otherwise entitled to terminate the agreements under the ABFA.

Plaintiffs contend that termination is barred because Pabst failed to provide Plaintiffs "at least sixty (60) days prior written notice" of the termination as required by the distributor agreements. Pls.' Resp. 12, ECF No. 33 (quoting Pabst Brewing Company Distributor Agreement § 8.2., ECF No. 27–2). Plaintiffs note that Pabst's Answer states that the termination letters were effective immediately upon receipt. Def.'s Answer ¶¶ 12, 13, 16, 17, 20, 21, ECF No. 24. The termination letters are consistent with Pabst's pleading, and do not purport to give any prior notice, let alone sixty days prior notice. *See* Notice of Termination, ECF No. 25–1. Thus, the uncontroverted record and pleadings establish that Pabst did not provide Plaintiffs sixty days prior written notice of its intent to terminate the distributor agreements.

Pabst argues that sixty days advance notice was not required because Plaintiffs did not have written agreements with "PBC-PHI." In addition, Pabst maintains that under the express language of the agreements, the termination provisions of § 1333.85(D) supercede the agreements' sixty-day notice provision.

The provisions of the agreements at issue are §§ 16.7, 8.2, and 8.2.10. Section 16.7 provides in pertinent part: "The laws, rules, and regulations of the jurisdiction in which Distributor conducts its business are hereby incorporated in this Agreement to the extent that such laws, rules, and regulations are required to be incorporated and shall supercede any conflicting provision of this Agreement." Pabst Brewing Company Distributor Agreement § 16.7, ECF No. 27–2. Sections 8.2 and 8.2.10 state as follows:

> 8.2 Immediate Termination. Pabst shall have the right to terminate this Agreement at any time by giving Distributor at least sixty (60) days prior written notice, without further obligation and liability of any kind or waiver of any other rights Pabst may have against Distributor, upon the occurrence of any of the following events:

. . .

8.2.10 *Other Legal Right.* Any other right to terminate this Agreement which exists under applicable state or federal law, statute or regulation.

. . .

Pabst Brewing Company Distributor Agreement §§ 8.2, 8.2.10, ECF No. 27–2.

The Court will proceed to address Pabst's first argument, that PBC-PHI never had written agreements with Plaintiffs and therefore no agreements exist to enforce against PBC-PHI. The argument entails the use of the labels Pabst created for purposes of identifying the entities involved in the instant litigation. Specifically, "PBC-PHI," means "Pabst Brewing Company, now owned by Pabst Holdings, Inc." and "PBC-S&P," means Pabst Brewing Company, "when owned by S&P Company." Def.'s Mot. Sum. J. 1–2, ECF No. 27; Def's Answer 1 n.1, ECF No. 13. Pabst argues. Def.'s Mot. Sum. J. 15–16; Def.'s Resp. 10 n.8. Implicit in Pabst's argument is the notion that the agreements immediately ceased to be binding on Pabst when the Stock Purchase Agreement was executed.

Pabst's argument is flawed on several levels. First, "PBC-PHI" and "PBC-S&P" are mere labels which by themselves have no legal significance. The distributor agreements were between Plaintiffs and *Pabst*, not a former entity named PBC-S&S. Pabst has existed continuously since 1924, and there was no change in Pabst's name or corporate form resulting from the stock purchase. In addition, the written distributor agreements expressly limit the circumstances in which Pabst may terminate those agreements. The purchase of Pabst's stock, by itself, is not listed among the

circumstances permitting termination.[1] *See* Pabst Brewing Company Distributor Agreement §§ 8.2, 8.3, ECF No. 27–2. Moreover, the Stock Purchase Agreement acknowledges that Pabst is bound by a multitude of preexisting "legal, valid and binding" obligations which are recognized to be "in full force and effect." Stock Purchase Agreement § 2.3(n), ECF No. 27–5 (listing categories of agreements). Among the binding obligations listed in the Stock Purchase Agreement is any contract which "establishes an exclusive sale or purchase obligation with respect to any product or any geographic location." Stock Purchase Agreement § 2.3 (n)(xiii), ECF No. 27–5. Hence, the Stock Purchase Agreement provides that the distributor agreements remain "in full force and effect."

Furthermore, Pabst cites no legal authority for the proposition that Pabst's preexisting written distributor agreements automatically ceased to be binding when PHI purchased all of Pabst's stock. No such authority exists. Otherwise, chaos would ensue any time a company purchased all of the stock of another corporation. In short, there is no provision of law or any agreement that provides for automatic termination of Pabst's preexisting distributor agreements with Plaintiffs immediately upon PHI's purchase of all of Pabst's stock. Consequently, the Court rejects Pabst's argument that the distributor agreements are not binding upon Pabst because they were not made with "PBC-PHI."

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[1]To the extent §§ 16.7 or 8.2.10 allow termination by incorporating Ohio Rev. Code § 1333.85(D), the stock purchase, by itself, nonetheless does not act to automatically and immediately terminate the distributor agreements. Rather, Pabst must first satisfy the conditions of the statute, and, as discussed below, the advance notice requirement of the distributor agreements.

Pabst also argues that the distributor agreements expressly permit termination pursuant to Ohio Rev. Code § 1333.85(D). It asserts that § 16.7 of the distributor agreements incorporates Ohio Rev. Code § 1333.85(D), and therefore provides for termination of the agreements under that statutory provision. Additionally, Pabst contends that § 8.2.10 of the distributor agreements independently allows it to terminate pursuant to Ohio Rev. Code § 1333.85(D) because that statutory provision constitutes a right to terminate under applicable state law.

Plaintiffs maintain that Pabst's reliance on § 16.7 of the distributor agreements is misplaced. They note that § 16.7 incorporates state law "to the extent that such laws, rules, and regulations are required to be incorporated and shall supercede any *conflicting* provision of this Agreement." Pabst Brewing Company Distributor Agreement § 16.7, ECF No. 27–2 (emphasis added). Plaintiffs argue that the sixty days advance notice requirement was not superceded because it does not conflict with § 1333.85(D). They contend that nothing in the ABFA precludes a manufacturer from "being more generous to distributors than the minimum requirements set out by the Act." Pls.' Resp. 13, ECF No. 33.

Plaintiffs suggest that Pabst fares no better under §§ 8.2 and 8.2.10 of the distributor agreements. They note that § 8.2.10 is a subsection of § 8.2, and the two sections must be read together. Section 8.2's sixty days advance notice requirement therefore necessarily applies when termination is based on a purported right to terminate under applicable state law pursuant to § 8.2.10.[2]

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[2]In its response, Pabst selectively quotes the operative language of §§ 8.2 and 8.2.10, conspicuously omitting the sixty-day notice requirement. Def.'s Resp. 11, ECF No. 32.

The Court agrees with Plaintiffs. With respect to § 16.7 of the distributor agreements, Pabst does not argue that, let alone explain how, the § 8.2 sixty days notice requirement conflicts with § 1333.85(D) or any other provision of the ABFA. In fact, there is no conflict. The distributor agreements and Ohio Rev. Code § 1333.85(D) require two different kinds of notice. The distributor agreements require notice at least sixty days prior to termination. Section 1333.85 requires notice "within ninety days of the date of the merger, acquisition, purchase, or assignment . . ." Ohio Rev. Code § 1333.85(D). Thus, the agreements require notice *before* termination, whereas the statute requires notice within a specified time *after* a certain event. For example, it would be a simple matter to provide the contractual advance notice less than thirty days after the stock purchase followed by the statutory notice sixty days later. Or, the statutory notice could be given within ninety days after the stock purchase, but state that the termination would not take effect until sixty days later. Furthermore, no other provision of the ABFA precludes or conflicts with the sixty days prior notice requirement. The Court therefore concludes that the provisions of the ABFA do not supercede the sixty days prior notice requirement of the distributor agreements.

Under the plain language of the distributor agreements, § 8.2.10 is expressly subject to the sixty days prior notice requirement of §8.2. Section 8.2.10 therefore provides Pabst no basis to avoid the contractual notice provision.

Pabst does not present any other arguments concerning the enforceability of the distributor agreements' advance notice requirement. For example, Pabst does not argue that the prior notice requirement is not a material term, that breach of the requirement can be excused, or that termination was effective despite the breach of the

agreements. Those arguments are now waived.

Based on the above, the Court holds as a matter of law that Pabst breached the distributor agreements by failing to give sixty days notice prior to termination. As a result, Pabst's purported termination of the distributor agreements was ineffective, and the agreements therefore continue to bind Pabst.

IV. DISPOSITION

For the above reasons, the Court **GRANTS** Plaintiffs' motion for summary judgment and **DENIES** Pabst's motion for summary judgment.

Within seven days after the date of this order, Plaintiffs shall submit to the Court a proposed final judgment entry granting judgment along the following lines: (1) in favor of Plaintiffs and against Pabst on Counts One and Two of Plaintiffs' first amended complaint; (2) in favor of Plaintiffs and against Pabst on Pabst's counterclaim, (3) declaring that Plaintiffs' distributor agreements with Pabst remain in full force and effect; (4) dismissing Count Three of Plaintiffs' first amended complaint as moot; (5) denying Plaintiffs' motion for preliminary injunction without prejudice as moot.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT