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E-Filed 11/17/09

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 SAN MATEO COUNTY

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

13 MAITA DISTRIBUTORS, INC. OF
 14 SAN MATEO COUNTY, a California
 corporation

15 Plaintiff,

16 v.

17 DBI BEVERAGE INC., a Tennessee
 18 corporation,

19 Defendant.

20 MILLERCOORS, LLC, a Delaware limited
 21 liability company,

22 Intervenor.

CASE NO. 5:09-CV-02318 RMW

~~PROPOSED~~ ORDER SEALING PORTIONS
 OF DEFENDANT DBI'S REVISED TRIAL
 BRIEF AND REVISED PROPOSED
 FINDINGS OF FACT AND CONCLUSIONS
 OF LAW

TRIAL DATE: November 17, 2009
 TIME: 9:00 a.m.
 DEPT: Courtroom 6, 4th Floor

Matter Removed on:
 May 26, 2009

JUDGE: HON. RONALD M. WHYTE

23 **TO ALL PARTIES HEREIN:**

24 The Court has read and considered Defendant DBI Beverage, Inc. ("DBI")'s
 25 Administrative Motion for a Sealing Order in Support of Its Amended Findings of Fact and Law
 26 and Trial Brief ("Motion") and Plaintiff Maita Distributing, Inc. of San Mateo County ("Maita")'s
 27 Response to the Motion ("Response"), and the accompanying declaration of Marcus Maita,
 28

1 pursuant to Local Rules 79-5 and 7-11, to file selected documents comprised of highly sensitive
2 information regarding Maita's private negotiations, financial information, and trade secrets under
3 seal.

4 Maita's interest in protecting information concerning private negotiations, financial
5 information, and trade secrets overcomes the right of public access to these records, and are
6 compelling reasons to support the sealing of the documents. If the documents are not sealed,
7 there is a substantial probability that Maita's interests in the confidential information, financial
8 information, and trade secrets will be prejudiced. The sealing is narrowly tailored in that it is
9 limited to line-by-line redactions of confidential information contained in those documents.

10 Compelling reasons appearing therefor, this Court finds pursuant to Civil L.R. 79-5, that:

- 11 (1) The documents to be sealed, or portions thereof, are
12 entitled to protection under the law, that overcomes the
13 right of public access to the record; and
14 (2) The proposed sealing is narrowly tailored.

15 IT IS ORDERED THAT the Motion and Response (1) to seal the highly confidential
16 information contained in and redacted from DBI's Revised Trial Brief, as shown in Exhibit 1
17 attached hereto; and (2) to seal the highly confidential information contained in and redacted
18 from DBI's Revised Proposed Findings of Fact and Conclusions of Law, as shown in Exhibit 2
19 attached hereto is GRANTED and that those portions of documents are hereby ordered to be
20 filed under seal. Unredacted copies of the documents shall be filed under seal; redacted copies
21 shall be filed in the public record.

22 DATED: 11/17/09

23 
24 UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

MAITA DISTRIBUTORS, INC. OF SAN
 MATEO COUNTY, a California corporation,

Plaintiff,

v.

DBI BEVERAGE INC., a Tennessee
 corporation,

Defendant.

MILLERCOORS, LLC, a Delaware limited
 liability company,

Intervenor.

Case No.: 5:09-CV-2318 RMW (HRL)

**DEFENDANT DBI BEVERAGE INC.'S
 REVISED TRIAL BRIEF**

UNREDACTED VERSION

Trial Date: November 17, 2009
 Time: 9:00 a.m.
 Dept.: Courtroom 6, 4th Floor

Complaint Filed (in State Court):
 May 6, 2009

Removed:
 May 26, 2009

1 The Court invited the parties to submit revised Trial Briefs focusing on the single
2 remaining claim for trial, namely plaintiff Maita Distributors Inc. of San Mateo County's
3 ("Maita's") claim that under California Business and Professions Code section 25000.2 ("section
4 25000.2"), good faith negotiation is a condition precedent to arbitration, and that defendant DBI
5 Beverage Inc. ("DBI") allegedly failed to negotiate in good faith. DBI therefore respectfully
6 submits this revised Trial Brief.

7 I. INTRODUCTION

8 This trial turns on application of the following sentence from section 25000.2(d): "The
9 successor beer manufacturer's designee *and* the existing beer wholesaler shall *negotiate* in good
10 faith." (Emphasis added.)

11 Maita contends that DBI did not negotiate in good faith, and thus may not proceed to
12 arbitration. As noted by this Court, [Maita's] sole argument "reduce[s] to the assertion that DBI
13 did not negotiate in good faith because Maita did not receive any offer to purchase the distribution
14 rights within the first thirty days."¹

15 There are several fundamental flaws with this argument, each dispositive.

16 First is the statutory construction. "Negotiate" means "to confer with another so as to
17 arrive at the settlement of some matter."² Maita cannot constrict "negotiate" to "an offer [by the
18 successor distributor]," or rewrite the statute from a mutual obligation to confer into a unilateral
19 obligation of the successor distributor to make an offer. In construing a statute the court shall
20 neither omit words nor insert words that are not there. *See Yucaipa Water Co. No. 1 v. Public*
21 *Utilities Comm'n*, 54 Cal. 2d 823, 831 (1960); *see also Doe v. City of Los Angeles*, 42 Cal. 4th
22 531, 545 (2007) ("in construing . . . any statute, we may not broaden or narrow the scope of the
23 provision by reading into it language that does not appear in it or reading out of it language that
24 does").

25
26 ¹ 11/03/09 Order Denying in part and Granting in part the parties' Cross-Motions for
Summary Adjudication ("Order on Summary Adjudication"), 13:15-17.

27 ² Merriam-Webster's Online Dictionary, available at [http://www.merriam-](http://www.merriam-webster.com/dictionary/negotiate)
webster.com/dictionary/negotiate (last accessed November 13, 2009).
28

1 Second, "good faith," undefined in the statute, is elsewhere defined as honesty in fact and
2 fair dealing.³ Maita bases its assertion of lack of faith solely on the failure to receive an offer
3 within thirty days of receiving the termination notice of September 2. The undisputed facts show
4 first that DBI sent an offer on October 15 and then, on October 21, minutes after being informed
5 that the offer had not been received, re-sent its offer. There is no claim that Maita was
6 disadvantaged or that DBI was advantaged in that miscommunication, if any, nor is there a claim
7 of any lack of honesty on DBI's part. Again, the statute cannot be rewritten. *Doe v. City of Los*
8 *Angeles*, 42 Cal. 4th 531, 545 (2007).

9 Third, and finally, is what *did* happen. Maita was notified September 2, 2008 of
10 MillerCoors' intent to terminate it, and received written formal notice September 8, 2008.
11 Meanwhile, Maita, with its brokers, decided to withhold from DBI basic financial documents such
12 as financial statements. The first information Maita's brokers provided DBI was a Confidential
13 Offering Memorandum ("COM"),⁴ dated September 28, 2008, asserting impossibly rosy
14 predictions of how DBI would profit after acquiring the Maita operation. The COM, described by
15 its author as a marketing document constructed on "back of the envelope" figures, was most
16 notable for what it did not include: an asking price, gross profit figures per supplier, and basic
17 numbers like rent, salary and overall gross profit. DBI swiftly and diligently asked for those
18 building blocks so it could conduct a reasonable estimate of what the business was worth. And
19 when those finally arrived, DBI immediately reiterated its offer.

20 Maita denigrated the offer and made no counter. DBI bid again, after the parties talked and
21 met in November, and through December, when Maita broke off discussions. The parties were
22 apart on price because Maita thought DBI would realize consolidation savings, or synergies, that
23 DBI thought impossibly optimistic (and Maita's actual experience in acquiring Coors in 2002
24 belied that as well, and led Maita to conceal from DBI how Maita was actually performing). That
25 is a disagreement, not lack of good faith. While Maita was responsive to a potential purchase in

26 ³ See Cal. Comm. Code § 1201(b)(20) (defining "good faith" as "honesty in fact and the
27 observance of reasonable commercial standards of fair dealing").

28 ⁴ See Maita's Confidential Offering Memorandum to DBI, DBI's Trial Exhibit ("Ex.") 118.

1 its concurrent negotiation with an in-county distributor, Matagrano, in DBI's case, Maita chose to
2 stonewall.

3 Negotiate is what DBI did, in good faith, but with little help from Maita. The statute by
4 design allows for a demand/offer gulf so great it can only be settled by arbitration, and DBI is
5 entitled to a judgment in its favor and to proceed to the arbitration step in this statutory process.

6 II. STATEMENT OF FACTS

7 A. July 2008 - September 8, 2008: MillerCoors Terminates Maita and DBI Begins Good 8 Faith Negotiations

9 As a successor manufacturer under section 25000.2, MillerCoors LLC ("MillerCoors")
10 designated DBI its successor wholesaler. MillerCoors then properly provided Maita written notice
11 of its intent to terminate Maita as the distributor of its products in San Mateo County. See Cal.
12 Bus. & Prof. Code § 25000.2. Pursuant to section 25000.2(d), Maita and DBI then embarked on
13 negotiations to establish the fair market value of the affected distribution rights, but the focus on
14 both sides was to find a price for the entire distributorship.

15 DBI first hired a reputable broker, Joe Thompson of Independent Beverage Group
16 ("IBG"), to negotiate the transfer. IBG sent Maita its standard Request for Information, asking for
17 necessary financial information to value the distribution rights, on August 27, 2008. It requested:
18 (1) Maita's previous three year's financial statements; (2) its gross profit and sales volume figures
19 per supplier; (3) its discretionary expenses; and (4) its employee salary and expense information.
20 Ex. 113.

21 Maita also hired a broker, Ippolito Christon & Co. ("Ippolito"). On September 2, 2008,
22 Ippolito sent a Preliminary Information Request to its own client similar in key measures to IBG's
23 request. Ippolito requested, among other things: (1) Maita's reviewed financial statements for the
24 past two years; (2) Maita's gross profit and sales volume figures by supplier; (3) Maita's
25 discretionary and operating expenses; and (4) capital expenditures. The next day, on September 3,
26 2008, Maita faxed Ippolito all of this information. Ex. 116. Maita provided nothing to DBI.
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1 **B. September 28, 2008 – October 6, 2008: Instead of Answering DBI’s Request for**
2 **Information, Maita Responds With a Confidential Offering Memorandum and**
3 **Limited, Non-Detailed Financial Data**

4 Maita intentionally did not respond to the information request IBG sent. Maita’s actual
5 financial performance was disappointing following its own acquisition of Coors and other rights in
6 2002, and that continued to hamper its performance. Instead, on September 28, 2008, after the
7 parties negotiated and executed a Non-Disclosure Agreement, Maita’s broker provided DBI with a
8 COM. Ex. 118. The COM made it clear Maita sought to sell its entire business to DBI, not just its
9 MillerCoors distribution rights. Marcus Maita acknowledged as much, telling DBI that it must
10 make an offer for Maita “in its entirety” and observing any attempt by DBI to distribute Miller and
11 Coors alone in San Mateo would be a “disgusting disaster.” Ex. 117. The COM also revealed that
12 Maita sought a purchase price based on synergies that it insisted that DBI, as a neighboring (vs.
13 “in-market”) wholesaler, would realize from the acquisition. Yet, the COM set forth surprisingly
14 little details about these alleged synergies, instead providing only sales volume, gross profit, and
15 EBITDA figures for Maita’s Crown distribution rights, and then massing together this same
16 information for all of Maita’s “Other” distribution rights.

17 On October 6, 2008, knowing she owed DBI financial information and concerned that “I
18 don’t think we can avoid providing this information now,” Maita’s broker sent DBI a non-detailed
19 2007 Income Statement and 2008 projection, along with a 2007 Balance Sheet. Ex. 120. Upon
20 receipt of the Income Statement, DBI first learned that Maita’s projected EBITDA for 2008 was
21 [REDACTED] Maita’s broker had Maita’s financial statement for over a month, and counseled
22 withholding it, stating “I do not think we need (or want) to send reviewed financials at this time.
23 Marcus has indicated that there is information contained therein that he does not want DBI to see
24 yet.” Ex. 119. She also acknowledged Maita’s [REDACTED] operating profit, and voiced
25 her fear that DBI would submit an offer based on Maita’s actual financial performance, rather than
26 the synergies casually predicted by the COM. *Id.*

1 **C. October 8, 2008 to October 14, 2008: DBI Seeks the Financial Information Initially**
2 **Requested, and Receives Some**

3 After receiving Maita's COM and its non-detailed Income Statements and Balance Sheet,
4 DBI's broker sent a series of e-mail requests to Maita for information that it had previously
5 requested in August 27. Exs. 121-125, 128. As of October 8, 2008—30 days after Maita received
6 MillerCoors' Termination Notice and more than 40 days after IBG sent its Request for
7 Information—DBI had yet to even receive Maita's gross profit or sales volume figures for Miller
8 and Coors. Maita first provided those figures October 9, 2008. Ex. 121.

9 On October 9, 2008, IBG also sent two e-mails to Maita requesting that it provide line-item
10 financials, payroll information, an organizational chart, owner salaries/benefits, and a list of all
11 one-time or discretionary expenses that Maita included in its income statement. Exs. 122-124.
12 Maita responded with an organizational chart and salary information by position, and it informed
13 DBI that it would work on gathering the other information requested. Yet Maita had already
14 provided all of this to its own broker.

15 On October 10, 2008, DBI wrote to Maita's broker to confirm Maita's adjusted EBITDA
16 based on synergies and to inquire whether Maita would be making an offer or whether it wanted
17 DBI to do so. Ex. 125. On October 13, 2008, DBI informed Maita that it should have an offer
18 shortly. Ex. 126. The next day, on October 14, 2008, DBI repeated its request for a detailed, line-
19 item financial statement and details regarding non-recurring discretionary expenses and owner
20 compensation. Ex. 128. It informed Maita that with this information, it could very quickly
21 provide an offer. Maita's broker responded only that DBI must make sure to break its offer out by
22 dollar amount per each brand Maita distributed so that Maita could compare DBI's offer to other
23 offers. Ex. 127.

24 **D. October 15, 2008 – December 15, 2008: After Receiving the Financial Information**
25 **Maita Would Provide, DBI Quickly Submits an Offer and Continues to Negotiate**

26 On October 15, 2008, after receiving what information Maita's broker would provide,
27 DBI's broker sent an e-mail offer to purchase Maita's entire business. Ex. 129. On October 17,
28 2008, having not heard any response from Maita, DBI initiated arbitration 39 days after Maita's

1 receipt of MillerCoors' termination notice. Ex. 131. Next, in the morning on October 21, 2008,
2 still not having heard from Maita, DBI phoned Maita to inquire where it stood on the October 15th
3 offer. Ex. 130. Maita informed DBI that it had not received any offer. Upon learning this, at 8:32
4 a.m. on October 21, 2008, IBG resent the offer to Maita. Ex. 132.

5 After confirming receipt of DBI's offer, from October 23rd to October 30th, Maita's broker
6 wrote to DBI insisting that it break down its offer to a dollar amount for each brand Maita
7 distributed. Ex. 134. DBI did so for MillerCoors brands, but informed Maita that it intended to
8 make an offer for the remainder as a multiple of EBITDA. DBI acknowledged the possibility of
9 synergies, but reminded Maita that, despite multiple requests, Maita had not provided it with the
10 information necessary to assess these claimed synergies. DBI also expressed a willingness to
11 further discuss should Maita be willing to provide the information requested. In response, Maita
12 wrote that DBI's unwillingness to break down prices in dollar terms for each non-MillerCoors
13 brand in Maita's portfolio constituted bad faith and that DBI's [REDACTED] offer for
14 MillerCoors was a "low-ball price." Ex. 135. But Maita provided no counter-offer.

15 **E. December 15, 2008: Having Never Provided Any Demand or Counter, Maita Refuses**
16 **All of DBI's Offers and Ends Discussions**

17 After receipt of Maita's October 31st letter, DBI reiterated its offer to purchase Maita's
18 MillerCoors rights and the rest of its business. Ex. 136. On November 3, 2008, it also requested a
19 counteroffer from Maita. *Id.* Although Maita never provided one, the parties continued
20 negotiations from November to mid-December. Exs. 138-142. But the theme remained
21 consistent. Not once during the 30 days or at any time thereafter did Maita provide DBI with *any*
22 counteroffer or *any* asking price for the distribution rights. When DBI made a final offer to
23 purchase on December 15, 2008 for [REDACTED] Maita again rejected it and again refused to
24 counter. Ex. 142. Maita then ended discussions.

25 **III. ARGUMENT**

26 **A. Maita Cannot Bear Its Burden of Establishing that DBI Failed to Negotiate in Good**
27 **Faith or that this Alleged Failure Prevents Arbitration**

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1 Despite Maita's stonewalling and DBI's good faith efforts, Maita now asks this Court to
2 rule that DBI failed to negotiate in good faith. Maita, as plaintiff, bears the burden of persuasion.
3 See Cal. Evid. Code § 500; *Weiner v. Fleischman*, 54 Cal.3d 476, 483 (1991) (citation omitted)
4 see also CACI 200.⁵ Maita cannot do so.

5 **1. Maita Cannot Rewrite the Statute To Require One Party Make an Offer**

6 Maita cannot reduce the definition of "negotiate" to "make an offer."⁶ "The court must
7 avoid reading into the statute words that are not there. The court cannot 'insert what has been
8 omitted, or omit what has been inserted.'" Order on Summary Adjudication, 5:27-28: 6:1-2
9 (citing *Yucaipa Water Co. No. 1*, 54 Cal.2d at 831 and *Doe*, 42 Cal.4th at 545 (internal quotation
10 omitted)). Nothing in the statute requires a formal offer. Had the Legislature intended to impose a
11 unilateral obligation on the successor distributor to make an offer, the statute would say so. It
12 does not.

13 Not only does section 25000.2 not require a formal offer, "good faith" negotiation is not
14 defined as a formal offer by analogous law or by plain and common sense meaning. Rather,
15 California law defines "good faith" as "honesty in fact and the observance of reasonable
16 commercial standards of fair dealing."⁷ See Cal. Com. Code § 1201(b)(20); *California v. Chevron*

17 ⁵ In diversity cases, state law governs the burden of proof. *Cal. Sansome Co. v. United*
18 *States Gypsum*, 55 F.3d 1402, 1406 (9th Cir. 1995).

19 ⁶ Maita's suggestion that the Court must only consider negotiations during the first 30-days
20 after Maita received its termination letter from MillerCoors is not persuasive. To properly
21 determine DBI's intent with regard to these negotiations, the Court should consider the
22 entire negotiation period because, "'the determination of intent [relating to good faith]
23 must be founded upon the party's overall conduct and the totality of the circumstances.'" *William Dal Porto & Sons Agric. Labor Relations Bd.*, 163 Cal. App. 3d 541, 549 (1984)
(citation omitted). All the relevant communications bear on intent. See Fed. R. Evid. 401.

24 ⁷ Furthermore, California law makes clear that "good faith is a subjective standard of actual
25 knowledge." *Bank One, Dearborn, N.A. v. Maisel*, No. C 02-0531 MHP, 2004 U.S. Dist.
26 LEXIS 2406, *14 (N.D. Cal. Feb. 17, 2004); see also *Farmers & Merchants State Bank v.*
27 *Western Bank*, 841 F.2d 1433, 1444 (9th Cir. 1987) (the appropriate standard for "good
28 faith" defined as "'honesty in fact in the conduct or transaction concerned'" is "'a
subjective one, looking to the intent or state of mind of the party concerned'" (citation
omitted). Whereas, bad faith is "a concept with a well-settled meaning in the law," defined
as "'neglect or refusal to fulfill some duty or some contractual obligation, not prompted

1 Corp., 872 F.2d 1410, 1413 (9th Cir. 1989); *E.S. Bills v. Tzucanow*, 38 Cal.3d 824, 833 (1985);
2 see also Cal. Civ. Code § 1102.7 (defining “good faith” as “honesty in fact in the conduct of the
3 transaction”); *Calemine v. Samuelson*, 171 Cal. App. 4th 153, 162 (2009) (same). The Kentucky
4 beer distribution transfer statute after which section 25000.2 was modeled similarly defines “good
5 faith”. See Ky. Rev. Stat. Ann. §§ 244.604(4); 244.606(2)(d).

6 And “negotiate” commonly means “to confer with another so as to arrive at the settlement
7 of some matter.” Merriam-Webster’s Online Dictionary, available at [http://www.merriam-
9 webster.com/dictionary/negotiate](http://www.merriam-
8 webster.com/dictionary/negotiate) (last accessed Nov. 13, 2009). It also means “. . . to conduct
10 communications or conferences with a view to reaching a settlement or agreement. It is that
11 which passes between parties or their agents in the course of or incident to the making of a
12 contract and is also conversation in arranging terms of contract” *Markborough Cal. Inc. v.
13 Superior Court*, 227 Cal. App. 3d 705, 714 (1991) (citing Black’s Law Dict. (5th ed. 1979) p.
14 934)). “The word ‘negotiate’ has no precise definition and means nothing more than the
15 process by which parties come to or do not come to an agreement Obviously, what
16 constitutes ‘negotiation’ in any one case cannot be fixed with any degree of specificity” *Id.*
(emphasis added).

17 No interpretative alchemy turns “negotiate” into “I need not say or do anything, but you
18 must make an offer.”⁸ Therefore, Maita cannot establish its claim.

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**by an honest mistake as to one’s rights or duties, but by some interested or sinister
motive.”** *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1380 (9th Cir. 1992)
(citing Black’s Law Dictionary) (emphasis added). Accordingly, the proper consideration
is DBI’s subjective knowledge concerning its negotiation efforts.

⁸ This argument is similar to, but no better than, Maita’s unsuccessful claim that a
“successor beer manufacturer’s designee” under the statute must be restricted to a licensed
distributor. See Order on Summary Adjudication at 11:13-28, fn. 4. Just as the Court held
that the statute’s provisions “do not define ‘distributor’ as one who is licensed to distribute
beer in the State,” so here neither does the statute define “negotiate” as requiring the
successor beer manufacturer’s designee to provide an offer in the first 30-days after the
existing distributor is terminated.

1 **2. Maita Cannot Establish Its Case Because DBI Engaged in Honesty in Fact and**
2 **Fair Dealing**

3 Moreover, DBI's conduct satisfies the legal definition of "good faith" and the common
4 sense definition of "negotiate." These require an honest back and forth in an attempt to reach a
5 settlement, and this is precisely what occurred, at least on DBI's part.

6 DBI hired a reputable broker to negotiate the purchase of Maita's distribution rights, who
7 promptly sent a standard commercially reasonable request for financial information to Maita.
8 Maita too hired a broker, and that broker asked for much the same information from its client,
9 Maita, as had DBI's broker. The difference is Maita answered its broker's request the day after it
10 was sent, yet chose to withhold this financial information from DBI.

11 So, when Maita sought an offer for its entire business based on speculative synergies
12 claimed by the COM and later revealed its actual EBITDA, DBI pursued the pertinent information
13 needed to value the distribution rights and assess Maita's actual performance. Then, after DBI had
14 received all of the information Maita was willing to provide, DBI promptly made an offer before
15 initiating arbitration on October 17, 2008. And, minutes after it was informed that its offer had
16 not reached Maita, DBI re-conveyed it. DBI then continued negotiations beyond the 30 day
17 period, evidencing its continued good faith intent and desire to reach an agreement. In the face of
18 Maita's failure to make any demand or to specify any purchase price, DBI set forth and reiterated
19 multiple, increasing offers. These facts are not in dispute.

20 There is also a deafening silence undercutting Maita's bad faith claim. Rather incredibly,
21 Maita's principal broker, Andrew S. Christon, was unable to recall *any* details of Maita and DBI's
22 negotiations during his deposition. See Declaration of Mark Slater, filed with DBI's Initial Trial
23 Brief on 11/06/09 ("Slater Decl. in Support of Initial Trial Brief") at Ex. A (referencing excerpts
24 from the Christon deposition) at 8:1-3 (Q: When Mr. Maita [initially] called you, what was he
25 asking you to do for him? A. I - I don't specifically recall); 24:16-19 (Q. . . was there a reason that
26 particular methodology as opposed to any other was chosen? A. I don't recall.); 34:20-22 (Q. And
27 at this point in time, had you talked directly with anyone from DBI? A. I don't recall); 135:1-4 (Q.
28 At this point in time, October 31, 2008, had anyone from the Ippolito side given anyone on the

1 DBI side any sort of a counteroffer? A. I don't recall); 159:5-15 (Q. At that point in time,
2 December 10, 2008, did you have a number in mind that reflected fair market value? A. I – I don't
3 recall. Q. Okay. Do you recall conveying anything to Mr. Maita about your views, if you had any,
4 on what fair market value would be? A. I don't recall); 162:6-11 (discussing DBI's offer to Maita
5 of [REDACTED] Q. Did you have any reaction to this offer? A. I don't recall. A. Did anyone ever
6 convey their opinion, that offer to you? A. No, I – I mean, I don't recall any opinion being
7 expressed).⁹ Maita's broker appears to have a complete memory failure. Maita cannot establish
8 lack of good faith.

9 **3. Maita Cannot Prove "Good Faith" Imposes Differing Obligations on the**
10 **Parties**

11 Maita's inability to establish lack of good faith is highlighted by several other factors,
12 including its own admissions and its decision to conceal relevant financial documents from DBI.
13 Maita may attempt to prove that good faith means something more or different for DBI than it
14 does for Maita. Although Maita admits that it made no counteroffer or demand to DBI
15 whatsoever, and it insists it negotiated in good faith. When asked to describe all facts showing
16 that Maita negotiated in good faith, Maita in responded in conclusory fashion that it "provided
17 sufficient information to DBI to allow DBI to make a good faith offer to purchase Plaintiff's
18 MillerCoors rights." See Maita's Responses to DBI's First Set of Interrogatories, attached as
19 Exhibit A to the Supplemental Declaration of Mark K. Slater in Support of DBI's Motion for
20 Summary Judgment.

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23 ⁹ See also Slater Decl. in support of Initial Trial Brief, Ex. A at 7:13-17; 13:22-14:1; 30:14-
24 31:1; 33:20-22; 41:2-7; 44:11-16; 49:25-50:1; 52:10-12; 53:5-7; 58:9-12; 60:14-61:2;
25 63:19-64:9; 65:1-4; 69:14-70:1; 70:19-71:10; 74:21-75:4; 82:22-83:17; 84:17-20; 85:4-16;
26 86:1-19; 90:16-18; 92:10-16; 93:2-5; 93:25-94:3; 95:10-11; 95:25-96:2; 96:22-97:4; 98:10-
27 24; 99:18-20; 100:9-20; 102:5-11; 103:18-20; 103:25-104:2; 104:8-10; 105:22-106:8;
28 109:18-20; 110:25-111:24; 113:8-20; 115:5-9; 117:5-14; 119:25-120:8; 121:4-13; 123:8-
10; 123:25-124:15; 125:21-126:2; 128:6-7; 128:25-129:2; 129:18-22; 130:9-21; 135:20-
136:18; 137:19-22; 138:12-14; 139:9-11; 140:4-5; 140:24-141:7; 143:18-20; 143:11-
144:25; 147:25-148:1; 148:19-149:5; 151:17-21; 152:2-8; 153:11-15; 160:13-16; 162:1-
163:2; 164:7-10; 165:10-17.

1 Even that is not true. Maita (not DBI) consciously concealed vital financial documents
2 during negotiations, which prolonged the process and possibly mislead DBI. Maita promptly
3 provided to its own broker the same information that it deliberately withheld from DBI. Maita's
4 broker memorialized this in writing, "As you both know, we need to provide financial and
5 warehouse information to DBI . . . I do not think we need (or want) to send the reviewed financials
6 at this time . . . Marcus has indicated that there is information contained therein that he does not
7 want DBI to see yet." Ex. 119. [REDACTED]

8 [REDACTED]
9 [REDACTED] *Id.*

10 Maita did not even provide DBI with MillerCoors' gross profit figures until after the 30-day
11 negotiation period passed. DBI negotiated in good faith. Maita took an aggressive stance to
12 withhold information and try to change the conversation from what Maita actually was doing to
13 what DBI might do with the same brands. Maita provoked a delay and cannot now complain
14 about the result of its own deliberate acts.

15 In the end, the parties simply could not agree on future savings, and thus not on a price.
16 The statute contemplates the possibility of just this result, and provides for arbitration to resolve
17 the impasse. Maita cannot establish by any evidence, much less a preponderance of the evidence,
18 lack of good faith negotiation by DBI.

19 **B. There Is No Implied Condition Precedent in Section 25000.2(d)**

20 Maita urges this Court to insert a condition precedent into section 25000.2 that is not there.
21 Subsection (d) sets forth a 30-day period for the parties to negotiate the sale of the affected
22 distribution rights in good faith, which DBI did. Cal. Bus. & Prof. Code § 25000.2(d). But,
23 subsection (f), which prescribes mandatory arbitration, plainly does not state either that failure to
24 negotiate in good faith precludes arbitration or that it is a condition precedent thereto.

25 Rather, subsection (f) provides:

26 *If the successor beer manufacturer's designee and the existing*
27 *beer wholesaler are unable to mutually agree on the fair market*
28 *value of the affected distribution rights within 30 days of the*
existing beer wholesaler's receipt of the successor beer
manufacturer's notice pursuant to subdivision (c), the successor

1 *beer manufacturer's designee or the existing beer wholesaler shall*
2 *initiate arbitration against each other to determine the issue of*
3 *compensation for the fair market value of the affected distribution*
4 *rights*

4 Cal. Bus. & Prof. Code §25000.2(f) (emphasis added).

5 The only condition precedent to arbitration is that the parties be unable to mutually agree
6 on the fair market value of the affected distribution rights. *Id.* If so, the parties are to initiate and
7 proceed with mandatory arbitration. *Id.* This is consistent with the legislative purpose of
8 providing an expedited arbitration to determine fair market value. Any contrary conclusion would
9 promote litigation each time arbitration under section 25000.2 is sought. Such interpretation is
10 both unsupported by the express provisions of the statute and defies its intent. *See Dyna-Med, Inc.*
11 *v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1392 (1987) (statutes are to be interpreted
12 consistent with legislative intent and to prevent absurdity). Here, the parties could not agree on
13 the value of the affected distribution rights. DBI initiated arbitration. Under section 25000.2(f),
14 the arbitration proceeds.

15 Moreover, if, as Maita urges, good faith negotiation is to be construed as a condition
16 precedent, it must apply equally to both parties. Maita consciously concealed financial
17 information from DBI, did not provide basic information such as MillerCoors gross profit figures
18 until after the 30-day period passed, and steadfastly refused to make a single offer or counteroffer.
19 DBI amply proves its good faith, but if good faith negotiation is a condition precedent to
20 arbitration, then Maita fell far short. By its own logic, Maita has forfeited the right to participate
21 in the arbitration.

22 ///

23 ///

24 ///

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

MAITA DISTRIBUTORS, INC. OF SAN
MATEO COUNTY, a California corporation,

Plaintiff,

v.

DBI BEVERAGE INC., a Tennessee
corporation,

Defendant.

Case No.: 5:09-CV-2318 RMW (HRL)

PROOF OF SERVICE

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PROOF OF SERVICE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On November 13, 2009, I served the following document(s) described as:

DOCUMENTS SUBMITTED UNDER SEAL

- 1) **DBI BEVERAGE INC.'S UNREDACTED REVISED TRIAL BRIEF; AND**
- 2) **DBI BEVERAGE INC.'S UNREDACTED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

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John G. Hursh, Esq., and/or
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BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY OVERNIGHT DELIVERY: I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

- 1 **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile
2 pursuant to Rule 2.306 of the California Rules of Court. The telephone number of
3 the sending facsimile machine was 415-434-3947. The name(s) and facsimile
4 machine telephone number(s) of the person(s) served are set forth in the service list.
5 The sending facsimile machine (or the machine used to forward the facsimile)
6 issued a transmission report confirming that the transmission was complete and
7 without error. Pursuant to Rule 2.306(g)(4), a copy of that report is attached to this
8 declaration.
- 9 **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the
10 office of the addressee(s).
- 11 **STATE:** I declare under penalty of perjury under the laws of the State of
12 California that the foregoing is true and correct.
- 13 **FEDERAL:** I declare that I am employed in the office of a member of the bar of
14 this Court at whose direction the service was made. I declare under penalty of
15 perjury under the laws of the United States of America that the foregoing is true and
16 correct.

Executed on November 13, 2009, at San Francisco, California.

Allen E. Rose

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

MAITA DISTRIBUTORS, INC. OF SAN
 MATEO COUNTY, a California
 corporation,

Plaintiff,

v.

DBI BEVERAGE INC., a Tennessee
 corporation,

Defendant.

Case No.: 5:09-CV-2318 RMW (HRL)

**DBI BEVERAGE INC.'S REVISED
 [PROPOSED] FINDINGS OF FACT
 AND CONCLUSIONS OF LAW**

UNREDACTED VERSION

Hearing date: November 17, 2009
 Time: 9:00 a.m.
 Dept.: Courtroom 6, 4th Floor

Complaint Filed (in State Court): May 6,
 2009

Removed: May 26, 2009

1 Pursuant to the Court's order at the November 6, 2009 pretrial conference in the
2 above-entitled matter, DBI Beverage Inc. ("DBI") submits the following amended
3 proposed findings of fact and conclusions of law.

4 **I. FINDINGS OF FACT**

5 **A. The Relevant Contracts**

6 1. Effective January 1, 1999, Maita Distributors, Inc. ("Maita") entered into its
7 current distribution agreement with Miller Brewing Company.

8 2. Maita acquired the right to distribute Coors Brewing Company products in
9 San Mateo County in 2002.

10 **B. MillerCoors LLC Becomes a Successor Manufacturer and Terminates Maita.**

11 3. MillerCoors LLC began operation on July 1, 2008, as a new Delaware
12 limited liability company.

13 4. MillerCoors is a new entity, separate and distinct from its members—Miller
14 Brewing Company and Coors Brewing Company.

15 5. On July 1, 2008, MillerCoors became a "successor beer manufacturer" as
16 defined in California Business and Professions Code section 25000.2 ("section 25000.2").

17 6. In August 2008, MillerCoors informed Maita that it intended to terminate
18 Maita's Miller and Coors distribution rights and to give those rights to another distributor.

19 7. On September 8, 2008, Maita received MillerCoors' Termination Notice,
20 dated September 2, 2008.

21 8. In its Termination Notice, MillerCoors states: (i) it has acquired the Miller
22 and Coors brands distributed by Maita; (ii) it intends to terminate Maita's Miller and Coors
23 distributor agreements; and (iii) it has designated DBI Beverage, Inc. ("DBI") as the new
24 distributor for the Miller and Coors brands in Maita's territory.

25 **C. DBI Negotiates in Good Faith with Maita, and Maita Negotiates with Another**
26 **Wholesaler**

27
28

1 9. DBI engaged reputable national beer distributor broker, Joe Thompson from
2 Independent Beverage Group, to negotiate the purchase of Maita's MillerCoors distribution
3 rights.

4 10. DBI sent Maita a Request for Information, asking for detailed financial
5 information regarding Maita's business on August 27, 2008, including Maita's previous
6 three years financial statements, its gross profit and sales volume figures per supplier, its
7 discretionary expenses, and employee salary and expense information.

8 11. Maita engaged Andrew S. Christon and Ippolito Christon & Co. ("Ippolito")
9 to negotiate the sale of its business.

10 12. On September 2, 2008, Ippolito sent Maita a Preliminary Information
11 Request, including a request for: Maita's reviewed financial statements for the past two
12 years; gross profit and sales volume figures by supplier; discretionary and operating
13 expenses; and capital expenditures.

14 13. On September 3, 2008, Maita sent Ippolito the information Ippolito
15 requested.

16 14. On September 28, 2008, more than a month after DBI sent its Request for
17 Information and following the execution of a confidentiality agreement, Maita sent DBI a
18 Confidential Offering Memorandum ("COM") rather than the financial data DBI
19 requested.

20 15. Maita sought a purchase offer for its entire business.

21 16. The COM revealed that Maita sought an undisclosed purchase price that
22 imputed contemplated savings or "synergies" that DBI would allegedly gain from the
23 purchase of Maita's business.

24 17. On October 6, 2008, Maita's broker authored an e-mail conveying Maita's
25 desire to hide certain financial information from DBI. This e-mail states, "I do not think
26 we need (or want) to send reviewed financials at this time. Marcus has indicated that there
27 is information contained therein that he does not want DBI to see yet."
28

1 18. On October 6, 2008, Maita's broker sent DBI some of the financial
2 information that DBI requested. Specifically, Maita's broker sent an income statement for
3 2007 and 2008 and a 2007 balance sheet. She also provided a brief description of its
4 warehouse space.

5 19. On October 6, 2008, Maita did not provide reviewed financials or gross
6 profit and sales volume figures by supplier to DBI, but it informed DBI that it had
7 provided the "relevant historical and current year financial data for Maita."

8 20. As of October 8, 2008, 30 days after Maita received its Notice of
9 Termination, Maita had not provided DBI with its gross profit figures for MillerCoors
10 products.

11 21. On October 8, 2008, DBI requested Maita confirm that its 2008 income
12 statement figures were a projection since the document sent to DBI did not clarify this. It
13 also requested that Maita provide it with information regarding sales by volume by specific
14 brand and MillerCoors gross profit figures as this information had previously combined
15 with other brands' gross profit figures in the COM.

16 22. On October 9, 2008, Maita's broker provided DBI with sales volume figures
17 and gross profit figures broken down by each brand that Maita distributed.

18 23. On October 9, 2008, DBI requested that Maita provide line item financials,
19 payroll information, and an organizational chart. DBI also requested that Maita provide it
20 with owner salaries/benefits and all one-time or discretionary expenses that Maita had
21 included in its income statement.

22 24. Maita's broker responded to DBI's request in the evening on October 9, 2008.
23 It provided an organizational chart that listed salaries by position, and informed DBI that it
24 was working on gathering the other information requested.

25 25. In the afternoon of Friday, October 10, 2008, DBI wrote to Maita's broker to
26 confirm Maita's calculation of its adjusted EBITDA figure and to inquire whether Maita
27 would be making an offer or whether it wanted DBI to do so.

28

1 26. On Monday, October 13, 2008, DBI's broker wrote to Maita's broker to
2 inform them that it hoped to have them an offer the next day.

3 27. On Tuesday, October 14, 2008, Maita's broker wrote to DBI, insisting that
4 DBI break down its offer on all brands sold my Maita so that Maita could compare DBI's
5 offer with other offers it had received.

6 28. On Tuesday October 14, 2008, DBI repeated its request for a line item
7 financial statement and for Maita's non-recurring, discretionary expenses. DBI informed
8 Maita that it could have an offer to it very quickly upon receipt of this information.

9 29. On Wednesday, October 15, 2008, DBI sent an offer to purchase Maita's
10 business for [REDACTED]

11 30. On October 15, 2008, Maita's broker sent [REDACTED] a
12 letter discussing the sale of Maita's [REDACTED] and forwarded
13 [REDACTED] a Confidential Offering Memorandum.

14 31. This COM that Maita sent to [REDACTED] included Appendix A, Maita's gross
15 profit figures by supplier.

16 32. Having not heard back from Maita regarding its offer, on October 17, 2008,
17 DBI initiated arbitration with JAMS 39 days after Maita received its Notice of
18 Termination.

19 33. Maita made no attempt to initiate arbitration against DBI and refused to
20 arbitrate.

21 34. In the early morning of October 21, 2008, DBI called Maita's President to
22 check the status of its offer, and Maita first told DBI that it had not received the October
23 15, 2008 offer.

24 35. Marcus Maita wrote an e-mail to his broker at 8:19 a.m. on October 21, 2008
25 to inform him of the details of DBI's call regarding its offer.

26 36. After hearing that Maita had not received its offer, at 8:32 a.m. on the
27 morning of October 21, 2008, DBI re-conveyed its October 15, 2008 offer.
28

1 37. On October 22, 2008, Maita's broker e-mailed [REDACTED] and encouraged it
2 to submit a bid for Maita's entire business, including its Miller Coors distribution rights,
3 noting that, at the very least, [REDACTED] bid could [REDACTED]
4 [REDACTED]

5 38. On October 22, 2008, [REDACTED] made an e-mail offer [REDACTED]
6 [REDACTED]

7 39. On October 23, 2008, rather than counter, Maita's broker asserted that DBI
8 was not complying with the "spirit of the terms of California law" and demanded that DBI
9 break down its offer according to all the brands that Maita distributed.

10 40. DBI broke down its offer the same day Miller and Coors brand products,
11 offering [REDACTED]
12 [REDACTED]

13 41. On October 24, 2008, Maita responded with a counter-offer to [REDACTED]
14 [REDACTED]

15 42. On October 27, 2008, Maita demanded that DBI break-down its previous
16 offer by all of the brands it distributed, not just its MillerCoors brands.

17 43. When Maita made its October 27, 2008 demand, Maita had been engaged in
18 negotiations regarding the sale of its business or portions thereof with [REDACTED]
19 [REDACTED]

20 44. Maita actively negotiated the potential purchase of its business with
21 [REDACTED] including submitting a counter-offer to [REDACTED] two
22 days after [REDACTED] made its first offer to purchase portions of Maita's business for
23 [REDACTED]

24 45. DBI refused to encourage a bidding war, declined to break down an offer for
25 brands other than the MillerCoors brands, and reiterated its offer to buy MillerCoors for
26 [REDACTED] and the entire business for [REDACTED]

27 46. On October 29, 2008, [REDACTED] made what it deemed its "final offer" for
28 [REDACTED]

1 47. On October 31, 2008, Maita claimed that DBI's unwillingness to break down
2 prices in dollar terms for each (non-MillerCoors) brand in Maita's portfolio constituted bad
3 faith and that DBI's [REDACTED] offer for MillerCoors was a "low-ball price."

4 48. DBI reiterated its offer to Maita on November 3, 2008, and it requested
5 Maita provide it with a counteroffer.

6 49. Maita never provided DBI with a counteroffer in response to DBI's
7 November 3, 2008 request.

8 50. The parties continued to negotiate into December 2008, and exchanged
9 documents reflecting what savings might follow a combined operation, but could not agree
10 on what those savings would be.

11 51. On December 15, 2008, DBI increased its purchase price and offered Maita
12 [REDACTED] for all of its distribution rights.

13 52. Maita rejected all of DBI's purchase offers.

14 53. No agreement for sale of Maita's business to DBI was ever reached.

15 54. Maita never provided DBI with any counter-offer for its MillerCoors
16 distribution rights or for any other portion of its business.

17 55. Maita never conveyed to DBI an asking price for its MillerCoors distribution
18 rights or for any other portion of its business.

19 56. Maita's President contends that Maita negotiated in good faith with DBI
20 throughout these negotiations.

21 57. When asked to describe all facts showing that Maita negotiated in good faith,
22 Maita responded only that it "provided sufficient information to DBI to allow DBI to make
23 a good faith offer to purchase Plaintiff's MillerCoors rights."

24 II. CONCLUSIONS OF LAW

25 1. Pursuant to section 25000.2(d), DBI, as the successor beer manufacturer's
26 designee, and Maita, as the existing beer wholesaler, were both required to negotiate in
27 good faith.

28 2. DBI negotiated in good faith for Maita's Miller and Coors distribution rights,

1 the requirements of section 25000.2 have been met, and Maita must arbitrate.

2 3. Good faith negotiation is not a condition precedent to arbitration under
3 section 25000.2, and Maita must arbitrate.

4 4. Because Maita failed to negotiate in good faith, it has waived the right to
5 participate in the arbitration.

6 DATED: November 13, 2009 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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By

/s/ Mark K. Slater

9

MARK K. SLATER
Attorneys for Defendant
DBI BEVERAGE INC.

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