IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Beverage Distributors, Inc., et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 2:08-cv-827
Miller Brewing Company, et al.,	:	JUDGE WATSON
Defendants.	:	
Muxie Distributing Co., Inc.,	:	
Plaintiff,	:	
v.	:	Case No. 2:08-cv-931
MillerCoors LLC, et al.,	:	JUDGE WATSON
Defendants.	:	
Esber Beverage Company,	:	
Plaintiff,	:	
v.	:	Case No. 2:08-cv-1112
Miller Brewing Company, et al.,	:	JUDGE WATSON
Defendants.	:	
Dayton Heidelberg Distributing Co.,	:	
Plaintiff,	:	Case No. 2:08-cv-1131
v.	:	
Coors Brewing Company, et al.,	:	JUDGE WATSON
Defendants.	:	

Tramonte Distributing Co.,	:	
Plaintiff,	:	Case No. 2:08-cv-1136
v.	:	
MillerCoors LLC, et al.,	:	JUDGE WATSON
Defendants.	:	

OPINION AND ORDER

As is fast becoming the history of this case, one dispute inevitably leads to another (or several more). Defendants' relatively simple request for a briefing schedule on their summary judgment motion has spawned one telephone conference and at least nine additional written filings raising disputes about both document discovery and deposition discovery. This Opinion and Order will address all pending issues.

I. Some Limited Background

The parties are intimately familiar with the background of this case as it relates to the current dispute. Consequently, the Court will only briefly summarize what has transpired to date.

This case involves at least one potentially dispositive issue: is MillerCoors LLC a "successor manufacturer" of beer products as that phrase is used in Ohio Revised Code §1333.85? In large part, its legal ability to terminate a number of franchise distributors who had agreements with either of the two joint venture partners in MillerCoors (the actual brewers of Miller and Coors beer products), depends upon the answer to that question.

From the outset of the case, MillerCoors has taken the position that this is a simple question, that little or no

discovery is needed in order to frame the issue for resolution, and that it should be presented and resolved quickly by way of a summary judgment motion. It filed such a motion on January 8, 2009, roughly four months after the complaint was filed. At that point, there had been no discovery.

Plaintiffs, recognizing that this issue may well turn out to be the most important, if not ultimately dispositive, issue in the case, took the position that they were entitled to do discovery before they could reasonably be required to respond to the summary judgment motion, especially since they may ultimately have the burden of showing, as they allege, that MillerCoors is not a "successor manufacturer" but is controlled in legally significant ways by its joint venture partners. The divergence in the parties' positions on how much discovery plaintiffs needed, and how quickly it could be provided, led to motions practice. On June 2, 2009, this Court resolved the issue (or at least attempted to do so) by granting in part plaintiffs' motion to compel discovery, granting their motion for a continuance under Fed.R.Civ.P. 56(f), and directing the parties to confer about a briefing schedule on the summary judgment motion. See Opinion and Order of June 2, 2009, Doc. #81 (also reported at 2009 WL 1542730).

Now, almost eleven months later, there is still no briefing schedule. Some discovery has occurred, including both document production and depositions. Neither is without its issues. Defendants, in their motion for a briefing schedule, now take the position that the discovery which the Court allowed has been completed and that there is no reason why the summary judgment motion should not be refiled and briefed expeditiously. Plaintiffs, on the other hand, argue that they need at least one more deposition, and they also take great issue with the way in which documents have been produced. There is no dispute that

many of the documents produced by the defendants are heavily redacted. Plaintiffs contend that until the deposition is taken and the redaction issue is resolved, they still cannot reasonably be expected to respond to a summary judgment motion on the "successor manufacturer" issue. The Court will deal with each of these matters separately.

II. The Deposition Issue

The deposition issue raised by the plaintiffs is the simpler of the two outstanding discovery matters. In essence, it involves a single deposition of an individual, Malcolm Wyman. Mr. Wyman is both a board member of MillerCoors and the chief financial officer of SABMiller, plc. Plaintiffs have requested this deposition but defendants have not agreed to it, arguing that plaintiffs have taken all of the deposition discovery contemplated by the Court's June 2, 2009 order. For the following reasons, the Court disagrees.

The parties represent that only three depositions have been taken. Lisa Jordan, whom MillerCoors designated as its Rule 30(b)(6) witness, was deposed in September, 2009. Tom Long, MillerCoors' chief commercial officer, was deposed in December, 2009. Leo Kiely, MillerCoors' CEO, was just recently deposed. The parties appear to agree that the proper subject of these depositions was, as the Court's order indicated, how MillerCoors makes its operational and strategic decisions, and the extent to which those decisions are or can be influenced by one or both of the joint venture partners.

That is where the parties' agreement ends. Plaintiffs agree that the depositions they have taken have shed some light on these subjects, but argue that each witness has, to date, been unable to answer certain questions about operational and decision-making processes, and that Mr. Wyman's deposition is needed to complete the picture. They note that he is the only

board member of MillerCoors whom they have asked to depose, and that he is also the only officer or employee of SABMiller who will be deposed. They assert that those perspectives are necessary before they can truly inform the Court, as part of their response to a summary judgment motion, how MillerCoors is governed and operated. Secondarily, they argue that Mr. Wyman will also be able to speak to how the joint venture partners account for the revenue derived from MillerCoors because of his position as a financial officer of SABMiller.

According to defendants, however, this proposed deposition is unnecessarily cumulative. They argue that the testimony to date has proven (apparently beyond dispute) that MillerCoors is a "CEO-centric" company and that its board of directors essentially rubber-stamps all of the decisions made by the company executives, never once having rejected any such decision presented to the board for approval. Thus, they assert that taking testimony from a MillerCoors board member will not produce any new or additional evidence about how the company makes its strategic or operational decisions. They also claim that information about how MillerCoors revenue is shared or allocated is totally irrelevant to the control issue which is the proper subject of plaintiffs' discovery. In reply, plaintiffs list a number of issues relating to control which other witnesses have been unable to answer (Reply Memorandum, Doc. #102, at 4); note that of the witnesses they have deposed or wish to depose, Mr. Wyman was the only one involved in the early stages of MillerCoors' formation; and point out that he will be able to answer questions about financial reporting and interdependency among MillerCoors and its partners which do go to the issue of control, and about which other witnesses lacked knowledge.

The Court agrees with defendants that its prior order contemplated that the discovery permitted in connection with

summary judgment proceedings would be limited as to subject-matter and should be reasonable in its scope. It does not agree, however, that either the plaintiffs or the Court should be satisfied that a subject has been fully exhausted for discovery purposes just because one witness has testified on that subject. For example, the testimony cited by defendants from Mr. Long's deposition certainly evidences his opinion as to how operational decisions are made and ratified, but plaintiffs should not be required to accept his testimony on blind faith without testing its accuracy from at least one additional source. It would not be uncommon that a company's operating officers and its board of directors would have different perspectives on the relative weight and value of each group's input into, and impact on, key company policies and decisions. Further, it is reasonable to assume that part of what ties various entities together for purposes of determining who controls whom is the entities' financial relationship. One foundation of the Court's prior order allowing discovery was the possibility that the documents which set up MillerCoors and which define, on paper, its relationship to the joint venture partners, may be contradicted in some areas by actual practice, and that plaintiffs were therefore entitled to explore that issue. Opinion and Order of June 2, 2009, at 11 (2009 WL 1542730, *5). The request to take Mr. Wyman's deposition seems reasonably related to the key issues which will be presented in defendants' summary judgment motion and, essentially for the reasons advanced by plaintiffs and enumerated above, the Court is not persuaded that it will be unduly cumulative of the testimony given by the other witnesses who have been deposed. For these reasons, the Court will overrule the motion for a protective order filed with respect to Mr. Wyman's deposition and allow plaintiffs to depose him.

III. The Redacted Documents Issue

The other impediment to establishing a briefing schedule is not quite so simply addressed. Again, there is no dispute about what happened, but a great deal of disagreement about whether it should have happened and, if not, what the Court should do about it.

All parties agree that many thousands of pages of documents have been produced in response to plaintiffs' requests. They also agree that a substantial percentage of the documents produced have been redacted to exclude some of the information contained within those documents. Finally, they agree that the primary reason given for those redactions is not that the information was privileged, or even that it is confidential (there is a protective order in place dealing with that question), but that, from the defendants' point of view, it is irrelevant. Defendants claim that they had every right to exclude irrelevant information from documents that are otherwise responsive to the plaintiffs' discovery requests and that they are under no obligation to produce any type of log or listing of what has been redacted. Plaintiffs, on the other hand, argue that a document which is discoverable and which does not contain any privileged or super-sensitive information must simply be produced as is, and that defendants failed to comply with their discovery obligations under Fed.R.Civ.P. 34 when they unilaterally determined that some information contained within otherwise discoverable documents was not subject to production.

Defendants have cited to a number of cases which, they say, support their position that the type of redaction they engaged in here is permitted by the Federal Rules. For example, in Spano v. Boeing Co., 2008 WL 1774460 (S.D. Ill. April 16, 2008), the court was faced with a similar situation where, despite the existence of a stipulated protective order, the defendant redacted information from the documents it produced in discovery. The

court specifically found that the redacted information was irrelevant, and agreed that redaction was a proper way for the defendant to produce a document that contained both relevant and irrelevant information, noting that "other courts have found redaction appropriate where the information redacted was not relevant to the issues in the case." Spano v. Boeing Co., 2008 WL 1774460, *2. The cases cited in Spano included Beauchem v. Rockford Products Corp., 2002 WL 1870050 (N.D. Ill. August 13, 2002), a case where the court, after conducting an *in camera* inspection of the documents in question, found the redacted information to be irrelevant; and Schiller v. City of New York, 2006 WL 3592547 (S.D.N.Y. December 7, 2006), where the court also allowed both parties and non-parties to redact portions of documents which contained irrelevant information.

By contrast, plaintiffs have cited to cases such as Orion Power Midwest, L.P. v. America Coal Sales Co., 2008 WL 4462301, *2 (W.D. Pa. September 30, 2008), for the proposition that Rule 34 requires documents to be produced as they are kept in the ordinary course of business and that "[t]here is no express or implied support" in the Rules of Civil Procedure for a procedure allowing "a party [to] scrub responsive documents of non-responsive information." See also In re Atlantic Financial federal Securities Litigation, 1991 WL 153075, *4 (E.D. Pa. August 6, 1991) (holding that the court has discretion to order the production of documents in unredacted form even if they might contain some irrelevant information and noting that "defendants are already well-protected from improper disclosure by the confidentiality order"). That court also found *in camera* review of such redactions inappropriate, reasoning that such review should only be "used to determine whether documents were redacted or withheld justifiably under a privilege such as attorney-client or work product." Id. at *5.

These decisions are not necessarily irreconcilable. The themes which pervade each of them are (1) that redaction of otherwise discoverable documents is the exception rather than the rule; (2) that ordinarily, the fact that the producing party is not harmed by producing irrelevant information or by producing sensitive information which is subject to a protective order restricting its dissemination and use renders redaction both unnecessary and potentially disruptive to the orderly resolution of the case; and (3) that the Court should not be burdened with an *in camera* inspection of redacted documents merely to confirm the relevance or irrelevance of redacted information, but only when necessary to protect privileged material whose production might waive the privilege.

In those cases cited by defendants where redactions were approved, the number of redacted documents appeared to be small, and the content of the redactions was readily apparent. For example, in Spano, all of the redacted information pertained to benefit plans which were not at issue in the case, and which the court determined were irrelevant even for discovery purposes. Beauchem involved redactions to meeting minutes which discussed not only the retirement plans at issue in the case, but other issues unrelated to those plans. The court reviewed the minutes *in camera* and confirmed the defendants' representations about the subject of the redactions. Finally, in Schiller, the redactions were confined to the minutes of three meetings, and the redacted information contained names of members of a certain protest group and discussions of other protests which may well have enjoyed First Amendment protection. In each of these cases, there was little or no burden placed on the court to review a large volume of redacted documents, and because the redactions involved a single type of document and one or two discrete categories of allegedly irrelevant information, both the opposing parties and

the courts were able to argue and resolve the legal issues in an intelligent and expeditious fashion.

That is not the case here, however. Given the extent of the redactions made by defendants, it would be impossible to divide them into a few discrete categories about which relevancy arguments could conveniently and intelligently be made. For the same reason, an *in camera* review of each redacted document and the corresponding unredacted original would be unnecessarily burdensome and time-consuming. Further, defendants have resisted preparing any type of log which provides the type of information that might assist either the Court or the plaintiffs in understanding what type of information defendants deem irrelevant, and why. They resisted producing such a log initially both because they assert that the Federal Rules do not oblige them to - such logs are required by Rule 26(b)(5)(A) only when redaction or withholding of documents is done on grounds of privilege - and because to do so would be burdensome. They produced an abbreviated version of a log at the Court's request, but it applies to only a handful of the documents at issue, and the log (as well as the documents attached to it) amply illustrate the point that the reasons for the myriad of redactions are as varied as the volume of redacted documents suggest. In short, it is simply impractical for the Court to view these documents and the arguments in favor of the redactions in the same manner as the courts in Spano, Beauchem, and Schiller were able to do. Further, the type of First Amendment issues involved in Schiller do not exist here. For all of these reasons, the Court does not approve of the manner in which defendants have produced documents, and it will grant the plaintiffs' motion to compel.

IV. The Briefing Schedule

There is some irony in the fact that, but for the

defendants' resistance to plaintiffs' discovery efforts and their decision to engage in wholesale and unilateral redaction of the documents they produced, the summary judgment motion they have been advocating since the outset of the litigation would long since have been briefed and either decided or ripe for decision. Nevertheless, the resolution of the discovery issues by this Order should set the stage for the re-commencement of the summary judgment process. Of the two issues resolved here, the Court anticipates that scheduling and taking the deposition of Mr. Wyman will consume more time than the production of the documents at issue. Therefore, the filing and briefing of the summary judgment motion will be tied to the schedule for that deposition, and it will take place substantially as proposed in plaintiffs' combined memorandum (Doc. #95).

V. Disposition and Order

For the foregoing reasons, MillerCoors' motion for entry of briefing schedule (#93), plaintiffs' motion to compel discovery (#96), and MillerCoors' motion for a protective order (#101) are resolved as follows. Defendants shall produce unredacted versions of the documents they previously produced in redacted form within fourteen days of the date of this order. They may, if appropriate, designate documents or portions of documents as confidential in accordance with the stipulated protective order filed on March 16, 2009. The parties shall arrange for and conduct the deposition of Malcolm Wyman within twenty-eight days of the date of this order. Defendants shall file their summary judgment motion within one week after that deposition has been completed. Within forty-two days thereafter, plaintiffs shall respond to the motion and, if appropriate, file a cross-motion for summary judgment. Any response or reply by defendants shall be filed within twenty-eight days thereafter. If plaintiffs have not cross-moved for summary judgment, no additional briefing will

be permitted. If plaintiffs have cross-moved for summary judgment, they may file a reply memorandum in support of the motion within twenty-eight days of defendants' response.

VI. Appeals Procedure

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge