

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

|                                       |   |                                 |
|---------------------------------------|---|---------------------------------|
| <b>TRI COUNTY WHOLESALE</b>           | : |                                 |
| <b>DISTRIBUTORS, INC., et al.,</b>    | : |                                 |
|                                       | : |                                 |
| <b>Plaintiff,</b>                     | : |                                 |
|                                       | : | <b>Case No. 2:13-CV-317</b>     |
| <b>v.</b>                             | : |                                 |
|                                       | : |                                 |
| <b>LABATT USA OPERATING CO., LLC,</b> | : | <b>JUDGE ALGENON L. MARBLEY</b> |
| <b>et al.,</b>                        | : |                                 |
|                                       | : | <b>Magistrate Judge Deavers</b> |
| <b>Defendants.</b>                    | : |                                 |
|                                       | : |                                 |

**OPINION & ORDER**

**I. INTRODUCTION**

This matter is before the Court on Distributors’ (Plaintiffs’) Motion to Certify Questions to the Ohio Supreme Court (“Motion to Certify Questions”). (Doc. 23.) For the reasons set forth herein, Distributors’ Motion to Certify Questions to the Ohio Supreme Court is **DENIED**.

**II. BACKGROUND**

The background of this case was briefed at length in the Court’s Opinion and Order on Plaintiffs’ Motion for Preliminary Injunction. (Doc. 56.) In the interest of judicial economy, the Court will limit discussion in this section to background that is pertinent to the Motion to Certify Questions.

*A. Factual Background*

Plaintiffs Tri County Wholesale Distributors, Inc. (“Tri County”) and the Bellas Company d/b/a Iron City Distributing (“Iron City”) (collectively “Plaintiffs” or the “Distributors”) are distributors of alcoholic beverages. Defendant Labatt USA Operating Co.,

LLC (“Labatt USA Operating” or “Defendant”) is a manufacturer with whom Plaintiffs had a franchise relationship. Labatt USA Operating is an entity that supplies alcoholic beverages to distributors in Ohio.

Tri County and Iron City entered into written distribution agreements with Labatt USA Operating in 2010 and 2011, respectively. In early March 2013, Iron City and Tri County each received letters allegedly terminating their distribution agreements with Labatt USA Operating. Defendants claimed that their right to terminate the Distributors’ distribution rights was found in the successor manufacturer provision of Ohio Rev. Code § 1333.85(D). Neither Distributor approved the termination of their respective franchises.

#### *B. Procedural Background*

Plaintiffs filed a complaint alleging breach of contract. (Doc. 1.) In addition, Plaintiffs are seeking a declaratory judgment, asking this Court to find one of the following: (1) that Defendants are prevented from terminating their distribution franchises with Labatt under O.R.C. § 1333.85(D); or (2) that Defendants’ action under O.R.C. § 1333.85(D) is considered an unconstitutional taking. Plaintiffs’ complaint also includes claims for compensatory payments falling under O.R.C. § 1333.851.

Shortly after filing their complaint, Plaintiffs moved for a preliminary injunction, in which they sought to enjoin Defendants from terminating Distributors’ contracts, and from taking any actions that would frustrate or prevent delivery of the brands at issue. (Doc. 9.) Following a preliminary injunction hearing, at which counsel for all parties appeared, the Court granted Plaintiffs’ motion. (Doc. 56.)

Now before the Court is Plaintiffs' Motion to Certify Questions to the Ohio Supreme Court. In their Motion to Certify Questions, Plaintiffs have asked the Court to certify two questions:

1. Would the termination of a written contract for the distribution of alcoholic beverages under Ohio Rev. Code § 1333.85(D) and the transfer of those distribution rights to a new distributor pursuant to a court order issued under Ohio Rev. Code § 1333.851 violate the Takings Clause of the Ohio Constitution, Section 19, Article 1?
2. To avoid any constitutional questions under the Takings Clause of the Ohio Constitution, should Ohio Rev. Code §§ 1333.85 and 1333.851 be interpreted so that they do not apply when the written distribution contract at issue is not extinguished by the transaction described in § 1333.85(D)?

This issue has been thoroughly briefed through Defendants' Memorandum in Opposition to Motion to Certify Questions to the Ohio Supreme Court ("Memorandum in Opposition"), and Distributors' Reply in Support of its Motion to Certify Questions to the Ohio Supreme Court ("Distributors Reply"). (Doc. 28 and Doc. 32, respectively.) This matter is, therefore, ripe for review.

### III. STANDARD OF REVIEW

Federal courts have the power to certify questions to the state supreme court. It is well within the discretion of this Court to decide whether to certify. *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir.2009). Though federal courts may certify questions to the Ohio Supreme Court, it is not mandatory. *Drown v. Wells Fargo Bank, NA*, 2:10-CV-00272, 2010 WL 4939963, at \*1 (S.D. Ohio Nov. 30, 2010) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974)). Under the Ohio Supreme Court Rules of Practice, the Ohio Supreme Court may answer questions of law certified to it by federal courts:

The Supreme Court may answer a question of law certified to it by a court of the United States. This rule is invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of

the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court. S.Ct. Prac. R. 9.1(A).

Simple “difficulty in ascertaining local law provides an insufficient basis for certification.”

*Duryee v. U.S. Dep't of the Treasury*, 6 F. Supp. 2d 700, 704 (S.D. Ohio 1995) (citing *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622 (5th Cir.1992)). If the Court “believes it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so,” certification is unwarranted. *Drown*, 2010 WL 4939963 at \*2 (citing *Lehman Bros.*, 416 U.S. 395) (Rehnquist, J., concurring). Even when the question of state law is generally unsettled, “federal courts generally ‘will not trouble our sister state courts.... When we see a reasonably clear and principled course, we will seek to follow it ourselves.’” *Pennington*, 553 F.3d at 450 (quoting *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir.2007)).

To decide in favor of certification, this Court must weigh whether “there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.” S.Ct. Prac. R. 9.1(A). Subsequently, the Court must consider if it is capable of resolving the issue of state law with the materials at hand. Only if the Court finds that there is a genuine dearth of guidance from state court precedent, so much so that it would be extremely difficult to examine properly the questions presented, will the Court then decide to certify questions to the Ohio Supreme Court.

#### **IV. ANALYSIS**

##### *A. Certification under Ohio Supreme Court Rule of Practice 9.1*

In considering whether to grant certification, the Court must examine whether the questions proffered by Plaintiffs for certification concern a question of Ohio law that may be

determinative of the proceeding. Plaintiffs argue that they “have presented serious questions pertaining to their constitutional claims that would be resolved by rulings of the Ohio Supreme Court on the proposed questions.” (Doc. 23 at 5-6.) Defendants disagree, stating that, unless the Ohio Supreme Court finds O.R.C. § 1333.85 unconstitutional, a ruling by the Ohio Supreme Court would not be determinative of this action. (Doc. 28 at 8.)

Though Plaintiffs argue that they have presented genuine questions regarding the constitutionality of O.R.C. § 1333.85, this Court does not find that they rise to the level necessary for certification. The Ohio Supreme Court, in the recent decision, *Esber v. Labatt*, focuses its discussion and analysis almost entirely on § 1333.85. *Esber v. Labatt*, No. 2012-0941, 2013 WL 5647792 (Ohio Oct. 17, 2013). Despite its thorough analysis, the Court did not even mention the issue of constitutionality.

The second prong of determining whether to grant certification under the Ohio Supreme Court Rules of Practice, is whether there is controlling precedent in Ohio Supreme Court decisions. In seeking certification, Plaintiffs argue that, based on the lack of controlling precedent, the Ohio Supreme Court should be given the opportunity to rule on how, exactly, § 1333.85(D) should be interpreted regarding contract rights and scope. (Doc. 23 at 6-7.) Conversely, Defendants state that this Court has “far more than ‘sufficient guidance’” to consider properly the constitutionality of § 1333.85(D). (Doc. 28 at 6).

This Court finds that it has sufficient guidance to consider the constitutionality of § 1333.85(D). There are various Ohio and federal cases that, though they do not specifically address the constitutionality of § 1333.85(D) under the Takings Clause of the Ohio Constitution, are precedential and provide this Court with guidance. In *State ex rel. Shelly Materials, Inc. v.*

*Clark Cty. Bd. of Commrs.*, the Ohio Supreme Court found that the denial of a landowner's conditional use permit to mine sand and gravel did not constitute a taking. 115 Ohio St. 3d 337, 340-341 (2007). In *Shelly Materials*, the Ohio Supreme Court set forth a detailed analysis under both the Takings Clause of the Fifth Amendment, and the analogous section of the Ohio Constitution, Section 19, Article I. *Id.* at 340-341. *See also, Wymso v. Bartec, Inc.*, 132 Ohio St. 3d 167, 183 (2012) (the Smoke Free Act did not amount to a regulatory taking); *Omnia Commercial Co. v. U.S.*, 261 U.S. 502, 508 (1923) (termination of a contract is not necessarily an unconstitutional action); *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008) (legislation that frustrates business interests does not amount to a taking).

Though there are not cases identical to the case *sub judice*, cases such as *Shelly*, as well as decisions of similar issues, can properly provide guidance in instances such as this, when a party seeks certification. *See e.g., Duryee v. U.S. Dept. of the Treasury*, 6 F. Supp. 2d 700, 703-704 (1995) (finding that "mere difficulty in ascertaining local law is an insufficient basis [for certification]"). Additionally, this Court, in the interest of comity and federalism, treats the Ohio Supreme Court's analysis in *Esber* as determinative that § 1333.85 is constitutional. Under the two-pronged analysis, this Court does not find that there is a need for certification under the Ohio Supreme Court Rules of Practice.

*B. This Court's Capability of Resolving the Issue of State Law with the Materials at Hand*

Though Plaintiffs' claims do not meet the two-prong certification approach, their questions must still be analyzed under the next part of the overall analysis, which examines whether this Court is capable of resolving the issue of state law with the materials at hand. As set out in the first part of the analysis, this Court finds that it is more than capable of resolving

the state law at issue, given the related Ohio Supreme Court decisions, as well as Supreme Court precedent regarding the Takings Clause. The parties have provided this Court with relevant legal analysis, both in the motions relevant to this particular proceeding, and the filings related to Defendants' Motion for Judgment on the Pleadings. (Doc. 27.) Since there is a reasonably clear and principled course to follow, this Court finds that it is more than capable of resolving the relevant issue of state law through its Order on Defendants Motion for Judgment on the Pleadings.

Even if Plaintiffs had sufficiently demonstrated the need for certification of their questions, which they did not, the Ohio Supreme Court's ruling in *Esber v. Labatt* would still dissuade this Court from granting certification. At numerous points throughout their Motion to Certify Questions, Distributors emphasize that certification would be particularly appropriate since *Esber v. Labatt* was before the Ohio Supreme Court. That, however, is no longer the case. The Ohio Supreme Court issued their ruling in *Esber v. Labatt* on October 17, 2013, over two months ago, thereby making one of Plaintiffs' strongest arguments moot.

## V. CONCLUSION

For the reasons set forth in this order, Plaintiff's Motion to Certify Questions to the Ohio Supreme Court is hereby **DENIED**.

**IT IS SO ORDERED.**

s/Algenon L. Marbley  
**ALGENON L. MARBLEY**  
**UNITED STATES DISTRICT JUDGE**

**Dated: January 6, 2014**