STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

MillerCoors, L.L.C.,

Petitioner,

vs

Case No. 09-609-AA

Michigan Liquor Control Commission,

Respondent,

Alcohol and Gambling
Enforcement Division

JUN 29 2010

Lansing

and

Michigan Beer & Wine Wholesalers Association,

Intervening Respondent.

OPINION

Petitioner, MillerCoors, recently issued a contract and requested that it be executed by all of MillerCoors' wholesalers in Michigan. The MillerCoors' contract is "national" in character and thus, not specifically tailored to Michigan law. On November 6, 2008, the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), Intervening Respondent, sought declaratory ruling from the Liquor Control Commission with regard to whether certain provisions of the MillerCoors agreement were inconsistent with Michigan statutes and, therefore, unenforceable. On March 4, 2009, the Commission issued its declaratory ruling and concluded that the challenged contract terms violate certain Michigan statutes. Before the Court is MillerCoors' Petition for Review of the Commission's declaratory ruling.

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In its request for declaratory ruling, the MB&WWA challenged five areas of the MillerCoors' Agreement. MillerCoors, is a licensed supplier of beer in Michigan and one of two foreign-owned manufacturers accounting for approximately eighty-five percent of total beer sales in the United States. MillerCoors contracts with an estimated 500 wholesalers through a nationwide distribution agreement. Intervening Respondent, MB&WWA, is a trade organization representing licensed beer wholesalers in Michigan that have either already entered into MillerCoors' nationwide agreement or have been presented with the contract.

By statute, every licensed Michigan beer wholesaler is required to have a written agreement with each beer supplier for whom the wholesaler distributes products. MCL 436.1403(3)(i) In general, all beer and wine sold in Michigan is distributed through the State's three-tier system of separately licensed suppliers, wholesalers and retailers. It works this way. Producers or distillers of alcoholic beverages, whether in or out of state, generally may sell only to licensed in-state wholesalers who in turn, may sell only to in-state retailers. The licensed retailers sell alcoholic beverages to consumers at retail.

The Nature of Declaratory Relief

While acknowledging that the Liquor Control Commission "exercises complete control over alcoholic beverage traffic in Michigan," MillerCoors argues that the Commission is limited to imposing those penalties enacted by the Legislature in MCL 436.1901, et seq. Because MCL 436.1901, et seq, does not specifically provide for declaratory judgment MillerCoors' argues that the Commission exceeded its authority. MillerCoors argues from MCL 436.1903(1) and from MCL 436.1403(3)(m) that the Legislature "withheld" from the Commission the authority to

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declare contractual provisions void.[1] Neither provision does any such thing. MCL 436.1903(1) simply allows the commission to impose license sanctions in delineated circumstances. Nothing therein reflects any legislative intent to restrict the plenary or "complete" authority of the commission referenced in Art. 4, § 40 of the Michigan Constitution. If no other options are available to the commission, why would the legislature adopt MCL 436.1917 providing generally for criminal and civil liability. That section by itself suggests that remedies beyond license sanctions are available to the commission and others as well.

More importantly, MillerCoors completely ignores the Administrative Procedures Act, which allows an agency to issue declaratory rulings. MillerCoors also ignores as *L&L Wine & Liquor Corp v Liquor Control Comm'n, 274 Mich App 354, 356; 733 NW2d 107 (2007)*, which specifically references the Commission's authority to issue declaratory rulings. Related to this is the argument in the Heineken-Crown amicus brief that section 13.2 of MillerCoors agreement renders the commission's ruling unnecessary. Heineken-Crown, and MillerCoors for that matter, would leave it up to the individual "aggrieved wholesaler" to institute litigation to challenge contract provisions which contravene the liquor control statutes. It's difficult to conceive of a more wasteful and expensive way to determine the validity of these challenged contract provisions.

As noted by MT&WWA, a declaratory proceeding avoids that very problem by enabling the parties to obtain an adjudication of rights before an injury occurs or to resolve a matter before it ripens into a violation of law or breach of contract. Declaratory judgments are given where the parties require direction as to their rights and obligations. As stated by the Michigan Supreme

[1] MillerCoors suggests that commission's issuance of a declaratory ruling as to the enforceability of a contract provision somehow constitutes a penalty, but fails to cite a single case that would support such a novel proposition.

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Court in Merkel v Long, 368 Mich 1, 11; 117 NW2d 130 (1962); quoting from City of Flint v Consumers Power Corporation, 290 Mich 305, 309-10; 287 NW2d 475 (1939):

> But the rights to be determined by declaratory judgment or decree . . . usually are rights not *in praesenti*, but rights which are to come into full fruition . . . at some future time. If uncertainties and controversies arise between interested parties as to what their respective rights will be when such rights accrue or become vested, and to avoid needless hazards or possible losses, it is necessary presently to have decision of such uncertain or controverted rights, then there is actual need of and justification for declaratory adjudication.

That is precisely our situation. Here, there can be no doubt about the authority of the commission issue declaratory ruling.

Section 7

The Commission found that "Section 7 of the MillerCoors distribution agreement essentially gives MillerCoors the right to hire and fire a wholesaler's managers . . . ." Certified Record, p 793. For example, subsection 7.1.1 of the proposed contract states : "Distributer shall designate and secure MillerCoors written approval of an Operating Manager." And subsection 7.3 provides:

> In the event that MillerCoors concerns [about the performance of any manager] are not resolved within a reasonable time, MillerCoors shall have the right to withdraw its approval of any or all of the Managers required under Section 7.1.

MillerCoors challenges the Commission's finding that sections 7.1.1 and 7.3 of the agreement violate MCL 436.1403(3)(l). That section provides in part:

> Should a wholesaler change an approved manager or successor manager, a supplier shall not require or prohibit the change unless the person fails to meet the reasonable written standards for Michigan wholesalers of the supplier which standards have been provided to the wholesaler.

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On it's face, subsection 7.1.1 of the MillerCoors' agreement goes beyond what is permitted under MCL 436.1403(3)(1). First, it forces a distributor to obtain MillerCoors' written approval for the "operating manager" (who has oversight over the wholesaler's business) and all other managers, before he/she can even function as a manager. Second, subsection 7.3 of MillerCoors' agreement allows MillerCoors to withdraw its approval if it has unresolved, indeed unspecified "concerns." This language is clearly broader that that authorized by statute which allows for removal of a manager who "fails to meet the reasonable written standards for Michigan wholesalers of the supplier." Third, under subsection 7.3, MillerCoors reserves the right to require removal of any manager who does not comply with the objectives imposed by the agreement, or by MillerCoors unilaterally imposed standards or by the Business Plan that MillerCoors has to approve.[2]

Subsections 7.1.1 and 7.3 must be read in light of subsection 7.4 which outlines the consequences if approval is withdrawn under subsection 7.3. Under subsection 7.4, if approval is withdrawn under subsection 7.3, a "Manager Vacancy" is created, and the distributor must follow the MillerCoors' process for identifying and securing approval of a replacement.

MillerCoors argues that subsection 7.6 "saves" subsections 7.1.1 and 7.3 and restores their validity. Not so. Subsection 7.6 provides:

> Nothing contained in this Agreement shall be construed as granting to any Manager any right to be retained in Distributor's employ, or as interfering with or limiting the sole and exclusive right of Distributor to terminate the employment of any Manager or to change such individual's duties so that the individual is no longer acting as a Manager.

This language imposes no practical restriction on MillerCoors rights under Section 7.1.1 and 7.3. While it may be the "sole" prerogative of a distributor to "terminate the employment" of a

[2] "Standard" and "Business Plan" are terms used in the MillerCoors' agreement.

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manager, or change his duties, without MillerCoors concurrence, no new manager will be installed. While this provision also allows the distributor to retain an employee over the objection of MillerCoors, again he/she would be doing something else. That employee could not act as the manager without MillerCoors' agreement.

Subsection 7.6 is silent on the distributor's right either to hire or retain a manager in his or her management capacity, over MillerCoors' objections. When subsections 7.1.1 and 7.3, are read together with subsection, 7.4, it is obvious that MillerCoors may dictate who the manager will be. Moreover, these sections allow MillerCoors to control to a degree the decisions of a wholesaler's manager. This contravenes MCL 436.1403(3)(l) and other provisions of the Liquor Control Code. The record amply supports the Commission's finding that the MillerCoors' contract "essentially" gives MillerCoors the right to "hire and fire" a wholesaler's manager.

MillerCoors next claims that the Liquor Control Commission made a substantial error of law when it concluded that section 7 of the Distribution Agreement violated MCL 436.1603(1) because the Commission does not explain how subsections 7.1.1 and 7.3 in any way give MillerCoors an impermissible "financial interest." MillerCoors mischaracterizes the effect of subsections 7.1.1 and 7.3. These subsections are contained within section 7, which is entitled "CHANGES IN MANAGEMENT." The apparent purpose of section 7 is to allow MillerCoors to inject itself into the actual management and operation of the wholesaler.

The very first sentence of section 7 speaks volumes. "Distributor's senior management is key to Distributor performance and MillerCoors and Distributor's mutual success." (Emphasis added.) Obviously, the suppliers and wholesalers are both in business to make money. The "mutual success" mentioned in MillerCoors' agreement refers to financial success. And MillerCoors' agreement recites that its reason for

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asserting control over the wholesaler's management and operation is because of its financial interest in the wholesalers.

As noted by the attorney general, for example, with such accountability to MillerCoors, and with broad authority over the wholesaler's business, the operating manager could be subject to pressure by MillerCoors to favor its brands over those of competing suppliers serviced by the wholesaler. This Court rejects MillerCoors claim that the Liquor Control Commission did not "explain" how MillerCoors' direct and pervasive involvement in the wholesaler's hiring process, management, and operations of the wholesaler's business constitutes a direct or indirect "financial interest."

Section 8

The Liquor Control Commission's findings with regard to provisions of section 8 are likewise supported by the Agreement. The Commission found that subsections 8.5, 8.7, 8.8 and 8.11 give MillerCoors an exclusive right of negotiation and the right of first refusal in the event of any transfer of distribution rights or transfer in ownership of a wholesaler. Certified Record, p 791. The commission is correct. Subsection 8.5.1 of the Agreement states in relevant part, "[i]f Distributor desires to pursue any Sale Transaction . . . Distributor shall first give MillerCoors written notice. . . ." Subsection 8.7 provides "MillerCoors shall, at its election, have the right to negotiate exclusively with Distributor for the Sale Transaction that is contemplated by the Sale Notice." Subsection 8.8 provides, "If MillerCoors does not timely elect to exercise its right of exclusive negotiation . . . [or] negotiations do not result in the closing of a transaction . . . and Distributor then negotiates for a Sale Transaction with a third party . . . Distributor shall deliver to MillerCoors a bona fide nonbinding letter of intent." Subsection 8.8.3 provides, "[u]pon receipt of the Letter of Intent, MillerCoors shall have the irrevocable right and option to purchase

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that portion of Distributor's business that is the subject of the Letter of Intent. . . ." The Commission found that subsections 8.5, 8.7, 8.8, and 8.11 all violate MCL 436.1603(1).

Petitioner acknowledges that its contractual provisions were intended to develop a mechanism through which MillerCoors can "exercise its right to approve the transfer of a wholesaler's rights." Petitioner specifically claims the "right to approve the transfer of a wholesaler's business." Petitioner's Brief in Support of Petition, p 26 - 27. MillerCoors claims too much. It has no right to "approve the transfer," MillerCoors' right is limited as set forth in MCL. 436.1403(16) and includes only the right to require that any buyer meet "material and reasonable qualifications and standards." Nothing in this language suggests that the legislature intended to allow a supplier to set the conditions of sale, the effect of which would be to permit the supplier to effectively exercise control of the operation of the business in the hands of the transferee. Since MillerCoors cannot acquire the contractual rights to purchase or control the sale of a wholesaler's business, in the first instance, it cannot purport to transfer such rights to an assignee to act in its place. *First of America Bank v Thompson*, 217 Mich App 581, 587; 552 NW2d 516 (1996)

By controlling who is permitted to purchase the wholesaler's business as well as the process for selling the business, as opposed to merely approving the qualifications of a buyer, MillerCoors has secured a "direct or indirect" financial interest in the establishment, maintenance, or promotion of the selling wholesaler's business. This violates MCL 436.1603(1). Even though MillerCoors cannot be a licensed wholesaler under Michigan law, its contract would permit it to acquire a wholesaler's entire business, thus retaining a direct or indirect financial interest in the maintenance and operation of the wholesaler's business. As observed by the attorney general, this contractual right would give MillerCoors the ability to pressure a

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wholesaler to sell its business (via threat of termination) to a buyer of MillerCoors' choosing. Having the contractual right to compel a wholesaler to sell its business to MillerCoors, to require a wholesaler to exclusively negotiate with MillerCoors and to give MillerCoors a right of first refusal, surely qualifies as a direct, or at least, an indirect financial interest in the wholesaler. The Liquor Control Commission properly found that the provisions of section 8, are integral to, and give MillerCoors a direct or indirect financial interest in, the establishment, maintenance, and operation of a wholesaler in violation of MCL 436.1603(1).

Sufficiency of Fact Finding

MillerCoors repeatedly complains about the commission's failure to find facts in support of its conclusions. Petitioner also complains that the commission made no factual determination as to the "extent of the unenforceability" of the sections. Petitioner's Brief, supra, p 18. MillerCoors also argues that the commission made its ruling based on "speculative, potential future actions" that are unsupported by evidence. Id at p 12. This case does not involve "speculative, potential future actions." Rather, it pertains to existing contract obligations which MillerCoors would impose on its Michigan distributors. MillerCoors is required by the statute to have a written contract which governs the relationship between the supplier and its Michigan distributors. MCL 436.1403(3)(i). It goes without saying that the provisions of such written contract must conform to the requirements of the act.

MillerCoors relies on Ludington Service Corp v Acting Comm'r of Insurance, 444 Mich 481, 500; 511 NW2d 661 (1994) It's reliance is misplaced. The question was whether a business plan adopted by petitioner there violated certain statutory provisions. The Supreme Court concluded that the agency decision was not supported by substantial

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evidence. This case does not involve a business plan — it involves a statutorily mandated written contract adopted pursuant to specific Michigan constitutional authority. The statutes are intended to control the conduct of the supplier and numerous distributors. The question here is not whether MillerCoors has undertaken to act improperly pursuant to its contract. Rather it is whether the mere inclusion of the power to act in certain ways which the contract purports to give MillerCoors violates the statute.

In other words, whether MillerCoors in fact involves itself in hiring or giving a distributor's manager is not dispositive. Nor is it dispositive whether or how they exercise their rights under section 8. What is important is that by contract they retain the power and authority to do so. MillerCoors claims for itself authority which it may not properly exercise and rights to which it is not entitled. The essence of the commission's holding is that the rights as incorporated by MillerCoors into its written contract are prohibited by statute. This Court finds that the commission may properly examine such contract to see if it grants Petitioner authority to which it is not entitled and upon the completion of that examination to issue a ruling.[3]

While the number of factual findings is here limited, there is no necessity for additional findings given the relatively narrow questions presented. What is a fact is that Petitioner has executed contracts with a number of distributors and will likely require all Michigan distributors to sign. And it is also beyond dispute that the constitution and the pertinent statutes are presumably valid.

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[3] MillerCoors also complains that the commission did not mention "70% of the language of the challenged sections." It is true that the commission did not "parse" every sentence and then determine if each line or phrase conforms with Michigan law. So what? The commission has no obligation to do so. Presumably they could if they decided to — but surely they are not required to redraft MillerCoors' flawed contract.

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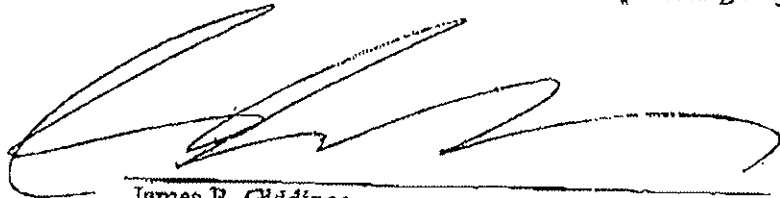
When the factual findings of the commission are read in conjunction with the statute and the contract language, the Commission's findings are supported by the record. Substantial evidence is any evidence a reasonable person will accept as adequate to support the decision. It must be more than a mere scintilla of evidence but it need not meet the preponderance of the evidence standard. Michigan Ed Ass'n Political Action Comm (MEAPAC) v Secretary of State, 241 Mich App 432, 444; 616 NW2d 234 (2000). Here, the evidence relied on by the Liquor Control Commission — the explicit and unambiguous terms of the MillerCoors Agreement — satisfy the substantial evidence test.

Conclusion

The Liquor Control Code is to be liberally construed to accomplish its intent. MCL 436.1925 The language used in MCL 436.1603(1) evidences that legislative intent. See *Odette v Liquor Control Commission*, 171 Mich App 137; 429 NW2d 814 (1988), and *In re Hon Edward Lawrence*, 417 Mich 248, 258-259; 335 NW2d 456 (1983). The determination by the Liquor Control Commission is not only sufficiently supported by substantial evidence, it is authorized by law and this Court can discern no basis upon which it may be found to be arbitrary or capricious.

The Commission's declaratory ruling must be affirmed. An order so providing may enter.



James R. Giddings

Dated: June 24, 2010

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