UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:11-CV-18-H
Electronically Filed

MAXWELL'S PIC-PAC, INC. et al. PLAINTIFFS

v. **DEFENDANTS DEHNER AND REED'S MOTION TO STAY ENFORCEMENT OF JUDGMENT WITHOUT BOND**

TONY DEHNER, et al. DEFENDANTS

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The Defendants, Tony Dehner and Danny Reed, by counsel, and pursuant to the Court's final Order entered in this action on August 21, 2012, move the Court to stay enforcement of the final Order, without bond, pending disposition of the appeal of said Order.[1] This motion is premised on Rule 8(a) (1) of the Fed. R. App. P. granting to this court the authority to stay a judgment or suspend an injunction while an appeal is pending.

A succinct and instructional analysis of the factors to be considered for a stay under Rule 8 is found in *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991). Likening the motion to one for preliminary injunction, Judge Martin identified the "well-known" factors as:

1. The likelihood that the party seeking the stay will prevail on the merits of the appeal;
2. The likelihood that the moving party will be irreparably harmed absent a stay;
3. The prospect that others will be harmed absent a stay; and
4. The public interest in granting a stay. *Id.*, at 153.

[1] Simultaneously with the filing of this motion, the defendants have filed their Notice of Appeal to the Sixth Circuit Court of Appeals.

Importantly Judge Martin observes, "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together". *Id.*, citing *In re Delorean Motor Co.*, 755 F.2d 1223 (6th Cir. 1985).

Reviewing these factors in order and in light of the record developed here, the defendants believe they are **likely to succeed** on appeal because:

a. the trial court does not attempt to balance the "core powers" reserved to the Commonwealth in the 21st Amendment against the least demanding equal protection standard of the 14th Amendment;

b. the opinion appears to invert the burden of proof to the defendants to demonstrate a rational basis for the statute (which is presumed constitutional) when the law requires that the plaintiffs demonstrate that there is no conceivable basis for the statute; and

c. the trial court's analysis seems to test plausible rationales for the statute against some hard data or logic standard, when the rationales "may be based on rational speculation unsupported by evidence or empirical data." [2]

The 21st Amendment grants to the Commonwealth near plenary authority in the regulation of where alcoholic beverages may be sold. This "core power" has been interpreted by Kentucky federal authorities to provide the rational basis for restricting the location and nature of premises where alcoholic beverages may be sold. *Simms v. Farris*, 657 F. Supp. 119, 124 (E.D. Ky. 1987). But the Court seems to dismiss Kentucky's 21st Amendment authority to prohibit hard liquor sales at certain types of businesses. The court accurately stated that states may constitutionally classify and treat businesses differently so as to permit certain kinds of alcohol

[2] *Federal Communications Commission v. Beach Communications, Inc., et al.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102 (1993).

sales at one type of business, but not another.[3] The court also acknowledged that states may constitutionally classify and treat alcohol businesses differently, based on their sales of one product as a percentage of their total gross sales.[4] Despite these conclusions, the court ultimately, and inconsistently held, that Kentucky cannot prohibit hard liquor sales at certain types of businesses based on their sales of one product as a percentage of their total gross sales. KRS 243.230(5) is a proper exercise of this 21st Amendment authority and treats all Kentucky businesses equally.

The trial court's analysis continually compared groceries to drugstores to conclude there is no rational basis for distinguishing between the two for the sale of alcoholic beverages, and thus, the statute is unconstitutionally discriminatory. But the statute in question makes no exception for drugstores. The statute applies equally to all retailers to prohibit the sale of "distilled spirits or wine" on "any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling at retail staple groceries or gasoline and lubricating oil."[5]

In fact, some grocery chains and some drugstore chains do sell similar products. But they do not sell similar volumes of products, they retain their separate primary purposes, and no drugstore selling 10% or more of its gross receipts in staple groceries may hold a liquor license. The point of the distinction is the volume of sales, and it is at least "conceivable" that there is a rational basis for this distinction. Groceries are the gathering place of all communities. All people must have groceries on a regular basis. Not all people need drugs on a regular basis. As the trial court acknowledged, "Kentucky's legislature was well within its broad powers to

[3] See Memoradum Opinion, p.12 (citing *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 623 (6th Cir. 1997).

[4] See, Memorandum Opinion, p. 13 (citing, *Gary v. City Warner Robins*, 311 F.3d 1334, 1336 (11th Cir. 2002).

[5] While the trial court found there was no rational basis for distinguishing between groceries and drugstores, its analysis was silent in regard to the prohibition on the sale of whiskey and wine at gas stations.

prohibit liquor sales in stores that might serve as a gathering point in a community."[6] But the trial court inappropriately subjected the short list of potential rationales to its own speculative "courtroom fact finding".[7] While the trial court disagreed that a grocery may have more community gathering power than a drugstore, it is at least "plausible" or "conceivable" that groceries get the nod because of everyone's need to eat. For this reason, the statute should pass muster of the least burdensome equal protection analysis.

For these reasons, there is a real likelihood defendants will succeed on appeal.

There is a substantial likelihood the defendants will suffer **irreparable harm** if the judgment is not stayed on appeal. As the court has acknowledged in discussion with the parties, the Memorandum Opinion upsets a 68 year old regulatory scheme. Enforcement of Kentucky's alcoholic beverage law is entrenched in this statutory scheme.

The court's ruling is in direct conflict with KRS 243.230(4). In Kentucky counties without a third or higher class city, KRS 243.230(4) permits liquor licenses to only be issued outside city limits to a commercial enterprise which exclusively sells distilled spirits and wine by the package and malt beverages (i.e., the business is only a liquor package store). The Memorandum Opinion only addresses subsection (5) so that subsection (4) is still valid. KRS 241.020(1) mandates Department to enforce KRS 243.230(4). A direct conflict exists with court's ruling that a grocery store is not prohibited from obtaining a liquor license under (5) but is prohibited by (4). This places the defendants in untenable position of ignoring statutory duties and official misconduct, or being held in contempt by this court for ignoring it's ruling.

There is a substantial likelihood that **others will be harmed** absent a stay. Kentucky liquor package licenses are quota licenses. Large chain grocery stores have financial resources

[6] Memorandum Opinion pp. 21-22.
[7] *Federal Communications Commission*, 508 U. S. at p. 315, 113 S. Ct. at p. 2102.

to purchase these quota licenses at prices which cannot be reasonably refused. If permitted to obtain these licenses pending appeal, grocery stores would place other small business owners at a competitive disadvantage since they cannot receive bulk purchase discounts from distributors/wholesalers like the large chain.[8] Small business owners would be unable to compete and forced to close their businesses. Even if KRS 243.230(5) were ultimately upheld on appeal, it would be too late for these small business owners.

Second, distilled spirits and wine sales are much more controversial than beer to a large segment of the general public. Because everyone in a community must eat food, everyone must frequent the grocery store. If the opinion is not stayed, grocery stores obtaining a liquor license could also obtain sampling licenses to permit alcohol samples of hard liquor and wine to be consumed on the premises. See, KRS 244.050(2). This will be the first time that alcohol has been permitted to be consumed in a place everyone in a community must visit. In addition to religious opposition, many members of the public oppose product displays and placement to encourage "impulse buys" and "bargains" of hard liquors at places where all community members must visit.

When a community associates its problems with alcohol, Kentucky citizenry have a Kentucky constitutional right to a precinct only election to return to dry status. *See*, Kentucky Constitution, § 61; *Campbell v. Brewer*, 884 S.W.2d 638 (Ky. 1994); *Fuson v. Howard*, 305 Ky. 843, 205 S.W.2d 1018 (1947). Only three (3) years ago, in the metropolitan city of Louisville, Kentucky, residents voted the Shawnee precinct dry after associating neighborhood problems with alcohol sales and consumption.

If the court's ruling is not stayed, the decades old community balance of interests will be shattered and many communities may hold precinct local option elections to prohibit hard liquors

[8] A large chain grocer would have unprecedented buying power among Kentucky retailers.

from being sold in grocery stores where all must go. Such a vote would actually prohibit all alcohol sales in the precinct and many businesses would shut down or leave as happened in the Shawnee precinct. Even if KRS 243.230(5) were ultimately upheld on appeal, it would be too late for these precincts and lost businesses therein.

Lastly, because of the complexity of balance under Kentucky alcoholic beverage law, the Memorandum Opinion will create new challenges to the equality of treatment of retailers. Because groceries were not intended to receive liquor licenses under the decades old scheme, restrictions placed on regular liquor licensed premises are not placed on groceries.[9] Now the traditional liquor store may have standing to challenge its restrictions as unfair.

Finally, there is substantial **public interest** in granting stay of the enforcement of the Order. The question of permitting the sale of wine in groceries has been prominent in the public spot light in recent years. Proof of the public's interest is in the legislature's refusal to permit the sale of liquor and wine in groceries as recently as the 2009 General Assembly.

The Court should issue its Order of stay without bond. Bond should be denied for at least three reasons. First, there is no money judgment to be superseded. Second, the plaintiff's claims that they will lose profits are purely speculative. It would be impossible for the plaintiffs to demonstrate: a.) their entitlement to the license privilege; b.) when they might obtain a license relative to the time necessary for appeal; or c.) if the quota license would even be available during the pendency of appeal. Third, these defendants would be immune to a claim for damages under the circumstances of this case. *See, Riechle v. Howards*, ___ U.S.___, 132 S.Ct. 2088, 2093 (2012) (citing *Ashcroft v. al-Kidd*, ___ U.S.___, 131 S.Ct. 2074, 2080 (2011)).

[9] *Cf.*, KRS 244.085(7).

Conclusion

For the reasons stated above, the Court should enter the attached Order staying the enforcement of its Final Order, without bond, pending the appeal thereof.

Respectfully submitted:

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CERTIFICATE OF SERVICE

It is hereby certified that on this 5th day of September, 2012, the foregoing Motion and tendered Order were electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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