IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

ROBERT McCURRY **PLAINTIFF**

v. **No. 4:13-CV-00467-DPM**

ALCOHOLIC BEVERAGE CONTROL DIVISION OF THE STATE OF ARKANSAS **DEFENDANT**

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes defendant, the Alcoholic Beverage Control Division of the State of Arkansas, and for its motion to dismiss, states:

I. INTRODUCTION

Plaintiff, Robert McCurry, filed this instant action alleging the unconstitutionality of Arkansas Code Annotated § 3-4-2-5(b)(1)(A), § 3-4-205(b)(1)(B) and § 3-4-301(a)(8)-(10). Plaintiff contends that the statutes' prohibition against a "person, firm or corporation" having an interest in more than one retail liquor permit is unconstitutional because the statutes violate the Commerce Clause, are void for vagueness, lack substantive due process and violate the Equal Protection Clause. Plaintiff's complaint should be dismissed in its entirety for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure based on plaintiff's failure to exhaust his administrative remedies. Moreover, plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

First, plaintiff's alleged Commerce Clause violation fails on its face because the subject statutes treat out-of-state "persons, firms or corporations" the same as their domestic equivalents.

Second, the statutory language conveys sufficient warning, when measured by common understanding and practice, of the prohibited activity and applicability. Third, plaintiff's equal protection claim lacks factual, non-conclusory allegations that state a plausible claim for relief, and the statutes are rationally related to legitimate government purposes. Fourth, plaintiff's substantive due process claim fails on the merits because plaintiff applies overruled, American jurisprudence from the Lochner Era, not the current rational basis review. The complaint should be promptly dismissed for all of the stated reasons.

II. FACTS

Plaintiff, Robert McCurry, is a resident of Bentonville, Arkansas. Pl's Am. Comp. ¶ 1. Plaintiff is a shareholder in Gild Holdings, LLC and/or Gild Corporation ("hereinafter referred to collectively as "Gild Holdings.") Id. ¶ 13. Gild Holdings, which is also known as Macadoodles, operates a number of franchise liquor stores in Missouri and one store in Springdale, Arkansas. See Pl's Am. Compl, Ex. 4-1. The franchises are operated pursuant to written franchise agreements, and the franchises are marketed under the name "Macadoodles Franchise." Id.

On April 26, 2013, plaintiff applied for a retail liquor permit through the Alcoholic Beverage Control Division of Arkansas ("ABC.") Pl's Am. Compl., ¶ 7. Plaintiff did not disclose his interest in Gild Holdings. Rather, plaintiff simply marked that he sold intoxicating liquors "in Missouri [from] 1997 to present." See Pl's Am. Compl, Ex. 4-1. Plaintiff proceeded to a hearing before the Board of Directors for the ABC ("ABC Board") on July 16, 2013. Plaintiff disclosed the following when prompted by the ABC Board.

> [T]hat on his application he listed an interest in a retail liquor permit in Missouri; that the interest that he holds is in Gild Corp; that he is a Partner in Gild Corp; that Gild Corp is Macadoodles; that as part of Gild Corp he has an interest in a liquor store in Springdale, which is Macadoodles liquor store; that the Macadoodles in Springdale pays him fees as part of a franchise agreement that Gild Corp has with the Macadoodles in Springfield; that he receives royalty fees

> from the Macadoodles liquor store in Springdale; that the franchise agreement that Gild Corp has with the Macadoodles in Springdale is the same franchise agreement that he forwarded to the ABC in connection with the federal lawsuit that has been filed against the Alcoholic Beverage Control Division;[1] that Gild Corp has the right to tell the Macadoodles in Springdale what products to buy; that he has an interest and control in the Macadoodles liquor store in Springdale; that he is a shareholder in Gild Corp and that he receives revenue from Gild Corp annually.

Pl's Am. Compl, Ex. 4-2.

The ABC Board denied plaintiff's application for a liquor permit based on the above findings pursuant to Ark. Code Ann. § 3-4-205(b)(1)(A) and Ark. Code Ann. § 3-4-301(8). Id. Plaintiff has now filed this suit challenging the constitutionality of several Arkansas statutes. The challenged statutes read as follows:

> Ark. Code Ann. § 3-4-205(b)(1)(A)-(B). Interest in other permits prohibits — Exceptions.
>
> . . .
>
> (b)(1)(A) No retail liquor permit shall be issued, either as a new permit or as a replacement of an existing permit, to any person, firm or corporation if the person, firm or corporation has any interest in another retail liquor permit, regardless of the degree of interest.
>
> (B) A retail liquor permit shall apply to only to one (1) location, and a person, firm or corporation, shall not be permitted to receive any direct or indirect financial benefit from the sale of liquor at any other location other than the permitted location.
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> . . . .

Ark. Code Ann. § 3-4-205(b)(1)(A)-(B).

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[1] Gild Holdings and Steven Cherry filed suit against the ABC and Michael Langley, in his capacity as Director of Alcoholic Beverage Control Division of the State of Arkansas on May 31, 2013. See Gild Holdings, Inc, et. al v. Alcoholic Beverage Control Division, 4:13-CV-333-JMM. The suit is essentially identical to the present suit. Plaintiff, like Gild Holdings and Steven Cherry, are represented by the same counsel, Jim Lyons. Both suits allege that Arkansas Code Annotated § 3-4-2-5(b)(1)(A), § 3-4-205(b)(1)(B) and § 3-4-301(a)(8)-(10) are unconstitutional because the statutes violate the Commerce Clause, are void for vagueness, lack substantive due process and violate the Equal Protection Clause.

Ark. Code Ann. § 3-4-301(8)-(10). Grounds for revocation.

. . .

> (8) Subsequent to March 1, 2011, if a retail liquor permittee directly or indirectly remunerates any person, firm, or corporation that has a direct or indirect pecuniary, proprietary, or financial interest in the creation, establishment, operation or contractual branding of another permitted liquor establishment;
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> (9) Subsequent to March 1, 2011, if a retail liquor permittee directly or indirectly receives remuneration from any other retail liquor permittee relating to the creation, establishment, operation, or contractual branding of another permitted liquor establishment; or
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> (10) Subsequent to March 1, 2011, if a retail liquor permittee brands the permitted location with the same name or logo as another retail liquor permittee.

Ark. Code Ann. § 3-4-301(8)-(10).

III. PLEADING STANDARD

"A complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face'" under the Supreme Court's most recent decision. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 570 (2007)). This pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. at 1949 (quoting Twombly, 550 U.S. at 555). And, the "[f]actual allegations must be enough to raise a right to relief above the speculative level. Twombly, 550 U.S. at 555. This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id.

IV. ARGUMENT

A. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO RULE 12(B)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiff's failure to exhaust his administrative remedies should result in a dismissal of this suit for lack of subject matter jurisdiction. Well established in the jurisprudence of

administrative law is the doctrine of exhaustion of administrative remedies. McCart v. United States, 395 U.S. 185, 89 S.Ct. 1657 (1969). The doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Id., 89 S.Ct. at 1657 (citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 – 51, 58 S.Ct 469, 463 (1938)). The doctrine requires that a party "pursue all administrative remedies before obtaining judicial review on the merits of a claim." Id. at 193, 89 S.Ct. 1662; see also State of Miss. v. Bowen, 813 F.2d 864 (8th Cir. 1987)). Stated differently, exhaustion of administrative remedies is a prerequisite to subject matter jurisdiction.

The ultimate issue before the Court is an appeal of the ABC Board's order denying plaintiff a liquor permit. This is evident by plaintiff's repeated requests that the Court overturn the decision of the ABC Board and require that it issue a liquor permit to plaintiff. See Pl's Compl., ¶¶ 27, 38, 44 and 53. The proper procedural avenue for challenging the ABC Board's decision is an administrative appeal to the state circuit court pursuant to the Arkansas Administrative Procedures Act. See Ark. Code Ann. 3-4-213. Ark. Code Ann. § 3-4-213 explicitly provides:

> Any appeal from an order of the Director of the Alcoholic Beverage Control Division or the Alcoholic Beverage Control Board **shall be made to the circuit court** of the county in which the premises are situated or the Pulaski County Circuit Court. **Appeals shall be governed by the terms of the Arkansas Administrative Procedure Act, § 25-15-2011 *et seq*.**

Ark. Code Ann. § 3-4-213 (emphasis added).

The APA and the ABC's statutes dictate that plaintiff exhaust his administrative remedies by appealing the ABC Board's order to the circuit court under the APA. Plaintiff failed to appeal to the circuit court despite the statute explicitly stating the proper procedure. Accordingly, plaintiff's complaint should be dismissed for lack of subject matter jurisdiction.

B. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

1. The Arkansas Statutes Do Not Violate The Dormant Commerce Clause.

The Twenty-first Amendment provides that the "transportation or importation in to any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., amend. XXI, § 2. The United States Supreme Court has acknowledged that the Twenty-first Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." Granholm v. Heald, 544 U.S. 460, 488 (2005)(quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).

State liquor control policies are supported by a strong presumption of validity and should not be set aside lightly given the special protection afforded by the Twenty-first Amendment. North Dakota v. United States, 495 U.S. 423, 433 (1990). In Granholm, the Supreme Court's most recent analysis of the relationship between the Twenty-first Amendment and the Commerce Clause, the Court adopted an analytical framework based upon the dichotomy between **discriminatory state regulations** that impede the flow of liquor products in interstate commerce (which are subject to the Commerce Clause) and state regulations that regulate the structure of the liquor industry within the state (which are protected by the Twenty-first Amendment). Id. at 489. Discrimination, for purposes of the dormant commerce clause, means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Sys., Inc. v. Dep't of Environmental Quality, 511 U.S. 93, 99 (1994). The Granholm Court explicitly held that "**[s]tate polices are protected under the Twenty-first**

Amendment when they treat liquor produced out of state the same as its domestic equivalent." 495 U.S. at 489.

Plaintiff's complaint fails as a matter of law. There is neither evidence nor even any factual allegation that the statutes are "discriminatory state regulations that impede interstate commerce." While the complaint alleges that the statutes "interfere with interstate commerce" and restrict "the trading of stock of publicly traded corporations," there are no facts set forth in the complaint showing differential treatment of in-state and out-of-state economic interests. Plaintiff's complaint is devoid of any allegations of discrimination because there is no evidence to support such claim. The statutes treat out-of-state "persons, firms or corporations" the same as their domestic equivalents. For example, the prohibition against having an interest in multiple retail liquor permits applies regardless of whether the "person, firm or corporation" is in-state or out-of-state. There is no "carve-out" or other device that enables in-state persons or entities to evade the prohibition. Likewise, there is no evidence of "home-field" advantage in connection with the enforcement of the restrictions. The statutes are valid under the Granholm rule absent evidence of "differential treatment of in-state and out-of-state economic interests." Accordingly, plaintiff's claim for violation of the dormant commerce clause should be dismissed.

2. The Statutes Are Not Void For Vagueness.

a. State statutes are presumed constitutional and should not be overturned based on the void for vagueness doctrine because of "policy" decisions or "hypothetical" situations.

A state statute is presumed constitutional. Schilb v. Kuebel, 404 U.S. 357, 364 (1971). Consequently, a party challenging the constitutionality of a state statute bears a heavy burden. Estate of Branson v. O.F. Mossberg & Sons, 221 F.3d 1064, 1065 n.4 (8th Cir. 2000). All doubts pertaining to a statute in question are resolved in favor of constitutionality. Hamilton v.

Hamilton, 317 Ark. 572, 576, 879 S.W.2d 416, 576 (1994). Where a constitutional construction is possible, the Court should uphold the validity of the statute under attack. Id. Ordinarily "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519 (1960). "[W]hen possible, [a court] must narrowly read a statute to be constitutional as applied to the facts of the case before [it] and cannot consider other arguably unconstitutional applications of that statute." United States v. Lemons, 697 F.2d 832, 835 (8th Cir. 1983); see also, Woodis v. Westark Comm. College, 160 F.3d 435 (1998)(holding that vagueness challenges that do not involve the First Amendment must be examined in light of the specific facts of the case at hand . . . .") Likewise, a Court should not find a statute void for vagueness based upon policy reasons. See Voinovich v. Women's Med. Pro. Group, 523 U.S. 1036, 118 S.Ct. 1347, 1349 (1998).

The void for vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments. D.C. & M.S v. City of St. Louis, 795 F.2d 652, 653 (8th Cir. 1986). The established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess the prohibited conduct and differ as to its enforcement. Id. at 654. A statute is constitutional if its language conveys sufficient warning when measured by common understanding and practice. Stated differently, the constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms that find adequate interpretation in common usage and understanding. Id.

b. The history behind the statutes and the challenges demonstrate that the pending challenge is based entirely on the General Assembly's "policy" decisions and "hypothetical" situations.

The pending lawsuit is not the first attack on the subject statutes. Rather, plaintiff and/or his counterparts have mounted several recent attacks, both in the legislature and in the judiciary, to change the statutes to allow for franchise agreements. For example, the 89th General Assembly for the State of Arkansas addressed three proposed bills to change the language in the subject statutes to allow for franchise agreements. The three bills included Senate Bill 356, House Bill 2187 and House Bill 1970. All three bills died in the respective senate and house committees.

Following the defeat at the General Assembly, plaintiff and his company, Gild Holdings, resorted to legal action. Plaintiff's company, Gild Holdings, filed suit against the ABC and Michael Langley on May 31, 2013. The lawsuit challenged the constitutionality of the statutes on multiple grounds including a void for vagueness argument. Gild Holdings' primary void for vagueness argument focused on hypothetical situations involving wholesalers, vendors and service providers. Gild Holdings ignored the relevant inquiry—whether it was on notice of the prohibited activity. Plaintiff has obviously recognized the weaknesses in his company's hypothetical argument relating to wholesalers, vendors and service providers as evident in the latest attack on the statutes. In the latest attack, plaintiff's amended complaint attempts to correct the deficiencies by using parentheticals stating "as interpreted and applied to the plaintiff" and by using a different hypothetical. See e.g., Pl's Am. Comp., ¶ 22. A review of plaintiff's amended complaint, however, reveals that the newest attack on the statutes amounts to nothing more than challenges to the legislature's policy decisions rather than any demonstration that plaintiff does not know what is prohibited. Indeed, plaintiff does know that holding an

interest in more than one retail liquor permit as he has proposed is prohibited by Arkansas law and that is the reason why his permit was denied, see infra.

c. The plain language of the Ark. Code Ann. § 3-4-205(b)(1)(A)-(B) and § 3-4-301(a)(8) places plaintiff on notice that the statutes apply to him, and that the statutes prohibit him from having an interest in more than one permit.

The relevant inquiry, in a void for vagueness challenge, is not whether the statutes are based on sound policy nor how the statute might apply to some hypothetical situation other than the facts of the plaintiff's case. The sole question is whether a reasonable person in plaintiff's position has the opportunity to learn that the law prohibits his proposed conduct. Here, there is no doubt that, without any difficult parsing of words or interpretation of meaning that plaintiff's proposed ownership interest in more than one retail liquor permit is plainly prohibited.

Plaintiff's void for vagueness argument centers on the misconceived notion that by not defining the terms "person, firm or corporation" and "any interest," it is impossible to discern when a "person, firm or corporation" has an "interest in a permit." Plaintiff then proceeds to rely on an endless hypothetical about how a hypothetical person, not the plaintiff, might, in some hypothetical and unlikely scenario end up with an interest in a retail liquor permit of which he is unaware. But that is not plaintiff's situation. Plaintiff has never contended that he is or ever was unaware of his existing financial interest in an Arkansas retail liquor permit at the time he applied for another retail liquor permit.

It is undisputed that plaintiff disagrees with the General Assembly's policy decisions to reject the bills he favored to change Arkansas law. The relevant inquiry, however, is not how the General Assembly's policy decisions could conceivably affect "other [hypothetical] persons [holding a public company's stock in their retirement portfolios]."

The relevant inquiries are whether McCurry, as a permit applicant, knew that the statutes applied to him and whether he was on notice of the prohibited activity. Addressing the facts at hand, and not the endless hypothetical posed by plaintiff, it is inconceivable, and, indeed, plaintiff does not even argue, that he does not understand that the terms "person, firm or corporation" used in their everyday common usage and understanding apply to him.

The plain language of the statutes place McCurry on notice of the prohibited activity. Arkansas Code Ann. § 3-4-205(b)(1)(A) plainly prohibits McCurry from having any interest, **regardless of the degree**, in another retail liquor permit. McCurry's own admissions before the ABC Board establish that he has both a financial interest and a controlling interest in another retail liquor permit, the Macadoodles located in Springdale. McCurry admitted the following:

(1) He is a partner and shareholder in Gild Holdings;
(2) Gild Holdings is Macadoodles;
(3) Gild Holdings operates retail liquor stores pursuant to written franchise agreements;
(4) Gild Holdings operates the Macadoodles in Springdale pursuant to a written franchise agreement;
(5) The Macadoodles in Springdale pays Gild Holdings a fee and royalties;
(6) McCurry receives annual distributions of Gild Holding's revenues; and
(7) Gild Holding has a controlling interest in Macadoodles including the ability to control its product purchases.

It is undeniable that McCurry has a financial interest in the Macadoodles in Springdale. The Macadoodles pays ongoing royalties to Gild Holdings, which are then distributed to McCurry through annual revenues. It is also undeniable that McCurry has a controlling interest in the Macadoodles in Springdale. McCurry, by and through the franchise agreement, is able to control aspects of Macadoodles' daily operations such as the purchasing of products. Simply put, McCurry's situation is drastically different than some hypothetical person who may own stock in a publically held company through his or her retirement portfolio. McCurry cannot

successfully hide behind the void for vagueness doctrine when the statute plainly prohibits his financial interest and controlling interest in more than one retail liquor permit.

Ark. Code Ann. § 3-4-205(b)(1)(B) and § 3-4-301(a)(8) equally place McCurry on notice of the fact that he cannot, either indirectly or directly, receive remuneration or a financial benefit from more than one liquor permit. McCurry is receiving a financial interest, regardless of whether directly or indirectly, from the Macadoodles in Springdale. The annual distributions that he receives from Gild Holdings are derived from the fee and monthly royalties paid by the Macadoodles in Springdale. Clearly, the statutes place plaintiff on notice that he cannot have a retail liquor permit plus receive the financial benefit/remunerations from the Macadoodles in Springdale. Accordingly, plaintiff's void for vagueness argument fails.

3. The Statutes Do Not Violate the Equal Protection Clause.

a. Plaintiff's equal protection claim does not satisfy Twombly and Iqbal.

Plaintiff's amended complaint is devoid of factual, non-conclusory allegations that state a plausible claim for relief under the equal protection clause. Plaintiff is required to prove that the legislation is not rationally related to some legitimate government purpose. In support of his claim, plaintiff's amended complaint is replete with conclusory allegations and formulaic recitations of the elements of an equal protection claim. As an example, plaintiff ignores the legitimate purposes set forth in the emergency clauses to the statutes and includes conclusory arguments that the statutes lack "any rational basis." Plaintiff's amended complaint, however, lacks any facts proving, or even suggesting, that the statutes lack a rational basis. This Court should dismiss plaintiff's equal protection claim because the factual allegations do not support a plausible claim for relief as required by the plausibility test of Twombly and Iqbal.

b. Plaintiff's amended complaint fails, on its face, because the statutes are rationally related to a legitimate government purpose.

Economic legislation that neither employs suspect classifications such as race nor infringes on a fundamental right such as voting is subject to rational basis review. Hodel v. Indiana, 452 U.S. 314, 331 (1981). A statute that simply regulates the economic activity of a business is judged only for whether it has some conceivable rational basis. Id. A Court, applying rational basis review, "must uphold the legislation as long as the means chosen by the legislature are rationally related to some legitimate government purpose." Id.; see also Pennell v. San Jose, 485 U.S. 1, 14 (1988). A state's legislative choices bear a strong presumption of validity. The state need only "articulate some 'reasonably conceivable set of facts' that could establish a rational relationship between the challenged laws and the government's legitimate ends." A court, under this view, must reject an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification and the government's legitimate goals.'" Knapp v. Hanson, 183 F.3d 786, 789 (8th Cir. 1999)(quoting FCC v. Beach Comminications, Inc., 508 U.S. 307, 313 (1993)). Indeed, "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data." Beach, 508 U.S. at 315. Those attacking the rationality of the legislation have the "burden to negate every conceivable basis which might support it." Independent Charities of America v. State, 82 F.3d 791, 797 (8th Cir. 1996)(citation and internal quotation marks omitted). Because "all that must be shown is 'any reasonably conceivable state of facts that could provide a rational basis for the classification,' it is not necessary to wait for further factual development." Carter v. Arkansas, 392 F.3d 965 (2004)(citing Knapp, 183 F.3d at 789). A district court may conduct a rational basis review on a motion to dismiss. Id.

Of relevance to this case is the First Circuit's decision in Wine & Spirit Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005), the only federal Court of Appeals to have addressed the constitutionality of a state statute prohibiting retail franchising of liquor. In Wine & Sprit Retailers, the First Circuit directly addressed whether a Rhode Island statute prohibiting retail franchising of liquor violated the equal protection clause. Plaintiff contended that statute violated the equal protection clause because it only applied to retail liquor stores, not "other entities licensed to sell alcoholic beverages at retail" such as restaurants and bars. Id. at 53.

The Rhode Island statute, like the Arkansas statutes, prohibited business activities that were typical for franchise or chain store relationships. And, strikingly similar to the legitimate government purposes set forth in the emergency clauses to the Arkansas statutes, the Rhode Island legislature enacted its statute to "promote effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." Id. at 42.

The Rhode Island district court and the First Circuit both applied a rational basis review in rejecting plaintiff's equal protection claim. Id. at 53 – 54; see also Wine & Spirit Retailers, Inc. v. Rhode Island, 364 F.Supp.2d 172 (D.C. R.I. 2005). The First Circuit stated, as follows:

> As a last resort, [plaintiff] mounts an equal protection challenge to sections 3-5-11 and 3-5-11.1. Its complaint is that these statutes apply to package stores but not to other entities licensed to sell alcoholic beverages at retail (such as restaurants and bars). Its contrived attempt to tease an equal protection violation out of this imperfect analogy is unpersuasive.

Id. at 53. The First Circuit went on to find that the purposes set forth by the legislature seem "clearly legitimate, on their face" and that plaintiff failed to establish any evidence that the challenged statute lacked a rational basis. Id.; 364 F.Supp.2d at 180.

Plaintiff's equal protection claim is easily disposed of, because the statutes are rationally related to legitimate government purposes. Plaintiff's primary attack—that the statutes treat restaurants and franchises that sell beer and wine differently—is identical to the argument that the First Circuit found was merely a "contrived attempt to tease an equal protection violation" after plaintiff failed to set forth any evidence that the entities were similarly situated. Here, plaintiff merely alleges that there is no rational basis but fails to set forth any evidence showing that the entities are similarly situated.

Moreover, the statutes, which are economic in nature and subject to a rational basis review, are based on several legitimate government purposes that are set forth in emergency clauses to the statutes. Although conveniently ignored by plaintiff, the legitimate government purposes are "to prevent unfair competition," "to ensure that those persons receiving retail liquor permits continue to abide by the spirit and intent of the law" and "to ensure that, through the permitting process, citizens are protect from illegal sale of alcoholic beverages." The protection of consumers and the intent to uphold the spirit and intent of Arkansas' regulation of the alcoholic industry are legitimate government purposes. See Wine & Spirits, 418 F.3d at 54.

Finally, plaintiff has not met his burden of demonstrating that there are no reasonably conceivable set of facts that could provide a rational relationship between the challenged classification and the government's legitimate goals. Merely alleging "that no rational basis exists for allowing franchises that sell beer and wine (without a retail liquor permit) or allowing franchises that operate restaurants that provide liquor" falls significantly short of establishing that no reasonably conceivable set of facts exist. Plaintiff cannot meet the burden because the exact opposite is true—there are a number of conceivable facts supporting the statutes, *see infra*. As one example, and although not meant to be exhaustive, it is rational for the State of Arkansas

to enact legislation that is aimed at preventing anti-competitive pricing by requiring that holders of retail licenses operate independent of each other. The legislation is rational in light of the stated purpose of maintaining "fair competition" within the retail liquor industry. See Wine & Spirits, 418 F.3d at 54.

In sum, a district court can conduct a rational basis review of an equal protection claim on a motion to dismiss. A rational basis review of plaintiff's equal protection claim demonstrates that plaintiff's claim fails on its face, under Twombly and Iqbal, and on its merits. Plaintiff cannot demonstrate that the statutes lack a legitimate governmental purpose or lack a rational basis to a legitimate governmental purpose. Accordingly, plaintiff's equal protection claim should be dismissed.

4. The Statutes Are Not Unconstitutional For Lack Of Substantive Due Process.

a. Substantive due process claims are analyzed under the rational basis test.

The proper test for an economic substantive due process claim is whether the law is rationally related to a legitimate government purpose; the test is not whether the legislature acted to protect "public health, morals and safety." As a matter of history, cases from the late 1800s and early 1900s largely followed the belief that society would thrive with minimal government regulations. That portion of American history and American jurisprudence was often referred to as the Lochner era based on the pivotal case of judicial activism, Lochner v. New York, 198 U.S. 45 (1905). In Lochner, the United States Supreme Court held that (1) the right to contract was a liberty interest protected by the Fourteenth Amendment; (2) the government could interfere with this right only to serve a valid police purpose: that is to protect the public safety, public health or public morals; and (3) it was the judiciary's role to carefully scrutinize legislation to ensure that it served a police purpose. Id.

In the 1930s, the belief that society would thrive with minimal government regulations started to fade, in part, because of the Great Depression. Consequently, the United States Supreme Court abandoned the jurisprudence of the Lochner era in West Coast Hotel v. Parrish, 300 U.S. 379 (1937) and United States v. Carolene Products Co., 304 U.S. 144 (1938). In West Coast Hotel, the Court explicitly stated that it would no longer protect the freedom of contract as a fundamental right and that the government could regulate economic legislation to serve "any legitimate purpose." 300 U.S. at 391 – 92. In a similar holding, the Carolene Court stated:

> Even in the absence of such aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

304 U.S. at 152.

Since 1937, the United States Supreme Court has consistently upheld state and federal economic regulations challenged on substantive due process grounds so long as the regulations were rationally related to a legitimate government purpose. See e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963). In fact, the Court has not invalidated an economic regulation on substantive due process grounds since 1937. Patel v. Texas Dept. of Licensing & Regulation, 2012 WL 3055479, *14 (Tex. App. 2012). A classic example of the United States Supreme Court's holdings is best set out in Ferguson wherein the Court stated:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.E. 937 (1905), outlawing 'yellow dog' contracts, Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), setting minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed, 785 (1923), and fixing

> the weight of loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924).
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> . . . .
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> The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases-that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely-has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

372 U.S. at 726.

The above body of law clarifies that substantive due process claims in the area of economic legislation "have evolved into a deferential rational basis analysis." Honeywell, Inc. v. Minn. Life & Health Ins. Guaranty Assoc., 110 F.3d 547, 553 (8th Cir. 1997). Stated differently, the United States Supreme Court's authorities "leave no doubt that . . . the modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate government purpose." Id. at 554.

b. Plaintiff's substantive due process argument is legally incorrect because it relies upon overruled jurisprudence from the Lochner Era.

Plaintiff's substantive due process claim fails, on its merits, because plaintiff incorrectly relies on jurisprudence from the Lochner Era in arguing that the statutes are unconstitutional. Specifically, plaintiff argues that the State of Arkansas exceeded its police powers—the right to protect the public health, morals and safety—in enacting the statutes. Pl's Compl. ¶ 54.

Economic legislation, however, is no longer restricted to whether the legislation serves a "valid police purpose" in the eyes of the judiciary. The correct inquiry, under the modern framework for a substantive due process claim, is whether the legislation is reasonably related to a legitimate government purpose.

Similar to plaintiff's equal protection claim, plaintiff's substantive due process claim is easily disposed of because plaintiff fails to statute a plausible claim for relief under a substantive due process challenge as required by plausibility test of Twombly and Iqbal, see supra (C)(1), and the statutes are rationally related to legitimate government purposes that are set forth in the emergency clauses to the statutes, see supra (C)(2). While plaintiff makes a meager attempt to argue that there is no rational basis for the statutes because there is no evidence that franchises with varying interests would not operate a store properly, plaintiff ignores the law stating that a court must reject a challenge subject to a rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification and the government's legitimate goals.'" Carter v. Arkansas, 392 F.3d 965 (2004)(citing Knapp, 183 F.3d at 789). As stated above, the statutes set forth multiple legitimate government purposes such as maintaining fair competition. Basic economic principles support the notion that when one company has interests in more than one store, it can shift costs and profits in a way that would allow anticompetitive pricing and other anticompetitive conduct. Certainly, it was rational for the General Assembly to adopt laws aimed at preserving fair competition by requiring that holders of retail liquor licenses within the State of Arkansas operate independent of each other.

V. CONCLUSION

For all the reasons stated herein, defendant, the Alcoholic Beverage Control Division of the State of Arkansas, respectfully requests that plaintiff's complaint and amended complaint be dismissed and for all other just and proper relief.

WHEREFORE, defendant, the Alcoholic Beverage Control Division of the State of Arkansas, prays that this Court grant its motion to dismiss and for all just and proper relief to which it is entitled to receive.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Mindy D. Pipkin, certify that on this 6th day of September, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification to plaintiff's counsel of record.

/s/ Mindy D. Pipkin