

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

AUG 21 2013

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

JAMES W. McCORMACK, CLERK
By:  DEP. CLERK

ROBERT McCURRY

Plaintiffs

Vs.

Case No. 4:13-CV-00467 DPM/JJV

ALCOHOLIC BEVERAGE CONTROL
DIVISION OF THE STATE OF ARKANSAS

Defendant

AMENDED COMPLAINT

Comes the Plaintiff, Robert McCurry, by and through his attorneys, Lyons & Cone, PLC, and for his Complaint against the Defendant, the Alcohol Beverage Control Division of the State of Arkansas, states:

VENUE, JURISDICTION, AND PARTIES

1. That the Plaintiff, Robert McCurry is a resident of Bentonville, Benton County, Arkansas.
2. That the Defendant, the Alcoholic Beverage Control Division of the State of Arkansas ("ABC"), is a state agency with its principal place of business located in Little Rock, Pulaski County, Arkansas, where the events involved herein occurred. That the ABC Board is an appointed Board of the State of Arkansas which hears and determines certain issues and cases regarding the issuance of various types of alcoholic beverage permits in the State of Arkansas whether on appeal from the Director's decision or in the first instance.
3. That the material allegations of this Complaint involve a federal question.
4. That this Court has jurisdiction over this cause of action pursuant to 28 U.S.C.

§ 1331 and 28 U.S.C. § 1367 and the parties hereto and venue is proper herein.

**BACKGROUND
AND
FACTUAL ALLEGATIONS**

5. That the voters of Benton County, Arkansas recently approved making Benton County a “wet” county for the purpose of allowing retail liquor stores to be operated in Benton County.

6. That based on Ark. Code Ann. § 3-4-201 and the population of Benton County, the ABC is to award and issue approximately fifty five (55) off-premises retail liquor permits to be issued for Benton County.

7. That on or about April 26, 2013, Plaintiff, Robert McCurry, submitted his application for a retail liquor permit to the ABC. (Attached hereto and incorporated by reference herein as Exhibit 1 is a true and correct copy of the application).

8. That the application was file-stamped on April 26, 2013 as being received for processing and for consideration of the application.

9. That on June 12, 2013, as the number of applicants who applications were being considered exceeded the number of permits to be issued, pursuant to ABC regulations and Arkansas law, a lottery was held at the ABC offices to determine which of the applicants for a retail liquor permit in Benton County would receive a hearing on their application before the ABC Board.

10. That Plaintiff drew number one (1) at the lottery and was then scheduled for a hearing on July 16, 2013.

11. That Plaintiff appeared before the ABC Board for a hearing on that date represented by his attorneys, Lyons & Cone, PLC.

12. That during the hearing, Plaintiff was asked if he held or owned an interest in Gild Corporation, to which he responded that he did have or own a minority interest in Gild Corporation.

13. That, in fact, Plaintiff owns the same minority interest in both Gild Corporation and Gild Holdings, LLC.

14. That after the ABC Board and others on behalf of the ABC asked questions of the Plaintiff regarding various issues, including but not limited to, the franchise of a Macadoodles store in Springdale, Arkansas which has a retail liquor permit, the Board voted to deny Plaintiff's application for such retail liquor permit because he had an interest in the franchisor of such Macadoodle's store. This denial was based upon the position of the ABC that owning a minority interest in a franchisor gives such minority interest holder an interest in a retail liquor permit.

15. That the ABC Board claimed that approving his application would allow him to have an interest in more than one retail liquor permit, and, therefore, would violate Arkansas law. (Attached hereto and incorporated by reference herein as Exhibit 1-A is a true and correct copy of the Decision of the ABC Board dated the 16th day of July, 2013).

16. That the Plaintiff was injured by the July 16, 2013 decision by the ABC Board because he was denied a retail liquor permit based upon his minority interest in Gild Corporation and/or Gild Holdings, LLC due to the franchise relationship with a retail liquor permit holder when, in fact, neither Gild Corporation nor Gild Holdings, LLC are an actual retail liquor permit holder in the State of Arkansas. (Attached hereto and incorporated by reference herein as Exhibit 2 is a true and correct copy of Permits Report from the ABC for Macadoodles in Springdale, AR).

17. That the Plaintiff has suffered damage as a result of the Defendant's actions by

improperly denying the Plaintiff a retail liquor permit upon law, rules and regulations which are invalid for the reasons and basis set forth below.

COUNT I

Arkansas Code Ann. § 3-4-205(b)(1)(A), § 3-4-205(b)(1)(B) and § 3-4-301(a)(8-10)
are Unconstitutional - Violation of Commerce Clause

18. That the Plaintiff hereby restates and realleges all allegations contained in this Complaint.

19. That Ark. Code Ann. § 3-4-205(b)(1)(A) states “[n]o retail liquor permit shall be issued, either as a new or 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.”

20. That Ark. Code Ann. § 3-4-205(b)(1)(B) states: “[a] retail liquor permit shall apply only to one 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 location other than the permitted location.”

21. That Ark. Code Ann. § 3-4-301(a) [in part] states: “Any permit issued pursuant to this act may be revoked for cause and must be revoked for the following causes: . . . (8) [s]ubsequent 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; (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

(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”.

22. That A.C.A. § 3-4-301(a)(8)-(10) as written substantially interferes with interstate commerce in that it restricts any person, firm or corporation from doing business with or receiving any benefit whatsoever from more than one (1) retail liquor store regardless of the degree of interest or benefit. These statutory subsections (as interpreted and applied to the Plaintiff) would prevent any person, firm or corporation owning any interest regardless of degree in any legal entity having an interest in a retail liquor permit in Arkansas (which would be applicable to the Plaintiff) from owning any stock in the publicly traded entities Walmart and Walgreens (both of whom who have a retail liquor permit in Arkansas). (Attached hereto and incorporated by reference herein as Exhibits 3, 4 and 5 respectively are the Permits Report for Sam’s Club in Fayetteville, AR; the Permits Report for Walgreens in West Memphis, AR; and the 2013 Annual Report for Walmart indicating ownership of Sam’s Club by Walmart).

23. That such statute substantially interferes with interstate commerce as it prevents or restricts the trading of stock of publicly traded corporations which is governed by federal law including the Securities Act of 1933 and the Securities Exchange Act of 1934 in that it prevents all persons, firms or corporation including the Plaintiff who own any interest in a retail liquor permit (such as a franchisor based upon the ABC’s interpretation of the statute) from owning any stock in a publicly traded corporation, e.g. Brown Forman which sells Jack Daniels, Early Times, Southern Comfort and many other liquors.

24. That the provisions of Arkansas law set forth above deprive Plaintiff of his right to conduct lawful business without a reasonable state interest to protect.

25. That even if the law has a reasonable state interest to protect, as written, the law

does not protect such interest and, thus, violates the Commerce Clause of the United States Constitution.

26. That based upon the actions of the Defendant, Plaintiff has suffered damages and is entitled to have the statutes described and discussed herein declared unconstitutional and unenforceable as they improperly prevent the Plaintiff from receiving a retail liquor permit.

27. That Plaintiff is entitled to receive a retail liquor permit and this Court should issue its Order requiring the ABC to issue such permit to the Plaintiff.

COUNT II

Arkansas Code Ann. § 3-4-205(b)(1)(A) § 3-4-205(b)(1)(B), and
§ 3-4-301(a)(8-10) are Unconstitutional - Void for Vagueness

28. That the Plaintiff hereby restates and realleges all allegations contained in this Complaint.

29. That Ark. Code Ann. § 3-4-205(b)(1)(A) and § 3-4-205(b)(1)(B) fail to define the term “person, firm or corporation” so that a person of ordinary intelligence has fair notice of what is prohibited or as to the applicability of the statute in regard to a particular “person, firm or corporation”.

30. That Ark. Code Ann. § 3-4-205(b)(1)(A) fails to define the term “any interest in” so that a person of ordinary intelligence has fair notice of what is prohibited or as to the applicability of the statute in regard to whether a particular person firm or corporation has “any interest in” a retail liquor permit.

31. That Ark. Code Ann. § 3-4-205(b)(1)(B) fails to define the term “direct or indirect financial benefit” so that a person of ordinary intelligence has fair notice of what is prohibited or as to the applicability of the statute in regard to whether a particular person, firm or corporation is

receiving any “direct or indirect financial benefit”.

32. That these statutory subsections are unclear due to the lack of definitions and fail to tell a person of ordinary intelligence whether these two (2) statutory subsections (referred to in paragraph 29) apply to permittees only or apply to all persons, firms or corporations such as franchisors, vendors, wholesalers or service providers who receive any pecuniary benefit from more than one (1) retail liquor store, regardless of the degree of interest or the amount of direct or indirect benefit. Further, such statutory subsections fail (due to their lack of definitions) to tell a person of ordinary intelligence when a person, firm or corporation has an interest in a permit.

33. That such statutes are unconstitutionally vague as a person of ordinary intelligence does not have fair notice of what is prohibited or as to the applicability of the statutes in regard to a particular “person, firm or corporation”.

34. That such statutes are also unconstitutionally vague as a person of ordinary intelligence does not have fair notice of what is prohibited or as to the applicability of the statutes in regard to remuneration of a “person, firm or corporation”. Further, the term “direct or indirect pecuniary, proprietary or financial interest in the creation, establishment, operation, or contractual branding of another permitted liquor establishment” is undefined and, once again, a person of ordinary intelligence does not have fair notice of what is prohibited or as to the applicability of the statutes in regard to the meaning of the term, “direct or indirect pecuniary, proprietary or financial interest in the creation, establishment, operation, or contractual branding of another permitted liquor establishment.”

35. Finally, the statutes are unconstitutionally vague as they (on their face) appear to prevent the following:

- a. any person, firm or corporation from obtaining, having or possessing any interest

in a retail liquor permit, if that person, firm or corporation owns any type of ownership interest in any type of entity including, but not limited to, any shares of stock whatsoever in any corporation which has an interest in a retail liquor permit in Arkansas, such as Walmart or Walgreens. This would also include any pension fund, retirement account or stock account of a person which has a portfolio that contains Walmart or Walgreens stock;

- b. any person, firm or corporation who owns stock in certain publicly traded entities, e.g. Brown Forman who sells or distributes Jack Daniels, Jim Beam, Finlandia Vodka and all of its other liquors from being sold to more than one (1) retail liquor store in Arkansas, from having any interest in or receiving any direct or indirect financial benefit from a retail liquor permit; and
- c. each distillery, maker, brewer or distributor of alcohol from selling or distributing to more than one (1) liquor store in the State of Arkansas because such distillery, maker or brewer of alcohol would (based upon the current unconstitutional statute) receive a direct or indirect financial benefit from each retail liquor permit holder to whom their alcoholic beverages are sold.

36. That as a result, the statutes mentioned in this Count allow for arbitrary and discriminatory enforcement of the law by Defendant which can subject permittees to the loss of their permit and prevent other persons, firms or corporations, such as Plaintiff, from being able to obtain a retail liquor permit because they merely own an interest in an entity, regardless of the amount, degree or percentage, which receives any benefit from a retail liquor permit in Arkansas.

37. That as a result of Defendant's actions by denying Plaintiff a retail liquor permit based upon unconstitutional statutes, Plaintiff has suffered damages as the result of the failure to

receive a retail liquor permit which it otherwise was entitled to receive.

38. That this Court should determine that each of these statutes are unconstitutional and Plaintiff is entitled to receive a retail liquor permit and this Court should Order the Defendant to issue a retail liquor permit to the Plaintiff.

COUNT III

Arkansas Code Ann. § 3-4-205(b)(1)(A) § 3-4-205(b)(1)(B), and § 3-4-301(a)(8-10) are Unconstitutional - Lack of Substantive Due Process

39. That the Plaintiffs hereby restate and reallege all allegations contained in this Complaint.

40. That each of the statutes mentioned herein are constitutionally invalid for a number of reasons, which include, but are not limited to:

- a. The state has exceeded the limits of its right to protect the public health, morals and safety;
- b. There is no substantial relation to the protection of the public health, morals and safety;
- c. There is no rational relationship to a legitimate interest of the government and law as enacted;
- d. These statutes as drafted do not accomplish the purpose and intent of protecting the public and violate both substantive due process and equal protection (as set forth below);
- e. The law is unreasonable and not tailored to promote any reasonable or significant public purpose in that it allows certain parties to have more than one (1) liquor permit, but denies that to others without any rational basis for doing so. These

statutes are arbitrary by claiming or determining that a franchisee who has one (1) permit and a franchisor who has one (1) franchisee will operate this single retail liquor store properly, but when another different franchisee (even with a similar investment) will not do so simply because he, she or it is the second franchisee in the state. Such an interpretation of the law is arbitrary and capricious and lacks any rational basis and fails to achieve any reasonable or significant public purpose.

41. Therefore, § 3-4-205(b)(1)(A) § 3-4-205(b)(1)(B), and § 3-4-301(a)(8-10) are unconstitutional for the reasons set forth herein.

42. That the Plaintiff has suffered damage as a result of the action of the Defendant in denying Plaintiff a retail liquor permit.

43. That this Court should determine that each of the statutes mentioned herein are unconstitutional and may no longer be enforced.

44. That this Court should determine that each of these statutes are unconstitutional and Plaintiff is entitled to receive a retail liquor permit and this Court should Order the Defendant to issue a retail liquor permit to the Plaintiff.

COUNT IV

Arkansas Code Ann. § 3-4-205(b)(1)(A) § 3-4-205(b)(1)(B), and
§ 3-4-301(a)(8-10) are Unconstitutional - Equal Protection

45. That the Plaintiff hereby restates and realleges all allegations contained in this Complaint.

46. That no rational basis exists for unequal treatment of person, firms or corporations who own a minority interest (i.e., no matter how small the interest may be) in a legal entity which

has any interest in one (1) retail liquor permit from owning or having any interest in another retail liquor permit.

47. 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 by the drink or beer and wine for on premises consumption, but deny the right to do so for franchisors or franchisees that have an interest in more than one (1) retail liquor permit.

48. Therefore, A.C.A. § 3-4-205(b)(1)(A) § 3-4-205(b)(1)(B), and § 3-4-301(a)(8-10) are unconstitutional due to the lack of any rational basis for such unequal treatment.

49. Further, the classification of retail liquor stores as different from franchisees that sell beer and wine or restaurants (operating as franchises) that sell liquor, beer and wine, is an unconstitutionally impermissible classification.

50. That such classification denies Plaintiff equal protection under the law.

51. That the Plaintiff has suffered damage as a result of the actions of the Defendant in denying Plaintiff a retail liquor permit.

52. That this Court should determine that each of the statutes are unconstitutional and may no longer be enforced.

53. That this Court should determine that each of these statutes are unconstitutional and Plaintiff is entitled to receive a retail liquor permit and this Court should Order the Defendant to issue a retail liquor permit to the Plaintiff.

WHEREFORE, Plaintiff, Robert McCurry prays as follows:

(a) for a judgment from and against the Defendant on Counts I, II, III and IV declaring the statutes set forth therein unconstitutional;

(b) for the granting of a permit to Robert McCurry or, in the alternative, for an Order

remanding this case to the ABC and requiring them to properly consider the application after such laws are determined to be unconstitutional; and

(c) for all other proper relief to which the Plaintiff may be entitled.

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