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FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1
No. 14-CI-001282

ANHEUSER-BUSCH, LLC

PETITIONER

v.

ORDER GRANTING
TEMPORARY INJUNCTION AND WRIT OF MANDAMUS

STEPHANIE STUMBO,
MALT BEVERAGE ADMINISTRATOR,
DEPARTMENT OF ALCOHOLIC BEVERAGE
CONTROL, ET AL

RESPONDENTS

This action is before the Court on the motion of the petitioner, Anheuser-Busch, LLC (“AB”) for a temporary injunction under CR 65.04, granting relief in the form of a writ of mandamus under CR 81, to require the defendant Stephanie Stumbo, as Malt Beverage Administrator of the Department of Alcoholic Beverage Control, to issue a wholesale beer distributor’s license to the petitioner. AB has entered into a contract to purchase the business of the current licensee, J.R. Hand, LLC (“Hand”) Budweiser of Owensboro, with a closing date no later than December 31, 2014. AB filed its application for approval of the transfer of the distributor’s license from Hand to AB, with the Malt Beverage Administrator, on August 18, 2014, along with supporting documents. Under the applicable statute, KRS 243.630(7), the Administrator “shall grant or deny the application within sixty (60) days of the date the application is substantially complete or on a later date that is mutually acceptable to the director and the transferee, but it shall not be acted upon before the end of the public protest period outlined in KRS. 243.360.”

This case is the latest battle in a regulatory war that has been waged for over 50 years concerning the question of whether a licensed brewer may also hold a distributor’s license for

malt beverages. In the first appellate decision of this regulatory dispute, the former Court of Appeals held that a licensed brewer may also be licensed as a distributor, and that the statute on incompatible licenses, KRS 243.110, specifically prohibited manufacturers of distilled spirits and wine from holding distributor's licenses, but there was no such prohibition that applied to brewers of malt beverages. Accordingly, Kentucky's highest court held that "[i]f the legislature had intended that a brewer's license and a distributor's license should be inconsistent with each other, then it would have so stated." Kentucky Beer Wholesalers Association, Inc. v. George Widemann Brewing Company, 302 S.W.2d 606, 607-08 (Ky. 1957). This final judgment of Kentucky's highest court rejected the longstanding administrative interpretation of the ABC Board that a brewer cannot also be licensed as a wholesale distributor.

The Alcoholic Beverage Control Board was unwilling to accept this final ruling of Kentucky's highest court. It responded to the ruling of the Court of Appeals by adopting an administrative regulation that purported to circumvent the high court's ruling on this issue. The Board's administrative regulation purported to prohibit "interlocking interests between wholesalers, distributors and manufacturers of malt beverages." That regulation was struck down as inconsistent with the statute on incompatible licenses, as interpreted by Kentucky's highest court. Alcoholic Beverage Control Board v. Anheuser-Busch, Inc., 574 S.W.2d 344 (Ky. App. 1978). AB was adjudged to be entitled to a wholesaler's license in that case, and its application for a wholesale distributor's license for the Louisville area was approved. AB has held a distributor's license for that area since that time. The applicable statutes have never been amended.

Since the decision of the Court of Appeals in 1978, it appears that an uneasy truce has existed, and AB made no further attempts to expand its presence as a wholesale distributor until

the application currently under consideration. The application of AB for transfer of the wholesale distributor's license for the Owensboro area was duly advertised, as required by law, and it has provoked a firestorm of protests, mostly from other actors in the beer industry who fear the concentration of market power of AB, and who further anticipate that AB will engage in unfair practices to restrict or obstruct the distribution of non-AB beers in that marketplace. The local alcoholic beverage control administrator in Davies County approved the application on or about August 26, 2014, but approval of the state Malt Beverage Administrator is required before the license can be transferred.

The Kentucky Court of Appeals recently held that third-parties protesting the decision of the local ABC administrator have a right to a hearing before the state Alcoholic Beverage Control Board. Beverage Warehouse v. Department of Alcoholic Beverage Control, 382 S.W.3d 34 (Ky. App. 2011). Counsel for both parties represented to the Court that the ABC Board has scheduled a hearing on the protests filed to the local administrator's decision on November 22, 2014.

AB has argued that its application for a transfer of the wholesale beer distributor's license currently issued to Hand was "substantially complete" when submitted on August 18, 2014. Under the applicable statute, the Malt Beverage Administrator has 60 days from the date the application is "substantially complete" to grant or deny the license. KRS 243.630(7).

FINDINGS OF FACT

1. The application submitted by AB was "substantially complete" within the meaning of KRS 243.630 at the time it was submitted on August 18, 2014. The Malt Beverage Administrator and her staff have subsequently asked for additional information, but the vast majority of such information requests deal with issues not

relevant to the license transfer under existing law. The remaining relevant issues, such as providing copies of the deed or lease, and brand information required by Form 714, are housekeeping matters involving information that cannot be definitively responded to until the closing of the transaction is complete. Such matters are routinely supplied at the time of the closing, and the need for supplemental information on those routine issues provides no rational basis for delaying action on the transfer application, or denying the license.

2. AB is currently the holder of an existing license as a beer wholesale distributor, and meets all the statutory qualifications to hold such a license.
3. Counsel for the ABC Board and the Malt Beverage Administrator, when specifically asked by the Court, were unable to point to any application for transfer of a wholesale distributor's license, that had ever been denied by Department or its Administrator. In the circumstances presented by this case, with a "substantially complete" application for transfer of an existing license to an applicant who meets all statutory qualifications, the granting of such a license is a ministerial act.
4. The only items identified by the Malt Beverage Administrator and the Department which were not complete in the AB application were: (a) a copy of the deed or lease for the real estate; (b) an inspection of the premises; and (c) the final data regarding the brand information required by ABC Form 714.
5. The premises that will be licensed under this application are currently used as the licensed premises for the Hand beer distributorship. The deed or lease cannot be supplied until the closing is complete, but AB has provided a copy of the draft deed. The basic Form 714 information was provided at the time of the submission of the

application on August 18, but can be supplemented after the closing to provide any additional information that is relevant, and such data is routinely submitted in final form at the time of the closing of such transactions. The ABC Department noted that the brand information submitted on August 18, 2014 was “good.” (See Tab 19 of ABC Documents submitted at hearing).

6. AB has not agreed to extend the time for the Malt Beverage Administrator to grant or deny the license application under KRS 243.630(7).
7. AB has reasonably relied to its detriment on two controlling decisions of Kentucky appellate courts that hold that it is eligible to hold a wholesale distributor’s license, Kentucky Beer Wholesalers Association v. George Wiedemann Brewing Company, 302 S.W.2d 606 (Ky. 1957), and Kentucky Alcoholic Beverage Control Board v. Anheuser-Busch, Inc., 574 S.W.2d 344 (Ky. App. 1978). AB has further relied to its detriment on the provisions of KRS 243.630(7) that require the Malt Beverage Administrator to grant or deny its license application within 60 days of submission of a “substantially complete” application.
8. The Malt Beverage Administrator and the ABC Board have provided no rational basis to deny this license application, or to delay final action on the license. There are many public policy issues surrounding this controversy that deserve public debate. Those issues include the issue of whether the three-tiered licensing system should apply to malt beverages, whether a brewer holding a wholesale distributor’s license has an unfair competitive advantage in the market, or whether additional safeguards need to be in place to prevent a brewer holding such a license from acting in an anti-competitive fashion. However, under our separation of powers, those issues are

reserved to the legislature, or to the ABC board in its rulemaking authority. They do not provide a basis for holding this license application hostage.

CONCLUSIONS OF LAW

1. In order to obtain injunctive relief, the Court is required to determine whether the applicant has suffered or will suffer an irreparable injury, whether the case presents a substantial issue of law, and to balance the equities, including the public interest. Maupin v. Stansbury, 575 S.W.2d 695 (Ky. App. 1978).
2. Here, the Court finds that AB will suffer irreparable injury in the absence of injunctive relief, because it has made a substantial monetary investment in the transfer of this license, in good faith reliance on established statutory and case law, and that if the Malt Beverage Administrator is allowed to further delay issuance of the license, any final judgment in favor of AB would be rendered ineffectual, because it would be practically impossible for AB to obtain a final order from the ABC Board and judicial review prior to its deadline for closing this transaction. *See* CR 65.04(1).
3. The applicable statute requires that the Malt Beverage Administrator make a decision to grant or deny this application within 60 days of the submission of an application that is "substantially complete." The Malt Beverage Administrator has failed to comply with this mandatory duty under KRS 243.630(7).
4. This Court, in the normal course of business, would remand this action to the Malt Beverage Administrator for a decision to grant or deny the license. However, in this case, because of the delay in issuing a ruling, a decision by the Malt Beverage Administrator at this point, would almost certainly come too late to allow a full

due process hearing and subsequent final administrative action by the Board, as required by law, in the case of denial. The delay caused by the Malt Beverage Administrator should not work to impair the rights of the applicant, and in these circumstances, in the absence of injunctive relief, a final decision in favor of AB would be rendered ineffectual, a circumstance explicitly provided for in CR 65.04(1).

5. The ABC Board and the Malt Beverage Administrator have been given every opportunity to articulate a basis for the failure to act on this application within 60 days, and the only reasons advanced by respondents are non-material administrative matters such a provision of the deed, conducting a final inspection of the premises, and submission of final data on Form 714.
6. The record in this case conclusively establishes that AB is entitled to the wholesale beer distributor's license under current law. Accordingly, remand to the Malt Beverage Administrator or the ABC Board would only compound the delay that has already violated the rights of AB to a decision within 60 days. Here, the agency, by failing to comply with its mandatory duty to issue a decision within 60 days, has lost jurisdiction to deny the license, and "great injustice or irreparable harm" to AB "will result if the petition is denied." See Southeastern United Medigroup, Inc. v. Hughes, 952 S.W.2d 195 (Ky. 1997), Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004).
7. The petitioner has presented a substantial legal issue on the merits, and demonstrated that its legal rights have been violated by the failure to grant or deny this application within the mandatory time period provided by statute. The Court

finds that the equities weigh in favor of AB, which relied to its detriment on well established law in investing in a significant business transaction, and AB is entitled to enforcement of the prior binding decision of the Kentucky appellate courts holding that it is eligible for the license at issue. AB is further entitled to enforcement of the mandatory requirement of KRS 243.630(7) for the Malt Beverage Administrator to make a decision on its application within 60 days of when the application was "substantially complete." The Court further finds that the public interest supports issuance of injunctive relief because the ABC Department retains full authority to regulate this license and to deal with any alleged violations of law in accordance with the requirements of due process.

CONCLUSION

For the reasons stated above, **IT IS ORDERED AND ADJUDGED** pursuant to CR 65.04, and the statutes and case law set forth above:

1. The Malt Beverage Administrator, the Department of Alcoholic Beverage Control, and the ABC Board, and all their agents, employees and persons acting in concert with them, are hereby ENJOINED to issue the wholesale beer distributor's license which is the subject of this action to AB within 7 days of the entry of this Order;
2. The Malt Beverage Administrator and the ABC Department may impose the usual terms and conditions of such a license, including final inspection of the premises, provision of an executed copy of the deed or lease to the ABC Department, and provision of all required information regarding brand sales and territory on ABC Form 714;

3. This injunction in no way prevents the ABC Board from conducting its hearing on the protests to this license, nor does it prevent the ABC Board from conducting any other proceeding to undertake rulemaking under KRS Chapter 13A to address any issue regarding unfair trade practices, or to further lawfully act on information that is produced at the hearing on the protest to this license that is currently scheduled. The ABC Department retains full authority to regulate the petitioner's compliance with all requirements of KRS Chapter 243, and any alleged violation of law may be addressed through the established procedures of the Department and the Board for suspension or revocation of licenses under KRS 243.480, 243.490 or other applicable law.
4. The Court sets bond at \$1,000.00 (one thousand dollars), which may be posted with the Clerk within 7 days of the entry of this Order.

SO ORDERED this 14th day of November, 2014, at 10:30 a.m.


PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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