

FILED
Court Administrator

JUL 12 2011

By  Deputy

Via E-Mail



July 11, 2011

Special Master Kathleen Blatz
Ramsey County District Court
15 West Kellogg Boulevard
St. Paul, MN 55102

62-CV-11-5203

Re: Petition for injunctive relief from enforcement of Minnesota Statutes §340A, subd. 6a, and Minnesota Rules §7515.0210, subd 1 and 3 during government shutdown.

Dear Special Master Blatz,

At issue is whether businesses who have fully complied with statutory and administrative requirements can be foreclosed from purchasing beer and liquor from licensed distributors as a result of the government shutdown. Prior to or shortly after the shutdown, the interim Commissioner of the Department of Public Safety, Alcohol and Gambling Enforcement Division ("AGED") issued a letter and list of 1,111 retailers who may be affected by the government shutdown. These include bars, restaurants liquor stores and other businesses licensed to purchase and sell alcohol at retail. This list is attached hereto as Exhibit A. This petition addresses the legality and wisdom of depriving these businesses of purchasing alcohol from wholesalers, effectively crippling their core business, forcing unnecessary closings and costing jobs. We do not argue that this issue constitutes a core function, nor do we request funding, but instead offer a simple, cost-effective solution in the form of injunctive relief.

Specifically, I petition the Special Master on behalf of Hard Knocks Holdings, LLC, d/b/a the Ugly Mug, a Minneapolis bar/restaurant which has standing to bring suit against the State of Minnesota for tortious interference with a business relationship and has suffered damages in lost business and income. My client has a valid liquor license and has timely paid the \$20.00 fee required for a retail buyer's card, but because of the shutdown is not in physical possession of the card. This has led to the distributors refusing to sell to him. I also represent Trevor Berg d/b/a Hoss Liquors, in Walker, MN, whose retail buyers' card is set to expire on July 17, 2011. He also has sent in his \$20 payment but will not receive a buyers' card. Mr. Berg's distributors have indicated that they cannot contact him or sell him product after that date, at which time his claims will ripen and be justiciable by the Courts. These are but two examples of the hundreds of affected businesses, not to mention the impact on the distributors. The State has informed the distributors that they will receive fines and other penalties should they sell to anyone that does not possess a valid liquor license or retail buyer's card.

I am in the process of drafting and will bring to the hearing a Complaint that lays out the facts of the underlying suit. We present this petition pursuant to paragraph 35 of Judge Gearin's June 29th

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Order, in an attempt to avoid multiple similar claims regarding the same issue, as there are significant numbers of businesses who may join the case as intervenors or pursue their own remedies as their Retail Buyers Cards or licenses expire and their claims ripen.

Background information on the industry:

Since the repeal of prohibition, alcohol enforcement has been in the form of a three-tiered system including the manufacturer, distributor and retailer each of whom are subject to strict regulation. A more detailed description of this system is attached for your reference as exhibit B.

The relevant sections of the Statutes and rules applicable to this petition are as follows are as follows:

Minn.Stat. §340A, Subd. 6a. Permits and fees.

Any person engaged in the purchase, sale, or use for any purpose other than personal consumption of intoxicating alcoholic beverages or ethyl alcohol shall obtain the appropriate regulatory permit and identification card from the commissioner as provided in this subdivision. The fee for each permit, other than one issued to a state or federal agency, is \$35 and must be submitted together with the appropriate application form provided by the commissioner. Identification cards and permits must be issued for a period coinciding with that of the appropriate state or municipal license and are not transferable. In instances where there is no annual license period, cards and permits expire one year after the date of issuance. The authority to engage in the purchase, sale, or use granted by the card or permit may be revoked by the commissioner upon evidence of a violation by the holder of such a card or permit of any of the provisions of chapter 340A or any rule of the commissioner made pursuant to law.

**Minnesota Administrative Rules §7515.0200
PERMITS AND FEES.**

Application forms for licenses or permits required by Minnesota Statutes, chapter 340A, shall be furnished by the commissioner upon request. The commissioner shall not issue any license or permit unless the applicant has satisfied all preconditions to licensure or permit and has paid the appropriate license and permit fees required by Minnesota law and, if required, has filed a corporate surety bond.

**Minnesota Administrative Rules §7515.0210,
Subpart 1. General.**

Any person engaged in the purchase, sale, or use for any purpose other than personal consumption of alcoholic beverages of more than 3.2 percent alcohol by weight or ethyl alcohol, shall obtain the appropriate regulatory permit and identification card from the

commissioner as provided in this part. The fee for each permit, other than one issued to a state or federal agency, is \$20 and must be submitted together with the appropriate application form provided by the commissioner. Identification cards and permits shall be issued for a period coinciding with that of the appropriate state or municipal license and are not transferable. In instances where there is no annual license period, cards and permits shall expire one year after the date of issuance. The authority to engage in the purchase, sale, or use granted by the card or permit may be revoked by the commissioner upon evidence of a violation by the holder of such a card or permit of any of the provisions of Minnesota Statutes, chapter 340A, or any rule of the commissioner made pursuant to law.

Subp. 3. Retailer's identification card.

Any on-sale or off-sale liquor dealer or any purchasing agent of any municipal liquor store shall apply to the commissioner on form PS 9135 for a permit to purchase alcoholic beverages containing more than 3.2 percent of alcohol by weight from any manufacturer or wholesaler or their agent or representative. The identification cards must be presented to the manufacturer or wholesaler or their agent or representative when ordering alcoholic beverages containing more than 3.2 percent of alcohol by weight. Manufacturers or wholesalers or any agent or representative thereof shall not sell alcoholic beverages containing more than 3.2 percent alcohol by weight to any licensee, permit holder, or purchasing agent of a municipal liquor store unless the person presents a retailer's identification card issued by the commissioner for the current year.

As noted above, the State has identified over 1,000 similarly situated beverage related businesses who will be affected by not having either their license or their Retail Buyers Card (also known as an "Identification Card") renewed after June 30th and during the indefinite shutdown. According to sources in the beverage distribution industry in Minnesota, the State has threatened additional sanctions against them for supplying any of these businesses on the list after their card expires.

According to the Beer, Wine and Sprints Distributors of Minnesota's [web site](#):

- Minnesota has 91 beer, wine and liquor distributors, all of which are family-owned businesses.
- These alcohol beverage distributors are the middle tier in the three-tier system, separating manufacturers and retailers to ensure that manufacturers do not exert undue influence on the retail sale of alcohol. In 2010, the Minnesota beer industry as a whole provided 17,554 jobs and paid nearly \$156 million in taxes.

Legal Argument:

The relief sought by this petition is an Order of the Court granting injunctive relief to my client and all similarly situated parties. A temporary restraining order or preliminary injunction is available under Minn.R.Civ.P., Rule 65, which provides, as follows:

65.01 Temporary Restraining Order; Notice; Hearing; Duration

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required. In the event that a temporary restraining order is based upon any affidavit, a copy of such affidavit must be served with the temporary restraining order. In case a temporary restraining order is granted without notice, the motion for a temporary injunction shall be set down for hearing at the earliest practicable time and shall take precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and, if the party does not do so, the court shall dissolve the temporary restraining order. On written or oral notice to the party who obtained the ex parte temporary restraining order, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

As discussed above, we are petitioning the Special Master due to the large number of similarly situated parties that are likely to bring suit on the same issue. Notice will be given to the State via providing copies of this petition and accompanying documents immediately preceding the hearing. Irreparable harm will be demonstrated using the application of the factors laid out in Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965) to determine the necessity of a TRO / Injunction.

Application of the Dahlberg factors to the instant issue demonstrates that Petitioner and similarly situated parties are entitled to temporary relief.

1. Relationship of the Parties. All retail alcohol sales outlets, whether bars, restaurants, liquor stores, airlines, golf courses, etc. are all required to be licensed and permitted by the state in order to purchase alcohol from State licensed distributors. During the government shutdown, the licensing authority (AGED) is unable to process any licenses or permits, whether filed in a timely manner or not, and has further instructed distributors to specifically refuse to ship alcohol to

entities, whose license or retail buyer's card has not been renewed or reissued by July 1st and through the duration of the shutdown.

2. Balance of Harms. If the temporary restraining order is not granted, a great number of businesses will suffer irreparable harm. Specifically, my client the Ugly Mug (and others by proxy) operate on a weekly cash flow and inventory basis, meaning that it renews its inventory every week paying in advance. Without inventory, there is no business. The inability to replenish inventory has a ripple effect throughout the business. It creates a critical shortage of income, which leads to loss of customers because of the decline of inventory and service available, which leads to cutting staff, and ultimately to closure. The shutdown has no effect on the creditors of the business- they expect to be paid. Once closed, it is impossible for a small business such as the Ugly Mug to reopen after the shutdown without replenishing its inventory, which it will not have the financial ability to do. Based on current inventory and revenue, the Ugly Mug will not survive a month without being able to receive new inventory. There does not appear to be any harm to the State by granting the injunction, in fact the injunction benefits the state in at least two ways, first it will continue to collect tax revenue and protect a valuable segment of the economy from further harm in the form of closures and layoffs.

3. Likelihood that Plaintiff Will Prevail on the Merits. The probability that plaintiff will prevail on the merits in this case seems high, given the fact that but for the shutdown, Plaintiff would have no issues with the distributors whatsoever. He has a valid liquor license and paid the \$20 fee to renew his retail buyers card in a timely fashion. As a direct result of the State's actions, Plaintiff has lost business opportunities and income from an ever-decreasing inventory.

4. Relevant Policies Expressed in the Statutes. All relevant statutes and rules are found above.

5. Administrative Burdens on the Court. If the injunction is granted the burden to the Court would be minimal. It is anticipated that if granted, Plaintiff and all similarly situated parties could deposit their \$20 payment and application to the Court to be held in trust until the licensing authority is again able to process the applications. Further the Court would maintain a list of compliant parties and indicate to Distributors whether or not it is legal to sell to a retail establishment.

Essentially, what my clients and related businesses are seeking is that enforcement of the Administrative rules be stayed during the shutdown and the period thereafter required to process timely applications and payments. This petition does not contemplate providing relief to parties who have let their licenses or retail buyer's card lapse prior to July 1, 2011.

Thank you in advance for your consideration of this matter.

Sincerely,

Eric D. Bull

EDB:hs

Cc: Minnesota Attorney General
Hard Knocks Holdings, LLC
Trevor Berg