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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 1

DOWNTOWN BAR AND GRILL, LLC,)
Plaintiff,)
v.)
STATE OF KANSAS,)
Defendant.)

Case No. 10CB22

**PETITION FOR DECLARATORY JUDGMENT
AND TEMPORARY AND PERMANENT INJUNCTION**
Pursuant to K.S.A. Chapter 60

COMES NOW THE PLAINTIFF, by and through its counsel, Michael W. Merriam, and for its cause of action states and shows as follows:

1. Plaintiff is a Kansas limited liability corporation with its principal place of business at 622 E. 4th, Tonganoxie, Kansas, 66086. Plaintiff is a licensed Class B club pursuant to K.S.A. 41-2606 and obtained its class B license originally on May 4, 2009.

2. Defendant is the State of Kansas. It may be served with process pursuant to K.S.A. 60-304(d) by serving the Kansas Attorney General, Steven N. Six or any assistant attorney general at their office, Memorial Hall, 2nd Floor, 102 SW 10th, Topeka, KS 66612.

3. The 2010 Kansas Legislature passed House Bill 2221 and the same was signed by Governor Parkinson on March 12, 2010. It is effective upon publication in the statute book. HB 2221 addresses a number of issues, but is generally known as the statewide smoking ban.

4. Section 3 of HB 2221 reads in part as follows:

No person shall smoke in an enclosed area or at a public meeting . . .
(d) The provisions of this section shall not apply to . . . (8) a class A

or class B club defined in K.S.A. 41-2601, and amendments thereto, which (A) held a license pursuant to K.S.A. 41-2606 et seq., and amendments thereto, as of January 1, 2009, and (B) notifies the secretary of health and environment in writing, not later than 90 days after the effective date of this act, that it wishes to continue to allow smoking on its premises . . .

5. The cited provision establishes two classes of class A and B clubs: those licensed prior to January 2, 2009, and those licensed after January 1, 2009. Otherwise such class A and class B licensees are treated identically for all lawful purposes. Such a classification scheme has no rational basis connected to the legislative purpose and is a violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States and the Section 2 of the Kansas Constitution Bill of Rights. The legislative intent to eliminate smoking generally in public places cannot be served by grandfathering licensees based upon their date of license and prohibiting later licensees with identical state licenses from allowing smoking upon their premises. Such a classification system is arbitrary.

6. Section 3(d)(9) of HB 2221 also exempts "private clubs" as that term is defined in Section 2(k) in designated areas where minors are prohibited. Many such establishments are also licensed class A or class B clubs. This legislative exemption also establishes a classification system between identically licensed clubs with no rational basis connected to the legislative purpose and is likewise a violation of the 14th Amendment and Section 1 and 2 of the Kansas Bill of Rights.

7. For these constitutional reasons the court should declare that these provisions of HB 2221 violate the cited constitutional provisions and should enjoin the enforcement of the illegal classification system between identically licensed class A and class B clubs based solely upon their date of license.

8. Alternatively, the court should sever the second clause of HB 2221 Section 3(d)(8) which establishes the arbitrary date that unconstitutionally distinguishes between identically licensed

class A and class B clubs, declaring that clause unconstitutional and upholding the remainder of HB 2221.

9. The court should waive the requirement of bond pursuant to K.S.A. 60-905(b) because Plaintiff seeks only statutory interpretation and Defendant will not be damaged by any such relief. Any such bond should be waived pursuant to K.S.A. 60-905(b) because Plaintiff seeks merely to have identically situated clubs be treated with equal protection of the law, and not to prohibit the general statewide smoking ban.

WHEREFORE, Plaintiff prays for a declaratory judgment that the classification of clubs in HB 2221 Section 3(d)(8) and (9) is arbitrary, has no rational basis connected to legitimate legislative goals and violates the 14th Amendment and Section 1 and 2 of the Kansas Bill of Rights; for a temporary and permanent injunction prohibiting the enforcement of the cited provisions in HB 2221; alternatively, for a declaratory judgment severing the second clause of HB 2221 Section 3(d)(8) which establishes the arbitrary date that unconstitutionally distinguishes between identically licensed class A and class B clubs, declaring that clause unconstitutional and upholding the remainder of HB 2221; and to waive any requirement of bond in this proceeding.

Respectfully submitted,



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