

Michael W. Merriam, #09019
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**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 7**

DOWNTOWN BAR AND GRILL, LLC,
Plaintiff,

v.

STATE OF KANSAS,
Defendant.

Case No. 10-C-822

PLAINTIFF'S SUPPLEMENTAL BRIEF

COMES NOW Plaintiff, by and through counsel, Michael W. Merriam, and in supplemental support of its Application for Temporary and Permanent Injunction, proffers the following evidence and states and shows as follows:

Attached to this brief are the affidavits (facsimile copies; originals will be filed when received by mail) of Kevin Haislip, owner of the plaintiff; Greg Turner, owner of a Class B club, the Cattleman's Lounge, in Dodge City, Kansas; and Darty Saunders, co-owner of a drinking establishment known as Bill's 32 West in Kansas City, Kansas. Each affidavit describes the situation of the Class B clubs licensed after January 1, 2009 in comparison to those licensed previously, and the irreparable harm that they will suffer by reason of the classification system in the Section (HB 2221, Section 3(d)(8)).

In an eminent domain action, the Kansas Supreme Court stated the standard for injunctive relief. *See, National Compressed Steel Corp. v. Unified Gov't of Wyandotte County/Kansas City*, 272 Kan. 1239, 38 P.3d 723 (2002).

To obtain injunctive relief, the [movant] must show: (1) there is a reasonable probability of irreparable future injury to [movant]; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to [movant] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Id.* at 729 (citing *Sampel v. Balbernie*, 20 Kan. App. 2d 527, 530-31, 889 P.2d 804 (1985)).

In *National*, the court states that "injunctive relief is equitable in nature and a substantial showing is required before a court is warranted in ordering a party to do or refrain from doing a certain act." *Id.* at 729 (citing *Kansas East Conf. Of the United Methodist Church, Inc. v. Bethany Med. Ctr.*, 266 Kan. 366, 382-83, 969 P.2d 859 (1998)). The court determined that the showing made by the movant in this case was "sufficient for the district court to consider injunctive relief" and reversed the trial court's denial of the permanent injunction. *Id.* at 730, 734. It is sometimes said that the movant must also show that it is likely to succeed on the merits, *State ex rel. Graves v. United States*, 86 F.Supp.2d 1094 (D.Kan.2000), although this requirement which was promulgated by the Court of Appeals in *Wichita Wire, Inc. n. Lenox*, 11 Kan.App.2d 459, was not adopted by the Kansas Supreme Court in *National*.

The Court of Appeals in *Wichita Wire* listed a somewhat different set of factors in a temporary injunction case:

"This test has often been expanded into four prerequisites which the moving party seeking a temporary or preliminary injunction must establish:

"(1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest." *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir.1980); *Uarco Inc. v. Eastland*, 584 F.Supp. 1259, 1261 (D.Kan.1984).

"While this four-factor analysis has never been expressly applied by Kansas state courts, it appears an appropriate standard. Kansas injunction cases have, in fact, never discussed in detail the standards for analyzing an injunction, although reference is frequently made to the prerequisite of irreparable injury. *U.S.D. No. 503 v. McKinney*, 236 Kan. at 227, 689 P.2d 860; *Concerned Citizens, United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 242-43, 523 P.2d 755 (1974), and cases cited therein. The four-factor analysis is well established in the federal courts (*Jundgrin v. Claytor*, 619 F.2d 61; *Wagner Elec. Corp. v. Thomas*, 612 F.Supp. 736, 741 [D.Kan.1985]; 7 Moore's Federal Practice §§ 65.04 [1986]; 11 Wright & Miller, Federal Practice and Procedure: Civil §§ 2948 [1973]; 42 Am.Jur.2d, Injunctions §§ 285) and was used by the trial court in the present case."

The difference between the *National* and *Wichita Wire* elements is that *National* replaces the element of a likelihood of success on the merits with the element of the absence of a remedy at law. It is not entirely clear what stage of injunctive relief was requested in *National*, because it was denied by the trial court, and ordered to be granted by the Supreme Court. Plaintiff's proffer will address all five elements.

1. Irreparable harm. Plaintiff proffers the testimony of two owners of Class B clubs and an owner of a drinking establishment, showing that they will in fact suffer injury up to and including complete loss of their businesses, as a result of losing customers to Class B clubs with identical licenses but which were licensed prior to January 2, 2009. The drinking establishment owner has a somewhat different perspective, but will suffer the same injury.

There are two other factors that supplement the proffered testimony. Deprivation of a constitutional right can be in itself an irreparable injury, without any showing of damages, and the Defendant will be immune from compensating Plaintiff because of sovereign immunity under the Eleventh Amendment.

For the first proposition, see *Elrod v. Burns*, 427 U.S. 347 (1976). In *Ross v. Meese*, 818 F.2d 1132 (4th Cir. 1987), the court said "Denial of a constitutional right constitutes irreparable harm for purposes of equitable jurisdiction." In *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996), the court said the district court "properly relied on the presumption of irreparable injury that flows from violation of constitutional rights. In any case, it is the *alleged* violation of a constitutional right that triggers a finding of irreparable injury" (Italics in original).

In *Saint v. Nebraska School Activities Ass'n* 684 F.Supp. 626, 628 (D.Neb., 1988), the court said, "However true plaintiff's claim may be, when an alleged deprivation of constitutional rights is involved, no further showing of irreparable injury is necessary. *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977) (citing 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* §§ 2948 at 440 (1973). As the plaintiff has alleged such violations, the threat of irreparable injury is present."

And in *Planned Parenthood of Kansas v. Drummond* 2007 WL 2811407, 9 (W.D.Mo.) (W.D.Mo., 2007), the court wrote, "The Court finds that Plaintiffs will suffer irreparable harm if a preliminary injunction is not issued at this time. Plaintiffs' showing that the Act will interfere with the exercise of their "'constitutional rights and the rights of [their] patients'" constitutes irreparable harm. *Planned Parenthood of Minn. Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977). See also, e.g., *Adams v. Baker*, 919 F.Supp. 1496, 1505 (D.Kan. 1996) (where "'the plaintiff has alleged

deprivation of her constitutional rights, ... no further showing of irreparable harm is required"").

Additionally, because Defendants are immune under the Eleventh Amendment from a retroactive award of damages if the Court ultimately finds application of the Act to Plaintiffs unconstitutional, any monetary harm suffered by Plaintiffs will not be compensable. See *Marigold Foods, Inc. v. Redalen*, 809 F. Supp. 714, 720 (D. Minn. 1992)."

The State of Kansas would be immune from responding in damages anyway. As noted in *Planned Parenthood*, supra, under Eleventh Amendment jurisprudence, states are immune from civil liability unless such immunity is waived. *Alden v. Maine*, 527 U.S. 706, 718 (1999), and recognized in cases such as *Kansas Health Care Alliance v. Kansas Department of SRS*, 822 F. Supp. 687 (1993), aff'd, 31 F.3d 1052.

2. Injury to Plaintiff outweighs potential injury to Defendant. The proffered evidence demonstrates the actual injury Plaintiff and similarly situated Class B clubs and other will suffer. The state's evidence would presumably show that it's interest is in ameliorating the effects of second-hand tobacco smoke. But the legislature has already made the determination that any such harmful effects are not worth remedying in Class A and Class B clubs licensed prior to January 2, 2009 (as well as in 7 other categories of places), so it can hardly present evidence that injury to citizens who voluntarily patronize such clubs and do not know when they were licensed would outweigh the potential complete loss of existence of clubs situated such as Plaintiff. This showing should be sufficient for a temporary injunction until trial on the merits.

3. Injunction is not adverse to the public interest. Proof upon this point is analogous to that in the preceding section. The evidence is that the legislature determined that smoking in Class A and Class

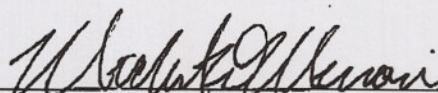
B clubs should not be prohibited in the public interest, but only if they were previously licensed. Yet the date of licensing has utterly nothing to do with smoking, so the legislature's concern with the public interest apparently ends with this classification system, not to mention the seven other categories of exempt locations.

4. Action at law option. As a matter of law, there is no possibility of an action at law because of sovereign immunity under the Eleventh Amendment. See discussion above.

5. Success on the merits. Plaintiff has proffered the evidence stated above. The likelihood of success depends upon an analysis of that evidence in light of the controlling law. Plaintiff has briefed the controlling equal protection law in its previously submitted memorandum. This is a clear case of discriminatory classification by the legislature with no rational basis connecting the classification to the legitimate legislative purpose. Given the devastating effect upon Plaintiff the Section will have and the evidence shows, it is very likely that Plaintiff will prevail in the trial on the merits. Plaintiff concedes that smoking bans have been generally upheld where challenged, but there is no such precedent for the classification at issue here.

WHEREFORE, Plaintiff makes the foregoing proffer.

Respectfully submitted,

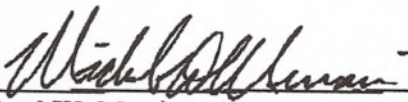

Michael W. Merriam, #09019
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Topeka KS 66603
(785) 233-3700
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was sent by facsimile on the 22^d day of June, 2010 to the following:

Tim J. Riemann, Asst Atty General at 785-291-3767

Robert E. Duncan II at 785-233-5659



Michael W. Merriam

Jun. 22. 2010 11:54AM

COMMUNITY NATIONAL BANK-TONGANOX

No. 0098

P. 1

Michael W. Merriam, #09019
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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
 DIVISION 7

DOWNTOWN BAR AND GRILL, LLC,)

Plaintiff,)

v.)

STATE OF KANSAS,)

Defendant.)

Case No. 10-C-822

STATE OF KANSAS)
 COUNTY OF LEAVENWORTH) ss.

AFFIDAVIT OF KEVIN HAISLIP

COMES NOW, Kevin Haislip, of lawful age, and allege and state as follows:

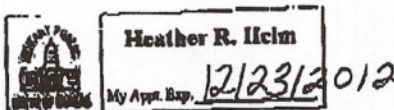
1. I am the owner of Downtown Bar & Grill, 622 E 4th St, Tonganoxie, Kansas, that was licensed in May 2009.
2. Tonganoxie is not an isolated town. It is a suburb of Kansas City, Kansas with all of the development in the last 15 years.
3. Tonganoxie is only 15 minutes from Leavenworth, Kansas City, Lawrence, Desoto and Oskaloosa. Please see the attached lists of all Class B bars that are less than 20 minutes from my bar in the surrounding area.
4. Tonganoxie is a bedroom community with a limited amount of employment. Ninety percent of our clients work in the surrounding metro areas.
5. Because over 80% of my daily clientele are smokers, they will all go to the bars on the attached two lists.
6. Attached as exhibits are lists of Class B clubs in close proximity to my club.

FURTHER AFFIANT SAITH NOT.

Kevin Haislip
 Kevin Haislip

SUBSCRIBED AND SWORN TO before me this 22 day of June, 2010.

Heather R. Helm
 Notary Public



06/22/2010 13:50 7852348997
Jun. 22. 2010 11:55AM

LAW OFFICE
COMMUNITY NATIONAL BANK-TONGANOX

No. 0098 P. 2 PAGE 10/15

My appointment expires: 12/23/2012

HALSLIP AFFIDAVIT EXHIBIT

| County Name | Owner | Business Name | Address | City | State | Zip | License Type | License Number | License Exp Date |
|-------------|------------------------|-----------------------|--------------------|-------------|-------|-------|-------------------|----------------|------------------|
| Leavenworth | FATHEADS IRISH PUB LLC | FATHEADS IRISH PUB | 327 DELAWARE | LEAVENWORTH | KS | 66046 | Class B Club (09) | 9007100201 | 6/2/2011 |
| Leavenworth | HYDEPEGGY L | BENNYS | 2001 DAKOTA ST | LEAVENWORTH | KS | 66046 | Class B Club (09) | 9007016201 | 10/7/2010 |
| Leavenworth | MCWILLIAMSTHOMAS L JR | TOMS COUNTRY STAMPEDE | 745 CHEROKEE | LEAVENWORTH | KS | 66046 | Class B Club (09) | 9007103001 | 1/2/2011 |
| Leavenworth | NO NAME TAVERN LLC | NO NAME TAVERN | 507 CHEROKEE | LEAVENWORTH | KS | 66046 | Class B Club (09) | 9007103101 | 11/1/2010 |
| Leavenworth | PAUENANNE I E A | OUR PLACE | 313 DELAWARE ST | LEAVENWORTH | KS | 66046 | Class B Club (09) | 9007088401 | 1/2/2011 |
| Leavenworth | WALSHJACQUELINE R | CHATTERBOX | 101 E CAROL | LANSING | KS | 66043 | Class B Club (09) | 9007008502 | 9/21/2010 |
| Johnson | BEER THIRTY LLC | BEER THIRTY | 8150 LEXINGTON AVE | DESOTO | KS | 66018 | Class B Club (09) | 9019150712 | 12/9/2010 |
| Johnson | FLY INC | SILVER WHEEL TAVERN | 8385 PENNER AVE | DESOTO | KS | 66018 | Class B Club (09) | 9019056412 | 6/30/2010 |
| Jefferson | CLABAUGHSCOTT W | STINKYS OTHER SIDE | 305 JEFFERSON ST | OSKALOOSA | KS | 68068 | Class B Club (09) | 9046122405 | 11/1/2010 |
| Jefferson | FREDS PLACE INC | FREDS PLACE | 808 N CEDAR ST | PERRY | KS | 66073 | Class B Club (09) | 9046121503 | 7/31/2010 |
| Douglas | LITTLE RENQ INC | PARADISE SALOON | 1897 HWY 40 | LAWRENCE | KS | 66044 | Class B Club (09) | 9018013400 | 4/14/2011 |

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

Case No. 10-C-822

STATE OF KANSAS)
COUNTY OF FORD) ss.

AFFIDAVIT OF GARY TURNER

COMES NOW, Gary Turner, of lawful age, and alleges and states as follows:

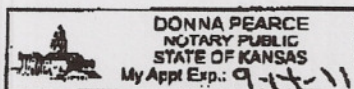
1. I am the owner of the Cattlemen=s Lounge in Dodge City, Kansas, purchased January 1, 2009 and licensed March 8, 2009 as a Class B bar.
2. Dodge City passed a Asmoking ban@ exempting all Class B clubs in September 17, 2008, which prompted the purchase of the Cattlemen=s Lounge.
3. The exemption for Class B bars Alicensed before January 1, 2009" will put the Cattlemen=s Lounge out of business as it will now have to compete with eight clubs that will be able to allow smoking. Additionally, our substantial investment will be irreparably lost.
4. We would not have considered buying the club until Dodge City passed a ban exempting all Class B clubs. Now, not only do we have a large investment to deal with, but also we have 45 months left on our lease of the building (\$27,000). As you can see from the attached list of Class B bars exempt from the ban, we are now going to be competing on a very unlevel Aplaying field@ with them and especially the Casino which opened December 2010.

FURTHER AFFIANT SAITH NOT.

Gary Turner
Gary Turner

SUBSCRIBED AND SWORN TO before me this 22 day of June, 2010.

Donna Pearce
Notary Public
My appointment expires: 9-14-11



TURNER AFFIDAVIT EXHIBIT

| County Name | Owner | Business Name | Address | City | State | Zip | License Type | License Number | License Exp Date |
|-------------|----------------------------|-----------------------|------------------------|------------|-------|-------|-------------------|----------------|------------------|
| Ford | DEL REALLEOBARDO | EL CAPORAL NIGHT CLUB | 206 E TRAIL | DODGE CITY | KS | 67801 | Class B Club (09) | 9035061901 | 10/23/2010 |
| Ford | EL COYOTE DISCO LLC | EL COYOTE DISCO | 1420 E WYATT EARP | DODGE CITY | KS | 67801 | Class B Club (09) | 9035063801 | 9/28/2010 |
| Ford | EL TORINOS CLUB INC | EL TORINOS CLUB | 110 W WYATT EARP | DODGE CITY | KS | 67801 | Class B Club (09) | 9035063001 | 1/7/2011 |
| Ford | HERRINGTON/WICKIE S | H DS SPORTS BAR | 2600 CENTRAL | DODGE CITY | KS | 67801 | Class B Club (09) | 9035064901 | 2/28/2011 |
| Ford | LAST POCKET LLC | LAST POCKET | 1216 E WYATT EARP BLVD | DODGE CITY | KS | 67801 | Class B Club (09) | 9035064301 | 9/28/2010 |
| Ford | POLLINGTON/CHERYL | FUGARWEES LAST CHANCE | 103 S 2ND AVE | DODGE CITY | KS | 67801 | Class B Club (09) | 9035064401 | 7/27/2010 |
| Ford | RUMBAUGH/DAVID A & MAZERAC | DOCTORS OFFICE | 113 GUNSMOKE | DODGE CITY | KS | 67801 | Class B Club (09) | 9035065201 | 8/12/2010 |

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DOWNTOWN BAR AND GRILL, LLC,)
 Plaintiff,)

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 STATE OF KANSAS,)

Defendant.)

Case No. 10-C-822

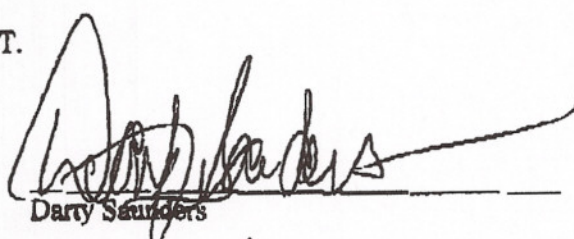
STATE OF KANSAS)
 COUNTY OF WYANDOTTE) ss.

AFFIDAVIT OF DARTY SAUNDERS

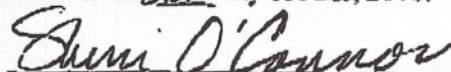
COMES NOW, Darty Saunders, of lawful age, and alleges and states as follows:

1. I am the co-owner of Bill=s 32 West at 6500 Kaw Drive, Kansas City, Kansas, purchased in August 2009. It is a small neighborhood bar and cater to a middle-aged crowd of which 80-90% are smokers.
2. Bill=s 32 West is a Drinking Establishment. There are 11 Class B bars within 10 minutes of Bill=s 32 West and two just blocks away which will be allowed to keep smokers in their bars.
3. The exemption for Class B bars licensed before January 1, 2009" will put Bill=s 32 West out of business within days as I will have to keep smokers out of my bar. The 11 Class B bars in the attached list are direct competitors of ours and will have a distinct advantage. Our investment will be lost.

FURTHER AFFIANT SAITH NOT.


 Darty Saunders

SUBSCRIBED AND SWORN TO before me this 22nd day of June, 2010.


 Notary Public

My appointment expires: 3.16.2013



SANDERS AFFIDAVIT EXHIBIT

| County Name | Owner | Business Name | Address | City | State | Zip | License Type | License Number | License Exp Date |
|-------------|-----------------------------|-------------------------|---------------------|----------------|-------|-------|-------------------|----------------|------------------|
| Wyandotte | APRILS FIRELIGHT LOUNGE INC | APRILS FIRELIGHT LOUNGE | 2043B N 18TH ST | KANSAS CITY | KS | 66104 | Class B Club (09) | 9001037601 | 12/1/2010 |
| Wyandotte | BLUE ROSES INC | BLUE ROSES | 1013 CENTRAL AVE | KANSAS CITY | KS | 66102 | Class B Club (09) | 9001141801 | 7/8/2010 |
| Wyandotte | BURTON INC | C & R | 4223 LEAVENWORTH RD | KANSAS CITY | KS | 66104 | Class B Club (09) | 9001492501 | 3/20/2011 |
| Wyandotte | C & M ENTERTAINMENT CO INC | BUBBLE ROOM | 1703 CENTRAL AVE | KANSAS CITY | KS | 66102 | Class B Club (09) | 9001033501 | 4/4/2011 |
| Wyandotte | JANSEN HOWARD II | ALIBI CLUB | 975 KANSAS AVE | KANSAS CITY | KS | 66105 | Class B Club (09) | 9001506401 | 6/12/2010 |
| Wyandotte | JUDD JOYCE D | BAR NONE LOUNGE | 1203 OSAGE AVE | KANSAS CITY | KS | 66105 | Class B Club (09) | 9001498401 | 4/11/2011 |
| Wyandotte | MARTY NOWICZ CHARLES R | STRAWBERRY SOUTH CLUB | 48 S 7TH ST | KANSAS CITY | KS | 66101 | Class B Club (09) | 9001010301 | 7/17/2010 |
| Wyandotte | MS KITTYS CLUB INC | DOUBLE TS ROADHOUSE | 1421 MERRIAM LN | KANSAS CITY | KS | 66103 | Class B Club (09) | 9001066501 | 9/28/2010 |
| Wyandotte | OWONA INC | RIVER ROAD INN | 813 LORING DR | BONNER SPRINGS | KS | 66012 | Class B Club (09) | 9001039902 | 12/1/2010 |
| Wyandotte | WYRICK PAULINE | RAYS COACH CLUB | 1102 OSAGE | KANSAS CITY | KS | 66105 | Class B Club (09) | 9001142901 | 11/15/2010 |
| Johnson | WILDCARD VENTURES LLC | KCS NEIGHBORHOOD BAR & | 10201 W 47TH | MERRIAM | KS | 66203 | Class B Club (09) | 9019164508 | 2/18/2011 |