IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MISSOURI BROADCASTERS ASSOCIATION, et al.,	)	
Plaintiffs,	)	Case No. 13-CV-04034-FJG
v.	)	
LAFAYETTE E. LACY, et al.,	)	
Defendants.	)	

ORDER

Pending before the Court is Plaintiffs' Motion for Summary Judgment (Doc. No. 50).

I. Background[1]

Plaintiff Missouri Broadcasters Association ("MBA") is a non-profit corporation organized under the laws of the State of Missouri, with its principal place of business located in Jefferson City, Cole County, Missouri. MBA's objects and purposes include promoting the interest and welfare of the broadcasting industry in the State of Missouri. MBA's members include persons, firms, institutions and corporations operating licensed

[1] The Court only includes sufficient background to describe the parties and claims. Notably, as discussed in defendants' opposition to the motion for summary judgment, plaintiffs' statement of undisputed material facts contains many statements that are actually hearsay or conclusions without a factual basis. See Doc. Nos. 51 and 52, ¶¶ 13-32. Included in these purported undisputed facts are claims from the MBA that certain of its unnamed members would have accepted advertising from unnamed third party wholesale or retail sellers of alcohol that would violate the statutes (Doc. No. 51 at ¶ 13-16); hearsay descriptions of investigations undertaken by Division of Alcohol and Tobacco Control related to non-parties to this action (Doc. No. 51 at ¶¶ 18-22); legal conclusions regarding the application of the challenged regulations and statutes (Doc. No. 51 at ¶¶ 23-27); printouts of Groupon advertisements sent to plaintiffs' counsel in this case (Doc. No. 51 at ¶¶ 28-29); and unsupported hearsay claims that the state does not enforce these regulations against Internet advertisements (Doc. No. 51 at ¶¶ 30-32). The Court, therefore, does not consider these assertions as "undisputed facts."

broadcasting stations, or non-commercial stations, who earn revenues from advertising. MBA's membership includes Zimmer Radio. Zimmer Radio is a corporation existing under the laws of the State of Missouri, with its principal place of business in Columbia, Missouri. Zimmer Radio operates radio stations KCLR, KTXY, KCMQ, KTGR, KATI, KWOS, and KFAL in Missouri, and generates revenues from paid advertisements on those stations.

Plaintiff Meyer Farms, Inc. ("Meyer") is alleged to be a corporation existing under the laws of the State of Missouri, with its principal place of business in Springfield, Missouri. It purportedly grows wine grapes at its Missouri farm, arranges for a Missouri winery to make the grapes into wine, and sells wine through a distributor to retail outlets in Missouri and elsewhere.[2] Plaintiff Uncle D's Sports Bar & Grill, LLC ("Uncle D's") is alleged to be a limited liability corporation organized under the laws of the State of Missouri, with its principal place of business in St. Joseph, Missouri. Uncle D's purportedly operates a commercial food and drink establishment licensed by the State of Missouri to serve alcoholic beverages.

Defendant Lafayette Lacy ("Lacy") is the State Supervisor of Liquor Control for the Department of Public Safety, Division of Alcohol and Tobacco Control. He has been sued in his official capacity. Defendant Chris Koster is the Attorney General for the State of Missouri. Chris Koster has been sued in his official capacity.

[2] The Court's description of plaintiffs Meyer Farms and Uncle D's comes solely from plaintiff's amended complaint (Doc. No. 10). Notably, defendants do not admit the allegations regarding Meyer Farms and Uncle D's. See Answer, Doc. No. 26, ¶¶ 10, 11. Curiously, plaintiffs provide no further description of Meyer Farms and Uncle D's in their motion for summary judgment or suggestions in support. Despite this questionable brief writing practice, the Court will assume for purposes of this Order that Meyer Farms and Uncle D's are as described in the amended complaint.

Plaintiffs filed this Section 1983 action contending that Missouri regulations 11 C.S.R. 70-2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I), and Missouri statute R.S.Mo. § 311.070.4(10) are facially unconstitutional prohibitions on commercial speech under the First Amendment. Missouri regulation 11 C.S.R. 70-2.240(5)(G) provides, in part:

> No advertisement of intoxicating liquor or nonintoxicating beer shall contain … [a]ny statement offering any coupon, premium, prize, rebate, sales price below cost or discount as an inducement to purchase intoxicating liquor or nonintoxicating beer except, manufacturers of intoxicating liquor other than beer or wine shall be permitted to offer and advertise consumer cash rebate coupons and all manufacturers of intoxicating liquor may offer and advertise coupons for nonalcoholic merchandise … .

11 C.S.R. 70-2.240(5)(G) thus generally prohibits retail licensees from advertising coupons or discounts outside of their retail establishments. Missouri regulation 11 C.S.R. 70-2.240(5)(I) provides, in part:

> No advertisement of intoxicating liquor or nonintoxicating beer shall contain … [a] price that is below the retailer's actual cost.

Finally, R.S.Mo. § 311.070.4(10) provides, in part:

> The distiller, wholesaler, winemaker or brewer may in an advertisement list the names and addresses of two or more unaffiliated retail businesses selling its product if all of the following requirements are met:
>
> (a) The advertisement shall not contain the retail price of the product;
>
> (b) The listing of the retail businesses shall be the only reference to such retail businesses in the advertisement;
>
> (c) The listing of the retail businesses shall be relatively inconspicuous in relation to the advertisement as a whole; and
>
> (d) The advertisement shall not refer only to one retail business or only to a retail business controlled directly or indirectly by the same retail business.

R.S.Mo. § 311.070.4(10) does not restrict advertising done by a retailer itself; instead, this statutory provision controls the means by which a distiller, wholesaler, winemaker or

brewer can list retailers in its advertising so as not to fall afoul of R.S.Mo. § 311.070.1, which prohibits distillers, wholesalers, winemakers, brewers or their employees, officers or agents from having any financial interest in retail alcohol sales.

Collectively, 11 C.S.R. 70- 2.240(5)(G), 11 C.S.R. 70-2.240(5)(I), and R.S.Mo. § 311.070.4(10) will be referred to as the "Challenged Advertising Rules."

Plaintiffs' Amended Complaint has three counts (1) Declaratory Relief Against Facially Unconstitutional Discount Advertising Prohibition Regulation[3] [11 C.S.R. 70-2.240(5)(G)] under 42 U.S.C. § 1983; (2) Declaratory Relief Against Facially Unconstitutional Below Cost Advertising Prohibition Regulation [11 C.S.R. 70-2.240(5)(I)] under 42 U.S.C. § 1983; and (3) Declaratory Relief Against Facially Unconstitutional Single Retailer Advertising Prohibition Statute [R.S.Mo. § 311.070.4(10)] under 42 U.S.C. § 1983. Plaintiffs seek declarations that each provision is unconstitutional under the First Amendment of the United States Constitution. In addition, plaintiffs seek a permanent injunction enjoining defendants from enforcing each provision. Plaintiffs also seek attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and/or 28 U.S.C. § 2202.

II. Standard

Summary judgment is appropriate if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The facts and inferences are viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–90 (1986). The moving party must carry the

[3] For clarity's sake, the Court has not adopted the shorthand characterizations of the statutes and regulations suggested by plaintiffs, and instead refers to the statutes and regulations by citation throughout this Order.

burden of establishing both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Matsushita, 475 U.S. at 586–90.

A nonmoving party must establish more than "the mere existence of a scintilla of evidence" in support of its position. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

> The nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (citations and quotations omitted)

III. Discussion

Plaintiffs argue that they are entitled to summary judgment because (1) they have demonstrated that they have standing to challenge Missouri's regulations and statute; (2) the challenged statute and regulations do not pass intermediate scrutiny; (3) the challenged statute is unconstitutional because it mandates compelled speech; and (4) the challenged advertising rules are unconstitutional because, in practice, they are only enforced upon a particular segment of the media. As an initial matter, the Court notes that plaintiffs' fourth ground for relief is an as-applied challenge to the challenged advertising rules, not a facial challenge to those rules, and plaintiffs have not set forth sufficient evidence demonstrating that the defendants only enforce the rules against specific segments of the media. Indeed, although plaintiffs plead certain facts about internet advertisers having an advantage over traditional media due to lack of enforcement of the challenged advertising rules, the counts pled in plaintiffs' amended complaint all reflect facial challenges to the statute and regulations, not as-applied

challenges. Plaintiffs did not seek leave to amend prior to close of discovery to assert an as-applied challenge to Missouri's advertising rules, and the Court will decline to allow such a challenge to be brought in this instance. Therefore, plaintiffs' motion for summary judgment is **DENIED** as to their claim that the challenged advertising rules are unconstitutional because they impose burdens on a specific segment of the media. Such claims, which were not sufficiently pled in the complaint, will be **DISMISSED**. The Court turns to the remainder of the arguments raised by plaintiffs.

A. Standing

Plaintiffs argue that they have demonstrated that they have standing to challenge Missouri's alcohol advertising rules. Specifically, plaintiffs Zimmer, Meyer Farms and Uncle D's indicate they are directly harmed by the state's restrictions on alcohol advertising, and the Court has already found the same in denying defendants' motion to dismiss. See Order, Doc. No. 24, at 9-11 (Judge Scott O. Wright, August 26, 2013). See also Pitt News v. Fisher, 215 F.3d 354, 359-61 (3d Cir. 2000) (finding that a student newspaper (similar to Zimmer, a broadcaster) had standing to challenge the constitutionality of alcohol advertising regulations); 281 Care Committee v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011) (finding self-censorship could demonstrate injury in fact sufficient to establish standing). Plaintiffs further argue that MBA has standing to bring suit on behalf of its members, including Zimmer, because of the Supreme Court's decisions on associational standing. See United Food and Commercial Workers Union Local 751 v. Brown Group, Inc. 517 U.S. 544, 553 (1996) (explaining the requirements for associational standing, which include (a) its members would otherwise have standing to sue in their own right; (b) the interests the group seeks to protect are

germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit).

In response, the defendants argue that the Court previously found that only the licensee plaintiffs (Meyer's and Uncle D's) had standing; however, that argument is at odds with Judge Wright's Order, which also indicates that he found that Zimmer had standing (and did not consider the standing of the MBA because defendants raised no argument that the MBA lacked standing). See Doc. No. 24. Defendants also attempt to distinguish Pitt News v. Fisher, noting that the plaintiff in Pitt demonstrated lost revenue resulting from the enforcement of the statute, whereas plaintiff Zimmer does not (noting that the declarations attached to plaintiffs' motion for summary judgment contain hearsay and do not establish that plaintiff Zimmer's customers placed no advertising at all or that Zimmer last revenue as a result). The Court, however, notes that injury in fact can be established through self-censorship, and plaintiff Zimmer has demonstrated sufficiently for purposes of reaching the merits of this action that it has standing. To establish standing, the plaintiffs "need[] only to establish that [they] would like to engage in arguable protected speech, but that [they are] chilled from doing so by the existence of the statute." See 281 Care Comm., 638 F.3d at 627 (emphasis added). Similarly, the Court finds that plaintiff MBA has sufficiently demonstrated it has associational standing.

Accordingly, the Court will turn to the merits of plaintiffs' constitutional claims.

B. First Amendment Commercial Speech – the Central Hudson test and 11 C.S.R. 70- 2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I)[4]

[4] Although plaintiffs treat all three challenged rules together at this point in their brief, the Court notes that statute R.S.Mo. § 311.070.4(10) is categorically different from the challenged regulations. R.S.Mo. § 311.070.4(10) is not a ban on advertising discount prices; instead, it regulates the ways in which a manufacturer or producer may advertise on behalf of a retailer (a party in a different tier in Missouri's system of alcohol industry

In Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), the U.S. Supreme Court established a four-part test to determine when a statute or regulation violates a right to free commercial speech. Notably, although the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," id. at 563, commercial speech is protected "from unwarranted governmental regulation." Id. at 561. See Passions Video, Inc. v. Nixon, 458 F.3d 837, 841 (2006). Regulations of commercial speech are subject to intermediate scrutiny. See Passions Video, 458 F.3d at 841-42. The Central Hudson test is as follows: (1) the court must determine if the First Amendment protects the speech in question (in other words, the speech must not be misleading or otherwise unlawful); (2) if the First Amendment does afford the speech protection, the court must determine whether the state's governmental interest is substantial; (3) if the first two elements are established, the court then must determine whether the statute or regulation directly advances the government's claimed interest; and (4) the court must determine whether the statute or regulation is more extensive than necessary. Central Hudson, 447 U.S. at 566.

1. Is the Speech Protected?

With respect to both the regulations and the statute at issue in this case, there is no dispute that the proposed commercial speech concerns lawful activity and is not misleading, and would therefore be constitutionally protected under the first prong of Central Hudson.

2. Is the Government's Interest Substantial?

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controls). The Court, therefore, will examine the two regulations separately from R.S.Mo. § 311.070.4(10).

Next, the Court turns to whether the state's asserted interest is substantial. Plaintiffs do not specifically assert in their motion and suggestions in support that the state does not have a substantial interest. In their response, defendants note that the purpose of Missouri's Liquor Control Law is "to promote responsible consumption, combat illegal underage drinking, and . . . maintaining an orderly marketplace." R.S.Mo. § 311.015. As noted by defendants, the Supreme Court has already indicated that promoting temperance and orderly market conditions are legitimate state interests. See North Dakota v. United States, 495 U.S. 423, 432 (1990). See also Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control, 731 F.3d 799, 808-11 (8th Cir. 2013) (finding that Missouri's tiered system of regulating liquor sales[5] to be a legitimate state interest) Defendants note that, consistent with Missouri's stated purposes, the regulations here are designed to restrict aggressive or overreaching sales tactics that tend to promote binge drinking. The defendants note that empirical studies are not necessary to show the significance of the harm the state seeks to remedy, and instead the State's interest may be shown by "anecdotes, history, consensus and simple common sense." Missouri ex rel Nixon v. American Blast Fax, Inc., 323 F.3d 649, 654 (8th Cir. 2003).

In their reply suggestions plaintiffs indicate they do not concede that maintaining an orderly marketplace is a legitimate state interest (calling that interest vague). However, considering that both the Supreme Court and the Eighth Circuit have found

[5] Missouri uses a tier system to separate the alcohol distributing into discrete levels. The first tier consists of producers (i.e., brewers, distillers, winemakers); the second tier consists of solicitors, who acquire alcohol from producers and sell it to wholesalers; the third tier consists of wholesalers, who purchase from producers or solicitors for sale to retailers; and the fourth tier consists of retailers, who sell alcohol to consumers. R.S.Mo. § 311.180(1), 311.200. See Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control, 731 F.3d 799, 802 (8th Cir. 2013).

that maintaining an orderly marketplace is a legitimate state interest in Commerce Clause jurisprudence (see North Dakota, 495 U.S. at 432 and Southern Wine and Spirits, 731 F.3d at 808-11), the Court finds that the second factor of the Central Hudson test has been met by the defendants as to all claimed interests.[6]

3. Do the Regulations Directly Advance the Government's Claimed Interests?

The burden of showing that a speech restriction directly and materially advances the asserted governmental interest cannot be satisfied by "mere speculation or conjecture"; rather, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Greater New Orleans Broadcasting Association, Inc. v. United States, 527 U.S. 173, 188 (1999). Plaintiffs suggest this means that empirical evidence is always required; however, the Supreme Court has allowed reference to studies and anecdotes as well as history, consensus and "simple common sense," in examining the rationale for speech regulations. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); American Blast Fax, Inc., 323 F.3d at 654.

Plaintiffs compare this case to the Supreme Court's 1996 decision, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). In 44 Liquormart, the Supreme Court found that Rhode Island's ban on all advertisements that included the retail prices of alcohol to violate the Constitution, stating,

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the

[6] The Court acknowledges that maintaining an orderly marketplace is not the primary goal of regulations 11 C.S.R. 70- 2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I); instead the interests of responsible alcohol consumption and preventing underage drinking are paramount in the enactment of those regulations. Maintaining an orderly marketplace, however, is the paramount concern of R.S.Mo. § 311.070.4(10), and will be considered along with that statute below.

> disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Id. at 501. In examining the third factor of the Central Hudson test, the Supreme Court found in 44 Liquormart that no evidence supported the suggestion that a ban on the advertising of alcohol prices would reduce alcoholic beverage consumption (the stated purpose of the ban); instead, the Court found that even if the price advertising ban led to higher prices, that would not significantly deter most drinkers. Id. at 506-07. The Supreme Court additionally found that the state had other, more direct, means of lowering alcoholic beverage consumption instead of banning advertising of prices, such as imposing direct controls on pricing or developing educational campaigns concerning problems related to excess drinking. Id. at 507-08.

Plaintiffs argue that defendants cannot establish that "the speech restriction directly and materially advances the asserted governmental interest." Greater New Orleans, 527 U.S. at 188. Plaintiffs assert that the governmental interests named by defendants ("to promote responsible consumption, combat illegal underage drinking, and . . . maintain[ ] an orderly marketplace," R.S.Mo. § 311.015) would be more difficult to combat through regulating speech than the interest asserted in 44 Liquormart, the reduction of alcohol consumption. Defendant, on the other hand, argues that responsible consumption is a real interest, and the question is whether advertising of discount prices for liquor will promote binge drinking (or buying) and whether limiting advertising of such discount prices will lessen such alcohol abuse.

Plaintiffs argue that defendants have no valid empirical evidence upon which the General Assembly and the Division relied in enacting the Challenged Advertising Rules, showing that the advertising restrictions promote responsible consumption or combat illegal underage drinking. See Greater New Orleans, 527 U.S. at 188 (stating that the government's burden is not satisfied by "mere speculation or conjecture"; instead, the state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"). The Court notes, however, that empirical evidence is not always necessary under the Central Hudson test. Instead, as noted by defendant, studies and anecdotes as well as history, consensus and "simple common sense," have been used by the Supreme Court as the rationale for limiting speech. See Lorillard, 533 U.S. at 555. In a similar alcohol advertising case, the Fourth Circuit found a common sense link between advertising and demand by considering that it would be counterintuitive for sellers to spend money on advertisements that do not increase demand for the product. Educational Media Co. v. Swecker, 602 F.3d 583, 590 (4th Cir. 2010). Similarly, in Central Hudson, the Supreme Court found a common sense link between the state's interest in energy conservation and a ban on advertising electricity, finding, "There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." 447 U.S. at 569. Additionally, defendants have provided a study, Meichun Kuo, *et al.*, The Marketing of Alcohol to College Students (AM. J. PREV. MED. 2003), which generally supports the proposition that there is a correlation between the advertisement of discount alcohol prices and increased drinking.[7]

[7] The Court recognizes that the Kuo study involves a college student population and

Upon consideration of the issues, the Court agrees with defendants that plaintiffs would not have challenged the regulations and statute herein unless they believed that sales would increase if the regulations were lifted. Moreover, there is a difference between a complete ban on listing prices in alcohol advertisements (as was the case in 44 Liquormart) and a ban on advertising discount pricing. Missouri's regulatory scheme cites real harms (irresponsible drinking and underage drinking), and common sense along with the Kuo study demonstrate that restrictions on discount alcohol advertising will alleviate those harms to a material degree.

One issue raised by plaintiffs, however, is deserving of additional examination. Plaintiffs argue that 11 C.S.R. 70-2.240(5)(G) fails the third part of the Central Hudson test because of "the overall irrationality of the Government's regulatory scheme," which provides inconsistent treatment for different types of alcohol. Rubin v. Coors Brewing Co., 514 U.S. 476, 488 (1995) (holding that while the prohibition of alcoholic strength on beer labels succeeded in keeping that information from the public, that limited prohibition did not advance the asserted interest in preventing strength wars since strength information appeared on labels for other alcoholic beverages). 11 C.S.R. 70-2.240(5)(G) allows manufacturers of intoxicating liquor other than beer or wine to advertise "consumer cash rebate coupons," while beer and wine manufacturers, as well as all retailers and wholesalers, are prohibited from doing so. From the record, it is not clear if there is a reason why manufacturers of intoxicating liquor other than beer or wine are treated differently in 11 C.S.R. 70-2.240(5)(G). Instead of having a trial on this

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tested only on-premises drink advertisements, not print or broadcast media advertisements. However, the Court agrees with defendants that such a study shows a logical connection between the government's interest (promoting responsible consumption and combatting illegal underage drinking)

issue, the Court believes the better course of action would be to first allow additional briefing from the parties, limited to whether there is a basis for the state's exception of liquor manufacturers from part of this regulation. The parties are each directed to file a brief on or before **APRIL 17, 2015**, answering the following questions:

- Is there a reason that manufacturers of intoxicating liquor are treated differently under 11 C.S.R. 70-2.240(5)(G)?
- Does that difference make Missouri's regulatory scheme irrational such that the Court should find the regulation unconstitutional?
- If the Court found the regulation unconstitutional as written, how should the Court remedy this issue?

Each side's brief should be no longer than **five pages**. Responses in opposition to these briefs, if any, shall be filed on or before **MAY 8, 2015.** Responses shall be no longer than **five pages**.

In all other respects, the Court finds that defendants have demonstrated that 11 C.S.R. 70- 2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I) meet the third factor of the Central Hudson test.

4. Is the regulation more extensive than necessary?

In Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989), the Supreme Court elaborated on the fourth requirement, often known as the "reasonable fit" requirement. For this factor, the government must affirmatively establish that it had "carefully calculated" the burdens imposed by its regulations and that those burdens were justified in light of the government's objectives. Id. at 480. These decisions "require … a 'fit' between the legislature's ends and the means chosen to accomplish those ends." Id. This "fit" need not be "necessarily perfect, but [a]

reasonable" one "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served . . . .'" Id.

Plaintiffs argue that there are other more direct means of meeting the state's goals of responsible alcohol consumption and prevention of underage drinking without resorting to speech restrictions. For example, plaintiffs point to 44 Liquormart, where the Supreme Court suggested alternatives to complete bans on providing alcohol price information in advertisements. The Court in 44 Liquormart indicated (1) the state could prohibit alcohol altogether, (2) it could heavily tax or regulate alcohol, (3) it could impose direct controls on pricing, or (4) it could develop educational campaigns concerning the problems of excessive drinking. 44 Liquormart, 517 U.S. at 507-08. Plaintiffs also point to the Kuo study, which suggests additional methods such as (5) banning promotions on alcohol (Kuo at pp. 1, 7); or (6) banning in-store promotions within a two-mile radius of colleges (Kuo at pp. 2, 7).

In response, defendants argue that plaintiffs continue to attempt to characterize the regulations as "total bans" on advertisement. However, the regulations do not ban ads for liquor, do not ban ads stating the price of liquor, do not ban all references to the availability of sales or discount prices (indeed, advertisements can say "Specials," "Happy Hour," and "Ladies Night"), and within a retail establishment advertisements of sales and promotions may state the price of alcohol. Therefore, defendants argue that the Missouri regulations are much more narrowly tailored than those in 44 Liquormart, which banned all advertising of liquor prices. Defendants argue, instead, that Missouri's regulations are narrowly tailored to specific "aggressive sales practices." See 44 Liquormart, 517 U.S. at 498 (acknowledging that states may restrict some forms of

"aggressive sales practices that have the potential to exert 'undue influence' over consumers," citing Bates v. State Bar of Ariz., 433 U.S. 350, 366 (1977)).

Defendants further note that the Supreme Court's decisions invalidating provisions of commercial speech have not "involved a provision that went only marginally beyond what would adequately serve the governmental interest. To the contrary, almost all the restrictions disallowed under Central Hudson's fourth prong have been substantially excessive." Board of Trustees of State University of N.Y. v. Fox, 492 U.S. 469, 479 (1989) (citing cases, and further noting that its test is not a "least restrictive means" test, but as long as there is a fit between the legislature's ends and the means chosen to accomplish those ends, the restriction would be found constitutional, id. at 479-80). Here, defendants argue that their regulations are not as broad as those that have been struck down, and instead focus on marketing efforts that emphasize the discount prices as a means of inducing liquor sales and consumption. Defendants, therefore, argue that the challenged regulations further a substantial state interest and are not more expansive than necessary to serve that interest.

In reply, plaintiffs suggest that "if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so." Thompson v. Western States Med. Center, 535 U.S. 357, 371 (2002). Plaintiffs again suggest alternatives to forbidding the advertising of discount prices, but the Court finds that most of those alternatives are either against the interests of the plaintiffs (for instance, the Court cannot imagine that the retailer plaintiffs would rather the state prohibited alcohol sales altogether) or do not have a more "reasonable fit" with the harms defendants seek to regulate than the regulations imposed by the state. In

short, the Court finds that the regulations imposed by the state of Missouri have a reasonable fit to the harms they seek to alleviate.

Therefore, for the reasons stated by defendants and by the Court in this Order, plaintiffs' motion for summary judgment as to regulations 11 C.S.R. 70- 2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I) is **DENIED.** Furthermore, given that defendants raised similar concerns previously in their motion to dismiss, the Court finds that reconsideration of the Court's previous order denying the motion to dismiss is warranted, and the Court sua sponte **GRANTS** defendants' motion to dismiss (Doc. No. 13) as to all claims related to 11 C.S.R. 70- 2.240(5)(G) and 11 C.S.R. 70-2.240(5)(I) (with the exception of the issue related to 11 C.S.R. 70-2.240(5)(G)'s treatment of manufacturers of intoxicating liquor other than beer or wine, as detailed on pages 13 and 14, above).

III. R.S.Mo. § 311.070.4(10) as Compelled Speech

Plaintiffs argue that R.S.Mo. § 311.070.4(10) violates the first amendment because it compels advertisers to promote and support entities that they do not wish to support. Plaintiffs argue that this statute takes the unusual approach of directing the content of advertising. Specifically, R.S.Mo. § 311.070.4(10) provides, in part:

> The distiller, wholesaler, winemaker or brewer may in an advertisement list the names and addresses of two or more unaffiliated retail businesses selling its product if all of the following requirements are met:
>
> (a) The advertisement shall not contain the retail price of the product;
>
> (b) The listing of the retail businesses shall be the only reference to such retail businesses in the advertisement;
>
> (c) The listing of the retail businesses shall be relatively inconspicuous in relation to the advertisement as a whole; and
>
> (d) The advertisement shall not refer only to one retail business or only to a retail business controlled directly or indirectly by the same retail business.

Plaintiff argues that the statute does not direct the advertising content to prevent fraud or for consumer protection, but rather argues that the apparent purpose of the statute is to "make any resulting advertisement less effective for the advertiser, apparently with the idea that if the advertiser is forced to advertise in a less effective way, he or she will not advertise at all." Doc. No. 51, p. 27. Plaintiffs argue that this statute discourages truthful speech and compels producers/wholesalers who desire to advertise their goods to the public to add state-required content to their speech. Plaintiff argues that in United States v. United Foods, Inc., 533 U.S. 405 (2001), the Supreme Court held that compelled commercial speech is only allowed in the rare cases where (1) there is a comprehensive regulatory scheme involving a "mandated association" among the entities who are required to pay the subsidy; and (2) the subsidy is levied only as a "necessary incident" of "the larger regulatory purpose which justified the association." Id. at 414-16. Plaintiffs argue that, here, Missouri's alcohol producers, wholesalers and retailers are not involved in a mandated association which would allow the State to impose a subsidy.

In response, defendants argue that the statute does not compel advertisers to do anything, and the statute does not mandate that producers or wholesalers include a reference to a retailer at all. Thus, instead of looking to the Supreme Court cases regarding compelled speech, the Court should simply apply Central Hudson. In particular, defendants argue that R.S.Mo. § 311.070.4(10) is actually a limited allowance for wholesalers or producers to conduct some advertising naming retailers, as without that subsection any advertising by a producer or wholesaler benefitting retailers would be prohibited by R.S.Mo. § 311.070.1 as the indirect provision of money or property between different levels of the liquor industry that are statutorily required to

be separate.[8] Defendants further note that plaintiffs did not argue in their opening suggestions that the separation of the levels of the liquor industry in Missouri is unconstitutional or not a substantial state interest, and as found above, the Court agrees that Missouri's tiered system of alcohol control is a substantial state interest under the second part of the Central Hudson test. Defendants note that one of the methods for maintaining an orderly marketplace in the alcohol industry is to separate the license holders into tiers and to prohibit financial transactions that blur the lines between the tiers. Defendants go on to note that plaintiffs' argument that producers and wholesalers should be allowed to partner with retailers in advertising but not for any other purpose makes no sense.

Upon review of the arguments made by the parties, the Court concludes that Section 311.070.4(10) is not "compelled" advertising, as argued by plaintiffs, but should be considered a limited allowance for some advertising paid for by wholesalers or producers that mentions the names of retailers. Missouri has a substantial interest in controlling and maintaining an orderly marketplace in the alcohol sales industry, and one means of control is prohibiting certain monetary transactions between the tiers.

[8] R.S.Mo. § 311.010.1 provides:

> Distillers, wholesalers, winemakers, brewers or their employees, officers or agents shall not, except as provided in this section, directly or indirectly, have any financial interest in the retail business for sale of intoxicating liquors, and shall not, except as provided in this section, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers. . . .

Thus, as discussed by defendants, Section 311.070.4(10) operates as an exception to the general rule that no direct or indirect financial interest shall be had between retailers and wholesalers.

This statute directly advances the governmental interest asserted, as it serves to allow some advertising but lessens the effect of transferring money among the tiers. Additionally, given that the statute allows some advertising to be paid for by wholesalers or producers that mentions the names of retailers, the statute is not more burdensome than necessary to serve the state's interest. The statute, therefore, meets the Central Hudson test and does not violate the First Amendment of the Constitution. Plaintiffs' motion for summary judgment as to Section 311.070.4(10), therefore, is **DENIED**.

Furthermore, given that defendants raised these same issues previously in their motion to dismiss, the Court finds that reconsideration of the Court's previous order denying the motion to dismiss is warranted, and the Court sua sponte **GRANTS** defendants' motion to dismiss (Doc. No. 13).

IV. Conclusion

Therefore, for the foregoing reasons:

(1) Plaintiffs' Motion for Summary Judgment (Doc. No. 50) is **DENIED**;

(2) The Court grants reconsideration of its previous order on defendants' motion to dismiss (Doc. No. 13), and **DISMISSES** all claims in plaintiffs' complaint, with the exception of the sub-issue in Count I regarding 11 C.S.R. 70-2.240(5)(G)'s disparate treatment of manufacturers of intoxicating liquor other than beer or wine; and

(3) As detailed on page 14 of this Order, the parties are each directed to file a brief on or before **APRIL 17, 2015**, answering the following questions:

- Is there a reason that manufacturers of intoxicating liquor are treated differently under 11 C.S.R. 70-2.240(5)(G)?
- Does that difference make Missouri's regulatory scheme irrational such that the Court should find the regulation unconstitutional?

- If the Court found the regulation unconstitutional as written, how should the Court remedy this issue?

Each side's brief should be no longer than **five pages**. Responses in opposition to these briefs, if any, shall be filed on or before **MAY 8, 2015.** Responses shall be no longer than **five pages**.

IT IS SO ORDERED.

Date: March 31, 2015
Kansas City, Missouri

/S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge