UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LEBAMOFF ENTERPRISES, INC., *et al*	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	2:17-cv-10191-AJT
	)	Hon. Arthur J. Tarnow
RICK SNYDER, Governor of Michigan, *et al*,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,	)	
	)	
Intervener.	)	

INTERVENING DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

This brief replies to Plaintiffs' Consolidated Response/Reply Brief on all Cross-Motions for Summary Judgment filed on April 23, 2018.

Plaintiffs now admit they are asking this Court to abolish Michigan's three-tier system regulating alcohol distribution. Their reasoning is that the three-tier system is not needed where Michigan licensed retailers are allowed to ship wine directly to Michigan consumers without the customer coming into the retailer's store – what plaintiffs refer to as "internet sales". According to plaintiffs, this direct shipping to consumers makes a licensed retailer's physical presence in the State unnecessary such that the Court should order Michigan's three-tier system to

be tossed aside. This is despite the fact that the case plaintiffs rely on, *Granholm v Heald*,[1] held the three-tier system to be "unquestionably legitimate".[2] See also, *Jelovsek v Bredesen*,[3] another case plaintiffs rely on ("Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds." Citing *Granholm, supra.*).

Plaintiffs' argument that requiring licensed retailers to be physically present in the State violates the Commerce Clause flies in the face of the holding in *Byrd v. Tennessee Wine and Spirits Retailers Ass'n.*,[4] which recognized that requiring retailer or wholesaler businesses to be in the State is a valid and inherent part of the three-tier system because the presence of those entities is part and parcel of the means of regulating the flow of alcohol in the State. The Court in *Byrd* adopted the express holding on that point from *Cooper v Texas Alcoholic Beverage Commission (Cooper II).*[5] Plaintiffs are incorrect in asserting the statement in *Byrd* was dictum; it was an essential part of the Court's reasoning that a durational-residency requirement for a retailer entity's owner is invalid, in contrast to a requirement that a retailer must be present in the State, which is inherent in the

[1] 544 U.S. 460, 489 (2005).
[2] 544 U.S. at 489, quoting *North Dakota v United States*, 495 U.S. 423, 432 (1990).
[3] 545 F.3d 431, 436 (6th Cir. 2008).
[4] 883 F.3d 608, 623 (6th Cir. 2018).
[5] 820 F.3d 730, 743 (5th Cir. 2016).

three-tier system and is valid.[6] Other Courts have upheld a State's physical presence requirement for retailers as an inherent part of the three-tier system, including *Arnold's Wines v Boyle*,[7] and *Wine Country Gift Baskets.com v Steen*.[8]

Brushing all these rulings aside, plaintiffs assert *Granholm v Heald's* discussion of in-state physical presence as to wineries should govern the present case.[9] The Court in *Wine Country* explained that *Granholm's* reference does not apply in the context of retailers and wholesalers whose presence in the State is an inherent part of regulating the flow of alcohol in the State under the three-tier system:

> The producers in a three-tier system often are not located in the State in which the sales occur. The traditional three-tier system, seen as one that funnels the product, *Granholm*, 544 U.S. at 489, has an opening at the top available to all. The wholesalers and retailers, though, are often required by a State's laws to be within the State. 612 F.3d 809, 815.

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[6] "In this language [citing *Cooper II*, 820 F.3d at 743] the Fifth Circuit created an important distinction: requiring retailer- or wholesaler-alcoholic-beverages businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational residency requirements govern owners." 883 F.3d 608, 623. (Footnote omitted.)

[7] 571 F.3d 185, 190-191 (2nd Cir. 2009).

[8] 612 F.3d 809, 820-821 (5th Cir. 2010).

[9] *Granholm v Heald* involved an exception to the three-tier system that allowed in-state but not out-of-state wineries to ship wine produced by the winery directly to consumers. The New York statute allowed out-of-state wineries to take advantage of the exception if they established an in-state location. The Supreme Court held in the context of producers that the New York statute violated the Commerce Clause because it gave preferential treatment to wineries in the state and discriminated against wine produced outside the state.

Plaintiffs assert *Wine Country* should be distinguished because the geographic scope of direct shipping was the county where the retailer was located rather than the entire state. But that minor factual difference is not significant to the holding that Texas' three-tier distribution system was immune from the Commerce Clause challenge even though Texas retailers operating within that State's three-tier system were allowed to do things that out-of-state retailers were not permitted to do. Further, according to the United States Census Bureau, Dallas County had a 2010 population of 2.3 million plus, while Harris County (in which Houston is located) had a 2010 population of 4 million plus.[10] Each of those Texas counties have larger populations than many States.[11] The county versus state-wide distinction plaintiffs rely on did not materially affect the analysis and does not make the Court's reasoning any less applicable here.[12]

The decision in *Byrd* adopted the holding from the Fifth Circuit in *Cooper II*, which expanded on the holding in *Wine Country* that requiring licensed retailers and licensed wholesalers to be present in the state is an inherent aspect of the three-

[10] https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk#.

[11] See information at www.enchantedlearning.com/usa/states/population.shtml.

[12] Plaintiffs' discussion of the Texas statute at issue in *Wine Country*, see page 29, is not accurate. Plaintiffs assert the statute limited Texas retailers to shipping to customers who physically came to the store. In fact, the statute considered there allowed direct shipment to customers within the county without the customers ever coming to the store. 612 F.3d 609, 620.

tier system and is permissible under the Twenty-first Amendment. The Court in *Cooper II* followed that holding and contrasted it with a durational-residency requirement for owners of alcohol beverage retailers and wholesalers, which was found not permissible. The reasoning of the Fifth Circuit, adopted by the Sixth Circuit in *Byrd*, resulted in upholding Texas laws (in *Wine Country*) which allowed in-state Texas retailers (operating in a three-tier system) to ship wine to in-state customers, and which are legally indistinguishable from the Michigan law being challenged in this case. Since the Sixth Court followed the reasoning of the Fifth Circuit in *Wine Country* and in *Cooper II* on the point of physical presence, it would also follow the Fifth Circuit on the closely related point of upholding state laws enforcing the three-tier system with respect to shipment to consumers by licensed in-state retailers.

Plaintiffs rely on *Cherry Hill Vineyards, LLC v Lilly*,[13] and *Jelovsek v Bredesen*, *supra*, both involving wineries (i.e., producers), not retailers or wholesalers. In *Cherry Hill* the Court addressed a Kentucky statute that allowed small farm wineries to ship wine to Kentucky consumers only if the wine was purchased by the consumer in person at the winery. The Court found the statute was discriminatory because it favored wine produced in Kentucky over wine produced in other states. In *Jelovsek* the Court addressed Tennessee's Grape and

[13] 553 F.3d 423 (6th Cir. 2008).

Wine law that included 1) a residency requirement for a winery license; and 2) a provision that allowed Tennessee wineries to ship wine directly to customers if the wineries used a certain percentage of Tennessee-grown grapes in their wine production. The statutory provisions were found discriminatory based, in part, on the language which declared the intent to provide a market for Tennessee grapes and to economically benefit rural areas and the general economy of the State.[14]

The statutes in those two cases were found to violate the Commerce Clause based on a straightforward application of *Granholm* and *Bacchus Imports, Ltd v Dias*.[15] But the holdings do not address or even have a bearing on the issue here, where plaintiffs are now admittedly claiming that because Michigan licensed retailers are allowed to ship wine directly to Michigan consumers, the three-tier system must be abolished under the Commerce Clause.

Plaintiffs argue at length that the three-tier system is not needed where licensed retailers can ship directly to consumers. Plaintiffs ignore the fact that direct shipment of wine by Michigan licensed retailers is just a form of a sale conducted wholly within, and as part of, Michigan's three-tier distribution system. The sales are made by highly regulated in-state retailers who can only sell wine that is registered in Michigan, that is imported into the State by a supplier operating within the three tier system (e.g. a wine supplier having an out-state

[14] 545 F.3d 431, 437-438.
[15] 468 U.S. 623 (1984).

seller of wine license), and purchased from a highly regulated in-state wholesaler (the "funnel" of the three-tier system). The protections provided by these provisions apply to direct shipment sales as much as to in-person sales.

The physical presence requirement for licensed retailers and wholesalers enables regulators (and law enforcement personnel) to conduct stings and physical inspections of the premises and records that must be kept. All, or virtually all, the retailer regulations described in intervening defendants' first brief, pp. 5 through 11, do not become any less important merely because in-state retailers are allowed to ship wine to Michigan consumers.

Intervening defendant relies on its previously filed brief as to plaintiffs' other arguments, and notes that the Privileges and Immunities Clause and the Twenty-first Amendment are part of the same Constitution.

Respectfully submitted,

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Dated: May 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

Respectfully submitted,

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