UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

TANNINS OF INDIANAPOLIS, LLC, et al *Plaintiffs,*	)	
vs.	)	No. 3:19-cv-00504-DJH-CHL
ALLYSON COX TAYLOR, Commissioner, Kentucky Dept. of Alcoholic Beverage Control	)	
DANIEL CAMERON, Attorney General of Kentucky *Defendants*	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CAMERON'S MOTION TO DISMISS

I. Introduction

Plaintiffs are challenging the constitutionality of a Kentucky law that prohibits out-of-state retailers from delivering wine to consumers' homes, but allows in-state retailers to do so.[1] In the age of the internet and the coronavirus, this law gives Kentucky retailers a huge advantage over their out-of-state competitors. The Second Amended Complaint alleges that this difference in treatment discriminates against out-of-state wine retailers in violation of the Commerce Clause and the Privileges and Immunities Clause.

[1] Defendant Cameron's brief misstates the issue. It asserts that the case is about Kentucky's laws regulating the sale of wine within its borders. Def. Brief at 2. The case actually challenges a statute that regulates the interstate shipment of wine.

Since the Complaint was filed, there have been two developments. First, the Kentucky General Assembly repealed the statute requiring one year of residency to apply for a liquor license.[2] This has rendered moot plaintiffs' claim that the denial of licenses to nonresidents violates the Privileges and Immunities Clause (Count II), and plaintiffs do not oppose dismissing it. However, plaintiffs' claim that the ban on home deliveries from out-of-state retailers[3] violates the Commerce Clause (Count I) was not based on the licensing residency rule and so remains viable.

Second, a panel of the Sixth Circuit recently upheld the constitutionality of a similar Michigan statute. *Lebamoff Enterp., Inc. v. Whitmer;* 956 F.3d 863 (6th Cir. 2020). Defendant Cameron contends that this decision forecloses any possibility that plaintiffs' Commerce Clause claim could succeed and has moved to dismiss it on that basis. He is wrong. The Complaint states a valid claim under well established precedent that state liquor laws violate the Commerce Clause if they discriminate against out-of-state interests unless the state can prove that no reasonable nondiscriminatory alternatives exist. *Granholm v. Heald,* 544 U.S. 460, 466, 493 (2005); *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423, 431-32 (6th Cir. 2008). The panel in *Lebamoff* had the power to decide whether the Michigan statute was constitutional under these precedents, but did not have the authority to overrule these precedents or change the law.

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[2] Former KRS § 243.100(1)(f) had limited the issuance of liquor licenses to applicants who had been Kentucky residents for one year. It was repealed by 2020 S.B. 99 § 4.

[3] KRS 244.165(1).

II. Standard of review

The standard for evaluating a motion to dismiss is well settled. The court accepts all well-pleaded facts as true and construes the complaint in the light most favorable to the plaintiff. A court must determine whether the complaint states a plausible claim for relief, "accepting all factual allegations as true." *Torres v. Vitale,* 954 F.3d 866, 871 (6th Cir. 2020). The plausibility standard "does not impose a probability requirement at the pleading stage." *Cagayat v. United Collection Bureau, Inc.*, 952 F.3d 749, 753 (6th Cir. 2020). It simply calls for enough factual allegations to raise a reasonable expectation that discovery will reveal evidence of illegal conduct. *Id.* If resolving the dispute involves a question of fact upon which evidence is required, dismissal on the pleadings is not appropriate. *See Novak v. City of Parma*, 932 F.3d 421, 426-27 (6th Cir. 2019).

III. The Complaint states a valid claim that Kentucky's ban on home deliveries from out-of-state is unconstitutional.

A. The Complaint adequately alleges a violation of the nondiscrimination principle of the Commerce Clause

Plaintiffs are challenging the constitutionality of a Kentucky ABC law that makes it "unlawful for any person in the business of selling alcoholic beverages in another state ... to deliver or ship ... any alcoholic beverage directly to any Kentucky resident." KRS § 244.165(1). The law prohibits the plaintiff Tannins of Indianapolis and other out-of-state retailers from selling and delivering wine to consumers in Kentucky. Compl., ¶¶ 5, 15-17. Only retailers physically located in Kentucky may make home deliveries of wine. KRS § 243.240(1)(b). See Compl. ¶¶ 13, 17. Because

of this law, the plaintiffs have been prevented from engaging in interstate commerce. Compl. ¶¶ 3-5, 18-24. Because Kentucky treats in-state and out-of-state wine retailers differently, the ban on interstate wine deliveries violates the nondiscrimination principle of the Commerce Clause.[4] Compl. ¶ 26.

The Complaint states a cause of action under the precedents of the Supreme Court and this Circuit which have held that the scope of state authority to regulate alcohol under § 2 of the Twenty-first Amendment[5] is limited by the nondiscrimination principle of the Commerce Clause

The Supreme Court held in *Granholm v. Heald* that state liquor laws are usually unconstitutional "if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Granholm v. Heald*, 544 U.S. at 472, because"state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." 544 U.S. at 487. The Twenty-first Amendment "did not give States the authority to ... discriminate against out-of-state goods" or give preferential treatment to their own wine sellers. 544 U.S. at 484-85. Therefore, "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms," 544 U.S. at 493, and "cannot require an out-of-state firm

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[4] "The Congress shall have the power [to] regulate commerce ...among the several states." U.S. CONST., ART. I, § 8, cl. 3. The Clause has long been understood to also have a negative, or dormant, aspect that prohibits states from discriminating against out-of-state business interests. *Huish Detergents, Inc. v. Warren Cnty., Ky.*, 214 F.3d 707, 712-13 (6th Cir.2000).

[5] "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST., AMEND. XXI, § 2.

to become a resident in order to compete." 544 U.S. at 475. The "burden is on the State to show that the discrimination is demonstrably justified [because] nondiscriminatory alternatives will prove unworkable." 544 U.S. at 492-93 (citations omitted). The Court reaffirmed these principles in *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, holding that "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'" 139 S.Ct 2449, 2460 (2019).

Sixth Circuit precedent is the same. State regulation of alcohol "is limited by the nondiscrimination principle of the Commerce Clause. The Twenty-first Amendment "does not displace the rule that States may not give a discriminatory preference" to their own firms, *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 431, nor does it allow "discriminat[ion] against out-of-state goods." *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008). "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms *Id.* If a state liquor law discriminates against out-of-state interests, "it is virtually per se invalid, unless the state can demonstrate that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 432. *Accord, Am. Beverage Assen v. Snyder*, 735 F.3d 362, 370 (6th Cir. 2013). The State's purported justification is given "strict scrutiny analysis." *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 432.

B. The matter cannot be resolved on the pleadings because the State must present evidence that no less discriminatory alternative is available

A discriminatory state liquor law is presumptively unconstitutional. It can be upheld only if the state proves with concrete evidence that it "advances a legitimate local purpose[6] that cannot be adequately served by reasonable nondiscriminatory means." *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 433-34, *quoting Granholm v. Heald*, 544 U.S. at 489. The state's purported justification is given strict scrutiny. *Am. Beverage Assoc. v. Snyder*, 735 F.3d at 369-70. If "a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose.'" *Tenn. Wine & Spirits Retailers Assoc. v. Thomas* 139 S.Ct at 2460. The burden of proof is on the State. It must present evidence that the law "actually promotes public health or safety" and "that nondiscriminatory alternatives would be insufficient to further those interests." *Id.* at 2474. *Accord Granholm v. Heald,* 544 U.S. at 489-90.

These are questions of fact. Concrete evidence is required and the assertions and assurances in the state's briefs "are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine,* 139 S.Ct. at 2474. *Accord Granholm v. Heald*, 544 U.S. at 490 ("concrete evidence" and "clearest showing" required to justify a discriminatory law). When resolving the dispute requires

[6] The Twenty-first Amendment comes back into play at this point. It gives the state an expanded number of legitimate local purposes its ABC code can serve, such as temperance.

evidence, as in this case, dismissal on the pleadings is not appropriate. *See Novak v. City of Parma*, 932 F.3d 421, 426-27 (6th Cir. 2019).

C. *Lebamoff* did not, and could not, overrule controlling Supreme Court and Sixth Circuit precedents

Despite this body of law, Defendant Cameron has moved to dismiss this claim based on a single recent case, *Lebamoff Enterpr., Inc v. Whitmer,* 956 F.3d 863 (6th Cir. 2020), in which the panel upheld a similar Michigan law as being within a state's Twenty-first Amendment authority. He argues that this decision forecloses plaintiffs' Commerce Clause claim. He is wrong.

The *Lebamoff* panel departed from the precedents of the Supreme Court and the Sixth Circuit in several significant ways. It is the only one to hold that the Twenty-first Amendment trumps the Commerce Clause and gave states the authority to discriminate against out-of-state liquor interests and require out-of-state firms to establish physical premises in the state in order to participate in its liquor distribution system.[7] Every other case has held to the contrary that the Twenty-first Amendment "did not give States the authority to ... discriminate against out-of-state goods" or give preferential treatment to their own wine sellers. *Granholm v. Heald,* 544 U.S. at 484-85; *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 431-32;

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[7] This Circuit said in dictum that requiring a retailer to be physically located in the state "may be" an inherent aspect of a three-tier system, *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 622 (6th Cir. 2018) (vacated), but that suggestion was rejected by the Supreme Court which said that physical presence "is not needed to enable the State to maintain oversight over liquor store operators," *Tenn. Wine & Spirits Retailers Assoc. v. Thomas,* 139 S.Ct at 2475, so is not an inherent aspect of the system. The state has to prove that it is necessary.

Jelovsek v. Bredesen, 545 F.3d 431, 436 (6th Cir. 2008). The *Lebamoff* panel determined the constitutionality of the Michigan law by looking only at the Twenty-first Amendment. Every other case holds that the validity of liquor laws that treat in-state and out-of-state interests differently is determined primarily under Commerce Clause principles. *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct 2449 (2019); *Granholm v. Heald,* 544 U.S. 460 (2005); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Bacchus Imports, Inc. v. Dias*, 468 U.S. 263 (1984); *Am. Beverage Assen v. Snyder*, 735 F.3d 362 (6th Cir. 2013); *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008); *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008); *Heald v. Engler,* 342 F.3d 517 (6th Cir. 2003), *aff'd* 544 U.S. 460 (2005).

A panel of the Sixth Circuit obviously cannot overrule Supreme Court precedents. *See Tchankpa v. Ascenda Retail Group, Inc.*, 951 F.3d 805, 815 (6th Cir. 2020). Under those precedents, a state liquor law that treats in-state and out-of-state economic interests differently violates the nondiscrimination principle of the Commerce Clause unless the state can prove that the discrimination is necessary to further a legitimate state interest that could not be advanced by nondiscriminatory alternatives. *Granholm v. Heald*, 544 U.S. at 472, 484-85. The Court could not have been clearer: "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms," 544 U.S. at 493, and it "cannot require an out-of-state firm to become a resident in order to compete." 544 U.S. at 475. *Accord Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. at 2470, 2474-75. Plaintiffs have alleged that the Kentucky law treats in-state and out-of-state wine retailers

differently and does not regulate home delivery of wine on evenhanded terms. Compl. ¶¶ 13, 15, 17. It alleges that Kentucky requires out-of-state retailer to become residents and open physical premises in the state in order to compete. Compl. ¶¶ 15-16. This states a claim under *Granholm*, and to the extent that *Lebamoff* may conflict with *Granholm*, the "Supreme Court case trumps [6th Circuit] precedent, even if we published conflicting opinions after the Supreme Court decision." *Tchankpa,* 951 F.3d at 815-16.

A panel of the Sixth Circuit also cannot nullify the prior decisions of this Circuit. When a recent circuit court decision conflicts with earlier precedent, the "prior decision remains controlling authority," not the more recent one. *Salmi v. Sec'y of HHS*, 774 F.2d 685, 689 (6th Cir. 1985). Only the United States Supreme Court or the Sixth Circuit en banc can overrule prior decisions; a later panel cannot, especially when the precedent has been affirmed by other panels. *Spencer v. Bouchard*, 449 F.3d 721, 726 (6th Cir. 2006). A district court faced with conflicting precedents is bound to follow the earlier decisions because "a subsequent panel may not overrule the decision of a previous panel." *Kepley v. Lanz*, 992 F.Supp.2d 781, 786-87 (W.D. Ky 2014).

If there is any uncertainty about which of two conflicting precedents to follow, the district court must undertake its own review of the opinions and adhere to the ones which engaged in the more thorough and comprehensive analysis. *Kepley v. Lanz*, 992 F.Supp. 2d at 787 n.1. That would be every case other than *Lebamoff*. Every other case considered both the Commerce Clause and the Twenty-first

Amendment. *E.g., Cherry Hill Vineyards v. Lilly,* 553 F.3d at 431. *Lebamoff* considered only the Amendment. The earlier cases critically examined the evidence presented by the State to justify discrimination. *E.g., Granholm v. Heald*, 544 U.S. at 489-93. *Lebamoff* did not. The other cases discussed possible nondiscriminatory alternatives. *E.g., Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. at 2474-76. *Lebamoff* did not. The *Lebamoff* decision is simply an outlier, consistent only with a prior dissenting opinion.[8]

The Complaint states a valid claim under the controlling precedents of the Supreme Court and Sixth Circuit. To the extent that *Lebamoff* deviates from that precedent in its summary or application of the nondiscrimination principle to state liquor laws, it is of no force.

IV. Conclusion

For the foregoing reasons, Defendant Cameron's motion to dismiss the Commerce Clause count of the Second Amended Complaint should be denied.

Respectfully submitted,
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[8] The opinion by Judge Sutton is basically a reworked version of his own dissent in *Byrd v. Tenn. Wine*, 883 F.3d at 628-36, in which he disagreed with controlling precedent.

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020, a copy of the foregoing was filed through the Court's CM/ECF system and was served upon counsel for the defendants via the CM/ECF notification system.

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