IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

B-21 WINES, INC., JUSTIN HAMMER, BOB KUNKLE KUMKLE, MIKE RASH and LILA RASH,	)	No. 3:20CV99
Plaintiffs,	)	
v.	)	REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS
A.D. GUY, JR., Chair, North Carolina Alcoholic Beverage Control Commission, JOSHUA STEIN, Attorney General of North Carolina,	)	
Defendants.	)	

Plaintiffs, a Florida wine retailer and Charlotte wine consumers, claim that North Carolina violates the dormant Commerce Clause by unfairly prohibiting out-of-state retailers from shipping wine to in-state consumers while allowing in-state retailers to do so. Defendants moved to dismiss Plaintiffs' Complaint, arguing that Plaintiffs lack standing, fail to state a viable claim, and have sued Attorney General Stein improperly. Plaintiffs responded to the motion. Defendants now reply.

I. Plaintiffs Lack Standing

Plaintiffs lack standing for two reasons: (1) B-21 Wines has never sought a North Carolina retail permit, rendering its injuries speculative, and (2) Plaintiffs' injuries are not redressable in this litigation. The first issue is adequately addressed in the motion to dismiss; this reply focuses on the second.

If this Court were to find that North Carolina's alcoholic beverage control laws violate the Constitution, any remedy would need to "further limit rather than expand commerce in alcoholic beverages." N.C. Gen. Stat. § 18B-100. Thus, if the Plaintiffs were to prevail, the appropriate remedy would be prohibiting in-state retailers from shipping wine to consumers, not allowing out-of-state retailers to do so. That would not benefit Plaintiffs, who seek expanded wine shipment, so Plaintiffs' alleged injuries are not redressable.

Plaintiffs respond that a state statute cannot "dictate the remedy that a federal court may impose." (Response at 6.) But the Supreme Court has ruled that a state legislature's intent – here memorialized in statute – must guide a federal court's choice of remedy. In *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), the Court considered a challenge to a state tax law, and explained that "[o]n finding unlawful discrimination," a court should "implement what the legislature would have willed had it been apprised of the constitutional

infirmity," in deference to "the State's legislative prerogative." Similarly, in *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), the Court considered a challenge to a state law and wrote that the "touchstone for any decision about remedy is legislative intent."

Plaintiffs next assert that Defendants' argument "cannot possibly be correct" because it would render the state's laws unreviewable. (Response at 6.) In place of legal authority, the response offers a parade of hypotheticals, including one about a state prohibiting out-of-state anglers from fishing in the state's lakes. The examples are fanciful, as the lack of citation to actual statutes or cases demonstrates. By contrast, North Carolina's policy of curing any constitutional concern by "leveling down" would simply prohibit direct-to consumer shipment altogether – a policy that is already the law in many states. (Motion at 10 n.1.) Worse, Plaintiffs' hypotheticals implicate a mishmash of constitutional provisions, governed by different bodies of law, including the First Amendment's Religion Clauses and the Equal Protection Clause. None of the examples involve the Commerce Clause. Square pegs, round hole.

Plaintiffs pejoratively characterize the provisions of N.C. Gen. Stat. § 18B-100 as a "poison pill." It is simply a policy choice by the General Assembly

about a matter within its authority. Because the provision renders Plaintiffs' requested relief unavailable, their purported injuries are not redressable.

II. The Complaint Fails to State a Viable Claim for Relief

Federal courts have repeatedly rejected claims like those advanced by Plaintiffs. The courts have ruled that state laws prohibiting out-of-state retailers from shipping wine to in-state consumers are not unwarranted economic protectionism, but rather prevent each state's alcohol regulations from being undermined by less regulated out-of-state actors. (Motion pp. 15-16, citing federal appellate cases.)[1]

Plaintiffs offer two reasons that the Complaint should not be dismissed. The first is that *Tennessee Wine & Spirits Retailers Ass'n v. Thomas,* __ U.S. __, 139 S. Ct. 2449 (2019), changed the legal landscape, rendering past cases "no longer good law." (Response at 10.) Actually, if a case changed the legal landscape, it was *Granholm v. Heald*, 544 U.S. 460 (2005), which analyzed the interplay between the Twenty-First Amendment and the dormant Commerce

[1] Plaintiffs attempt to distinguish these cases, claiming that in *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), "in-state retailers were not allowed to ship directly to consumers." But the court stated that such retailers "may obtain off-premises licenses permitting them to deliver alcohol directly to consumers' homes." Likewise, Plaintiffs claim that *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), "did not involve retail shipping." But the court stated that the statute at issue "regulates . . . direct shipments to consumers."

Clause. *Granholm* established that while states have broad authority to regulate alcohol, that authority is not unlimited and the dormant Commerce Clause prohibits pure economic protectionism. *Tennessee Wine*, by contrast, was an incremental decision applying *Granholm* to a Tennessee law that imposed lengthy durational residency requirements – up to ten years – on applicants for retail liquor store licenses. The provision in question was plainly protectionist and had nothing to do with shipping alcohol. By contrast, the cases cited in the Motion to Dismiss – all but one decided after *Granholm* – all concern restrictions on the interstate shipment or delivery of alcohol, and all find no dormant Commerce Clause problem.

Lebamoff Enters. v. Whitmer, __ F.3d __, 2020 U.S. App. LEXIS 12745 at *15 (6th Cir. April 21, 2020) is the nail in the coffin for Plaintiffs' claims. *Lebamoff* was decided after *Granholm* and after *Tennessee Wines*. Far from repudiating the line of cases upon which Defendants rely, it cited them with approval and reached the same conclusion. *See id.* at *12 (noting that multiple "courts have permitted the States to prohibit out-of-state direct deliveries as a valid exercise of their Twenty-first Amendment authority," and proceeding to follow those decisions). Tellingly, Plaintiffs' response buries *Lebamoff* in a footnote and does not address its merits.

Plaintiffs' second argument is that whether a state's laws are unfairly discriminatory cannot be determined on a motion to dismiss. But federal courts regularly do so. *See, e.g., LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020) (affirming 12(b)(6) dismissal of a Commerce Clause challenge to Minnesota laws giving certain preferences to incumbent electric power companies); *Doran v. Mass. Tpk. Auth.*, 348 F.3d 315 (1st Cir. 2003) (affirming 12(b)(6) dismissal of a Commerce Clause challenge to certain commuter tolls in Massachusetts). Here, as explained at pages 12-14 of the Memorandum in Support of Defendants' Motion to Dismiss, it is clear that North Carolina's laws preserve the state's legitimate interests in preventing overconsumption; in protecting orderly markets for alcoholic beverages; and in collecting tax revenues at each tier of the system. Given the long line of federal cases rejecting claims like Plaintiffs', dismissal of the Complaint is appropriate.

III. Attorney General Stein Is Not a Proper Party

Plaintiffs sued Attorney General Stein in his official capacity, alleging that he is "generally empowered" to enforce "all state laws." (Compl. ¶ 10.) Defendants pointed out that the Attorney General lacks any particular connection to North Carolina's alcoholic beverage control laws, and so must be

dismissed as a defendant, for "general authority to enforce the laws of the state is an insufficient ground for abrogating Eleventh Amendment immunity." *McBurney v. Cuccinelli*, 616 F.3d 393, 400 (4th Cir. 2010).

Plaintiffs responded with a new theory: that the Attorney General has enforcement authority under 27 U.S.C. § 122a, which empowers an attorney general to seek injunctive relief in federal court against a person violating a state alcohol law. This statute was not cited in the Complaint, and Plaintiffs do not allege that Attorney General Stein has ever relied upon it or threatened to do so. Furthermore, subsection (e) of § 122a, not quoted in Plaintiffs' response, limits an attorney general's authority to enforcing a "law that is a valid exercise of power vested in the States" under the Constitution. This creates a Catch-22 for Plaintiffs: if they are correct that North Carolina's laws are unconstitutional, then Attorney General Stein has no authority under 27 U.S.C. § 122a and he must be dismissed as a defendant, while if the laws are not unconstitutional the Complaint is meritless and should be dismissed entirely.

Whatever options federal law may offer, Attorney General Stein remains constrained by state law. North Carolina law specifically charges the ABC Commission and the Alcohol Law Enforcement Division of the Department of

Public Safety – not the Attorney General – with enforcing the state's alcoholic beverage control laws. *See* N.C. Gen. Stat. § 18B-203(a)(2). Attorney General Stein has no special connection to those laws and enjoys Eleventh Amendment immunity in this case.

CONCLUSION

For these reasons, Defendants' Motion to Dismiss should be granted.

Respectfully submitted, this the 18th day of May, 2020.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this document complies with the 1,500 word limit imposed by this Court's Initial Scheduling Order.

I hereby certify that on May 18, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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