

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT FREEMAN and)
JUDY FREEMAN, WALTER)
HANSEL WINERY, INC.,)
MEYER FRIEDMAN and)
BEVERLY FRIEDMAN,)
)
) HON. KATHARINE HAYDEN, U.S.D.J.
)
) Plaintiffs,)
)
) v.) Civil Action No. 03cv03140(KSH)
)
)
) JAMES E. MCGREEVEY,)
) Governor of New Jersey,)
) PETER C. HARVEY,)
) Attorney General of New)
) Jersey, JERRY FISCHER,)
) Director of the New)
) Jersey Division of,)
) Alcoholic Beverage)
) Control,)
)
)
) Defendants.)

DEFENDANT JERRY FISCHER'S BRIEF IN SUPPORT OF
CROSS-MOTION TO DISMISS AND IN OPPOSITION TO
PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

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STATEMENT OF THE CASE

This case is a challenge to New Jersey's alcoholic beverage laws brought by four New Jersey wine consumers and two out-of-state wineries. Plaintiffs' Amended Complaint alleges that New Jersey's statutory scheme regulating the direct shipment of wine discriminates against them, in violation of the United States Constitution's Commerce Clause, by favoring in-state wineries over out-of-state wineries. Plaintiffs have now brought a Motion for Judgment on the Pleadings, alleging that New Jersey's laws cannot pass muster under the Supreme Court's recent decision in Granholm v. Heald, 125 S.Ct. 1885 (2005). Their arguments are without merit.

In Granholm, the Supreme Court upheld a state's right to regulate the sale and distribution of alcohol within its own borders, but declared unconstitutional state statutes, such as those in Michigan and New York, which contained a disparity favoring in-state over out-of-state wineries with regard to the ability to directly ship wine to consumers. New Jersey's alcoholic beverage law was amended in 2004 to eliminate any disparity between in-state and out-of-state wineries. It now prohibits direct shipment of wine by both.

New Jersey's amended direct shipping law, therefore, satisfies all constitutional requirements set out in Granholm. In a tacit acknowledgment of this, Plaintiffs' motion only vaguely

discusses direct shipment. They now argue issues not pled in the Amended Complaint. These unpled supplemental issues obliquely raised to the court by Plaintiffs, including the operation of multiple retail salesrooms by in-state wineries, were not previously the basis of the New Jersey litigation, and constitute an entirely new cause of action. Thus, they must be dismissed by the court.

For these reasons, Defendant Jerry Fischer opposes Plaintiffs' motion and cross-moves to dismiss Plaintiffs' Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6), since the substantive claims in the Amended Complaint centered on the disparity between in-state and out-of-state wineries regarding direct shipping, and that disparity no longer exists. Any unpled supplemental claims must not be considered by the court.

In the alternative, if the court does not grant his Motion to Dismiss, Defendant Jerry Fischer urges the court to deny Plaintiffs' Motion for Judgment on the Pleadings, since Plaintiffs have not shown that they are entitled to judgment as a matter of law. Furthermore, their new unpled supplemental claims, if considered by the court, raise new factual allegations which Defendant Fischer is entitled to explore through additional discovery.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

This case was filed on July 17, 2003 as a civil rights action pursuant to 42 U.S.C. 1983, challenging the constitutionality of the New Jersey Alcoholic Beverage Control Act, N.J.S.A. 33:1-1, et seq. Plaintiffs filed an Amended Complaint on July 21, 2003. The Amended Complaint seeks declaratory and injunctive relief, claiming that the direct shipping provisions of New Jersey's alcoholic beverage law are unconstitutional. This is the sole relief sought.

Two groups of plaintiffs join in this case: (1) the "Consumer Plaintiffs", New Jersey residents Robert and Judy Freeman and Meyer and Beverly Friedman, and (2) the "Winery Plaintiffs", Walter Hansel Winery of California and Oliver Wine Company of Indiana. The Consumer Plaintiffs complain that some wines they wish to purchase and have delivered are unavailable in the State and they are prohibited from ordering these wines for delivery from out-of-state wineries because of New Jersey's ban on interstate direct shipping (Complaint, Paragraph 20).²

¹ Since the Statement of Facts and Procedural History are closely interwoven, they are stated together for the convenience of the court and to avoid repetition.

²Since this is a cross-motion to dismiss, the factual allegations set forth in the Amended Complaint will be accepted as true. However, their use for purposes of this cross-motion should not be deemed an admission by Defendant Jerry Fischer. Defendant Fischer specifically reserves the right to contest all facts in later proceedings, should his cross-motion be denied.

Plaintiffs allege that New Jersey's laws prohibiting direct shipment of wine only apply to interstate shipment and not intrastate shipment of wine, thus these laws violate the United States Constitution's Commerce Clause. Further, the Amended Complaint states that the Winery Plaintiffs intend to ship wines directly to New Jersey consumers if the state law restrictions against interstate direct shipments are removed or declared unconstitutional (Amended Complaint, Paragraph 13).³

Plaintiffs originally named as defendants Governor James E. McGreevey, in his official capacity as Governor of the State of New Jersey, Peter C. Harvey, in his official capacity as Attorney General of the State of New Jersey and Jerry Fischer, in his official capacity as the Director of the Division of Alcoholic Beverage Control, Department of Law and Public Safety.

Defendants Governor James McGreevey and Attorney General Peter C. Harvey filed a motion to dismiss on October 30, 2003. Plaintiffs consented to the dismissal of the Governor and Attorney General and they were dismissed from this case by court order on November 21, 2003. Defendant Jerry Fischer filed his

³ Interestingly, Plaintiffs indicate that Winery Plaintiff Oliver Wine Company, Inc., based in Indiana, intends to ship wine into the State of New Jersey, even though it is clear that such shipment would violate Indiana's own laws, which prohibit all shipping from its wineries. See Indiana Code Sec. 7.1-3-12.5.

Answer on November 29, 2003 and an Amended Answer on June 7, 2004. Thereafter, discovery proceeded and centered on direct shipping issues, since this was the sole relief requested in the Amended Complaint.

As the instant litigation progressed, the Supreme Court granted certiorari in Granholm v. Heald, 541 U.S. 1062 (2004), two consolidated cases that presented a single issue surrounding the constitutionality of laws of Michigan and New York banning the direct shipping of alcoholic beverages, based on the Commerce Clause. Thereafter, on June 7, 2004, this court ordered that the New Jersey case be administratively terminated based on the similarity of this case to that being reviewed by the Supreme Court, without prejudice to the right of the parties to move before the court to reopen the proceedings.

While the Supreme Court case was pending, the State of New Jersey enacted legislation that rescinded the authority of New Jersey's in-state wineries to ship directly to consumers. See P.L. 2004, c. 102 (July 14, 2004). This removed any disparity in treatment between in-state and out-of-state wineries, since both are now prohibited from shipping directly to New Jersey consumers. Thereafter, the Supreme Court issued its opinion in Granholm v. Heald, 125 S.Ct. 1885 (2005).

In Granholm, the Supreme Court upheld a state's right to regulate the sale and distribution of alcohol within its own

borders, but declared unconstitutional state statutes, such as those in Michigan and New York, which contained a disparity favoring in-state over out-of-state wineries with regard to the ability to directly ship wine to consumers. Id. at 1891.

Upon this court's order, Plaintiffs filed a letter on July 14, 2005, requesting that the court reopen this matter and allow Plaintiffs to file a Motion for Judgment on the Pleadings. Defendant Jerry Fischer filed his response on July 26, 2005. The court reopened the case by order dated August 3, 2005 and allowed Plaintiffs to file their motion. Thereafter, Plaintiffs filed a Motion for Judgment on the Pleadings, claiming that New Jersey's laws cannot pass muster under Granholm (Pb9).⁴

In response, Defendant Jerry Fischer now cross-moves to dismiss Plaintiffs' Amended Complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)6. In the alternative, Defendant urges the court to deny Plaintiffs' Motion for Judgment on the Pleadings.

⁴ Pb refers to Plaintiffs' brief.
Db refers to Defendant's brief.

ARGUMENT

POINT I

PLAINTIFFS' AMENDED COMPLAINT MUST BE DISMISSED
BECAUSE PLAINTIFFS HAVE FAILED TO STATE
A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND
THEIR CAUSE OF ACTION IS NOW MOOT.

A. STANDARD OF REVIEW.

Defendant Jerry Fischer cross-moves to dismiss Plaintiffs' Amended Complaint for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 12(b)(6) governs such motions. Rudolph v. Adamar of New Jersey, Inc., 153 F.Supp.2d 528, 533 (D.N.J. 2001). "In considering a Rule 12(b)(6) motion, the Court may dismiss a complaint if it appears certain the plaintiff cannot prove any set of facts in support of its claims which would entitle it to relief." Mruz v. Caring, Inc., 39 F.Supp.2d 495, 500 (D.N.J. 1999), citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

"While all well-pled allegations are accepted as true and reasonable inferences are drawn in the plaintiff's favor, the Court may dismiss a complaint where, under any set of facts which could be shown to be consistent with a complaint, the plaintiff is not entitled to relief." Ibid., citing Gomez v. Toledo, 446 U.S. 635, 636, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); Schrod v. Patterson, 948 F.2d 1402, 1405 (3d Cir. 1991); Markowitz v.

Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); see also Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

B. PLAINTIFFS' AMENDED COMPLAINT DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A review of Plaintiffs' Amended Complaint evidences no claim that can support the relief they are seeking. Plaintiffs contend that they are seeking a declaratory judgment that New Jersey's laws and regulations as applied to shipments of wine originating out-of-state violate the Commerce Clause of the United States Constitution. Thus, they request an injunction against the law's enforcement (Amended Complaint, Paragraph 1). In their various "Commerce Clause Violation" counts, Plaintiffs allege that the State of New Jersey has enacted prohibitions which prevent the Consumer Plaintiffs from purchasing wine from out-of-state retailers and wineries and having it shipped to their residences within the State of New Jersey (Amended Complaint, Paragraph 21). Plaintiffs also state that the Winery Plaintiffs intend to ship wines directly to New Jersey consumers if the State law restrictions against interstate direct shipments are removed or declared unconstitutional (Amended Complaint, Paragraph 13).

The Amended Complaint's request for relief similarly asks the court to enter judgment declaring New Jersey's statutes and

regulations unconstitutional "as applied to preventing direct shipment of wine to New Jersey residents from out-of-state wineries and retailers as a violation of the Commerce Clause of the United States Constitution" (Amended Complaint, Request for Relief, Sec. A). Plaintiffs also ask the court to enter judgment declaring unconstitutional the State's law and regulations regarding permits, residency requirements, excise taxes, and the prohibition of delivery from out-of-state suppliers (Amended Complaint, Request for Relief, Sec. B, C and D).

The gravamen of Plaintiffs' Amended Complaint is their claim that New Jersey's statutory scheme violates the Commerce Clause of the United States Constitution. New Jersey law, at the time this pleading was filed in 2003, prevented direct shipping by out-of-state wineries, yet allowed such direct shipping by in-state wineries. Plaintiffs have not articulated in their Amended Complaint any allegation, nor any request for relief, that does not have its origins in their theory that New Jersey law violates the Commerce Clause based on a disparity between the regulation of in-state and out-of-state shipping. Indeed, the discovery completed thus far in this case centered only on the issue of direct shipment.

Subsequent to the filing of Plaintiffs' Amended Complaint, the State of New Jersey enacted legislation which rescinded the authority of in-state wineries to ship directly to consumers.

See P.L. 2004, c. 102 (July 14, 2004)⁵. Thus, the allegedly unconstitutional disparity between in-state and out-of-state wineries with respect to direct shipment of wine that was the subject of the Amended Complaint no longer exists. Likewise, the relief the Amended Complaint requests, judgment that New Jersey law violates the Commerce Clause by differentiating between the ability of in-state and out-of-state wineries to ship to New Jersey consumers, and an injunction prohibiting Director Fischer from enforcing such laws, is moot.

Indeed, the recent Supreme Court discussion of direct shipping in Granholm v. Heald, 125 S.Ct. 1885 (2005) supports Defendant Jerry Fischer's Cross-Motion to Dismiss. In Granholm, the Supreme Court upheld a state's right to regulate the sale and distribution of alcohol within its own borders, but declared unconstitutional state statutes which contained a disparity favoring in-state over out-of-state wineries with regard to the ability to directly ship wine to consumers. The New Jersey Alcoholic Beverage Control Act, based upon the legislation enacted in July 2004, has eliminated any such disparity. Thus,

⁵In their brief, Plaintiffs repeatedly claim that New Jersey in-state wineries can ship and deliver products to New Jersey residents (Pb7). However, this right was specifically rescinded by P.L. 2004, c. 102. N.J.A.C. 13:2-20.3(b), the regulatory section which implemented in-state wineries' shipping, now without statutory authority, is void and being repealed. See 37 N.J.R. 3221 (September 6, 2005).

it satisfies all constitutional requirements set out in Granholm. Consequently, Plaintiffs' Amended Complaint must be dismissed for failure to state a claim upon which relief can be granted.

Fed.R.Civ.P. 12(b)(6).

C. THE AMENDED COMPLAINT IS A REQUEST FOR DECLARATORY JUDGMENT REGARDING A NEW JERSEY STATUTORY PROVISION THAT HAS BEEN REPEALED AND THUS SHOULD BE DISMISSED AS MOOT.

The 2004 legislative change of New Jersey law removing the in-state wineries' ability to ship, changed the very statutory scheme regarding direct shipping which was the subject of the Amended Complaint. "A request for declaratory judgment that a statutory provision is invalid is moot if the provision has been substantially amended or repealed." Nextel Partners, Inc. v. Kingston, 286 F.3d. 687, 693 (3d Cir. 2002) (intervening amendments to an ordinance that was challenged as inconsistent with the Telecommunications Act mooted suit). Since the statutory section of which Plaintiffs complained no longer exists, Plaintiffs' Amended Complaint must be dismissed as moot.

D. THE UNPLED SUPPLEMENTAL ISSUES NOW OBLIQUELY RAISED BY PLAINTIFFS WERE NOT PREVIOUSLY THE BASIS OF THE NEW JERSEY LITIGATION, CONSTITUTE AN ENTIRELY NEW CAUSE OF ACTION, AND MUST BE DISMISSED.

Recently, perhaps in recognition that their direct shipment claim is no longer viable, Plaintiffs have attempted to graft new allegations into the litigation. Specifically, in their letter dated July 14, 2005 and their brief in support of their Motion for Judgment on the Pleadings (Pb7), Plaintiffs obliquely raise additional broad issues, including the operation of multiple salesrooms and the ability of in-state wineries to sell to retailers without going through a wholesaler. These issues were not previously the basis of the New Jersey litigation and constitute an entirely new cause of action not originally pled in the Amended Complaint. Thus, the Amended Complaint must be dismissed.

The pleading requirements of the Federal Rules of Civil Procedure require "a short and plain statement of the claim." Fed.R.Civ.P. 8(a)(2). Yet, even in these days of notice pleadings, a complaint must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S. 41 (1957); Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002).

Plaintiffs' Amended Complaint makes no factual allegations regarding retail sales rooms or in-state wineries' ability to

sell to retailers. There are no allegations in the Amended Complaint that the Winery Plaintiffs have an interest in selling to retailers in the State of New Jersey or have made an application for such a privilege. Furthermore, the Consumer Plaintiffs have no standing to complain regarding these issues. The only factual allegations made in the Amended Complaint focus on the issue of direct shipping.

Thus, Plaintiffs' attempt to claim unpled supplemental causes of action regarding issues other than direct shipping pushes the liberal pleading standards beyond their limits. The Third Circuit has held that an entirely new claim for relief presented in a brief does not constitute an amendment to the pleadings. Mele v. Federal Reserve Bank of New York, 359 F.3d 251, 257 (3d Cir. 2004). Because these vague supplemental issues do not meet the pleading requirements of Rule 8(a), Plaintiffs' Amended Complaint must be dismissed.

POINT II

THE PULLMAN ABSTENTION DOCTRINE MANDATES
THAT ANY SUPPLEMENTARY ALLEGATIONS MADE
BY PLAINTIFFS MUST BE DISMISSED.

The allegations in Plaintiffs' Amended Complaint and their request for relief center solely on their Commerce Clause concerns regarding New Jersey's ban on direct shipping from out-of-state wineries compared to the State's former statutory permission for direct shipping by in-state wineries. In light of Granholm and the change in New Jersey's statute, which now denies direct shipping privileges to in-state as well as out-of-state wineries, New Jersey's Alcoholic Beverage Control law clearly passes constitutional muster and renders Plaintiffs' cause of action moot. See Point I above (Db7).

In recent submissions to the court, Plaintiffs appear to be attempting to insert new unpled allegations into this litigation. However, the court should decline any consideration of these unpled supplemental issues based on the doctrine of Pullman abstention, which takes its name from the Supreme Court's seminal opinion in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

In Pullman, the Supreme Court held that federal courts should not interfere when a state action may obviate a federal

question. Indeed, Pullman abstention comes into play when the challenged law is susceptible of a construction by state court that would eliminate the need to reach the federal question. GTE North v. Strand, 209 F.3d 909, 921 (6th Cir. 2000), citing Babbitt v. United Farm Workers National Union, 442 U.S. 289, 306 (1979).

The Pullman analysis focuses on determining whether three "special circumstances" exist: (1) There are uncertain issues of state law underlying the federal constitutional claims brought in federal court; (2) The state law issues are amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims; and (3) A federal court's erroneous construction of state law would be disruptive of important state policies. Chez Sez III Corp. v. Township of Union, 945 F.2d 628, 631 (3d Cir. 1991).

In this case, requirements for Pullman abstention have been met. The first two Pullman prongs turn on the existence of unclear issues of state law and the state court's ability to interpret state law to obviate or narrow the scope of constitutional claims. Plaintiffs' Amended Complaint is suffused with allegations concerning New Jersey's direct shipment laws. However, these claims are rendered moot by Granholm and the statutory change. See Point I above (Db7). The unpled

supplemental claims currently raised by Plaintiffs in their brief (Pb8), appear to be based on areas of New Jersey law related to issues such as the extent of in-state wineries' privileges and their place in the three-tier system.⁶ Defendant Jerry Fischer's Second Affirmative Defense states that New Jersey's alcoholic beverage law, which includes the three-tier system, is constitutional. Plaintiffs' unpled vague claims appear to be an attack on New Jersey's three-tier system of alcoholic beverage regulation. New Jersey State courts are better able to settle disputes regarding the statutory meaning and authority of New Jersey's alcoholic beverage laws. Thus, any consideration of these unpled supplemental claims would meet the first two Pullman prongs.

The third Pullman prong is invoked when a federal court's erroneous construction of state law would be disruptive of important state policies. The State of New Jersey has clearly enunciated its position on direct shipment by recently rescinding the in-state wineries' shipping privileges to safeguard the State's direct shipping ban. The Legislative statement to P.L. 2004, c. 102 (July 14, 2004) clearly emphasizes the State's policy to prohibit direct shipping. The statement proclaims that

⁶Because Defendant Fischer was not apprised of these unpled supplemental claims until Plaintiffs' recent submissions to the court, he has had no opportunity for discovery on these claims and is limited to Plaintiffs' abbreviated description of them.

[t]he Twenty-first Amendment of the Constitution of the United States empowers the states to control the sale and consumption of alcoholic beverages within their boundaries in order to protect and promote public safety. Upon the repeal of Prohibition, New Jersey enacted a statutory distribution scheme utilizing a three-tiered system to regulate the sale and shipment of alcoholic beverages into the State. Recently, Internet and telephone solicitations have increasingly been employed to sell alcoholic beverages, requiring little more than a shipping address and a credit card. These types of sales effectively bypass the State's three-tier statutory distribution system, and deny consumers the protections provided by this system.

If this court mistakenly construes New Jersey's alcoholic beverage laws, based on vague allegations not previously pled, policies clearly important to the State of New Jersey would be compromised. Hence, the third Pullman prong is also present in this case.

Since all of the prongs have been met, an analysis based on the Pullman abstention doctrine mandates that this court should decline any consideration of the unpled supplemental allegations made by Plaintiffs and such claims must be dismissed.

POINT III

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE DENIED BECAUSE PLAINTIFFS CANNOT PREVAIL AS A MATTER OF LAW ON THE CAUSES OF ACTION RAISED IN THEIR AMENDED COMPLAINT AND DEFENDANT JERRY FISCHER'S ANSWER RAISES VIABLE DEFENSES.

A. STANDARD OF REVIEW.

Plaintiffs have filed a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). According to this rule, such a motion may be filed after the pleadings have closed. The pleadings consist of the plaintiff's complaint and the defendant's answer, and are not closed until an answer is filed. Fed.R.Civ.P. 7(a); Poliquin v. Heckler, 597 F.Supp. 1004, 1006 (D. Me. 1984).

On a Rule 12(c) motion, the facts are to be viewed in the light most favorable to the nonmoving party; the facts asserted in the nonmoving party's pleadings will be accepted as true; and any contradictory statements in the movant's pleadings are deemed false. Constitution Bank v. DiMarco, 815 F.Supp. 154, 157 (E.D. Pa. 1993). To prevail, the moving party must show that there are no genuine issues of fact and that he is entitled to judgment as a matter of law. Mele v. Federal Reserve Bank of New York, 359 F.3d 251, 253 (3d Cir. 2004), citing Leamer v. Fauver, 288 F.3d 532, 535 (3d Cir. 2002).

Judgment on the pleadings is appropriate only when "all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." 5C Charles Alan Wright & Arthur Miller, Federal Practice and Procedure §§ 1367.

B. PLAINTIFFS' RULE 12(c) MOTION MUST BE DENIED BECAUSE THEY CANNOT SHOW THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The landscape upon which to view Plaintiffs' original cause of action has radically changed since they filed their Amended Complaint in July 2003. In their Amended Complaint, Plaintiffs contended that the New Jersey law, which allowed in-state wineries to directly ship their product to New Jersey customers, while banning such direct shipments from out-of-state wineries, was unconstitutional. As this litigation proceeded, the Supreme Court granted certiorari in a case that this court's June 7, 2004 Order states "presents a legal issue identical to the one presented in this case." While the Supreme Court case was pending, New Jersey enacted legislation which took away the authority of in-state wineries to ship directly to consumers. See P.L. 2004, c. 102 (July 14, 2004). This removed any disparity in treatment between in-state and out-of-state wineries, since both are now prohibited from shipping directly to

New Jersey consumers. Thereafter, the Supreme Court issued its opinion in Granholm v. Heald, 125 S.Ct. 1885 (2005).

In Granholm, the Supreme Court upheld a state's right to regulate the sale and distribution of alcohol within its own borders, but declared unconstitutional state statutes which contained a disparity favoring in-state wineries over out-of-state wineries with regard to the ability to directly ship wine to consumers. The New Jersey Alcoholic Beverage Control Act, based upon the legislation enacted in July 2004, has eliminated any such disparity.

In his opinion in Granholm, Justice Kennedy cited with approval the statement that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." Granholm, 125 S.Ct. at 1905 (citations omitted). Justice Kennedy added: "States have broad power to regulate liquor under Sec. 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." Granholm, 125 S.Ct. at 1907.

In Granholm, the Supreme Court specifically outlined the issue it was deciding by declaring: "The petitions for writs of certiorari are granted limited to the following Question: Does a State's regulatory scheme that permits in-state wineries to directly ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?" 541 U.S. 1062 (2004); Granholm, 125 S.Ct. at 1895. Furthermore, the factual scenario described by the Supreme Court in Granholm focused on the Federal Trade Commission report regarding internet shipping of wine, and other information regarding shipping into the various states in light of the Commerce Clause. It was shipping that was decided in Granholm, not multiple salesrooms or sales to retailers by wineries. Indeed, unlike the broad assertions and sweeping generalizations made by Plaintiffs in their brief in support of their motion (Pb6), Granholm does not stand for the proposition that consumers and out-of-state wineries have a right to import, only that in-state and out-of-state wineries must have equal access to direct shipment privileges.

A broader reading of the Granholm opinion is contrary to Supreme Court doctrine. Indeed, it has long been the Supreme Court's considered practice not to decide abstract, *hypothetical* or *contingent* questions, or to decide any constitutional question *in advance* of the necessity for its decision. Alabama State

Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389-1390, 89 L.Ed. 1725 (1945) (emphasis added). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." Spector Motor Service v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944); Burton v. United States, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482 (1905). The Supreme Court has also made clear in these cases that this doctrine of avoidance applies to the entire federal judiciary, not just the Supreme Court.

Moreover, the parties themselves previously advised the court that the issue in the New Jersey litigation was identical to that before by the Supreme Court, as noted in the court's June 7, 2004 Order. Indeed, the Request for Relief in Plaintiffs' Amended Complaint and the discovery completed thus far in this matter emphasize that the litigation centers on direct shipment.

Thus, an analysis of the current New Jersey statutes using the standard set out in Granholm supports Director Fischer's request that the Amended Complaint be dismissed. In the alternative, if the court does not grant his Motion to Dismiss, Defendant Jerry Fischer urges the court to deny Plaintiffs' Motion for Judgment on the Pleadings, since Plaintiffs have not

shown that they are entitled to judgment as a matter of law.⁷ Furthermore, their new unpled supplemental claims, if considered by the court, raise new factual allegations which Defendant Fischer is entitled to explore through additional discovery.

C. PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS MUST BE DENIED BECAUSE THERE ARE UNKNOWN FACTS SURROUNDING PLAINTIFFS' RECENTLY ASSERTED UNPLED CLAIMS AND DEFENDANT JERRY FISCHER'S ANSWER PRESENTS VIABLE DEFENSES.

Plaintiffs broadly alleged in their July 14, 2005 letter that, even though the legislation has leveled the playing field in New Jersey with regard to shipping, the State's laws "discriminate against out-of-state wineries in other respects," without indicating what aspects of non-shipping activities are discriminatory and what remedy they are seeking. Likewise, Plaintiffs allege in their brief in support of their motion that New Jersey laws disadvantage out-of-state wineries and give in-state wineries access to New Jersey customers on preferential terms (Pb7). However, there is no nexus between the internet direct shipping claims asserted by Plaintiffs in their Amended Complaint, as well as the relief sought therein, and Plaintiffs' newly asserted unpled supplemental issues regarding wine outlets and distribution.

⁷Indeed, Plaintiffs acknowledge that New Jersey's law differs from the Michigan and New York laws struck down by the Supreme Court in Granholm (Pb9).

Plaintiffs' Amended Complaint was filed over two years ago. Discovery has commenced, focusing exclusively on issues related to direct shipment. Until the filing of their letter intimating these unpled supplemental claims two months ago, Plaintiffs remained silent regarding any of these other issues. Indeed, Plaintiffs have still not set out the basic allegations related to any claim other than direct shipment. Are they claiming unconstitutional disparity based on the Commerce Clause with regard to the retail outlets of New Jersey's farm and plenary wineries? What remedy are they seeking now that direct shipping is no longer viable? The answers to these questions remain a mystery, and the Amended Complaint provides no response. See Point I above (Db7).

The new unpled issues intimated in Plaintiffs' brief appear to focus on retailing and wholesaling regulation, which are within the purview of the State's three-tier system of regulation. In Granholm, Justice Kennedy, writing for the majority, noted that three-tier systems of alcohol regulation, such as that enacted by the State of New Jersey, are "unquestionably legitimate." Granholm, 125 S.Ct. at 1905. In the opinion, the Court upheld a state's right to protect its residents and watch over the way alcohol is sold and distributed within its borders.

Defendant Jerry Fischer's Second Affirmative Defense states that New Jersey's alcoholic beverage law, which includes the three-tier system, is constitutional. Plaintiffs' unpled vague claims appear to be an attack on New Jersey's three-tier system of alcoholic beverage regulation. If the new unpled allegations implicit in Plaintiffs' recent submissions are even considered by this court, on the face of the pleadings (which is all the court is to consider on a Rule 12(c) motion), there is evidence of facts in dispute.

Since Plaintiffs seem to be asking for judgment on claims not properly pled, Defendant Fischer cannot know enough information to begin to analyze the factual issues surrounding Plaintiffs' claims. These factual issues are as basic as what the claims are and who is asserting them. Until discovery is conducted as to these unpled supplemental claims, Defendant Jerry Fischer continues to be denied the opportunity to interpose additional defenses and determine which facts are controverted.

Moreover, as an issue of enormous public importance, this matter is not appropriate for a motion for judgment on the pleadings. See Point II above (Db14). Additionally, fundamental fairness dictates that Director Fischer must be apprised of the allegations against him and the remedy being sought. Thus, Director Fischer must have the right to new interrogatories, supplemental depositions and additional economic reports.

Plaintiffs' Motion for Judgment on the Pleadings cannot meet the heavy burden set out in Rule 12(c). If this court decides to entertain Plaintiffs' unpled supplemental claims, there are material facts still unknown. Because there are unknown facts surrounding Plaintiffs' recently asserted unpled claims, and since Defendant Jerry Fischer presents viable defenses, Plaintiffs' Motion for Judgment on the Pleadings must be denied.

RESPONSE TO CROSS-MOTIONS TO INTERVENE

Defendant Jerry Fischer, Director of the New Jersey Division of Alcoholic Beverage Control, respectfully advises the court that he does not object to the Cross-Motions to Intervene of R&R Marketing, LLC, Fedway Associates, Inc., and Allied Beverage Group, LLC. He consents to the filing of their proposed Answers to the Amended Complaint, as well as their proposed briefs in Opposition to Plaintiffs' Motion for Judgment on the Pleadings and in support of Defendant's Cross-Motion. Defendant Jerry Fischer is not in disagreement with the arguments submitted by these parties.

