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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
NO. 3:05-cv-00289-CRS

HUBER WINERY, et al

PLAINTIFFS

v.

LaJUANA S. WILCHER, et al

DEFENDANTS

and

WINE AND SPIRITS WHOLESALERS
OF KENTUCKY, INC.

INTERVENOR DEFENDANT

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION
FOR LEAVE TO FILE AMENDED COMPLAINT

Come Defendants, LaJuana S. Wilcher and Lavoyed Hudgins, in their official capacities as Secretary of the Environmental and Public Protection Cabinet, and Executive Director of the Kentucky Office of Alcoholic Beverage Control, respectively (hereafter collectively referred to as "State Defendants"), by counsel, and for their Response to Plaintiffs' Motion for Leave to File Amended Complaint, state as follows:

Plaintiffs have asked the Court to grant them leave to amend their Complaint to add an additional Plaintiff: Cherry Hill Winery (Cherry Hill) from Oregon. Plaintiffs seek this addition "because of certain restrictions against interstate sales found in the Indiana liquor licensing statutes." Plaintiffs' Motion for Leave to Amend, D.E. 38, p. 1. This clear tacit admission shows the truth behind State Defendants' standing arguments: Huber lacks standing or else Plaintiffs would not seek to amend the Complaint. In an attempt to avoid dismissal (the only legal conclusion that can result by their admission), plaintiffs' attorneys now attempt to avoid dismissal by searching and finding new plaintiffs to inject into the lawsuit.

To begin, Plaintiffs do not explain their procedurally irregular motion, especially given their failure to follow F.R.Civ.P. 20, regarding permissive joinder of parties. This rule, which is the proper vehicle to add a party, requires (1) that the causes of action of the joined parties arise out of the same transaction or occurrence and (2) that common questions of law and fact will arise in the litigation. *See Desert Empire Bank v. Insurance Co. of N. America*, 623 F.2d 1371, 1375 (9th Cir. 1980). Obviously, as there has been no act by the ABC against either Huber or Cherry Hill, there is no transaction or occurrence about which the parties may complain. Realizing that F.R.Civ.P. 20 would not allow the joinder of Cherry Hill, Plaintiffs' finesse the issue and seek its addition under F.R.Civ.P. 15's amendment provisions.

Laying aside the procedural irregularity of Plaintiff's Motion to Amend, the subject matter jurisdiction issues raised by State Defendants in their Motion to Dismiss apply equally to Cherry Hill. Cherry Hill has not alleged that it has applied for any winery license in Kentucky. Given the current enforcement posture of the Kentucky Office of Alcoholic Beverage Control (ABC) as to KRS 244.165 and 243.032, about which the State Defendants have repeatedly informed the Court in pleadings, state statutes could be applied so as to allow out-of-state small wineries to be eligible for a winery license. Of course, no one can say what the licensing process would allow or disallow for the new would-be Plaintiff Cherry Hill since it, like Huber Winery, has never applied for a license. Moreover, Cherry Hill has not alleged that the ABC has ever threatened enforcement of KRS 244.165 and 243.032 against it. Cherry Hill has not alleged the ABC has sent it a cease and desist letter, or that it has threatened to hold an administrative hearing to determine if it had violated KRS 244.165 and 243.032. See 804 KAR 4:330. Indeed, Cherry Hill has not alleged that it has even shipped wine into the Commonwealth of Kentucky (given its web page, attached as Exhibit 1 to D.E. 43, Cherry Hill probably never has shipped

wine into Kentucky). This failure to plead critical facts again highlights the lack of subject matter jurisdiction confronting the would-be Plaintiffs in this case given their rush to the courthouse.

For instance, if Cherry Hill produces more than 50,000 gallons of wine annually, it would not be eligible for a Kentucky small or farm winery license. In that event, no commerce clause discrimination could occur. In-state wineries that produce over 50,000 gallons of wine annually are forbidden from selling to anyone other than a licensed wholesaler. Cherry Hill, if it produces over 50,000 gallons of wine, is, and will continue to be, treated equally to in-state competitors (*i.e.*, it may sell in Kentucky but only through a licensed wholesaler). *Granholm* is in no way offended by this evenhanded application of Kentucky law. If, on the other hand, Cherry Hill produces less than 50,000 gallons of wine annually, it still will not have suffered requisite injury-in-fact. Cherry Hill has not applied for a license. Neither has it been threatened with administrative or criminal enforcement of Kentucky's alcoholic beverage control laws. It, therefore, like Huber, lacks standing.

F.R.Civ.P. 15 (which is really the wrong rule for entertaining Plaintiff's Motion), a Court should grant leave to amend a complaint freely. *Jet Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 425 (6th Cir. 1999). However, at least four situations exist whereby a court should not grant leave to amend a complaint: futility of the amendment; bad faith or dilatory motive; repeated failure to act; and undue prejudice to the non-movant. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Additionally, courts have denied the addition of a party to cure a lack of subject matter jurisdiction problem. *See Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775-776 (5th Cir. 1986); *Summit Office Park, Inc. v. United States Steel Corp.*, 639 F.2d 1278, 1282-1283 (5th Cir. 1981). Of these five reasons, four of the above require the Court to dismiss the present motion.

Only repeated failure to act is inapplicable. Moreover, because futility and subject matter jurisdiction are closely aligned, and because motive and undue prejudice are also aligned, the following discussion weaves these matters into a coherent whole revealing that Plaintiff's Motion should be denied.

The State Defendants' pending Motion to Dismiss based upon the lack of subject matter jurisdiction renders Plaintiffs' instant Motion futile. *See Neighborhood Development Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir. 1980)(holding that an amended complaint will be considered futile if it cannot withstand a motion to dismiss on subject matter jurisdiction grounds). Plaintiffs admit that they seek to add Cherry Hill as a party because of Indiana's legal restrictions on the exportation of wine. However, State Defendants' Motion to Dismiss against Huber concerned more than Indiana's legal limitations on domestic winery exports. The Motion raises Huber's lack of standing, because of a number of problems, the most important of which include the ABC's enforcement posture (post-*Granholm*), ripeness and abstention.

These same problems apply equally to the new prospective co-Plaintiff Cherry Hill. The ABC has no enforcement action pending or threatened against Cherry Hill. This type of injury is essential for injury-in-fact. Ripeness is also applicable; Cherry Hill has not alleged that it applied for a Kentucky license to sell wine. If shipment of wine into Kentucky was of paramount importance, Cherry Hill should have made some attempt to apply for any applicable licenses. In truth, Cherry Hill's lack of standing is no different than Plaintiff Huber Winery's as previously briefed in the State Defendants' pending Motion to Dismiss, with the exception of Cherry Hill's location, *i.e.*, the State of Oregon, whose laws may or may not have similar

exportation limitations as Indiana's. For these reasons, the Court should deny the Motion to Amend as futile.

Moreover, Federal courts have a long standing rule that an amendment to a pleading may not cure defective allegations in a complaint. *See* 28 U.S.C. § 1653. The Supreme Court, however, has interpreted this statute as forbidding amendments to remedy actual jurisdictional defects. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831-832 (1989); *Jones v. Knox Exploration Corp.*, 2 F.3d 181, 183 (6th Cir. 1993). In other words, Huber could amend its Complaint to include allegations that the ABC had threatened to enforce KRS 244.165 against it (if this was in fact the case). Or Huber could amend its Complaint to allege how it has suffered injury-in-fact (assuming it has actually suffered such injury, which it has not). Or finally, Huber could amend its Complaint to show how Indiana's alcohol enforcement authorities allow for shipment of wine to out-of-state places such as Kentucky (assuming such was actually the case, but it is not).

However, 28 U.S.C. § 1653, and the cases interpreting it, do not allow Plaintiffs to substitute an additional party, and create, retroactively, jurisdiction when it did not previously exist. *Aetna Cas. & Sur. Co. v. Hillman*, 796 F.2d 770, 775-776 (5th Cir. 1986). This rule exists because Federal courts' jurisdiction depends "on the facts as they exist when the complaint is filed." *Newman-Green*, 490 U.S. at 830. While most of the cases barring the addition of a party for jurisdictional purposes occur in the diversity jurisdiction context, the same reasoning applies in the standing context.

Plaintiffs' attempt to add this co-Plaintiff appears to be motivated, at least in part, by an attempt to salvage a doomed lawsuit brought by the original Plaintiffs rather than a *bona fide* concern of the prospective co-Plaintiff to sell wine in Kentucky. If the latter were true, why

didn't Cherry Hill ever make an effort to license with, or even contact, the Kentucky ABC prior to attempting to join this suit? The State Defendants have made it crystal clear (via their pleadings in this action) that the ABC (post-*Granholm*) will not simply reject an out-of-state winery's application for a winery license if appropriate eligibility conditions (unaffected by *Granholm*) such as gallonage, etc., were otherwise satisfied by the winery. The logical answer to the above question is that the original Plaintiffs to this lawsuit, recognizing they face a serious likelihood of dismissal for lack of subject matter jurisdiction, desperately need to amend to add Cherry Hill who they believe has a better chance at establishing standing (and subject matter jurisdiction).

If Cherry Hill has standing, it also preserves a potential claim for attorney's fees incurred in this action. If the current Complaint is dismissed, and Cherry Hill is not allowed to join this action, Plaintiffs' attorneys fees incurred to date will be unrecoverable under 42 U.S.C. §1988. The Motion to file the Amended Complaint, therefore, should be denied not only because it would be futile as lacking in jurisdiction but also because it apparently is motivated, in part, by procedural fencing so as to preserve a potential claim for attorneys' fees. The decision to file an amended complaint to preserve a potential claim of attorneys' fees provides the improper motive to deny the present motion.

If Cherry Hill had sufficient cause to initiate its own lawsuit against the State Defendants because it suffered injury-in-fact by virtue of some action taken against it by the Kentucky ABC (which it does not have), then Cherry Hill may bring its own lawsuit in a proper forum. It need not piggyback its claims challenging Kentucky's winery laws onto Plaintiffs' Complaint in this action. If the Amended Complaint is permitted, Cherry Hill will circumvent the State Defendants' right to have official capacity lawsuits brought only in the most appropriate and

convenient forum, which for them is Franklin Circuit Court or the Eastern District of Kentucky, Frankfort Division, where their offices are located and they carry out their official duties.

The original Plaintiffs initiated this action in the Western District of Kentucky, Louisville Division, a potentially objectionable venue to the State Defendants. But the State Defendants waived this objection at the initiation of this lawsuit because the key Plaintiff, Huber Winery, resides just across the river from this Court in southern Indiana. The prospective co-Plaintiff, Cherry Hill, is located nowhere near Kentucky, however, and from the State Defendants' perspective, its claims should properly pend in a venue more convenient to where the State Defendants carry out their official duties, *i.e.*, in Frankfort. In this respect, if the Court were to permit the requested amendment, it would unduly prejudice the State Defendants' right to require Cherry Hill's claims to proceed against them in a proper and convenient venue. *See* 28 U.S.C. §1391(b) (general federal question venue statute); *see also* LR 3.2(a)&(d)(intra-district venue assignment rules, making the Frankfort Division of the Eastern District of Kentucky, the appropriate federal forum in which to sue the State Defendants); 28 U.S.C. §1404 (transfer for convenience statute); LR 3.2(g)(intra-district transfer for convenience rule).

The fact that Cherry Hill purports to raise the same issues as the original Plaintiffs have alleged in their Complaint does not change the procedural prejudice associated with the attempt to "amend" the original Complaint so as to add Cherry Hill as a party. While it may be efficient for Plaintiffs to attempt to adjudicate all their claims in one lawsuit, to the State Defendants, having to defend in Louisville vis-à-vis Cherry Hill is less desirable than Frankfort. Equally important, State Defendants have been prejudiced by the improper procedural vehicle Plaintiffs have employed to add Cherry Hill (*i.e.*, by "amendment" into this lawsuit rather than through a proper F.R. Civ. P. 20 motion to join an additional party permissively).

The foregoing procedural concerns frame up the reasons why the State Defendants suspect that the instant Motion to Amend represents nothing but a disguised attempt to keep an otherwise “dead” lawsuit (for lack of subject matter jurisdiction over the original Plaintiffs’ claims) “alive” in the hopes that a potential claim for attorneys fees can eventually be made against the State Defendants. It has been stated before, and bears repeating: the original Plaintiffs’ Complaint must be dismissed for lack of subject matter jurisdiction, and Plaintiffs’ premature filing of that Complaint is not correctable, nor should it be salvageable, by the attempted addition of a new party co-Plaintiff whose primary reason for joinder appears to be nothing more than an attempt to retroactively prove subject matter jurisdiction.

In *Summit Office Park*, 639 F.2d 1278, the Fifth Circuit Court of Appeals stated “we hold only that where a[n original] plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, a new cause of action.” *Id.* at 1283. That case concerned an antitrust class action. During the course of litigation, a Supreme Court decision eviscerated the cause of action. To rescue the suit, Plaintiffs filed an amended complaint seeking to add in additional parties that had standing to bring suit. The Circuit Court upheld the lower court’s denial of the requested relief, relying in part on the fact that new claims could not benefit the old plaintiff. *Id.*

The situation here is identical. Faced with a serious dismissal challenge to their lawsuit, Plaintiffs are making a futile attempt to insert a new party with hopes of better establishing standing before the Court. In doing so, Plaintiffs hope to save the present lawsuit as well as their time, money and effort expended in bringing this action, and to preserve a hoped-for claim for attorneys fees should they ever succeed in getting a favorable ruling on the merits of this action.

For the reasons that have already been briefed extensively before this Court in pending motions, however, they should not so succeed.

The prospective new party (Cherry Hill) can file a separate lawsuit in the proper forum, but only after it has been injured by a licensing denial, or other adverse enforcement action taken, by the Kentucky ABC. Short of such injury-in-fact, however, Cherry Hill, like the original Plaintiffs in this action, lacks standing to challenge Kentucky's winery statutes. Plaintiffs should not be allowed to amend Cherry Hill into this action as a co-party to bootstrap their original Complaint's jurisdictional defects because such would be nothing but a prohibited attempt to "control th[is] litigation" by substituting an allegedly proper party for an improper one. *Summit Office Park*, 639 F.2d at 1283.

If Plaintiffs insist upon bringing a facial challenge to Kentucky's winery statutes and refuse to wait for the General Assembly to address the *Granholm* decision in the upcoming 2006 legislative session, the State Defendants urge this Court to require Plaintiffs to demonstrate actual injury by an application of Kentucky's winery laws to them. Of course, Plaintiffs will never be able to demonstrate actual injury because the State Defendants are fully cognizant of their legal duties to apply the law in a constitutional fashion and have no intent of acting unconstitutionally. Plaintiffs, however, have rushed to the courthouse without testing to see how the ABC would in fact apply Kentucky's winery laws in the post-*Granholm* era. Notwithstanding their haste, this Court should not reward them by allowing an amendment to their Complaint that represents an overt attempt to rectify obvious jurisdictional deficiencies.

Prospective Plaintiff Cherry Hill and Plaintiff Huber Winery are encouraged to contact the ABC about any potential concerns they may have with potential shipments of wine into Kentucky in this post-*Granholm* era. If the parties are unable to come to an agreeable

constitutional application of Kentucky's winery laws, and Plaintiffs become injured-in-fact by some adverse action of the ABC thereafter, Plaintiffs would then, and only then, have a legal basis to claim standing to pursue their claims against the State Defendants. To date, none of the Plaintiffs have seen fit to do so, and accordingly, the State Defendants must insist that their Motion to Dismiss be granted against the current Plaintiffs and that the prospective Plaintiff Cherry Hill be barred from coming into this suit (per the Amended Complaint), since it has no more basis for claiming standing than the original Plaintiffs.

The present Complaint, and the tendered Amended Complaint, are both fatally flawed in that none of the Plaintiffs have requisite standing. Since the proffered Amended Complaint is no sounder jurisdictionally than the original, and for all the other reasons stated above, the Court should deny the Plaintiffs' Motion for Leave to File Amended Complaint.

WHEREFORE, the State Defendants ask the Court to deny Plaintiff's Motion for Leave to File Amended Complaint.

Respectfully submitted,

s/ Douglas L. McSwain

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2005, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first class mail to the following non-CM/ECF participants:

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