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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT FREEMAN, et. al.,)	
)	
Plaintiffs,)	Case No. 03cv3140 (KSH)
)	
vs.)	Judge Katharine S. Hayden
)	
JAMES E. MCGREEVEY, Governor))	
of New Jersey, et. al.)	
)	
Defendants.)	

**PLAINTIFFS' REPLY BRIEF
IN SUPPORT OF MOTION
FOR JUDGMENT ON THE PLEADINGS**

RETURN DATE: SEPTEMBER 26, 2005

After the Supreme Court in *Granholm v. Heald* struck down laws in Michigan and New York similar to the ones at issue here, the District Court re-opened this case for the limited purpose of allowing plaintiffs to file a motion for judgment on the pleadings. All other aspects of this case were to remain closed for the time being. Plaintiffs have filed their motion for judgment on the pleadings and defendant has responded. In this memorandum, plaintiffs reply briefly to the arguments raised by the defendant.

However, in disregard of the boundaries of the Court's Order re-opening this case, defendant has also filed a motion under Fed. R. Civ. P. 12(b)(6) to dismiss plaintiffs' Complaint, which was bundled in with its response to plaintiffs' motion and incorrectly denominated a "cross-motion." Plaintiffs believe the defendant's motion to dismiss is improper and exceeds the limits of the Court's Order re-opening the case. However, the grounds asserted by the defendant in support of its motion to dismiss are similar to the arguments advanced in opposition to plaintiffs' motion for judgment on the pleadings. Indeed, defendant filed only one memorandum to serve both as a response to plaintiffs' motion and in support of its own motion. Therefore, in the event that the Court decides, in its discretion, to permit the defendant to go forward with its motion to dismiss, this Reply Brief shall also serve as

plaintiffs' memorandum in opposition to that motion.

I. CONTRARY TO THE DEFENDANT'S ASSERTION, PLAINTIFFS ARE CHALLENGING THE RULE THAT OUT-OF-STATE WINERIES CANNOT SELL WINE DIRECTLY, NOT JUST THAT THEY CANNOT SHIP DIRECTLY.

The defendant first argues that judgment on the pleadings cannot be granted to plaintiffs because their Complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Given that the U.S. Supreme Court just granted relief to similarly situated plaintiffs in Michigan and New York upon similar complaints, *Granholm v. Heald*, 125 S.Ct. 1885 (2005), defendant's argument is implausible in the extreme.

The defendant asserts that the plaintiffs only challenged one narrow part of New Jersey's discriminatory wine laws, namely the prohibition against direct shipping. Whether the direct shipping prohibition is discriminatory has recently been cast in doubt because the New Jersey Legislature has repealed a statute that explicitly authorized in-state wineries to use parcel delivery services.¹ The defendant does not dispute the fact that there are plenty of other discriminatory rules still in force. In-state wineries are allowed to sell wine in unlimited quantities directly to the public and to restaurants, without going through a wholesaler, and may deliver that wine to their

¹Whether the repeal of this provision actually eliminated discrimination is questionable. N.J. Stat. §§ 33:1-10(2a-2b) and 33:1-28 still permit in-state wineries to deliver their wine directly to individuals and restaurants located in New Jersey, and N.J. Admin. Code §13:2-20.3(b) currently allows shipments by parcel delivery service.

customers. N.J. Stat. §§33:1-2(a), 33:1-10(2a-2b), 33:1-28; N.J. Admin. Code §§13:2-20.3(b). Out-of-state wineries are prohibited from all such direct sales. N.J. Stat. §33:1-2(a); N.J. Admin. Code 13:2-21.1. Rather, the defendant argues that New Jersey should be allowed to continue to discriminate against out-of-state wineries and the plaintiffs' challenge should be dismissed because the plaintiffs' Complaint did not challenge any of these other discriminatory rules.

Defendant is being disingenuous. Defendant never quotes the Complaint, but instead continually paraphrases it in ways that twist the meaning beyond recognition. Defendant says that plaintiffs only challenged the ban on direct shipment of wine and not the ban on direct sales of wine. This is preposterous and false. Paragraph two of plaintiffs' Complaint challenges the ban on both direct sales and direct shipping and names the statutes and regulations that are the source of this discrimination.

The State of New Jersey permits in-state wineries to sell wine directly to customers and to ship wine by parcel delivery services, but does not allow out-of-state wineries to sell or ship wine directly to customers, pursuant to N.J. Statutes §§33:1-2(a), 33:1-10(2a), 33:1-10(2b), 33:1-28.1, and N.J. Admin. Code §§13:2-21.1, 13:2-20.3, 13:2-21.6.

Similarly, paragraphs 29 and 34, which summarize each count, complain that New Jersey law "discriminates against interstate sales" of wine, as well as shipments. The issue of direct

selling, as distinct from shipping, is also clearly mentioned in paragraphs 20, 21, 25, 32, 37, and 40. Key paragraphs also use the word "customers," not consumers, which word would include business customers such as restaurants, as well as individual customers. Complaint, Paragraphs 2, 13. It is true, in hindsight, that the plaintiffs might have drafted a better Complaint. We occasionally used the term "delivery" to encompass both the sale and the shipment and did not describe every potential customer. However, mere inartful drafting of a Complaint is not grounds for dismissing it when a claim is otherwise reasonably clear. The Supreme Court has said unambiguously that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 48. Rule 8 only requires that plaintiff give sufficient notice to defendant of the type of litigation involved. *Barnhart v. Compugraphic Corp.*, 936 F.2d 131, 135 n.7 (3rd Cir. 1991). The Complaint clearly did so and it stated a claim that discriminatory treatment of out-of-state wineries with respect

to their ability to sell wine directly to customers in New Jersey was unconstitutional.

II. GRANHOLM APPLIES TO DISCRIMINATORY PROHIBITIONS ON DIRECT SALES OF WINE AS WELL AS DIRECT SHIPMENTS.

The defendant next makes a related argument that *Granholm v. Heald*, 125 S.Ct. 1885 (2005), only applies to discriminatory shipping laws and not to any other type of economic discrimination against out-of-state wineries. That argument is without merit. It cites, as authority, the grant of *certiorari*, Def. Brief at 21, rather than the language of the actual decision. In its decision, the Supreme Court stated clearly that it is unconstitutional for a state "to allow in-state wineries to sell wine directly to consumers in that State, but to prohibit out-of-state wineries from doing so or, at the least, to make direct sales impractical from an economic standpoint." 125 S.Ct. at 1891-92 (emphasis added). The Court said that a state cannot constitutionally require out-of-state wineries to distribute wine only through wholesalers while allowing in-state wineries to bypass the wholesalers and sell directly to the public, 125 S.Ct. at 1895-96, which is exactly what New Jersey does. States may not "grant[] in-state wineries access to the State's consumers on preferential terms," 125 S.Ct. at 1896, so the New Jersey laws are unconstitutional.

III. THE STATUTES UNDER CHALLENGE HAVE NOT BEEN REPEALED

Third, the defendant makes the assertion that "the statutory section of which plaintiffs complained no longer exists," Brief at 11, apparently referring to N.J. Stat. §33:1-28.1 (authorizing in-state shipping) which was repealed last year. That assertion is bizarre. Plaintiffs never challenged the rule allowing in-state shipping. Plaintiffs are wine enthusiasts who *like* in-state shipping. Plaintiffs challenged the laws which prohibit out-of-state wineries from selling wine directly to customers in New Jersey. N.J. Stat. §33:1-2(a), N.J. Admin. Code §§13:2-21.1, 13:2-21.6, 13:2-23.12(a) and §13:2-21.2(a). All of these laws are still on the books.

IV. *PULLMAN* ABSTENTION IS NOT REQUIRED BECAUSE THERE IS NO PENDING STATE COURT ACTION AND NO AMBIGUITY IN THE STATUTES BEING CHALLENGED.

Fourth, the defendant asks the Court to abstain under the doctrine of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). His argument is without merit. He has fundamentally misunderstood the *Pullman* abstention doctrine. Abstention is not a basis for dismissing a case, but only for deferring action until after a state court has ruled. *Grove v. Emison*, 507 U.S. 25, 32 (1993). Therefore, at a minimum, there must be a state court action pending. *Id.* Nothing is currently pending in any state court which could resolve the dispute.

Abstention also is appropriate only when state laws are

ambiguous so that a narrowing construction by a state court is plausible. *Stenberg v. Carhart*, 530 U.S. 914, 945 (2000); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 (1984). The laws being challenged in this case are clear. Out-of-state wineries may not sell wine directly to customers in New Jersey. No amount of "interpretation" could turn the prohibition against direct interstate sales into permission.

The defendant also misconstrues the third prong of the *Pullman* test by arguing that it would be disruptive of important state policies to overturn the will of the legislature. Under that interpretation, no federal court could ever strike down a state statute.

V. THERE ARE NO FACTUAL ISSUES

Finally, the defendant claims that he does not know how to begin a "factual" analysis of plaintiffs' claims. Def. Brief at 26. The argument is spurious. Plaintiffs have moved for judgment on the pleadings, which raises a pure question of law - there are no factual issues. The law says out-of-state wineries may not sell wine directly to customers in New Jersey. In-state wineries may do so. The law says that out-of-state wineries can only sell wine in New Jersey if they use a wholesaler. In-state wineries are exempt. This differential treatment gives in-state wineries an economic advantage and violates *Granholm* on its face. Judgment on the pleadings can be granted to plaintiffs

merely by looking at these statutes and holding them up to the light of *Granholm*.

VI. CONCLUSION

For the foregoing reasons, plaintiffs are entitled to judgment on the pleadings.

Dated: September 20, 2005

Respectfully submitted by
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2005, I filed the foregoing with the Clerk of the Court through the Electronic Case Filing system that will send notice automatically to the attorney of record, and mailed a copy of the foregoing document by United States mail to the attorney of record for Defendants:

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