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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ROBERT FREEMAN, et. al.,)	
)	
Plaintiffs)	Case no. 03cv03140 (KSH)
)	
vs.)	Judge Katharine S. Hayden
)	
JAMES E. McGREEVEY, Governor)	
of New Jersey, et. al.)	
)	
Defendants)	

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

RETURN DATE: SEPTEMBER 26, 2005

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ARGUMENT

I. STANDARD FOR JUDGMENT ON THE PLEADINGS

Judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is appropriate when “the moving party has established that there is no material issue of fact to resolve, and that it is entitled to judgment in its favor as a matter of law.” *Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 253 (3d Cir. 2004). In considering a motion for judgment on the pleadings by plaintiffs, the question is whether the case as alleged in the Defendant’s answer would, if true, constitute a legal defense to plaintiff’s claim. *United States v. Blumenthal*, 315 F.2d 351, 352-53 (3d Cir. 1963).

II. NEW JERSEY’S WINE LAWS DISCRIMINATE AGAINST OUT-OF-STATE WINERIES IN VIOLATION OF *GRANHOLM* v. *HEALD*.

A. SUMMARY OF *GRANHOLM*

In *Granholm v. Heald*, 125 S.Ct. 1885 (2005), the Supreme Court held 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.” Such laws “grant in-state wineries a competitive advantage over wineries located beyond the States’ borders,” and therefore “discriminate against interstate commerce in violation of the Commerce Clause.” The Court held that “discrimination is neither authorized nor permitted by the Twenty-first Amendment.” 125 S.Ct. at 1891-92. The Court then applied this nondiscrimination principle to wine shipping rules in Michigan and New York, and struck them down.

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. Such a scheme gives in-state wineries a competitive advantage. The markups added by the wholesalers and retailers raise the cost of distribution for those out-of-state wineries able to obtain a wholesaler, and excludes from the market those small out-of-state wineries that cannot find a wholesaler. The Court said in no uncertain terms that this violates the Commerce Clause.¹

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States..... Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms.... The current patchwork of laws -- with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity -- is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine "invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."

125 S.Ct. at 1895-96 (citations omitted). States may not "grant[] in-state wineries access to the State's consumers on preferential terms." 125 S.Ct. at 1896.

The Court made it clear that the 21st Amendment does not authorize discrimination and is not a defense.

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.

125 S.Ct. at 1902. The Court rejected the states' affirmative defense that restricting direct

¹U.S. Const., art. I, § 8.

shipments from out-of-state wineries was necessary to keep alcohol out of the hands of minors, facilitate tax collection, facilitate orderly market conditions, protect public health and safety, and ensure regulatory accountability. Each of these “objectives can also be achieved through the alternative of an evenhanded licensing requirement.” Differential treatment is not justified because the state has more control over local wineries. 125 S.Ct. at 1905-06.

In sum, *Granholm* holds that it is unconstitutional for a state with local wineries to have nonuniform laws that disadvantage out-of-state wineries, prohibit out-of-state wineries from selling and delivering wine directly to state residents, require out-of-state wineries to be sold through a separate wholesaler, or otherwise grant in-state wineries access to the state’s consumers on preferential terms. A state may have a three-tier system, in which producers sell to wholesalers who sell to retailers, but if “the three-tier system is [used] only for sales from out-of-state wineries... [t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.” 125 S.Ct 1892.

B. NEW JERSEY’S WINE LAWS VIOLATE *GRANHOLM*

The New Jersey laws being challenged do exactly what the Supreme Court said was constitutionally forbidden. New Jersey has nonuniform laws regulating wine sales that disadvantage out-of-state wineries and give in-state wineries access to New Jersey consumers on preferential terms. Only out-of-state wineries are forced through the three-tier system. In-state wineries are eligible for special plenary winery licenses if they are “situated in New Jersey,” N.J. Stat. § 33:1-10(2a), and for farm winery licenses if they use “fruit grown in the State.” N.J. Stat. § 33:1-10(2b). Holders of those licenses are *not* required to use the three-tier system, but are authorized to:

1. Sell wine directly to consumers. N.J. Stat. § 33:1-10(2a-2b) (“holder ... shall be

entitled ... to sell his products at retail to consumers”).

2. Open multiple salesrooms around the state at which they may sell wine directly to consumers. N.J. Stat. § 33:1-10(2a-2b) (“holder ... shall also have the right to sell such wine ... in six salesrooms apart from the winery premises).
3. Accept mail and telephone orders. N.J. Admin. Code § 13:2-20.3 (b).
4. Deliver wine to customers’ residences. N.J. Stat. § 33:1-28 (“[l]icensees ... may transport alcoholic beverages in their own vehicles”).
5. Deliver wine by parcel delivery service. N.J. Admin. Code §13:2-20.3 (b) (“holder ... may authorize the shipment of wine ... by a parcel delivery service”).²
6. Sell and deliver wine directly to restaurants and other retailers without going through a wholesaler. N.J. Stat. § 33:1-10(2a-2b) (“holder ... shall be entitled ... to sell and distribute his products to ... retailers); N.J. Stat. § 33:1-28 (“[l]icensees [may] transport alcoholic beverages in their own vehicles”).
7. Sell in unlimited quantities. N.J. Stat. § 33:1-2(a) (“a person may, without limitation, purchase [and transport] any amount of alcoholic beverages ... from a point within this State”).

Out-of-state wineries are not eligible for the privileges that flow from holding a plenary or farm winery permit because they are neither “situated in New Jersey,” N.J. Stat. § 33:1-10(2a) (plenary winery license), nor use “fruit grown in the State.” N.J. Stat. § 33:1-10(2b) (farm winery license). Nor is any other license or authorization available that would permit out-of-

²The status of this regulation is unclear. The legislature in 2004 repealed a statute with similar language, N.J. Stat. § 33:1-28.1, but the Administrative Regulation authorizing such deliveries has not been changed.

state wineries to engage in any of the seven preferential transactions listed above. Without a license, out-of-state wineries may not sell or deliver wine directly to consumers or retailers.

New Jersey Stat. § 33:1-2(a) provides that:

It shall be unlawful to ... sell ... transport, ... or distribute alcoholic beverages in this State, except pursuant to and within the terms of a license, or as otherwise expressly authorized, under this chapter.

See also N.J. Admin. Code §§ 13:2-21.1 (“Delivery of alcoholic beverages into ... New Jersey is prohibited unless the beverages are transported by a licensee”); 13:2-21.6 (“No alcoholic beverages shall be transported into ... the State except in accordance with this subchapter”).

Restaurants and retailers in New Jersey may not buy wine from them. N.J. Admin. Code § 13:2-23.12(a) (“No retail licensee shall purchase or obtain any alcoholic beverage except from the holder of a New Jersey manufacturer’s or wholesaler’s license”). New Jersey citizens cannot even drive to their tasting rooms, pick up a case of wine, and transport it home. N.J. Admin Code § 13:2-21.2(a).

Are New Jersey’s laws exactly the same as the Michigan and New York laws struck down by the Supreme Court? No. The exact package of preferences given to in-state wineries and withheld from out-of-state wineries varies from state to state. Does this matter? No. The Supreme Court held broadly that it is unconstitutional for a state to “allow in-state wineries to sell wine directly to consumers [but] prohibit out-of-state wineries from doing so,” 125 S.Ct. at 1891-92, “subject out-of-state wineries, but not local ones, to the three-tier system, 125 S.Ct. at 1896, and “grant in-state wineries a competitive advantage over wineries located beyond the States' borders” 125 S.Ct. at 1892, by “grant[ing] in-state wineries access to the State's consumers on preferential terms.” 125 S.Ct. at 1896. New Jersey’s laws cannot pass muster under *Granholm*.

III. CONCLUSION

New Jersey discriminates against out-of-state wineries. It prohibits them from selling wine directly to New Jersey consumers and retailers, while simultaneously granting this privilege to in-state wineries. Such a scheme violates *Granholm v. Heald*, and is unconstitutional on its face.

Dated: _____, 2005.

Respectfully submitted by
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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____, 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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