

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELEANOR HEALD, RAY HEALD,
JOHN ARUNDEL, KAREN BROWN,
RICHARD BROWN, BONNIE MCMINN,
GREGORY STEIN, MICHELLE MORLAN,
WILLIAM HORWATH, MARGARET CHRISTINA,
ROBERT CHRISTINA, TRISHA HOPKINS,
JIM HOPKINS, MALVADINO VINEYARDS, INC.
and DOMAINE ALFRED, INC.

Case No. 00-CV-71438-DT

Plaintiffs,

BERNARD A. FRIEDMAN
United States District Judge

v

MARC L. GOLDMAN
Magistrate Judge

JOHN ENGLER, Governor of Michigan,
JENNIFER M. GRANHOLM, Attorney
General of Michigan; and JACQUELYN
STEWART, Chairperson, Michigan Liquor
Control Commission, in their official
capacities,

Defendants,

and

MICHIGAN BEER & WINE WHOLESALERS
ASSOCIATION,

Intervenor-Defendant.

_____ /

**DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

On June 14, 2000, Defendants filed a Motion to Dismiss Plaintiffs' Complaint based on deficiencies in the pleadings, pursuant to FED. R. CIV. P. 12(b)(6) and 12(c). This motion originally was scheduled for hearing on August 23, 2000, but the hearing

date was rescheduled several times, and finally the Court directed that all motions for dismissal be heard on January 31, 2001. Defendants supplemented their original motion on September 6, 2000, to alert the Court to the decision of the 7th Circuit in *Bridenbaugh v. Freeman-Wilson*, 7th Circuit Ct. Nos. 00-1044 and 00-1046.

Plaintiffs filed a response to Defendants' motion on October 2, 2000, and a response to Defendants' supplemental brief on October 9, 2000. In support of their response of October 2, 2000, Plaintiffs included numerous affidavits, thus essentially responding to Defendants' motion as though it had been filed pursuant to FED. R. CIV. P. 56.

ARGUMENT

I.

Defendants are not required to submit affidavits or other evidence in support of a Motion to Dismiss based upon FED. R. CIV. P. 12(b)(6) or 12(c).

Plaintiffs argue against Defendants' motion, citing the affidavits accompanying their response to support Plaintiffs' premise that their complaint sets forth a cause of action. Rule 12(b)(6) and 12(c) motions are considered on the pleadings alone, and Defendants submit that Plaintiffs' arguments on the pleadings provide no basis for recovery, as the pleadings are deficient in facts and legal allegations.

Plaintiffs argue that Defendants "have not offered evidence in support of their claimed interests", (Pls. Resp., page 17). However Plaintiffs are applying the wrong standard in response to Defendants' motion. A Rule 12(b) motion tests the sufficiency of the pleadings alone, and does not require that the moving party present evidence. Plaintiffs instead request the Court to apply the Rule 56 standard to the motion filed pursuant to Rule 12(b). In ruling on a 12(b)(6) motion, a Court does not consider evidence outside the pleadings such as affidavits. If such evidence is considered by the Court, the Court's decision is made under Rule 56.

If on a motion asserting the defense number (6) to dismiss for failure of the pleading to state a claim upon which relief may be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. CIV. P. 12(b).

See, also, similar language in FED. R. CIV. P. 12(c).

Accordingly, Defendants submit that their original motion is appropriate for the court's consideration based only on the pleadings, and excluding the affidavits attached by plaintiffs to their response. Defendants further submit that the affidavits are inappropriate for consideration, even under Rule 56, for the reasons set forth in Defendants' Motion to Strike. (All of Plaintiffs' attached affidavits are discussed in that Motion.)

If the Court considers the motion under Rule 56, Defendants submit that the affidavits and other evidence submitted to the court by Defendants in response to Plaintiffs' Rule 56 motion should be considered in deciding Defendants' motion as well.

Under either Rule, Defendants are entitled to summary disposition.

II.

Plaintiffs rely upon cases that do not relate to the core purposes of the 21st Amendment.

The cases relied upon by Plaintiffs are cases in which the courts concluded that the state interests did not fall within the core purposes of the 21st amendment, or where the conduct regulated was not within the state.

For example, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573; 106 S.Ct. 2080 (1986), upon which Plaintiffs rely heavily, invalidated a New York pricing statute because it attempted to control the sale of alcoholic beverages in other

states. The New York law required that a distiller licensed to do business in New York, file a price schedule with the Alcohol Control Board, and additionally affirm that the distiller was not selling the products anywhere else in the United States for less than the New York price schedule. New York initiated license revocation proceedings against Brown-Forman Distillers, when Brown-Forman provided a promotional allowance to wholesalers in other states that could not be provided to New York wholesalers under New York liquor law. The court construed the New York laws as requiring that producers or consumers in other states surrender whatever competitive advantage they may have, in order to do business in New York. The court concluded that the statute directly regulated out-of-state transactions involving alcohol not for use in the state of New York.

Plaintiffs' legal argument is also interesting in terms of the cases Plaintiffs choose to ignore. These include the most recent United States Supreme Court case relevant to the inquiry here, *North Dakota v. United States*, 495 U.S. 423; 110 S.Ct. 1986 (1990), which discussed a state's jurisdiction to impose labeling and reporting requirements on alcohol sold to military bases within the state, even though those bases were not subject to regulation by the state.

Justice Scalia's concurrence concluded that the Twenty-First Amendment was binding on the federal government like everyone else, and empowered the state of North Dakota to require that all liquor sold "for use in the state" be purchased from a licensed in-state wholesaler. *Id.*, at 447.

III.

Michigan has established that its regulatory scheme advances core purposes of the 21st Amendment.

The state's valid interests in reducing opportunities for underage purchases, holding alcohol sellers accountable for the consequences of such sales, assuring an

orderly market, precluding the sale of adulterated products, protection of individual communities choices to restrict alcohol sales, and raising revenue, are all core purposes of alcohol regulation that come within the state's authority under the 21st Amendment.

Plaintiffs are dismissive of Defendants' concerns about minors purchasing alcohol over the Internet or by other means such as catalogs, from outstate sellers for direct delivery. They state that Defendants can point to only two instances in which minors have received direct shipments of wine. In fact, Defendants provided information on 3 recent incidents of a minor ordering wine and one incident of the minor ordering gin over the Internet for direct delivery to his residence, as part of a 1999 sting operation conducted jointly by the Michigan Liquor Control Commission and the Attorney General. See, Stewart's Answers to Interrogatories, Ex. 11 to Response to Pls. Motion for Summary Judgment. In addition, Plaintiffs were advised of purchases made by a minor as part of a television documentary.

Further, Defendants have cited a study performed by the organization Americans for Responsible Alcohol Access (ARAA), which concluded that, while a relatively low percentage of college students surveyed have actually made Internet alcohol purchases for direct delivery, the total number having ordered was nonetheless significant, approximately 17,600 of the students surveyed. Moreover, the study found that awareness of on-line alcohol access is increasing dramatically, and a significant percentage of underage college students were willing to gain access illegally to alcohol by Internet purchases if they could not do so at local retailers because of local enforcement efforts. See, ARAA study, attached to Defendants' Response to Plaintiffs' Motion for Summary Judgment as Exhibit 7.

While Plaintiffs challenge the survey as biased, without specifying the faults, it really does not take an expert or a study to divine that minors seeking alcohol will use whatever access is available, or that the Internet is a tremendously attractive method to the technology-savvy generation of college students for obtaining that access.

Moreover, as explained by the Michigan Liquor Control Commission's Director of Enforcement in his affidavit attached to Defendants' Response to Plaintiffs' Motion for Summary Judgment, most enforcement of sales to minors results from decoy operations, since minors do not typically report themselves to be arrested. Enforcement of state laws precluding sales to minors becomes a virtual nightmare, if direct shipment to private residences from outstate, unlicensed sellers is permitted. See, affidavit of Mark Smith, Ex. 5.

The state's interest in holding alcohol sellers accountable for the consequences of their actions is also shrugged off by Plaintiffs, who assert that Michigan's jurisdiction over outstate sellers is undisputable. Defendants certainly wish that were so. However, Defendants experience to date does not lead to the conclusion that outstate sellers will presume that Michigan has jurisdiction over them. Rather, as demonstrated by the objections to jurisdiction contained in letters from outstate shippers' counsel when enforcement has been sought, this point is hotly contested, particularly by the wineries violating Michigan's laws most frequently. See, Ex. 6 of Defendants' Response to Plaintiffs' Motion to Dismiss. Further, the single case located that has addressed this issue, *Butler v. Beer Across America*, No. CV99-H-2050-S, 2000 LW 156005 (N.D. Ala., Feb. 10, 2000), concluded that the Illinois company shipping alcohol to the Alabama minor had not established sufficient contacts for Dramshop jurisdiction.

Plaintiffs also misstate Defendants' position on the payment and nonpayment of taxes. Defendants had noted that the non-payment of taxes by outstate sellers places instate sellers who collect required taxes at an economic disadvantage. Plaintiffs then suggest that Defendants' concern that all appropriate taxes be paid is economic protectionism. (Pls. Resp., page 25.) Requiring that all alcohol sellers whose products are sold for use in Michigan pay taxes equally can hardly be construed as economic protectionism.

The remainder of Plaintiffs' arguments have been adequately addressed in the original brief in support of Defendants' motion, and need not be reiterated.

For the reasons set forth above, and as set out in Defendants' Motion to Dismiss and supporting motion, Defendants respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted,

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Reply to Pls' Response/Heald.cwk