UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEBAMOFF ENTERPRISES, INC., d/b/a CAP N' CORK, RANDY LEWANDOWSKI, and LUTHER STRODER	)	
Plaintiffs	)	
	)	1:09-cv-0744-JMS.-TAB
vs	)	
P. THOMAS SNOW, in his Official Capacity as Chairman of the Indiana Alcohol & Tobacco Commission,	)	
Defendant	)	

PLAINTIFFS' MOTION FOR RELIEF FROM ORDER, TO AMEND JUDGMENT, AND TO STAY THE COURT'S ORDER PENDING APPEAL

Come now the plaintiffs, Cap N' Cork et al., and move the court to vacate its order on cross-motions for summary judgment dated December 6, 2010 (dkt. 45) and issue an amended order that denies the defendant Alcohol and Tobacco Commission's motion (dkt. 26) and either grants Cap N' Cork's motion (dkt. 16) or sets the case for trial. As more fully explained below, plaintiffs assert:

(1) When the Court granted the ATC's motion for summary judgment on the question of whether the common carrier ban was subject to heightened scrutiny because it discriminated against interstate commerce, the Court mistakenly considered only whether the law was facially discriminatory and failed to consider whether the law had a discriminatory effect.

(2) When the Court granted the ATC's motion for summary judgment on the question of

whether the common carrier ban excessively burdened interstate commerce under the *Pike* test,[1] it failed to construe all facts and reasonable inferences in favor of plaintiff Cap N' Cork.

(3) When the Court denied Cap N' Cork's motion for summary judgment, it reached the conclusion that banning wine shipping significantly reduces youth access to alcohol, which is contrary to the holding in *Granholm v. Heald.* 544 U.S. 460 (2005), and was based solely on unsupported opinion testimony, which the Seventh Circuit says is not enough to avoid summary judgment.

The Court should therefore grant Cap N' Cork relief from the Court's order and judgment pursuant to Fed. R. Civ. P. 60(b)(6), and issue an amended order pursuant to Fed. R. Civ. P. 59(e) that either grants summary judgment to Cap N' Cork or sets the case for trial. However, in the event that the court adheres to its original order, plaintiffs request a stay pending appeal pursuant to Fed. R. App. 8(a).[2]

A. THE COURT FAILED TO CONSIDER WHETHER THE BAN ON COMMON CARRIERS WAS SUBJECT TO STRICT SCRUTINY BECAUSE IT IS DISCRIMINATORY IN EFFECT.

In deciding whether strict scrutiny applied, the Court considered only whether the statute banning common carrier deliveries was facially discriminatory. The Court wrote that "[s]trict scrutiny analysis is reserved for statutes that are explicitly discriminatory,"[Opinion, dkt. 45 at 10-11], and that because "on its face, the statute treats all wine targeted for off premises delivery ... exactly the same way," it was not subject to strict scrutiny. [Id. at 13]. The court wrote that "[i]f a

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[1]*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

[2]Plaintiffs also contend that the Court erred in its ruling that the ban on common carrier deliveries was not preempted by Federal law but do not believe any purpose would be served by asking for reconsideration of that ruling, which is more properly a matter for appeal.

law is not facially discriminatory ... but nevertheless has some discriminatory effect, courts apply the flexible balancing standard articulated in *Pike.*" [Id. at 11]. The Court has misstated the law on this critical issue.

For at least 70 years, cases from the Supreme Court, Seventh Circuit, and other circuits have been uniform that strict scrutiny is applied both to statutes that are facially discriminatory and also to laws that are even-handed on their face but have a discriminatory effect that disadvantages interstate commerce. *See, e.g., Granholm*, 544 U.S. at 487 ("When a state statute ... discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry") (emphasis added); *Hunt v. Washington State Apple Adv. Comm'n*, 432 U.S. 333, 351-52 (1977) (even-handed law subject to strict scrutiny where its effect was to deprived out-of-state business of "competitive and economic advantages" they would have in a free market); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious," and the issue is whether a law "will in its practical operation work discrimination against interstate commerce"); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 911 (7th Cir. 2003) (strict scrutiny "is applied when a statute 'directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests'") (emphasis added); *Government Suppliers Consol. Services, Inc. v. Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992) (if a law "discriminates 'in practical effect' against interstate commerce, the fact that it purports to apply equally ... does not save it") (emphasis added); *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Marketing Bd.*, 298 F.3d 201, 210 (3d Cir. 2002) (statute invalid if it discriminates "either on its face

or in practical effect").[3] Lesser scrutiny under *Pike* is not applied unless a law has "only incidental effects on interstate commerce." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 619 (1997) (emphasis added).

Thus, the court's finding that the ban on common carrier deliveries is "facially neutral, and, as such, ... is not subject to strict scrutiny" is incorrect. A law escapes strict scrutiny only if it is both facially neutral and even-handed in practical effect. Indiana's ban on common carrier deliveries is not even-handed in effect. An Indiana consumer may buy wine from local wineries and have it delivered by common carriers, and may have wine delivered by local retail dealers, but may not buy wine from interstate sources and have it delivered through the fulfillment process because as a practical matter it is too expensive for Cap N' Cork to use its own trucks to drive all over the state. Doust Aff. ¶ 12 [dkt. 18-2]. The ATC has not disputed that delivery by truck outside Cap N' Cork's immediate vicinity is cost-prohibitive, and the Supreme Court has twice said that economic impracticality constitutes discriminatory effect. *Granholm,* 544 U.S. at 474-75 (New York required a winery to establish premises in the state before selling directly to consumers, which would "drive up the cost" for out-of-state wineries and had a discriminatory effect because "the expense of establishing a bricks-and-mortar distribution operation ... is prohibitive"); *Hunt*, 432 U.S. at 351-52 (requiring apple producers to conform to standard packaging would "rais[e] the costs of doing business" for out-of-state dealers by requiring them to alter their marketing practices and deprive

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[3] *Accord* Jelovsek v. Bredesen, 545 F.3d 431, 436 (6th Cir. 2008); Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007); Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007); Town of Southold v. Town of East Hampton, 477 F.3d 38, 48 (2d Cir. 2007); Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006); Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc., 401 F.3d 560, 567 (4th Cir. 2005); S.D. Myers, Inc. v. City and County of San Francisco, 253 F.3d 461, 466 (9th Cir. 2001); American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1254 (10th Cir. 2000).

them of "competitive and economic advantages" they would have in a free market).

B. WHEN THE COURT GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, IT FAILED TO CONSTRUE THE FACTS MOST FAVORABLY TO PLAINTIFFS

When ruling on cross-motions for summary judgment, the Court must evaluate each motion independently. *Franklin v. City of Evanston*, 384 F.3d 838, 842-43 (7th Cir. 2004). The Court is required in each instance to "construe all facts and reasonable inferences in favor of the nonmoving party." *Singer v. Raemisch,* 593 F.3d 529, 533 (7th Cir. 2010). Therefore, when ruling on the defendant's motion for summary judgment, the court was required to view the evidence in the light most favorable to the plaintiff, but failed to do so.

The Pike test asks the court to weigh the burden on interstate commerce against the putative local benefit. The plaintiffs offered evidence on both issues. On the first prong, our evidence showed that banning common carrier deliveries has a substantial adverse impact on interstate commerce by decreasing selection, raising prices, closing market access to many small wineries, and halting $1.5 million in annual wine sales to Cap N' Cork. [Pl. Response Brief at 6-7, Statement of Facts ¶¶ 10-16, dkt. 29]. The defense did not dispute this evidence. On the second prong, we provided evidence that the rule did little to advance the state's purpose of preventing youth access because minors rarely try to order wine for home delivery in the first place, other states that allow such deliveries have reported few or no problems, and UPS checks IDs in a face-to-face transaction upon delivery. We showed that requiring a face-to-face transaction at the point of sale was not more effective than any other form of age verification. Much of this evidence comes from two systematic and careful studies by federal agencies, the FTC and the National Academies of Science. [Id. at 5-6, ¶¶ 2-9].

In response, the ATC offered only brief, one-sentence opinions of two ATC excise officers that

the requirement of a face-to-face transaction at the point of sale was "one effective barrier to youth access to alcohol." This conclusion is actually inconsistent with the ATC's own evidence showing that this supposedly effective procedure fails to prevent sales to minors 35% of the time. Poindexter Aff. ¶ 15 (dkt. 28-1).[4] The ATC offered absolutely no evidence that age verification at the point of delivery was any less effective or that even a single bottle of wine had ever been delivered to a minor in Indiana by a common carrier. Indeed, the very opinion relied on by the Court merely said that point-of-sale age verification was "one" barrier to youth access, and conspicuously did not say it was the only or most effective barrier.

When ruling on the ATC's motion, the Court was required to interpret this evidence and the reasonable inferences flowing from it in the light most favorable to Cap N' Cork as the non-moving party. It did exactly the opposite. It "presumed" that face-to-face age verification upon delivery was less effective than if done at the point of sale, despite there being no evidence to this effect. [Opinion at 18, dkt. 45]. It rejected Cap N' Cork's evidence in favor of fact findings from *Baude v. Heath*, a different case that involved an entirely different record and different issue. [Id. at 15-22, esp. 16-17, 19 n.6]. The court ignored our evidence from the FTC that common carrier bans have deleterious effect on interstate commerce because the study did not specifically show what the effect would be in Indiana, refusing to make the reasonable inference that what is true nationally will be true at the state level [Id. at 20-21] -- even thought the Supreme Court in *Granholm* made such an inference. 544 U.S. at 490 (using FTC Report as evidence of what the effects of Michigan and New York's laws would be). The court rejects Cap N' Cork's uncontested evidence that UPS verifies age

[4]This evidence from ATC compliance studies is consistent with data collected by the FTC and National Academies of Science showing the relative ineffectiveness of traditional face-to-face age verification. See Pl. Response Brief at 6, ¶ 9 [dkt. 29].

in a face-to-face transaction upon delivery because it is "skeptical" of its effectiveness. [Opinion at 19].

The court is not permitted to be skeptical or judge the credibility of the evidence on summary judgment, but must put skepticism aside and interpret the facts and inferences most favorably to the non-moving party. Cap N' Cork requests hat the Court reconsider its ruling on the ATC's motion for summary judgment, view the facts and inferences more favorably to them as the non-moving party, and amend its judgment to deny the ATC's motion.

C. WHEN THE COURT DENIED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, IT EVALUATED IMPORTANT EVIDENCE INCONSISTENTLY WITH SUPREME COURT AND SEVENTH CIRCUIT PRECEDENT

The Pike test asks the court to weigh the burden on interstate commerce against the putative local benefit. Cap N' Cork's motion for summary judgment asserts that the law banning common carrier deliveries violates Pike because the burden is substantial and the local benefits virtually non-existent, and it challenges the ATC to come forward with evidence to the contrary. The ATC offered no evidence as to the extent of the burden, but rested their case on the conclusory statements of two ATC officers that the common carrier ban significantly advances local interests by reducing underage access. If the ATC evidence were sufficient, i.e., that a reasonable juror could find for ATC based upon it, then Cap N' Cork's motion would have to be denied because there would be a triable issue. However, both the Seventh Circuit and Supreme Court have held such evidence insufficient, so plaintiffs' motion should have been granted.

In *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 726 (7th Cir. 2004), the Seventh Circuit held that conclusory statements which are not backed up by specific facts and details are not sufficient to avoid summary judgment. The ATC provided no such factual basis for the conclusory

statements by its officials . The sum total of the evidence it offered on the connection between banning common carrier deliveries and youth access is a one-sentence conclusory statement that "[t]he requirement of a direct, face-to-face transaction in any sale of alcohol to consumers is one effective barrier to youth access to alcohol." Poindexter Aff. ¶ 6 [dkt. 28-1]; Swallow Aff. ¶ 5 [dkt. 29-2] (the statements in the two affidavits are identical). The ATC offered no evidence to show that these statements are anything more than self-serving speculation by the defendant's employees -- no evidence that any UPS driver ever failed to verify age on delivery or delivered any wine to a minor, no affidavit from a disinterested expert, no estimate on how often minors try to obtain wine through the fulfillment process, and no data on the relative effectiveness of point-of-sale versus point-of-delivery age verification. The bald conclusions standing alone, without some quantification of the benefit, are not adequate to defeat Cap N' Cork's motion for summary judgment. *See Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2010) ("It is impossible to tell whether a burden on interstate commerce is 'clearly excessive in relation to the putative local benefits' without understanding the magnitude of [the] benefits").

The court's conclusion that banning direct shipping significantly reduces youth access is not only unsupported by evidence, it is inconsistent with the Supreme Court's holding in *Granholm v. Heald*, 544 U.S. 460, 490 (2005). In *Granholm*, the Supreme Court relied upon the same FTC Report offered in this case, accepted its factual findings that direct shipping of wine does not contribute to youth access, rejected the State's claim to the contrary as "unsupported," and held that a ban on direct shipping cannot be justified on the basis that it prevents youth access. 544 U.S. at 490.[5] The FTC Report is 46 pages long and details hundreds of underlying facts, studies, testimony,

[5]If the Court is going to grant evidentiary weight to factual statements in a Seventh Circuit case (Baude v. Heath), it should similarly grant such status to factual finding in Supreme Court

and data supporting its conclusion. Something more than one-sentence conclusory statements to the contrary were required to defeat summary judgment, and the ATC offered no such evidence. Cap N' Cork therefore requests that the Court reconsider its ruling on its motion for summary judgment after considering the sufficiency of the ATC's evidence in light of *Lucas* and *Granholm*, and amend its judgment to grant the motion.

However, in the event that the Court adheres to its original ruling that the ATC has introduced enough evidence to warrant denying Cap N' Cork's motion for summary judgment, despite *Lucas*, the proper procedure would have been to set the case to trial and Cap N' Cork requests an amended order to that effect.

D. IF THE COURT AFFIRMS ITS PREVIOUS ORDER, PLAINTIFFS REQUEST A STAY PENDING APPEAL.

In the event that the Court denies plaintiffs' motion for an amended order and affirms its original order, plaintiffs request a stay pending appeal to preserve the *status quo*. Underlying this case are three pending administrative actions against Cap N' Cork brought by the ATC based on Cap N' Cork's past use of common carriers. See ATC Brief at 3-4, ¶¶ 5-8 [dkt. 27]. It would be a waste of resources to proceed on those complaints at this time because the Court of Appeals could reverse this court's order. This case has implications not just Cap N' Cork, but for the hundreds of Indiana consumers who order 13,000 cases of wine a year through the fulfillment process, Doust Supp. Aff. ¶ 7 (dkt. 30-6), and the dozens of businesses that handle the production, sale, packaging and distribution of the wine. E.g., Lucca Aff ¶¶ 4-11 (dkt. 18-3), all of whom will be affected by the ultimate decision. Therefore, plaintiffs request that if the Court affirms its original order granting

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cases.

summary judgment against plaintiffs, it stay that order pending appeal to preserve the *status quo*. The District Court has the primary authority to decide whether stay its own order pending appeal. Fed. R. App. 8(a).

WHEREFORE, for the reasons set forth, plaintiffs Cap N' Cork et al. request that the court vacate its order of December 6, 2010 and issue an amended order that denies the defendant ATC's motion for summary judgment, grants plaintiffs' motion for summary judgment or sets the case for trial, and stays its order pending appeal.

Respectfully submitted by
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on the 3rd of January, 2011. Notice of this filing will be sent to counsel of record for all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's PACER system.

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