UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-11682-RWZ

FAMILY WINEMAKERS OF CALIFORNIA, STEPHEN J. POOR, III and GERALD C. LEADER

v.

EDDIE J. JENKINS in his official capacity as Chairman of the Massachusetts Alcoholic Beverages Control Commission, SUZANNE IANNELLA in her official capacity as Associate Commissioner of the Massachusetts Alcoholic Beverages Control Commission and ROBERT H. CRONIN in his official capacity as Associate Commissioner of the Massachusetts Alcoholic Beverages Control Commission

MEMORANDUM OF DECISION AND ORDER

November 19, 2008

ZOBEL, D.J.

Plaintiffs, two Massachusetts consumers and a non-profit trade association which advocates the rights and interests of its member wineries, challenge the constitutionality of certain provisions of a Massachusetts statute which limits wine shipment rights based on wineries' total annual production of wine and existing relationships with Massachusetts-licensed wholesalers. Defendants are sued in their official capacities as members of the Massachusetts Alcoholic Beverages Control Commission ("Commission").[1] The matter is before me on the parties' cross-motions

[1] The Commission "consist[s] of a commissioner and 2 associate commissioners appointed by the treasurer." Mass. Gen. Laws ch. 10, § 70. The Commission exercises "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages." Id. § 71.

for summary judgment.[2]

I. Legal Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A dispute is 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party." Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (internal quotation marks and citations omitted). A material fact is one which has the "potential to affect the outcome of the suit under the applicable law." Id. (internal quotation marks and citations omitted). Generally the court must view the record in the light most favorable to the non-moving party and indulge all reasonable inferences in that party's favor. See O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993). On cross-motions for summary judgment, however, the court simply determines "whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Barnes v. Fleet Nat'l Bank, N.A., 370 F.3d 164, 170 (1st Cir. 2004).

Under Rule 56, supporting or opposing affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(e). "[I]f a party does not move to strike an inadmissible affidavit, 'any objections to its consideration are deemed to have been waived and it may properly be considered by the court when

[2] The court acknowledges the brief submitted by amicus curiae Wine & Spirits Wholesalers of Massachusetts, Inc. (Docket # 77).

ruling on the motion.'" Desrosiers v. Hartford Life and Acc. Co., 515 F.3d 87, 91 (1st Cir. 2008) (quoting Davis v. Sears, Roebuck & Co., 708 F.2d 862, 864 (1st Cir. 1983)).[3] Neither party lodged objections to the affidavits submitted in support of the summary judgment motions. The court therefore accepts and considers the affidavits in ruling on this motion. Additionally, defendants respond to many of the facts in plaintiffs' Local Rule 56.1 Statement of Undisputed Material Facts by simply stating that they "lack knowledge necessary to respond . . . ." (See, e.g., Docket # 102 ¶¶ 49-66.) However, defendants did not seek a continuance under Federal Rule of Civil Procedure 56(f) to investigate the accuracy of plaintiffs' statements of fact and, under the Local Rule, "[m]aterial facts of record set forth in the statement required to be served by the moving party will be deemed for purposes of the motion to be admitted by opposing parties unless controverted by the statement required to be served by opposing parties." D. Mass. R. 56.1. Accordingly, such undisputed statements are deemed admitted by defendants.[4]

II. Factual Background

A. Granholm v. Heald

In 2005 the Supreme Court held in Granholm v. Heald that state laws which

---

[3] Desrosiers noted that a written motion to strike is not always required; however, a party must take "some action" which is "substantially equivalent" to a motion to strike to apprise the court of its objection to an affidavit. 515 F.3d at 91 (quoting Perez v. Volvo Car Corp., 247 F.3d 303, 314 (1st Cir. 2001)).

[4] Plaintiffs, similarly, did not address paragraphs 13 and 14 of Defendants' Local Rule 56.1 Statement. (Compare Docket # 80, with Docket # 104, 8-9.) These statements are also deemed admitted.

permit in-state wineries to sell wine directly to consumers in the State but prohibit out-of-state wineries from doing so discriminate against interstate commerce in violation of the Commerce Clause.[5] 544 U.S. 460, 466 (2005). The Granholm decision invalidated laws in Michigan and New York which discriminated against interstate commerce in different ways. The Michigan scheme was facially discriminatory, in that it allowed in-state producers to ship wines directly to Michigan customers while banning out-of-state producers from doing so. "The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching customers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market." Id. at 474.

The New York scheme did not ban direct sales altogether; rather, it allowed wineries to direct-ship only if they first established a physical presence in New York. In finding that the law was simply "an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system," the Court noted that for most out-of-state wineries the expense of establishing a physical presence was prohibitive, making direct sales "impractical from an economic standpoint." Id. at 475, 466.

B. Stonington Vineyards, Inc. v. Jenkins

A lawsuit challenging the constitutionality of Massachusetts' law was pending in the United States District Court for the District of Massachusetts at the time

[5] U.S. Const. art. I, § 8, cl. 3.

Granholm was decided. See Stonington Vineyards, Inc. v. Jenkins, Civ. A. No. 05-10982-JLT (D. Mass. filed May 12, 2005). Massachusetts law at that time allowed in-state wineries to apply for "farmer-winery licenses" which permitted them to sell wine to both wholesalers and consumers. Mass. Gen. Laws ch. 138, § 19B (2002).[6] In contrast, the law granted out-of-state wineries a certificate of compliance but did not permit them to sell directly to consumers in Massachusetts. See id. §§ 18, 18B.[7] In the aftermath of Granholm, the district court in Stonington Vineyards declared Mass. Gen. Laws ch. 138 §§ 2, 18 and 19B unconstitutional and enjoined the Commission from enforcing those provisions. Stonington Vineyards, Civ. A. No. 05-10982-JLT, slip op. at

---

[6] Section 19B provided:

> (a) For the purpose of encouraging the development of domestic vineyards, the commission shall issue a farmer-winery license to any applicant who is both a citizen and a resident of the commonwealth, and to applying partnerships composed solely of such individuals, and to applying corporations organized under the laws of the commonwealth or organized under the laws of any other state of the United States and admitted to do business in this commonwealth . . .
>
> . . . .
>
> (g) A winegrower [defined in ch. 138, § 1 as "any person licensed to operate a farmer's winery under section nineteen B"] may sell wine or winery products:
>
> (1) at wholesale . . .
>
> . . .
>
> (7) at retail by the bottle to consumers for consumption off the winery premises . . .

Mass. Gen. Laws ch. 138, § 19B. See also Mass. Gen. Laws ch. 138, § 22 (2002) (authorizing farmer-winery license holders to ship wine by parcel delivery service).

[7] Under the statute, Massachusetts wholesalers could only import wine from wineries which held certificates of compliance. Id. § 18.

1-2 (D. Mass. Oct. 5, 2005).

C. Section 19F

In response to the Stonington Vineyards decision, the Massachusetts House and Senate passed House Bill No. 4498, "An Act Authorizing the Direct Shipment of Wine," on November 17, 2005. Then-Governor Romney vetoed the bill on November 23, 2005. (See Docket # 88-2, 2.) The legislature overrode the veto on February 15, 2006.[8]

The Act creates a new section, 19F, to regulate the direct shipment of wine. Mass. Gen. Laws ch. 138, § 19F ("§ 19F"). Section 19F provides for a two-tier licensing scheme based upon whether the winery's total annual production of wine is above or below 30,000 gallons.[9] Wineries producing 30,000 gallons of wine or more are considered "large" wineries, while those producing less than 30,000 gallons of wine are "small" wineries. Id. A "small" winery may sell wine to wholesalers, retailers, restaurants and bars and directly to consumers. Id. § 19F(b). A "large" winery, in contrast, may sell wine directly to consumers only if it "has not contracted with or has not been represented by a wholesaler licensed under section 18 for the preceding 6 months." Id. § 19F(a). In addition, "wine or wine product fermented from other than grapes" is not counted towards the 30,000 gallon figure. Id.[10]

---

[8] Passage of H.B. 4498 is discussed in further detail infra.

[9] The 30,000 gallon limit is sometimes referred to as a "gallonage cap."

[10] Section 19F reads in relevant part:

(a) The commission may issue to an applicant, who: (1) operates a winery

Section 19F represents a departure from the so-called "three-tier system." Many states have chosen to regulate the distribution of alcoholic beverages by requiring that producers sell exclusively to licensed wholesalers who, in turn, sell only to licensed retailers; consumers may purchase alcoholic beverages for off-premises consumption

---

> whose total annual production, including that of its affiliates, franchises and subsidiaries, is 30,000 gallons of wine or more; provided, however, any wine or wine product fermented from other than grapes shall not be included in the aforementioned 30,000 gallon figure; and (2) is authorized by the appropriate licensing authority to manufacture, export and sell wine, a large winery shipment license to sell and ship wine or winery products produced by the winery directly to consumers; provided that the winery has not contracted with or has not been represented by a wholesaler licensed under section 18 for the preceding 6 months.
>
> (b) The commission may issue to an applicant who: (1) operates a winery whose total annual production, including that of its affiliates, franchises and subsidiaries, is less than 30,000 gallons of wine; provided, however, any wine or wine product fermented from other than grapes shall not be included in the aforementioned 30,000 gallon figure; and (2) is authorized by the appropriate licensing authority to manufacture, export and sell wine, a small winery shipment license to sell and ship wine or winery products produced by the winery: (i) at retail directly to consumers; (ii) at wholesale in kegs, casks, barrels or bottles to a person licensed under section 12, 13 or 14; (iii) at wholesale for the sole purpose of resale in containers in which wine was delivered to any person licensed under section 15; provided, that all direct deliveries of wine from a winery to a section 15 licensee shall not exceed 250 cases of wine annually; (iv) at wholesale to a person licensed under section 18, 19 or 19B . . . .

Id. Section 18 allows the issuance of wholesalers' and importers' licenses only to "any individual who is both a citizen and resident of the commonwealth, . . . to partnerships composed solely of such individuals, and to corporations organized under the laws of the commonwealth whereof all directors are citizens of the United States and a majority thereof residents of the commonwealth and to limited liability companies and limited liability partnerships organized under the laws of the commonwealth, subject to such conditions as the commission may prescribe . . . ." Id. § 18. See also id. ("In order to ensure the necessary control of traffic in alcoholic beverages for the preservation of the public peace and order, the shipment of such beverages into the commonwealth, except as provided in this section and section 19F, is hereby prohibited.").

only from licensed retailers. See Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 30 (1st Cir. 2007). However, § 19F permits producers to circumvent the three-tier system by allowing "small" wineries to make direct sales to wholesalers, retailers and consumers and "large" wineries to choose between direct sales to wholesalers or consumers.

D. Passage of House Bill No. 4498

1. Drafting the Legislation

State Senator Michael Morrissey and State Representative Vincent Pedrone were the co-chairmen of the Joint Committee on Consumer Protection and Professional Licensure[11] when the bill was passed, and Senator Morrissey was the primary driving force behind the enactment of the amended bill.[12] Massachusetts wholesalers, represented by the Wine and Spirits Wholesalers of Massachusetts ("WSWM"),[13] participated in drafting the legislation from an early point. By September 15, 2005 (prior to the district court's invalidation of the then-statute on October 5, 2005), the WSWM had submitted a draft of legislation to Senator Morrissey's and Representative Pedrone's staff that would have banned all direct shipping and allowed wineries to sell directly to consumers only if the consumer was on the winery premises. On October 6, 2005, Senator Morrissey's staff distributed a new draft that: (1) created a Section 19F

[11] This committee heard all alcoholic beverage bills.

[12] (See, e.g., Docket # 93-3, 6 (draft press release stating that Senator Morrissey authored the legislation).)

[13] The WSWM is comprised of five members which together sell approximately 75% of all wine within the Commonwealth.

which allowed all wineries to obtain a license to ship directly to consumers "provided however, that said winegrower cannot be affiliated with, contracted with, or represented by a Massachusetts wholesaler;" and (2) created a Section 19G which allowed for direct shipment of wine from a winery producing less than 50,000 gallons of wine annually to a retailer "provided that said winegrower cannot be affiliated with, contracted with, or represented by a Massachusetts wholesaler. . . ." (Docket # 91-12.)

In-state wineries strongly opposed the suggestion that direct shipping would only be permitted for wineries which did not have wholesaler relationships. Kipton Kumler ("Kumler") is the owner of Turtle Creek Winery in Lincoln, Massachusetts, and the president of the Massachusetts Farm Wineries and Growers Association, whose members produce over 90% of the wine production in the Commonwealth. (Decl. of Kipton Kumler (Docket # 88-5) ¶¶ 3, 7.) Kumler voiced his opposition to Senator Morrissey's staff on October 14, 2005 (see Docket # 93-11). Richard Pelletier ("Pelletier") is the majority owner and operator of Nashoba Valley Spirits, Inc. ("Nashoba Valley"), which at that time was Massachusetts' largest winery. On October 18, 2005, Pelletier e-mailed numerous senators and representatives to voice his opposition to the proposed amendment. He stressed the importance of allowing wineries to sell their wines through wholesalers and retailers and directly to customers, and he noted that the proposed bill was "not the compromise that Massachusetts wineries were promised but instead represents an attack on my farm, other Massachusetts farms and especially on Massachusetts's wineries. If passed, you will have voted on a proposal that will put many of our existing wineries out of business."

(Docket # 91-15, 2.)

Senator Morrissey's staff sent a revised draft of the legislation to Pelletier on the evening of October 18, 2005. The revised draft allowed wineries which produced less than 30,000 gallons to ship directly to consumers without regard to whether they had wholesaler representation. (Docket ## 91-16, 91-17.) Pelletier responded on October 19, 2005, that the draft was "much improved" but that he was concerned about the 30,000 gallonage cap because "apples not sold to customers will be collected and made into wine. I may not sell this wine for 3 years but to maximize my farming efforts and the fruit grown, I will be producing more than I can sell in a particular year and it could reach 30000." (Docket # 91-16, 2.)

During this time Robert Buckley ("Buckley") was President of the WSWM and Carol Martel ("Martel") was a lobbyist working on behalf of the Wine Institute, an advocacy organization that represents California wineries at the state, federal and international level. Both were actively involved in lobbying legislators to obtain the most advantageous legislation for their respective groups. Both state that the wholesalers initially opposed any direct shipping, and once it became clear that direct shipping would be allowed the wholesalers sought a low gallonage cap. (See Decl. of Carol Martel (Docket # 91-7) ¶ 11; Buckley Dep. 26, Mar. 4, 2008 (Docket # 91-2); id. at 23.) Craig Wolf ("Wolf") served as general counsel for the Wine and Spirit Wholesalers of America ("WSWA") during this time. (Docket # 87 ¶¶ 119.) He advised Representative Pedrone's aide that the WSWA supported limits on direct shipping by wineries, noting, "the only businesses being hurt by this legislation are Massachusetts

wholesalers and retailers. . . . [Wholesalers] are taking a substantial hit by accepting this legislation and legislators should understand that every deviation from the three-tier system takes business away from those in-state businesses and could ultimately cost the Commonwealth jobs and revenue . . . . While direct-to-consumer sales are currently only a small percentage of the sales nationwide, that number could increase dramatically over time – to the detriment of your in-state wholesalers and retailers." (Id. ¶¶ 179-180.)

On November 3, 2005, the Joint Committee on Consumer Protection and Professional Licensure voted in favor of House Bill 4477. The bill proposed two amendments to Mass. Gen. Laws ch. 138: (1) under a new § 19F, wineries were permitted to ship wine directly to consumers provided that the winery had not contracted with or been represented by a Massachusetts wholesaler for the preceding six months; and (2) under a new § 19G, wineries producing less than 30,000 gallons annually were permitted to ship directly to consumers, retailers and wholesalers. (Docket # 92-4.) The bill was amended on November 9, 2005, and renamed House Bill 4490. (Id.) House Bill 4490 was substantively the same as H.B. 4477 but structurally eliminated § 19G in favor of §§ 19F(a) and (b). Wineries producing 30,000 gallons or more annually were denoted "large wineries" subject to § 19F(a), while those producing less than 30,000 gallons were "small wineries" subject to § 19F(b). (Docket # 92-5.) On November 14, 2005, the bill was amended once more and renamed House Bill 4498. It was passed by the House that same day. House Bill 4498 changed the annual gallonage cap from 30,000 to 50,000 gallons. (Docket ## 92-6, 92-9.)

2. Debate in the Senate

The Senate debated House Bill 4498 on November 16, 2005. During the debate Senator Antonioni, who represents the area encompassing Nashoba Valley, expressed concern that the 30,000 gallonage cap would hurt the winery, as it "is growing" and "right now, my understanding is that winery comes close to the 30,000 production limit." (Tr. of Mass. Sen. Sess. Regarding House Bill 4498, Nov. 16, 2005 (Docket # 92-11), 29.)

Senator Morrissey vigorously argued in favor of passage of H.B. 4498. (See id. at 8-14, 19-21, 23-26, 31-33.) He recognized that all of the wineries in Massachusetts produced less than the 30,000 gallonage cap. (See id. at 9 ("Now, if someone wants a list of who the wineries are and what their production is, I have that . . . . We have a number of wineries in Massachusetts who [*sic*], over the years, we have granted broad, broad powers to do business here and also outside the Commonwealth. We preserved that right for all the wineries here in Massachusetts."); see also id. at 11 ("Very simply, [we've] protected the wineries here and given everybody across the country the same rights that those wineries have based upon a gallon production.").) The Senator also repeatedly noted that most of the wine nationwide is produced by a small number of wineries, and a majority of wineries produce less than 30,000 gallons annually. (See id. (". . . 10 percent of the wine owners do 90 percent of the business. And 70 to 80 percent of the wineries in this country make less than 25,000 gallons, and those are the people that we are actually opening our doors completely to . . ."); id. at 20 ("So 80 percent of the vineyards in this country are going to be given the same rights as

Massachusetts wineries have.").)

Senator Morrissey also trumpeted the choice given to "large" wineries. (See id. at 12 ("We are not making them do anything they don't want to do. They have to pick their own business model. Whatever works for them is a choice they are going to make."); id. at 20 ("If you are over that gallon production, we treat them the same as well. . . . Make a choice: Go with the wholesaler or be a direct shipper. It's a business decision. It's that easy.").) At the same time, however, he noted that using wholesalers is the only economically rational "choice" for the largest ten percent of wineries. (See id. ("If 10 percent of the wineries control 90 percent of the business, you got to think they are going to go with the wholesaler because they can't move that much wine. So they are going to use the wholesale market. So it's a very small percentage [of wineries which may choose direct sales over wholesalers]. But we give them a choice.").) Senator Morrissey noted, "We also have a lot of industries here too, and there's a lot of working people that earn it: The small liquor stores, the grocery stores that sell alcohol and other people that handle the shipping. So we have a lot of people working in that business as well. This strikes a good balance." (Id. at 25.) Finally, Senator Morrissey concluded the discussion by noting: "But everybody can do business here now. And ironically, with the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries." (Id. at 33.)

3. Passage of the Final Version

The Senate passed H.B. 4498 on November 16, 2005, with certain amendments

by Senators Morrissey and Antonioni. (Docket # 92-10, 2.) That evening, Pelletier arranged to have a message sent to Senator Morrissey's aide indicating that he would prefer an increase of the gallonage cap over an exclusion of fruit wine from the gallonage cap. (Docket # 93-2.)

The next day the House concurred with the Senate's amendments and made amendments of its own, and the Senate concurred with the House amendments and receded from some of the Senate amendments.[14] (Docket # 92-10, 2.) The bill was enacted by both the House and the Senate on November 17, 2005. (Id.) The final version of H.B. 4498 differed from the initial version passed by the House on November 14, 2005, in two notable ways: (1) it changed the gallonage cap from 50,000 gallons to 30,000 gallons; and (2) it excluded fruit wine from the gallonage cap. (Docket # 93-3, 10.) Nashoba Valley's production is approximately 75% fruit wine. (Docket # 87, ¶ 40.)

Governor Romney vetoed the bill four days later. In January 2006 he introduced a competing direct shipping bill which did not contain a gallonage cap or an either/or choice between engaging in direct shipping and having representation by a Massachusetts wholesaler. The proposed bill eliminated the two-tier licensing scheme for large and small wineries and instead allowed all wineries to obtain a direct shipping license on the same terms. (Docket # 93-4.) In a letter accompanying the proposed bill, the Governor expressed his belief that H.B. 4498 "would unduly burden Massachusetts wine consumers," and that the two-tier licensing scheme "specifically

[14] The content of any of the House or Senate amendments is not clear from the record.

benefited the wholesaler industry." (Id.) On February 15, 2006, the House and Senate overrode Governor Romney's veto and enacted H.B. 4498.

E. The Wine Market

The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), a bureau under the United States Department of the Treasury, assembles statistical data relating to the production of wine in the United States. The National Revenue Center ("NRC") is the division within TTB primarily responsible for assembling and maintaining this data. Roger L. Bowling, Director of the NRC, submitted a Declaration responsive to both parties' requests for statistical information, and which both parties accept as accurate. (See Decl. of Roger L. Bowling (Docket # 83).) According to the Declaration, wineries in the United States produced over 646 million gallons of wine in the calendar year 2006. Approximately 12% of wineries (637) produced more than 30,000 gallons, but these larger operations produced 98% of the total volume of wine. (Id. ¶ 9.) There were 5,912 wineries in the United States in calendar year 2007, which produced over 653 million gallons of wine. Approximately 11% of the wineries (627) produced more than 30,000 gallons; they account for 98% of the total volume of wine in 2007. Approximately 2,800 wineries produced less than 30,000 gallons but more than one gallon of wine. (Id. ¶¶ 7, 12.) Approximately 2,500 wineries produced less than one gallon of wine. (Id. ¶ 7.)

There are 31 wineries in Massachusetts. The amount of wine that these Massachusetts wineries produce annually ranges from approximately 200 gallons to 24,000 gallons. (Docket # 80, ¶¶ 8-9.)

The wine distribution system is shaped like an hourglass, in that there are a large number of producers (the top) and a large number of consumers (the bottom), but significantly fewer wholesalers (the middle). This structure has the effect of giving wholesalers greater bargaining power with both wineries and retailers in states where it is mandatory to have a wholesaler. Generally wholesalers prefer to carry a larger volume of a particular wine, rather than an equivalent volume of several wines, because it is more profitable for a wholesaler to warehouse, manage and sell a single wine. Many wineries produce both specialty wines in small quantities and higher-volume wines. It is rare for a winery producing approximately 30,000 gallons per year to have all of its wines represented by a wholesaler.

Wholesalers and retailers mark up the price of wine to cover their business costs. The general "rule of thumb" is that the price of a wine at retail will cost a consumer twice the price the wholesaler pays for the wine at the winery. Wineries enjoy higher profit margins on direct-shipping sales. A winery can discount its direct-ship wines and still earn more revenue per bottle than for wine sold through a wholesaler. This allows wineries to compete with wholesalers in states where direct shipping is allowed.

III. Discussion

A. The Dormant Commerce Clause

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States[.]" U.S. Const. art I, § 8, cl. 3. This affirmative grant of power implies a "negative" or "dormant" constraint on state regulatory authority. "[T]his

negative aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992). "A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect . . . or of discriminatory purpose . . . ." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472 n.15 (1981) (internal citations omitted).[15] The inquiry should "eschew[] formalism for a sensitive, case-by-case analysis of purposes and effects." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994). "[T]he initial burden of establishing discrimination rests with the challenger. Once discrimination is established, however, the devoir of persuasion shifts and the affected state must demonstrate that no reasonable nondiscriminatory regulation could achieve its objectives." Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007) (internal citations omitted). Laws that regulate evenhandedly and only incidentally burden commerce are subjected to a less searching scrutiny known as the Pike test, under which the statute will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

B. Discriminatory Purpose

"A court's finding of improper purpose behind a statute is appropriately

---

[15] Statutes may also discriminate facially, such as in Granholm. See 544 U.S. at 473-74 (Michigan statute expressly permitted in-state wineries to ship directly to consumers but prohibited out-of-state wineries from doing so). However, the parties agree that the Massachusetts statute at issue here is facially neutral.

determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency. The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose. Moreover, in determining the legislative purpose of a statute, the Court [ ] also consider[s] the historical context of the statute and the specific sequence of events leading to passage of the statute." Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987) (internal citations omitted). See also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005) (noting that in Edwards the Court "relied on a statute's text and the detailed public comments of its sponsor" in determining the purpose of a state law).

In this instance the text of the statute is not especially helpful, as House Bill No. 4498, "An Act Authorizing the Direct Shipment of Wine," simply states that its purpose is "to authorize forthwith the direct shipment of wine . . . ." H.B. 4498, 184th Gen. Ct., 2006 Reg. Sess. (Mass. 2006). However, the sequence of events leading up to the passage of the bill and the public comments by the bill's sponsor, detailed supra, provide strong support for plaintiffs' assertion that § 19F was designed to allow all in-state wineries to continue direct shipping while forcing the majority of interstate wine to go through the three-tier system, thereby preserving the economic interests of both Massachusetts wholesalers and Massachusetts wineries.[16] The most damning

[16] "[A]ny notion of discrimination assumes a comparison of substantially similar entities." Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997). For purposes of this analysis the out-of-state wineries are similarly situated to both in-state wineries and in-state wholesalers, as the "large" wineries would compete with wholesalers to sell to retailers and restaurants if they had the same privileges that "small" wineries enjoy.

evidence is the exemption for fruit wine, which has no stated purpose or rationale but benefits Nashoba Valley, the only in-state winery which – absent the exemption – would approach the 30,000 gallonage cap. See Kassel v. Consol. Freightways Corp. of Delaware, 450 U.S. 662, 676 n.22 (1981) (plurality op.) (statutory exemptions benefitting in-state entities "contribute[d] to the pattern of parochialism apparent" in the statute); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 273 (1984) (statute which exempted fruit wine manufactured in Hawaii from imposition of 20% excise tax on all liquor sales found to have discriminatory purpose); see also Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 446-47 (1978) (statutory exemptions favorable to in-state industries "weaken the presumption in favor of the validity of the [statute], because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce"). In addition, the statute's sponsor recognized that the "choice" in § 19F(a) for large out-of-state wineries to either direct ship or sell through a Massachusetts wholesaler is an illusory one, as it would be economically irrational for a large winery to give up its wholesaler relationship. (See Docket # 92-11, 20 (comments of Senator Morrissey during Senate debate: "If 10

Tracy, 519 U.S. at 300 (Commerce Clause challenge must involve "actual or prospective competition between the supposedly favored and disfavored entities"); Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 268 (1984) (extent of competition between entities unimportant). Additionally, to the extent a winery is able to ship directly to a consumer, it can compete with wine available at retail stores which has gone through the three-tier system. Cf. West Lynn Creamery, 512 U.S. at 202 ("For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce–from wholesaler to retailer to consumer–is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer.")

percent of the wineries control 90 percent of the business, you got to think they are going to go with the wholesaler because they can't move that much wine. So they are going to use the wholesale market.").) It is further notable that § 19F permits "large" wineries to choose only between selling to wholesalers and selling directly to consumers, while "small" wineries may sell to wholesalers, retailers, restaurants and consumers. Accordingly, even if a "large" winery were willing to undertake the expense and effort of selling its wine without a wholesaler, under the statute there is no set of circumstances under which it could sell to retailers and restaurants, making it even more unlikely that a "large" winery would ever choose the direct shipping option.[17] Finally, the statute's sponsor explicitly stated, "with the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries." (Id. at 33.) See Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 352 (1977) (referring to State Commissioner's statements of protectionist intent as the "most glaring" evidence of discriminatory purpose).

The Commonwealth argues that § 19F was intended to benefit "small" wineries, in accordance with Granholm's recognition that smaller wineries have historically faced

[17] There is also some question of whether Massachusetts law permits a winery which has already selected wholesaler representation to terminate the relationship. Under Massachusetts law a winery must show "good cause" to discontinue sales to a wholesaler. Mass. Gen. Laws ch. 138, § 25E (2008). The statute expressly limits "good cause" to five specific situations; preference for direct shipping is not included. Id. Defendants suggest that § 25E "prevents a producer that sells its products in the wholesale market from cutting off supplies to a wholesaler to which it has made regular sales during the prior six months, [but] it does not prevent a winery from surrendering its certificate of compliance issued pursuant to G.L. c. 138, § 18B, and foregoing sales to Massachusetts wholesalers altogether." (Docket # 101, 23.) However, the basis for this interpretation of § 25E is unclear.

difficulties in obtaining wholesaler relationships and consequently rely upon direct shipping to reach new markets. (See Docket # 79, 13-14 (citing Granholm, 544 U.S. at 467).) But it does not logically follow that aiding "small" wineries must be done at the expense of burdening "large" wineries with the more onerous requirements of § 19F(a), particularly when the burden of § 19F(a) falls entirely on out-of-state wineries and its benefit entirely on in-state wholesalers. See Kassel, 450 U.S. at 675-76 ("[l]ess deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state . . . businesses"); Bacchus Imps., 468 U.S. at 273 ("Virtually every discriminatory statute allocates benefits and burdens unequally . . . . The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. . . . [I]t could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.").

C. Discriminatory Effect

The Commonwealth argues that there is no discriminatory effect on interstate commerce because "89% of all wineries in the United States are eligible for a 'small winery' direct shipment license under § 19F and, of these wineries, an overwhelming 99.5% are located outside of Massachusetts." (Docket # 79, 17.) However, the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978); cf. Walgreen Co. v. Rullan, 405 F.3d 50, 58 (1st Cir. 2005) (rejecting notion that "favored group must be entirely in-state for a law to have a

discriminatory effect on commerce"); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 274 (1988) (finding tax credit provision discriminatory in effect despite its availability to some out-of-state manufacturers). Thus, the relevant inquiry is the amount of wine in interstate commerce affected by § 19F(a), not the number of wineries affected. It is undisputed that in calendar year 2007 the 11% of wineries nationwide which produced more than 30,000 gallons of wine accounted for 98% of the total volume of wine production. As discussed supra, for these "large" wineries there is, as a practical matter, no real choice between direct shipping and a wholesaler relationship. Therefore, the Massachusetts statute in practice prevents direct shipment of approximately 98% of out-of-state wine while allowing 100% of Massachusetts wineries to sell direct. This clearly confers disproportionate benefits on both Massachusetts wineries and wholesalers. See Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 351 (1951) (invalidating statute which "in practical effect" erected an "economic barrier protecting a major local industry against competition from without the State"). Defendants rightly note that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market." Exxon, 437 U.S. at 127. However, as the Seventh Circuit Court of Appeals recently noted in an analogous case, "the [Supreme] Court concluded in Exxon that Maryland's separation of the retail and wholesale functions did not affect interstate commerce in petroleum, all of which came from out of state no matter how the distribution system was organized." Baude v. Heath, 538 F.3d 608, 612 (7th Cir. 2008) (invalidating statute which "prevents direct shipment of almost all out-of-state wine while allowing all wineries in Indiana to sell

direct").

Defendants heavily rely upon the First Circuit's recent opinion in Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28 (1st Cir. 2007), in which it considered the constitutionality of a Maine statute that permits wineries to sell directly to consumers only in face-to-face transactions. Plaintiffs in Baldacci asserted only that the statute was discriminatory in effect, forgoing any argument that the statute was discriminatory in purpose or failed the Pike test. Id. at 33. The plaintiffs there argued that consumers could easily travel to in-state wineries but the law effectively prevented out-of-state wineries from enjoying any real opportunity to sell directly to consumers. As a result, out-of-state wines would be available to Maine consumers only after the "middleman" mark-ups inherent in the three-tier system, or, for wineries too small to attract the attention of a wholesaler, not available at all. Id. at 33-34. Maine defended the face-to-face transactional requirement, and related restriction on direct shipping, as necessary to prevent underage persons from gaining access to alcoholic beverages. Id. at 32. The First Circuit held that the plaintiffs had failed to show a discriminatory effect because there was no evidence that: (1) "Maine law acts to protect Maine vineyards;" (2) "Maine consumers substitute wines purchased directly from Maine vineyards for wines that they otherwise would have purchased from out-of-state producers;" (3) "any wines at all are purchased by consumers directly from Maine vineyards;" (4) "the locus option somehow alters the competitive balance between in-state and out-of-state firms;" and (5) "Maine consumers (like imbibers everywhere) [do not] view trips to a winery as a distinct experience incommensurate with – and,

therefore, unlikely to be replaced by – a trip to either a mailbox or a retail liquor store." Id. at 36-37.

In any event, Baldacci's utility to the present case is limited because the Maine statute did not allow any direct shipping. Accordingly, there was no "direct-shipping market" from which the in-state entities disproportionately benefited. The First Circuit recognized this when it distinguished the Maine statute from the New York statute invalidated in Granholm:

> New York created an additional barrier to the entry of out-of-state wineries into the direct-shipping market – a barrier that Maine has not erected. To elaborate, New York created a direct-shipping market for wine; it allowed direct shipping on particular conditions, and those conditions were rigged to favor in-state wineries . . . . Maine flatly outlaws any and all direct shipping of wine. Consequently, there is no direct-shipping market; neither in-state nor out-of-state wineries may direct ship.

Id. at 35. Finally, to the extent that the dormant Commerce Clause analysis requires a "sensitive, case-by-case analysis of purposes and effects," West Lynn Creamery, 512 U.S. at 201, the record in this case, unlike that in Baldacci, is replete with evidence of discriminatory effect. To begin with, as discussed supra, there is evidence that § 19F acts by design to benefit Massachusetts wineries and wholesalers. There is also evidence that Massachusetts wineries sell their wines directly to consumers as well as to retailers and wholesalers. Kumler, the president of the Massachusetts Farm Wineries and Growers Association (whose members produce over 90% of the wine in the Commonwealth), attested that "[m]ost of our association's members self-distribute some or most of their wines to restaurants and wine stores," and "[d]irect shipping and self-distribution to retailers allows us to build our brands, develop customer loyalty, and

reach people who might not otherwise try our wines through a three-tier system." (Docket # 88-5, ¶ 11, 13; see also id. ¶ 15 ("Taking away direct shipping from our association's members would be a severe detriment to their business.").) Pelletier (of Nashoba Valley) testified that his winery has sold to consumers, retailers, wholesalers, and restaurants. (See Docket # 88-8, 19-20; see also Docket ## 88-9 - 89-12 (applications by eighteen wineries for "small" winery shipment licenses).) The evidence also shows that 98% of the wine produced out-of-state is made by "large" wineries and that, as a practical matter, these wineries cannot terminate their wholesaler relationships. Finally, it is undisputed that the wine distribution system's hourglass shape gives wholesalers greater bargaining power with wineries, and because wholesalers prefer higher-volume wines it is rare for a winery producing 30,000 gallons of wine per year to have all of its wines (i.e., both the high-volume brands and the lower-volume specialty brands) represented by a wholesaler. As a result, a "large" winery is unable to sell certain wines to Massachusetts consumers which its wholesaler has declined to carry.[18]

Accordingly, the court concludes that § 19F has a discriminatory effect on interstate commerce because as a practical matter it prevents the direct shipment of

[18] For example, plaintiff Gerald Leader stated that on a visit to Ravenswood Winery in Sonoma County, California, he tasted and enjoyed the winery's Early Harvest Gewurztraminer but was unable to purchase several cases for shipment to his home because Ravenswood Winery is a "large" winery. In response, defendants investigated the availability of Ravenswood Winery wine in Massachusetts and submitted evidence that sixteen different brands are available for sale in the Commonwealth. However, the Early Harvest Gewurztraminer is not one of them. (Compare Decl. of Gerald Leader (Docket # 48-3) ¶ 4, with Second Aff. of William A. Kelley, Jr. ("Kelley Aff.") (Docket # 82) ¶ 13 and Kelley Aff. Ex. B (Docket # 82-3) at 10.)

98% of out-of-state wine to consumers but permits all wineries in Massachusetts to sell directly to consumers, retailers and wholesalers.

D. Legitimate Local Purpose

"When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt, 432 U.S. at 353 (citing Dean Milk, 340 U.S. at 354). The State has failed to sustain this burden on both scores. It argues that § 19F is shielded because the three-tier system is "unquestionably legitimate." (See Docket # 79, 13-15 (citing Granholm, 544 U.S. at 489).) However, § 19F by its terms is a departure from this system since it allows "small" wineries to both direct ship and sell to wholesalers and retailers, and "large" wineries to (theoretically) opt out of the system by choosing to direct ship instead of sell to wholesalers. The legitimacy of the three-tier system cannot provide succor to a statute which allows exceptions to that system which benefit in-state interests. See Peoples Super Liquor Stores, Inc. v. Jenkins, 432 F. Supp. 2d 200, 221 (D. Mass. 2006) ("While the three-tiered system is unquestionably legitimate, Granholm cannot be held to sanction protectionist policies at any of the tiers."); Baude, 538 F.3d at 612 (finding wholesale clause in statute unconstitutional despite legitimacy of three-tier system and noting, "once a state allows any direct shipment it has agreed that the wholesaler may be bypassed").

E. The Pike Test

In any event, even if § 19F were not discriminatory in purpose or effect, it would still fail the Pike test, under which a statute is upheld only if its burden on interstate commerce is not "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.[19] "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Id. Under § 19F, "large" wineries are permitted, as a practical matter, to sell only to wholesalers, with the resultant unnecessary burdens on interstate commerce, as discussed supra. However, there are no putative local benefits served by § 19F's two-tier system. Moreover, even if one accepts the Commonwealth's assertion that the purpose of § 19F is to allow "small" wineries nationwide to direct ship because of the difficulties they face in retaining wholesaler representation, this goal would not be undercut by allowing "large" wineries the same privileges.

IV. Conclusion

Plaintiffs' motion for summary judgment (Docket # 84) is ALLOWED. Defendants' motion for summary judgment (Docket # 78) is DENIED.

---

[19] Defendants and amicus suggest that the Commonwealth's authority to regulate alcohol distribution under the Twenty- first Amendment shields it from application of the Pike test. However, Granholm is clear that a state's authority under the Amendment does not allow even constitutionally authorized liquor regulations to escape Commerce Clause scrutiny. See Granholm, 544 U.S. at 487; see also Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 15 (1st Cir. 2007) (applying Pike to alcohol regulation statute); Baude, 528 F.3d at 611-12 (same).

Judgment may be entered enjoining defendants from further enforcing § 19F, and from further enforcing Massachusetts General Laws chapter 138, § 2 ("no person shall . . . sell . . . transport, import or export alcoholic beverages or alcohol, except as authorized by this chapter") and § 18 ("the shipment of [alcoholic] beverages into the commonwealth, except as provided in this section and section 19F, is hereby prohibited").

The parties shall jointly file a proposed form of judgment with the court.

November 19, 2008
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE