UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

E.F. TRANSIT, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:13-cv-01927-RLY-MJD
	)	
DAVID COOK, *et al.*	)	
	)	
	)	
Defendants.	)	

ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

E.F. Transit, Inc. ("EFT") is a federally licensed motor carrier that is engaged in the business of transporting alcoholic beverages and has a carrier's permit issued by the Indiana Alcohol and Tobacco Commission ("the Commission"). EFT shares common ownership with Monarch Beverage Company, Inc. ("Monarch"), a state licensed beer and wine wholesaler. EFT seeks to provide transportation services to Indiana Wholesale Wine & Liquor Company ("Indiana Wholesale"), but the Commission has blocked it from doing so under state laws which prohibit a holder of a beer wholesaler's permit from having an interest in a liquor wholesaler's permit. Ind. Code § 7.1-5-9-3(b).

On September 13, 2016, the court issued an Order denying EFT's Motion for Summary Judgment and granting the Defendants' Motion for Summary Judgment, holding that EFT's claims were not ripe for adjudication. The court also held that the Commission is entitled to Eleventh Amendment immunity, but that the Commissioners are not. Notably, the court did not address EFT's argument that the Prohibited Interest

Statutes are preempted by the Federal Aviation Administration Authorization Act ("FAAAA").

EFT appealed the court's judgment. On appeal, neither party challenged the court's holdings under the Eleventh Amendment. On January 2, 2018, the Seventh Circuit reversed the court's judgment holding that EFT's claim is ripe. *See E.F. Transit v. Cook*, 878 F.3d 606, 609-610 (7th Cir. 2018) ("The state high court's decision in *Spirited Sales* eliminates any concern that E.F. Transit's preemption claim may be unripe."). The Seventh Circuit's mandate was issued on January 24, 2018.

Before the court are the parties' cross-motions for summary judgment[1] on the sole remaining claim in this litigation: preemption. For the reasons stated below, the court **GRANTS** the Commission's cross-motion for summary judgment and **DENIES** EFT's motion for summary judgment.

I. Background

Indiana maintains a three-tier distribution system for alcoholic beverages consisting of manufacturers, wholesalers, and retailers. Ind. Code §§ 7.1-3 *et seq*. Permits are both issued and required in order to participate in any of the three tiers. *Id.* There are no permits to sell alcoholic beverages in all three tiers. *Id.* Rather, at any given tier, a business must obtain a specific permit to sell beer, liquor, or wine respectively. *Id*. §§ -3(1), -8(1), -13(1).

[1] In addition, the Indiana Beverage Alliance and Wine & Spirits Distributors of Indiana filed amicus curiae briefs. The court took both amicus curiae briefs into consideration when forming its opinion.

This case focuses on the wholesaler tier: a wholesaler cannot hold an interest in both a beer and liquor permit and vice versa. *Id.* § 7.1-5-9-3(b) ("It is unlawful for the holder of a . . . beer wholesaler's permit to have an interest in a liquor permit of any type under this title."); *id.* § 7.1-5-9-6 ("It is unlawful for the holder of a . . . liquor wholesaler's permit to have an interest in a beer permit of any type under this title."); *see also id.* § 7.1-1-2-5 ("[W]henever a person is prohibited from doing a certain act or holding a certain interest directly, he shall be prohibited also from doing that act or holding that interest indirectly."). These statutes are known as the Prohibited Interest Statutes. If the Prohibited Interest Statutes are violated by a liquor wholesaler, it can result in the revocation of that wholesaler's permit. *Id.* § 7.1-3-23-23(b) ("The commission shall revoke the permit of a brewer or beer wholesaler who holds an interest in another permit in violation of IC 7.1-5-9-3.").

EFT is a trucking company licensed by the Commission to transport beer, wine, and liquor. (Filing No. 163-10, Phillip Terry ("Terry Dep") at 12, 25; Filing No. 163-15, Carrier's Permit). EFT subleases space in its warehouse to Monarch, a beer and wine wholesaler, for which it also provides delivery services. (Terry Dep. at 23). Although EFT and Monarch are separate corporate entities, the two companies share the same CEO, the same shareholders, the same board of directors, and approximately 20 employees. (*Id.* at 11, 35-36).

In 2009, EFT reached a tentative agreement to warehouse and ship alcoholic beverages for Indiana Wholesale. (Filing No. 163-18, 2009 Lease Agreement; Filing No. 163-19, 2009 Services Agreement). Because Indiana Wholesale is a licensed liquor

wholesaler, Indiana law requires it to obtain the Commission's approval before moving its warehouse. *See* Ind. Code § 7.1-5-9-12. In 2010, following an investigation into the Indiana Wholesale/EFT Transit agreement, the Commission indicated to Indiana Wholesale that it would reject Indiana Wholesale's application to move its warehouse. (Terry Dep. at 96). The findings of the investigation concluded that "Monarch Beverage and EFT Transit operate as one entity" and that "if the transfer is allowed, Monarch Beverage would have an interest in Indiana Wholesale Wine & Liquor, which is prohibited by IC 7.1-5-9-3(b)." (Filing No. 163-37, Swallow Report at 8). As a result of these findings, Indiana Wholesale withdrew its application to move its warehouse to EFT's location. (*See* Filing No. 163-43, Rusthoven Letter dated 9/9/2010).

In 2012, EFT and Indiana Wholesale proposed a revised (and limited) service agreement, wherein EFT trucks would simply pick up shipments from Indiana Wholesale's existing warehouse and deliver those shipments to Indiana Wholesale's customers. (Filing No. 163-46, Letter from Terry dated April 20, 2012). The proposed agreement was contingent on the Commission either providing written approval of the agreement or failing to object within 60 days of receiving the agreement. (*Id.*). The Commission refused to either approve or disapprove of the agreement, although it warned that it "has some concerns about prohibited interests." (Filing No. 163-47, Letter from Chairman Huskey dated June 19, 2012). As a result of the Commission's tepid response, Indiana Wholesale withdrew from the agreement—fearing that the Commission's response sufficed as a written objection, and that it could have sanctions imposed upon it by the Commission. (*See* Filing No. 163-51, Letter from Indiana Wholesale's President,

James Howard, dated November 12, 2012). To date, the Commission has refused to approve EFT's agreement with Indiana Wholesale.

II. Summary Judgment Standard

Summary judgment is appropriate if the movant shows that "there is no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Carmody v. Board of Trustees of Univ. of Ill.*, 893 F.3d 397, 401 (7th Cir. 2018). In the instant case, the material facts are undisputed, making summary judgment particularly appropriate. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2550 (1986).

III. Discussion

A. Application of Indiana's Prohibited Interest Statutes to EFT

The Indiana Supreme Court's decision in *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371 (Ind. 2017) bears mention. There, Spirited Sales LLC, an aspiring liquor wholesaler, sought a liquor wholesaler's permit. *Id.* at 371. Spirited Sales, however, was wholly owned by EFT, and EFT was owned by the same five shareholders as Monarch. *Id*. at 379. Thus, the Commission denied Spirited Sales' application, finding it ran afoul of the Prohibited Interest Statutes. *Id.* at 383.

On petition to transfer, the Indiana Supreme Court interpreted the term "interest" broadly, and upheld the Commission's denial. *Id.* at 379. The Court reviewed the business relationship between EFT and Monarch, and found the ties between them so close that "they were practically one in the same." *Id.* Indeed, the "ties between EFT and Monarch were so extensive that EFT could reasonably be deemed to hold an interest in a

beer wholesaler's permit—an interest prohibited by a combined reading of [the Prohibited Interest Statutes]." *Id.* Given the extent of those ties, Spirited Sales' application for a liquor wholesaler's permit was barred by virtue of EFT's interest in a beer wholesaler's permit. *Id.*

Based on this holding, the court finds the proposed contract between EFT, which holds an interest in a beer wholesaler's permit, and Indiana Wholesale, which holds an interest in a liquor wholesaler's permit, would violate the Prohibited Interest Statutes. *See E.F. Transit v. Cook*, 878 F.3d 606, 610 (7th Cir. 2018) ("And the Indiana Supreme Court has now construed the prohibited-interest statutes to forbid E.F. Transit from entering into an agreement like the one it negotiated with Indiana Wholesale (or any similar company)."). The court now turns to the issue of preemption.

B. Preemption

The FAAAA preempts state laws "having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *See* 49 U.S.C. § 14501(c)(1). EFT argues that enforcing the Prohibited Interest Statutes against it falls within the scope of FAAAA preemption by limiting EFT's motor carrier services. The Commission argues that Indiana's Prohibited Interest Statutes are protected from preemption by virtue of the Twenty-first Amendment. Section 2 of the Twenty-first Amendment reads, "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." U.S.C.A. Const.Amend. 21.

The parties agree that Indiana's Prohibited Interest Statutes and the FAAAA conflict. Ordinarily, the Supremacy Clause "would invalidate a state law that conflicted with a federal statute." *Lebamoff v. Enter., Inc. v. Huskey*, 666 F.3d 455, 458 (7th Cir. 2012) (citing *Capital Cities Cable, Inc. v. Crisp*, *supra*, 467 U.S. 691, 716 (1984)). However, state laws that involve a "core power" of the state under Section 2 of the Twenty-first Amendment are presumptively valid. *Id.* In *Capital Cities*, the Supreme Court defined the state's "core power" as the power to "regulat[e] the times, places, and manner under which liquor may be imported and sold." *Capital Cities*, 467 U.S. 716. Thus, Section 2 of the Twenty-first Amendment "reserves to the States the power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id.* at 712.

1. The Challenged Statutes Are Within the State's Core Power and Are Entitled to a Strong Presumption of Validity

In *Lebamoff*, the Seventh Circuit addressed whether an Indiana alcohol regulatory statute fell within the state's "core power." There, a liquor retailer and two consumers challenged the constitutionality of an Indiana state law that prevented retail wine shipping to customers via a motor carrier. 666 F.3d at 456. The company argued that the Indiana statute was preempted by the FAAAA. *Id.* at 457. The Seventh Circuit observed that an important "core power" of the state under Section 2 of the Twenty-first Amendment is the power to regulate the time, place, and manner under which liquor may be imported and sold. *Id.* at 458 (quoting *Capital Cities*, 467 U.S. 716). The Court held that "Indiana's prohibition of the delivery of wine by motor carriers is within that [state's]

[core] power, because it is an aspect of 'regulating the manner under which [wine] may be … sold.'" *Id.* Similarly here, the Prohibited Interest Statutes "regulate and limit the manufacture, sale, possession, and use of alcohol." *See* Ind. Code § 7.1-1-1-1(2). Therefore, the court finds that the Prohibited Interest Statutes fall within Indiana's core powers.

2. The State Interests Outweigh the Federal Interests

This is not the end of the inquiry though. "Even though [the challenged statute] represents the exercise of a core state power pursuant to the Twenty-first Amendment, a balancing of state and federal interests must be conducted." *Lebamoff*, 666 F.3d at 458. Because the Prohibited Interest Statutes fall within the state's core power, "there is a thumb on the scale" in favor of the state. *Id.*

When balancing the state and federal interests at play, the Seventh Circuit has not required specific evidence of stated goals being met through the challenged statute. Rather, the Seventh Circuit in *Lebamoff* noted that "[a]llowing motor carriers to deliver wine could . . . undermine the state's efforts to prevent underage drinking, the state having decided not unreasonably that requiring face-to-face age verification by someone who has passed a state-certified training course should reduce the prevalence of drinking." *Id.* at 459. No further evidence was required to show that the statute did prevent underage drinking, or that it advanced its intended purpose through any other

means.[2] Instead, the Seventh Circuit looks to whether the challenged law is a reasonable effort to meet the stated interests. *Id.* at 459.

David Cook, as chairman of the Commission, advanced the following state interests of the Prohibited Interest Statutes: (1) ensuring there is a stable marketplace at the retail level; (2) temperance; (3) encouraging competition among diverse wholesalers; (4) controlling the size of organizations to prevent undue influence on the system and regulators; and (5) discouraging monopolistic business models. (Filing No. 167-6, Dep. David Cook ("Cook Dep.") at 45). These same purposes have also been advanced for maintaining the three-tiered system in other states. *See, e.g., North Dakota v. United States*, 495 U.S. 423; *Dickerson v. Bailey*, 336 F.3d 388, 397 (5th Cir. 2003); *Cal. Beer*

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[2] Notwithstanding *Lebamoff*, EFT argues that in order for a state's alcohol regulation to trump the FAAAA, the state must substantiate its Twenty-first Amendment interest with evidence that the alcohol regulation at issue actually advances the state's purported interest. In support of its argument, EFT cites two Supreme Court cases, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

In *Cal. Retail Liquors Dealers Ass'n*, the Court held that California's system for resale price maintenance was a Sherman Act violation "because the wine producer holds the power to prevent competition by dictating the prices charged by wholesalers." *Cal. Retail Liquor Dealers Ass'n*, 100 S.Ct. at 939. Similarly, in *324 Liquor Corp.*, the Court held that the New York Statute "allows 'vertical control' by wholesalers of retail prices. Such industrywide resale price fixing is virtually certain to reduce both interbrand and intrabrand competition." *324 Liquor Corp.*, 107 S.Ct. at 721 (citing *California Retail Liquor Dealers Ass'n*, 100 S.Ct. 937).

These cases are inapposite. In contrast to the challenged price maintenance statutes in *Midcal* and *324 Liquor*, the Prohibited Interest Statutes are intended to facilitate competition among wholesalers, not restrict it. (Cook Dep. at 4). In other words, the laws at issue here do not attempt to regulate the price of alcohol; instead, they regulate the manner in which alcohol may be sold. As noted by the *Lebamoff* court, this is "a field emphatically occupied (since 1933) by the states." *See Lebamoff*, 666 F.3d at 458. For this, and for the other reasons advanced by the Commission, the court finds the Commission is not required to come forward with evidence demonstrating that the Prohibited Interest Statutes actually further the state's purported interests.

Wholesalers Ass'n v. Alcoholic Bev. Control Appeals Bd., 487 P.2d 745, 747–50 (Cal. 1971); *Neel v. Texas Liquor Control Bd.*, 259 S.W.2d 312, 316–17 (Tex. Ct. App. 1953). The federal interest advanced by EFT is the deregulation of the domestic airline and trucking industry.

The Prohibited Interest Statutes are central to the three-tier system in Indiana, as *Spirited Sales* makes clear, and effect core Twenty-first Amendment interests. 77 N.E.3d at 377. As noted, the Prohibited Interest Statutes regulate the ownership and control of the distribution of alcohol within Indiana's borders so as to ensure the strict separation of business interests both vertically between tiers (suppliers, wholesalers, and retailers) and horizontally between product categories (beer, wine, liquor) to limit influence and economic power of alcoholic beverages permittees. (*See* Cook Dep. at 123; *see also id.* at 70) (testifying that the Prohibited Interest Statutes ensure "[t]hat you don't create [an] environment that allows for tied houses vertically or undue influences horizontally"). These statutes are not directed at price, route, or service of interstate motor carriers. *See* 49 U.S.C. § 14501(c)(1) (preemption).

Because the transportation function is a particularly critical and far-reaching aspect of alcohol supply and distribution in this state, a wholesaler[3] could circumvent Indiana's three tier system by using a commonly owned motor carrier. (Cook Dep. at 120, 130). And if one wholesaler held a monopoly, the Commission's ability to regulate

[3] For example, Indiana Code section 7.1-3-8-3(c) authorizes a liquor wholesaler to "sell, *transport*, and *deliver* liquor." Likewise, Indiana Code section 7.1-3-2-7 authorizes a brewer to "manufacture beer, place beer in containers or bottles, *transport* beer, [and] sell and *deliver* beer."

that wholesaler would be impeded due to a lack of transparency and industry watchdogs, where one oversized wholesaler could unduly influence regulators through its dominant market share. (*Id.* at 63, 123-24, 127-28). Furthermore, liquor or spirits are treated differently due to their high alcohol content. "Distilled liquors are thus seen to be in a class by themselves, with an alcoholic strength far in excess of wines and beers," with the argument being that that "difference should be made the basis of a radical difference in treatment under the law." Scott Fosdick, TOWARD LIQUOR CONTROL 20 (The Center for Alcohol Policy, ed. 2011). Indiana's legislators choose to distinguish, through differentiated permitting, beverages with an alcohol content (like beer) from those with a heavier alcohol content (like liquor). This differing treatment encourages, among other things, temperance.

Indiana's intricate regulatory system that relies, in part, on the separation of liquor wholesalers from beer wholesalers, would be unable to regulate the "times, places, and manner under which liquor may be imported and sold," *Capital Cities*, 467 U.S. at 716, if the challenged statutes were struck down. The court therefore finds that the state's interests protected by the Twenty-first Amendment, and carried out through reasonable means, outweigh the federal interest advanced by EFT.

IV. Conclusion

For the reasons above, the court **GRANTS** the Commission's Cross-Motion for Summary Judgment (Filing No. 212) and **DENIES** EFT's Motion for Summary Judgment (Filing No. 161).

SO ORDERED this 12th day of December 2018.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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