UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREENBUSH BREWING CO., et al., Plaintiffs,	)	
	)	No. 1:19-cv-536
-v-	)	
	)	Honorable Paul L. Maloney
MICHIGAN LIQUOR CONTROL COMMISSION, et al., Defendants.	)	

OPINION

Plaintiffs Greenbush Brewing Company, Michigan Cider Association, Farmhaus Cider Company, and Vander Mill, LLC, filed this motion for a preliminary injunction (ECF No. 11), claiming that Defendants Michigan Liquor Control Commission (MLCC), Andrew J. Deloney, Kurt Cox, and Jon Reeder have irreparably harmed them by seizing Greenbush's wine and hard cider inventory. Plaintiffs contemporaneously filed a motion for a temporary restraining order, which this Court denied (ECF No. 13). For the reasons to be explained, the motion for a preliminary injunction will be denied.

I. Background

Wine[1] is "in bond" or "bonded" when it has been produced and packaged but has not been sent to distribution or to a tasting room for consumption. Bonded alcohol is "untaxpaid," and a "bonded premises" is a federally authorized area where untaxpaid alcohol may be stored and handled. When a winemaker sells product to a distributor, retailer, or

[1] This case involves both wine and cider. Cider is treated as wine under state and federal law.

individual customer, federal excise tax liability is incurred and paid, and the wine is no longer in bond. A winemaker may also transfer its wine in-bond to a different bonded premises, and the receiving party becomes responsible for the eventual tax liability. Federal tax law places no restrictions on these bonded transfers of wine.

In Michigan, "small wine maker" licenses allow licensees to manufacture not more than 50,000 gallons of wine per year and sell that wine to wholesalers, retailers, consumers by direct shipment, and at retail on the licensed winery premises such as tasting rooms. MCL 436.1111(12); MCL 436.1113(10). Small wine maker licenses cost $25 and are not subject to Michigan's Liquor License quota. MCL 436.1525(1)(d). However, small wine maker licenses do not allow licensees to sell wine manufactured by other wineries. To sell wine or beer manufactured and bottled off-site, a licensee needs a tavern license. MCL 436.1113a(2). Tavern licenses are limited by Michigan's Liquor License quota, which is based on population in local geographic units. MCL 436.1531(1). Thus, tavern licenses are usually only obtainable by transfer from another party.

In December 2018, the Michigan Legislature placed restrictions on bonded transfers of wine for wine makers and small wine makers. MCL 436.1204a provides, in relevant part:

> (1) A manufacturer shall not sell or transfer alcoholic liquor to a licensed manufacturer in this state except as provided in subsections (2) and (3).
>
> (2) Notwithstanding any provision in this act to the contrary, a manufacturer may sell or transfer wine or spirits to a licensed manufacturer, and a licensed manufacturer may purchase or receive wine or spirits, under any of the following conditions:
>
> (a) For a sale or transfer of wine:
>
> (*i*) The selling or transferring manufacturer is a wine maker, small wine maker, or out-of-state entity that is the substantial equivalent of a wine maker or small wine maker and is selling or transferring the wine to a wine maker,

> small wine maker, or out-of-state entity that is the substantial equivalent of a wine maker or small wine maker.
>
> (*ii*) The purchasing or receiving wine maker or small wine maker manufactures wine at its licensed premises or the purchasing or receiving small wine maker bottles wine at its licensed premises.
>
> * * *
>
> (3) A wine maker, small wine maker, distiller, or small distiller may not sell alcoholic liquor purchased or received under this section unless 1 of the following conditions is met:
>
> (a) The purchasing or receiving manufacturer modifies the purchased or received alcoholic liquor by performing a portion of the manufacturing process as described in section 109(1).
>
> (b) The purchasing or receiving small wine maker bottles the purchased or received wine.
>
> (c) The purchasing or receiving wine maker or small wine maker is selling a shiner[2] on which the wine maker or small wine maker has placed a label under section 111(10).
>
> (4) This section does not prevent a manufacturer from selling, purchasing, or receiving nonalcoholic ingredients to or from another manufacturer.

The Legislature also amended the definition of "manufacture" to read:

> "Manufacture" means to distill, rectify, ferment, brew, make, produce, filter, mix, concoct, process, or blend an alcoholic liquor or to complete a portion of 1 or more of these activities. Manufacture does not include bottling or the mixing or other preparation of drinks for serving by those persons authorized under this act to serve alcoholic liquor for consumption on the licensed premises. In addition, manufacture does not include attaching a label to a shiner. All containers or packages of alcoholic liquor must state clearly the name, city, and state of the bottler.

MCL 436.1109(1). Essentially, the Legislature now allows a purchasing small wine maker to sell bonded wine for consumption only if it has modified the bonded wine by performing part of the manufacturing process on it or if it has bottled the bonded wine. Small wine

[2] A "shiner" is an unlabeled sealed container of wine that the purchasing wine maker must label before selling. MCL 436.1111(10).

makers may also receive unlabeled sealed bottles of wine called "shiners," label them, and sell them.

Plaintiff Greenbush holds both a microbrewer license and a small wine maker license. Greenbush operates a tasting room on its licensed premises in Sawyer, Michigan. At some point, the MLCC became aware that Greenbush possessed and offered for sale unaltered bonded wine and cider. On June 19, 2019, Defendants Cox and Reeder investigated Greenbush's premises and spoke with Greenbush's Director of Operations, Anna Rafalski, and Brewer, Joseph Hinman. The investigators asked Rafalski and Hinman how Greenbush manufactured wine and cider; Rafalski explained that Greenbush only manufactured beer on the premises.

Cox and Reeder also asked about the wine and cider stored on the premises. Rafalski stated that Greenbush possessed wine produced by Fenn Valley Vineyards, which it received in unlabeled shiner bottles or 1/6-barrel kegs. Greenbush did not label the shiners. Rafalski also stated that Greenbush's cider was manufactured by Vander Mill, which shipped cider to Greenbush in 1/2-barrel kegs. Cox and Reeder requested copies of any federally required filings regarding wine production, but Rafalski conceded that no such forms were available.

Based on this investigation, Reeder and Cox determined that Greenbush was violating the new Michigan law, seized and impounded all wine and cider on Greenbush's property, and informed Greenbush that it could no longer sell wine or cider. At Greenbush's request, Reeder and Cox left for an hour so that Greenbush could move the wine and cider into cold storage. When Reeder and Cox returned, Rafalski had spoken with counsel, and informed the investigators that Greenbush did, in fact, produce wine and cider at the brewery. Rafalski

explained that Greenbush had made sangria from bonded wine and that Greenbush had attempted to brew cider. Cox and Reeder filed a violation report and submitted it to the MLCC; this administrative matter is still pending, and the seized inventory is being held awaiting MLCC's decision. Plaintiffs now seek a preliminary injunction and the return of their inventory, arguing that federal law preempts the new Michigan statutes and that the statutes are void for vagueness.

II. Legal Framework

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Mich.*, 782 F.3d 318, 323 (6th Cir. 2015). A court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (quoting *Northeast Ohio Coal. for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)).

The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coal.*, 467 F.3d at 1009; *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)

(internal citation omitted); see *Patio Enclosures, Inc. v. Herbst*, 39 Fed. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)).

The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J.R. Tobacco*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting U.S. v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)). The Sixth Circuit has noted that "[a]lthough the four factors must be balanced, the demonstration of some irreparable injury is a sine qua non for issuance of an injunction." *Patio Enclosures*, 39 Fed. App'x at 967 (citing *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

III. Analysis

A. Success on the Merits

1. Federal Preemption

Preemption claims are grounded in the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the land; . . . any Thing in the constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. This gives Congress the power to enact statutes that preempt state law. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Congressional intent to preempt is the most important factor to consider in a preemption claim. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Federal law may expressly preempt state law, but if it does not, intent may "also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Id.*

"[T]here is a strong presumption against federal preemption of state law[.]" *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015). This presumption also applies to federal agency regulations. *Schoolcraft Mem'l Hosp. v. Mich. Dep't of Cmty. Health*, 570 F. Supp. 2d 949, 958 (W.D. Mich. 2008). The presumption can only be overcome by a showing that preemption was the "clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Plaintiffs concede that Congress did not expressly preempt state law on this issue; instead, they first argue that Congress has pervasively regulated the field of bonded transfers of wine, so the Michigan statutes at issue are preempted. The Court disagrees.

The core of Plaintiffs' argument is that Congress intended to preempt state law on this issue because it has published so many regulations regarding the production of wine. However, as Plaintiffs stated at oral argument, the federal government regulates production of alcohol while states retain control over the distribution and sales of alcohol. *See e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). MCL 436.1204a fits squarely inside the realm of distribution and sales, governing the process of distribution for small wine makers, and dictating which small wine makers may sell wine they have purchased in bond. The sheer volume of federal regulations concerning the production of wine has no bearing on whether this statute, concerning distribution and sales, is preempted.

In their pleadings, Plaintiffs cited several specific statutes as illustrative points. However, each statute discusses the tax liability for or the logistics of bonded transfers. 26

U.S.C. 5362(b) permits bonded transfers under the IRS code and discusses excise tax liability. This section explicitly does not consider the removal of wine "for consumption or sale." 26 U.S.C. 5362(b)(4). 27 C.F.R. § 24.101 permits bonded transfers under the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). 27 C.F.R. § 25 governs beer and is wholly inapplicable. Even giving Plaintiffs the benefit of the doubt and reviewing 27 C.F.R. §§ 24.280-24.284 (which govern bonded transfers of wine) reveals only a discussion of the logistics and paperwork required for bonded transfers of wine. In contrast, MCL 436.1204a concerns *who* may participate in the bonded transfers of wine, and who may remove wine from in-bond status to sell it for consumption. None of the federal statutes Plaintiffs cite govern who may operate bonded premises, nor do they consider the removal from bonded status. Plaintiffs have failed to show that MCL 436.1204a is barred because of field preemption.

Plaintiffs next argue that the statute is in direct conflict with federal law. Conflict preemption exists where compliance with both federal and state law is physically impossible, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Plaintiffs have not identified what specific provisions conflict; rather, they argue broadly that the state's impairment of a license issued under a federal regulatory scheme is improper. This argument is misplaced: Plaintiffs cite cases involving a license issued by the federal government under a federal regulation that later was subject to stricter state requirements. *See, e.g., Ray v Atlantic Richfield Co.*, 435 U.S. 151 (1978) (a state's judgment that a vessel was unsafe was preempted

by the federal government's judgment that it was safe); *Leslie Miller, Inc., v. Arkansas*, 352 U.S. 187 (1956) (per curiam) (federal certification of a contractor as "responsible" preempted inconsistent state licensing requirements). This is classic conflict preemption, and the federal law preempts the state law.

However, that is not the issue presented here. In the case at bar, licenses are issued by the state government under state regulations. The relevant federal regulations permit certain actions to be taken by licensed individuals, and the state then places some conditions on the permitted actions. In this case, states may not "impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank of Marion Cty, N.A., v. Nelson*, 517 U.S. 25, 33 (1996). States may not take actions that amount to "suspension or revocation" of a federally-granted "right to operate." *Castle v. Hayes Freight Lines*, Inc., 348 U.S. 61, 64 (1954). However, if Congress intends to subject a grant of power to state and local restrictions, these restrictions do not amount to a significant impairment. *Barnett Bank*, 517 U.S. at 33-34.

Plaintiffs set forth a conclusory allegation that MCL 436.1204a amounts to the suspension of a federally-granted right to operate, but again fail to acknowledge that the federal regulatory scheme intentionally leaves the distribution and sales of alcohol to the states. As discussed above, federal law governs bonded transfers of wine and state law governs the sale of wine for consumption; a restriction on the sale of wine for consumption does not suspend, revoke, or substantially impair Plaintiffs' ability to engage in the federally-granted power to perform bonded transfers of wine. Rather, MCL 436.1204a concerns who may

remove wine from bonded status and sell it to consumers. Therefore, the statutes are not in direct conflict, and federal law does not preempt the state law at issue.

Finally, Plaintiffs make a brief argument that MCL 436.1204a has no cognizable relation to state interests, and therefore, the statute is unenforceable. In the context of the Commerce Clause, the Supreme Court recently reaffirmed that states have the leeway to enact laws that address the public health and safety effects of alcohol or other state interests, but states cannot enact protectionist measures that do not serve legitimate interests. *Tenn. Wine and Spirits Retailers Ass'n. v. Thomas*, 139 S. Ct. 2449, 2474 (2019). Plaintiffs argue that the new legislation advances no state interest because bonded wine is already carefully monitored for unlawful activity: the TTB requires careful measurements of bonded wine transfers at both the shipping port and the receiving port, so no threat of diversion is present. Again, the Court disagrees.

Defendants explain that the Michigan Legislature was concerned with the exact fact pattern presented here: a small wine maker license being used to circumvent the Michigan Liquor Control Code by selling bonded wine without actually using the small wine maker license to manufacture wine. This controverts the state interest in controlling the amount of available liquor licenses, the carefully monitored issuance of those licenses, and the ability to adequately monitor compliance with those licenses. This state interest sufficiently justifies the restrictions imposed by MCL 436.1204a, which directly relates to that interest by ensuring that "small wine maker" licenses are to make, rather than simply to sell, wine.

2. Vagueness

Plaintiffs also argue that parts of MCL 436.1204a and all of MCL 436.1109(1) (the definition of manufacture) are void for vagueness. A statute is void for vagueness if it fails "(1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct," and (2) fails to articulate standards that allow enforcement officers to enforce the law in a non-arbitrary manner. *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999). Statutes are not rendered void simply because they contain "flexibility and reasonable breadth, rather than meticulous specificity." *Platt v. Bd. of Comm'rs on Grievances and Discipline of the Ohio Supreme Court*, 894 F.3d 235, 246 (6th Cir. 2018) (quoting *Grayned v. City of Rockford*, 408 US 104, 110 (1972)).

Looking first to MCL 436.1109(1): the statute defines "manufacture" as:

> to distill, rectify, ferment, brew, make, produce, filter, mix, concoct, process, or blend an alcoholic liquor or to complete a portion of 1 or more of these activities. Manufacture does not include bottling or the mixing or other preparation of drinks for serving by those persons authorized under this act to serve alcoholic liquor for consumption on the licensed premises. In addition, manufacture does not include attaching a label to a shiner. All containers or packages of alcoholic liquor must state clearly the name, city, and state of the bottler.

Plaintiffs argue that the terms "make," "produce," "concoct," and "process" are insufficiently vague and render this statute void. The Court disagrees. These four words appear at the end of a list of specific wine manufacturing techniques, and each of the disputed words are readily definable by consulting a dictionary. The inclusion of these four words does not render the statute insufficiently vague; rather, they provide flexibility and breadth for wine manufacturing techniques not identified by name. Further, the statute specifically

outlines what manufacturing is *not*. This definition provides sufficient guidance for an ordinary person to understand what "manufacture" means. *See Platt*, 894 F.3d at 246.

Plaintiffs next contest MCL 436.1204a(2)(a)(*ii*). This subsection allows only winemakers that meet the following condition to purchase or receive wine: "The purchasing or receiving wine maker or small wine maker manufactures wine at its licensed premises or the purchasing or receiving small wine maker bottles wine at its licensed premises." Given the definition of "manufacture," the Court believes that this statute provides reasonable guidance for an ordinary person. Plaintiffs argue that it is unclear what quantity of wine manufacturing qualifies under the statute. True, the statute does not define exactly how much wine must be manufactured (or bottled), but the statute plainly states that the wine maker must engage in the process of manufacturing or bottling wine in any quantity. The statute need not define a quantity with meticulous specificity to be understood. *See id.* It follows that MCL 436.1204a(2)(a)(*ii*) provides sufficient guidance for an ordinary person to understand its meaning. *See Belle Maer Harbor*, 170 F.3d at 556.

Finally, MCL 436.1204a(3) provides:

> (3) A wine maker, small wine maker, distiller, or small distiller may not sell alcoholic liquor purchased or received under this section unless 1 of the following conditions is met:
>
> (a) The purchasing or receiving manufacturer modifies the purchased or received alcoholic liquor by performing a portion of the manufacturing process as described in section 109(1).
>
> (b) The purchasing or receiving small wine maker bottles the purchased or received wine.
>
> (c) The purchasing or receiving wine maker or small wine maker is selling a shiner on which the wine maker or small wine maker has placed a label under section 111(10).

Again, given the definition of "manufacturing," this statute is reasonably clear. An ordinary person can read the statutes together and understand that to sell bonded wine, the receiving wine maker must either perform a portion of the manufacturing process on it or bottle it. MCL 436.1204a(3) provides sufficient guidance for an ordinary person to understand its meaning. *See id.*

Plaintiffs also argue that the MLCC has enforced MCL 436.1204a randomly and arbitrarily around the state. However, this argument is misplaced. When considering a void-for-vagueness argument, the "question is not whether discriminatory enforcement occurred here, as we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). Plaintiffs have not identified what parts of the statute are so vague that they lead to inconsistent or discriminatory enforcement. Plaintiffs have failed to show a reasonable likelihood of success on their claims.

B. Irreparable Harm

"To be granted an injunction, the plaintiff must demonstrate, by clear and convincing evidence, actual irreparable harm or the existence of an actual threat of such injury." *Patio Enclosures, Inc. v. Herbst*, 39 Fed. Appx. 694, 969 (6th Cir. 2002), quoting *Clark v. Mt. Carmel Health*, 124 Ohio App. 3d 308, 339 (1997) (quotation marks omitted). The loss of customer goodwill "often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992).

Greenbush has alleged that it has suffered a loss of customer goodwill because it has not been able to sell wine, cider, or other fruit-based alcoholic drinks. However, Greenbush has failed to present any evidence to support these claims beyond conclusory statements that some customers may prefer fruit and wine products over beer. Greenbush has attempted to demonstrate the loss of some customer goodwill, but has failed to show irreparable harm by clear and convincing evidence. Vander Mill, Farmhaus, and the Michigan Cider Association make a conclusory claim that "some" of their customers have stopped purchasing cider as a result of the MLCC's actions. However, this is a vague assertion and these Plaintiffs have provided no evidence, let alone clear and convincing evidence, to show that they have suffered irreparable harm.

C. The Equities

The equities slightly disfavor the issuance of a preliminary injunction. Issuing an injunction enjoining Defendants from enforcing MCL 436.1204a would hinder the MLCC's ability to enforce the Liquor Code and the state's interest in regulating liquor sales within its borders. Further, issuing an injunction would harm the public interest of regulation of alcohol sales, and the public interest of avoiding oversaturation of taverns or bars. Therefore, both the possible harm to Defendants and the public interest weigh against granting a preliminary injunction.

D. Conclusion

After consideration of the factors together, the Court does not find that a preliminary injunction is warranted, primarily because Plaintiffs have not established a substantial likelihood of success on their claims that the statutes at issue are unconstitutional.

However, the Court is sympathetic to Plaintiff Greenbush's desire for guidance from the MLCC, and Greenbush's complaint that it may not receive answers to its statutory interpretation questions for months because a hearing has not yet been scheduled on the administrative complaint. Plaintiffs deserve answers from the MLCC to their questions about the meaning of the new legislation, which are questions that this Court cannot consider on the pleadings before it. To the extent that a ruling from the MLCC's administrative process would provide guidance about MCL 436.1109(1) and MCL 436.1204a, Plaintiffs deserve that guidance. Therefore, the Court orders the MLCC to hold a hearing on the administrative complaint within 60 days of the date of this order. The Court also orders that a final decision on that complaint shall issue within 120 days of the date of this order.

ORDER

For the reasons stated in the Court's Opinion, Plaintiffs' motion for a preliminary injunction (ECF No. 11) is **DENIED**.

IT IS FURTHER ORDERED THAT Defendant MLCC shall arrange and hold a hearing on Plaintiff Greenbush's administrative complaint by December 10, 2019, and that a final decision shall issue in Greenbush's case by January 24, 2020.

IT IS SO ORDERED.

Date: September 16, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge