IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTHERN INDIANA
(Southern Division)

JOSHUA D. WILKINSON, MICHAEL CENTO,

JENNIFER CENTO, & ALMA MADER BREWING,

Plaintiffs, Case No. 1:26-cv-00248-JPH-MKK

v.

THE HON. THEODORE. E. ROKITA & JESSICA ALLEN

Defendants.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs consist of an out-of-state brewery located in Kansas, Missouri, and three beer consumers located in Indiana. They have brought this lawsuit contesting Indiana law that creates the inability of the out-of-state brewery or any out-of-state brewery from using a common carrier to sell, ship, and deliver its product directly to Indian consumers.

Plaintiffs contend that this inability constitutes discrimination "in effect". Further, using the *Pike Balancing Test*, plaintiffs contend that the merits of the burden on interstate commerce far outweigh any state interest in not allowing common carriers to be sued to make these types of deliveries:

A. Standard of Review

To invoke a federal court's subject-matter jurisdiction, a plaintiff needs to provide only "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). The plaintiff must allege facts, not mere legal conclusions, in compliance with the pleading standards established by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929

(2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *See Harris v. Rand*, 682 F.3d 846, 850–51 (9th Cir. 2012). Assuming compliance with those standards, the plaintiff's factual allegations will ordinarily be accepted as true unless challenged by the defendant. *See* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1363, at 107 (3d ed.2004).

Defendants may move to dismiss a case for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack "accepts the truth of the plaintiff's allegations but asserts that they are 'insufficient on their face to invoke federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Safe Air*, 373 F.3d at 1039)). When a defendant brings a facial challenge under Rule 12(b)(1), the court resolves it as it would under Rule 12(b)(6), "[a]ccepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Id.* at 1121 (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Plaintiffs assert that they have met this burden of factual pleading.

B. Effect of Recent Seventh Circuit Precedent

Defendants claim in their introduction that the recent Seventh Circuit opinion, *Chi. Wine Co. v. Braun,* 148 F.4th 530 (7th Cir. 2025), is precedent in this case and would foreclose the plaintiffs' claim. This is inaccurate. There are three types of alcohol cases: producer, retailer, and self-distribution. The present case is a producer case related to *Granholm v. Heald*, 544 U.S. 460,

125 S. Ct. 1885 (2005). The case cited by the defendants is a retailer case, as stated therein: "The upshot in this case is that any wine or beer producer (in or out of Indiana) can ship by common carrier to consumers in Indiana, the holding in the retail case, Chicago Wine was that no retailer (in or out of Indiana) may do so." *Id. Chicago Wine* is therefore distinguishable from the case at hand. Plaintiffs in Chicago Wine have filed a Petition in Certiorari, which is still pending.

By "producer case," it is meant that in *Granholm*, the claim was that out-of-state wineries, as producers, could not directly sell, ship, or deliver their products to Michigan or New York consumers. The United States Supreme Court found that the Michigan statute was facially discriminatory. And that the New York statute discriminated in effect by creating an economic burden. In the more recent case decided by the Seventh Circuit, the court held that an out-of-state retailer, such as a Chicago wine retailer, cannot sell, ship, or deliver wine directly to Indiana consumers. It should also be noted that this decision is currently on appeal to the United States Supreme Court, with a Petition for Certiorari pending.

C. Different Types of Discrimination

There are three types of discrimination to be considered. The first is facial discrimination, the second is discrimination "in effect," and the third is Pike Balancing, to see if the effect on interstate commerce outweighs the concern for local interest.

D. Discriminatory Effect

Defendants claim that the statute is neutral and that there is no discrimination. It is true that there is no facial discrimination because neither an out-of-state brewery nor an in-state brewery can currently use a common carrier to sell, ship, and deliver its products to Indiana consumers. However, it is not correct to say that there is no discriminatory effect on commerce

from outside the state of Indiana's borders. While it may be true that Indiana breweries may only be able to use their own vehicles and personnel to make deliveries within the state of Indiana, current Indiana law makes it practically impossible to ship beer from out-of-state brewers and, by extension, for them to enter the beer market in Indiana by forcing them to use their own vehicles and employees to make deliveries. This disparity shields Indiana breweries and wholesalers from competition. Consider that it is unreasonable and discriminatory to expect an Oregon Brewery to use its own vehicle.

Alma Mader Brewery, located in Kansas City, Missouri, is approximately 480 miles from the nearest Indiana border. It is economically unfeasible for Alma Mader, which is a craft brewery, to use its own vehicles and personnel to deliver beer products to an Indiana consumer. The statute effectively insulates Indiana breweries from out-of-state competition, such as Alma Mader, thereby violating the Commerce Clause. The only way that Alma Mader can engage in interstate commerce as provided by the Commerce Clause of the United States Constitution is to use a common carrier. The result of the statutory scheme in Indiana is to create discrimination in effect based upon the pertinent facts of this matter. This scheme creates a ban on Alma Mader from entering the Indiana market.

A similar case, *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, was decided in Massachusetts in 2010. In that case, the federal court in Massachusetts found that while Massachusetts Gen. Laws Ch. 138, § 19F, "is neutral on its face; it does not, by its terms, allow only Massachusetts wineries to distribute their wines through a combination of direct shipping, wholesaler distribution, and retail sales. Section 19F instead uses a very particular gallonage cap to confer this benefit upon 'small' as opposed to 'large' wineries. We hold that § 19F violates the Commerce Clause because the effect of its particular gallonage cap is to change the competitive

balance between in-state and out-of-state wineries." *Id.* This was deemed to be discrimination in effect.

E. Pike Balancing

If, for whatever reason, the Court does not find discrimination in effect in this matter, the Court must proceed with the *Pike Balancing Test,* see Pine v. Bruce Church, 397 US 137 (1971). In this case, the merits of the Plaintiffs' desire to access better craft beer from out of state means that they will have to switch to less interesting beers produced or available locally.

There is a lot of knowledge that there are thousands of craft breweries across the country. Currently, Indiana statute bars consumers from purchasing beer from many of those distant, well-known craft breweries while insulating the few craft brewers located within the state of Indiana from that competition.

It should be noted that Indiana already allows wineries to use a common carrier to make out-of-state deliveries of their wine to Indiana consumers.

F. The Local Benefit Is Outweighed by The National Economic Impact

Under the *Pike Balancing Test,* a factual determination must be made through discovery to show that there is no substantial reason common carriers cannot be used to deliver beer to consumers and that state law imposes an undue burden on interstate commerce by weighing local benefits against the law's impact on national economic activity.

As it stands, the wishes of craft beer consumers to drink craft beer from outside the borders of the state of Indiana are essentially precluded by the protectionist and unconstitutional posture of Indiana Code § 7.1-3-2-7(5)(H). While on its face the statute treats both Indiana

breweries and out-of-state breweries the same, as neither can ship by common carrier to consumers, in effect it has a greater disparaging impact, as by its design the statute will "bear more heavily on interstate than local commerce," *Regan v. City of Hammond*, 934 F.3d 700, 703 (7th Cir. 2019).

The defendant, in its memorandum in support of Defendant's Motion to Dismiss for Failure to State a Claim, states that "both a brewery in Bargersville, Indiana, and a brewery in Kalamazoo, Michigan may use their own employees to deliver their beer to a consumer in Indiana." While this may be true, the farther away from the Indiana border, the greater the burden on out-of-state breweries.

The Seventh Circuit addresses this balancing in Baude v. Heath, Nos. 07.3323 & 07.3338. That case decided whether one face-to-face meeting by a consumer to allow DTC shipping was constitutional. The Baude Court states, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental. It will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," see Pike p.397.

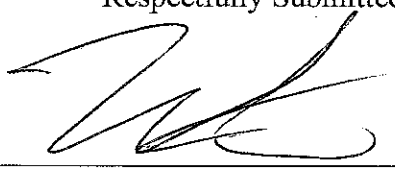
In this case, the statute creates a virtual ban on out-of-state shipping and deliveries of beer to Indiana consumers. Its impact is clearly excessive. While an out-of-state brewery may acquire a shipper's permit, the usage of the permit is illusory.

Indiana has, however, created, with its aforementioned statement, a market preference for local breweries by allowing in-state breweries to use their own employees for direct delivery while creating a geographical barrier and burdens on out-of-state breweries that are less likely to ship to Indiana under the current legal regime. That preferential treatment is protectionist

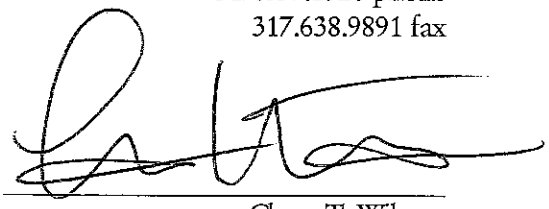
because it preserves local economic advantage at the expense of interstate competition, violating the Dormant Commerce Clause.

Thus, showing that the Plaintiffs have stated a dormant Commerce Clause claim, Defendant's Motion to Dismiss should be denied.

Respectfully Submitted,



Robert D. Epstein
Attorney No: 6726-49
Epstein Seif Porter & Beutel
The Meridian Centre
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
317.639.1326 phone
317.638.9891 fax



Chase T. Wilson
Attorney No.: 34258-49
Hurst Limontes, LLC
50 South Meridian St. Suite 600
Indianapolis, IN 46204
317.636.0808 phone
317.633.7680 fax