UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUANITA SWEDENBURG, in her own capacity and as Proprietor of SWEDENBURG WINERY, a Virginia Partnership; DAVID LUCAS, in his own capacity and as Proprietor of THE LUCAS WINERY, a California sole Proprietorship; PATRICK FITZGERALD; CORTES DeRUSSY; and ROBIN BROOKS	:	
Plaintiff,	:	00 Civ. 0778 (RMB)
- against -	:	**DECISION AND ORDER**
EDWARD F. KELLY, Chairman, and LAWRENCE J. GEDDA and JOSEPH ZARRIELLO, Commissioners, of the State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in their official capacities,	:	
Defendants,	:	
- and -	:	
CHARMER INDUSTRIES, INC., PEERLESS IMPORTERS INC., EBER BROTHERS WINE & LIQUOR CORP., PREMIER BEVERAGE COMPANY LLC, METROPOLITAN PACKAGE STORE ASSOCIATION, INC., LOCAL 2D OF THE ALLIED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, and DR. CALVIN BUTTS	:	
Intervenor-Defendants.	:	

INTRODUCTION

On February 3, 2000, Plaintiffs Juanita Swedenburg ("Swedenburg") and David Lucas ("Lucas"), proprietors of two out-of-state wineries, and Patrick Fitzgerald ("Fitzgerald"), Cortes DeRussy ("DeRussy"), and Robin Brooks ("Brooks"), three New York State consumers (collectively "Plaintiffs") filed an action against Defendants Edward F. Kelly ("Kelly"), Chairman of the New York State Liquor Authority, and Lawrence J. Gedda ("Gedda") and Joseph Zarriello ("Zarriello"), Commissioners of the New York State Liquor Authority, requesting that the Court "[d]eclare ... N.Y.

Alco. and Bev. Cont. Law §§ 102(1)(a), (c), and (d) [collectively "ABC Laws"] ... unconstitutional, void, and of no effect[.]"[1] (Compl. at 10.) Plaintiffs claim that "the Direct Shipment and Advertising Ban violates the rights of all the plaintiffs to freedom of commerce as guaranteed by the interstate commerce clause," (Compl. ¶ 38), "the economic liberty of the plaintiffs Swedenburg and Lucas under the privileges and immunities guarantee," (Compl. ¶ 46), and, "the right of the winery plaintiffs to produce, and of the consumer plaintiffs to receive, protected speech in violation of the First Amendment." (Compl. ¶ 54.)

Defendants Kelly, Gedda, and Zarriello, as well as Intervenors Charmer Industries, Inc., Peerless Importers Inc., Eber Brothers Wine & Liquor Corp., Premier Beverage Company LLC, Metropolitan Package Store Association, Inc., Local 2d of The Allied Food and Commercial Workers International Union, and Dr. Calvin Butts (collectively "Defendants") filed a (joint) motion to dismiss the complaint on or about May 11, 2000 pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6) (failure to state a claim upon which relief can be granted) alleging that "the Twenty-first Amendment insulates from constitutional attack state regulation of the delivery of alcoholic beverages," (Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs. Mem.") at 3), and that "[a]cting within the scope of that 'core power,'[2] states have the inviolate right to regulate distribution of alcohol within their borders[.]" (Defs.' Mem. at 2.) Plaintiffs, including amici Coalition to Preserve Consumer

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[1] ABC Law § 102(1)(a) states that, "No person shall send or cause to be sent into the state any letter, postcard, circular, newspaper, pamphlet, order kit, order form, invitation to order, price list, or publication of any kind containing an advertisement or a solicitation of any order for any alcoholic beverages ... unless such person shall be duly licensed hereunder to traffic in alcoholic beverages." Section 102(1)(c) provides that, "No alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages..." Section 102(1)(d) provides that, "No common carrier or other person shall bring or carry into the state any alcoholic beverages, unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages..."

[2] "The Supreme Court has consistently ruled that Section 2 [of the Twenty-first Amendment] permits only interstate 'core' regulation of alcoholic beverages by a state." Dickerson v. Bailey, 87 F. Supp.2d 691, 697 (S.D. Tex. 2000). Some cases suggest "that temperance is the core purpose of the Twenty-first Amendment." Bridenbaugh v. O'Bannon, 78 F. Supp.2d 828, 831 (N.D. Ind. 1999). See also Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 861 (S.D.N.Y. 1985)("[o]nly those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment").

Access to Wine, Arcadian Estate Vineyards and Cascata Winery at the Professor's Inn, and Consumer Alert, have opposed Defendants' motion.[3] Oral argument was held on July 21, 2000. (See Transcript.)

For the reasons set forth below, Defendants' motion to dismiss is denied.

BACKGROUND

"Under New York's Alcoholic Beverage Control ("ABC") Law, the only persons who are authorized to distribute alcoholic beverages to consumers in this State are persons who are licensed [by New York] and accountable[.]" (Defs.' Mem. at 5.)[4] "Although the plaintiff wineries are licensed in their home states, they cannot obtain a license in New York because out-of-state wineries are not eligible." (Pls. Mem. in Opp'n to Defs.' Mot. to Dismiss ("Pls.' Mem.") at 2.) "They are therefore subject to the Direct Shipment and Advertising Ban." (Compl. ¶ 18.)

The "[P]laintiff wineries are not represented by wholesalers in New York"; (Compl. ¶ 21) "[f]ew wineries of such small size [as the Plaintiff wineries] are represented by wine wholesalers by reason of economies of scale." (Compl. ¶ 20.) Plaintiffs contend that "the Direct Shipment and Advertising Ban therefore has the effect of preventing plaintiff wineries of the opportunity to sell wines in the State of New York." (Compl. ¶ 21.)

Plaintiffs contend that the ABC Laws discriminate against out-of-state wineries "by prohibiting direct sales and shipments of wines to New York consumers from out-of-state wineries and by permitting such direct sales and shipments to New York consumers by licensed in-state wineries." (Compl. ¶ 34.) Plaintiffs assert that "Defendants have no adequate justification for maintaining such discrimination," (Compl. ¶ 35), because "[a] principal purpose of the Direct Shipment and Advertising

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[3]On June 5, 2000, the Court also granted a letter application by the Coalition for Free Trade to participate as amicus. The Coalition for Free Trade is welcome to participate in future Court proceedings with Plaintiffs and the other amici.

[4]New York, along with other states, has a so-called "three-tier" system of alcohol sales. "[A]lcohol producers must go through wholesalers and distributors, who must in turn go through retailers, who can then sell to consumers." Vijay Shanker, Note, Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment, 85 Va. L. Rev. 353, 355 (1999).

Ban is economic protectionism ... [which is] not a valid justification for discriminatory trade barriers under the interstate commerce clause." (Compl. ¶ 36.)

Plaintiffs also claim that "[b]ecause nearly all the winery plaintiffs' sales are directly to consumers, the Direct Shipment and Advertising Ban significantly impairs plaintiffs' ability to pursue their chosen and legitimate livelihood." (Compl. ¶ 43.) Since "[t]he freedom to pursue a livelihood is a fundamental right protected by the privileges and immunities guarantee[,] [and] [t]he opportunities available to plaintiffs Swedenburg and Lucas to sell and ship wine directly to New York consumers are severely disadvantageous relative to the opportunities available to similarly situated New York wineries, by virtue of the Direct Shipment and Advertising Ban[,] [Plaintiffs claim that the ABC Laws] ... violate[] the economic liberty of plaintiffs Swedenburg and Lucas under the privileges and immunities guarantee." (Compl. ¶¶ 41, 44, 46.)

Plaintiffs further claim that "[t]he Direct Shipment and Advertising Ban, on its face, prohibits in the most sweeping terms truthful information and advertising about wine..." (Compl. ¶ 49), and "subjects to misdemeanor liability any person who advertises out-of-state wines in any manner whatsoever, including over the Internet." (Compl. ¶ 50.) Plaintiffs contend that "the Direct Shipment and Advertising Ban violates the right of the winery plaintiffs to produce, and of the consumer plaintiffs to receive, protected speech in violation of the First Amendment." (Compl. ¶ 54.)

Defendants counter that "[t]he ABC law is a valid exercise of New York's 'core power' to regulate the importation and distribution of alcohol within the State under the Twenty-first Amendment,"[5] (Defs.' Mem. at 8), and that "[t]he 'dormant' Commerce Clause is not implicated here because Congress, in enacting the Webb-Kenyon Act[6] and related federal legislation, directly

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[5] Section 2 of the Twenty-first Amendment states that "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. Const. amend. XXI, § 2.

[6] The Webb-Kenyon Act states, in part, that "[t]he shipment or transportation ... of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States ... into any other State, Territory, or District of the United States ... or from any foreign country into any State, Territory, or District of the United States ... in violation of any law of such State, Territory, or District of the United States ... is hereby

authorized the states to adopt laws, such as the ABC Law, which govern the importation, transportation and distribution of alcoholic beverages, and thereby federalized those state laws." (Defs.' Mem. at 8.)

Defendants claim that "[e]ven if the 'dormant' Commerce Clause were implicated here, the ABC Law would not impose an undue burden on interstate commerce because it has prevented neither the importation of alcohol into New York State, nor the sale of out-of-state alcohol within New York State. Furthermore, the ABC Law is not designed to discriminate against interstate commerce, as evidenced by the fact that almost all of the alcohol sold within New York State, including most wine, comes from out-of-state sources and is still distributed in the same manner as in-state product." (Defs.' Mem at 8-9.)

Defendants further state that "[t]he Privileges and Immunities Clause is not implicated here because only natural persons, who are citizens of other states but located here, are entitled to protection under this clause." (Defs.' Mem. at 9.) They assert that "[a]s business entities, the winery plaintiffs in this case are not 'citizens' within the meaning of the Privileges and Immunities Clause and, therefore, do not qualify for its protection." (Defs.' Mem. at 25.)

Defendants also claim that "[t]he First Amendment is not implicated here because the ABC Law restricts, to a limited extent, only unprotected commercial speech concerning an unlawful activity[,]" (Defs.' Mem. at 9), and that the "narrowly tailored restriction on commercial advertising for alcoholic beverages is plainly aimed at preventing the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed, out-of-state suppliers. Because this provision minimally restricts only commercial speech concerning an unlawful activity, plaintiffs' First Amendment claim fails as a matter of law." (Defs.' Mem. at 27.)

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prohibited." 27 U.S.C. § 122.

Related Litigation

This case is one in a recent series of constitutional challenges to state liquor regulations. In Dickerson v. Bailey, 87 F. Supp.2d 691 (S.D. Tex. 2000), Texas residents wishing to receive wine shipments directly from out-of-state suppliers sued the Administrator of the Texas Alcohol Beverage Commission, claiming that Texas Alcoholic Beverage Code Ann. §107.07 ("Texas Statute") violates, among other things, the "dormant" Commerce Clause of the U.S. Constitution.[7] Dickerson, 87 F. Supp.2d at 693. The Texas Statute prohibited, inter alia, "non-Texas wine sellers from shipping wines or causing wines to be shipped to Texas residents, but not local Texas wineries or Texas retailers from shipping wines or causing wines to be shipped to Texas residents." Dickerson, 87 F. Supp. 2d at 696. In granting plaintiffs' motion for summary judgment, United States District Court Judge Melinda F. Harmon held, among other things, that: (1) the Texas Statute violated the dormant Commerce Clause; (2) the Twenty-first Amendment did not diminish other provisions of the Constitution, including the Commerce Clause and Supremacy Clause; (3) the Twenty-first Amendment did not empower states to favor local liquor industries by erecting anti-competitive barriers; and (4) the Twenty-first Amendment did not "save" the Texas Statute from being declared unconstitutional under the dormant Commerce Clause. Id. at 691.[8] Judge Harmon stated that:

> [i]n light of the evolution of relevant case law ... the Court finds that Texas Alcohol Beverage Code Ann. §107.07(a) and (f) facially discriminates against out-of-state vintners and wine shippers, especially small ones, prohibiting

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[7] "The Court notes that the federal Constitution empowers Congress '[t]o regulate Commerce ... among the several states.' U.S. Const. art. I, §8, cl. 3. The courts have interpreted the language of this provision affirmatively granting authority to Congress to regulate commerce as having a 'negative' aspect, designated the 'dormant' commerce clause, that implicitly establishes a national free market and restricts state and local governments from impeding the free flow of goods from one state to another." Dickerson, 87 F. Supp.2d at 693 n.2 (citing Wyoming v. Oklahoma, 502 U.S. 437, 469-70 (1992)). See also Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 856 (S.D.N.Y. 1985)("[t]he traditional principles underlying the [commerce] clause operate not only as a grant to Congress of power to regulate interstate commerce, but also as a restriction on the authority of the states to regulate interstate trade").

[8] Judge Harmon found that "there is no temperance goal served by the statute since Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers able to pass into the state through its distribution system, and available in unrestricted quantities, as those that, because of their sellers' size or Texas wholesalers or retailers' constraints, are in practical effect kept out of state by statute." Dickerson, 87 F. Supp.2d at 710.

> direct shipments to consumers and in requiring them to attempt to go through Texas retailers to ship wines to in-state consumers, thereby benefiting Texas wholesalers and retailers by means of such economic protectionism, negatively impacting Texas consumers because of more limited wine selection and higher prices, and impeding interstate commerce in violation of the commerce clause.

Id. at 709-10. The parties have briefed the issue of how best to fashion an injunctive remedy, but Judge Harmon has yet to issue a final judgment.

In Kendall-Jackson Winery, Ltd. v. Branson, 82 F. Supp.2d 844 (N.D. Ill. 2000), several wineries filed suit against the members of the Illinois Liquor Control Commission and three wholesale distributors of alcoholic beverages challenging the constitutionality of the Illinois Wine and Spirits Industry Fair Dealing Act, 1999 Public Act 91-2 ("Illinois Fair Dealing Act"). Plaintiffs claimed, among other things, that the Illinois Fair Dealing Act violated the dormant Commerce Clause of the Constitution by discriminating against out-of-state wineries and regulating "agreements between distributors and suppliers of liquor... [but not] agreements between a distributor and a supplier when the supplier is 'an Illinois winery' or is a 'winery that has annual case sales in the State of Illinois less than or equal to 10,000 cases per year.'" Kendall-Jackson, 82 F. Supp. 2d at 850 (citation omitted). On January 3, 2000, United States District Court Judge Joan B. Gottschall preliminary enjoined the Commissioners from enforcing the Illinois Fair Dealing Act because "Plaintiffs [] show[ed] a likelihood of succeeding on the merits of their claim that the Illinois winery exemption violates the dormant Commerce Clause." Kendall-Jackson, 82 F. Supp. 2d at 869. The distributors appealed the preliminary injunction, but the appeal was dismissed because the distributors' injuries could not be "redressed." See Kendall-Jackson Winery, Ltd. v. Branson, 212 F.3d 995, 998 (7th Cir. 2000)("the distributors miss the real point: redressability. Sure the injunction injures them, but how can their

appeal redress that injury given that the injunction will continue to bind the Commission?").[9] The case remains pending in District Court.

In Bridenbaugh v. O'Bannon, 78 F. Supp.2d 828 (N.D. Ind. 1999), plaintiffs challenged the constitutionality of "Indiana Statute section 7.1-5-11-1.5 which ... made it unlawful for persons in another state or country to ship an alcoholic beverage directly to an Indiana residence." Bridenbaugh, 78 F. Supp.2d at 829. United States District Court Judge Allen Sharp held that the Indiana direct shipment regulation was unconstitutional and granted the plaintiffs' summary judgment motion. "[T]he Twenty-First Amendment does not necessarily immunize state liquor control laws from invalidation under the commerce clause ... [t]he chief question is whether the interests implicated by a state's regulation are so closely related to the powers reserved by the Amendment that the regulation may prevail, notwithstanding the fact that its requirements directly conflict with express federal policy." Bridenbaugh, 78 F. Supp. 2d at 831 (citing Cooper v. McBeath, 11 F.3d 547, 555 (5th Cir. 1994)). Bridenbaugh is currently on appeal to the Court of Appeals for the Seventh Circuit.

STANDARD OF REVIEW

In resolving a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)(emphasis added.) The burden upon the movant is very substantial as the issue before the court on a Fed. R. Civ. P. 12(b)(6) motion "is not whether a plaintiff is likely to prevail ultimately, 'but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote

[9] "[T]he Commission is not among the appellants." Kendall-Jackson, 212 F.3d at 996.

and unlikely but that is not the test.'" Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995)(quoting Weisman v. LeLandais, 532 F.2d 308, 311 (2d Cir. 1976)(per curiam)). "The motion to dismiss for failure to state a claim is disfavored and is seldom granted." Bower v. Weisman, 639 F. Supp. 532, 539 (S.D.N.Y. 1986)(citing Arfond v. E.I. DuPont de Nemours & Co., 261 F.2d 434, 435 (2d Cir. 1958))(emphasis added.) See also New Paradigm Software Corp.v. New Era of Networks, Inc., -- F. Supp.2d –, 2000 WL 1121349 (S.D.N.Y. Jul 26, 2000). While "'the well-pleaded material allegations of the complaint are taken as admitted ... conclusions of law or unwarranted deductions of facts are not admitted.'" First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994), cert. denied, 513 U.S. 1079 (1995)(citations omitted).

ANALYSIS

There has been considerable change and evolution in Twenty-first Amendment jurisprudence since House of York v. Ring, 322 F. Supp. 530 (S.D.N.Y. 1970).[10] Apart from the recent District Court cases referred to above, there have been several Supreme Court rulings in this area. In Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), for example, the Supreme Court stated that "the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program." Id. at 114. The Midcal Court held that a California state resale price maintenance statute violated the Sherman Antitrust Act and resisted the contention that §2 of the Twenty-first Amendment "'freed the States from all restrictions upon the police power to be found in other provisions of the Constitution.'" Id. at 108 (citation omitted).

In 1984, the Supreme Court noted that, in attempting to harmonize state and federal powers where alcoholic beverages are concerned, a court must determine "whether the interests implicated by

[10] "The twenty-first amendment to the Constitution is dispositive of plaintiffs' claims that the disputed statute violates the Commerce Clause ... [T]he states have wide latitude in regulating liquors coming into, rather than through, the state, and such latitude encompasses the statute now before us." House of York, Ltd. v.. Ring, 322 F. Supp. 530, 533, 535 (S.D.N.Y. 1970).

a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984).

In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the Supreme Court explained that "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition ... **State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.**" Bacchus, 468 U.S. at 276 (emphasis added.)[11] And in 1986, the Supreme Court stated that "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).[12]

Clearly, "recent Twenty-First Amendment cases have emphasized federal interests to a greater degree than had earlier cases[.]" Bacchus, 468 U.S. at 275. See also Dickerson, 87 F. Supp.2d at 707 ("the courts have increasingly emphasized federal interests and more carefully scrutinized the actual purpose behind the state's law").

Rulings in this judicial circuit since House of York also reflect an evolution. In In re Beer Institute, 849 F.2d 753 (2d Cir. 1988), the Court of Appeals reversed the District Court's decision that the "price affirmation" provisions to the Connecticut Liquor Control Act did not violate the Commerce

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[11]The Bacchus Court also stated that "[i]t has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States' ... [w]ere it otherwise, 'the trade and business of the country [would be] at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States' ... [i]t was to prohibit such a 'multiplication of preferential trade areas' that the Commerce Clause was adopted." Id. at 272-73 (citations omitted.)

[12]The Supreme Court has stated that "[i]f a state law purporting to promote [legitimate] purposes is in reality 'simple economic protectionism,'... we have applied a 'virtually per se rule of invalidity.'...Even if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981)(citations omitted.)

Clause. Id. at 754. The Court of Appeals held that the Connecticut price affirmation provisions allow Connecticut to "directly regulate interstate commerce in violation of the Commerce Clause." Id. at 761. The Court observed that "the extraterritorial effect of Connecticut's affirmation provisions ... 'may interfere with the ability of other [s]tates to exercise their own authority under the [t]wenty-first [a]mendment' by impinging upon their 'regulatory goals' or by 'depriv[ing] their citizens of the opportunity to purchase brands of liquor that are sold' in Connecticut." Id.

In Joseph E. Seagram & Sons, Inc. v. Gazzara, 800 F.2d 49 (2d Cir. 1986), the Court of Appeals again reversed the District Court's ruling that New York's "price affirmation statute...[is] constitutional under the commerce clause and within the authority granted to the states to regulate the importation and distribution of alcoholic beverages under the Twenty-First Amendment."[13] Id. at 50. "In light of the Court's recent ruling in ... [Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986),] on the specific issue raised herein finding that 'the [New York] ABC Law on its face violates the Commerce Clause,' ... we reverse the judgment of the district court." Seagram, 800 F.2d at 50 (citation omitted.)

In Loretto Winery Ltd. v. Gazzarra, 601 F. Supp. 850 (S.D.N.Y. 1985), United States District Court Judge Charles L. Brieant determined that New York Alcoholic Beverage Control Law Section 3, subdivision 36-a and 79-a, which permitted the sale of 'wine product' made exclusively from New York State grapes in grocery stores, violated the Commerce Clause and could not be "saved" by §2 of the Twenty-first Amendment. Id. at 852. "[T]he New York ABC Law in effect excludes for sale in retail grocery stores any 6% wine product not produced exclusively from New York grapes." Id. at 859. The ABC Law "is plain and simple economic protectionism of New York grown grapes ... and a

[13] The price affirmation statute required that distillers file with the New York State Liquor Authority "a monthly price schedule ...[and] an affirmation that the prices in the schedule are no higher than the lowest prices that the distiller will charge wholesalers anywhere else in the United States during the month." Seagram, 800 F.2d at 50.

violation of the commerce clause..." Id. at 858.[14] The Court also stated that **"[o]nly those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment."** Id. at 861 (emphasis added.) The Court further noted that "[i]t is now clear that ... [the Supreme] Court no longer considers the power of the states under the Twenty-first Amendment to be 'unfettered by the Commerce Clause.'" Id. at 860. Affirming, the Court of Appeals held that "[s]uch clearly protectionist measures are violative of the commerce clause and, in light of Bacchus ... cannot be saved by Section 2 of the twenty-first amendment." Loretto Winery, Ltd. v. Duffy, 761 F.2d 140, 141 (2d Cir. 1985).[15]

Technological advancements facilitate - - as never before - - the commerce between and among states. See generally American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 168 (S.D.N.Y. 1997)("The borderless world of the Internet raises profound questions concerning the relationship among the several states and the relationship of the federal government to each state..."). The Internet increasingly is responsible for direct sale and shipment of goods to consumers. See Vijay Shanker, Note, Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment, 85 Va. L. Rev. at 356. "Recent years ... have seen a boom in the direct shipment business, due in large part to the Internet ... Wholesalers and retailers are consequently concerned about a potential drop in revenues and, because sales taxes for alcohol are generally collected at the wholesale point, states are foreseeing lost tax revenues. As a result, states have been amending their direct shipment laws, either by imposing greater restrictions or by increasing sanctions for violations." Id.

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[14]Judge Brient went on to state that "[t]o permit the 1984 amendments to the ABC Law to stand would violate the economic principle upon which our Constitution was drafted, to assure a nation of states comprising a shared common market. Those principles which made our nation great and prosperous lie at the very core of the interstate commerce clause ..." Loretto, 601 F. Supp. at 863.

[15]The Court of Appeals described Judge Brient's opinion as "comprehensive and thoughtful." Loretto, 761 F.2d at 141.

In view of the allegations in the complaint, and light of these (legal and economic) developments, it would be inappropriate to deny Plaintiffs here the opportunity to adduce evidence in support of their claims.[16]

Interstate Commerce

In their complaint, Plaintiffs' allege that "[t]he Direct Shipment and Advertising Ban violates the rights of all plaintiffs to freedom of commerce as guaranteed by the interstate commerce clause," (Compl. ¶ 38), by discriminating "on its face against out-of-state wineries, and in favor of New York wineries, by prohibiting direct sales and shipments of wines to New York consumers from out-of-state wineries and by permitting such direct sales and shipments to New York consumers by licensed in-state wineries." (Compl. ¶ 34.) Plaintiffs allege that "[a] principal purpose of the Direct Shipment and Advertising Ban is economic protectionism, primarily or exclusively for the benefit of wholesalers." (Compl. ¶ 36.) The winery Plaintiffs also allege that they "all have New York consumers who would like to order their products" and that they "would sell and ship products to New York customers but do not do so because of the Direct Shipment and Advertising Ban." (Compl. ¶ 23.)

Defendants contend that "[t]he 'dormant' Commerce Clause is not implicated here because Congress, in enacting the Webb-Kenyon Act and related federal legislation, directly authorized the states to adopt laws, such as the ABC Law, which govern the importation, transportation and distribution of alcoholic beverages, and thereby federalized those state laws." (Defs.' Mem. at 8.) In the alternative, Defendants assert that "[e]ven if the 'dormant' Commerce Clause were implicated here, the ABC Law would not impose an undue burden on interstate commerce because it has prevented neither the importation of alcohol into New York State, nor the sale of out-of-state alcohol within New York State." (Defs.' Mem at 8.) Defendants' contend that "according to data from the New York State

[16] The Court hastens to add that it is in no way ruling here upon the ultimate merits of the parties' respective claims.

Department of Taxation and Finance ... nealy [sic] 90% of all wine sld [sic] in New York State comes from out-of-state sources." (Defs. Mem. at 23 n.25.)

Because all reasonable inferences are, at this stage of the case, to be drawn in favor of the plaintiff, Ortiz v. Cornetta, 867 F.2d 146, 149 (2d Cir. 1989), Plaintiffs' Commerce Clause claim survives the motion to dismiss.[17] Both "'the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.'" Bacchus, 468 U.S. at 275 (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)). "If a state law purporting to promote [legitimate] purposes is in reality 'simple economic protectionism,' we have applied a 'virtually per se rule of invalidity.'...Even if a statute regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce, the courts must nevertheless strike it down if the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Clover Leaf Creamery Co., 449 U.S. at 471. See also Bacchus, 468 U.S. at 270 ("where simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected").

As noted, in Midcal, 445 U.S. 97 (1980), the Supreme Court sustained a federal antitrust challenge to a state alcohol pricing law, finding that the Twenty-first Amendment did not shield the state's action under the Commerce Clause. "[E]ven where the States had acted under the explicit terms of the [Twenty-first] Amendment, the Court resisted the contention that § 2 'freed the States from all restrictions upon the police power to be found in other provisions of the Constitution.'" Id. at 108 (citing State Board of Equalization v.Young's Market, 299 U.S. 59, 64 (1936)). In Bacchus, where out-of-state wholesalers challenged a Hawaii excise tax exemption for certain locally produced

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[17]As noted, Plaintiffs allege that "[a] principal purpose of the Direct Shipment and Advertising Ban is economic protectionism, primarily or exclusively for the benefit of wholesalers." (Compl. ¶36.) See, e.g., Loretto, 601 F. Supp. at 861 ("'[t]he twenty-first amendment was plainly designed only to allow the states to legislate against the evils of intoxicating liquors rather than to reward its purveyors.' In other words, the powers reserved must be exercised with temperance as their goal").

alcoholic beverages, the Supreme Court held that the "central purpose of [the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers of competition ... State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of unrestricted traffic in liquor." Bacchus, 468 U.S. at 276.

And, in this Circuit, "[o]nly those restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment." Loretto, 601 F. Supp. at 861. Defendants have the burden of demonstrating that "the statutes advance 'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" See Cooper v. McBeath, 11 F.3d at 553 (quoting New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988)). See also 44 Liquormart v. Rhode Island, 517 U.S. 484, 507 (1996)(where a plurality of the Supreme Court struck down Rhode Island's ban upon advertising liquor prices on First Amendment grounds, holding that "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the States's goal of promoting temperance").[18]

Defendants cite several cases in support of their motion, including House of York, where "a mail order liquor and wine solicitation service and a trucking subcontractor challenged the constitutionality of the statutory predecessor to § 102, alleging that the statute's prohibition on direct shipment of alcohol beverages to New York consumers by out-of-state supplier violated their rights under the Commerce Clause and the Equal Protection Clause." (Defs.' Mem. at 13.) Defendants correctly point out that the Court in House of York found that "[t]he twenty-first amendment to the Constitution is dispositive of plaintiffs' claims that the disputed statute violates the Commerce Clause"

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[18] See also Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999) (where the court struck down, by summary judgment, Indiana's ban on direct interstate shipping of wines); Kendall-Jackson Winery, Ltd. v. Branson, 82 F. Supp. 2d 844, 863 (N.D. Ill. 2000) (where the court enjoined enforcement of regulations under which alcohol suppliers could terminate wholesaler distribution agreements because "the effect is discriminatory, the exemption must be viewed as economic protectionism."); Dickerson, 87 F. Supp. 2d 691 (where the court struck down Texas' discriminatory ban on direct interstate wine sales, finding a "per se commerce clause violation").

and that "the states have wide latitude in regulating liquors coming into, rather than through, the state, and such latitude encompasses the statute now before us." House of York, 322 F. Supp. at 533, 535. But the force of House of York has been diminished by subsequent rulings. See e.g. Bacchus, 468 U.S. at 275 (holding that "recent Twenty-first Amendment cases have emphasized federal interests to a greater degree than had earlier cases"). See also Loretto, 601 F. Supp. at 860 (commenting that the Supreme Court "no longer considers the power of the states under the Twenty-first Amendment to be 'unfettered by the Commerce Clause'").[19]

Defendants also refer to North Dakota v. United States, 495 U.S. 423 (1990), where the Supreme Court determined that "[t]he Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." North Dakota, 491 U.S. at 447. (Defs.' Reply at 2.) "[W]ithin the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system [citations omitted]. The Court has made clear that the States have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate market..." North Dakota, 495 U.S. at 431 (citing Young's Market, 299 U.S. at 62). "The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." North Dakota, 495 U.S. at 432.

North Dakota, although it clearly contains language supportive of Defendants' cause, is distinguishable from the case at bar and does not ineluctably support dismissal of Plaintiffs' case. For

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[19]Indeed, Judge Brieant observed that "recent cases have demonstrated an unwillingness on the part of the Supreme Court to allow a state legislature to conduct a trade war against another state, contrary to the principles underlying the commerce clause, simply because the product discriminated against is an alcoholic beverage subject to regulation under the Twenty-first Amendment." Loretto, 601 F. Supp. at 860.

one thing, North Dakota involved interpretation of the Supremacy Clause (and intergovernmental immunity doctrine) and did not focus on the relationship between the Twenty-first Amendment and the Commerce Clause. Second, the facts of North Dakota are rather unique, involving a federal enclave within that State.[20] There are a number of other cases that are more closely analogous to the instant case than North Dakota. See, e.g., Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Kendall-Jackson Winery, Ltd. v. Branson, 82 F. Supp. 2d 844, 863 (N.D. Ill. 2000); Dickerson v. Bailey, 87 F. Supp. 2d 691 (S.D. Tex. 2000); Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828 (N.D. Ind. 1999); Loretto Winery Ltd. v. Gazzarra, 601 F. Supp. 850 (S.D.N.Y. 1985).[21] Also, the Court notes that North Dakota was a split decision with no majority opinion.[22]

Defendants also contend, among other things, that the "Indiana and Texas district courts [in Bridenbaugh and Dickerson] ... erroneously cited only 'temperance' as a constitutional basis for state regulation under the Twenty-first Amendment ... [and failed] to recognize that regulation of the distribution of alcoholic beverages within the state's borders is necessarily a means to advance temperance." (Defs.' Mem. at 15, n.15.) **It is too early to assess definitively the wisdom and correctness of these other rulings. No evidence has been presented here regarding the purpose(s) and effect(s) of New York's ABC Laws and it would be precipitous to make a determination foreclosing Plaintiffs' cause upon the existing record. At this stage, the Court is constrained to assume that a "principal purpose of the Direct Shipment and Advertising Ban is economic protectionism[.]" (Compl. ¶ 36.)**

Defendants' argument that the "dormant" Commerce Clause is not implicated here because of the Webb-Kenyon Act and related federal legislation, similarly, does not warrant dismissal of the

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[20] In North Dakota the federal government challenged North Dakota's laws regulating liquor sold to military bases over which the United States and North Dakota exercised concurrent jurisdiction. See North Dakota, 495 U.S. at 426.

[21] But see Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193 (D.C. Cir. 1996), cert. denied, 520 U.S. 1186 (1997).

[22] Justice Stevens' plurality opinion was joined by Justices Rehnquist, White and O'Connor. Justice Scalia issued a concurring opinion. Justice Brennan's dissenting opinion was joined by Justices Marshall, Blackmun and Kennedy.

complaint at this time.[23] Some courts have stated that "the Twenty-first Amendment in effect constitutionalizes the Webb-Kenyon Act." Florida Dep't of Business Regulation v. Zachy's Wine and Liquor, Inc., 125 F.3d 1399, 1402 (11th Cir. 1997), cert. denied, 523 U.S. 1067 (1998). See also Craig v. Boren, 429 U.S. 190, 205-06 (1976)("[t]he wording of §2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes"). "In so far as the Twenty-first Amendment has been subjected to judicial interpretation the same scope, meaning and purpose has been ascribed to it as to the Webb-Kenyon Act." Georgia v. Wenger, 94 F. Supp. 976, 981 (E.D. Ill. 1950), aff'd, 187 F.2d 285 (7th Cir. 1951), cert.denied, 342 U.S. 822 (1951).

It does not appear that the Webb-Kenyon Act and related federal legislation provide the states with any additional power to avoid the Commerce Clause than that granted to them in the Twenty-first Amendment. Indeed,

> [w]hile it may be conceded that the intent of the Wilson Act, ... the Webb-Kenyon Act, ... and the Twenty-First Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them **an advantage** over the intoxicating liquors produced in the state into which they were brought, yet, **none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another.**

Pacific Fruit & Produce Co. v. Martin, 16 F. Supp. 34, 39-40 (W.D. Wash. 1936)(emphasis added.)[24] Moreover, the Supreme Court has indicated that congressional authorization of discriminatory state laws must be unambiguously clear. See Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992)("Congress

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[23] It appears that the Webb-Kenyon and Wilson Acts were raised in Dickerson, but were not analyzed in Judge Harmon's opinion. Id. at 699 (citing 27 U.S.C. §§ 121, 122).

[24] The Wilson Act states that "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory ... shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, **to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory**, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 27 U.S.C. § 121 (emphasis added.)

must manifest its unambiguous intent before a federal statute will be read to permit or to approve such a violation of the Commerce Clause as Oklahoma here seeks to justify"); Maine v. Taylor, 477 U.S. 131, 138-39 (1986)("because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been 'unmistakably clear'")(citation omitted). For the purposes of the instant motion, neither the Webb-Kenyon Act nor the Wilson Act exhibits such an "unmistakably clear" direction.

Privileges and Immunities[25]

Plaintiffs Swedenburg and Lucas claim that "[t]he freedom to pursue a livelihood is a fundamental right protected by the privileges and immunities guarantee," (Compl. ¶ 41), and "[b]ecause nearly all the winery plaintiffs' sales are directly to consumers, the Direct Shipment and Advertising Ban significantly impairs plaintiffs' ability to pursue their chosen and legitimate livelihood." (Compl. ¶ 43.)[26] Plaintiffs Swedenburg and Lucas argue that they have alleged "their Privileges and Immunities Clause cause of action in their individual capacities" (Pls.' Mem. at 31), but even if they "are seen as pursuing their claim based on injury to their businesses rather than as individuals, they have standing to assert their privileges and immunities claim..." (Pls.' Mem. at 31.)[27]

Defendants contend that "[a]s business entities, the winery plaintiffs in this case are not 'citizens' within the meaning of the Privileges and Immunities Clause and, therefore, do not qualify for its protection." (Defs.' Mem. at 25.) Defendants further assert that Saenz v. Roe, 526 U.S. 489 (1999), makes clear that, "Article IV protection is available only to those citizens who, upon *entering* another

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[25] The Privileges and Immunities Clause of Article IV, § 2 provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.

[26] "Though the [Supreme] Court has not issued an exhaustive list of the rights or activities that will be considered fundamental to interstate harmony as to fall within the purview of the privileges and immunities clause, it would seem clear that the ability to engage in private sector commercial activity is one of them." 2 Ronald D. Rotunda & John E. Nowak, Treatise of Constitutional Law § 12.7 (3rd ed. 1999).

[27] Plaintiff Swedenburg is a partner of Swedenburg Winery and Plaintiff Lucas is the sole proprietor of the Lucas Winery.

state, are treated discriminatorily precisely because they are not citizens of that state." (Defs.' Reply at 20.)(emphasis in original.)

"Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279-80 (1985).[28] The Privileges and Immunities Clause was intended to "fuse into one Nation a collection of independent, sovereign States." Toomer v. Witsell, 334 U.S. 385, 395 (1948). The Supreme Court declared in Toomer that "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." Toomer, 334 U.S. at 396. "Those protections are not 'absolute,' but the Clause 'does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.'" Saenz v. Roe, 526 U.S. 489, 502 (1999)(citing Toomer, 334 U.S. at 396).

The term "citizens" as used in the Privileges and Immunities Clause applies "only to natural persons." Paul v. Virginia, 75 U.S. 168, 177 (1868). Plaintiffs Swedenburg and Lucas have brought the instant case as proprietors of wineries **and in their individual capacities.**[29] Plaintiffs Swedenburg and Lucas, certainly in their individual capacities, are "citizens" within the meaning of the Privileges and Immunities Clause and may continue to pursue claims thereunder. Id. See also W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486 (7th Cir. 1984)(while the Court stated that an unincorporated

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[28]The Supreme Court "has recognized the 'mutually reinforcing relationship' between the Commerce Clause and the Privileges and Immunities Clause." Piper at 280 n.8 (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)). In fact, "there is a respectable argument that the framers of the Constitution intended the privileges and immunities clause to play the role that has come to be played instead by the negative commerce clause." W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486, 496 (7th Cir. 1984).

[29]Plaintiffs Fitzgerald, DeRussy, and Brooks, who are all New York residents, are not pursuing claims under the Privileges and Immunities Clause.

association lacked standing under the Privileges and Immunities Clause, it proceeded to assess the claim on the merits relying on the presence of individual claimants who were "natural persons").[30]

Defendants' contention that the "Privileges and Immunities Clause is designed to protect a citizen of one state from discriminatory treatment when traveling to other states" appears overly restrictive. (Defs.' Mem. at 25.) Defendants seem to suggest that because Plaintiffs Swedenburg and Lucas are not **physically** in New York State, they cannot invoke the protection the Privileges and Immunities Clause. (Id.) This argument is unavailing. In Blake v. McClung, 172 U.S. 239 (1898), the Supreme Court, applying the Privileges and Immunities Clause, condemned a Tennessee statute that granted a priority to resident creditors over nonresident creditors. Writing for the Court, Justice Harlan stated that:

> We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union.

Id. at 258. Nowhere does the McClung Court suggest that the nonresident creditors must be "physically present" in order to fall within the ambit of the Privileges and Immunities Clause.[31]

First Amendment

Plaintiffs claim that "[t]he Direct Shipment and Advertising Ban, on its face, prohibits in the

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[30]The Supreme Court has long held that the Privileges and Immunities Clause of Article IV does not protect corporations. See Paul, 75 U.S. at 177. "On the basis of a dictum in Paul that confines 'citizens' in the privileges and immunities clause to 'natural persons,' the only court to consider whether an unincorporated association is a citizen within the meaning of the clause has held that it is not. Given Paul - - even without the dictum - - this conclusions seems inescapable." W.C.M. Window Co, 730 F.2d at 492-93 (citations omitted). In Nutritional Support Services, L.P. v. Miller, 826 F. Supp. 467 (N.D. Ga. 1993), the Court went even further, holding that "[b]ecause both Plaintiffs in this action are business entities [limited partnerships], the Court concludes that summary judgment is appropriate as to Plaintiffs' Privileges and Immunities Clause claim." Id. at 471.

[31]Moreover, based upon the relatively limited briefing of this issue here, it would be inappropriate to dismiss the claims of Plaintiffs Swedenburg and Lucas at this stage.

most sweeping terms truthful information and advertising about wine, including but not limited to commercial speech." (Compl. ¶ 49.) The "statute's broad language prohibits advertising concerning a range of lawful activities, namely, information relevant to visiting out-of-state wineries and purchasing wines produced by out-of-state wineries." (Pls.' Mem. at 34-35.) Defendants contend that "[t]he First Amendment is not implicated here because the ABC Law restricts, to a limited extent, only unprotected commercial speech concerning an unlawful activity." (Defs.' Mem. at 9.) Defendants assert that "the regulation, on its face and as applied, prohibits only *advertising that solicits orders* for alcoholic beverages and, thus, is directly related to the State's 'core power.'" (Defs. Reply at 21.)(emphasis in original.) According to Defendants, the "narrowly tailored restriction on commercial advertising for alcoholic beverages is plainly aimed at preventing the unlawful solicitation of orders for direct shipments of alcohol to New York residents by unlicensed, out-of-state suppliers. Because this provision minimally restricts only commercial speech concerning an unlawful activity, plaintiffs' First Amendment claim fails as a matter of law." (Defs.' Mem. at 27.)

The Court believes "there is a considerable and unresolved factual dispute regarding key elements of the speech at issue ... Whether the allegations in the ... [Plaintiffs' complaint] are true remains to be determined. But dismissal is warranted only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" In re Orthopedic Bone Screw Products Liability Litigation, 193 F.3d 781, 793-94 (3d Cir. 1999)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court is unwilling to decide the First Amendment questions without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove the disputed factual assertions upon which they rely. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986). See also Stewart v. District of Columbia Armory Board, 863 F.2d 1013 (D.C. Cir. 1988).

The Supreme Court has held that "[w]here a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force ... [The Court] 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.'" Preferred Communications, Inc., 476 U.S. at 496 (citations omitted.) See also Rothner v. City of Chicago, 929 F.2d 297, 302 (7th Cir. 1991)(holding that "[w]hen a complaint implicates first amendment values, we must take special care not to terminate the litigation prematurely ... [m]oreover, when the factual basis of the litigation is novel and there is a danger that today's holding, if uninformed, might control situations only dimly perceived at present, courts should proceed cautiously when asked to dismiss on the basis of pleadings"); Valient-Bey v. Morris, 829 F.2d 1441, 1442 (8th Cir. 1987) (holding that "allegations of deprivation of first amendment rights must be scrutinized carefully, and even conclusory allegations of constitutional violations may be held sufficient as a matter of pleading to call for the offering of supporting evidence").[32]

ORDER

For the foregoing reasons, Defendants' motion to dismiss [15-1] Plaintiffs' complaint is denied. Counsel are directed forthwith to contact Court Deputy Christine Murray (at (212) 805-6715) to arrange a scheduling conference with the Court.

Dated: New York, New York
September 5, 2000

RMB

RICHARD M. BERMAN
U.S.D.J.

[32] See also Reno v. ACLU, 521 U.S. 844 (1997)(holding that Internet communications are entitled to the protections of the First Amendment).