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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 SHADY KNOLL ORCHARDS &
8 DISTILLERY LLC, PETER
9 WRIGHT, and CHRIS BAUM,

10 Plaintiffs,

11 v.

12 DAVID POSTMAN, Chairperson of
13 the Washington Liquor and Cannabis
14 Commission,

15 Defendants.

NO. 1:23-CV-3093-TOR

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

16 BEFORE THE COURT is Defendant's Motion to Dismiss Plaintiffs' First
17 Amended Complaint (ECF No. 9). The matter was submitted for consideration
18 without oral argument. The Court has reviewed the record and files herein and is
19 fully informed. For the reasons discussed below, Defendant's motion to dismiss
20 (ECF No. 9) is **DENIED**.

BACKGROUND

This motion to dismiss arises out of a 42 U.S.C. § 1983 challenge to

1 Defendant Washington State’s restrictions on the direct sale and shipment of liquor
2 by out-of-state distilleries to Washington consumers. Plaintiff Shady Knoll
3 Orchards and Distillery LLC is a small distillery operating out of Middlebrook,
4 New York. ECF No. 8 at 3, ¶ 5. Like many modern businesses, Shady Knoll
5 maintains a website which lists its products for purchase and ships those products
6 directly to online consumers. *Id.* at ¶¶ 5-6. Plaintiffs Peter Wright and Chris
7 Baum are Washington State consumers who enjoy Shady Knoll products. *Id.* at 5-
8 6, ¶¶ 18-22.

9 Together, Plaintiffs argue that a viable market of consumers exist in
10 Washington who would like to purchase Shady Knoll distilled beverages from its
11 Internet storefront. *Id.* at 5-6, ¶¶ 18-22. However, Washington’s regulatory
12 scheme proscribes the direct sale of distilled products from out-of-state distillers to
13 in-state consumers. *Id.* at 4, ¶ 8. Plaintiffs seek a declaratory judgment affirming
14 that these laws unlawfully discriminate against interstate commerce in violation of
15 the dormant Commerce Clause, and an injunction preventing Defendant from
16 enforcing the same. *Id.* at 8-9, ¶¶ A-C. Defendant brings this instant motion to
17 dismiss under Federal Rule of Civil Procedure 12(b)(6). ECF No. 9.

18 DISCUSSION

19 Defendant argues that Plaintiffs’ lawsuit fails to state a claim upon which
20 relief can be granted because Washington law, even if discriminatory, promotes a

1 legitimate state interest under the Twenty-first Amendment of the U.S.
2 Constitution. *See* ECF No. 9 at 12-20. Because Supreme Court precedent appears
3 to sanction Plaintiff’s intended direct online sales, the Court respectfully disagrees
4 and retains the matter for further consideration.

5 Many states, including Washington, have historically regulated the sale of
6 alcohol through a “three-tier system” of manufacturers, distributors, and retailers.
7 Wash. Rev. Code (RCW) §§ 66.28.280, 66.28.285. Under the three-tier system,
8 manufacturers sell to distributors; distributors sell to retailers; and retailers sell to
9 consumers. *See Wash. Ass’n for Substance Abuse & Violence Prevention v. State*,
10 174 Wash.2d 642, 647-48 (2012); *see also* ECF No. 9 at 5 (explaining that the
11 system is designed to “creat[e] gaps between the various levels of distribution”).

12 Distillers, of course, act as manufacturers of the spirits they produce. ECF
13 No. 9 at 6. However, Washington-based distillers may also “act as a retailer and/or
14 distributor” of their own products or of another Washington-based distillery. RCW
15 § 66.24.640. A distillery operating as a retailer must abide by the same laws and
16 regulations as any other retailer, including maintaining a physical presence in
17 Washington. RCW § 66.24.140(2)(a); ECF No. 9 at 14. Distilleries with a
18 physical retail location may ship Internet orders directly to purchasing consumers.
19 RCW § 66.20.410. Due to the physical presence requirement, out-of-state
20 distilleries may not make direct shipments to online Washington consumers. ECF

1 No. 9 at 9-10.

2 The Commerce Clause authorizes Congress “[t]o regulate Commerce with
3 foreign nations, and among the several States, and with the Indian Tribes.” U.S.
4 CONST., art. I, § 8, cl. 3. Under the Commerce Clause, Congress has the
5 affirmative power to regulate (1) the channels of interstate commerce; (2)
6 instrumentalities, goods, and persons in interstate commerce; and (3) activities that
7 substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17
8 (2005); *see also Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (Congress may
9 regulate purely local economic activity which “exerts a substantial effect on
10 interstate commerce.”). Over the years, the Supreme Court has “read[] between
11 the Constitution’s lines” to give this constitutional provision even broader sweep
12 through its longstanding dormant Commerce Clause jurisprudence. *Nat’l Pork*
13 *Producers Council v. Ross*, 598 U.S. 356, 368 (2023); *see also Comptroller of*
14 *Treasury of Maryland v. Wynne*, 575 U.S. 542, 549 (2015) (discussing the history
15 of the dormant Commerce Clause). The dormant Commerce Clause limits the
16 power of states to adopt regulations which burden or discriminate against interstate
17 commerce for purposes of economic protectionism. *West Lynn Creamery, Inc. v.*
18 *Healy*, 512 U.S. 186, 192 (1994); *see also Nat’l Pork Producers Council*, 598 U.S.
19 at 368 (the dormant Commerce Clause “‘contains a further, negative command[]’
20 . . . effectively forbidding the enforcement of ‘certain state economic regulations

1 even when Congress has failed to legislate on the subject.’”) (quoting *Oklahoma*
2 *Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (internal brackets
3 omitted)). *But see New York v. United States*, 505 U.S. 144, 171 (1992) (states
4 may burden interstate commerce with prior congressional authorization); *White v.*
5 *Massachusetts Council of Constr. Emps., Inc.*, 460 U.S. 204, 208 (1983) (“[W]hen
6 a state or local government enters the market as a participant it is not subject to the
7 restraints of the Commerce Clause.”).

8 A state law which facially discriminates against interstate commerce is *per*
9 *se* invalid. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). Courts will strike
10 down discriminatory regulations as illegally protectionist where they are
11 ““designed to benefit in-state economic interests by burdening out-of-state
12 competitors.’” *Nat’l Pork Producers Council*, 598 U.S. at 369 (quoting *Dep’t of*
13 *Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008)). Nevertheless, a
14 presumptively invalid discriminatory law may survive if the State “demonstrate[s]
15 both that the statute serves a legitimate local purpose, and that this purpose could
16 not be served as well by available nondiscriminatory means,” or with the usual
17 exceptions of congressional authorization or market participation. *Maine v.*
18 *Taylor*, 477 U.S. 131, 138 (1986) (internal quotations omitted); *see also id.* at 151
19 (states “retain[] broad regulatory authority to protect the health and safety of
20 [their] citizens and the integrity of [their] natural resources.”).

1 Although Defendant does not concede the issue, it is difficult to understand
2 the web of regulations permitting Washington distilleries to retail their products
3 directly to online consumers while preventing out-of-state distilleries from doing
4 the same as anything but facially discriminatory. Still, Defendant jockeys for this
5 Court to dismiss Plaintiff’s case, insisting that “the Supreme Court has recognized
6 a vast array of legitimate areas of concern under the Twenty-first Amendment”
7 outside of economic protectionism, including “a state’s interest in preserving its
8 three-tier system.” ECF No. 9 at 13. Defendant further maintains that the Fourth,
9 Sixth, and Eighth Circuit Courts of Appeals have found that “[s]tate physical
10 presence requirements are considered essential features of the three-tier system.”
11 *Id.* at 2, 13 (italics omitted).

12 Given the posture the case is in, the Court is skeptical of Defendant’s claim
13 that the Twenty-first Amendment compels dismissal. *See* FED. R. CIV. P. 12(b)(6);
14 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (To survive dismissal, a plaintiff must
15 allege “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
16 plausible on its face.’”) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
17 (2007)). Under the Twenty-first Amendment, “The transportation or importation
18 into any State, Territory, or possession of the United States for delivery or use
19 therein of intoxicating liquors, in violation of the laws thereof, is hereby
20 prohibited.” U.S. CONST. amend. XXI, § 2. Although this language by its plain

1 terms appears to give States unchecked authority to ban the flow of alcohol into
2 their borders, the Supreme Court has “concluded that § 2 does not confer limitless
3 authority to regulate the alcohol trade.” *Tennessee Wine & Spirits Retailers Ass’n*
4 *v. Thomas*, 588 U.S. ----, 139 S. Ct. 2449, 2474 (2019).

5 In *Granholm v. Heald*, the Court considered a challenge to a regulatory
6 scheme not unlike the one here. 544 U.S. 460, 472 (2005). There, producers and
7 consumers challenged Michigan and New York’s restrictions on out-of-state
8 shipments of wine. *Id.* at 465-66. Both states, which had adopted a three-tier
9 structure similar to Washington’s, permitted direct shipments from in-state wine
10 producers to in-state consumers, but restricted out-of-state wineries from making
11 similar direct shipments. *Id.* at 469-70. Michigan banned out-of-state direct
12 shipments altogether, whereas New York required out-of-state wineries to establish
13 an in-state distribution operation before they could directly ship to in-state
14 consumers. *Id.* at 473-74.

15 The *Granholm* Court had little trouble concluding that Michigan’s total ban
16 as well as New York’s physical presence requirement discriminated against
17 interstate commerce. *Id.* at 475 (“New York’s in-state presence requirement runs
18 contrary to our admonition that States cannot require an out-of-state firm ‘to
19 become a resident in order to compete on equal terms.’”) (quoting *Halliburton Oil*
20 *Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)). The States urged that the

1 laws were permissible despite their discriminatory character because they
2 advanced the legitimate purposes of keeping minors from obtaining alcohol and
3 facilitating tax collection. *Id.* at 490. The Court rebuffed those rationalizations,
4 concluding the Commerce Clause “demand[s] more than mere speculation to
5 support discrimination against out-of-state goods . . . Michigan and New York
6 have not satisfied this exacting standard.” *Id.* at 492-93.

7 More recently, in *Tennessee Wine & Spirits Retailers Ass’n*, the Court
8 accepted a challenge to Tennessee’s two-year durational residency requirement for
9 corporations seeking to sell alcoholic beverages to in-state consumers. 139 S. Ct.
10 2449. In striking down the law as violative of the dormant Commerce Clause, the
11 Court closely examined the history of the Twenty-first Amendment and the
12 Commerce Clause, explaining:

13 Recognizing that § 2 was adopted to give each State the authority to
14 address alcohol-related public health and safety issues in accordance
15 with the preferences of its citizens, we ask whether the challenged
16 requirement can be justified as a public health or safety measure or on
17 some other legitimate nonprotectionist ground. Section 2 gives the
18 States regulatory authority that they would not otherwise enjoy, but as
19 we pointed out in *Granholm*, “mere speculation” or “unsupported
20 assertions” are insufficient to sustain a law that would otherwise violate
the Commerce Clause. Where the predominant effect of a law is
protectionism, not the protection of public health or safety, it is not
shielded by § 2.

19 *Id.* at 2474 (internal citation omitted).

1 Defendant quotes *Granholm* for the proposition that “the three-tier system
2 itself is ‘unquestionably legitimate’” and argues that Plaintiff’s challenge
3 represents a threat to Washington’s three-tier system “by allowing out-of-state
4 distillers to bypass Washington’s regulated market.” 544 U.S. at 489 (internal
5 citation and quotation omitted); ECF No. 9 at 15-17; *see also* ECF No. 11 at 4.
6 But as in Michigan, New York, and Tennessee, the legitimacy of Washington’s
7 three-tier system is not put in issue by a scheme which allows in-state distributors
8 to eschew the standard three-tier scheme requirements and sell directly to
9 consumers while denying out-of-state distributors the same privilege. At this
10 juncture, in light of the foregoing Supreme Court precedent on similar state bans,
11 Defendant’s proffered rationalizations do not appear to support Washington’s
12 discrimination against out-of-state distributors.

13 Turning from Supreme Court precedent, Defendant invites the Court to
14 dismiss the case on the basis that, since *Granholm* and *Tennessee Wine* were
15 decided, other courts of appeals—namely, the Fourth, Sixth, and Eighth Circuits—
16 have apparently allowed the creation of three-tier systems “with limited exceptions
17 . . . in which [distributors] can play multiple roles,” including state physical
18 presence for direct sales. ECF Nos. 9 at 18; 11 at 4. However, Plaintiff retorts that
19 courts in the First, Seventh, and Eleventh Circuits have reached the opposite
20 conclusions. ECF No. 10 at 4-5. Plaintiff also represents that the Ninth Circuit has

1 not squarely confronted these issues. ECF No. 10 at 5-6.

2 Even accepting Defendant's claims that some post-*Granholm* authority
3 exists which would support a discriminatory in-state physical presence
4 requirement, the existence of a circuit split compels the Court to stay its hand. At
5 this stage, Defendant has not shown that Plaintiff's allegations, if proven true, fail
6 to state a plausible claim to relief. FED. R. CIV. P. 12(b)(6). As such, the Court
7 denies Defendant's motion to dismiss at this time.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

9 Defendant's Motion to Dismiss (ECF No. 9) is **DENIED**.

10 The District Court Executive is directed to enter this Order and furnish
11 copies to counsel.

12 DATED October 24, 2023.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge