



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
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Date: 12/31/2020

Pro Se     Retained     CJA     FPD     USA or other  
 Federal Agency  
(Appeal Fee Exempt)

Case No: 20-cv-03107-RM-KLM

Amended Notice of Appeal  
 Other pending appeals  
 Transferred Successive  
§2254 or §2255  
 Supplemental Record

Date Filed: 12/31/2020

Appellant: Jennifer Ann Smith et al

Pro Se Appellant:

IFP forms mailed/given     Motion IFP pending     Appeal fee paid  
 IFP denied     Appeal fee not paid

Retained Counsel:

Appeal fee paid     Appeal fee not paid     Motion IFP filed

The Preliminary Record on Appeal is hereby transmitted to the Tenth Circuit Court of Appeals. Please refer to the forms, procedures, and requirements for ordering transcripts, preparing docketing statements and briefs, and designations of the record that are found on the Tenth Circuit's website, [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov).

If not already completed, either an appeal fee payment for filing this case or filing of a motion to proceed *in forma pauperis* will be made to this District Court.

The transcript order form must be filed in the District Court as well as the Court of Appeals within 14 days after the notice of appeal was filed with the District Court.

If you have questions, please contact this office.

Sincerely,

JEFFREY P. COLWELL, CLERK

by: s/Román Villa  
Deputy Clerk

cc: Clerk of the Court, Tenth Circuit Court of Appeals

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Raymond P. Moore**

Civil Action No. 20-cv-03107-RM-KLM

JENNIFER ANN SMITH, a citizen and taxpayer of  
the State of Colorado,  
LIGGETT GROUP LLC,  
VECTOR TOBACCO INC., and  
XCALIBER INTERNATIONAL LTD., LLC,

Plaintiffs,

v.

STATE OF COLORADO, by and through JARED S.  
POLIS, in his official capacity as Governor of  
Colorado,  
PHILIP J. WEISER, in his official capacity  
as Attorney General of Colorado, and  
HEIDI HUMPHREYS, in her official capacity as Interim  
Executive Director of the Colorado Department of  
Revenue,

Defendants.

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**ORDER DENYING  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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On November 3, 2020, a majority of voters in Colorado approved "Proposition EE," also known as House Bill 20-1427 ("HB 1427"). Section 10 of HB 1427 requires a minimum retail sales price of \$7.00 per pack of 20 cigarettes. Defendants contend Section 10 is intended to reduce overall cigarette usage, especially among youth and young adults, and provide revenue mainly for Colorado's preschool program. Plaintiffs, however, challenge the constitutionality of Section 10 under the United States Constitution. At issue before the Court is Plaintiffs' Motion for Preliminary Injunction (the "Motion") seeking to enjoin Defendants from enforcing Section

10 which goes into effect on January 1, 2021. Due to the exigency of the matter, the Court ordered expedited briefing on the Motion and allowed the parties to conduct limited expedited discovery. In addition, on December 21, 2020, the Court held a hearing where the parties presented evidence and oral argument. The parties also provided supplemental briefing on the standard of review. After considering the Motion, the court record, the matters presented at the hearing, and the applicable law, and being otherwise fully advised, the Court finds and orders as follows.

## I. BACKGROUND

Plaintiffs are Liggett Group LLC, Vector Tobacco Inc., and Xcaliber International LTD., LLC, three out-of-state discount cigarette manufacturers (collectively, the “Discount Manufacturers”), and Jennifer Ann Smith (“Ms. Smith”), a Colorado citizen who states she voted for Proposition EE. They have sued Defendants alleging Section 10 violates the dormant Commerce Clause.<sup>1</sup> The background which gives rise to this action and the Motion is as follows.

The cigarette supply chain generally consists of manufacturers, intermediaries (e.g., distributors), and retailers. This is true for discount and premium brand cigarette manufacturers, including Discount Manufacturers.

Discount Manufacturers – and all other cigarette manufacturers – are located out-of-state. Discount Manufacturers sell discount brand cigarettes primarily to distributors,<sup>2</sup> who then sell them to retailers. The retailers sell to consumers; the Discount Manufacturers operate no retail

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<sup>1</sup> Plaintiffs’ other claim based on alleged violations of the Colorado Constitution was dismissed voluntarily without prejudice.

<sup>2</sup> The parties sometimes referred to the intermediary as “wholesalers”; the terms are used interchangeably. (Ex. A-12, Shipe 30(b)(6) Depo., 16:21-17-1.) Manufacturers may also sell to a handful of large retailers, such as Kroger or Wawa. (Shipe 30(b)(6) Depo., 15:19-16:20.)

Except for hearing exhibits, the page references are to the page number assigned to the document by the court’s CM/ECF system, found in the upper right hand corner of the document.

stores and they do not sell directly to consumers. The cigarette manufacturers and distributors set their own prices and the retailer sets the final price to be sold to the consumer.

Discount Manufacturers compete with other cigarette manufacturers – discount and premium – mainly by pricing their products lower than other domestically sold brands of cigarettes.<sup>3</sup> And, no one disputes that if prices increase, the sales of cigarettes would decrease. Effective January 1, 2021, with the passage of HB 1427 and Section 10, all other things being unchanged, the price differential between discount brand and premium brand cigarettes would decrease while the retailers' profit margins would increase.<sup>4</sup>

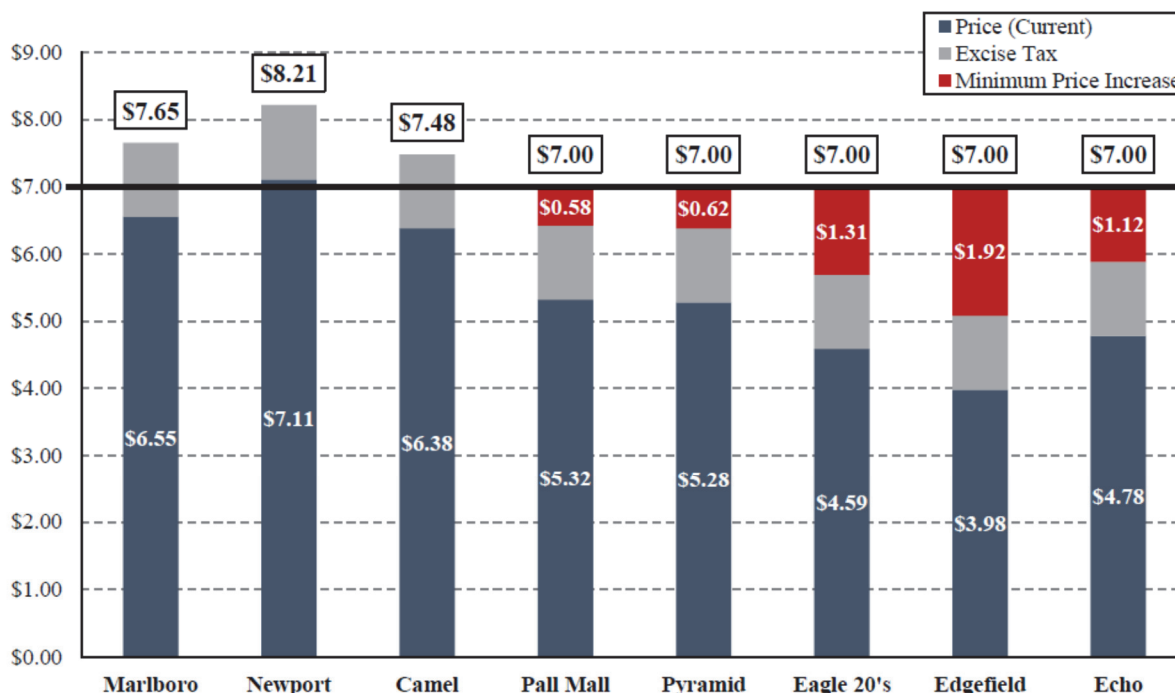
Specifically, HB 1427 increases the excise tax for cigarettes to \$1.10 per pack and, under Section 10, sets a minimum retail sales price of \$7.00 per pack. The price differentials and margin increases are demonstrated by Figure 2 in Discount Manufacturers' expert's report, which figures the Court assumes are true for the purposes of the Motion. Thus, using Pyramid cigarettes as an example, assuming a current retail price of \$5.28 per pack, the \$1.10 excise tax would increase the price to \$6.38 per pack. However, in order to comply with the \$7.00 minimum price, the retailer would sell the Pyramid cigarettes for at least \$7.00. The increase in profit margin of \$0.62 would be retained by the retailers.<sup>5</sup> And, the price differential between Camel, a premium brand, and Pyramid would decrease from \$1.10 (\$6.38 - \$5.28) to \$0.48 (\$7.48 - \$7.00).

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<sup>3</sup> Their goal is to get the retail store customer to purchase their brands based on price, distribution, and visibility. (Shipe 30(b)(6) Depo., 27:5-14.)

<sup>4</sup> For example, the discount manufacturers may not *all* change their prices in response to HB 1427. Section 10 places no restrictions on the price at which a manufacturer must sell its cigarettes to distributors or to retailers. Plaintiffs' expert, Robert S. Maness, Ph.D., presented some testimony that, as he understood it, prices charged to wholesalers are set nationally and fairly uniform across states; that wholesale prices are not altered on a state-by-state basis. That the manufacturers may not do so, however, does not mean they cannot do so.

<sup>5</sup> Presumably this would be in addition to whatever profits the retailer would have received at the \$5.28 per pack sales price.



(ECF No. 48-2, p. 15; Ex. 35, p. 15.)

According to Discount Manufacturers' theory, because they compete by having lower prices, the \$7.00 price floor would result in (1) smaller price differences between discount and premium brands of cigarettes, which will cause a significant decrease in sales of Discount Manufacturers' discount brands of cigarettes as consumers would shift to buying premium brands from other interstate cigarette manufacturers and (2) an increase in profits to in-state retailers at Discount Manufacturers' expense, with whom Discount Manufacturers allegedly compete. Thus, Discount Manufacturers assert, Section 10 discriminates between competitors – in-state retailers and out-of-state discount cigarette manufacturers – in the cigarette market and unduly burdens interstate commerce. Hence, Plaintiffs' Motion seeking to enjoin Section 10 from going into effect on January 1, 2021 followed.

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