

In the Circuit Court of the
Second Judicial Circuit, in and
for Leon County, Florida

BEAD ABODE, INC.,
a Florida corporation,

Plaintiff,

Case No.: 2021-CA-1588

v.

STATE SURGEON GENERAL in his official
capacity as the head of THE FLORIDA
DEPARTMENT OF HEALTH,

Defendant.

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ORDER DENYING TEMPORARY INJUNCTION

Plaintiff, Bead Abode, Inc. (Bead Abode), filed this action for a declaratory judgment. It asks the Court to determine whether Florida Statute Section 381.00316(1) unlawfully abridges its First Amendment right to freedom of speech. Plaintiff also seeks a temporary injunction.

At the October 7, 2021, temporary injunction hearing, the Court heard testimony from Mary Reich, one of the Plaintiff's customers, and Kirsten Boyer, the Plaintiff's owner. The Court found these two witnesses to be credible. Defendant, Department of Health (DOH), did not call any witnesses. There are no exhibits. The Court has considered the evidence, counsels' arguments, and the applicable law.

Summary of the Facts and the Issue Presented

In March of 2020, in response to the COVID-19 pandemic, Bead Abode closed its retail store and no longer sold its wares or taught in-person classes at its physical location. Since then, Plaintiff has conducted online sales and taught online courses. Its sales and net income have significantly declined since it closed its physical

location. Now, Plaintiff wants to reopen a brick-and-mortar store to make in-person retail sales and teach group classes.

Bead Abode's customer base is predominately older females. Plaintiff wants to require its patrons to provide documentation certifying their COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service. It thinks doing so will better protect the health of its employees and its elderly customer base. Thus, Bead Abode needs to know, as soon as possible, if section 381.00316 is enforceable. If Plaintiff can be fined for proceeding as planned, it must choose between staying closed or reopening and making do with fewer sales and less income.

The Law

The State of Florida is a republic. Our constitution divides the powers of government into the legislative, executive, and judicial branches. "No person belonging to one branch shall exercise any powers appertaining to either of the other branches." Article 2, Section 3 of the Florida Constitution.

The Florida Legislature is the state's policymaker, and it sets the state's public policy by the laws and budgets it enacts.

Courtesy of the Fourteenth Amendment to the United States Constitution, the First Amendment precludes states from making laws abridging the freedom of speech. Corporations have freedom of speech rights too.

Many legal disputes boil down to what a statute means. When statutes are unambiguous, courts apply their plain meaning as written. Doing so assures that the people are on notice of the law and how to govern themselves.

Generally, a court does not consider a statute's legislative history to ascribe meaning unless the law is ambiguous on its face. An exception to this rule is unambiguous statutes that abridge freedom of speech rights.

Florida Statute Section 381.00316(1) reads:

"(1) A business entity, as defined in s. 768.38 to include any business operating in this state, may not require patrons or customers to

provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the business operations in this state. This subsection does not otherwise restrict businesses from instituting screening protocols consistent with authoritative or controlling government-issued guidance to protect public health."

Bead Abode is a business entity, as defined in Florida Statute Section 768.38. Moreover, section 381.00316(1) is unambiguous. Ordinarily, that would end the Court's analysis, and the statute would be applied to Plaintiff as written. Here, more judicial labor is required.

On-point cases decided by state appellate courts are binding on this Court. Alas, section 381.00316 is a new statute, and this case is a matter of first impression in the state courts.

In contrast, an on-point case from a federal trial court may be persuasive, but it is not binding on this Court. On August 8, 2021, the United States Court for the Southern District of Florida held that section 381.00316(1) was unconstitutional for two reasons: (1) It abridged Norwegian Cruise Line's freedom of speech; and (2) it violated the dormant commerce clause. *Norwegian Cruise Line Holdings, Ltd. v. Rivkes*, 2021 WL 3471585 (S.D. Fla. 2021). The District Court's decision is not final and is pending appeal.

This Court has great respect for Judge Williams—the federal judge who rendered the *Norwegian* decision. Nevertheless, this Court must review the law and make its own decision.

The question is does section 381.00316(1) abridge Plaintiff's freedom of speech? Reduced to laymen's terms, does section 381.0316(1) prohibit inquiry or reliance? Does it restrict speech or regulate conduct?

Section 381.00316(1) Does Not Prohibit Inquiry (i.e., speech)

Section 381.00316(1) does not preclude Bead Abode from speaking, thinking, reading, writing, or engaging in expressive conduct intended as a substitute for the spoken or written word. Indeed, Plaintiff can freely communicate

with patrons, ask them questions about their COVID-19 status, request to see their pandemic-related documents, and review them if provided. It can even ask patrons to provide it with documentation certifying COVID-19 vaccination or post-infection recovery, and willing patrons can comply.

Bead Abode can also institute screening protocols consistent with authoritative or controlling government-issued guidance to protect public health. Thus, section 381.00316 does not in any way prohibit Bead Abode or other businesses from making inquiries or expressing themselves.

Section 381.00316(1) Does Prohibit Reliance (i.e., conduct)

Instead, section 381.00316(1) prohibits Plaintiff from requiring its patrons to present documentation certifying their COVID-19 vaccination or post-infection recovery to gain access, entry, or service. The section does not restrict or limit Bead Abode's ability to communicate or the content of its speech. Instead, the statute eliminates an action it and other businesses can take—reliance *only* on specific documents. Thus, section 381.00316(1) regulates conduct—not speech.

This Court relies on *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 134 (3rd Cir. 2020) and *Wollschlaeger v. Governor*, 848 F.3d 1293, 1301 (11th Cir. 2017).

In *Greater Philadelphia*, the City of Philadelphia was concerned about wage disparity. In response, it enacted an ordinance that prohibited employers from inquiring about applicants' prior wage histories and prohibiting employers from relying on peoples' previous wage histories to determine their salaries.

The Third Circuit Court of Appeals rightly held that the ordinance language prohibiting inquiry abridged freedom of speech. More significantly as it applies here, the Third Circuit also held that language prohibiting employers from relying on applicants' prior wage histories regulated conduct—not speech. And, the Court upheld the conduct part of the ordinance.

In *Wollschlaeger*, the Eleventh Circuit Court of Appeals struck down the part of the Florida Firearms Owners' Privacy Act (FOPA) prohibiting medical doctors from asking patients specific questions and documenting their answers as an

abridgement of the freedom of speech. Again, significantly, the Eleventh Circuit upheld the anti-discrimination portion of FOPA, finding that the statute did not "on its face implicate the spoken or written word," and therefore, scrutiny under the First Amendment was not appropriate. *Id* at 1301.

No doubt the Florida Legislature took the *Greater Philadelphia* and *Wollschlaeger* decisions into consideration before enacting section 381.00316. This section does not implicate the spoken or written word but instead regulates conduct. Section 381.00316(1) assures open markets. Prohibiting businesses from requiring patrons to produce documentary proof of vaccination or recovery may or may not be a good idea. Notwithstanding, that decision belongs solely to the legislature and is subject to approval or rejection by the voters at the ballot box.

The Court declines to follow *Norwegian*, unless directed otherwise by the First District of Appeal. *Norwegian* found that section 381.00316(1) abridges free speech because it "singles out documentary proof of COVID-19 vaccination" while allowing oral proof. Respectfully, the law often distinguishes between written and oral confirmation. Two examples should suffice. Law enforcement officers ask car drivers to produce their drivers' licenses and written evidence of insurance coverage. Drivers can't just say out loud they have both. The statute of fraud requires some contracts to be signed and in writing to be enforced.

Here, by being specific, the Florida Legislature narrowed the conduct it is regulating to a minimum. Anything less specific would subject the statute to attack for being overbroad.

Temporary Injunction

A movant must establish four elements to obtain a temporary injunction: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy at law; (3) the likelihood of irreparable harm absent the entry of an injunction; and (4) injunctive relief will serve the public interest. *Department of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So.3d 466, 472 (Fla. 1st DCA 2018). If the party seeking the temporary injunction fails to prove an element, the Court must deny the motion. *Id.*

If Bead Abode could lawfully do so, it would ask patrons for documentation certifying their COVID-19 vaccination or post-infection recovery to gain access,

entry, and in-person services. Its reasons for doing so are to protect the health of its employees and existing customer base. Plaintiff established that complying with section 381.00316(1) will significantly reduce its revenue.

Bead Abode seeks a declaratory judgment finding that Florida Statute Section 381.00316(1) is unconstitutional because it unlawfully abridges Plaintiff's freedom of speech.

Given the Court's ruling holding otherwise, the Court finds that Plaintiff is not substantially likely to succeed on the merits at trial. Thus, Bead Abode cannot satisfy the first element it needs to obtain a temporary injunction.

Conclusion

The only issue before the Court, and the only one the Court decided, is whether Florida Statute Section 381.00316(1) abridges Bead Abode's First Amendment right to freedom of speech. It does not. Instead, the statute regulates the Plaintiff's conduct.

Section 381.00316(1) assures open markets. Prohibiting businesses from requiring patrons to provide documentation certifying COVID-19 vaccination or post-infection recovery may or may not be a good idea. Notwithstanding, this decision belongs to the state's policymaker—the Florida Legislature.

Because Plaintiff is unlikely to succeed on the merits at trial, the Court denies its motion for a temporary injunction.

DONE AND ORDERED on October 14, 2021.



J. Layne Smith
Circuit Judge

Copies to counsel of record by e-service