

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

LEBAMOFF ENTERPRISES, INC.,)	
JOSEPH DOUST)	
and)	
IRWIN BERKLEY)	
)	
Plaintiffs,)	Case No: 16-cv-08607
)	
vs.)	
)	Judge: Hon. William T. Hart
DONALD G. O'CONNELL, Commissioner and)	
Acting Chairman of the Illinois Liquor Control)	
Commission and)	
THOMAS GIBBONS,)	
PATRICIA PULIDO SANCHEZ,)	
& MELODY SPANN COOPER)	
Commissioners of the Illinois Liquor Control)	
Commission)	
)	
Defendants,)	
)	
and)	
)	
WINE AND SPIRITS DISTRIBUTORS)	
OF ILLINOIS)	
)	
Intervenor-Defendant.)	

FIRST AMENDED COMPLAINT BY CONSENT

Plaintiffs make the following allegations for their Complaint based upon information and belief, except for the allegations pertaining to Plaintiffs, which are based upon personal knowledge.

INTRODUCTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of 235 IL Comp. L. 5/5-1(d) and 235 IL Comp. L. 5/6-29.1(b) which

allow Illinois wine retailers to sell, ship and deliver wine directly to consumers within the state of Illinois, while prohibiting out-of-state retailers from doing so. Plaintiffs seek a declaratory judgment that this statutory scheme is unconstitutional for two reasons: It deprives them under color of law of their constitutional rights to engage in interstate commerce in violation of the Commerce Clause and *Granholm v. Heald*, 544 U.S. 460 (2005); and it denies Joseph Doust the same privilege to engage in his profession as a wine retailer on terms equivalent to that given to citizens of Illinois, in violation of the Privileges and Immunities Clause in Article IV. Plaintiffs seek an injunction barring Defendants from enforcing these laws to prohibit out-of-state wine retailers from selling, shipping and delivering wine directly to consumers in Illinois.

JURISDICTION

1. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges under the United States Constitution.

2. The Court has authority to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PLAINTIFFS

3. Consumer Plaintiff Irwin Berkley is a resident of Cook County, Illinois. He is over the age of twenty-one, does not live in a dry county, and is legally permitted to purchase, receive, possess and drink wine at his residence. He is a regular purchaser and consumer of fine wine and would purchase wine from out-of-state retailers and have those wines shipped to his residence in Illinois, if Illinois law permitted him to do so.

4. Plaintiff Lebamoff Enterprises Inc. is a Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana. Lebamoff Enterprises has been in business in Fort Wayne for fifty-five years. In that time, it has developed an extensive base of loyal customers who trust it to recommend, obtain, supply, sell and deliver wine to them. Lebamoff has received requests that it sell and ship wine to Illinois from customers who have moved to Illinois or who wish to send gifts of wine to Illinois residents, but is unable to do so as a result of the Illinois ban. It intends to sell and ship wines directly to consumers in Illinois if the laws prohibiting such sales and shipments are removed or declared unconstitutional.

5. Lebamoff maintains an Internet web site, has previously handled deliveries and shipping of wine that was purchased from its retail stores or ordered through national wine clubs, and intends to continue to do so.

6. Plaintiffs intend to pay all taxes that may be due on such interstate shipments and to comply with all other non-discriminatory state regulations.

DEFENDANTS

7. Defendants are sued in their official capacities.

8. Defendant Donald G. O'Connell is a Commissioner and the Acting Chairman of the Illinois Liquor Control Commission, which is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

9. Defendant Thomas Gibbons is a Commissioner of the Illinois Liquor and Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

10. Defendant Patricia Pulido Sanchez is a Commissioner of the Illinois Liquor and Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

11. Defendant Melody Spann Cooper is a Commissioner of the Illinois Liquor and Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

12. Defendants are acting under color of state law when they enforce or supervise the enforcement of the statutes and regulations challenged herein.

I.
COMMERCE CLAUSE VIOLATION—
DISCRIMINATION AGAINST OUT-OF-STATE WINE RETAILERS WITH RESPECT TO SALE
TO CONSUMERS

13. In the State of Illinois, a wine retailer can obtain an off-premises license from Defendants which allows it to sell, ship and deliver wine directly to Illinois consumers any wine that it has in its inventory.

14. In-state off-premises licensees are also allowed to ship wine by common carriers and parcel delivery services directly to Illinois consumers.

15. The Defendants will issue an off-premises license described in the previous paragraphs only to wine retailers located in the State of Illinois.

16. Lebamoff Enterprises, Inc., is not located in Illinois, is not eligible for an Illinois off-premises license, and is prohibited by law from selling, delivering or shipping wine from its inventory directly to consumers in Illinois.

17. The Consumer Plaintiff wants to buy wine directly from Lebamoff Enterprises, Inc. and other wine retailers outside of Illinois and to have these wines

delivered to his residence, including wines that have sold out in Illinois but are still available from retail stores in other states, older vintage wines and limited production allocated wines.

18. Plaintiffs cannot complete the transactions described in paragraphs 16 and 17 because the laws of Illinois prohibit them.

19. If Lebamoff Enterprises, Inc were permitted to sell, ship and deliver its wine directly to consumers in the State of Illinois, it would comply with applicable laws and regulations concerning permits, licenses, labeling, reporting, proof of age, and payment of taxes.

20. The laws of the State of Illinois treat interstate sales, shipment and delivery of wine by retailers differently and less favorably than intra-state sales, shipment and delivery of wine. This statutory scheme discriminates against out-of-state wine retailers and provides economic advantages and protection to wine retailers in Illinois, in violation of the Commerce Clause of the United States Constitution.

II.
PRIVILEGES AND IMMUNITIES CLAUSE VIOLATION—
OUT-OF-STATE WINE MERCHANT DENIED SAME PRIVILEGES AS ILLINOIS
CITIZENS WITH RESPECT TO SALE TO CONSUMERS

21. Plaintiffs repeat and re-allege paragraphs 1-20 as if set out fully herein.

22. Joseph Doust is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana. He is co-owner and operator of Lebamoff Enterprises in Fort Wayne.

23. Doust develops personal relationships with many of his customers, makes special wine purchases for them, consults with them about wine in person, by telephone

and by Internet, and sells and delivers wine to them. Some of his customers have moved to Illinois but want to continue to do business with him.

24. Some wines wanted by Mr. Doust's customers are difficult to obtain because they are old and only sold at auction, available only in limited allocated amounts or only for a limited time, or scarce because of their popularity.

25. Mr. Doust wants to practice his profession as a wine merchant in Illinois by consulting with, obtaining wines for, and delivering wines to Illinois residents, but is prevented from doing so by Illinois law.

26. Being a professional wine merchant who sells and ships wine to Illinois residents is a lawful activity for citizens of Illinois.

27. No substantial reason exists for denying citizens of Indiana the same privilege to consult about, advise on, obtain, sell, deliver and ship wine to Illinois consumers as is given to citizens of Illinois.

28. Illinois' ban on wine sales and deliveries by out-of-state merchants denies Mr. Doust the privilege to engage in his occupation in the state upon the same terms as Illinois citizens, and therefore violates the Privileges and Immunities Clause in Article IV of the United States Constitution.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff seeks the following relief:

A. Judgment declaring 235 IL ST 5/5-1(d) and 235 IL ST 5/6-29.1(b), unconstitutional to the extent that they prohibit out-of-state wine retailers from selling, shipping and delivering wine directly to Illinois consumers, as a violation of the Commerce Clause of the United States Constitution.

B. Judgment declaring 235 IL ST 5/5-1(d) and 235 IL ST 5/6-29.1(b), unconstitutional to the extent that they prohibit out-of-state wine merchants from obtaining licenses and engaging in their occupations in Illinois, as a violation of the Privileges and Immunities Clause of the United States Constitution.

C. An injunction prohibiting Defendants from enforcing those statutes and requiring them to allow out-of-state wine retailers to sell, ship, and deliver directly to consumers in Illinois.

D. Plaintiffs do not request that the State be enjoined from collecting any tax due on the sale of wine.

E. An award of costs and expenses, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.

F. Such other relief as the Court deems appropriate to afford Plaintiffs full relief.

Respectfully submitted,

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to all counsel of record:

/s/ Robert D. Epstein
Robert D. Epstein
Attorney for Plaintiffs