In the United States Court of Appeals
for the Seventh Circuit

No. 17-2495

LEBAMOFF ENTERPRISES, Inc., JOSEPH DOUST,
and IRWIN BERKLEY
Plaintiffs - Appellants

vs.

BRUCE RAUNER, Governor of Illinois, LISA MADIGAN, Attorney-General of Illinois, CONSTANCE BEARD, Chairperson of the Illinois Liquor Control Commission, and DONOVAN BORVAN, Executive Director of the Illinois Liquor Control Commission, in their official capacities
Defendants - Appellees

and

WINE AND SPIRITS DISTRIBUTORS OF ILLINOIS,
Intervening Defendant - Appellee

On appeal from the United States District Court for the Northern District of Illinois, No. 1:16-cv-08607, Hon. Samuel Der-Yeghiayan, District Judge

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Brief and Appendix of All Appellants

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Circuit Rule 26.1 Disclosure Statement

Appellate Court No: 17-2495

Short Caption: Lebamoff Enterprises, Inc. et al. v. Rauner et al.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Lebamoff Enterprises, Inc., Joseph Doust, and Irwin Berkley

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any: None

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___

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Jurisdictional Statement

1. District court jurisdiction. Plaintiffs-Appellants Lebamoff Enterprises et al. brought this action in the Northern District of Illinois pursuant to 42 U.S.C. § 1983, alleging that provisions in the Illinois Liquor Control Act that allow Illinois wine retailers to conduct mail-order sales and ship wine to consumers, but prohibit out-of-state retailers from doing so, violate the Commerce Clause, U.S. Const. art. I, § 8, and the Privileges and Immunities Clause, U.S. Const., art. IV., § 2. They sued Illinois Liquor Control Commission officials in their official capacity and seek declaratory and injunctive relief. Complaint, Doc. No. 1, App. 12 et seq. The district court had federal question jurisdiction 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 U.S. Constitution.

2. Court of appeals jurisdiction. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from a final order disposing of all claims and there is no part of the litigation in the district court that is not subject to this appeal. Order, Docket entry 30, App. 1.

On June 8, 2017, the district court entered an opinion and order dismissing the complaint and terminating the case. Doc. No. 30; App. 2 et seq. On June 19, 2017, the plaintiffs filed a motion pursuant to Fed. R. Civ. P. 59(e) to alter the judgment, reopen the case, and grant leave to file an amended complaint. Doc. No. 31, App. 20. On June 27, 2017, the district court entered an order denying the motion to alter the judgment. Doc. No. 34, App. 11. On July 24, 2017, the plaintiffs filed a notice of appeal. Doc. No. 35.

Statement of the Issues

This is an appeal from the district court's order dismissing the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, and then refusing to allow the plaintiffs to amend the complaint. It presents four issues.

1. Whether the allegation that Illinois law allows in-state retailers to sell and ship wine to consumers in Illinois but prohibits out-of-state retailers from doing so is sufficient to state a claim that the law violates the Commerce Clause by discriminating against interstate commerce.

2. Whether the allegation that Illinois will license only its own citizens to sell and ship wine to consumers in Illinois is sufficient to state a claim that the law violates the Privileges and Immunities Clause by denying nonresident wine merchants the privilege to engage in their occupations in Illinois upon terms equivalent to those for Illinois citizens.

3. Whether the plaintiffs should have been given an opportunity to amend the complaint before the district court closed the case, pursuant to *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510 (7th Cir. 2015).

4. Whether on remand, a new judge should be assigned pursuant to *Stuart v. Local 727, Intern. Broth. of Teamsters*, 771 F.3d 1014 (7th Cir. 2014), because the original judge displayed bias, behaved abruptly and irregularly, and issued an opinion with an unmistakable tone of derision.

Statement of the Case

The Illinois Liquor Control Act treats in-state and out-of-state wine retailers differently, benefitting the former and burdening the latter. An Illinois wine retailer may engage in mail-order sales and may ship wine to consumers in Illinois. 235 Ill. Comp. Stat. 5/5-1(d).[1] An out-of-state wine retailer may not. 235 Ill. Comp. Stat. 5/6-29.1(b).[2] It is unlawful for a nonresident to sell or ship wine without a license, 235 Ill. Comp. Stat. 5/2-1,[3] and Illinois will not issue a retail sales license to a nonresident. Ill. Admin. Code tit. 11, § 100.480.[4]

On September 1, 2016, a wine retailer and merchant from Indiana and an Illinois consumer filed a lawsuit challenging the constitutionality of this statutory

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[1]The relevant part of Section 5/5-1(d) provides: "A retailer's license shall allow the licensee to sell and offer for sale at retail, only in the premises specified in the license, alcoholic liquor for use or consumption, but not for resale in any form. Nothing in Public Act 95-634 shall deny, limit, remove, or restrict the ability of a holder of a retailer's license to transfer, deliver, or ship alcoholic liquor to the purchaser for use or consumption subject to any applicable local law or ordinance."

[2]In relevant part, section 29.1(b) provides: "Any person manufacturing, distributing, or selling alcoholic liquor who knowingly ships or transports or causes the shipping or transportation of any alcoholic liquor from a point outside this State to a person in this State who does not hold a manufacturer's, distributor's, importing distributor's, or non-resident dealer's license issued by the Liquor Control Commission, other than a shipment of sacramental wine to a bona fide religious organization, a shipment authorized by Section 6-29, subparagraph (17) of Section 3-12, or any other shipment authorized by this Act, is in violation of this Act."

[3]In relevant part, section 2-1 provides: "No person shall manufacture, bottle, blend, sell, barter, transport, transfer into this State from a point outside this State, deliver, furnish or possess any alcoholic liquor for beverage purposes, unless such person has been issued a license by the Commission."

[4]In relevant part, section 100.480 provides: "[N]o person shall import alcoholic liquor into this State for a non-personal or commercial use without first obtaining a license to import issued by the Commission, such as a manufacturer's, importing distributor's, railroad, airplane and foreign importer's license."

scheme. Complaint, Doc. No. 1, App. 12 *et seq*. They contend that the law: (1) prevents them from engaging in the same type of commercial transactions as in-state retailers are allowed, and therefore discriminates against interstate commerce in violation of the dormant Commerce Clause, U.S. Const., Art. I, § 8,[5] and (2) deprives out-of-state merchants of their ability to do business in Illinois upon the same terms as citizens of that state, in violation of the Privileges and Immunities Clause. U.S. Const., Art. IV, § 2.[6] They sued officials at the Illinois Liquor Control Commission and others[7] for declaratory and injunctive relief.

On January 20, 2017, the State filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Doc. Nos. 16-17. The State asserted that Section 2 of the Twenty-first Amendment[8] nullifies both the Commerce Clause and the Privileges and Immunities Clause, and gives it the authority to discriminate against out-of-state wine merchants, ban interstate commerce in wine, and restricts eligibility for alcoholic beverage licenses to Illinois residents.

On June 8, 2017, the district court granted the State's motion. Opinion, Doc. No. 30; App. 2 et seq. The court dismissed the Commerce Clause claim because it

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[5]"The Congress shall have power ... To regulate Commerce ... among the several States."

[6]"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[7]Also named were Governor Rauner and Attorney-General Madigan, but they have been dismissed by agreement of the parties.

[8]"The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., Amend. XXI, § 2.

interpreted the complaint as a request by an out-of-state retailer for favorable treatment, not equal treatment, because it was demanding the right to engage in totally unregulated commerce in wine. The district judge derisively rejected the plaintiffs' constitutional arguments as mere "red herrings," Opinion at 4, App. 5, that masked their true purpose to "prey on Illinois consumers and reap profits without regard to the health and welfare of the Illinois public [and] without complying with Illinois' regulations." Opinion at 5-7, App. 6-8. The court dismissed the Privileges and Immunities Clause claim in a single page for basically the same reason, interpreting the complaint as demanding favorable, rather than equal, treatment and seeking the privilege to sell wine without obtaining a license or obeying Illinois regulations. Opinion at 8, App. 9. The court contemporaneously terminated the case without either giving the plaintiffs the opportunity to amend the complaint or explaining why such an amendment would be futile. Docket text entry 30, App. 1.

On June 19, 2017, the plaintiffs filed a motion under Fed. R. Civ. P. 59(e) to alter the judgment, reopen the case, and grant leave to file an amended complaint. Doc. No. 31, App. 20. They drew the district court's attention to *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510 (7th Cir. 2015), in which this court said that denying a plaintiff at least one opportunity to amend a complaint before the case is closed "carries a high risk of being deemed an abuse of discretion." *Id.* at 518. The plaintiffs submitted a proposed amended complaint, Doc. No. 31-1, App. 22 *et seq*., that addressed the district court's concerns and made clear that they were

seeking only to end discrimination against nonresidents and to have the opportunity to obtain a license, practice their occupation, and compete for business on equal terms with Illinois citizens, including compliance with state regulations.

On June 27, 2017, the district court entered a terse order denying the motion to alter the judgment and reopen the case. Doc. No. 34, App. 11. It said that the record "reflects that any attempt by Plaintiffs at amending the complaint would be futile," but did not explain what record it was referring to or why an amendment would be futile. On July 24, 2017, the plaintiffs filed a notice of appeal. Doc. No. 35.

Summary of Argument

The complaint should not have been dismissed because it adequately alleges that the disparate treatment of in-state and out-of-state wine retailers violates the Commerce Clause and Privileges and Immunities Clause. At a minimum, the case should not have been closed without giving the plaintiffs the opportunity to file an amended complaint. It should be remanded and assigned to a new judge.

1. Commerce Clause violation

The Illinois Liquor Control Act discriminates against out-of-state wine retailers in violation of the Commerce Clause. The Act allows in-state retailers to ship wine to Illinois consumers but prohibits out-of-state retailers from doing so. The Supreme Court has held repeatedly that the nondiscrimination principle of the Commerce Clause applies to state alcohol laws and prohibits a state from treating in-state economic interests more favorably than those from out of state. *E.g., Granholm v. Heald,* 544 U.S. 460, 484-85 (2005). Although the Twenty-first Amendment gives

states broad discretion over how to structure their alcohol distribution systems, it "did not immunize state alcohol laws from challenge under other parts of the Constitution," *Ind. Petroleum Mktrs. & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 320-21 (7th Cir. 2015), and is not a defense to a charge of discrimination. A state is free to decide whether to allow wine to be shipped to consumers, but once it creates a mail-order market, it must operate it in a nondiscriminatory way that allows participation by out-of-state sellers.

Plaintiff Lebamoff Enterprises alleged in the complaint that it is an out-of-state wine retailer that ships wine to its customers, has potential customers in Illinois, and would abide by Illinois licensing and regulatory rules if allowed to ship to them. It alleges that in-state wine retailers are allowed to make such shipments, but out-of-state retailers are not. The complaint states a valid claim that the Act violates the nondiscrimination principle of the Commerce Clause.

2. Privileges and Immunities Clause violation

The Liquor Control Act denies nonresidents the opportunity to sell wine in Illinois upon the same terms as Illinois citizens, in violation of the Privileges and Immunities Clause. The Act allows residents to obtain retail licenses, sell wine to the public, and ship to their customers, but prohibits nonresidents from doing so. The Supreme Court has long held that the Clause forbids states from barring nonresidents from practicing their occupation in the state. *E.g., Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985). Although the Twenty-first Amendment gives states discretion to prohibit private citizens from selling wine at all, it did not repeal the

Privileges and Immunities Clause. If a state decides to give its citizens the privilege to apply for licenses and become wine retailers, it must extend that privilege to non-citizens as well.

Plaintiff Joseph Doust alleged in the complaint that he is a nonresident wine merchant who obtains wine for his customers and delivers it to them, that he has potential customers in Illinois, and would abide by Illinois licensing and regulatory rules if allowed to ship to them. He alleged that Illinois citizens may obtain licenses allowing them to engage in the retail wine business but nonresidents may not. The complaint states a valid claim that the Act violates the Privileges and Immunities Clause.

3. *Runnion v. Girl Scouts of Greater Chicago* violation.

The district court granted the State's motion to dismiss and then closed the case without giving the plaintiffs the opportunity to amend the complaint, in violation of *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 518 (7th Cir. 2015). The court dismissed the complaint because it thought the plaintiffs were demanding the right to sell wine in Illinois completely unregulated, without obtaining a license or complying with state rules. This erroneous view of the plaintiffs' claims could have been corrected by an amended complaint which clarified that the plaintiffs were not seeking to evade state regulations, but would comply with licensing and other rules if allowed to do business in the state. The district court abused his discretion under *Runnion* by not allowing the amendment.

4. Remand to a different judge

In *Stuart v. Local 727, Intern. Broth. of Teamsters*, 771 F.3d 1014, 1020 (7th Cir. 2014), this court held that it had the discretion to order that a new judge be assigned on remand when the original district judge had behaved abruptly and irregularly, dismissed a complaint without giving plaintiff the opportunity to amend it, and issued an opinion with an unmistakable tone of derision. That is what happened in this case. Therefore, the plaintiffs request that this court exercise its discretion to direct that a new district judge be assigned who will give more measured consideration of the issues on remand.

Standard of Review

A district court's grant of a motion to dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. The motion may be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. The court must construe the complaint in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in the party's favor. *Bell v. City of Chicago*, 835 F.3d 736, 738 (7th Cir. 2016).

A district court's decision to close the case without giving the plaintiffs the opportunity to amend their complaint is reviewed for abuse of discretion, and there is a presumption that refusing to give plaintiffs at least one opportunity to amend their complaint is an abuse of discretion. *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d at 518-19.

Argument

I. The complaint states a valid claim under the Commerce Clause that the Illinois wine shipping law discriminates against out-of-state retailers

Lebamoff Enterprises asserts that the Illinois Liquor Control Act violates the constitution by allowing in-state retailers but not out-of-state retailers to ship wine. To decide whether this claim can survive a motion to dismiss, this court will have to consider both the Commerce Clause, which generally prohibits such discriminatory rules, and the Twenty-First Amendment, which gives states fairly broad authority to regulate alcohol sales. Both provisions are parts of the same constitution and "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Brown-Forman Distillers Corp. v. N.Y. State Liq. Auth.,* 476 U.S. 573, 584-85 (1986) (citations omitted). The Supreme Court has made it clear in prior decisions that although the Twenty-first Amendment gives states broad regulatory power, it does not authorize states to enact discriminatory liquor laws. *E.g., Granholm v. Heald,* 544 U.S. 460, 487-88 (2005) (citations omitted).

A. The Illinois Liquor Control Act violates the nondiscrimination principle of the Commerce Clause by allowing only in-state sellers to ship wine to consumers

The Commerce Clause provides that "Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8. The Supreme Court has long held that this affirmative grant of power to Congress implies a negative or "dormant" constraint on state authority. *See Legato Vapors, LLC v. Cook,* 847 F.3d 825, 829 (7th Cir.

2017) (citations omitted). States may not set up trade barriers against interstate commerce, nor engage in economic protectionism that benefits local industry by restricting competition from out-of-state business interests. *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646-47 (1994).

A state law may violate the Commerce Clause in either of two ways: (1) by discriminating against out-of-state businesses directly or in effect, or (2) by placing a burden on interstate commerce that exceeds the legitimate local benefit. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009). This case is of the first kind. Illinois directly discriminates against interstate commerce and favors local business interests by prohibiting out-of-state retailers from shipping wine to Illinois consumers, 235 Ill. Comp. Stat. § 5/6-29.1(b), while allowing in-state retailers to do so. 235 Ill. Comp. Stat. § 5/5-1(d). The Liquor Commission's website explains:

> Holders of a State of Illinois Retailer's Liquor License will continue to be allowed to ship product to Illinois residents; however, ... out-of-state retailers are prohibited from shipping alcoholic liquor directly to Illinois consumers.

"New License Required to Ship Wine Directly into Illinois" (May 6, 2008), https://www.illinois.gov/ilcc/News/Pages/New-license-required-to-ship-wine-directly-to-consumers.aspx (last visited August 21, 2017). The discrimination is deliberate and not the incidental byproduct of an antiquated liquor code. Illinois previously allowed out-of-state retailers to ship wine into the state, see former 235 Ill. Comp. Stat. § 5/6-29 (2006),[9] but that statute was repealed by Pub. Act 95-634, West 2007

[9]Former section 5/6-29(a) provided that "an adult resident or holder of an alcoholic beverage license in a state which affords Illinois licensees or adult residents an equal reciprocal shipping privilege may ship ... not more than 2 cases of wine ... to any adult

Ill. Legis. Serv. P.A.95-634, because such shipments "pose[d] a serious threat ... to the economy of this State." 235 Ill. Comp. Stat. § 5/6-29.1(b).

When a state statute discriminates against interstate commerce, courts have applied strict scrutiny. "Such laws are treated as all but per se unconstitutional," *Nat'l Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1131 (7th Cir. 1995), and are "generally struck down ... without further inquiry." *Wiesmueller v. Kosobucki*, 571 F.3d at 703, *quoting Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. at 578–79. It makes no constitutional difference whether the product is spray paint, legal services, or an alcoholic beverage.

> Time and again, the Supreme Court has held that state laws -- including liquor laws -- violate the Commerce Clause if they treat out-of-state and in-state economic interests differently, burden the former, and give a competitive advantage to the latter.

Granholm v. Heald, 544 U.S. at 472.

A discriminatory law may be upheld only if the State proves that no reasonable non-discriminatory alternative exists that would advance the state's regulatory interest. *Granholm v. Heald*, 544 U.S. at 489 (citations omitted) (the standards for such justification are high). The intent of the legislature is not relevant so "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. at 653. Actions speak louder than words, so a good motive is not a defense to a charge of discrimination. *Id.*

The plaintiffs contend that they have been harmed by an Illinois law that

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resident of this State.

prohibits out-of-state wine retailers from shipping to Illinois consumers. Complaint ¶¶ 16-19, App. 15-16. They alleged that the law is discriminatory because in-state retailers are allowed to do so and therefore have been given an important economic advantage. Complaint ¶ 20, App. 16. The Supreme Court has declared this exact type of differential treatment unconstitutional in a case involving retail shipments from wineries, holding that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald*, 544 U.S. at 487. Therefore, unless a significant reason exists to treat retail sales by wineries differently than other kinds of retail sales, Lebamoff Enterprises has stated a prima facie claim that the Illinois scheme violates the Commerce Clause, and the case should be remanded to the district court to give the State the opportunity to prove that "its concerns cannot be adequately served by nondiscriminatory alternatives." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 661 (7th Cir. 1995) (quotation and citation omitted). No such reason can be found in the jurisprudence of either the Commerce Clause or the Twenty-first Amendment.

B. The nondiscrimination principle of the Commerce Clause applies to all forms of commerce including retail sales and shipping

The nondiscrimination principle of the Commerce Clause applies equally to all commercial activity. The Supreme Court has repeatedly held that state laws violate the Commerce Clause if they discriminate against out-of-state "economic interests" of all kinds, because the nondiscrimination rule is "essential" to the health of the nation's economy. *Granholm*, 544 U.S. at 472 (citations omitted). Nowhere in *Granholm* or any other Supreme Court case is there any suggestion that the

Commerce Clause applies to retail transactions made at a winery salesroom but not at a store down the street. To the contrary, the Court has consistently applied the nondiscrimination principle to state laws that disadvantaged all types of business entities engaged in all kinds of interstate commerce from summer camp operators, *Camps Newfound/ Owatonna, Inc., v. Town Of Harrison*, 520 U.S. 564 (1997), to hazardous waste processors, *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992), to mail-order sellers, *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994).

Indeed, most lower federal courts reviewing discriminatory state liquor laws have found no constitutional basis for differentiating among retailers based on whether they are affiliated with a winery, or for stripping traditional retail stores of their constitutional right to engage in interstate commerce free from discriminatory state regulations. *See Freeman v. Corzine*, 629 F.3d 146, 160-61 (3d Cir. 2010) (striking down restrictions on personal transportation of purchases from out-of-state retailers); *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) and *Peoples Super Liquor Stores v. Jenkins,* 432 F.Supp.2d 200, 218 (D. Mass. 2006) (striking down residency requirement for retail licenses); *Siesta Village Mkt. v. Granholm,* 596 F.Supp.2d 1035, 1038-39 (E.D. Mich. 2008) (striking down ban on shipping by out-of-state retailer).

One case suggested, based on a loose reading of *Granholm,* that the Commerce Clause distinguishes producers from retailers and only applies to producers, and therefore provides a constitutional basis for treating shipping by wineries differently from shipping by other retailers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d

185, 189 (2d Cir. 2009). There is no authority for this distinction and it has not been adopted by other courts. *See Wine Country Gift baskets.com v. Steen*, 612 F.3d 809, 819-20 (5th Cir. 2010). Indeed, *Granholm* says the opposite -- that all "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, so states "may not enact laws that burden out-of-state producers *or shippers," id.* at 472 (emphasis added), favor "in-state economic interests," *id.* at 487, or "discriminate against out-of-state goods."[10] 544 U.S. at 484-85. This is consistent with prior cases holding that the nondiscrimination principle applied to retailers, not just to producers. *See, e.g., Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994) (mail-order sellers); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (retail sellers).

C. The Twenty-first Amendment does not immunize discriminatory state liquor laws from Commerce Clause scrutiny

Section 2 of the Twenty-first Amendment provides that "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., amend. XXI, § 2. Because the text refers to transportation and importation, the courts wrestled for many years with how the Amendment and the Commerce Clause interact. The Amendment appears to give states power to restrict commerce in liquor; the "dormant" Commerce Clause denies them that power.

As it relates to discriminatory state laws, the dispute was resolved in a series of three Supreme Court cases. *Bacchus Imports, Ltd, v. Dias,* 468 U.S. 263 (1984)

[10]"Goods" means any items that are movable at the time of sale. U.C.C. § 2-105(1).

struck down a discriminatory excise tax system favoring local beverages and raising the cost of liquor imported from the mainland. The Court held that the Twenty-first Amendment could not save a discriminatory state law and did not empower States to favor local liquor interests by erecting barriers to competition." *Id.* at 276. *Healy v. Beer Institute*, 491 U.S. 324 (1989) struck down a discriminatory price-affirmation law which required out-of-state distributors, but not in-state distributors, to affirm that their wholesale beer prices in Connecticut were no higher than in surrounding states. The Court held that the statute could not be saved by the Twenty-first Amendment, 491 U.S. at 341-42, with Justice Scalia stating broadly that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344 (concurring). Most recently, *Granholm v. Heald,* struck down a discriminatory shipping rule that allowed in-state wineries, but not out-of-state wineries, to ship directly to consumers. 544 U.S. at 487. The Court said that "the Twenty-first Amendment does not supersede other provisions of the Constitution," *id.* at 486-87, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *id.* at 487, discriminatory laws cannot be "saved by the Twenty-first Amendment," *id.* at 489, and its prior opinion in "*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." *Id.* at 487-88. *See also Ind. Petroleum Mktrs. & Convenience Store Ass'n v. Cook*, 808 F.3d at 320-22 (the Twenty-first Amendment did not immunize state alcohol laws from constitutional challenge).

Although the holdings of these cases seems perfectly clear, one court has taken a single line of dicta from *Granholm* out of context and held that, contrary to the language in these cases, states may discriminate against out-of-state retailers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d at 190-91. In *Granholm*, the Court said "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate,'" citing *North Dakota v. U. S.,* 495 U.S. 423, 432 (1990). The Second Circuit took this to be a constitutional endorsement of both the three-tier system generally and all of its individual rules and regulations, and that the nondiscrimination principle applied only at the most general level. As long as everyone is equally bound to sell through the three-tier system, all aspects of that system pass constitutional muster, even discriminatory ones.

The Second Circuit's opinion is untenable. The Supreme Court's comment that, as a general matter, a state may legitimately create a three-tier distribution system says nothing about whether it can enact discriminatory regulations. The dictum is from a plurality opinion in a case involving neither the Commerce Clause nor a discriminatory law, *North Dakota v. U.S., supra,*[11] so says nothing about the validity of discriminatory shipping rules that harm out-of-state retailers. The Second Circuit's interpretation is at odds with *Bacchus* and *Healy,* both of which applied the nondiscrimination principle to laws completely within the three-tier

[11]*North Dakota* was a Supremacy Clause case involving whether a state could require liquor sold on a military base to be confined to that base. Justice Scalia concurred only because the law was *not* discriminatory. 495 U.S. at 448. Therefore, under general principles of interpreting plurality opinions, the North Dakota holding was that the three tier system is unquestionably legitimate as long as it is not discriminatory.

system -- taxes paid by importers in *Bacchus*, and prices charged by beer distributors in *Healy*. Most importantly, it contradicts *Granholm* itself. The Supreme Court did not issue a one-sentence opinion that all aspects of the three-tier system are unquestionably legitimate. The paragraph in which the dictum appears says that the Twenty-first Amendment gives states the authority to ban alcohol altogether, assume control of distribution through state stores, or funnel sales through a three-tier system, but that "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." 544 U.S. at 488-89.

II. The complaint states a valid claim under the Privileges and Immunities Clause that Illinois is denying nonresident wine merchants the privilege to do business in the state on the same terms as its own citizens

In Count II of the complaint, Joseph Doust, who lives in Indiana, has alleged that he is being denied the privilege to do business in Illinois in violation of the Privileges and Immunities Clause. U.S. Const., art. IV, § 2, cl. 1. Complaint ¶ 28, App. 17. He is a wine merchant, consultant, and advisor who is barred from selling or shipping wine to Illinois residents upon terms equal to citizens of that state. Complaint ¶¶ 13, 17, 18, 21, 22, 25, App. 15-17. The particular roadblock is 235 Ill. Comp. L. 5/6-29.1(b), which prohibits him from selling[12] or shipping wine to Illinois residents and reserves that privilege exclusively to Illinois citizens. 235 Ill. Comp. L. 5/5-1(d).

To decide whether these allegations state a valid constitutional claim, this court will have to consider both the Privileges and Immunities Clause, which generally

[12]*See* 235 Ill. Comp. Stat. § 5/6-20(b-3) (out-of-state sale of wine for delivery into the state is deemed a sale in Illinois).

prohibits discriminatory rules based on residency, and the Twenty-first Amendment, which gives states fairly broad authority to regulate alcohol sales. When two constitutional provisions are implicated, neither automatically trumps the other, because they are both parts of the same constitution, and each must be considered in the light of the other and the context of the issues. *Brown-Forman Distillers Corp. v. N.Y. State Liq. Auth.,* 476 U.S. at 584-85 (citations omitted). This is a question of first impression in this Circuit and there is little authority to guide the court.

A. Illinois allows its own citizens to be wine retailers and ship wine to consumers, but denies the privilege to nonresidents

The Privileges and Immunities Clause 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, cl. 1.[13] It places the citizens of each State upon the same footing with citizens of other States in so far as the advantages resulting from citizenship in those States are concerned. *McBurney v. Young*, 133 S.Ct. 1709, 1714 (2013) (citations omitted). The Clause is violated when -- as in the present case -- the different treatment given nonresidents is discriminatory and "advantage[s] in-state workers and commercial interests at the expense of their out-of-state competitors." *McBurney v. Young*, 133 S.Ct. at 1715.

This does not mean that state citizenship may never be used to distinguish among persons or that a state must always apply all its laws equally to

[13]The 14th Amendment contains a confusingly labeled Privileges or Immunities Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

nonresidents. The Supreme Court has long held that the Clause only protects those privileges that are "fundamental." *McBurney v. Young,* 133 S.Ct. at 1714. However, the Court has also repeatedly found that one such fundamental privilege 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." *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985). Engaging in an occupation is fundamental because it is important to the economy, whether a person is practicing law, *id.* at 280-81, working on the Alaska pipeline, *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), fishing for shrimp, *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948), working construction, *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 210-11 (1984), or selling goods by mail-order. *Ward v. State,* 79 U.S. 418, 424-25 (1870). *See also W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 497 (7th Cir. 1984) (privilege to work in another state is protected). Indeed, counsel has been unable to find a single federal case in which any bona fide occupation was deemed not fundamental.

The fact that the wine business is heavily regulated and that a license is required to sell and deliver wine to consumers does not remove that occupation from the protection of the Privileges and Immunities Clause. To the contrary, it requires that the license must also be available to nonresidents. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 280-81 (law license); *O'Reilly v. Bd. of App. of Montgomery Co., Md.*, 942 F.2d 281, 284-85 (4th Cir. 1991) (taxi license) The Clause guarantees nonresidents equal treatment, so at a minimum, a state must allow noncitizens to apply for such licenses and engage in the activities permitted by them. Illinois does not. Ill.

Admin. Code tit.11, § 100.480 (everyone shipping into the state is an importer eligible only for an importer license); 235 Ill. Comp. Stat. 5/5-19® (only a winery may ship wine directly from out of state to consumers).

The Privileges and Immunities Clause is not absolute. Like the nondiscrimination principle of the Commerce Clause, it does not preclude discrimination against nonresidents where (I) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the state's objective. Part of the inquiry into whether the discrimination bears a close or substantial relationship to the state's objective is whether the state can prove that no less restrictive means is available. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 284. Of course, a state must present evidence to support any claim that no other regulatory means will advance its interest. *Id.* at 285. Because this case is on appeal from a motion to dismiss, the parties have not yet developed such evidence, so unless the State can find some absolute defense in the Twenty-first Amendment, the case should be remanded for consideration of whether the ban is supported by substantial reasons.

B. The Twenty-first Amendment does not immunize state liquor laws from the commands of the Privileges and Immunities Clause.

While there is scant authority on whether a state liquor law giving preference to its own citizens violates the Privileges and Immunities Clause, there are two lines of closely related cases that provide guidance. Both lead to the same conclusion: that the Twenty-first Amendment is not a defense to a violation of the Privileges and Immunities Clause.

The first are the Commerce Clause/Twenty-first Amendment cases cited above. They hold that although states have broad regulatory authority over alcohol, they may not discriminate against out-of-state shippers. *Granholm v. Heald*, 544 U.S. at 484-87; *Bacchus Imports, Ltd, v. Dias,* 468 U.S. at 276; *Healy v. Beer Institute*, 491 U.S. at 341-42, 344. The Supreme Court has noted in the past that the Privileges and Immunities Clause and Commerce Clause arose from the same principle that the Constitution creates a single national economic union, *Sup. Ct. of N.H. v. Piper,* 470 U.S. at 279-80, and there is a mutually reinforcing relationship between them. *Hicklin v. Orbeck,* 437 U.S. at 531. Therefore, since the Twenty-first Amendment is limited by the nondiscrimination principle of the Commerce Clause, it must also be limited by the nondiscrimination principle of the Privileges and Immunities Clause.

The second line of cases are those balancing the states' Twenty-first Amendment authority to regulate alcohol against constitutional provisions other than the Commerce Clause. The Supreme Court has held repeatedly and consistently that the Amendment "places no limit whatsoever" on any other constitutional provisions and does not permit states to enact laws that would otherwise violate the constitution. *44 Liquormart v. R.I.,* 517 U.S. 484, 515-16 (1996) (First Amendment challenge to advertising ban); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (Equal Protection challenge to higher drinking age for men); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (Due Process challenge to posting habitual drunkard notice). This, too, suggests that the Twenty-first Amendment cannot be a defense to a violation of the Privileges and Immunities Clause. Joseph Doust has stated a

prima facie claim.

The only case counsel have been able to find in which plaintiffs alleged that a state liquor law violated the Privileges and Immunities Clause is of little help because it was resolved on other grounds. In *Swedenburg v. Kelly*, 358 F.3d 223, 239-40 (2d Cir. 2004), *rev'd on other grounds*, *Granholm v. Heald,* 544 U.S. 460 (2005), plaintiffs had challenged a New York law that prohibited out-of-state wineries from selling directly to New York citizens without establishing a physical presence in the state. The Second Circuit decided that the specific laws being challenged -- unlike the ones at issue in our case -- did not give an advantage to residents or exclude nonresidents, so the Privileges and Immunities Clause was not implicated. It never discussed the Twenty-first Amendment at all nor suggested that it was relevant to the decision.

III. If there were defects in the complaint, the district judge abused his discretion by refusing to let the plaintiffs amend it, in violation of *Runnion v. Girl Scouts of Greater Chicago*

On June 8, 2017, the district court issued an order granting the defendants' motion to dismiss the complaint. It then contemporaneously closed the case without giving the plaintiffs the opportunity to amend the complaint. Doc. No. 30, App. 1. The plaintiffs filed a motion to amend the judgment and reopen the case to permit an amended complaint. Doc No. 31, App. 20. They directed the district court's attention to *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 518 (7th Cir. 2015) which held that plaintiffs should be given at least one opportunity to amend their complaint after a Rule 12(b)(6) motion is granted. The district court denied the

motion in a terse order without mentioning *Runnion.*

In *Runnion,* this Circuit held that a request to amend a complaint normally should be granted because "a plaintiff whose original complaint has been dismissed under Fed. R. Civ. P. 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed." 786 F.3d at 519. The presumption in favor of allowing an amendment is so strong that "denying a plaintiff that opportunity carries a high risk of being deemed an abuse of discretion," 786 F.3d at 518, especially if it is the plaintiffs' first such request, which this was. The court noted that Fed. R. Civ. P. 15(a)(2) mandates that leave to amend should freely be granted, *id.* at 519, so that the district court must rigorously explain its decision if it denies such a request. The district court did not explain its decision.

In this case, the district court appears to have granted the motion to dismiss because it viewed the complaint as a demand by the plaintiffs that they be allowed to sell and deliver wine into Illinois outside the state's regulatory system and without complying with Illinois regulations, Opinion at 6-7, App. 7-8, and that "there are no allegations that would suggest that Doust is in any way prevented from obtaining the proper licenses." Opinion at 8, App. 9. This is contrary to several paragraphs in the complaint which allege that the plaintiffs would comply with Illinois regulations and apply for licenses if Illinois law permitted it. Complaint ¶¶ 15, 16, 19, 21, 25, App. 15-17. Any uncertainty over whether the plaintiffs were seeking to evade the Illinois regulatory system and engage in unlicensed sales could

have been clarified by an amended complaint, and the plaintiffs should have been allowed to do so.

IV. The case should be assigned to a different judge on remand.

Circuit Rule 36 provides that when a case is remanded, this court has the discretion to direct that a new judge be assigned. Although Rule 36 mentions only cases remanded for a new trial, this court has invoked the rule to order that a new judge be assigned following a reversal of the district judge's ruling on a motion to dismiss. The purpose of Rule 36 is to give the successful appellant a fair hearing on remand and "avoid the operation of bias or mindset which seems likely to have developed from consideration and decision of motions to dismiss." *Cange v. Stotler & Co.,* 913 F.2d 1204, 1208 (7th Cir.1990). This court has previously found that a district judge displays such a bias when the judge behaves abruptly and irregularly, dismisses a complaint without giving the plaintiff the opportunity to amend it, and issues an opinion with an unmistakable tone of derision. *Stuart v. Local 727, Intern. Broth. of Teamsters*, 771 F.3d 1014, 1020 (7th Cir. 2014). That is exactly what happened in this case.

The district judge ruled abruptly in a complicated constitutional case, without oral argument. The court devoted a mere 5 pages to the Commerce Clause issue. Opinion at 3-7, Doc. No. 30, App. 4-8. It addressed the central question of whether the law was discriminatory without discussing any of the Supreme Court cases other than *Granholm,* and without referring to any of the four Seventh Circuit cases on alcohol regulation and the Commerce Clause that were brought to its attention.

It devoted only a single page to the Privileges and Immunities Clause issue, Opinion at 8, App. 9, without citing a single case mentioned in the briefs, despite that this is a matter of first impression in this Circuit. The judge dismissed the complaint and gave the plaintiffs no opportunity to amend it, ignoring *Runnion v. Girl Scouts of Greater Chicago*, and deliberately refusing even to cite *Runnion* in its one-paragraph denial of the plaintiffs' motion to amend.

Finally, the court issued an opinion with an unmistakable tone of derision. It called the plaintiffs' constitutional arguments "red herrings." Opinion at 4, App. 5. It characterizes the plaintiffs as seeking "to prey on Illinois consumers and reap profits without regard to the health and welfare of the Illinois public." Opinion at 6, App. 7. The district judge has clearly shown the kind of bias and closed mindset contemplated by *Cange* and *Stuart*, and will not give the plaintiffs a fair hearing on remand. A new judge should be assigned.

Conclusion

The judgment of the district court should be reversed and the case remanded and assigned to a new judge.

Respectfully submitted,
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Certification of Word Count

I certify that this brief, including footnotes and the statement of issues, but excluding tables and certificates, contains 7233 words according to the word-count function of WordPerfect, the word processing program used to prepare this brief.

s/ James A. Tanford
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Certificate of Service

I certify that on August 22, 2017, I electronically filed the foregoing with the Clerk of the Court for the U. S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James A. Tanford
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Certification as to Appendix

I certify that all materials required by Cir. R. 30(a) & (b) are included in the appendix.

s/ James A. Tanford
James A. Tanford
Attorney for Appellants

Appendix

1. Docket text on order closing case

United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 6.1.1.2 (Chicago)
CIVIL DOCKET FOR CASE #: 1:16-cv-08607

Lebamoff Enterprises, Inc. et al v. Rauner et al
Assigned to: Honorable Samuel Der-Yeghiayan
Case in other court: 17-02495
Cause: 42:1983 Civil Rights Act

Date Filed: 09/01/2016
Date Terminated: 06/08/2017
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
06/08/2017	30	MEMORANDUM Opinion and Order: Defendants' motion to dismiss 16 is granted in its entirety. Status hearing set for 6/13/2017 is stricken. Signed by the Honorable Samuel Der-Yeghiayan on 6/8/2017. Civil case terminated. Mailed notice. (etv,) (Entered: 06/08/2017)

2. Memorandum opinion

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Lebamoff Enterprises, Inc. et al.,	)	
	)	Case No: 16 C 8607
v.	)	
	)	Judge Samuel Der-Yeghiayan
Bruce Rauner, et al.	)	

MEMORANDUM OPINION

Samuel Der-Yeghiayan, United States District Court Judge

This matter is before the court on Defendants' motion to dismiss. For the reasons stated below, the motion is granted.

BACKGROUND

Plaintiff Lebamoff Enterprises, Inc. (Lebamoff) allegedly operates wine retail stores in Indiana. Plaintiffs contend that Lebamoff, one of the Plaintiffs, has received requests from customers who moved to Illinois to sell and ship wine to Illinois. Plaintiffs also claim that Lebamoff has received requests from customers to send gifts of wine to Illinois residents. Lebamoff allegedly declined such offers due to the Illinois Liquor Control Act of 1934 (ILCA), 235 ILCS 5/1-1 *et seq.*, which Plaintiffs contend prevents Lebamoff from shipping wine directly to Illinois

consumers. Plaintiffs argue that 235 ILCS 5/5-1(d) and 236 ILCS 5/6-29.1(b) of ILCA are unconstitutional. Plaintiffs include in their complaint claims asserting violations of the Commerce Clause (Count I), and claims asserting violations of the Privileges and Immunities Clause (Count II). Wine and Spirits Distributors of Illinois have intervened in this matter as a Defendant. Defendants now move to dismiss all claims.

LEGAL STANDARD

In ruling on a motion to dismiss brought pursuant Federal Rule of Civil Procedure 12(b)(6) (Rule 12(b)(6)), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). A plaintiff is required to include allegations in the complaint that "plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level' " and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)(quoting in part *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)); *see also Morgan Stanley Dean Witter, Inc.*, 673 F.3d at 622 (stating that "[t]o survive a motion to dismiss, the complaint must contain sufficient factual matter,

accepted as true, to state a claim to relief that is plausible on its face," and that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged")(quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009))(internal quotations omitted).

DISCUSSION

I. Commerce Clause Claims (Count I)

Defendants argue that Plaintiffs have not alleged facts that would indicate that ILCA violates the Commerce Clause. A state law may violate the Commerce Clause if it "mandate[s] 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *Granholm v. Heald*, 544 U.S. 460, 472 (2005)(quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)) (explaining that "[t]he mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States" and that "States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses"). However, the Twenty-first Amendment granted to the "States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 488-89 (explaining that "[a] State

which chooses to ban the sale and consumption of alcohol altogether could bar its importation"). The Twenty-first Amendment was intended to provide States with authority to "maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Id.* at 484.

Plaintiffs argue that the challenged sections of ILCA are unconstitutional to the extent that they are applied to out-of-state alcohol retailers. While Plaintiffs address arguments in their brief, such as whether the Twenty-first Amendment overrides other portions of the Constitution, such arguments are mere red herrings. Plaintiffs' Commerce Clause claims as alleged in the complaint fail at the most basic starting point. Plaintiffs cannot show that ILCA provides for differential treatment of in-state and out-of-state economic interests. Under Illinois law, the sales of alcoholic liquors is funneled through a three-tier system. 235 ILCS 5/5-1. The Illinois Liquor Commission (Commission) is authorized to license: (1) manufacturers and primary U.S. importers, (2) distributors and importing distributors, and (3) retailers. 235 ILCS 5/5-1. In order the facilitate the controlled importation of alcohol into the state, ILCA authorizes the Commission to issue non-resident dealer licenses for out-of-state manufacturers and primary U.S. importers to import alcohol into the State for sale and delivery to Illinois licensed importing distributors. 235 ILCS 5/1-3.29. ILCA also allows in-state retailers to sell and ship alcohol by common carriers and parcel delivery services to Illinois consumers. 235 ILCS 5/5-1(d). Out-of-state retailers that operate outside the three-tier system are prohibited

from selling and delivering alcohol to Illinois consumers through various direct means. 235 ILCS 5/6-29.1(b).

In *Granholm*, the Supreme Court made clear that States can "assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system." *Granholm*, 544 U.S. at 489 (stating that the Court had "previously recognized that the three-tier system itself is 'unquestionably legitimate' ") (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). While the Court in *Granholm* ultimately found the three-tier systems in question to be unconstitutional, the reason for such a finding was based on the preferential treatment accorded to in-state producers, which allowed them to circumvent the systems. *Id.* at 474-76.

The Illinois statutory scheme does not provide such exceptions for in-state retailers or differentiate between such retailers and out-of-state retailers. Under the statutory scheme in Illinois, all alcohol sold in Illinois by retailers directly to Illinois consumers must pass through the three-tier system. In Illinois, ILCA is in place to control the use of alcohol by regulating its transportation, importation, and sales. Unlike in-state-retailers who have obtained alcohol under the three-tier regulation system, certain out-of-state retailers such as Plaintiffs have not proceeded through the regulatory system in place to protect the Illinois public from harm. Plaintiffs' constitutional claims relating to unfair treatment is an attempt to circumvent the Illinois statutory scheme designed to protect the Illinois public. The Commission

has made findings as to the purpose of Section 6-29.1 of ILCA, stating that the section is necessary to help to limit problems such as automobile accidents, domestic violence, alcohol abuse, and underage drinking, and to collect revenue to address such social problems. 235 ILCS 5/6-29.1(a). The Illinois Legislature properly passed ILCA to protect the public, stating for example, that ILCA is to "be liberally construed, to the end that the health, safety, and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquors." 235 ILCS 5/1-2. Out-of-State Plaintiffs' constitutional interests in conducting commerce within Illinois does not provide them with unfettered access to Illinois markets to prey on Illinois consumers and reap profits without regard to the health and welfare of the Illinois public without complying with Illinois' regulations and laws that are applicable to all.

To allow Out-of-State Plaintiffs to operate outside the three-tier system in Illinois, while in-state-retailers diligently operate within the regulatory system and help to limit the potential social problems connected with improper use of alcohol, would actually provide Out-of-State Plaintiffs with an unfair advantage over the in-state retailers rather than remove any self-perceived disadvantage to Plaintiffs. Plaintiffs' Commerce Clause claims in this action thus seek to foster unfair advantages in commerce, which is ironically contrary to the Commerce Clause.

Other Circuits have upheld the constitutionality of three-tier systems such as Illinois' system, and Plaintiffs have not pointed to any controlling precedent on point that would support their position or to any Circuit law which has ruled in the manner that they advocate. *See, e.g., Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009)(fmding that "New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers"); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818-20 (5th Cir. 2010)(finding Texas three-tier system constitutional). ILCA is in place to protect the Illinois public and Plaintiffs have not shown that in-state entities and out-of-state entities are treated unequally. For the protection of the Illinois public, all alcohol sold directly to Illinois consumers must first pass through the three-tier regulatory system. The system ensures proper control and regulation of alcohol, and ensures the proper collection of revenues, which promotes the welfare of the Illinois public. Plaintiffs' complaint on its face fails to suggest any burden on interstate commerce or violation of the Commerce Clause. Defendants have shown that the challenged sections of ILCA are rationally related to a legitimate state interest. Therefore, Defendants' motion to dismiss the Commerce Clause claims is granted.

II. Privileges and Immunities Clause Claims (Count II)

Defendants argue that Plaintiffs have failed to allege facts that suggest a violation of the Privileges and Immunities Clause. Although Plaintiffs present a

variety of arguments, their claims fail on their face at the most basic level. The Privileges and Immunities Clause analysis relating to "discrimination against out-of-state residents entails a two-step inquiry." *United Bldg. & Const. Trades Council of Camden Cty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 218-19 (1984). The court must initially determine whether the governmental action "burdens one of those privileges and immunities protected by the Clause." *Id.* The Supreme Court of Illinois has made clear that "[t]he right to deal in intoxicating liquors is not an inherent right, but is always subject to the control of the State in the legitimate exercise of its police power." *Hornstein v. Illinois Liquor Control Comm'n*, 106 N.E.2d 354, 357 (Ill. 1952). Plaintiffs have not identified any interest in their complaint that would trigger the protections of the Privileges and Immunities Clause. Plaintiffs' allegations also do not indicate any disparate treatment. Plaintiffs allege that Plaintiff Joseph Doust (Doust) is unable to deal with Illinois consumers in violation of the Privileges and Immunities Clause. (Comp. Par. 22-28). Plaintiffs' allegations indicate that Doust is seeking to deal directly with Illinois consumers without proceeding through the three-tier regulatory system in place to protect the public welfare. Under Illinois law, no individual in Illinois or outside of Illinois possesses such a right. There are no allegations that would suggest that Doust is in any way prevented from obtaining the proper licenses and proceeding through Illinois' three-tier regulatory system. Therefore, Defendants' motion to dismiss the Privileges and Immunities Clause claims is granted.

CONCLUSION

Based on the foregoing analysis, Defendants' motion to dismiss is granted in its entirety.

Date: 6/27/17

_____

Samuel Der-Yeghiayan
United States District Court Judge

3. Order on motion to alter judgment

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Lebamoff Enterprises, Inc. et al.,	)	
	)	Case No: 16 C 8607
v.	)	
	)	Judge Samuel Der-Yeghiayan
Bruce Rauner, et al.	)	

ORDER

This matter is before the court on Plaintiffs' motion to reinstate the instant action and for leave to file an amended complaint. [31] On June 19, 2017, this court granted Defendants' motion to dismiss and the clerk of court promptly entered judgment. Plaintiffs have not shown or even argued that the court erred in dismissing the instant action. This action has been terminated and the request for leave to file an amended complaint is untimely. *Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 512 (7th Cir. 2007). The record also reflects that any attempt by Plaintiffs at amending the complaint would be futile. Therefore, the instant motion is denied. Noticed motion date of 06/28/17 is stricken.

Date: 6/27/17

_____

Samuel Der-Yeghiayan
United States District Court Judge

4. Complaint

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

LEBAMOFF ENTERPRISES, INC.,	)
JOSEPH DOUST	)
and	)
IRWIN BERKLEY	)
	)
Plaintiffs,	)
	)
vs.	)
	)
GEORGE RAUNER, Governor of Illinois,	)
LISA MADIGAN, Attorney General of Illinois,	)
CONSTANCE BEARD, Chairperson of the	)
Illinois Liquor Control Commission	)
and U-JONG CHOE, Executive Director of the	)
Illinois Liquor Control Commission	)
	)
Defendants.	)

COMPLAINT

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 G*ranholm 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 George Rauner is the Governor of Illinois and is the chief executive officer.

9. Defendant Lisa Madigan is the Attorney General of Illinois and is generally empowered to enforce Illinois laws.

10. Defendant Constance Beard is the Chairperson of the Illinois Liquor Control Commission, which is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

11. U-Jong Choe is the Executive Director 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. Missouri's 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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5. Motion to Alter the Judgement

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEBAMOFF ENTERPRISES, INC., et al.	)	
Plaintiffs	)	Case No. 1:16 cv 08607
	)	
vs.	)	Judge Samuel Der-Yeghiayan
	)	
BRUCE RAUNER, et al.	)	
Defendants	)	

PLAINTIFFS' MOTION TO ALTER THE JUDGMENT, REOPEN THE CASE, AND GRANT LEAVE TO FILE AN AMENDED COMPLAINT

Come now the plaintiffs, by counsel, and move the court pursuant to Fed. R. Civ. P. 59(e) to alter its judgment terminating the case, reopen the case, and grant them leave to amend the complaint pursuant to Fed. R. Civ. P. 15(a)(2). As more fully explained in the accompanying memorandum of law, the recent Seventh Circuit opinion in *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 516-21 (7th Cir. 2015) holds that when a district court dismisses a complaint for failure to state a claim under Fed. R. Civ. P. 12(b), plaintiffs should be given at least one opportunity to amend the complaint to try to add what the court found lacking in the original, before the case is terminated. A proposed amended complaint is attached.

WHEREFORE, plaintiffs request that the court alter the judgment by removing the notation on the electronic docket that the case has been terminated, reopen proceedings, and grant plaintiffs leave to file an amended complaint.

Respectfully submitted:

s/ James A. Tanford
Of counsel
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s/ Robert D. Epstein
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Attorneys for plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record for the defendants, Michael T. Dierkes, and intervening defendant, Richard J. Prendergast.

s/ James A. Tanford
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6. Proposed First Amended Complaint

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEBAMOFF ENTERPRISES, INC., JOSEPH DOUST and IRWIN BERKLEY,	)	
	)	No. 1:16-cv-08607
Plaintiffs,	)	
	)	Hon. Samuel Der-Yeghiayan
vs.	)	
BRUCE RAUNER, Governor of Illinois, LISA MADIGAN, Attorney General of Illinois, CONSTANCE BEARD, Chairperson of the Illinois Liquor Control Commission and DONOVAN BORVAN, Executive Director of the Illinois Liquor Control Commission	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

Plaintiffs make the following allegations 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 obtain licenses giving them the right to sell, ship and deliver wine directly to consumers within the state of Illinois, but prohibit out-of-state retailers from doing so. Plaintiffs seek a declaratory judgment that this statutory scheme is unconstitutional for two reasons: (1) it violates the Commerce Clause and G*ranholm v. Heald*, 544 U.S. 460 (2005), because it discriminates against out-of-state wine retailers by denying them the right to sell and

deliver wine to Illinois consumers upon the same terms as in-state retailers, and (2) it violates the Privileges and Immunities Clause in Article IV by denying nonresidents the privilege of engaging in their profession as wine merchants on terms equivalent to those given to citizens of Illinois. Plaintiffs seek an injunction barring Defendants from enforcing these laws so as to prohibit out-of-state wine retailers from selling and delivering wine directly to Illinois consumers upon the same terms as in-state businesses.

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 fifteen 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, including obtaining licenses.

Defendants

7. Defendants are sued in their official capacities.

8. Defendant Bruce Rauner is the Governor of Illinois and is the chief executive officer.

9. Defendant Lisa Madigan is the Attorney General of Illinois and is generally empowered to enforce Illinois laws.

10. Defendant Constance Beard is the Chairperson of the Illinois Liquor Control Commission, which is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

11. Donovan Borvan is the Executive Director of the Illinois Liquor and Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit. He succeeds U-Jong Choe in this office, who was the Executive Director when the original complaint was filed.

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

Count I: Commerce Clause Violation

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

14. An Illinois wine retailer may obtain wine for resale from distributors, auction houses and private collections.

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. No other Illinois license is available to Lebamoff that would allow it to sell, deliver and ship wine from its inventory to consumers in Illinois. It would obtain such a license if one were available.

18. Irwin Berkley is a wine consumer and he wants the opportunity to buy wine directly from Lebamoff Enterprises, Inc. and other wine retailers outside of Illinois and to have these wines delivered to his residence.

19. Some wines that Berkley wants to buy are not available in retail stores in Illinois but are available from retail stores in other states. This includes older vintages no longer generally available except at specialty retailers located outside Illinois, and current vintages that have sold out locally after receiving favorable reviews or because few bottles of a limited production wine were allocated to Illinois.

20. Most retailers who carry rare and unusual wine are located in California or New York,

and Berkley cannot afford the time and expense of traveling to out-of-state retailers to purchase a few bottles of rare wine and personally transport them home.

21. Plaintiffs cannot complete the transactions described in paragraphs 18 and 19 because the laws of Illinois prohibit direct sales and shipments of wine from out-of-state retailers to in-state consumers and will not issue any kind of license that would allow such transactions.

22. If Lebamoff Enterprises, Inc., were permitted to sell, ship and deliver its wine directly to consumers in the State of Illinois, it would obtain a license if one were available, and would comply with the same rules concerning labeling, shipping, reporting, obtaining proof of age, and paying taxes as in-state retailers do.

23. By refusing to issue a license to out-of-state retailers that would allow them to sell, deliver and ship wine upon the same terms as in-state retailers, the State of Illinois is discriminating against interstate commerce and protecting the economic interest of local businesses by shielding them from competition, in violation of the Commerce Clause of the United States Constitution.

Count II: Privileges and Immunities Clause Violation

24. Plaintiffs repeat and re-allege paragraphs 1-23 as if set out fully herein.

25. 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.

26. 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.

27. Doust has also received requests by his customers to send wine to residents of Illinois

as gifts.

28. 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.

29. 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.

30. As a nonresident, Doust is not eligible to apply for a license that would allow him to engage in his occupation as a wine merchant, sell and ship wines to Illinois consumers upon terms similar to those given to Illinois residents.

31. If a license were available, Doust would obtain it. He does not ask for the right to engage in the unlicensed sale of wine in Illinois.

32. Being a professional wine merchant who sells and ships wine to Illinois residents is a lawful activity for citizens of Illinois who may obtain a license to do so.

33. 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.

34. Illinois' ban on wine sales and deliveries by out-of-state merchants and its prohibition against issuing licenses to nonresidents, 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 obtain licenses and to sell, ship, and deliver wine 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:

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CERTICATE OF SERVICE

I hereby certify that on June 19, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record for the defendants, Michael T. Dierkes, and intervening defendant, Richard J. Prendergast.

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