

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

*Electronically filed*

TANNINS OF INDIANAPOLIS, LLC  
d/b/a TASTINGS—A Wine  
Experience, *et al.*,

*Plaintiffs*

v.

ALLYSON COX TAYLOR,  
Commissioner of the  
Kentucky Department of  
Alcoholic Beverage Control,

and

DANIEL CAMERON,  
Attorney General of Kentucky

*Defendants*

Civil Action No. 3:19-CV-00504  
Judge David J. Hale

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**ATTORNEY GENERAL DANIEL CAMERON'S MOTION TO DISMISS  
PLAINTIFFS' SECOND AMENDED COMPLAINT**

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Plaintiffs challenge several provisions of Kentucky's alcohol beverage control laws, many of which were amended as part of extensive revisions made during the regular session of the 2020 General Assembly. For the reasons that follow, Plaintiffs' Second Amended Complaint should be dismissed under Rules 12(b)(1) and 12(b)(6).

## **BACKGROUND**

The case is about the constitutionality of Kentucky’s laws regulating the sale of wine within its borders. The Plaintiffs’ chief complaint is that Kentucky law “prohibit[s] wine retailers located outside the state from selling, delivering, or shipping wine directly to Kentucky residents, while at the same time allowing its own retailers to do so.” [DN 33 at p. 1]. This, the Plaintiffs allege, violates both the (dormant) Commerce Clause and the Privileges and Immunities Clause of the United States Constitution.

Like many states, Kentucky requires a license to ship alcohol to Kentucky residents. *See, e.g.*, KRS 243.020(2); KRS 243.0305(3)(a), (b); KRS 243.155(2)(h)1., 2.; KRS 243.240(1)(b)1., 2.; KRS 244.165(2)(c); KRS 244.165(3)(c). And also like many states, Kentucky requires its licensed retailers to maintain a physical presence in the state in order to sell, ship, and deliver alcohol to its residents. *See* KRS 244.165(1) (providing that it is “unlawful for any person in the business of selling alcoholic beverages in another state or country to deliver or ship or cause to be delivered or shipped any alcoholic beverages . . . directly to any Kentucky resident”).

Kentucky’s physical-presence requirement is different than a residency requirement. Although Kentucky previously imposed a one-year residency requirement to obtain a retail license in KRS 243.100(1)(f), that requirement has been repealed and Kentucky will no longer require its licensed retailers to reside in the state effective July 15, 2020. *See* 2020 Senate Bill 99 §4 (striking the one-year

residency requirement in subsection (1)(f)).<sup>1</sup> But even before repealing the residency requirement, Kentucky required that alcohol deliveries originate from a physical presence within the Commonwealth. So the physical-presence requirement has always operated as an *additional* restriction on alcohol delivery above the residency requirement.

Plaintiff Jack Bailey is an Indiana resident and professional wine merchant. He alleges that Kentucky law prevents him from obtaining a Kentucky license so that he can ship wine directly from his retail establishment (Plaintiff Tannins LLC) in Indiana to Kentucky residents. [DN 33 at ¶ 14 (challenging KRS 243.100); *id.* at ¶ 26]. Presumably, that is because Bailey does not have any intention of establishing a physical presence in Kentucky—for himself or on behalf of Tannins. [*Id.* at ¶ 16 (“Tannins has no business reason to establish physical premises in Kentucky, cannot afford to do so, and the cost of such premises would add to the retail price of its wine compared to shipping it from Indiana, which would make it less competitive than wine sold and shipped from a retailer located in Kentucky.”); *see also id.* at ¶ 28]. So Bailey and Tannins challenge Kentucky’s restrictions as unconstitutional, focusing their aim at Kentucky’s (repealed) residency requirement, as well as the physical-presence requirement. These laws, they allege, “discriminat[e] against interstate commerce . . . in violation of the Commerce Clause.” [*Id.* at ¶ 26]. Two other individuals—Steven A. Bass and David Kittle—join this claim as wine customers who

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<sup>1</sup> Available at <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb99/bill.pdf> (last visited May 8, 2020).

claim the constitutional violation has deprived them of their ability to enjoy at-home wine delivery from out-of-state sellers.

Bailey and Tannins make the same claim under the Privileges and Immunities Clause. Bailey challenges Kentucky law generally on the grounds that, “[b]eing a professional wine merchant who may sell and deliver wine to Kentucky residents is a lawful privilege for citizens of Kentucky,” [DN 33 at ¶ 37], but that Kentucky denies him that “privilege” with no “substantial reason” for doing so, [*id.* at ¶ 38].

### **ARGUMENT**

#### **I. Plaintiffs’ Second Amended Complaint fails to state a claim under the Commerce Clause and the Privileges and Immunities Clause.**

Under Rule 12(b)(6), the Court may dismiss a cause of action for “failure to state a claim upon which relief can be granted.” The Court’s analysis turns on whether the Amended Complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must view the allegations in the light most favorable to the non-moving party and must accept as true well-pleaded facts. *Severe Records, LLC v. Rich*, 658 F.3d 571, 578 (6th Cir. 2011). The Court need not, however, “accept as true legal conclusions or unwarranted factual inferences.” *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Moreover, the “grounds of [a plaintiff’s] ‘entitlement to relief’ requires more than labels and conclusions[.]” *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 246–

47 (6th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555). Where, as here, the Amended Complaint does not state facts sufficient to “state a claim to relief that is plausible on its face,” the claims must be dismissed. *Twombly*, 550 U.S. at 570.

**A. The Plaintiffs fail to state a claim against Kentucky on its physical-presence requirement under the dormant Commerce Clause.**

The Plaintiffs fail to state a claim under the dormant Commerce Clause against the physical-presence requirement because the Twenty first Amendment allows states to make the precise policy decision Kentucky has made here. In essence, Plaintiffs ask a simple question: “If [Kentucky] may . . . require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers?” *Lebamoff Enterprises Inc. v. Whitmer*, No. 18-2199, 2020 WL 1921939, at \*4 (6th Cir. Apr. 21, 2020). According to the Sixth Circuit, “[t]he answer is yes.” *Id.*

*Lebamoff* concerned a challenge to a remarkably similar physical-presence law in Michigan. In *Lebamoff*, the Court considered “whether Michigan may permit its retailers to offer at-home deliveries within the State while denying the same option to an Indiana retailer who does not have a Michigan retail license.” *Id.* at \*1. In reaching its conclusion that Michigan could limit delivery of alcohol to its in-state retailers, the Sixth Circuit considered the history of the Twenty First Amendment and its interaction with Commerce Clause jurisprudence. *Id.* at \*2 (describing the interplay as “accordion-like”). Michigan had claimed that to effectively regulate liquor retailers and to ensure their compliance with the law, it was essential that retailers have a physical location—*i.e.* a store—within the state. *See generally id.* at \*3–4. The

*Lebamoff* court explained, “[t]he federal courts also have permitted States, like Michigan, to require retailers to be physically based in the State.” *Id.* at \*3 (citing *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 622–23 & n.8 (6th Cir. 2018); *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 743 (5th Cir. 2016)).

Thus, the challenge brought by Plaintiffs here has already been resolved in favor of states like Kentucky, which prohibits shipment of alcohol from outside the state to its citizens. *See* KRS 244.165(1). As the *Lebamoff* Court concluded, “[t]hat [Kentucky] permits direct deliveries by in-state retailers does not alter this conclusion. These retailers all live with the bitter and sweet of [Kentucky’s] three-tier system—the bitter of being able to buy only from [Kentucky] wholesalers . . . and the sweet of being subject only to intrastate competition.” 2020 WL 1921939, at \*6. “The text and history of the Twenty-first Amendment support this conclusion.” *Id.*

Because *Lebamoff* controls here, Plaintiffs’ challenge to KRS 244.165 fails. It is within Kentucky’s authority under the Twenty First Amendment and the Commerce Clause to prohibit the direct sale and delivery of wine from retailers outside the Commonwealth to its residents. *Lebamoff*, 2020 WL 1921939, at \*4; *Byrd*, 883 F.3d at 622–623 & n.8; *Cooper*, 820 F.3d at 743. For this reason, Count I in the Second Amended Complaint must be dismissed.

**B. The Plaintiffs fail to state a claim under the Privileges and Immunities Clause.**

Plaintiffs also challenge Kentucky statutes under the Privileges and Immunities Clause in Article IV of the United States Constitution. According to the Privileges and Immunities Clause, “[t]he 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. The Clause “protects only those privileges and immunities that are ‘fundamental.’” *McBurney v. Young*, 569 U.S. 221, 226 (2013). And the Sixth Circuit has recently reiterated that “[t]here is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States.” *Lebamoff*, 2020 WL 1921939, at \*8 (quoting *Crowley v. Christensen*, 137 U.S. 86, 91 (1890)); *see also S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, No. 11-CV-04175-NKL, 2012 WL 1934408, at \*5 (W.D. Mo. May 29, 2012), *aff’d*, 731 F.3d 799 (8th Cir. 2013) (citing *Steamers Service Co. v. Wright*, 505 S.W.2d 65, 68 (Mo. 1974) (“the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations . . . and is thereby separated or removed from the natural rights, privileges and immunities of the citizen.”)).

As a “professional wine consultant, advisor, and merchant who resides in and is a resident of Indiana,” [DN 33 at ¶ 28], Bailey alleges that he is denied “the privilege to engage in his occupation in the Commonwealth upon the same terms as Kentucky citizens” because Kentucky law bans “direct wine sales and deliveries by out-of-state merchants[.]” [*Id.* at ¶ 39]. Because Bailey does not have a “fundamental” right to “sell intoxicating liquors by retail,” he fails to state a claim under the Privileges and Immunities Clause. And Count II of the Second Amended Complaint should be dismissed. *Lebamoff*, 2020 WL 1921939, at \*8 (“No prior case in this or any

other circuit has found a state regulation of alcohol violated the Privileges and Immunities Clause. We see no good reason to be the first.” (cleaned up)).

**C. Plaintiffs fail to state claim that KRS 243.240 is unconstitutional.**

Finally, the Court should dismiss Plaintiffs’ Second Amended Complaint insofar as it makes any claim regarding the constitutionality of KRS 243.240. Although a complaint need contain only “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), to survive a motion to dismiss, this short and plain statement “must contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A complaint must include something more than “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’” *Id.* (quoting *Twombly*, 550 U.S. at 555).

Here, the only reference Plaintiffs make to KRS 243.240 in the Second Amended Complaint is in the prayer for relief. [*See generally* DN 33]. There they ask that this Court declare KRS 243.240 unconstitutional. [*Id.* at p. 8–9]. Yet the Complaint is devoid of any explanation of how this provision is unconstitutional or why the Court should declare it so. [*See id.*]. Regardless, the General Assembly amended multiple provisions of Kentucky’s alcohol beverage control laws during its 2020 regular session. Those amendments include several revisions to KRS 243.240. *See* 2020 House Bill 415 § 11.<sup>2</sup> For all these reasons, this claim should be dismissed. *Ashcroft*, 556 U.S. at 678.

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<sup>2</sup> Available at <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/hb415/bill.pdf> (last visited May 8, 2020).

## II. The Plaintiffs lack standing to challenge the residency requirement in KRS 243.100.

Plaintiffs attempt to piggyback on *Tennessee Wine & Spirits Retailers Association v. Thomas*, \_\_ U.S. \_\_, 139 S. Ct. 2449 (2019) by objecting to the requirement that Kentucky’s laws imposed before their recent amendment. In *Tennessee Wine*, the United States Supreme Court addressed a durational-residency requirement that effectively prevented Total Wine from opening a store in the state. There, the Supreme Court held that Tennessee’s two-year durational-residency requirement for initial retail liquor store license applicants violated the dormant Commerce Clause, and was not saved by § 2 of the Twenty First Amendment. Kentucky law, as of July 15, will no longer impose a residency requirement of any sort. For the reasons that follow, therefore, Plaintiffs’ challenge to the residency requirement contained in KRS 243.100 must be dismissed.

“Article III of the United States Constitution limits the power of the federal courts to ‘Cases’ and ‘Controversies.’” *Ermold v. Davis*, 855 F.3d 715, 718 (6th Cir. 2017) (citing U.S. Const. Art. III, § 2). And “[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998). The “irreducible constitutional minimum” of Article III standing has three elements: “(1) the plaintiff must have suffered an ‘injury-in-fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual [and] imminent, not conjectural and hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be

redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

Although Plaintiffs ask that KRS 243.100(1)(f) be declared unconstitutional, the Second Amended Complaint fails to present an “actual controversy” because Plaintiffs lack standing to challenge that provision. That is because KRS 243.100(1)(f) is immaterial to Plaintiffs’ alleged harm. Even without the residency requirement they could not ship alcohol from their Indiana premises to Kentucky residents because Kentucky—like Michigan in *Lebamoff*—requires that retailers shipping alcohol to Kentucky residents maintain a physical presence within the state. And Bailey and Tannins have no intention of obtaining the physical premises in Kentucky that is necessary to obtain a license in the first place. [See DN 33 at ¶¶ 14–15]. Thus, the residency requirement in KRS 243.100 is no impediment here. Instead, it is Kentucky’s physical-presence requirement that bars the relief Plaintiffs seek. And as discussed above, that requirement is constitutional under *Lebamoff*. Thus, Plaintiffs’ alleged harm will not “be redressed by a favorable decision” from this Court. *Lujan*, 504 U.S. at 561. Regardless, the General Assembly has stricken the residency requirement. See 2020 Senate Bill 99 § 4 (striking the residency requirement in subsection (1)(f)).<sup>3</sup>

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<sup>3</sup> Available at <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb99/bill.pdf> (last visited May 8, 2020).

### **CONCLUSION**

On behalf of the Commonwealth of Kentucky and in defense of the constitutionality of the statutes challenged as unconstitutional, the Attorney General respectfully requests that this Court dismiss Plaintiffs' Second Amended Complaint.

Respectfully submitted,

**Daniel Cameron**  
**ATTORNEY GENERAL**

/s/ Carmine G. Iaccarino

Carmine G. Iaccarino (KBA #93838)

Brett R. Nolan (KBA #95617)

Office of the Attorney General

700 Capital Avenue, Suite 118

Frankfort, Kentucky 40601

Phone: (502) 696-5300

Carmine.Iaccarino@ky.gov

Brett.Nolan@ky.gov

*Counsel for Attorney General Daniel Cameron*

### **CERTIFICATE OF SERVICE**

I certify that on May 8, 2020, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

/s/ Carmine G. Iaccarino

*Counsel for Attorney General Daniel Cameron*