

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

TANNINS OF INDIANAPOLIS, LLC,)
d/b/a Tastings—A Wine Experience,)
JACK BAILEY,)
STEVEN A. BASS, and)
DAVID KITTLE,)
) Case No. 3:19-cv-00504-DJH-CHL
Plaintiffs,)
)
vs.)
)
CAROL BETH MARTIN, Commissioner)
of the Kentucky Dept. of Alcoholic Beverage)
Control, and)
ANDREW BESHEAR, Attorney General)
of Kentucky)
Defendants.)

SECOND 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 KY. REV. STAT. § 244.165(1) and Kentucky’s related laws, practices, and regulations that prohibit 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. Tannins of Indianapolis and other retailers whose premises are located outside Kentucky cannot sell wine over the internet and ship it to Kentucky consumers because Kentucky laws make this business practice illegal. The plaintiffs seek a declaratory judgment that this regulatory scheme is unconstitutional for two reasons: (1) it violates the Commerce Clause because it discriminates against wine

retailers located outside Kentucky who are engaged in interstate commerce, and (2) it violates the Privileges and Immunities Clause of Article IV, section 2, because it denies nonresident wine merchants the privilege of engaging in their occupation in Kentucky on terms equivalent to those given to citizens of Kentucky. The plaintiffs seek a permanent injunction barring the defendants from enforcing these laws, practices and regulations, and requiring them to allow out-of-state wine retailers to sell, ship, and deliver wine to Kentucky consumers from their premises located outside the Commonwealth.

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 and laws.

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

PLAINTIFFS

3. Consumer Plaintiff Steven A. Bass is a resident of Louisville, Jefferson County, Kentucky. 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 wine collector and consumer of fine wine and would purchase wine from out-of-state wine retailers which would be added to his wine collection, and have those wines shipped to his residence in Kentucky, if Kentucky practices and regulations permitted him to do so.

4. Consumer Plaintiff David Kittle resides in Louisville, Jefferson County, Kentucky and is a wine consumer. 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

desires to purchase special wines that are difficult to locate. He would purchase wine from out-of-state wine retailers, and have those wines shipped to his residence in Kentucky, if Kentucky law, practices and regulations permitted him to do so.

5. Plaintiff Tannins of Indianapolis, LLC, is an Indiana limited liability company that operates an Indiana-licensed retail store under the name Tastings—A Wine Experience. It engages in internet sales, and makes direct-to-consumer deliveries from its premises in Indiana to states where it is lawful to do so. It has customers from all over the country with whom it has developed long-term relationships and for whom it makes special purchases and arranges delivery. Tannins has received requests from Kentucky residents that it sell and deliver wine to them from, but is unable to do so because Kentucky law prohibits such transactions. It intends to sell, ship, and deliver wines directly to consumers in Kentucky from its premises in Indiana if the rules and regulations prohibiting such transactions are removed or declared unconstitutional.

6. Jack Bailey is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana. He operates Tannins of Indianapolis LLC which does business as Tastings -- A Wine Experience. He has previously handled sales and deliveries of wine to customers from his inventory and licensed premises at Tastings.

7. Plaintiffs intend to pay all taxes that may be due on such interstate sales and shipments and to comply with all other non-discriminatory state regulations, including obtaining licenses.

DEFENDANTS

8. Defendants are sued in their official capacities.

9. Former defendant Matthew Bevin is the Governor of Kentucky but has been voluntarily dismissed as a party from this case.

10. Defendant Andrew Beshear is the Attorney General of Kentucky and is generally empowered to enforce Kentucky laws.

11. Defendant Carol Beth Martin is the Commissioner of the Kentucky Department of Alcoholic Beverage Control, which is charged with enforcing Kentucky liquor control laws and regulations, 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.

Count I: Commerce Clause Violation

13. A retailer located in the Commonwealth of Kentucky, can obtain a retail package license that allows it to sell, ship, and deliver wine from its premises by common carrier directly to Kentucky consumers.

14. Jack Bailey cannot obtain a Kentucky retail package license because he is not a Kentucky resident, and KY. REV. STAT. § 243.100 imposes a 1-year residency requirement on applicants for licenses.

15. Tannins of Indianapolis cannot obtain a retail package license for its premises in Indiana because they are not located in Kentucky and licenses to engage in retail wine sales in Kentucky are available only if a business has physical premises in the state.

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.

17. Neither Bailey nor Tannins may sell and ship wine directly to consumers in Kentucky because no license is available that would allow such shipments to originate from premises outside the state, KY. REV. STAT. § 243.020 prohibits anyone from selling,

delivering, or shipping wine in Kentucky without a license, and KY. REV. STAT. § 244.165(1) prohibits anyone in the business of selling alcohol in another state from delivering or shipping alcoholic beverages directly to any Kentucky.

18. Steven A. Bass is a wine consumer and he wants the opportunity to buy wine directly from Tannins and other wine retailers located outside of Kentucky and to have these wines delivered to his residence.

19. He has contacted several out-of-state wine retailers either on the Internet or by phone in order to buy wines he cannot find in Kentucky, but was unable to complete those purchases when he indicated he lived in Kentucky.

20. Many wine retailers who carry rare, unusual, older vintages, or other limited-supply wines are located outside Kentucky and have wines for sale that are not available in Kentucky. Mr. Bass cannot afford the time and expense of traveling to out-of-state wine retailers to purchase a few bottles of rare wine and personally transport them home.

21. David Kittle is a wine consumer and he wants the opportunity to buy wine directly from Tannins and other wine retailers outside of Kentucky and to have these wines delivered to his residence.

22. He has attempted to purchase wine from out-of-state wine retailers, including wine which he could not find for sale locally, but has been denied these purchases when he indicated he lived in and wanted them shipped to Kentucky.

23. Some wines that he wants to buy he has not been able to find in retail stores in the Louisville area or elsewhere in Kentucky but are available from retail stores in other states. This includes older vintages no longer generally available except at specialty wine retailers located outside Kentucky, and current vintages that have sold out locally after

receiving favorable reviews or because few bottles of limited production wine were allocated to Kentucky wholesalers.

24. The consumer plaintiffs cannot complete the transactions described in paragraphs 18-23 because the laws, regulations, and practices of Kentucky, including KY. REV. STAT. §§ 243.100(1)-(2) and 244.165, prohibit direct sales and shipments of wine from retailers located outside Kentucky to in-state consumers, and state officials will not issue any kind of license that would allow such interstate transactions.

25. If Tannins were permitted to sell, ship, and deliver wine to Kentucky consumers from its Indiana premises, 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 wine retailers do.

26. By imposing a residency requirement upon applicants for liquor licenses and prohibiting sales and shipments to Kentucky consumers from retail premises located outside Kentucky, while allowing such sales and shipments from wine retailers physically located in the state, Kentucky 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

27. Plaintiffs repeat and re-allege paragraphs 1-26 as if set out fully herein.

28. Jack Bailey is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana and makes his living in the wine business. He and his wife Lisa Bailey own 81% of Tastings Diversified LLC, and he is its managing member. Tastings Diversified owns 70% of Tannins of Indianapolis LLC, and Mr. Bailey is its

managing member representative. He buys, sells and delivers wine from his business premises in Indiana doing business as Tastings -- A Wine Experience.

29. Mr. Bailey 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 that is purchased and processed through Tannins under an Indiana retail wine license.

30. Mr. Bailey has received requests from his customers to send wine to residential addresses in Kentucky but was unable to complete those sales and ship the specifically requested wines because Kentucky law prohibits such transactions.

31. Some wines wanted by Mr. Bailey's customers are difficult to obtain because they are old and only obtainable at auction, available only in limited allocated amounts or only for a limited time, or scarce because of their popularity. Many of these wines are not available in Kentucky through its three-tier system because Kentucky wholesalers did not stock it or have depleted their supply.

32. Mr. Bailey wants to practice his profession as a wine merchant in Kentucky by consulting with, obtaining wines for, and delivery wines to Kentucky residents, but is prevented from doing so by Kentucky laws limiting licenses to Kentucky residents and prohibiting nonresidents from shipping directly to them.

33. Because he is not personally eligible for a Kentucky license, Mr. Bailey must transact any business in Kentucky through his licensed business in Indiana, Tannins of Indianapolis LLC.

34. Tastings Diversified and Tannins of Indianapolis are LLCs, so all profits made by either company pass directly to the members of the LLC, so Mr. Bailey has personally suffered economic harm by not being able to complete sales through Tannins, and has

lost the ability to compete personally for business in Kentucky because he does not satisfy the one-year residency requirement.

35. Mr. Bailey has not applied to Kentucky officials for a retail license because it would be futile to do so since he is not a resident of Kentucky.

36. If a license were available that would permit Mr. Bailey to engage in the wine business in Kentucky without becoming a resident, he would obtain it. He does not ask for the right to engage in the unlicensed sale of wine in Kentucky.

37. Being a professional wine merchant who may sell and deliver wine to Kentucky residents is a lawful privilege for citizens of Kentucky.

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

39. Kentucky's residency requirement that prevents Mr. Bailey from engaging in the wine business in Kentucky, and its laws that ban direct wine sales and deliveries by out-of-state merchants, deny Mr. Bailey the privilege to engage in his occupation in the Commonwealth upon the same terms as Kentucky 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 Ky. Rev. Stat. §§ 243.100 (1)-(2), 243.240 (1), 244.165, and related laws and regulations unconstitutional to the extent that they prohibit wine retailers located outside the state from selling, shipping, and delivering wine from their premises directly to a Kentucky consumer, as a violation of the Commerce Clause of the United States Constitution.

B. Judgment declaring Ky. Rev. Stat. §§ 243.100 (1)-(2), 243.240 (1), 244.165, and related laws and regulations that prohibit a nonresident from obtaining a license to sell, ship, and deliver wine directly to Kentucky consumers unconstitutional as a violation of the Privileges and Immunities Clause of Article IV of the United States Constitution.

C. An injunction prohibiting defendants from enforcing those laws, rules and regulations, and requiring them to allow Tannins of Indianapolis, LLC, to sell, ship, and deliver wine directly to customers in Kentucky.

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

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

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

Respectfully submitted,

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on October _____, 2019, a copy of the foregoing was filed through the Court's CM/ECF system and was served upon counsel for the defendants via the CM/ECF notification system.

/s/ James A. Tanford
James A. Tanford
Co-counsel for plaintiffs