

FEB 18 2020

US DISTRICT COURT
WESTERN DISTRICT OF NC

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

B-21 WINES, INC.,)
JUSTIN HAMMER,)
BOB KUNKLE,)
MIKE RASH,)
and LILA RASH,)

Plaintiffs,

vs.

A.D. GUY, Jr., Chair, North Carolina)
Alcoholic Beverage Control Commission,)
JOSHUA STEIN, Attorney General of)
North Carolina,)

Defendants.

) Case No. 3:20-cv-99

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 N.C. Gen. Stat. §§ 18B-102.1(a), 18B-109, 18B-900(a)(2), and North Carolina’s related laws, practices, and regulations that individually and collectively prohibit wine retailers located outside the state from selling, delivering, or shipping wine directly to North Carolina residents, when in-state retailers are allowed to do so. The consumer Plaintiffs cannot purchase wine over the internet from retailers whose premises are located outside North Carolina and have it shipped or delivered to them because North Carolina laws make this business practice illegal. B-21 Wines, Inc. and other retailers whose premises are located outside North Carolina cannot sell wine over the internet and ship it to North Carolina consumers because North Carolina laws make this business

practice illegal. The plaintiffs seek a declaratory judgment that this statutory scheme violates the Commerce Clause because it discriminates against wine retailers located outside North Carolina who are engaged in interstate commerce and gives economic protection to in-state businesses. 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 North Carolina consumers from their premises located outside the state.

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. Plaintiff Bob Kunkle is resident of Charlotte, Mecklenburg County, North Carolina, 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 would purchase wines from out-of-state retailers and have them shipped to his residence in North Carolina if it were lawful to do so.

4. Plaintiffs Mike and Lila Rash are residents of Charlotte, Mecklenburg County, North Carolina, are over the age of twenty-one, do not live in a dry county, and are legally permitted to purchase, receive, possess and drink wine at their residence. They would

purchase wines from out-of-state retailers and have them shipped to their residence in North Carolina if it were lawful to do so.

5. Plaintiff B-21 Wines, Inc. is a wine retailer located in Tarpon Springs, Florida and is licensed and regulated by the State of Florida. It accepts internet, telephone and other remote orders for wine, verifies the age of purchasers, and makes direct-to-consumer deliveries from its premises in Florida to consumers in 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. B-21 Wine, Inc., has received requests from North Carolina residents to purchase wine and deliver it to them, but is unable to sell and ship directly to them because North Carolina law prohibits such transactions. It intends to sell, ship, and deliver wines directly to consumers in North Carolina from its premises in Florida if the current laws prohibiting such transactions are repealed or declared unconstitutional.

6. Justin Hammer resides in and is a citizen of Florida. He owns and operates B-21 Wines, Inc. He has previously engaged in the sale and delivery of wine to customers from his inventory and licensed premises at B-21 Wines, Inc.

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 a permit if one were available and required.

DEFENDANTS

8. Defendants are sued in their official capacities.

9. A.D. Guy, Jr., is Chair of the North Carolina Alcoholic Beverage Control Commission, which is charged under N.C. Gen. Stat. §18B-203, with administering and enforcing the Alcoholic Beverage Control laws, including the ones being challenged.

10. Joshua Stein is the Attorney General of North Carolina, generally empowered to enforce state laws, and authorized by N.C. Gen. Stat. § 114-2 to initiate enforcement proceedings for violations of all state laws, including the ones being challenged.

11. Defendants are acting under color of state law when they administer and enforce the statutes and regulations challenged herein.

Commerce Clause Violation

12. A retailer located in North Carolina can obtain an off-premises wine permit that allows it to sell and ship wine from its premises directly to North Carolina consumers.

13. Justin Hammer cannot obtain a North Carolina off-premises wine permit that would allow him to sell and ship wine from B-21 Wines, Inc. because he manages that business and is not a North Carolina resident, and N.C. Gen. Stat. § 18B-900(a)(2) provides that permits will be issued only to North Carolina residents or businesses managed by residents.

14. B-21 Wines, Inc. cannot ship wine directly to North Carolina residents because it is located outside the state and N.C. Gen. Stat. § 18B-102.1(a) provides that it is unlawful for any person who is an out-of-state retail dealer in the business of selling alcoholic beverages to ship any alcoholic beverages directly to any North Carolina resident.

15. A retail wine dealer must open a physical facility in North Carolina in order to ship wine to consumers inside the state.

16. Justin Hammer and B-21, Inc., have no business reason to establish physical premises in North Carolina, cannot afford to do so, and the cost of maintaining a second

retail store would add to the retail price of their wine compared to shipping it from Florida which would make it less competitive than wine sold and shipped from a retailer located in North Carolina.

17. Neither B-21 Wines, Inc. nor Justin Hammer may sell, ship, or deliver wine directly to consumers in North Carolina because no permit is available that would allow such activity to originate from premises outside the state; N.C. Gen. Stat. § 18B-102 prohibits anyone from selling or shipping wine in North Carolina without an ABC permit, and N.C. Gen. Stat. § 18B-102.1 prohibits anyone in the business of selling alcohol in another state from shipping wine directly to any North Carolina resident.

18. Plaintiff B-21 Wines, Inc. has received requests from its website, or made in person at its Florida premises, to sell and ship wine to North Carolina residents, but is unable to do so directly because North Carolina law prohibits such transactions.

19. Bob Kunkle is a wine consumer and he wants the opportunity to buy wine directly from wine retailers located outside of North Carolina and to have these wines delivered to him in North Carolina. He has contacted several out-of-state wine retailers either on the internet or by telephone in order to buy wines, but was unable to complete those purchases when he indicated he lived in North Carolina.

20. Mike and Lila Rash are wine consumers and they want the opportunity to buy wine directly from wine retailers located outside of North Carolina and to have these wines delivered to them in North Carolina. They have contacted several out-of-state wine retailers either on the internet or by telephone in order to buy wines, but were unable to complete those purchases when they indicated they lived in North Carolina.

21. Some wine retailers located outside North Carolina have wines for sale that plaintiffs Kunkle and the Rashes have not been able to find at North Carolina retailers in their areas, including rare, unusual, older vintage, and limited-supply wines. They cannot afford the time and expense of traveling to out-of-state wine retailers to purchase a few bottles of such wine and personally transport them home.

22. Some wines sought by the plaintiffs are not available from retail stores in North Carolina because N.C. Gen. Stat. § 18B-1006(h) limits in-state retailers to only selling wines they can get from North Carolina wholesalers and the wholesalers do not stock it, have no business relationship with the winery or importer, or have depleted their supply.

23. The plaintiffs cannot complete the commercial transactions described in paragraphs 18-20 because the laws, regulations, and practices of North Carolina, including N.C. Gen. Stat. §§ 18B-102.1, 18B-109, and 18B-900(a)(2), prohibit direct sales, shipments, and deliveries of wine from retailers located outside North Carolina to in-state consumers, and state officials will not issue any kind of license that would allow such interstate transactions.

24. If B-21 Wines, Inc. were permitted to sell, ship, and deliver wine directly to North Carolina consumers from its premises in Florida, it would obtain a permit if one existed and would comply with the same rules concerning labeling, shipping, reporting, obtaining proof of age, and paying taxes as in-state wine retailers do.

25. North Carolina sells spirits through a system of state-run ABC stores. There are ABC stores in every county in the state except one, which is dry by local option.

26. If B-21 Wines, Inc., were allowed to sell wine to North Carolina consumers to be picked up at an ABC store, it would obtain a permit to do so and ship to the ABC store designated by the customer.

27. By imposing a residency requirement upon applicants for retail permits and prohibiting sales and shipments to North Carolina consumers from retail premises located outside the state while allowing such sales and shipments from wine retailers physically located in the state, North Carolina is discriminating against interstate commerce and protecting the economic interest of local businesses by shielding them from competition, and is depriving plaintiffs of their access to the markets of other states upon equal terms, in violation of the Commerce Clause of the United States Constitution.

Request For Relief

WHEREFORE, Plaintiff seeks the following relief:

A. Judgment declaring the residency requirement in N.C. Gen. Stat. § 18B-900(a) unconstitutional as a violation of the Commerce Clause of the United States Constitution

B. Judgment declaring N.C. Gen. Stat. §§ 18B-102.1, 18B-109, and related laws and regulations that prohibit wine retailers located outside the state from selling and shipping wine from their premises directly to North Carolina consumers unconstitutional as a violation of the Commerce Clause of the United States Constitution.

C. An injunction prohibiting defendants from enforcing those laws, rules and regulations, and requiring them to allow Justin Hammer, B-21 Wines, Inc., and other retailers whose premises are located outside the state, to sell and ship wine to consumers in North Carolina.

D. Plaintiffs do not request that state officials 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,

/s/ William C. Trosch (NC Attorney No. 20163)
CONRAD TROSCH & KEMMY, P.A.
301 S. McDowell Street, Suite 1001
Charlotte, NC 28204
Tel: 704-553-8221
Fax: 704-331-0595
troschbill@ctklawyers.com

Robert D. Epstein* (Indiana Attorney No. 6726-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
Rdepstein@aol.com

James A. Tanford* (Indiana Attorney No. 16982-53)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 812-332-4966
Fax: 317-638-9891
tanfordlegal@gmail.com

James Porter* (Indiana Attorney No. 28011-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
james@jeporterlaw.com

**Pro Hac Vice* to be filed (pending)