

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DONALD H. BESKIND, KAREN BLUESTEIN,)
MICHAEL D. CASPER, SR., MICHAEL Q. MURRAY,)
D. SCOTT TURNER, MICHAEL J. WENIG, MARY A.)
WENIG, and OAKSTONE WINERY, INC.,)

Plaintiffs)

vs.)

CAUSE NO. 3:00-CV-258-MU

JAMES B. HUNT, JR., Governor of North Carolina;)
MIKE EASLEY, Attorney-General of North Carolina;)
DAVID E. KELLY, Secretary of the North Carolina)
Department of Crime Control and Public Safety; and)
GEORGE BASON, Chairman of the North Carolina)
Alcoholic Beverage Control Commission, all)
in their Official Capacities,)

Defendants)

AFFIDAVIT OF RUSSELL BRIDENBAUGH

I, Russell Bridenbaugh, being first duly sworn, hereby state upon my oath:

1. I am Russell Bridenbaugh, 301 E. Cottage Grove Road, Bloomington, Indiana 47408;
(812) 332-0102.

2. I have been in the wine business for more than twenty years. I am a professional wine journalist and critic, and I am included in International Who's Who of Wine & Spirits. I wrote the wine column for the Indianapolis Star until then end of 2000, and have contributed articles to numerous other publications, including Wine East Magazine, Wines & Vines Magazine, the Los Angeles Times, the Wine Trader Magazine, and Indiana Beverage Journal. I regularly conduct wine tastings and educational seminars, and participate in national and international wine judgments. I am a consultant and wine buyer to individuals and restaurants. I have been employed

in several legal proceedings to evaluate and appraise wine cellars that are part of estates or that are subject to division in divorce cases, and have submitted an expert witness affidavit on the wine industry and direct shipment laws in *Heald v. Engler*, #00-71438 (E.D. Mich. 2000) and *Bainbridge v. Turner*, #8:99-cv-2681 (M.D. Fla 2000). I was formerly the manager of the wine department at Big Red Liquors, the largest wine retailer in southern Indiana, and oversaw the wine buying and selling at seven retail outlets in three cities. Over the course of my career, I have attended classes and seminars on numerous issues concerning the wine business, and read extensively in the literature on wines, wine marketing, and the wine business.

3. From my twenty years of experience and training, I have become an expert on the wine business and wine industry in the United States and worldwide. I am familiar with the laws and regulations governing the manufacture, sale, labeling and distribution of wine, am familiar with the economics of the wine business, and am familiar with the customs and practices of wine manufacturers, wholesalers, retailers and regulatory agencies, as well as wine buyers and collectors.

4. There are currently approximately 2100 wineries in the United States producing and selling wine. They range from huge commercial operations like Gallo and Kendall-Jackson, to small local wineries producing relatively few bottles a year. There are wineries in all states except North Dakota.

5. Wine is sold in the United States for home consumption primarily in five ways: through local retail establishments, directly to the public at tasting rooms located on the premises of wineries, by telephone or Internet order accompanied by home delivery; through wine clubs that deliver one or bottles of a “wine of the month” to subscribers; and for older vintages, through auction houses that specialize in the sale of vintage wine.

6. Although most wine sold in the United States is purchased in person at local retailers,

some wine is shipped directly from the seller to the purchaser. Retailers, such as the Carolina Wine Company in Raleigh, North Carolina, will often deliver wine to its customers within the region served by the retailer. See Attached Exhibit A, page 16. Some retailers use their own vehicles; others rely on common carriers to deliver wine to customers who live outside the region served by the retailer, including those who live outside the retailer's home state. Small wineries sell their product on their own premises through tasting rooms, and ship much of the wine purchased there to consumers' residences by common carrier. Auction houses, such as the Chicago Wine Company, take bids by mail and ship the wine to the winner of the auction. See Attached Exhibit B, page 2. Wine clubs send bottles of wine to their members by common carrier

7. Some wineries produce small quantities of excellent quality highly desirable wine (known as "allocated" wines) and sell that wine only by a mail-order customer list, and deliver it by common carrier. None of the allocated wine is delivered to a wholesaler and none appears on the shelves of retail wine stores. Among these are wines produced by Dunn Vineyards (Napa Valley), Windsor Vineyards, Fieldstone Winery, Williams-Selyem Winery, White Oak Vineyards & Winery, Lazy Creek Vineyard, Staglin Family Vineyard, Rochioli Winery, Spottswoode Vineyard & Winery, Martinelli Vineyard, and Turley Winery; which are among the highest rated and most desirable wine. Allocated wines are also very expensive, often costing over \$100 a bottle.

8. The better quality wines are bottled and marketed by "vintage" (the year in which the wine was produced). Depending on a number of factors, including weather, a vintage may produce average, below average or above average wines. As a rough guide to the quality of a particular vintage for a particular type of wine, various commercial sources produce Vintage Guides. A typical one from the magazine Wine Enthusiast as attached as Exhibit F. In general,

vintage wines are released by the winery for commercial distribution only once. Therefore, once the retail outlets have sold all of the wine from a particular producer's vintage, there is no more available through the retail market. For example, 1990 was the best year for French red Bordeaux wines in the last twenty years. As a result, it was in high demand and sold out rapidly, and little or none is still available through the retail market. If a consumer wants a bottle of classified French Bordeaux from 1990 to celebrate a special occasion, especially one that received a good rating by a wine enthusiast magazine or Robert Parker, he or she will probably not find any available for sale. Even the largest national retailers may have only a few scattered bottles in stock. For example, a computer search of the inventory of Sam's Wines in Chicago conducted on January 10, 2001, revealed that they have only three 1990 Bordeaux left in stock, costing \$300 to \$600 per bottle. Exhibit D, page 14. However, the wine is available through auction houses. Much wine from the best years is bought by speculators who store the wine for several years or decades and then sell it at auction. For example, one of the leading wine auction houses in the United States, the Chicago Wine Company, in its August 30-31, 2000, auction, had over 300 bottles of 1990 Bordeaux from 25 different wineries for sale. See Exhibit B. The Chicago Wine Company takes bids on wine by telephone, e-mail, FAX, and regular mail, and then ships the wine directly to the winning bidder's home.

9. Older wines no longer available at retail are often highly desirable to a collector. Many of the great vintages of Bordeaux, Burgundy, and Port get better with age and may be at their best thirty years after they were bottled. Other very old wines, often more than 100 years old, are prized by collectors for their rarity as a collector's item, and are bought for display rather than drinking. Such wines are available only at auction. For example, the August 2000 catalog for the Chicago Wine Company auction lists for sale bottles of Chateau Lafite Rothschild from 1874 and 1900, expected to sell for \$2000 to \$6000 per bottle (Ex. B, p 15); as well as bottles from

1945, 1961, 1966, and 1982 (Ex. B, pp. 16-22).

10. State laws vary on the legality of direct shipments of wine to consumers. In some states, direct shipments are permitted. In other states, direct shipments are totally prohibited. In some states, interstate shipments are prohibited, but in-state sellers may direct ship within the state. A number of states have “reciprocal” laws, under which residents of one state may receive direct shipments from another state if that other state allows direct shipments from the first state. See attached Exhibit C, describing variety of state approaches to the direct shipment issue.

11. Despite state laws prohibiting or restricting direct shipments of wine, it was common until recently for wineries and retailers to ship wine directly to purchasers’ residences. Most states made no attempt to enforce the laws against direct shipments. Within the last four years, coincidentally with the rise of the Internet as a national commercial vehicle for wine, many states, including North Carolina, have begun to try to stop these direct shipments by increasing the penalties and aggressively enforcing the prohibition through seizures of illegal shipments. These new laws and stepped-up enforcement efforts are well-known within the wine business.

12. Because of the new laws, increased penalties, and increasingly vigorous enforcement of laws against direct shipments, many wineries, retailers and wine clubs that formerly shipped directly to residents of states like North Carolina will no longer do so. A few continue to defy state laws and ship their products directly to consumers, but many of the major interstate retailers who solicit wine sales on the Internet, will no longer ship to residents of North Carolina and other prohibitory states. See attached Exhibit D, page 2; Exhibit E, page 3.

13. Only one state has recent experience with the effect of enactment and repeal of its direct shipment laws -- Indiana. Prior to the enactment of a law making direct shipment a felony, such direct shipments to Indiana residents from out of state were common. When the law was passed in 1998, most sellers stopped shipping to Indiana. When the direct shipment law was declared

unconstitutional in December 1999, at least one interstate retailer, Sam's Wines in Chicago, which had refused to ship directly to Indiana residents because of the prohibitory law, resumed such direct shipments immediately after the law was declared unconstitutional, and continued to do so until the judge stayed the effective date of the order.

14. In North Carolina and in most other states that restrict direct shipment of wine, the state alcoholic beverage commission grants licenses to sell and deliver wine directly to the public only to in-state businesses; no out-of-state retailer may sell and deliver wine directly to a consumer. The only way an out-of-state retailer may sell its wine in North Carolina is to go through an in-state wholesaler and retailer, which adds cost. These in-state-only permit rules mean that an out-of-state retailer such as Sam's Wines in Chicago, who wants to sell wine to North Carolina residents in North Carolina, would have to send its products through a North Carolina wholesaler, despite the fact that Sam's obtained the wine through a wholesaler in the first place. Therefore, for a North Carolina consumer to order wine from Sam's for home delivery, the consumer would pay the wholesaler's and retailer's price mark-up twice (two wholesalers and two retailers). To buy wine from a North Carolina retailer for home delivery, the consumer would only have to pay the mark-ups once, as the wine would have gone through only a single wholesaler and retailer.

15. For a California winery to sell its wine in North Carolina and in other states that prohibit direct shipment to consumers, it would have to go through an in-state wholesaler and retailer, each of whom would add their handling costs and profit to the cost of the wine. However, North Carolina and most other prohibition states exempt their in-state small wineries from having to go through the three-tiered system and allow them to sell and deliver wine directly to the public. Thus, the consumer must pay the additional mark-up on California wine, but not on North Carolina wine.

16. Wine sold and shipped directly to a consumer by an out-of-state winery or retailer is generally more expensive than the same wine sold in-state. Although a large out-of-state retailer may be able to sell wine at a slightly lower base cost because of economies of scale, the reverse is true for the cost of delivery. Delivery is generally free from local retailers, see Exhibit A, page 16. Shipping costs for interstate delivery, however, typically range from \$3.00 to \$10.00 per bottle. See Exhibit D, page 3. Thus the net cost to the consumer is similar or higher for interstate shipments. For example, in the Summer 2000 catalog of the Carolina Wine Company in Raleigh, NC, there are about 75 French red wines for sale from \$8.00 to \$45.00 per bottle. See Exhibit A, pages 5-15. Twelve of those wines are also available over the Internet from Sam's Wines in Chicago, one of the country's largest wine retailers. See Exhibit D, pages 4-13. Sam's prices were generally about \$2.00 per bottle cheaper. If one bought one bottle of each of the twelve wines, it would cost \$279.88 at the Carolina Wine Company, and \$260.68 at Sam's in Chicago. The Carolina Wine Company would give the purchaser a 10% mixed case discount and add 6% sales tax, for a total of \$267.00. Sam's would add shipping charges. If the consumer used the cheapest possible shipping method, it would add \$35.63 to the cost (see Exhibit D, page 3), for a total of \$296.31. It would be cheaper to buy the wine locally. This result is typical. Consumers buy from out-of-state because of selection and availability, not price.

17. There are thousands of different wines marketed and sold in the United States. To most regular wine drinkers, each wine is unique and they are not interchangeable. Not only is French Bordeaux different from French Burgundy, but within Bordeaux, wine produced in Pauillac is different from wine produced in Pomerol. Within Pauillac, Chateau Latour is different from Chateau Lafite Rothschild. Even a basic stock of wine requires a retailer to carry several representative labels each from over a hundred different varieties and regions from around the world. For this reason, few liquor or grocery stores attempt to carry a substantial wine inventory.

Each region may have only three or four wine retailers with a large enough inventory to cater to wine enthusiasts, and may have only a single retailer that carries the highest-priced wines, such as the classified growths of French Bordeaux. Even those retailers may not carry enough bottles of a highly-rated wine, and will not carry some labels at all, so wine enthusiasts who wish to add to their collection often must buy some wine from the major national retailers like Sam's Wines, or directly from California wineries. Outside of New York and California, only about ten percent (10%) of the world's wine production is actually available on retail shelves within a given state.

18. The price of wine at retail varies considerably in most states, including North Carolina. There is no generally known "list price" for wine. Some wine retailers who face little or no competition may charge prices for wine considerably higher than the major national retailers like Sam's. If a consumer is located in a small town or area served by only a single wine retailer, that consumer might find that an out-of-state source is cheaper even with the added shipping costs. In general, the availability of competition affects wine prices and prevents merchants from charging exorbitant prices to a captive market.

19. In order to sell wine, a retailer must hold at least a state license or permit issued by the state in which it is physically located, and in most instances must also hold a federal ATF permit. In every state in the U.S., there is an alcohol control and licensing agency that conducts background checks on those applying for permits, requires financial documents, requires bonds, and imposes regulatory and reporting requirements. The scope of regulation and the costs it imposes on wine retailers for licensing and compliance is similar in all states.

20. Sales of wine to minors is prohibited in all 50 states. A retailer who sells to a minor is subject to penalties including suspension or loss of license and criminal penalties for such sales.

21. There is a substantial body of literature on how minors gain access to alcohol. It shows that the most common method is to have someone over 21 buy it for them. The next most

common method is to buy from a local retail outlet that does not check IDs. Anecdotal information from state sting operations generally shows that minors can successfully buy alcohol in person without showing an I.D. about 30% of the time. Minors consume mostly beer and hard liquor, and buy relatively little wine. Their purchases tend to be spontaneous and not planned out in advance, and they are unlikely to buy wine by mail order because it is relatively expensive and shipments may take two to three weeks to arrive.

22. Some states, such as Louisiana and New Hampshire, issue permits to out-of-state wine retailers which allow that retailer to make direct shipments. The out-of-state retailer is subject to the same kinds of regulations as in-state retailers, must furnish periodic reports concerning sales, must collect and remit excise taxes, and is required to provide a mechanism for assuring that alcohol is not delivered to minors. There are no reports from those states indicating that minors are gaining easy or frequent access to wine through these licensed direct shipments.

23. Wholesalers select which wines to carry, and they choose to carry only a limited number of brands, notably those wines produced in large enough numbers to make it economically efficient for the wholesalers. There are hundreds of small wineries throughout the US that would prefer to have their wines distributed by a wholesaler, but can find no wholesaler willing to carry and distribute their wines. The problem is confounded for the small winery by the fact that in a majority of states, only in-state licensed wholesalers may distribute wine, so a small winery might have to try to negotiate a contract with twenty or thirty wholesalers to have its wine distributed nationally. The winery must negotiate a contract with a wholesaler before the wholesaler will carry its wine – it cannot simply consign its wine to a licensed wholesaler for resale, because the wholesaler will refuse to handle the transaction. These small wineries who cannot find a wholesaler have no choice but to sell their wines directly to the public. Many of them rely for their entire livelihood on tourists visiting their tasting rooms and buying small

quantities of wines they like. The vast majority of such purchasers want the wines shipped home, rather than carrying them in the trunk of their car for the rest of their vacation.

24. Exhibit A is a true and accurate copy of all portions of the Summer 2000 wine catalog from the Carolina Wine Company, Raleigh, North Carolina relating to French red wines. This particular copy was downloaded from the Internet at www.carolinawine.com on January 11, 2001. It is generally used and relied on by the wine consuming public and as a source of reliable information by persons in the wine business.

25. Exhibit B is a true and accurate copy of portions of the wine auction catalog from the Chicago Wine Company, Niles, Illinois for August 30-31, 2000. It is generally used and relied on by the wine consuming public and as a source of reliable information by persons in the wine business.

26. Exhibit C is a true and accurate copy of information compiled by the Wine Institute in San Francisco, California and posted on the Internet at www.wineinstitute.org as of September 14, 2000. It is generally used and relied on by the wine consuming public and as a source of reliable information by persons in the wine business.

27. Exhibit D is a true and accurate copy of extracts from the on-line wine catalog of Sam's Wine & Spirits, Chicago, Illinois, as posted on the Internet at www.samswines.com as of January 9-11, 2001. It is generally used and relied on by the wine consuming public and as a source of reliable information by persons in the wine business. Page 14 is an accurate print-out of the entire catalog of available wines that appeared when I asked it to search for Bordeaux wines from the 1990 vintage.

28. Exhibit E is a true and accurate copy of extracts from the on-line wine catalog of K & L Wine Merchants, in California, as posted on the Internet at www.klwines.com as of January 9-10, 2001. It is generally used and relied on by the wine consuming public and as a source of reliable

information by persons in the wine business.

29. Exhibit F is a true and accurate copy of the wine vintage chart compiled by the "Wine Enthusiast" magazine and distributed in its magazine in December, 1999. It is generally used and relied on by the wine consuming public and as a source of reliable information by persons in the wine business.

I affirm under penalties of perjury that the foregoing representations are true and accurate to the best of my knowledge, information, and belief.

Date:

Russell Bridenbaugh

State of Indiana)

County of Monroe) ss:

Subscribed to and sworn before me this _____ day of _____, 2000.

Notary Public

My commission expires: _____

My county of residence: _____