

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

LEBAMOFF ENTERPRISES, INC., et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 16-cv-08607
	)	
DONALD G. O'CONNELL, et al.	)	Hon. William T. Hart
	)	
Defendants,	)	
	)	
- and -	)	
	)	
WINE AND SPIRITS DISTRIBUTORS	)	
OF ILLINOIS	)	
	)	
Intervenor-Defendant.	)	

**ANSWER OF DEFENDANTS O'CONNELL, GIBBONS, SANCHEZ, AND  
SPANN COOPER TO FIRST AMENDED COMPLAINT**

Defendants Donald G. O'Connell, Commissioner and Acting Chairman of the Illinois Liquor Control Commission ("ILCC"), and Thomas Gibbons, Patricia Pulido Sanchez, and Melody Spann Cooper, Commissioners of the ILCC, by and through their attorney, Kwame Raoul, Illinois Attorney General, respond to plaintiffs' complaint as follows:

**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 *Granholm 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.

**ANSWER:** Defendants admit that plaintiffs bring this action pursuant to 42 U.S.C. § 1983, that plaintiffs challenge the constitutionality of 235 ILCS 5/5-1(d) and 235 ILCS 5/6-29.1(b), and that plaintiffs seek declaratory and injunctive relief. Regarding the operation of these statutory provisions, defendants adopt and incorporate by reference their responses to the allegations in paragraphs 13-16 and 18 below. Defendants deny that the challenged statutory provisions are unconstitutional, deny that plaintiffs are entitled to any relief, and deny any remaining allegations of this paragraph.

#### **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.

**ANSWER:** Defendants admit that jurisdiction is proper, but deny any violation of plaintiffs' 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.

**ANSWER:** Defendants admit that the Court has authority to grant declaratory relief, but deny that plaintiffs are entitled to any such relief.

**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.

**ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.**

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.

**ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.**

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.

**ANSWER: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.**

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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

**DEFENDANTS**

7. Defendants are sued in their official capacities.

**ANSWER:** Defendants admit the allegations in this paragraph.

8. Defendant Donald G. O'Connell is a Commissioner and the Acting Chairman of the Illinois Liquor Control Commission, which is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

**ANSWER:** Defendants admit the allegations in this paragraph.

9. Defendant Thomas Gibbons is a Commissioner of the Illinois Liquor Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

**ANSWER:** Defendants admit the allegations in this paragraph.

10. Defendant Patricia Pulido Sanchez is a Commissioner of the Illinois Liquor Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

**ANSWER:** Defendants admit the allegations in this paragraph.

11. Defendant Melody Spann Cooper is a Commissioner of the Illinois Liquor Control Commission and is charged with enforcing the Illinois liquor control laws, including the ones challenged in this lawsuit.

**ANSWER:** Defendants admit the allegations in this paragraph.

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

**ANSWER:** Defendants admit the allegations of this paragraph.

**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.

**ANSWER:** Defendants admit that the holder of an Illinois retailer's license that is designated as an "off premise sale retailer" or a "combined on premise consumption and off premise sale retailer" may "transfer, deliver, or ship alcoholic liquor to the purchaser for use or consumption subject to any applicable local law or ordinance." *See* 235 ILCS 5/5-1. Defendants deny any remaining allegations of this paragraph.

14. In-state off-premises licensees are also allowed to ship wine by common carriers and parcel delivery services directly to Illinois consumers.

**ANSWER:** Defendants admit that the holder of an Illinois retailer's license that is designated as an "off premise sale retailer" or a "combined on premise consumption and off premise sale retailer" may ship wine by common carriers and parcel delivery services to the purchaser, subject to any applicable laws and ordinances. Defendants deny any remaining allegations of this paragraph.

15. The Defendants will issue an off-premises license described in the previous paragraphs only to wine retailers located in the State of Illinois.

**ANSWER:** Defendants admit that the ILCC may not issue a retailer's license, including to an "off premise sale retailer," to a person who has not "obtained a local license for the same premises." *See* 235 ILCS 5/3-14. Defendants further admit that if a retailer does not have a physical presence in Illinois, then no local license is able to be issued. *See* 235 ILCS 5/6-2. Defendants deny any remaining allegations of this paragraph.

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.

**ANSWER:** Defendants admit that if Lebamoff Enterprises, Inc. does not have a physical presence in Illinois, then no local license is able to be issued. *See* 235 ILCS 5/6-2. Defendants further admit that that without a local license, the ILCC is prohibited by statute from issuing a retailer's license to Lebamoff Enterprises, Inc. *See* 235 ILCS 5/3-14. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

18. Plaintiffs cannot complete the transactions described in paragraphs 16 and 17 because the laws of Illinois prohibit them.

**ANSWER:** Defendants adopt and incorporate by reference their answers to paragraphs

16 and 17, and further state that if Lebamoff Enterprises, Inc. is not a maker or manufacturer of wine licensed in another state, then the ILCC is not authorized to issue a winery shipper's license to the company. See 235 ILCS 5/5-1(r); 235 ILCS 5/6-29.

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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

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.

**ANSWER:** Defendants deny the allegations of this paragraph.

**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.

**ANSWER:** Defendant restates and incorporates by reference all answers to all paragraphs above as though fully set forth 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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

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.

**ANSWER:** Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

26. Being a professional wine merchant who sells and ships wine to Illinois residents is a lawful activity for citizens of Illinois.

**ANSWER:** Defendants admit that this activity would be lawful for Illinois-licensed retailers or winery shippers, and deny any remaining allegations of this paragraph.



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.

**ANSWER:** Defendants deny the allegations of this paragraph.

28. Illinois' 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.

**ANSWER:** Defendants deny the allegations of this paragraph.

**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.

**ANSWER:** Defendants deny that plaintiffs are entitled to such relief.

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.

**ANSWER:** Defendants deny that plaintiffs are entitled to such relief.

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.

**ANSWER: Defendants deny that plaintiffs are entitled to such relief.**

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

**ANSWER: Defendants admit that plaintiffs have not requested such relief.**

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

**ANSWER: Defendants deny that plaintiffs are entitled to such relief.**

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

**ANSWER: Defendants deny that plaintiffs are entitled to any relief.**

**ANSWERING FURTHER, Defendants deny each and every allegation not heretofore answered.**

WHEREFORE, Defendants deny that plaintiffs are entitled to any relief and request that this Court dismiss plaintiffs' complaint and grant any other relief that the Court deems just.

Dated: October 3, 2019

Respectfully submitted,

KWAME RAOUL  
Attorney General of Illinois

/s/ Michael T. Dierkes

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