UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PATRICK L. BAUDE, LARRY J. BUCKEL, KITTY BUCKEL, J. ALAN WEBBER, JAN WEBBER, WHITE OWL WINERY, Inc., and CHATEAU GRAND TRAVERSE, Ltd. Plaintiffs, v. DAVID L. HEATH, in his official capacity as Chairman of the Indiana Alcohol and Tobacco Commission Defendant	)	CIVIL ACTION NO: 1:05-cv-0735-JDT-TAB

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Defendant, David L. Heath, in his official capacity as Chairman of the Indiana Alcohol and Tobacco Commission ("ATC"), by counsel, Steve Carter, Indiana Attorney General, by Robert B. Wente, Deputy Attorney General, and by Chad C. Duran, Deputy Attorney General, submits the following Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment:

I. INTRODUCTION

On May 16, 2005, the Supreme Court published its decision in *Granholm v. Heald*, 125 S. Ct. 1885 and struck down Michigan and New York laws which permitted the

wineries of their respective states to ship wine to consumers, but prevented other states' wineries from doing so. On May 18, 2005, before the impact of the *Granholm* could possibly be assessed by the Indiana legislature or the ATC, the Plaintiffs filed the instant action alleging that Indiana's alcoholic beverage laws unfairly and unconstitutionally discriminate against them. The Plaintiffs can be easily divided into two distinct groups. First, there are the two Winery Plaintiffs, Chateau Grand Traverse, Ltd., a Michigan winery and Owl Creek Winery, Inc., an Illinois winery. Second, there are the Consumer Plaintiffs, a group of five Indiana wine drinkers. The two groups of Plaintiffs have separate, but interrelated goals in this litigation. The Winery Plaintiffs seek to ship and market wine directly to Indiana consumers in a manner which is presently illegal under Indiana law, and the Consumer Plaintiffs want to be able to acquire wine from the Winery Plaintiffs in a manner which is presently illegal under law. Both groups of Plaintiffs allege that *Granholm* provides them with the vehicle to fulfill their desires.

In essence, both groups of Plaintiffs urge this court to rule that *Granholm* mandates that any winery can take orders via mail, telephone, facsimile, and the internet from Indiana consumers and ship such orders to them through the mail, UPS, Federal Express, or the common carrier of their choice. However, *Granholm* does not mandate direct shipment, it mandates that out-of-state wineries and Indiana wineries be treated in an evenhanded, non-discriminatory fashion. In so ruling the court stated as follows:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. . . . State policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent.

Granholm, 125 S.Ct. at 1905.

Unlike Michigan and New York, the two states whose laws were struck down in *Granholm*, Indiana's laws have never authorized the direct shipment of wine by in-state producers or by out-of-state producers. As a result, Indiana's prohibition against direct shipment has been evenly applied and withstands the application of *Granholm*. Moreover, the Indiana ATC has adopted an enforcement posture, which is more fully articulated below, that recognizes and respects the impact of *Granholm*.

II. FACTS

Indiana, like many other states, has adopted a "three-tier" system to provide the backbone of its regulatory framework for controlling the use, distribution, and sale of alcohol. The three-tiered distribution system requires that producers sell their products to licensed wholesalers (tier 1), who then sell to retailers (tier 2), who then sell alcoholic beverages to consumers (tier 3). In general, an individual entity may only occupy a single tier in the system, which, among other things, prevents vertical integration in the production, distribution, and sale of alcoholic beverages. It also provides for an efficient system for the collection of excise taxes as the majority of excise taxes are collected at the wholesaler level. The Supreme Court has recognized that this type of three-tier system is "unquestionably legitimate." *North Dakota v. United States* 495 U.S. 423 at 432, cited in *Granholm* at 1905.

In Indiana there are two types of permits available to primary producers of wine: a vintner's permit and a farm winery permit. The vintner's permit is available to a person who wishes to commercially manufacture wine. Ind. Code § 7.1-3-12-1. The holder of a vintner's permit is entitled to deliver wine out of state, to a wholesaler, or to another vintner. The farm winery permit, as discussed below, provides for a different scope of

permissible commercial activities for certain wineries producing less than 500,000 gallons of wine on an annual basis.

In 1973, the Indiana legislature created an exception to Indiana's three-tier system for its nascent wine industry by enacting what has now become known as the Indiana Farm Winery Act. Ind. Code §§ 7.1-3-12-3, *et seq*. In 1973, there was a single winery, the Oliver Winery in Bloomington, Indiana. (Heath Affidavit, ¶ 3) In 1989 there were only 9 wineries. (Heath Affidavit, ¶ 4) Today, there are now 31 permitted wineries throughout the state of Indiana. (Heath Affidavit, ¶ 5) The two most recent additions to the list of Indiana's wineries, Wine Cellar Supply in Goshen, Indiana and the Mallow Run Winery in Bargersville Indiana were permitted after this lawsuit was initiated. (Heath Affidavit, ¶ 5)

When the *Granholm* case was decided, the ATC moved quickly to issue statements reciting existing Indiana law with respect to the direct shipment of wine. These statements were issued in response to media inquiries regarding the impact of *Granholm* on the wine industry and consumers alike. (Heath Affidavit, ¶ 6) On May 17, 2005, ATC Chairman Dave Heath (hereinafter "Chairman") published a notice on the ATC's web page which stated, "This ruling [*Granholm*] will not allow out-of-state wineries to ship wine to Indiana residents, because Indiana law does not permit Indiana wineries to ship directly to consumers." (Heath Affidavit, ¶ 6, Exhibit 1) On May 20, 2005, the Chairman issued a bulletin directed to Indiana's wineries which informed the wineries that selling wine by taking orders via internet, mail, or telephone and directly shipping to a consumer's address was contrary to Indiana law. (Heath Affidavit, ¶ 7, Exhibit 2). Since the issuance of the bulletin, the ATC has observed that Indiana

wineries have voluntarily complied with Indiana's ban on direct shipment. (Heath Affidavit, ¶ 8) Moreover, no Indiana Winery challenged the direct shipment ban until nearly six months had passed since the *Granholm* decision and the issuance of the May 20, 2005 bulletin. (Heath Affidavit, ¶ 9)

A variety of fine wine is presently available throughout Indiana. In addition to the 31 wineries located throughout Indiana, thousands of domestic wines from hundreds of domestic wineries are available for purchase in consumption in Indiana. (Snow Affidavit, ¶ 3; Calvert Affidavit ¶ 3; Terry Affidavit, ¶ 3) Chateau Grand Traverse is one of the domestic wineries whose wines are widely available in Indiana. This Plaintiff's wines are available at more than 115 retail locations in Indiana. (Snow Affidavit, ¶ 4) The other Winery Plaintiff, White Owl Winery, has not even approached three of the Indiana wholesalers with respect to carrying their wines in Indiana. (Snow Affidavit, ¶ 5; Calvert Affidavit, ¶ 5; Terry Affidavit ¶ 5) In situations where wines may be unavailable in Indiana, consumers have the ability to work with retailers to obtain wine from a wholesaler without the need to circumvent Indiana's three-tier system. (Snow Affidavit, ¶ 6; Calvert Affidavit ¶ 8; Terry Affidavit ¶ 7) The Consumer Plaintiffs have made no allegation that they have not been able to obtain a particular wine after making a request from a retailer.

The ATC recognizes that Indiana's laws are not unaffected by *Granholm*. The Farm Winery Act contains two provisions which, if enforced, would conflict with the directives contained in *Granholm*. First, the Farm Winery Act requires that in order to receive a farm winery Permit, the permittee must produce wine from Indiana fruit. Ind. Code 7.1-3-12-4(a) (1). Second, the Farm Winery Act requires that the farm winery

permit may only be issued to a person who has been a bona fide resident of Indiana for at least one year. Ind. Code § 7.1-3-12-3. In light of *Granholm*, the ATC will not enforce these provisions of the Farm Winery Act and will allow out-of-state wineries to apply for a farm winery permit. (Heath Affidavit, ¶ 11) Accordingly, an out-of-state winery will have the opportunity to market, sell, and distribute wine in the same manner an Indiana winery does. To date, however, no out-of-state winery has applied for such a permit and the ATC's enforcement posture, as articulated in this memorandum, has not been brought to bear upon the current situation. (Heath Affidavit, ¶ 10)

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Initially, under Rule 56(c), a party seeking summary judgment bears the responsibility of informing the court of the basis for the motion, and identifying evidence which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 323 (1986).

A statute is presumed to be constitutional and a challenger, against whom all doubts are resolved, must overcome that presumption by clearly demonstrating the provision to be invalid. *State v. Hoovler*, 668 N.E.2d 1229, 1232 (Ind.1996), *cert. denied*, 524 U.S. 905, 118 S.Ct. 2062, 141 L.Ed.2d 140 (1998). If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, the statute will be

upheld as the courts should not attribute unconstitutional intention to the legislature if reasonably avoidable. *Price v. State*, 622 N.E.2d 954, 963 (Ind.1993). Unless the challenged statute is incapable of constitutional application, the court should limit itself to vindicating the rights of the party before it. *Id.* at 958.

IV. ARGUMENT

A. THE PLAINTIFFS CLAIMS ARE NOT RIPE AS THEY HAVE FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

The Winery Plaintiffs' claims are not ripe as they have failed to exhaust, or even attempt to utilize, their administrative remedies. Much of the relief sought by the Winery Plaintiffs could be obtained if they were to apply for and obtain an Indiana farm winery permit. The Indiana ATC has made clear that it recognizes, in the wake of the *Granholm* decision, that it may not enforce the Indiana residency requirement reflected in Ind. Code § 7.1-3-12-3 or the Indiana fruit requirement in Ind. Code § 7.1-3-12-4. As a result, it is prepared to accept applications for farm winery permits from out-of-state producers manufacturing wine with non-Indiana grapes. However, no out-of-state winery has applied for such a permit, which permit would place them on equal footing with Indiana wineries. Instead, the Winery Plaintiffs have chosen to leapfrog over the administrative process and request this Court to perform a major overhaul of Indiana's alcoholic beverage laws and to strike down any law which might provide a theoretical impediment to the Winery Plaintiffs' access to the Indiana markets and to the Consumer Plaintiffs' facile access to the wines of their choice.

Relief in an administrative dispute is available only if plaintiffs exhaust their administrative remedies. *Johnson v. Celebration Fireworks, Inc.*, 829 N.E.2d 979, 982 (Ind. 2005) (*quoting* Ind. Code § 4-21.5-5-4(a) (2004)). Indiana courts have repeatedly

emphasized the '"value of completing administrative proceedings before resorting to judicial review."' *Id.* (*quoting Ind. Dept. of Envtl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 844 (Ind. 2003). Specifically, '"if an administrative remedy is available, it must be pursued before a claimant is allowed access to the courts."' *Id.* (*quoting Austin Lakes Joint Venture v. Avon Utils. Inc.*, 648 N.E.2d 641, 644 (Ind. 1995)). Indiana courts closely adhere to this principle even '"where the ground of the complaint is the unconstitutionality of the statute"' because the compliant may be resolved without confronting broader legal issues *Id.* at 982 – 83 (*quoting Twin Eagle*, 798 N.E.2d at 844).

A party's failure to exhaust administrative remedies cannot be excused because the administrative agency "might refuse to provide the relief requested." *Johnson*, 829 N.E.2d at 984. Moreover, futility is a valid excuse only if '"the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances."' *M-Plan, Inc. v. Indiana Comprehensive Health Insurance Association*, 809 N.E.2d 834, 840 (Ind. 2004) (*quoting Smith v. State Lottery Comm'n.*, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998)).

In this case, Plaintiffs complain they are not permitted to sell wine through their preferred distribution channels in the State of Indiana. Notably, if Plaintiffs had properly followed the administrative process, their complaints could have been resolved, thus obviating the need for this Court to determine the constitutionality of Indiana's alcoholic beverage laws. Plaintiffs have clearly failed to exhaust their administrative remedies and as a result, this Court should decline to hear their claims.

First, the Winery Plaintiffs have wrongfully bypassed the entire administrative process. In their complaint, the Winery Plaintiffs do not allege that they have ever filed

an application for an Indiana farm winery permit or even inquired about filing such an application. As a result, Plaintiffs have no foundation from which to complain their preferred distribution channels in Indiana are unavailable. Since the Winery Plaintiffs did not apply for and have not yet applied for a permit, such Plaintiffs have no way of knowing whether their application would have been approved, and they have no way of knowing the terms and restrictions of such a permit.

Second, in the State of Indiana, the Indiana Alcohol Tobacco Commission is charged with the responsibility of regulating all alcoholic beverages, including wine. Ind. Code § 7.1-2-3-31. This responsibility includes issuing vintner's and farm winery permits as well as enforcing laws related to the production, transportation, distribution, and sale of wine. Consequently, Plaintiffs' complaints about the unavailability of certain distribution channels must be addressed to the Indiana ATC before turning to a Federal court for relief. By not addressing their complaints to the ATC, they have ignored the administrative process, a tactic that Indiana courts have consistently held improper. *See Johnson*, 829 N.E.2d at 982-84.

Third, if Plaintiffs properly exhaust their administrative remedies, their constitutional claims may become moot. *See Johnson*, 829 N.E.2d at 982-83 (stating that "even where the ground of the complaint is the unconstitutionality of the statute, which may be beyond the agency's power to resolve, exhaustion of administrative remedies may still be required because administrative action may resolve the case on other grounds without confronting broader legal issues") (internal quotations omitted).

Until the Winery Plaintiffs have exhausted their administrative remedies the Consumer Plaintiffs' claims are likewise unripe as they cannot purchase the wine they seek to drink unless the Winery Plaintiffs have the ability to sell it to them.

B. NO COMMERCE CLAUSE DISCRIMINATION

In *Granholm v. Heald*, 125 S.Ct. 1885 (2005), the Supreme Court was called upon once again to resolve the tension between the Commerce Clause and the Twenty-First Amendment. Section 2 of the Twenty-First Amendment provides that, "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Commerce Clause of the United States Constitution is offended when state laws "mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 125 S.Ct. at 1895 (quoting *Oregon Waste Systems, Inc. v. Departmental Quality of Ore*., 511 U.S. 93, 99 (1994)). *Granholm* further provides, "[s]tate policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent. *Granholm* at 1905.

Indiana's alcoholic beverage laws, in light of the enforcement posture taken by the ATC, do not discriminate against out-of-state producers and are thus constitutionally valid. The starting point for any analysis of Indiana's laws and regulations concerning alcoholic beverages is Ind. Code § 7.1-5-1-1 which is set forth below:

> Sec. 1. Prohibition Against Commercial Purposes. It is unlawful for a person to manufacture for sale, bottle, sell, barter, import, transport, deliver, furnish, or possess, alcohol or alcoholic beverages, malt, malt syrup, malt extract, liquid malt or wort, for commercial purposes except as authorized in this title.

This provision establishes that an all commercial activity involving alcoholic beverages must be specifically authorized by Title 7.1.

The Winery Plaintiffs seek to make interstate shipments of wine to consumers and retailers in Indiana who have placed an order with them by mail, telephone, or internet communication, and the Consumer Plaintiffs want to have shipments sent to them. However, whatever desires the Plaintiffs may have, nowhere is the direct shipment sought by the Plaintiffs permitted in Title 7.1 of the Indiana Code. and the Plaintiffs have failed to point to any statute which specifically authorizes the activities in which they desire to engage. In fact, Indiana's statutes prohibit, in a non-discriminatory fashion, the direct shipment of wine by in-state wineries and out-of-state wineries alike. For example, Ind. Code § 7.1-5-10-3 prohibits furnishing or selling to a nonpermittee unless expressly authorized by Title 7.1, and Ind. Code § 7.1-5-10-5 prohibits importing alcoholic beverages unless permitted under Indiana law. Moreover, Ind. Code § 7.1-5-11-15 prohibits importing or transporting alcoholic beverages unless the beverages are the property of a permittee, except for one quart in the possession of a traveler. These statutes pertain to in-state entities and out-of-state entities alike and do not serve to enact local preferences.

Shortly after the Granholm decision was issued, and in the wake of a flood of inquiries regarding the propriety of shipping wine, the Chairman of the ATC issued an "enforcement bulletin" which was intended to inform the public that Indiana's laws do not permit the direct shipping of alcoholic beverages. The enforcement bulletin was nothing more than a straightforward recital of established Indiana law that no winery, in-

state or out-of-state, may ship wine via mail or common carrier directly to an Indiana consumer. The bulletin correctly stated that shipment is not authorized by the Indiana Farm Winery Act as set forth in Ind. Code § 7.1-3-12-3, *et seq*,. or anywhere else in Title 7.1.

Despite the lack of any express statutory authorization to ship wine, the Plaintiffs have asserted that Indiana wineries have shipped wine in the past and that this unauthorized and illegal activity has somehow vested Indiana wineries with the right to directly ship. Such an interpretation is directly contrary to the provisions of Title 7.1 and the policies of the ATC which is clothed with wide-ranging authority over alcoholic beverages in the State of Indiana. Ind. Code § 7.1-2-3-31.

The fact that Indiana wineries are not permitted to directly ship their wines immediately distinguishes Indiana's laws from those struck down by *Granholm* in both Michigan and New York. Each of the Michigan and New York regulatory schemes had enacted local preferences with respect to the direct shipment of wine. Michigan permitted its wineries to directly ship wine, while not allowing out-of-state wineries to do so, and New York only permitted an out-of-state winery to directly ship if it used native grapes and adhered to a series of additional administrative requirements. No such local preference exists in Indiana, as no winery may ship wine directly to the consumer.

Moreover, the regulatory posture of the ATC with respect to farm winery permits would permit an out-of-state winery to apply for and obtain a permit. The ATC would thus allow an out-of-state winery to engage in the same scope of commercial activity an Indiana winery can. With a farm winery permit in hand, any winery would have the ability to sell its wines at wholesale or retail. Ind. Code § 7.1-3-12-5(a) (4). A permitted

winery would also be able to make a direct, face-to-face sale to the consumer on the premises of the winery or at an approved second location. Ind. Code § 7.1-3-12-4(a)(3) and Ind. Code § 7.1-3-12-5(b).

The requirement of a direct, face-to-face transaction in any sale of wine, by the bottle or by the glass, from a winery to a consumer advances an important state interest: the prevention of sale of alcohol to minors. (Heath Affidavit, ¶ 14; Huskey Affidavit, ¶ 6) Under Indiana's present regulatory system, winery staffs are necessarily present during the transaction between the winery and the consumer and are thereby able to request identification and obtain verification of age at the point of sale, rather than rely on anonymous statements of age taken over the internet, telephone, or facsimile. (Heath Affidavit, ¶ 13) Furthermore, winery staff are required to be permitted by the ATC prior to selling wine. (Heath Affidavit, ¶ 15; Huskey Affidavit, ¶ 7)

C. ABSTENTION

Although the Plaintiffs cannot direct this court to a single Indiana statute or regulation which authorizes the direct shipment of alcohol from a winery to a consumer, the Plaintiffs nevertheless assert that Indiana law permits such shipment. Plaintiffs' counsel filed a case in the Marion County Superior court, *S.J. Thomas Family Winery, Inc., et al. v. Heath, et al*. 49DO6-0511-PL-045032, on behalf of a group of Indiana wineries, seeking a determination from State court that Indiana wineries may directly ship to Indiana consumers. If this court should decide that the question as to whether Indiana wineries are permitted to directly ship wine, which the ATC maintains they are not, would determine the outcome of this case then this court should dismiss the case

pursuant to the *Pullman* and *Colorado River* abstention doctrines and allow the Plaintiffs to pursue the answer to this question in a state forum.

The *Pullman* abstention doctrine was established in *Railroad Comm'n. of Texas v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention is warranted only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question. *See, e.g., Babbit v. United Farm Workers Nat. Union*, 442 U.S. 289, 306 (1979). The doctrine announced in *Pullman* allows a federal court to exercise its discretion and abstain from exercising its jurisdiction to decide unsettled issues of state law involving "policy problems of substantial public import whose importance transcends the result in the case at bar." *E&E Hauling, Inc. v. Forest Preserve District of DuPage County, Illinois*, 821 F.2d 433 (7th Cir. 1987).

Pullman abstention is appropriate where any state forum may obviate the Federal lawsuit. *See, e.g., Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1011 (5th Cir. 1984). The primary purpose of the Pullman abstention doctrine is to provide a federal court with an avenue to avoid litigating, and ultimately deciding, a federal issue by encouraging the state courts to make a determination on the crux of the matter before proceeding to a federal forum. *Sam Remo Hotel, L.P v. City and County of San Francisco, California*, 125 U.S. 2491, 2502 (2005). Moreover, Pullman abstention provides the state courts the opportunity to narrowly interpret statutes, such as the ones currently at issue in this case, before a federal court determines them to be unconstitutional. *Mazanec v. North-Judson-San Pierre School Corporation*, 763 F. 2d 845 at 847 (7th Cir. 1985).

The Supreme Court has also found abstention to be proper where parallel state and federal litigation is pending. *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976). Pursuant to the abstention doctrine established in *Colorado River*, a court may refrain from exercising jurisdiction for "reasons of wise judicial administration," *Id.* at 818.

D. THE INDIANA FARM WINERY ACT DOES NOT UNCONSTITUTIONALLY REGULATE COMMERCE IN OTHER STATES

The Plaintiffs assert that Supreme Court's holding in *Healy v. Beer Institute*, 491 U.S. 324 (1989), directs the outcome of this case and claim that Indiana's failure to authorize the direct shipment of wine from a producer to a consumer is tantamount to the extraterritorial regulation of commerce prohibited in *Healy*. The statutes struck down in *Healy* and those at issue in this case are quite distinct in both character and effect. As a result, *Healy* and the line of cases leading to *Healy* are inapposite for the proposition promoted by the Plaintiffs.

The State readily contends that no winery, whether located in Indiana or elsewhere, may directly ship wine to a consumer located in Indiana. The State also contends that no consumer may transport more than a quart of wine into Indiana pursuant to Ind. Code § 7.1-5-11-15. These laws are not a "double whammy" as the Plaintiffs have referred to them, but, rather, are duly enacted components of Indiana's regime for regulating alcoholic beverages.

The *Healy* court struck down a Connecticut statute which required out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut

wholesalers were no higher than those products sold in Connecticut's bordering states. In so doing, the court looked to the principle that that a "State may not adopt legislation that has the practical effect of establishing a 'scale of prices for use in other states." *Healy* at 336 *citing Baldwin v. G.A.F. Seelig, Inc*., 294 U.S. 511, at 528 (1935). The Indiana statutes placed at issue by the Plaintiffs do not seek to control the pricing of commodities beyond Indiana's borders and have no extraterritorial effect whatsoever on the pricing or any other aspect of the sale of wine in other states.

An Indiana consumer is free to travel to Illinois and visit the Owl Creek Winery. While there, the consumer is free to engage in any transaction permissible under Illinois law. The consumer, however, may not have wine purchased at the Owl Creek Winery directly shipped to an Indiana address, nor may the consumer transport wine in excess of the quantities permitted by Ind. Code § 7.1-5-11-15 back to Indiana. The prohibitions do not rise to the level of regulating the sale of liquor in other states. Indiana laws are local in character and are part of a regulatory regime permissible under the 21st Amendment.

E. ANY REMEDY ADOPTED BY THE COURT SHOULD CAUSE THE "MINIMUM DAMAGE" TO THE STATE'S EXISTING REGULATORY SCHEME.

In their Complaint and in their Motion for Summary Judgment, the Plaintiffs urge this court to make sweeping revisions to Indiana's alcoholic beverage law and request that the court strike down or alter provisions in seven separate provisions of Title 7.1. At root, the Plaintiffs are requesting that the floodgates be opened without any preparatory consideration as to the consequences by the legislature. Indeed, these preparations could not be made as the Plaintiffs filed this suit before the legislature could consider the consequences of *Granholm.*

If the Court were to modify Indiana's laws in the manner sought by the Plaintiffs, out-of-state wineries would be able to be able to ship wine in unlimited quantities to Indiana consumers without a permitting scheme in place, without a mechanism in place for collecting excise taxes, and without adequate safeguards to ensure that minors could not easily access alcohol. Similarly, the Consumer Plaintiffs urge this court to alter Indiana's laws to allow them to purchase and personally transport wines from out-of-state wineries in unlimited quantities with no procedures in place for assessing and collecting excise taxes. Indiana's borders would essentially become porous to the shipment and transportation of wine by wineries and consumers alike.

If this Court were to find that Indiana's laws with respect to wine are not evenhandedly applied and are, in fact, discriminatory, then this Court should adopt a remedy that would cause "minimum damage" to the State's existing regulatory scheme. The Fourth Circuit adopted this approach when North Carolina faced a similar challenge to its alcoholic beverage laws. *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). In so ruling, the *Beskind* court stated:

> [T]heir right is not to void a law protected by the Twenty-first Amendment but rather to eliminate discrimination in interstate commerce. The local preference provision gave them the opportunity to challenge the discrimination but not the right to dictate the course that cures the constitutional violation.

Beskind at 519.

Accordingly, if the Court determines it must grant relief to the Plaintiffs it should carefully excise any provision of Indiana law which grants a local preference rather than to perform a wholesale revision of Title 7.1. *See also, Alabama ABC Board v. Henri-Duvall Winery LLC*, 890 So.2d 70, 79 (Ala. 2003).

V. CONCLUSION

For the foregoing reasons, the Defendant request that Plaintiffs' claims be dismissed as the Winery Plaintiffs have failed to exhaust their administrative remedies and the Consumer Plaintiffs' claims are not yet ripe for review. If the Court were not to dismiss the Plaintiffs' claims, then the Court should declare that Indiana's laws are constitutional in that Indiana's laws are evenhanded and non-discriminatory in their implementation with respect to their treatment of in-state and out-of-state wineries producing less than 500,000 gallons of wine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing has been filed electronically on this 21st day of November 2005. Notice of this filing will be sent to the e undersigned counsel hereby certifies that a copy of the foregoing was filed parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Chad C. Duran

_____

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