

**IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

LEBAMOFF ENTERPRISES, INC., d/b/a
CAP N' CORK, RANDY LEWANDOWSKI,
and LUTHER STRODER,

Plaintiffs,

V.

P. THOMAS SNOW, in his official capacity as
CHAIRMAN OF THE INDIANA ALCOHOL
& TOBACCO COMMISSION,

Defendant.

)Cause No.: 1:09-CV-0744 LJM-TAB

CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant, P. Thomas Snow, in his official capacity as Chairman of the Indiana Alcohol & Tobacco Commission ("ATC"), by counsel, in accordance with Federal Rule of Civil Procedure 56 and S.D. Ind. L. R. 56.1, moves the Court to grant summary judgment in his favor and against Plaintiffs on all five counts of Plaintiffs' Complaint:

1. Plaintiffs, Lebamoff Enterprises, Inc., d/b/a Cap n' Cork, Randy Lewandowski and Luther Stroder challenge the constitutionality of Indiana Code section 7.1-3-15-3(d) which limits the manner in which the holders of certain wine dealer permits may deliver alcoholic beverages and seek a determination that this statute violates federal and state law.

2. Plaintiffs have failed to establish that Indiana Code section 7.1-3-15-3(d) violates Article 1, section 23 of the Indiana Constitution , the Equal Protection Clause of

the United States Constitution, the Commerce Clause of the United States Constitution, or 49 U.S.C. section 14501(c)(1) of the Federal Aviation Administration Act of 1994.

3. In further support of its Cross-Motion for Summary Judgment, the ATC files concurrently herewith its Memorandum in Support of Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment and its Designation of Evidence in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

WHEREFORE, Defendant, the ATC requests that the Court:

- (1) grant its Cross-Motion for Summary Judgment
- (2) deny Plaintiffs' Motion for Summary Judgment;
- (3) find in favor of the Defendant and against the Plaintiffs;
- (4) and award all other appropriate relief.

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2010, a copy of the foregoing was filed with the Clerk of Court electronically, using the CM/ECF system, which sent notification of such filing to the following:

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each delivery for at least one (1) year that shows the customer's name, location of delivery, and quantity sold.

In addition to the face-to-face delivery requirement in Indiana Code section 7.1-3-15-3, a separate provision in Title 7.1 contains an explicit and general ban on the direct shipment of alcoholic beverages. Indiana code section 7.1-5-11-1.5(a) provides in relevant part:

Except as provided in IC 7.1-3-26, it is unlawful for a person in the business of selling alcoholic beverages in Indiana or outside Indiana to ship or cause to be shipped an alcoholic beverage directly to a person in Indiana who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3(a)).

Furthermore, under the general penalty provisions of the Indiana Code section 7.1-5-1-8 a “person who violates a provision of this title for which no other penalty is provided commits a Class B misdemeanor.” Despite the clear and unambiguous language of these statutes, Cap n’ Cork began to deliver wine directly to consumers via common carrier in direct violation of the statutory requirement that the delivery be performed by the holder of the permit or an employee who holds an employee permit.

After receiving multiple citations for violating Indiana law, Cap N’ Cork filed a five count complaint which challenges the face-to-face delivery requirements in Indiana Code section 7.1-3-15-3 as violating Article 1, section 23 of the Indiana Constitution, the Equal Protection Clause of the United States Constitution, the Commerce Clause of the United States Constitution, and 49 U.S.C. section 14501(c)(1) of the Federal Aviation Administration Act of 1994. The Motion for Summary Judgment filed by Plaintiffs, however, relies entirely on the theory that the face-to-face limitation on delivery violates the Commerce Clause of the United States Constitution.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Cap N' Cork holds 15 active type 217 Package Liquor Store Permits issued by the Indiana Alcohol and Tobacco Commission which authorizes it to sell beer, wine, and liquor within the scope of its permit. (Aff. of Officer Swallow ¶ 10, Aff. of Major Poindexter ¶ 19).
2. There are presently 1004 active type 217 Package Liquor Store Permits in the State of Indiana. (Aff. of Major Poindexter ¶ 18).
3. There are presently 53 active type 305 Indiana Farm Winery Permits. (Aff. of Major Poindexter ¶ 20).
4. There are presently 120 active type 310 Direct Wine Seller Permits, 21 of which have been granted to the holders of Indiana Farm Winery Permits. (Aff. of Major Poindexter ¶ 21).
5. Cap N' Cork was cited on three occasions for delivering multiple shipments of wine outside the scope of its permit by shipping wine to Indiana consumers using a common carrier. (Aff. of Officer Swallow ¶ 15-22).
6. The investigation of the Indiana State Excise Police established that Cap N' Cork was delivering shipments of wine in violation of Indiana Code section 7.1-3-15-3(a) by shipping wine directly to consumers using a common carrier rather than utilizing its own employees. (Aff. of Officer Swallow ¶ 13).
7. When this action was filed on May 19, 2009, there were active administrative proceedings against Cap N' Cork regarding the three citations it received. (Aff. of Officer Swallow ¶ 23).

8. On May 26, 2009, the administrative proceedings were stayed and have not been concluded. (Aff. of Officer Swallow ¶ 24).
9. For the shipments of wine at issue in this action, Cap N' Cork utilizes the following business model:
 - a. An Indiana consumer contacts a third party "wine fulfillment company" and places an order for the purchase of wine via phone, facsimile, mail, or via the internet. (Plaintiffs' Brief, p. 1). Cap N' Cork has alleged that some consumers may place an order through Cap N' Cork which will then work with the wine fulfillment company. (Plaintiffs' Brief, p. 4). Such wine fulfillment companies include wine clubs through which wine may be ordered via the internet.¹
 - b. The wine fulfillment company then packages and ships the wine to a licensed Indiana wholesaler.
 - c. The licensed Indiana wholesaler then transfers the pre-packaged wine to Cap N' Cork.
 - d. Cap N' Cork then transfers the wine to a common carrier – UPS – for delivery to the Indiana consumer.(Aff. of Officer Swallow ¶¶ 15-22 and Aff. Exhibits A-E) (See also Plaintiffs' Brief, pp. 1-4).
10. Cap N' Cork does not hold, has not applied for, and is not eligible for a Direct Wine Seller's Permit. (Aff. of Officer Swallow ¶ 25).

¹ See, for example, the American Wine Cellars Wine Club, which maintains its website at <http://www.vinasse.com/index.cfm?s=vinasse&t=clubacwc.cfm&src=googlesearch&cfid=2826518&cftoken=31316253> (last visited February 2, 2010). (See also, Plaintiffs' Designation of Evidence No. 6, p. 15).

11. Employees of Cap N' Cork do not directly verify the age of the Indiana consumers who purchase or receive alcoholic beverages shipped to them via common carrier. (Aff. of Officer Swallow ¶ 17).
12. Employees of Cap N' Cork are required to complete a mandatory employee training program pursuant to Indiana Code section 7.1-3-1.5-13 One component of which provides training on Indiana age verification requirements and preventing youth access to alcohol. (Aff. of Major Poindexter ¶¶ 9-10).
13. Sales of alcoholic beverages to minors are prohibited in Indiana. All states, including Indiana, require a consumer purchaser to verify their age prior to purchasing alcohol. The Indiana State Excise Police and the Indiana Alcohol and Tobacco Commission have waged and continue to wage public information campaigns to foster compliance with Indiana's requirement that alcoholic beverage retailers verify a purchaser's age. (Aff. of Major Poindexter ¶¶ 5-14 and Aff. of Officer Swallow ¶¶ 4-9).
14. Preventing youth access to alcoholic beverages is a primary concern of the Indiana ATC and the Indiana State Excise Police. (Aff. of Major Poindexter ¶ 5 and Aff. of Officer Swallow ¶ 4).
15. An important barrier to youth access to alcohol is Indiana's general requirement that all consumer purchases of alcoholic beverages, including wine, must be preceded by a face-to-face transaction. The requirement that wine dealers licensed under Indiana Code section 7.1-3-10-4 effect deliveries provides this initial face-to-face transaction and, therefore a barrier to the purchase of alcohol by underage drinkers. (Aff. of Major Poindexter ¶ 6 and Aff. of Officer Swallow ¶ 5).

16. Dealer employees are required to receive server training pursuant to Indiana Code section 7.1-3-1.5. Server Training is designed to educate employees on the (i) selling; (ii) serving; and, (iii) consumption of alcoholic beverages. Ind. Code § 7.1-3-1.5-4.3. Such training is required to include:

methods for properly and effectively:

- (i) checking the identification of an individual;
- (ii) identifying an illegal identification of an individual; and
- (iii) handling situations involving individuals who have provided illegal identification

Ind. Code § 7.1-3-1.5-6(e). (See also Aff. of Major Poindexter ¶ 9).

17. Requiring deliveries to be made by the permit holder or an employee of the dealer ensures a face-to-face transaction at which time the employee may verify age. (Aff. of Major Poindexter ¶ 6 and Aff. of Officer Swallow ¶ 5).

18. Furthermore, every permit holder or employee of a permit holder engaged in the sale of alcoholic beverages to consumers in Indiana is permitted by the ATC and is subject to ATC sanctions. (Aff. of Major Poindexter ¶ 17).

19. Permitting in excess of 1000 Package Liquor Store Permit holders to ship alcoholic beverages via common carrier would create substantial additional enforcement burdens for the Indiana State Excise Police. (Aff. of Major Poindexter ¶¶ 18, 22). The Indiana State Excise Police consists of approximately eighty five (85) officers. During the typical shift, there are approximately forty (40) officers in the field. (Aff. of Major Poindexter ¶¶ 3-4).

III. STATUTORY BACKGROUND

1. The Wine Dealer Permit: A Wine Dealer Permit authorizes the holder to sell wine or flavored malt beverages for consumption off premises. Ind. Code § 7.1-3-15-1. A Wine Dealer Permit is available only to the holder of a beer dealer's permit or the holder of a liquor dealer's permit. Ind. Code § 7.1-3-15-2. Only grocery stores, drug stores, and package liquor stores are eligible to obtain a Wine Dealer Permit. See Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-10-4.

If the holder of Wine Dealer Permit is a package store licensed to deal in liquor under Indiana Code section 7.1-3-10-4 the permittee is also entitled to deliver alcoholic beverages, including wine, to a customer's residence, office, or designated location as described above. If such a delivery is made the permit holder is required to maintain a written record of each delivery for at least one (1) year that shows the customer's name, location of the delivery, and quantity sold. Ind. Code § 7.1-3-15-3(d). A grocery, drug store, or pharmacy is not authorized to deliver wine in any manner whatsoever. In addition, the holder of a Wine Dealer Permit is limited to selling no more than three (3) cases of wine to a consumer in a single transaction. Ind. Code § 7.1-3-15-3(b).

2. The Farm Winery Permit: A Farm Winery Permit is available to any winery in any state that sells no more than 1,000,000 gallons of wine in Indiana. See Ind. Code § 7.1-3-12-4. The holder of a Farm Winery Permit is authorized to engage in the following transactions:

- a. Sell wine directly to consumers on the winery's premises either by the glass or by the bottle, Ind. Code § 7.1-3-12-5(a)(3);
- b. Conduct business at up to three additional locations, Ind. Code § 7.1-3-12-5(b);
- c. Sell wine directly to consumers at a farmer's market operated on a non-profit basis, Ind. Code § 7.1-3-12-5(a)(4); and

- d. Sell wine to a holder of a wholesaler's permit, Ind. Code § 7.1-3-12-5(a)(5).

The holder of a Farm Winery Permit is not authorized to deliver wine off-premise in any fashion, whether delivered by an employee or not.

3. The Direct Wine Seller's Permit: Like a Farm Winery Permit, a Direct Wine Seller's Permit is only available to a producer that sells no more than 1,000,000 gallons of wine a year in Indiana. *See* Ind. Code § 7.1-3-26-7(a)(7). A Direct Wine Seller's Permit holder may then ship no more than 27,000 liters (3,000 cases) per year, in total, and up to 216 liters (24 cases) of wine per year per customer. *See* Ind. Code §§ 7.1-3-26-9(2)(e), 7.1-3-26-12.

Pursuant to Indiana Code § 7.1-3-26-7, the holder of a Direct Wine Seller's Permit may only sell and ship wine to a consumer if:

A. The consumer provides the winery with the following information in an initial face-to-face transaction:

1. Name, telephone number, Indiana address, or Indiana business address;
2. Proof that the consumer is twenty-one years of age or older;
3. A verified statement that the consumer is twenty-one, has an Indiana address, and intends to use the wine for personal purposes;

B. The Permit holder labels the shipping container with the following, "CONTAINS WINE. SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY";

C. The Permit holder ships the wine using the holder of a valid carrier's alcoholic beverage permit;

D. The Permit holder directs the carrier to verify that the recipient is twenty-one or older;

E. The Permit holder does not ship more than 216 liters (24 cases) of wine to any consumer in a calendar year; and

F. The Permit holder remits all excise, sales, and use taxes on a monthly basis.

IV. ARGUMENT

A. Standard for entry of summary judgment

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if a moving party demonstrates that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986); *Certain Underwriters of Lloyd's v. General Accident Ins. Co. of America*, 909 F.2d 228, 231 (7th Cir. 1990); *Walter v. Fiorenzo*, 840 F.2d 427 (7th Cir. 1988); *Roman v. U.S. Postal Services*, 821 F.2d 382 (7th Cir. 1987). The substantive law underlying the claim defines which facts are material and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248.

The party opposing a properly supported summary judgment motion cannot rely upon the mere allegations or denials of his pleadings. If he would bear the burden at trial on the matter that forms the basis of the motion, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Federal Rules of Civil Procedure; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 884 (1990); *Celotex, supra*. “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted.” *Anderson*, 477 U.S. at 249-50 (citations omitted); see *Harbor House Condominium Ass'n v. Massachusetts Bay Ins. Co.*, 915 F.2d 316, 320 (7th Cir. 1990); *Hines v. British Steel Corp.*, 907 F.2d 726, 728 (7th Cir. 1990).

If the nonmoving party fails to establish an essential element of his case, summary judgment is appropriate. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23; see *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990).

As Plaintiffs are challenging the constitutionality of the face-to-face delivery requirements for certain holders of wine dealer permits it must be noted from the outset that the Plaintiffs statute must overcome the strong presumption that a statute is constitutional. See *Bowen v. Kendrick*, 487 U.S. 589; *Hines v. Elkhart Gen. Hosp.*, 465 F.Supp. 421 (N.D. Ind. 1979), *aff'd*, 603 F.2d 646 (7th Cir.1979); *Government Suppliers Consolidating Services, Inc. v. Bayh*, 734 F.Supp. 853, 862 (S.D.Ind.1990). Along with this presumption, a federal court is required to construe a statute to be constitutional if possible. See *Hodgkins ex rel. Hodgkins v. Peterson*, 175 F.Supp.2d 1132 (S.D.Ind. 2001) citing *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 508 (7th Cir.1998).

B. Indiana's Even-Handed Regulation Of The Delivery Of Wine By Licensed Package Liquor Stores Is Not Prohibited By The Commerce Clause

i. *Granholm* Permits States To Regulate The Sale And Distribution Of Alcoholic Beverages In A Non-Discriminatory Fashion

In this action, Plaintiffs contend that that the face-to-face delivery requirements contained in Indiana Code section 7.1-3-15-3(d) are facially discriminatory because, "Indiana wineries and out-of-state wineries are able to use common carriers but Indiana wine retailers are forbidden from doing so." As a result of this contention, Plaintiffs urge the Court to apply strict scrutiny level of Commerce Clause analysis. This differential treatment of entities which have markedly

distinct roles in Indiana's highly regulated alcoholic beverage market does not constitute facial discrimination against interstate commerce and is clearly permissible under the principles set forth in *Granholm v. Heald*, 544 U.S. 460 (2005).

Laws affecting interstate commerce fit into one of three categories: (1) those that explicitly discriminate against interstate commerce ("disparate treatment"); (2) those that discriminate against interstate commerce in their effect ("disparate impact"); and (3) those that affect, but do not discriminate against, interstate commerce at all. *See Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131-32 (7th Cir. 1995).

Explicitly discriminatory statutes are invalid virtually *per se*. *See id.* at 1131; *see also Granholm*, 544 U.S. at 473-76. Statutes that have a disparate impact on interstate commerce, however, are subject to strict scrutiny only if that impact is "powerful, acting as an embargo on interstate commerce without hindering intrastate sales." *See Nat'l Paint*, 45 F.3d at 1131.

If, instead, the discriminatory effect is "weak" or "mild," *id.*, the flexible balancing standard articulated in *Pike* applies:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike, 397 U.S. at 142. For laws which fit into the third category, rational-basis review is applied. *Nat'l Paint* at 1131.

The Supreme Court's decision in *Granholm* illustrates the application of these principles. *Granholm* struck down provisions of Michigan's and New York's wine-distribution laws as "straightforward attempts to discriminate in favor of local producers." *Granholm*, 544 U.S. at 489. The statutes at issue permitted in-state wineries to make direct sales to consumers but prohibited out-of-state wineries from doing so on the same terms. *See id.* at 468-70. The Court

applied strict scrutiny because this “differential treatment between in-state and out-of-state wineries constitute[d] explicit discrimination against interstate commerce.” *Id.* at 467.

Granholm, however, did not strike down *all* wine-distribution regulations. As the First Circuit has explained, “[t]he novel aspect of *Granholm* was the Court’s holding that the Twenty-First Amendment . . . cannot salvage explicitly discriminatory regimes even though the regulated product is an alcoholic beverage.” *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 35 (1st Cir. 2007); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 189 (2nd Circuit, 2009); *Siesta Village Market, LLC v. Steen*, --- F.3d ---, 2010 WL 277786, *5 (5th Cir. 2010).

The narrow aspect of the Indiana’s alcohol regulations challenged by Plaintiffs neither violates the principles of *Granholm* nor manifest the kinds of blatant economic protectionism and facial discrimination that cannot be shielded by the Twenty-First Amendment. Indiana’s requirement that package liquor stores, like those operated by Cap N’ Cork, engage in a face-to-face delivery of all alcoholic beverages, including wine, is not facially discriminatory and likely has no disparate impact on out-of-state commerce. Instead, the law’s impact is only on the *method of distribution*, which the Commerce Clause does not protect. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (explaining that the Commerce Clause does not protect “the particular structure or methods of operation in a retail market”); *see also Cherry Hill*, at 38 (finding no evidence, and declining to speculate, that Maine’s prohibition of direct wine shipments had a substitution effect amounting to a disparate impact).

Granholm itself reinforced this notion when it declared that the traditional three-tier distribution system did not violate the Commerce Clause and recognized that “the three-tier system itself ‘is unquestionably legitimate.’” *Granholm*, 544 U.S. at 489. However, the Court also observed that the Twenty-First Amendment will protect state regulations only “when they

treat liquor produced out of state the same as its domestic equivalent.” *Id.* While “States have broad power to regulate liquor under § 2 of the Twenty-first Amendment,” the Court said, “[t]his power . . . does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers.” *Id.* at 493. In the wake of *Granholm*, the First Circuit upheld a Maine wine-distribution regulatory scheme that prohibits direct shipment of wine altogether, requiring all transactions to be face-to-face. *See Cherry Hill*, at 39. Additionally, as discussed below, the Second Circuit upheld New York’s requirement that wine shipments pass through a New York wholesaler. *Arnold’s Wine*, at 192. Most recently, the Fifth Circuit upheld a Texas law requiring local delivery of wine. *Siesta Village*, at *12

Here, there has been no showing by Plaintiffs that Indiana is treating Indiana wine any differently from wine produced in any other state. If wine, wherever it comes from, is delivered by a package liquor store it must be made by the permit holder or an employee permit. Similarly, both Indiana and out-of-state wineries are eligible for a Direct Wine Seller’s Permit.

ii. The Original Package Doctrine Does Not Prohibit Nondiscriminatory Regulation of Alcoholic Beverages

Plaintiffs challenge to Indiana’s even-handed face-to-face delivery requirements relies heavily on the original package doctrine developed more than a century ago in *Lelsy v. Hardin*, 135 U.S. 100 (1890). This doctrine, pre-dating Prohibition and its eventual repeal by the 21st Amendment to the United States Constitution, held that liquor moving in interstate commerce was immune from state regulation so long as it remained in its original package. *Id.* at 119. Under this doctrine, even nondiscriminatory regulations “directly affecting interstate commerce” were prohibited by the Commerce Clause. *Bowman v. Chicago & Northwestern R. Co.*, 125

U.S. 564, 496-97 (1888). The original package doctrine has since been rejected by the Supreme Court. See *Granholm v. Heald*, 544 U.S. 460, 476-482 (2005). Plaintiffs have cited to no modern case which applies this doctrine to invalidate a state regulation. Indeed, *Granholm* expressly reaffirmed that “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.” *Id.* at 488 citing *California Retail Liquor Dealers Ass’n v. MidCal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Although *Granholm* held that the Twenty-First Amendment did not save explicitly discriminatory statutes, the Court indicated that the Amendment supports States’ broad powers to regulate alcohol through non-discriminatory laws: “state policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent.” *Id.* at 489. States, then, may prohibit altogether the direct shipment of alcohol. See *id.* at 482-83 (noting that the Webb-Kenyon Act, 27 U.S.C. § 122, explicitly allows States to prohibit direct shipment of alcohol to consumers).

It is unclear what support the invocation of the original package doctrine provides to Plaintiffs’ constitutional challenge to Indiana’s face-to-face delivery requirements. The mere fact that alcohol may be delivered from out-of-state in its original package to a licensed Indiana wholesaler for eventual delivery to the holder of Indiana Wine Dealer Permit and, ultimately, to a consumer does not insulate it from state regulation. Recently, in *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185 (2nd Circuit, 2009), an Indiana wine dealer, initiated a commerce clause challenge to New York’s requirement that all wine pass through a New York wholesaler. In that case the Plaintiffs contended that New York effectively prohibited an Indiana retailer from directly selling to New York consumers in violation of the Commerce clause. *Id.* at 186-187. Although the sale and delivery of wine from an Indiana retailer to a New York consumer would

plainly constitute interstate commerce, the Second Circuit concluded that the New York law “treats in-state and out-of-state liquor evenhandedly under the state’s three-tier system, and thus complies with *Granholm*’s nondiscrimination principle.” *Id.* at 191.

Once again in *Siesta Village Market, LLC v. Steen*, --- F.3d ----, 2010 WL 277786 (5th Cir. 2010), a state alcoholic beverage regulation which purportedly discriminated against interstate commerce was found to pass muster under *Granholm*. *Id.* In this case, Plaintiffs challenged a Texas law which allowed licensed Texas alcohol retailers to make local deliveries of alcoholic beverages. These Texas retailers were permitted to use common carriers. *Id.* at *1-2. However, out-of-state retailers were not permitted to make deliveries of alcoholic beverages via common carrier or otherwise. *Id.* In upholding the law, the Fifth Circuit carefully examined the core principles underlying the Supreme Court’s decision in *Granholm* and determined that, “[r]egulating alcoholic beverage retailing is largely a State’s prerogative.” *Id.* at *11. The Fifth Circuit further observed:

We view local deliveries as a constitutionally benign incident of an acceptable three-tier system. . . . A State’s right to authorize a variety of retail practices for alcoholic beverages free of dormant Commerce Clause barriers may not be limitless. Yet it seems to us that implementing consumer-friendly practices for in-state retailing of these products often has more to do with changing economic realities than with the Constitution.

Id. at *12.

iii. Pike Analysis

In their Brief in Support of Motion for Summary Judgment, Plaintiffs assert that, “[i]f the court determines that strict-scrutiny does not apply, then we must look at second-tier analysis under *Pike v. Bruce Church, Inc.*” (Plaintiffs’ Brief at 8). This assertion reflects a misunderstanding of the holdings of both *Pike* and *Granholm*. Should this Court properly decline to apply strict scrutiny to the challenged statutes, it does not automatically follow, as

Plaintiffs imply, that the Court should then engage in *Pike* balancing. *See Nat'l Paint*, 145 F.3d at 1132 (“No disparate treatment, no disparate impact, no problem under the dormant commerce clause.”). Instead, the Court should determine whether Plaintiffs have borne their burden of establishing whether the challenged statute any discriminatory effect on commerce. If not, the statute is subject only to rational-basis review. *Id.* at 1131. Here, Plaintiffs have not established any discrimination between wine produced out-of-state and that produced in Indiana. Indeed, the plain language of the statute prevents Cap N’ Cork from shipping *any* wine via common carrier and makes absolutely no distinction as to the origin of the wine. Notably, neither the court in *Arnold’s Wines* nor the Court in *Siesta Village Market* engaged in any *Pike* balancing when state laws regulating the delivery and shipment of wine were upheld.

However, should this Court apply *Pike* to the current action, the State has identified local benefits advanced by the face-to-face delivery requirements which are not “clearly excessive” as compared to the local benefits. In its Brief in Support of Motion for Summary Judgment, Plaintiffs rhetorically ask, “[j]ust what is the state’s interest? Keeping the wine out of the hands of minors?” (Plaintiff’s Brief, p.8). The answer to that question is an unqualified yes.

Reducing minors’ access to alcohol is a core policy of both federal and state governments. Indiana, like other States, prohibits sales of alcoholic beverages to minors and makes doing so a criminal offense. *See, e.g., Ind. Code § 7.1-5-7-8.* In fact, the Defendant in this case, the Indiana Alcohol and Tobacco Commission, is an agency which has identified preventing youth alcohol access as a paramount goal and is required to provide training to permittees throughout the state to achieve this goal. (See Affidavits of Major Poindexter and Officer Swallow). This core policy was not rejected by *Granholm* as Plaintiffs intimate in their Brief. (Plaintiff’s Brief, pp. 8-9) Indeed, the Seventh Circuit decision in *Baude v. Heath*, 538

F.3d 608, observed that the Plaintiffs challenging the initial face-to-face transaction requirement of the Direct Wine Seller's Permit had conceded that "keeping alcohol out of minors' hands is a legitimate, indeed a powerful interest." *Id.* at 614.

Not only is preventing youth access to alcohol important to Indiana, it is an expressly articulated national concern as well. In 2006, Congress enacted the STOP Act (Sober Truth on Preventing Underage Drinking Act), and, in doing so, stated: "Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government . . . States also have a responsibility to fight youth access to alcohol and reduce underage drinking." STOP Act, P. L. No. 109-422 § 2(b)(7) (codified at 42 U.S.C. § 290bb-25b(b)(7)). Specifically, Congress found the "[c]ontinued State regulation and licensing of the manufacture, importation, sale, distribution, transportation and storage of alcoholic beverages" to be "clearly in the public interest" and "critical to promoting responsible consumption [and] preventing illegal access to alcohol by persons under 21 years of age." *Id.*

To prevent minors from accessing alcoholic beverages, the Indiana Alcohol and Tobacco Commission requires businesses to use face-to-face age verification as the primary tool. (See Affidavits of Major Poindexter and Officer Swallow). Moreover, the Indiana Alcohol and Tobacco Commission has enhanced the mandatory training program that all holders of employee permits must undertake – a significant component of which concerns combating underage access to alcohol. Although the internet and UPS may make it possible to purchase wine remotely, Indiana law still requires package liquor stores to make face-to-face contact with consumers when alcohol is delivered. See Indiana Code sections 7.1-3-5-3, 7.1-3-10-3, and 7.1-3-15-3.

In terms of *Pike* balancing, when a statute regulating wine distribution is facially neutral, and therefore the threshold question is the degree of burden on interstate commerce, Section 2 of

the Twenty-First Amendment should tip the scales in favor of the State even in close cases. After all, “[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.” *Granholm v. Heald*, 544 U.S. 460, 484 (2005). *Granholm* expressly reaffirmed that “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.” *Id.* at 488. What is more, the Seventh Circuit has recognized that *Pike* balancing does not “authorize a comprehensive review of [a] law’s benefits, free of any obligation to accept the legislature’s judgment.” *See Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995). And the Seventh Circuit has criticized applications of the *Pike* balancing test that tend toward indiscriminate “judicial review of statutory wisdom after the fashion of *Lochner*.” *Id.* at 1131; *see also Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 80 (1993) (Scalia, J., concurring in part and concurring in the judgment) (criticizing *Pike* balancing as akin to *Lochnerism* insofar as it “ultimately asks courts to make policy judgments—essentially, whether nondiscriminatory state regulations of various sorts are ‘worth’ their effect on interstate . . . commerce”). Giving due deference to the Indiana General Assembly’s policy choices, in this case, *Pike* balancing plainly favors the State.

C. Indiana’s Differential Treatment of Wineries And Package Liquor Stores Easily Passes Muster Under The Equal Protection Clause And Article 1, section 23 of the Indiana Constitution.

i. Equal Protection Clause Analysis

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of

the laws.” U.S. Const. amend. XIV, § 1. In essence, this provision of the Constitution requires that all persons similarly situated be treated alike. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). In analyzing the constitutionality of state legislation the court must first determine which level of scrutiny to apply. There are three levels of scrutiny: 1) strict scrutiny; 2) intermediate scrutiny; and 3) rational basis scrutiny. *Griffin High School v. Illinois High School Ass’n*, 822 F.2d 671, 674 (7th Cir. 1987) *citing City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). If the statute does not discriminate against a “suspect class” or a fundamental right then rational basis is the proper basis of review. *See Lamers Dairy Inc. v. U.S. Dept. of Agr.*, 379 F.3d 466, 472. At issue in this case is the differential treatment between wineries and package liquor stores and there appears to be no allegation that Indiana’s alcoholic beverage regulations improperly target a suspect class or infringe upon fundamental rights. Accordingly, rational basis is the appropriate level of scrutiny.

Under the rational basis test, the challenged legislation “is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *City of Cleburne*, 473 U.S. at 440. When economic legislation is at issue, the equal protection clause gives states “wide latitude.” *Id.* Moreover, legislation that does not burden a suspect class or burden fundamental rights passes constitutional muster if the legislature could think that the law is “rationally related to any legitimate goal of government.” *Johnson v. Daley*, 339 F.3d 582, 285 (7th Cir. 2003). Additionally, the party challenging a law must “negative every conceivable basis which might support” the law. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

Here, the state has asserted its interest in preventing underage access to alcohol in requiring face-to-face transactions in deliveries of alcohol by permit holders or permitted

employees who have received training in age verification procedures. Providing a limited exception to wineries who distribute their own product – and who might not have otherwise have access to wide wholesale distribution – does not undercut the legitimate and compelling interest of the state in verifying the age of the purchasers and recipients of alcohol when deliveries are made. Moreover, one of the principles gleaned from *Granholm* is that States have a relatively free hand in structuring their alcoholic beverage markets as this is inherent in their “broad power to regulate liquor under § 2 of the Twenty-First Amendment.” *Granholm*, at 493. Accordingly, there is no constitutional defect in a State providing differently situated market participants a different bundle of rights with respect to the selling, transporting, shipping, delivering, and distributing a highly regulated and age-restricted product. Accordingly, Plaintiffs have failed to state a claim under the Equal Protection clause in the second county of their Complaint.

ii. Privileges and Immunities Clause, Article 1, section 23

In the first count of their Complaint, Plaintiffs also allege that the differential treatment of wineries and wine dealers violates Article 1, section 23 of the Indiana Constitution, which provides that “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms, shall not equally belong to all citizens.” Ind. Const. art. 1, § 23. Although, Plaintiffs’ Equal Protection claims and their Article 1, section 23 claims are interrelated, the Indiana courts apply two separate and distinct analyses when these issues are presented. *See Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 251 (Ind. 2003) (*citing Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994) (stating that in 1994, “this court jettisoned the use of federal equal protection analytical methodology to claims alleging violations of Art. I, § 23, and held that such claims should be analyzed using a different standard”).

The Indiana Supreme Court has explained that Article 1, section 23 “imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.” *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

“In determining whether a statute complies with or violates [Article 1, § 23], the Court shows substantial deference to the discretion of the Legislature in attempting to ‘balance the competing interest involved,’ and the Legislature’s basis in creating the distinction.” *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 253 (Ind. 2003). Thus, the “challenger to the constitutionality of the legislative scheme bears the burden to ‘negative every conceivable basis which might have supported the classification.’” *Id.* at 254; see also *Morrison v. Sadler*, 821 N.E.2d 15, 22 (Ind. Ct. App. 2005). In other words, a “[l]egislative classification becomes a judicial question only where the lines drawn appear arbitrary and manifestly unreasonable.” *Collins*, 644 N.E.2d at 80. Courts should not “substitute [their] judgment for that of the legislature” or “inquire into the legislative motives prompting such classification” so long as the legislative classification “is based upon substantial distinctions with reference to the subject matter.” *Id.*

The first step in the *Collins* analysis is to “identify the legislative classification at issue.” *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 253 (Ind. 2003). Petitioner argues “Indiana Code section 7.1-3-15-3 violates...Art.1, section 23, in that it denies Petitioner the privilege to use a common carrier to make deliveries of wine to its customers when other Indiana wine retailers with whom it is in competition are allowed to use a common carrier.” Complaint

at 4, ¶ 21. However, the legislative classification at issue in this case is found in Indiana Code section 7.1-3-26-5; “[a] person located within or outside Indiana that wants to sell and ship wine directly to a consumer must be the holder of a Direct Wine Seller’s Permit[.]” Ind. Code § 7.1-3-26-5. Indiana Code section 7.1-3-26-7 sets forth the eligibility requirements for the Direct Wine Seller’s Permit. Ind. Code § 7.1-3-26-7. The requirements have the effect of making certain wineries eligible for the permit. *Id.* Therefore, the Legislature has chosen to grant wineries, assuming they meet the requirements of Indiana Code section 7.1-3-26-7, the privilege of directly shipping limited quantities of wine they produce to consumers via common carrier. Package liquor stores, like Petitioner, are not afforded this privilege. This classification is neither arbitrary nor manifestly unreasonable.

Under the first prong of *Collins*, “the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Collins*, 644 N.E.2d at 80. In the present case, the Legislature’s decision to grant eligible wineries the limited privilege of using common carriers is reasonably related to inherent characteristics that distinguish wineries from package liquor stores. Wineries produce and market wine they produce. Package liquor store, by contrast, may sell wine, beer, and liquor, all of which has been produced or manufactured by others and passes through the hands of a licensed wholesaler. For wineries, it is their own product which they must market and sell to consumers. Package liquor stores, like Cap N’ Cork, on the other hand, do not produce or manufacture wine, and therefore have no need to distribute their own product. These inherent characteristics distinguish the two classes. The challenged legislation is reasonably related to these inherent characteristics.

Indiana's alcoholic beverage laws provide wineries a limited right to use common carriers. This limited exception to the general prohibition against direct shipment in Indiana Code section 7.1-5-11-1.5 is reasonably related to the State's policies in establishing orderly market conditions and providing producers, which might not otherwise have access to other means of distribution, a limited ability to directly ship their products. This limited exception, which carries with it a face-to-face transactional requirement under Indiana code section 7.1-3-26-6, also supports Indiana's goals in preventing youth access to alcohol.

Under the second prong of *Collins*, "the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Collins*, 644 N.E.2d at 80. In the present dispute, all wineries who meet the requirements of Indiana Code section 7.1-3-26-7 are allowed the limited privilege of shipping the wine they produce via common carrier. Thus, all wineries are treated equally. All package liquor stores, like Petitioner, cannot ship wine via common carrier. Thus, all package liquor stores are treated equally. Indiana Code section 7.1-3-15-3 is uniformly applicable and equally available to all persons similarly situated and does not offend Article 1, section 23. The legislation is reasonably related to inherent characteristics which distinguish wineries from package liquor stores, and the legislation is uniformly applicable to all persons similarly situated. The legislative classification between wineries and package liquor stores is not arbitrary or manifestly unreasonable.

IV. Indiana Code Section 7.1-3-15-3 Does Not Regulate Common Carriers In Violation Of 49 U.S.C. Section 14501(c)(1).

Plaintiffs' contention in the fourth count of their Complaint that the enforcement of the face-to-face delivery requirement set forth in Indiana Code section 7.1-3-15-3 is somehow pre-empted by the Federal Aviation Administration Authorization Act ("FAAA") of 1994 is misplaced. This

provision places limits on States to “enact or enforce a law . . . related to a price, route, or service of any motor carrier.” 49 U.S.C. section 14501(c)(1). Recently, the Supreme Court held that this restrictive language prevented New Hampshire from regulating the age-verification procedures of common carriers when delivering tobacco products restricted to individuals over eighteen (18) years of age. *Rowe v. New Hampshire Motor Transport Assn.*, 128 S.Ct. 989 (2008). This case is plainly inapposite for the straightforward reason that the challenged provisions of Indiana Code section 7.1-3-15-3 do not regulate common carriers at all – these provisions govern how the holders of Indiana alcoholic beverage dealers deliver products to consumers not the manner in which the common carrier delivers them. Indeed, in *Baude v. Heath*, 538 F. 3d 608, (7th Cir. 2008) the Seventh Circuit observed that the ruling in *Rowe* underscores the need for point of sale age verification:

But we know from *Rowe v. New Hampshire Motor Transport Ass'n*, --- U.S. ---, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008), that states cannot require interstate carriers to verify the recipients' age. Even if that case had come out the other way- or if some carriers offer an age-checking service without the need for legal compulsion-a rushed driver is unlikely to take as much care in checking credentials, and testing for forgery with ultraviolet light and other methods, as a winery's desk clerk. Some drivers treat anyone 18 and over as an “adult”, see Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 36 (2003); no winery would do so. The FTC's staff concluded that data do not reveal “how often couriers obtain a valid adult signature.” *Ibid*.

Baude v. Heath, at 613-614. Under the theory advanced by Plaintiffs in their Complaint, any law which prohibited a retailer from shipping any product, age-restricted or otherwise via common carrier would be pre-empted. This is plainly not the case and Plaintiffs are not entitled to any relief premised on 42 U.S.C. section 14501(c)(1).

V. CONCLUSION

For the foregoing reasons, this Court should uphold the validity of the face-to-face delivery requirements of Indiana Code section 7.1-3-15-3, enter judgment in favor of Defendant and against Plaintiffs as to all counts of Plaintiffs' Complaint, and award such further relief as is just and proper.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana
Attorney No. 1958-98

By: */s/ Chadwick C. Duran*

Chadwick C. Duran
Deputy Attorney General
Attorney No. 18615-53

CERTIFICATE OF SERVICE

I hereby certify that on 9th day of February a copy of the foregoing was filed with the Clerk of Court electronically, using the CM/ECF system, which sent notification of such filing to the following:

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**IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

LEBAMOFF ENTERPRISES, INC., d/b/a
CAP N' CORK, RANDY LEWANDOWSKI,
and LUTHER STRODER,

Plaintiffs,

v.

P. THOMAS SNOW, in his official capacity as
CHAIRMAN OF THE INDIANA ALCOHOL
& TOBACCO COMMISSION,

Defendant.

)
)
)
)
)
) Cause No.: 1:09-CV-0744 LJM-TAB

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

In support of his Cross-Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment, Defendant, P. Thomas Snow, in his official capacity as Chairman of the Indiana Alcohol & Tobacco Commission, by counsel, designates the following evidence, attached hereto as exhibits:

1. Affidavit of Major Robin Poindexter, Indiana State Excise Police.
2. Affidavit of Officer Richard J. Swallow, Indiana State Excise Police with exhibits including ATC citations against Lebamoff Enterprises, Inc. d/b/a Cap N' Cork and related Incident Report Forms.
3. The Discovery materials provided by the Indiana Alcohol and Tobacco Commission to Plaintiffs attached as Exhibit 6 to Plaintiffs' Designation are incorporated herein by reference.

Respectfully submitted

GREGORY F. ZOELLER
Attorney No. 1958-98
Attorney General of Indiana

By: /s/ Chadwick C. Duran
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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2010, a copy of the foregoing was filed with the Clerk of Court electronically, using the CM/ECF system, which sent notification of such filing to the following:

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/s/ Chadwick C. Duran
Deputy Attorney General
Counsel for Defendant

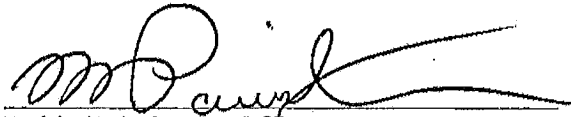
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6. The requirement of a direct, face-to-face transaction in any sale of alcohol to consumers is one effective barrier to youth access to alcohol.
7. I have personally conducted public information programs at events such as the Indiana State Fair, various expositions, various high schools and/or law enforcement classes. At these programs I am available to the public to answer questions and hand out materials intended to prevent minor access to alcoholic beverages. Many of these programs incorporate interactive exercises such as DUI goggles. DUI goggles blur one's vision and simulate the effects of alcohol on the body.
8. During my tenure with the Indiana State Excise Police, at various times I have served as a consultant to numerous Local Community Coalition/Drug Free Partnership associations throughout the state.
9. As of January 1, 2010, all alcoholic beverage servers are mandated to complete a server training program pursuant to Ind. Code § 7.1-3-1.5-13.
10. One component of server training provides instruction on Indiana age verification requirements and preventing youth access to alcohol.
11. Presently, I supervise the Survey of Alcohol Compliance initiative conducted by the Indiana State Excise Police.
12. The purpose of the Survey of Alcohol Compliance is to evaluate the availability of alcoholic beverages to persons under the age of 21.
13. Survey of Alcohol Compliance inspections consist of Indiana State Excise Police Officers and 18-20 year-old youths who attempt to obtain alcohol at licensed retailer or dealer establishments.

14. Conducted in phases, the primary goal is to reduce access and availability of alcoholic beverages to Indiana youth.
15. For 2009, the Survey of Alcohol non-compliance rate for the state of Indiana was 35%.
16. Requiring deliveries to be made by the holder of a dealer permit or an employee of the dealer ensures a face to face transaction at which time the permittee or employee may verify age.
17. Every permit holder or employee of a permit holder engaged in the sale of alcoholic beverages to consumers in Indiana is permitted by the Alcohol & Tobacco Commission ("ATC") and is subject to ATC sanctions.
18. There are presently 1004 active type 217 Package Liquor Store permits in the State of Indiana.
19. Lebamoff Enterprises, Inc. d/b/a Lebamoff's Cap N' Cork ("Cap N' Cork"), 5430 Coldwater Road, Fort Wayne, Indiana 46825, permit number DL02-10553 is the holder of 16 type 217 ATC permits 15 of which are presently in use.
20. There are presently 53 active type 305 Indiana Farm Winery permits.
21. There are presently 120 active type 310 Direct Wine Seller permits, 21 of which have been granted to the holders of Indiana Farm Winery permits.
22. Allowing package liquor stores to ship alcoholic beverages via common carrier would create substantial additional enforcement burdens for the Indiana State Excise Police.

I declare under penalty of perjury that the foregoing representations are true and correct.

Date: 2-9-10

A handwritten signature in black ink, appearing to read 'Robin Poindexter', written over a horizontal line.

Robin Poindexter, Officer
Indiana State Excise Police

questions and hand out materials intended to prevent minor access to alcoholic beverages. Many of these programs incorporate interactive exercises such as DUI goggles. DUI goggles blur one's vision and simulate the effects of alcohol on the body.

7. From approximately 2002 to 2007, I was personally a member of the Local Community Coalition/Drug Free Partnership in Porter County.
8. From approximately 2002 to 2005, I was personally a member of the Local Community Coalition/Drug Free Partnership in LaPorte County.
9. During my tenure on LaPorte County's Local Community Coalition/Drug Free Partnership, I received Nine Thousand Dollar (\$9000) in grants to use to develop and implement enforcement initiatives to deal with underage drinking.
10. Lebamoff Enterprises, Inc. d/b/a Lebamoff's Cap N' Cork ("Cap N' Cork"), 5430 Coldwater Road, Fort Wayne, Indiana 46825, permit number DL02-10553 is the holder of a type 217 Alcohol & Tobacco Commission ("ATC") permit.
11. A type 217 ATC permit is a liquor, beer & wine dealer, otherwise known as package store, in an incorporated area.
12. Pursuant to Ind. Code § 7.1-3-15-3(d), delivery of wine by a wine dealer "may only be performed by the permit holder or an employee who holds an employee permit."
13. Indiana State Excise Police received multiple complaints alleging Cap N' Cork was delivering shipments of wine outside the scope of its permit by shipping wine to Indiana consumers using a common carrier.
14. I was assigned to investigate the complaints.

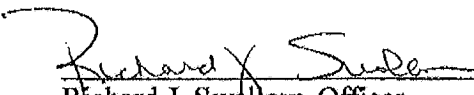
15. The first complaint was received by Major Robin Poindexter on August 1, 2008.
16. My investigation established Cap N' Cork was delivering shipments of wine in violation of Indiana Code section 7.1-3-15-3(d) by shipping wine directly to consumers using a common carrier rather than utilizing its own employees.
17. Based on my investigation, I concluded employees of Cap N' Cork do not directly verify the age of the Indiana consumers who purchase or receive alcoholic beverages shipped to them via common carrier.
18. On October 6, 2008, I delivered a Notice of Violation to d/b/a Cap N' Cork for the charges of 1) Sales Discrimination by a Permittee, 2) Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries and 3) Hindering Law Enforcement. The citation and corresponding case report are attached hereto as Exhibits A & B.
19. On March, 11, 2009, I received a complaint stating d/b/a Cap N' Cork was continuing to violate the scope of their permit by delivering wine via a common carrier.
20. On March 18, 2009, I delivered a Notice of Violation to d/b/a Cap N' Cork for the charge of Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries. The citation and corresponding case report are attached hereto as Exhibits C & D.
21. On April 23, 2009, I received a complaint stating Cap N' Cork was continuing to violate the scope of their permit by delivering wine via a common carrier.
22. On May 1, 2009, I delivered a Notice of Violation do d/b/a Cap N' Cork for the charge of Scope of Permit Violation To Wit: Illegal Alcoholic Beverage

Deliveries. The citation and corresponding case report are attached hereto as Exhibits E & F.

23. On or about May 19, 2009, there were active administrative proceedings pending against Cap N' Cork regarding the three citations it received.
24. On or about May 26, 2009, the administrative proceedings were stayed and have not been concluded.
25. To my knowledge, Cap N' Cork does not hold, has not applied for, and is not eligible for a Direct Wine Seller's Permit.

I declare under penalty of perjury that the foregoing representations are true and correct.

Date: 2/8/2010


Richard J. Swallow, Officer
Indiana State Excise Police

INDIANA STATE EXCISE POLICE

EX-08-012564 9/13/2008

OFFICER: RS2614 RICHARD J SWALLOW

☐ Administrative☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

Incident Report Form

1. Log Number EX-08-012564	1a. Incident Number 02	1b. File Number DL02-10553	1c. Case Number	2. UCR 22 LIQUOR LAWS
3. Incident Type ADMIN ENFORCEMENT		4. Dispatcher RP9216	5. Source CP	6. District 2
7. Status CLSD	8. Date Received 9/13/2008	8a. Rcvd 0946	8b. Disp	8c. Arrv
8d. Clrd	9. Disposition NOV - NOTICE OF VIOLATION			
INCIDENT OCCURRED AT OR BETWEEN		8e. Earliest Date and Time 7/22/2008 0800		8f. Latest Date and Time 10/6/2008 1045
10. Location 5430 COLDWATER RD FORT WAYNE IN 46825		10a. Cross Street		10b. Intersection <input type="checkbox"/>
11. Premise Code ALCOHOL & TOBACCO BUSINESS		12. Business Name LEBAMOFF'S CAP N' CORK		
13. Modus Operandi Coding ENTRY: EXIT: METHOD:		VICTIM: IDENT IDENTIFIED PROPERTY AB/TOB ALCOHOL & TOBACCO AREA: SCOPE SCOPE OF PERMIT TIME OF DAY:		
14. Caller / Complainant Type Normal <input type="checkbox"/> Anonymous <input type="checkbox"/> Refused <input type="checkbox"/> Hang Up <input type="checkbox"/>				
15. Involved Persons				
J Arr DATE	ARREST#	PriCHG	DESCRIPTION	INVL DOB R S PHONE Cnt AddlCHG DESCRIPTION Cnt PL Vd
<input type="checkbox"/> BRUMBAUGH, MATTHEW	2540	LOGANBERRY COVE	EMPL1	12/20/1966
<input type="checkbox"/> DOUST, JOSEPH	6620	CHERRY HILL PKWY	OWN1	6/27/1955
<input type="checkbox"/> LEBAMOFF, ANDREW	15533	TALON RIDGE COVE	OWN1	10/24/1961
<input type="checkbox"/> STANLEY, JAMES	7816	WEYMOUTH CT	MGR1	10/3/1948
<input type="checkbox"/> SWALLOW, RICHARD J	302 W WASHINGTON ST	EXCISE		(317) [REDACTED]
	RM E-112			
	RM E-			
<input type="checkbox"/> CLEVELAND, HEATHER LYNN	1353 S GOVERNORS DR	EXCISE		(260) [REDACTED]
	IN STATE EXCISE POLICE			
	IN ST			
<input type="checkbox"/>	1712 E US HWY 20	EXCISE		W M

WSIRF-01

EX-08-012564 9/13/2008

☐ APPROVED BY:

ON:

EXHIBIT A

INDIANA STATE EXCISE POLICE

EX-08-012564 9/13/2008

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

OFFICER: RS2014 RICHARD J SWALLOW

Incident Report Form

REED, JEREMY

IN STATE EXCISE POLICE
IN ST

18. Citations	NAME	VIOL	ORDINANCE	PLATE	STATE YEAR	MAKE	MODEL
RJS08-1006-		AV	7.1-5-5-7				
Ordinance	1. 7.1-5-5-7		Sales Discrim	4.			
	2. 7.1-3-10-7		Scope Liq Dlr	5.			
	3. 7.1-5-8-1		Hindering Ent				

22. Business	NAME	ADDRESS	PHONE #S
DL0210553	LEBAMOFF'S CAP N' CORK	5430 COLDWATER RD.	

FORT WAYNE, IN 46825

26. Comments / Narratives	CREATED BY / ON	UPDATED BY / ON	LOCK
COMPLAINT FORM	RSWALLO 9/30/2008	RSWALLO 9/30/2008	Y

8/1/08 Complaint received by Major Poindexter. Complaint is that the premise is violating the scope of permit by delivering to customers via UPS. See attachments for proof of violations. Complaint issued to Swallow

COMPLAINT LOG	RSWALLO 9/30/2008	RSWALLO 10/6/2008	N
---------------	-------------------	-------------------	---

8/1/08 Complaint issued to Swallow

8/13/08 Went to premise to speak with owners. I was advised that Joseph Doust was the person I needed to speak, but he was not present. Left my business card for Mr. Doust to contact me. Swallow

8/18/08 Contacted Mr. Doust due to him not contacting me. While speaking with Mr. Doust, I asked him to provide me information pertaining to the shipments. Mr. Doust stated he would get me that information. Swallow

9/29/08 Contacted Mr. Doust due to him not sending me the information. Mr. Doust stated he would fax me that information within 30 minutes. Mr. Doust never faxed the information. Swallow

10/06/08 NOV Issued to Premise. See Narrative. - Swallow/H Cleveland/J. Reed

10/06/08 Complaint Closed. - Swallow

WSIRF-01 EX-08-012564 9/13/2008 ☐ APPROVED BY: ON:

INDIANA STATE EXCISE POLICE

EX-08-012564 9/13/2008

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

OFFICER: RS2614 RICHARD J SWALLOW

Incident Report Form
NARRATIVE **RSWALLO** **9/30/2008** **RSWALLO** **11/19/2009** **N**

On Wednesday August 13, 2008 at approximately 10:00 AM, I was at LEBAMOFF Enterprises Inc. D/B/A LEBAMOFF's Cap N' Corks, which is located at 5430 Coldwater Rd., Fort Wayne, County of Allen, Indiana 46825, due to a complaint received by GHQ for the violation of Scope of Permit To Wit: Illegal Alcoholic Beverage Deliveries.

Note: The Scope of Permit To Wit: Illegal Alcoholic Beverage Deliveries occurred on the following dates by D/B/A LEBAMOFF's Cap N' Corks using UPS to deliver alcoholic beverages:

Shipped Date: 07/22/08 Delivered Date: 07/31/08 Tracking Number:
 1ZAE7395A800003898 Alcoholic Beverages: 750 ml Bottle of 2006 Rocky Ridge California Syrah and 750 ml Bottle of 2005 Quail Hollow California Merlot
 Shipped Date: 08/05/08 Delivered Date: 08/13/08 Tracking Number:
 1ZAE7395A800004146 Alcoholic Beverages: 750 ml Bottle of 2005 El Tiburon California Cabernet and 750 ml Bottle of 2005 Hooper's Hall California Merlot
 Shipped Date: 09/16/08 Delivered Date: 09/25/08 Tracking Number:
 1ZAE7395A800004931 Alcoholic Beverages: 750 ml Bottle of 2005 Rock Hollow Central Coast California Merlot and 750 ml Bottle of 2006 Buffalo Grove California Merlot

On said date and time, I entered the premise. Upon entering the premise, I identified myself verbally and by badge as an Indiana State Excise Police Officer to an unknown Employee of the premise and explained the reason I was present. At this time, the Employee had me speak to the person in charge of the warehouse/shipping, who was identified as Matthew Brumbaugh by his Money Order and Driver's License.

When explained the reason I was present, Employee Brumbaugh stated he does not ship any alcoholic beverages. When shown the label that showed the Cap 'N Cork address, he stated he does not deal with that. When asked who does deal with that, he stated the owners. When asked where they were getting the alcoholic beverages from, he stated he thought from someone in Gary. When asked if it was from a wholesaler, he stated he did not know. When asked how he did not know due to him being in charge of the warehouse, he stated that the alcoholic beverages never entered the warehouse or inventory; the alcoholic beverages came already packaged with the Cap 'N Corks label affixed and stayed on the delivery truck. When asked if I could speak with one of the owners, he contacted Andy Lebamoff via the telephone.

While speaking with Owner Lebamoff, he stated that Joe Doust, the other owner, dealt with that. When asked where the records would be for the purchases of the alcoholic beverages used for the deliveries, Owner Lebamoff stated in the records department. Owner Lebamoff then stated he would call the records department and have them get those documents for me. When asked if the records department was on premise, Owner Lebamoff stated it was.

Once I had ended my telephone conversation with Owner Lebamoff, I went up to the

 WSIRF-01 EX-08-012564 9/13/2008 ☐ APPROVED BY: ON:

INDIANA STATE EXCISE POLICE

EX-08-012564 9/13/2008

OFFICER: RS2614 RICHARD J SWALLOW

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects
Incident Report Form

records department with Employee Brumbaugh.

When speaking with the records department staff, they provided me with the name of the wholesaler, Beer Guy Distributing, LLC D/B/A Winding Road Beverages, which is located at 2421 S. Nappanee St. Suite 1, Elkhart, County of Elkhart, Indiana 46516. When asked about the online wine sales, the records department stated that they did not know anything about it, but did provide me with some paperwork, which included Beverage Solutions Paperwork with the names of D/B/A Winding Road Beverages and D/B/A LEBAMOFF's Cap N' Corks on it and checks payable to D/B/A LEBAMOFF's Cap N' Corks from various companies.

While speaking with the records department staff, Owner Lebamoff arrived at the premise.

When asked about the alcoholic beverages delivered to them by D/B/A Winding Road Beverages, Owner Lebamoff stated that they did come into the warehouse and became part of the inventory before being shipped out. When asked further questions, Owner Lebamoff stated Owner Doust would have to answer those due to him not knowing.

After finishing my conversation with Owner Lebamoff, I explained to him that I needed Owner Doust to contact me and left my business card for him.

Once I had exited the premise, I contacted D/B/A Winding Road Beverages via the telephone and spoke with Lee Richardson, the Owner. When asked if he could send me the price sheets for his products, Owner Richardson asked why to which I replied because I was asking. When asked by Owner Richardson what I was looking for, I explained I was looking for products that D/B/A LEBAMOFF's Cap N' Corks was shipping to customers via UPS. Owner Richardson then explained that those items would not be on the standard price sheets, because they were on the Lionstone International Price Sheet, which is only offered to D/B/A LEBAMOFF's Cap N' Corks. When asked if he could fax me those pricing sheets, Owner Richardson stated he would.

Note: SLJ Group Inc. D/B/A Lionstone International LTD, which is located at 13801 Laurel Dr., Lake Forest, Illinois 60045, has a valid Primary Source Permit. The Permit Number is PS-IL-08547 Expiring 05/28/09.

On Monday August 18, 2008 I contacted Owner Doust via the telephone due to him not contacting me back. When asked about the shipments, Owner Doust stated that he does business with six or seven internet wine websites. When asked for the names of the companies he is dealing with, Owner Doust said he would have to look those up for me. When asked what the photocopies of the checks that the records department had given me were, Owner Doust stated he would have to check into that. When asked for records of the deliveries made by UPS for them, Owner Doust stated he would have to get those for me. When asked any information pertaining to this investigation, Owner Doust stated he would have to get back to me.

WSIRF-01 EX-08-012564 9/13/2008 ☐ APPROVED BY: ON:

INDIANA STATE EXCISE POLICE

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OFFICER: RS2614 RICHARD J SWALLOW

☐ Administrative☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects**Incident Report Form**

On Monday September 29, 2008 at approximately 9:00 AM, I again contacted Owner Doust via the telephone requesting the abovementioned information. Upon hearing this, Owner Doust stated he thought he sent me that information. When explained that he had not, Owner Doust stated he would fax it to me in thirty minutes. While continuing our conversation, Owner Doust stated he did not know that only an Employee of the Premise or Owner had to personally deliver alcoholic beverages to customers.

At the end for our conversation, I again provided Owner Doust with my contact information.

As of today's date, September 30, 2008, I have not received anything from Owner Doust or D/B/A LEBAMOFF's Cap N' Corks.

Also on this date, I contacted Owner Richardson of D/B/A Winding Road Beverages. While speaking with him, Owner Richardson again stated that the Lionstone International Products were only offered to D/B/A LEBAMOFF's Cap N' Corks and to no other Retailers or Dealers. When asked if D/B/A LEBAMOFF's Cap N' Corks offered these products to any other customers in any of their stores, Owner Richardson stated to his knowledge these items were only offered to web based purchases. (Note: D/B/A LEBAMOFF's Cap N' Corks does not offer online purchases on their website.) When asked if he could fax me the Lionstone International Products List that had been delivered to D/B/A LEBAMOFF's Cap N' Corks for the past six months, Mr. Richardson stated he would.

On Wednesday October 01, 2008 at approximately 11:21 AM, I received the fax Mr. Richardson.

Shortly after that, I contacted D/B/A LEBAMOFF's Cap N' Corks via the telephone and asked an unknown male clerk if they carried Black Fox Cabernet Sauvignon, which was a product on the Lionstone International Products List delivered to the premise by D/B/A Winding Road Beverages, to which he stated no.

On Monday October 06, 2008 at approximately 10:45 AM, Officers Heather Cleveland and Jeremy Reed of the Indiana State Excise Police and I were at D/B/A LEBAMOFF's Cap N' Cork to deliver a Notice of Violation for the charges of 1) Sales Discrimination by a Permittee, 2) Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries and 3) Hindering Law Enforcement.

Upon entering the premise, I identified us verbally and by badge as Indiana State Excise Police Officers to the clerk on duty. When asked if either Owner Lebamoff or Owner Doust were present, she stated no, but would get the manger, who was identified as James Stanley by his Employee Permit BR1454405 Expiring 08/24/11.

While speaking with Manager Stanley, he was explained the Notice of Violation to which he signed and received a copy.

WSIRF-01

EX-08-012564 9/13/2008

☐ APPROVED BY:

ON:

INDIANA STATE EXCISE POLICE

EX-08-012564 9/13/2008

OFFICER: RS2614 RICHARD J SWALLOW

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

Incident Report Form

Once Manager Stanley received the signed copy of the Notice of Violation, we exited the premise without incident.

Officer to Testify: Richard J. Swallow

INDIANA EXCISE POLICE CITATION REPORT



Citation Number RJS08-1006-1		Date Issued 10/6/2008	Time Issued 1045 Hrs	Citation Type ALCOHOL VIOLATION	
Citation Location 5430 COLDWATER RD Fort Wayne IN 46825					
PERSON / BUSINESS CITED					
Sex Race DOB Dr License			LEBAMOFF'S CAP N' CORK License Number: DL0210553 5430 COLDWATER RD. FORT WAYNE IN 46825 LEBAMOFF ENTERPRISES INC		
INCIDENT INFORMATION:					
Incident Number (LOGNUM) EX-08-012564		Incident Type ADMIN ENFORCEMENT			District 2
INCIDENT LOCATION LEBAMOFF'S CAP N' CORK 5430 COLDWATER RD FORT WAYNE, IN 46825					
Incident Occurred At / Between 7/22/2008 0800 Hours			Disposition 2000		
VEHICLE INFORMATION:					
Plate	State	Make	Model	Year	VIN
CHARGES:					
1	Code 7.1-5-5-7	Charge SALES DISCRIMINATION BY PERMITTEE			
2	Code 7.1-3-10-7	Charge SCOPE OF PERMIT - LIQUOR DEALER			
3	Code 7.1-5-8-1	Charge HINDERING ENFORCEMENT			
4	Code	Charge			
5	Code	Charge			
Court Information:					
Court ATC ADMINISTRATIVE			Court Date	Court Time	Day of Week
Court Disposition - Citation 1 PENDING			Court Disposition - Citation 2 PENDING		
Court Disposition - Citation 3 PENDING			Court Disposition - Citation 4		
Court Disposition - Citation 5			Court Disposition - Single Citation PENDING		
ID RS2614	Officer RICHARD J SWALLOW				

EXHIBIT B

INDIANA STATE EXCISE POLICE

EX-09-003125 3/11/2009

☐ Administrative

OFFICER: RS2614 RICHARD J SWALLOW

☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

Incident Report Form

1. Log Number EX-09-003125	1a. Incident Number 02	1b. File Number DL02-10553	1c. Case Number	2. UCR 22	LIQUOR LAWS	
3. Incident Type ADMIN ENFORCEMENT		4. Dispatcher RS2614	5. Source CP	6. District 2	7. Status CLSD	
8. Date Received 3/11/2009	8a. Rcvd 1545	8b. Disp	8c. Arrv	8d. Clrd	9. Disposition NOV - NOTICE OF VIOLATION	
INCIDENT OCCURRED AT OR BETWEEN			8e. Earliest Date and Time 1/29/2009 0951		8f. Latest Date and Time 3/18/2009 1035	
10. Location 5430 COLDWATER RD. FORT WAYNE IN 46825			10a. Cross Street		10b. Intersection <input type="checkbox"/>	
11. Premise Code ALCOHOL & TOBACCO BUSINESS			12. Business Name LEBAMOFF'S CAP N' CORK			
13. Modus Operandi Coding ENTRY: EXIT: METHOD:			VICTIM: IDENT IDENTIFIED PROPERTY AB/TOB ALCOHOL & TOBACCO AREA: SCOPE SCOPE OF PERMIT TIME OF DAY:			
14. Caller / Complainant Type Normal <input type="checkbox"/> Anonymous <input type="checkbox"/> Refused <input type="checkbox"/> Hang Up <input type="checkbox"/>						
15. Involved Persons						
STREET ADDRESS		INVOL	DOB	R S PHONE		
J Arr DATE	ARREST#	PrICHG	DESCRIPTION	Cnt	AddICHG	DESCRIPTION
[] BRUMBAUGH, MATTHEW 2540 LOGANBERRY COVE		EMPL1	12/20/1966			
2540						
[] LEBAMOFF, ANDREW 15533 TALON RIDGE COVE		OWN1	10/24/1961			
15533						
[] STANLEY, JAMES 7816 WEYMOUTH CT		MGR1	10/3/1948			
7816						
[] SWALLOW, RICHARD J 302 W WASHINGTON ST		EXCISE		(317) [REDACTED]		
RM E-112						
RM E-						
[] CLEVELAND, HEATHER 1353 S GOVERNORS DR		EXCISE		(260) [REDACTED]		
LYNN IN STATE EXCISE POLICE						
IN ST						
18. Citations						
NAME	VOL	ORDINANCE	PLATE	STATE YEAR	MAKE	MODEL
RJS09-0318-	AV	7.1-3-10-7				
Ordinance	1. 7.1-3-10-7	Scope Liq Dlr	4.			
	2.		5.			
	3.					
WSIRF-01 EX-09-003125 3/11/2009			[] APPROVED BY:		ON:	

EXHIBIT C

INDIANA STATE EXCISE POLICE

EX-09-003125 3/11/2009

OFFICER: RS2614 RICHARD J SWALLOW

☐ Administrative☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects**Incident Report Form**

22. Business	NAME	ADDRESS	PHONE #/S
DL0210553	LEBAMOFF'S CAP N' CORK	5430 COLDWATER RD.	

FORT WAYNE, IN 46825

26. Comments / Narratives	CREATED BY / ON	UPDATED BY / ON	LOCK
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COMPLAINT FORM	RSWALLO 3/17/2009	RSWALLO 3/17/2009	Y
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3-11-09 Received Email stating the premise is continuing to violate the scope of their permit by delivering via UPS. Complaint issued to self. RJS

COMPLAINT LOG	RSWALLO 3/17/2009	RSWALLO 3/17/2009	N
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3-11-09 Complaint received and issued to self.

3-18-09 NOV issued to premise. Complaint Closed.

WSIRF-01

EX-09-003125 3/11/2009

☐ APPROVED BY:

ON:

INDIANA STATE EXCISE POLICE

EX-09-003125 3/11/2009

☐ Administrative

OFFICER: RS2614 RICHARD J SWALLOW

☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects**Incident Report Form**

NARRATIVE RSWALLO 3/17/2009 RSWALLO 3/19/2009 N

On Wednesday March 18, 2009 at approximately 10:35 AM, Officer Heather Cleveland of the Indiana State Excise Police and I, Officer Richard J. Swallow of the Indiana State Excise Police, were at LEBAMOFF Enterprises Inc. D/B/A LEBAMOFF's Cap N' Corks, which is located at 5430 Coldwater Rd., Fort Wayne, County of Allen, Indiana 46825, to deliver a Notice of Violation for the charge of Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries due to a complaint being received by GHQ.

Note: The Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries occurred on the following dates by D/B/A LEBAMOFF's Cap N' Corks using UPS to deliver alcoholic beverages:

Delivered Date: 01/29/09

Order Number: 12RRT3554912

Alcoholic Beverages: 750 ml Bottle of 2006 Jones Bridge California Cabernet Sauvignon and 750 ml Bottle of 2006 Old School Lane California Syrah

Delivered Date: 03/11/09

Order Number: 12RRT3637276

Alcoholic Beverages: 750 ml Bottle of 2006 El Tiburon California Merlot and 750 ml Bottle of 2006 Silver Pony California Cabernet Sauvignon

On said date and time, Officer H. Cleveland and I entered the premise. Upon entering the premise, I identified us verbally and by badge as Indiana State Excise Police Officers to the female clerk on duty. When asked if the owners were present, she stated no. When asked if a manager was present, she stated yes and contacted Manager James Stanley, who was identified by his Employee Permit BR1454405 Expiring 08/24/11.

While speaking with Manager Stanley, I explained to him the reason we were present. Upon hearing this, he stated he would have Matthew Brumbaugh, who was later identified by his Employee Permit BR1447509 Expiring 07/18/2011, come speak with us due to him being in charge of the Wine Club.

When Mr. Brumbaugh arrived, I explained to him the reason we were present. Upon hearing the reason we were present, he stated that they were not doing that. When explained that I had invoices showing that they were using UPS, Mr. Brumbaugh did not say anything. When asked if the Employees of the premise were delivering the alcohol beverages throughout the state of Indiana, Mr. Brumbaugh stated no.

At this time, Mr. Brumbaugh contacted Owner Andy Lebamoff so that I could speak with him concerning this matter.

While speaking with Owner Lebamoff, he admitted that they were still using UPS to deliver alcoholic beverages. Owner Lebamoff stated they had continued to deliver

WSIRF-01 EX-09-003125 3/11/2009 ☐ APPROVED BY: ON:

INDIANA STATE EXCISE POLICE

EX-09-003125 3/11/2009

☐ Administrative

OFFICER: RS2614 RICHARD J SWALLOW

☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

Incident Report Form

alcoholic beverages using UPS due to the Notice of Violation issued previously for the same charge not being addressed. Owner Lebamoff stated his attorney has attempted to work something out with our prosecutor, but has not been able too due to Prosecutor Drewry only working two (2) days a week. Owner Lebamoff further stated that D/B/A LEBAMOFF's Cap N' Corks actions were making the State of Indiana money.

Once my conversation with Owner Lebamoff was over, I explained the Notice of Violation to Mr. Brumbaugh.

After Mr. Brumbaugh received the signed copy of the Notice of Violation, Officer H. Cleveland and I exited the premise without incident.

Note: Owner Lebamoff and Mr. Brumbaugh were made clear that they were not allowed to use UPS to deliver their alcoholic beverages, and that all deliveries of alcoholic beverages had to be made by an Employee of the premise.

Officer to Testify: Richard J. Swallow

Attachments: Invoices showing deliveries via UPS

INDIANA EXCISE POLICE CITATION REPORT



Citation Number RJS09-0318-1		Date Issued 3/17/2009	Time Issued 1035 Hrs	Citation Type ALCOHOL VIOLATION	
Citation Location 5430 COLDWATER RD. Fort Wayne IN 46825					
PERSON / BUSINESS CITED					
			LEBAMOFF'S CAP N' CORK License Number: DL0210553 5430 COLDWATER RD.		
			FORT WAYNE IN 46825 LEBAMOFF ENTERPRISES INC		
Sex	Race	DOB	Dr License		
INCIDENT INFORMATION:					
Incident Number (LOGNUM) EX-09-003125		Incident Type ADMIN ENFORCEMENT			District 2
INCIDENT LOCATION					
LEBAMOFF'S CAP N' CORK 5430 COLDWATER RD. FORT WAYNE, IN 46825					
Incident Occurred At / Between 1/29/2009 0951 Hours				Disposition 2000	
VEHICLE INFORMATION:					
Plate	State	Make	Model	Year	VIN
CHARGES:					
1	Code 7.1-3-10-7	Charge SCOPE OF PERMIT - LIQUOR DEALER			
2	Code	Charge			
3	Code	Charge			
4	Code	Charge			
5	Code	Charge			
Court Information:					
Court ATC ADMINISTRATIVE			Court Date	Court Time	Day of Week
Court Disposition - Citation 1 PENDING			Court Disposition - Citation 2		
Court Disposition - Citation 3			Court Disposition - Citation 4		
Court Disposition - Citation 5			Court Disposition - Single Citation PENDING		
ID RS2614	Officer RICHARD J SWALLOW				

EXHIBIT D

INDIANA STATE EXCISE POLICE

EX-09-004798 4/23/2009

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

OFFICER: RS2614 RICHARD J SWALLOW

Incident Report Form

1. Log Number EX-09-004798	1a. Incident Number 02	1b. File Number DL02-10553	1c. Case Number	2. UCR 22 LIQUOR LAWS
3. Incident Type ADMIN ENFORCEMENT		4. Dispatcher RS2614	5. Source CP	6. District 2
7. Status CLSD		9. Disposition NOV - NOTICE OF VIOLATION		
8. Date Received 4/23/2009	8a. Rcvd 1141	8b. Disp	8c. Arrv	8d. Clrd
INCIDENT OCCURRED AT OR BETWEEN		8e. Earliest Date and Time 4/23/2009 0940		8f. Latest Date and Time 5/1/2009 1100
10. Location 5430 COLDWATER RD. FORT WAYNE IN 46825		10a. Cross Street		10b. Intersection <input type="checkbox"/>
11. Premise Code ALCOHOL & TOBACCO BUSINESS		12. Business Name LEBAMOFF'S CAP N' CORK		
13. Modus Operandi Coding ENTRY: EXIT: METHOD:		VICTIM: IDENT IDENTIFIED PROPERTY AB/TOB ALCOHOL & TOBACCO AREA: SCOPE SCOPE OF PERMIT TIME OF DAY:		
14. Caller / Complainant Type Normal <input type="checkbox"/> Anonymous <input type="checkbox"/> Refused <input type="checkbox"/> Hang Up <input type="checkbox"/>				
15. Involved Persons				
STREET ADDRESS		INVOL		DOB
J Arr DATE ARREST# PriCHG DESCRIPTION		Cnl AddlCHG DESCRIPTION		R S PHONE
Cnl PL Vd				
<input type="checkbox"/> LEBAMOFF, ANDREW		15533 TALON RIDGE COVE		OWN1 10/24/1961
		15533		
<input type="checkbox"/> SWALLOW, RICHARD J		302 W WASHINGTON ST		EXCISE (317) [REDACTED]
		RM E-112		
		RM E-		
<input type="checkbox"/> CLEVELAND, HEATHER LYNN		1353 S GOVERNORS DR		EXCISE (260) [REDACTED]
		IN STATE EXCISE POLICE		
		IN ST		
18. Citations				
NAME		VIOL		ORDINANCE
RJS09-0501-		AV		7.1-3-10-7
Ordinance		1. 7.1-3-10-7		Scope Liq Dir
		2.		4.
		3.		5.
22. Business				
NAME		ADDRESS		PHONE #/S
DL0210553		LEBAMOFF'S CAP N' CORK		5430 COLDWATER RD.
		FORT WAYNE, IN 46825		
26. Comments / Narratives				
CREATED BY / ON		UPDATED BY / ON		LOCK
WSIRF-01 EX-09-004798 4/23/2009 <input type="checkbox"/> APPROVED BY: ON:				

EXHIBIT E

INDIANA STATE EXCISE POLICE

EX-09-004798 4/23/2009

☐ Administrative

OFFICER: RS2614 RICHARD J SWALLOW

☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects**Incident Report Form****COMPLAINT FORM** RSWALLO 4/29/2009 BMCKINN 12/31/2009 10 Y

4-23-09 I received information and documentation that Cap N Cork is still shipping using UPS. Complaint logged and issued to self.

COMPLAINT LOG RSWALLO 4/29/2009 RSWALLO 4/29/2009 N

4-23-09 I received information and documentation that Cap N Cork is still shipping using UPS. Complaint logged and issued to self.

5-1-09 NOV issued and complaint closed. RJS

WSIRF-01

EX-09-004798 4/23/2009

☐ APPROVED BY:

ON:

INDIANA STATE EXCISE POLICE

EX-09-004798 4/23/2009

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

OFFICER: RS2814 RICHARD J SWALLOW

Incident Report Form
NARRATIVE **RSWALLO** **4/29/2009** **RSWALLO** **5/4/2009** **Y**

On Friday May 01, 2009 at approximately 11:00 AM, Officer Heather Cleveland of the Indiana State Excise Police and I, Officer Richard J. Swallow of the Indiana State Excise Police, were at LEBAMOFF Enterprises Inc. D/B/A LEBAMOFF's Cap N' Corks, which is located at 5430 Coldwater Rd., Fort Wayne, County of Allen, Indiana 46825, to deliver a Notice of Violation for the charge of Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries due to a complaint being received by GHQ.

Note: The Scope of Permit Violation To Wit: Illegal Alcoholic Beverage Deliveries occurred on the following date by D/B/A LEBAMOFF's Cap N' Corks using UPS to deliver alcoholic beverages:

Delivered Date: 04/23/09

Order Number: 12RRT3690141

Alcoholic Beverages: 750 ml Bottle of 2006 Addison Vineyards North Coast California Syrah and 750 ml Bottle of 2005 Bridge Trail Mendocino California Merlot.

On said date and time, Officer H. Cleveland and I entered the premise. Upon entering the premise, Manger James Stanley, who is known to Officer H. Cleveland and I, asked what did they do now. When explained that they have continued to ship via UPS, Manager Stanley stated he would have us speak with the Owner, Andrew (Andy) Lebamoff.

At this time, Manager Stanley took us to speak with Owner Lebamoff.

Upon meeting Owner Lebamoff, I identified us verbally and by badge as Indiana State Excise Police Officers and explained the reason we were present.

Upon hearing the reason we were present, Owner Lebamoff, he did not deny shipping UPS and tried to justify continuing to do so by stating the following:

- 1) He has attempted to speak with the Alcohol and Tobacco Commission concerning this matter, but they will not speak to him.
- 2) The Wineries were allowed to do so. When explained that the Wineries have a special permit to do so which they not entitled to have, Owner Lebamoff stated they are trying to change that.
- 3) He is paying the taxes on the Alcoholic Beverages and making the State money.

Once Owner Lebamoff was done speaking, I explained to him the Notice of Violation for the charge of Scope of Permit Violation To Wit: Illegal Deliveries.

After Owner Lebamoff signed and received a copy of the Notice of Violation, Officer H. Cleveland and I exited the premise without incident.

Officer to Testify: Richard J. Swallow

WSIRF-01

EX-09-004798 4/23/2009

☐ APPROVED BY:

ON:

INDIANA STATE EXCISE POLICE

EX-09-004798 4/23/2009

☐ Administrative
☐ Investigation ☐ Accident ☐ Arrests Made ☐ Suspects

OFFICER: RS2614 RICHARD J SWALLOW

Incident Report Form

Attachments: Invoice showing deliveries via UPS

WSIRF-01

EX-09-004798 4/23/2009

☐ APPROVED BY:

ON:

INDIANA EXCISE POLICE CITATION REPORT



Citation Number RJS09-0501-1		Date Issued 5/1/2009	Time Issued 1100 Hrs	Citation Type ALCOHOL VIOLATION	
Citation Location 5430 COLDWATER RD. Fort Wayne IN 46825					
PERSON / BUSINESS CITED					
Sex Race DOB Dr License			LEBAMOFF'S CAP N' CORK License Number: DL0210553 5430 COLDWATER RD. FORT WAYNE IN 46825 LEBAMOFF ENTERPRISES INC		
INCIDENT INFORMATION:					
Incident Number (LOGNUM) EX-09-004798		Incident Type ADMIN ENFORCEMENT			District 2
INCIDENT LOCATION LEBAMOFF'S CAP N' CORK 5430 COLDWATER RD. FORT WAYNE, IN 46825					
Incident Occurred At / Between 4/23/2009 0940 Hours			Disposition 2000		
VEHICLE INFORMATION:					
Plate	State	Make	Model	Year	VIN
CHARGES:					
1	Code 7.1-3-10-7	Charge SCOPE OF PERMIT - LIQUOR DEALER			
2	Code	Charge			
3	Code	Charge			
4	Code	Charge			
5	Code	Charge			
Court Information:					
Court ATC ADMINISTRATIVE			Court Date	Court Time	Day of Week
Court Disposition - Citation 1 PENDING			Court Disposition - Citation 2		
Court Disposition - Citation 3			Court Disposition - Citation 4		
Court Disposition - Citation 5			Court Disposition - Single Citation PENDING		
ID RS2614	Officer RICHARD J SWALLOW				

EXHIBIT F