



4. Plaintiffs Randy Lewandowki and Luther Stroder are customers of CNC who wish to receive home deliveries of wine sold to them by CNC. Lewandowski lives in Hamilton County at 50 East Admiral Way, Carmel, Indiana 46032. Stroder lives in Marion County at 7054 Pluto Drive, Indianapolis, IN 46241. Both Consumer Plaintiffs live more than 10 miles from the nearest CNC store, and CNC will not make home deliveries to them using its own vehicles.

5. Plaintiff CNC has executed an agreement with United Parcel Service (UPS) entitled "UPS Agreement for Approved Wine Shippers". A copy of this agreement has been attached hereto as Exhibit "A". Plaintiff has used UPS to make home deliveries for several of its customers who live more than ten (10) miles of a CNC store.

6. Consumer Plaintiffs Lewandowski and Stroder are willing to visit a CNC store in person one time to prove their ages and establish an account, but they cannot afford the time and expense of driving to Ft. Wayne from Hamilton County and Marion County every time they want to purchase wine from CNC.

7. Plaintiff CNC has been advised by many of its customers that they want wine delivered from CNC because it is inconvenient for them to come to Plaintiff's stores. Several of these customers live more than fifty (50) miles from the nearest Cap n' Cork store.

8. Plaintiff CNC has lost potential sales to customers who want the wine delivered but live outside their 10-mile delivery zone.

9. Plaintiff CNC currently operates fifteen (15) Cap n' Cork stores. Attached hereto as Exhibit "B" is a complete list of these stores.

10. Plaintiff CNC does an aggressive amount of internet advertising, which attracts customers from far distances. An example of one of Plaintiff's recent internet advertisements is attached hereto as Exhibit "C".

11. Plaintiff CNC has been visited and inspected by the Indiana Alcohol and Tobacco Commission ("ATC") on at least three separate occasions regarding Plaintiff's manner of wine delivery.

12. Plaintiff CNC has received three Reports of Permit Visit and Evaluation from the ATC. Copies of all three evaluations are attached hereto as exhibits "D-1", "D-2", and "D-3". Each of these ATC evaluations found that Plaintiff was using a common carrier, specifically UPS, to make deliveries of wine within the State of Indiana. It is believed that each of these reports refers to the same factual situation.

13. Plaintiff CNC recently has been cited to appear before the ATC on June 8, 2009 to answer as to its having used a common carrier to make wine shipments. Thus, Plaintiff's retail licenses to sell alcoholic beverages are at risk.

14. Indiana Code IC 7.1-3-15-3 prohibits a retail wine dealer from using a common carrier to make direct-to-consumer deliveries.

#### **FIRST CLAIM – VIOLATION OF INDIANA CONSTITUTION**

15. An Indiana winery is permitted to act as a retailer and sell and deliver its wine directly to customers if it holds a Small Farm Winery Permit.

16. When engaged in the retail sale and delivery of wine, the holder of a Small Farm Winery Permit may use a common carrier to make deliveries of wine provided that it also holds an Indiana Wine Direct Shipper's Permit. The latter permit is not limited to wineries located within the State of Indiana. Attached as Exhibit "E" is the relevant

statute that permits a Direct Wine Shipper to use a common carrier to make deliveries (see IC 7.1-3-26-9 (2)(c)).

17. Plaintiff CNC is not eligible for a Small Farm Winery Permit.

18. Holders of an Indiana Wine Wholesaler Permit may use common carriers to deliver wine to Indiana wine retailers on a case by case basis and to make emergency deliveries of wine.

19. The ATC lacks the authority to regulate, and in fact does not regulate, common carriers.

20. Plaintiffs believe that there is no rational basis for the distinction between a winery retailer and a wine store retailer with respect to using common carriers to deliver wine. Both sell wine at retail and both are permitted to make off-site deliveries to their customers. The only difference is the method of delivery – wineries may use common carriers for their deliveries, and therefore may deliver state-wide, while wine retailers must use their own delivery vehicles and are therefore limited to making deliveries near their premises.

21. Indiana Code section 7.1-3-15-3 violates the Indiana Constitution, Art. I, section 23, in that it denies Plaintiff 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. Plaintiffs herein seek declaratory relief from this Court in the form of a ruling that this statute is unconstitutional in requiring that retail license holders be limited to deliveries in their own vehicles and precluding the use of common carriers.

## **SECOND CLAIM – VIOLATION OF EQUAL PROTECTION CLAUSE**

22. Plaintiffs incorporate paragraphs 1-21 of the complaint.

23. Plaintiff CNC sells wine and other products that originate outside Indiana and move in interstate commerce.

24. Because there is no rational basis for distinguishing among categories of wine retailers for purposes of selling wine and using common carriers, Indiana Code section 7.1-3-15-3 denies Plaintiff CNC its right to equal protection of the law, in violation of the Equal Protection Clause of the United States Constitution and 42 U.S.C. §1983.

## **THIRD CLAIM – VIOLATION OF COMMERCE CLAUSE**

25. Plaintiffs incorporate paragraphs 1-24 of this complaint.

26. Almost all the wine and wine products sold and delivered by Plaintiff CNC are produced out of state. This out-of-state wine may not be shipped using a common carrier. The wines Plaintiff CNC intends to sell and deliver to consumers such as Consumer Plaintiffs Lewandowski and Stroder by common carrier have already passed through the Indiana three-tier system.

27. The wine sold and shipped by licensed Indiana winery retailers is produced within the state. This wine may be shipped by common carrier.

28. Indiana Code section 7.1-3-15-3 favors wine produced in the state, and disfavors wine produced out-of-state with respect to retail sales and deliveries.

29. This ban on using common carriers to deliver wine produced out of state violates the well recognized principal of federal Constitutional law that state statutes may neither discriminate against out-of-state products nor burden interstate commerce. See *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

**FOURTH CLAIM – ILLEGAL REGULATION OF A COMMON  
CARRIER**

30. Plaintiffs incorporate paragraphs 1-29 of this complaint.

31. To deliver its wine, Plaintiff CNC would use a common carrier such as UPS or FedEx or any other common carrier that engages in interstate business.

32. Indiana Code section 7.1-3-15-3 directly regulates interstate common carriers.

33. The Federal Aviation Administration Authorization Act of 1994 forbids States to "enact or enforce a law . . . related to a price, route, or service of any motor carrier," 49 U.S.C. §14501(c)(1). The U.S. Supreme Court has interpreted this provision as pre-empting states from regulating deliveries by UPS, FedEx, and other contemporary carriers, even in the context of dangerous or adult-only products. *Rowe v. New Hampshire Motor Transp. Assn.*, 128 S.Ct. 989 (2008).

34. To the extent that Indiana Code section 7.1-3-15-3 purports to prohibit common carriers from handling deliveries of wine in Indiana, it is preempted by federal law and unenforceable.

**FIFTH CLAIM – BURDEN ON INTERSTATE COMMERCE**

35. The wine sold and delivered by Plaintiff CNC originates outside Indiana and is moving in their original packages in interstate commerce to the customer. They pass through Indiana retailers because Indiana law generally requires wine that originates out-of-state to be distributed through an Indiana wholesaler and retailer.

36. Plaintiff CNC has a customer base spread throughout Indiana, which customers would be the end-users of the wine delivered by Plaintiff CNC through common carriers.

37. Indiana's preclusion of the use of common carriers by wine retailers creates a burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution and denies plaintiffs their right to engage in interstate commerce in violation of 42 U.S.C. §1983.

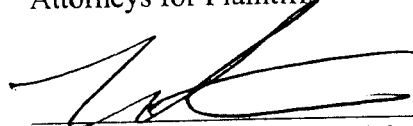
**CLAIM FOR ATTORNEY'S FEES.**

38. Plaintiffs incorporate paragraphs 1-37 of this complaint.

39. Plaintiffs' have been denied their federal statutory and constitutional rights as alleged herein, and therefore are entitled to reasonable fees under 42 U.S.C. §1988 as a result of the defendant's acts under color of state law in violation of 42 U.S.C. §1983.

WHEREFORE, Plaintiffs and each of them pray for declaratory relief determining that Indiana Code IC 7.1-3-15-3 is unconstitutional, for appropriate relief under claims one through four, for attorney's fees, for an injunction preventing the defendant and other governmental entities from precluding the use of common carriers by Plaintiffs, for an injunction prohibiting the defendant from proceeding with any civil, criminal or administrative action against CNC in connection with shipping by common carrier, and for all other relief proper in the premises.

Respectfully submitted,  
Attorneys for Plaintiffs



Robert D. Epstein (No. 6726-49)