

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

LEBAMOFF ENTERPRISES, INC., et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 16-cv-08607
)	
DONALD G. O'CONNELL, et al.)	Hon. John Z. Lee
)	
Defendants,)	
)	
- and -)	
)	
WINE AND SPIRITS DISTRIBUTORS)	
OF ILLINOIS)	
)	
Intervenor-Defendant.)	

**DEFENDANTS' AND INTERVENOR-DEFENDANT'S COMBINED MOTION TO
DISMISS JOSEPH DOUST AND LEBAMOFF ENTERPRISES, INC. AS PLAINTIFFS
PURSUANT TO RULE 12(B)(1) AND MOTION TO STRIKE CERTAIN
ALLEGATIONS OF PLAINTIFFS' COMPLAINT, AND PLAINTIFFS' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO RULE 12(F)**

Defendants Donald G. O'Connell, Commissioner and Acting Chairman of the Illinois Liquor Control Commission (the "ILCC"), and Thomas Gibbons, Patricia Pulido Sanchez, and Melody Spann Cooper, Commissioners of the ILCC (collectively, "defendants"), by and through their attorney, Kwame Raoul, Illinois Attorney General, and along with Intervenor-Defendant Wine and Spirits Distributors of Illinois ("WSDI"), by and through its undersigned counsel, and for their combined motion to dismiss Joseph Doust ("Doust") and Lebamoff Enterprises, Inc. ("Lebamoff") as plaintiffs pursuant to Rule 12(b)(1) for a lack of subject matter jurisdiction and

to strike certain allegations of plaintiffs' complaint, and plaintiffs' proposed findings of fact and conclusions of law related to Doust and Lebamoff, state as follows:¹

INTRODUCTION

A very recent development in this case has mooted the claims of Lebamoff and Doust, which must be dismissed for a lack of standing. Lebamoff and Doust allege that Illinois' direct-shipping laws (235 ILCS 5/5-1 (d) and 235 ILCS 5/6-29.1 (b)) bar them from shipping and selling wine directly to Illinois consumers in violation of the dormant Commerce Clause. They further allege that, absent these provisions, they would like to sell, ship, and deliver wine from their Indiana retail liquor stores directly to Illinois consumers. Doust and his partner, Andy Lebamoff, have recently sold all their Indiana-based retail liquor stores, transferred the liquor licenses to the third party that acquired their retail liquor stores, publicly announced their retirement from the industry and, upon information and belief, covenanted that they will not engage in the business of selling alcohol in Indiana.

Lebamoff's and Doust's decision to exit the retail alcohol business deprives them of standing to challenge Illinois' direct-shipping laws and, in turn, negates subject matter jurisdiction over their claims for declaratory and equitable relief, which must be dismissed as moot. Further, because Lebamoff and Doust are no longer in the retail alcohol business, certain allegations in their complaint and proposed findings of fact and proposed conclusions of law are no longer true. Controlling law requires those untrue allegations to be stricken.

¹ Count I is the only remaining claim here, as Count II has been voluntarily dismissed. DKT. # 80. Count I is brought by Joseph Doust and Lebamoff Enterprises, Inc. (as retail-plaintiffs), as well as by consumer plaintiff, Karen Berkley ("Mrs. Berkley"). The instant motion does not challenge Mrs. Berkley's claim.

FACTUAL BACKGROUND

At the time this action was filed, Lebamoff was an Indiana corporation (d/b/a Cap n' Cork) that operated 15 retail liquor stores in Fort Wayne, Indiana. At that time, Lebamoff was licensed to sell alcohol in the State of Indiana but alleged that it was “prohibited by law from selling, delivering or shipping wine from its inventory directly to consumers in Illinois.” Exh. A, ¶ 16. Lebamoff and Doust challenged Illinois’ direct-shipping laws by seeking prospective injunctive and declaratory relief, which, in pertinent part, requested:

- a judgment declaring 235 ILCS 5/5-1 (d) and 235 ILCS 5/6-29.1 (b), unconstitutional to the extent that they prohibit out-of-state wine retailers from selling, shipping and delivering wine directly to Illinois consumers, as a violation of the Commerce Clause of the United States Constitution; and
- an injunction prohibiting defendants from enforcing those statutes and requiring them to allow out-of-state wine retailers to sell, ship, and deliver directly to consumers in Illinois.²

To establish standing, Lebamoff and Doust alleged that they are unable to sell wine to Illinois consumers from their retail stores in Indiana, but “intend[] to sell and ship wines directly to consumers in Illinois if the laws prohibiting such sales and shipments are removed or declared unconstitutional.” Exh. A, ¶ 4.

In July 2021, 2021, Big Red Liquors acquired all fifteen of the Lebamoff liquor stores. Exh. C. As part of this transaction, Lebamoff requested permission from the Indiana Alcohol and Tobacco Commission (“ATC”) to transfer its liquor licenses to Big Red Liquors. At a meeting held on August 17, 2021, the Indiana ATC approved the transfer of the Lebamoff liquor licenses to Big Red Liquors. Accordingly, Doust and Lebamoff no longer own and operate retail liquor

² Lebamoff and Doust confirmed in subsequent pleadings that they “are claiming no monetary damages.” Exh. B. Lebamoff and Doust’s only other prayer for relief requests attorney’s fees and costs. However, this request is irrelevant to the issue of whether they have standing and whether their claims are moot. *Cornucopia Inst. v. U.S. Dept. of Agric.*, 560 F.3d 673, 676 (7th Cir. 2009) (“a claim for attorneys’ fees is separate from the merits of the action, it cannot save [plaintiffs] claim from becoming moot.”).

business in Indiana (or elsewhere). Nor will they own and operate retail liquor stores in the near future. First, as part of this transaction, Lebamoff and Doust publicly stated that the sale was done because they are exiting the industry permanently. See e.g., Exh. C (“The decision to retire wasn’t an easy one.”). Second, upon information and belief, the sale of Lebamoff to Big Red Liquors includes a contractual non-compete clause that prohibits Doust and Lebamoff from competing in the retail liquor business in the State of Indiana (*i.e.*, the only state that they have operated a retail liquor business).³

Given that Lebamoff and Doust are no longer engaged in the retail liquor business, counsel for defendants and WSDI initiated a meet-and-confer with plaintiffs’ counsel regarding their claims. On August 20, 2021, counsel for defendants and WSDI requested orally and in writing that Lebamoff and Doust be dismissed as plaintiffs due to their lack of Article III standing. Exh. D. Counsel for defendants and WSDI further requested that certain allegations of the complaint, and the proposed findings of fact and proposed conclusions of law regarding Lebamoff and Doust be withdrawn, as they are no longer true or correct. See Exh. E, SoF ¶¶ 2-9; ¶¶ CoL 3-4; Exh. A, ¶¶4-5, 16-18. Counsel for plaintiffs acknowledged that Lebamoff and Doust have sold their businesses and transferred their alcohol licenses, but have not reached a decision on whether to withdraw their claims for lack of standing or remove these allegations from their complaint or the proposed findings of fact and proposed conclusions of law. Given the approaching trial date and unambiguous law confirming Lebamoff’s and Doust’s lack of standing, the instant motion is

³ In written correspondence, defendants and WSDI asked plaintiffs’ counsel to provide a copy of the purchase and sale agreement with Big Red Liquors if plaintiffs disputed that Doust and Lebamoff were subject to non-competes barring them from the retail liquor business. See Exh. D, p 1. To date, plaintiffs’ counsel has neither verbally contested the existence of the non-compete nor provided a copy of the purchase and sale agreement.

brought to dismiss Lebamoff and Doust's claims as moot and to strike the now-incorrect allegations contained in their pleadings.

LEGAL STANDARD

The issue of subject matter jurisdiction is one that can and should be raised at any stage of the litigation when it appears that the Court no longer possesses jurisdiction over the claims in the action. *Micrometl Corp. v. Tranzact Technologies, Inc.*, 656 F.3d 467, 471 (7th Cir. 2011). Motions to dismiss claims as moot are properly brought under Rule 12(b)(1) for lacking subject-matter jurisdiction. See, e.g., *St. John's Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2006); *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 771 (7th Cir. 2002); *Snyder v. King*, 745 F.3d 242, 251 (7th Cir. 2014) (Wood, J., concurring) ("If [the case] were moot, then the dismissal would have to be under Rule 12(b)(1), for lack of subject-matter jurisdiction").

When ruling on a motion to dismiss under Rule 12(b)(1), the court may "properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *St. John's Church*, 502 F.3d at 625; see also *Ciarpaglini v. Norwood*, 817 F.3d 541, 543 (7th Cir. 2016). (noting that courts may "view evidence to determine whether subject matter jurisdiction exists in fact"). No presumption of truthfulness attaches to a plaintiff's standing allegations. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (when faced with evidence calling plaintiff's standing into question, "[t]he presumption of correctness that we accord to a complaint's allegations falls away"). Rather, when "standing is challenged as a factual matter, the plaintiff must come forward with competent proof - that is a showing by a preponderance of the evidence - that standing exists." *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003).

ARGUMENT

Lebamoff and Doust should be dismissed as plaintiffs under Rule 12(b)(1) because, as a result of their exit from retail liquor business, they no longer have standing to pursue their claims. This Court therefore lacks subject-matter jurisdiction over their claims, which should be dismissed as moot. Further, because Lebamoff and Doust are no longer in the retail liquor business, several of the allegations in the complaint and proposed findings of fact and proposed conclusions of law are no longer true as they relate to those parties. Accordingly, those allegations and proposed findings should be stricken.

A. Lebamoff And Doust No Longer Have Standing To Pursue Their Claims, Which Should Be Dismissed As Moot.

Lebamoff and Doust previously asserted that they have standing because: (1) they are injured by “being prevented from shipping wine to potential customers in Illinois;” (2) that the “cause of the injury is the law prohibiting an out-of-state wine retailer from shipping to Illinois consumers;” and (3) that this “injury is redressable because the defendants may be enjoined from enforcing this ban, and Lebamoff will then be able to compete for business in Illinois.” Exh. E, CoL ¶ 3. Lebamoff and Doust have since voluntarily exited the retail alcohol business and, therefore, cannot claim they are suffering from an injury that is traceable to Illinois’ direct-shipping laws. Further, given Lebamoff and Doust’s departure from this industry, they no longer have a personal stake in this litigation that is capable of redress by this Court.

Article III of the Constitution limits federal-court jurisdiction to “cases” and “controversies.” U.S. Const., Art. III, § 2. This limitation demands that “an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (“[T]he doctrine of standing

set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 149 (7th Cir. 2011) (The mootness doctrine, which is premised on both “constitutional requirements and prudential considerations,” requires that the case “contain a live dispute through all stages of litigation.”). “If an intervening circumstance deprives the plaintiff of a ‘personal stake in the outcome of the lawsuit,’ at any point during litigation, the action can no longer proceed and must be dismissed as moot.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990)); *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (“if an event occurs while a case is pending [review] that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party,” the court must dismiss the case as moot.”).

In order to have standing to bring a suit seeking prospective relief, such as declaratory and injunctive relief, a plaintiff must be able to show an actual controversy. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). “A plaintiff seeking a forward-looking remedy like an injunction or a declaratory judgment has standing to sue for an alleged future injury only if ‘the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.’” *Santiago v. City of Chicago*, 446 F. Supp. 3d 348, 364 (N.D. Ill. 2020) quoting *Swanigan v. City of Chicago*, 881 F.3d 577, 583 (7th Cir. 2018). Thus, a plaintiff “who seeks injunctive relief may do so only upon alleging a ‘real and immediate threat’ of a future injury.” *Cornucopia Inst. v. U.S. Dept. of Agric.*, 560 F.3d 673, 676 (7th Cir. 2009). The Seventh Circuit has held the same requirements apply for declaratory relief, and therefore a plaintiff must also demonstrate a likelihood of immediate future harm, not simply exposure to past, unconstitutional conduct. *Id.*; *Gilbert v. Illinois State Board of*

Education, 2008 WL 4390150 at *6 (N.D. Ill., 2008) (finding a “federal court may not issue a declaratory judgment based on past illegal action that plaintiff is unlikely to face again.”). Indeed, it is axiomatic that “[p]ast exposure to illegal conduct does not itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495- 96 (1974).

Lebamoff and Doust cannot satisfy the foregoing standing requirements at this stage of the litigation. There is no dispute that Lebamoff and Doust are no longer in the retail alcohol business, nor is there any dispute that they are barred from re-entering this business at any time in the near future. As such, Lebamoff and Doust do not face a real and immediate threat of a future injury caused by Illinois’ direct-shipping statute. *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017) (affirming dismissal of a constitutional challenge because “a past injury alone is insufficient to establish standing for purposes of prospective injunctive relief”). Because there is no possibility of any concrete and particularized future harm to Lebamoff and Doust, their claims for injunctive and declaratory relief must be dismissed.

Lebamoff and Doust also no longer have a personal stake in the outcome of this lawsuit that is capable of redress. Declaring Illinois’ direct-shipping statute unconstitutional or enjoining the Illinois Liquor Control Commission from enforcing that statute would have absolutely no impact on the (non-existent) businesses interests of Lebamoff or Doust, who are no longer in the retail alcohol business. Because this Court cannot grant Lebamoff or Doust any effectual relief, it does not have subject matter jurisdiction to rule on their moot claims. *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 627–28 (7th Cir. 2007) (dismissing First Amendment claims as moot and noting that “[e]ven though someone may be affected by the [defendant’s actions], that ‘someone’ is no longer [the plaintiff], and it is well established that the ‘case or controversy’

requirement applies to declaratory judgments, just as it applies to every other kind of litigation in federal court.”); *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001) (holding the plaintiff’s claim moot because the declaratory relief requested “would have no impact on the parties to this suit”); *Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677, 682 (7th Cir. 2017) (dismissing discrimination claim as moot because the plaintiff “is no longer in first grade and is no longer subject to the challenged” rules).

In sum, even if Lebamoff and Doust originally had standing to initiate the lawsuit, their claims for injunctive and declaratory relief are now moot. *Evers v. Astrue*, 536 F.3d 651, 662 (7th Cir. 2008) (claim becomes moot when plaintiff’s legally cognizable interest in litigation ceases to exist or where court “can no longer affect the rights of the litigants in the case”). Lebamoff and Doust cannot claim any ongoing injury caused by the Illinois direct-shipping statute, nor would their challenge to that statute afford them any relief. As such, they lack standing and their claims should be dismissed.

B. Plaintiffs’ Proposed Findings Of Fact And Conclusions Of Law Related To Lebamoff And Doust Should Be Stricken Pursuant to Rule 12(f).

Various allegations in plaintiffs’ complaint and proposed findings of fact and proposed conclusions of law assert or rely on the assertion that Lebamoff and Doust are in the retail alcohol business. See Exh. E, SoF ¶¶ 2-9; ¶¶ CoL 3-4; Exh. A, ¶¶4-5, 16, 18-19. Those allegations and proposed findings are no longer true and will thus prejudice defendants and WSDI if introduced at trial. Accordingly, those untrue allegations and proposed findings should be stricken pursuant to Rule 12(f).

Under Rule 12(f), the Court can strike “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f); *Delta Consulting Grp., Inc. v. R. Randle Constr., Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009). A district court may strike an

allegation when it “bears no possible relation to the controversy” or when the allegations are “devoid of any factual basis.” *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664–65 (7th Cir. 1992); see also *Anderson v. Bd. of Educ. of City of Chicago*, 169 F.Supp.2d 864, 867–68 (N.D. Ill. 2001) (“[p]rejudice results when the matter complained of has the effect of confusing the issues”). Motions to strike are appropriate if they serve to expedite litigation. See *Heller Fin., Inc. v. Midwhey Powder*, 883 F.2d 1286, 1294 (7th Cir. 1989).

Here, there is no dispute that certain of the allegations in plaintiffs’ complaint and proposed findings of fact and proposed conclusions of law rest on the now-incorrect assertion that Lebamoff and Doust operate retail liquor stores in Indiana. For instance, plaintiffs’ proposed findings of fact assert matters such as:

- Lebamoff Enterprises, Inc., is an Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana. Exh. E, SoF ¶ 2;
- Joseph Doust is co-owner and operator of Lebamoff Enterprises. Exh. E, SoF ¶ 3;
- Lebamoff carries some wines not available in Illinois. Exh. E, SoF ¶ 4;
- Lebamoff maintains an Internet web site, has previously handled deliveries and shipping of wine that was purchased from its retail stores or ordered through national wine clubs, and intends to continue to do so. It would ship to Illinois if it were lawful to do so. Exh. E, SoF ¶ 6;
- If allowed to ship wine from its Indiana location to Illinois consumers, Lebamoff Enterprises would collect and remit all taxes required under the terms of a license, verify the age of the purchaser, make its premises available to Illinois officials for inspection and audits, and consent to the jurisdiction of the Illinois Liquor Control Commission and Illinois courts. Exh. E, SoF ¶ 8
- Lebamoff Enterprises, Inc., has standing. It has suffered an injury by being prevented from shipping wine to potential customers in Illinois, a benefit that in-state retailers enjoy. . . . The cause of the injury is the law prohibiting an out-of-state wine retailer from shipping to Illinois consumers. The injury is redressable because the defendants may be enjoined from enforcing this ban, and Lebamoff will then be able to compete for business in Illinois. Exh. E, CoL ¶ 3

Plaintiffs are not permitted to introduce these untrue “facts” at trial, which should be stricken pursuant to Rule 12(f). *Delta Consulting Group, Inc. v. R. Randle Const., Inc.*, 554 F.3d 1133, 1142 (7th Cir. 2009) (trial court was “well within the discretion of the district court” to strike untrue allegations); *Talbot*, 961 F.2d at 665 (7th Cir. 1992) (district court properly struck allegations “devoid of any factual basis” under Rule 12(f)). Accordingly, to narrow the issue at trial and avoid confusion, plaintiffs’ allegations pertaining to Lebamoff and Doust owning and operating retail liquor stores in Indiana should be stricken.

CONCLUSION

For the foregoing reasons, defendants and WSDI respectfully request that the Court enter an Order dismissing Lebamoff Enterprises, Inc. and Joseph Doust as plaintiffs in this litigation and enter an order striking paragraphs 4-5, 16, 18-19 of the First Amended Complaint as they pertain to Lebamoff and Doust, paragraphs 2-9 of plaintiffs’ Proposed Findings of Fact and paragraphs 3-4 of plaintiffs’ Proposed Conclusions of Law.

Dated: August 25, 2021

Respectfully submitted,

By: /s/Richard J. Prendergast
Counsel for Intervenor Defendant
Wine and Spirits Distributors
Of Illinois

By: /s/Michael T. Dierkes
Counsel for Defendants

Richard J. Prendergast, Esq.
Michael T. Layden, Esq.
RICHARD J. PRENDERGAST, LTD.
111 W. Washington St., Suite 1100
Chicago, Illinois 60602
(312) 641-0881
rprendergast@rjpltd.com
mLAYDEN@rjpltd.com

Michael T. Dierkes
Mary A. Johnston
Illinois Attorney General’s Office
Assistant Attorney General
100 West Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 814-3672
michael.dierkes@ilag.gov
mary.johnston@ilag.gov

CERTIFICATE OF SERVICE

Richard J. Prendergast, an attorney, certifies that he caused a copy of **Defendants' and Intervenor-Defendant's Combined Motion to Dismiss Joseph Doust and Lebamoff Enterprises, Inc. as Plaintiffs Pursuant to Rule 12(B)(1) and Motion to Strike Certain Allegations of Plaintiffs' Complaint, and Plaintiffs' Proposed Findings of Fact and Conclusions of Law Pursuant to Rule 12(F)** to be served upon all counsel of record, via the Court's ECF system, on this **25th** day of **August, 2021**.

/s/ Richard J. Prendergast

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

LEBAMOFF ENTERPRISES, INC.,)	
JOSEPH DOUST)	
and)	
IRWIN BERKLEY)	
)	
Plaintiffs,)	Case No: 16-cv-08607
)	
vs.)	
)	Judge: Hon. William T. Hart
DONALD G. O'CONNELL, Commissioner and)	
Acting Chairman of the Illinois Liquor Control)	
Commission and)	
THOMAS GIBBONS,)	
PATRICIA PULIDO SANCHEZ,)	
& MELODY SPANN COOPER)	
Commissioners of the Illinois Liquor Control)	
Commission)	
)	
Defendants,)	
)	
and)	
)	
WINE AND SPIRITS DISTRIBUTORS)	
OF ILLINOIS)	
)	
Intervenor-Defendant.)	

FIRST AMENDED COMPLAINT BY CONSENT

Plaintiffs make the following allegations for their Complaint based upon information and belief, except for the allegations pertaining to Plaintiffs, which are based upon personal knowledge.

INTRODUCTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of 235 IL Comp. L. 5/5-1(d) and 235 IL Comp. L. 5/6-29.1(b) which

allow Illinois wine retailers to sell, ship and deliver wine directly to consumers within the state of Illinois, while prohibiting out-of-state retailers from doing so. Plaintiffs seek a declaratory judgment that this statutory scheme is unconstitutional for two reasons: It deprives them under color of law of their constitutional rights to engage in interstate commerce in violation of the Commerce Clause and *Granholm v. Heald*, 544 U.S. 460 (2005); and it denies Joseph Doust the same privilege to engage in his profession as a wine retailer on terms equivalent to that given to citizens of Illinois, in violation of the Privileges and Immunities Clause in Article IV. Plaintiffs seek an injunction barring Defendants from enforcing these laws to prohibit out-of-state wine retailers from selling, shipping and delivering wine directly to consumers in Illinois.

JURISDICTION

1. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges under the United States Constitution.

2. The Court has authority to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PLAINTIFFS

3. Consumer Plaintiff Irwin Berkley is a resident of Cook County, Illinois. He is over the age of twenty-one, does not live in a dry county, and is legally permitted to purchase, receive, possess and drink wine at his residence. He is a regular purchaser and consumer of fine wine and would purchase wine from out-of-state retailers and have those wines shipped to his residence in Illinois, if Illinois law permitted him to do so.

4. Plaintiff Lebamoff Enterprises Inc. is a Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana. Lebamoff Enterprises has been in business in Fort Wayne for fifty-five years. In that time, it has developed an extensive base of loyal customers who trust it to recommend, obtain, supply, sell and deliver wine to them. Lebamoff has received requests that it sell and ship wine to Illinois from customers who have moved to Illinois or who wish to send gifts of wine to Illinois residents, but is unable to do so as a result of the Illinois ban. It intends to sell and ship wines directly to consumers in Illinois if the laws prohibiting such sales and shipments are removed or declared unconstitutional.

5. Lebamoff maintains an Internet web site, has previously handled deliveries and shipping of wine that was purchased from its retail stores or ordered through national wine clubs, and intends to continue to do so.

6. Plaintiffs intend to pay all taxes that may be due on such interstate shipments and to comply with all other non-discriminatory state regulations.

DEFENDANTS

7. Defendants are sued in their official capacities.

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

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

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

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

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

I.
COMMERCE CLAUSE VIOLATION—
DISCRIMINATION AGAINST OUT-OF-STATE WINE RETAILERS WITH RESPECT TO SALE
TO CONSUMERS

13. In the State of Illinois, a wine retailer can obtain an off-premises license from Defendants which allows it to sell, ship and deliver wine directly to Illinois consumers any wine that it has in its inventory.

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

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

16. Lebamoff Enterprises, Inc., is not located in Illinois, is not eligible for an Illinois off-premises license, and is prohibited by law from selling, delivering or shipping wine from its inventory directly to consumers in Illinois.

17. The Consumer Plaintiff wants to buy wine directly from Lebamoff Enterprises, Inc. and other wine retailers outside of Illinois and to have these wines

delivered to his residence, including wines that have sold out in Illinois but are still available from retail stores in other states, older vintage wines and limited production allocated wines.

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

19. If Lebamoff Enterprises, Inc were permitted to sell, ship and deliver its wine directly to consumers in the State of Illinois, it would comply with applicable laws and regulations concerning permits, licenses, labeling, reporting, proof of age, and payment of taxes.

20. The laws of the State of Illinois treat interstate sales, shipment and delivery of wine by retailers differently and less favorably than intra-state sales, shipment and delivery of wine. This statutory scheme discriminates against out-of-state wine retailers and provides economic advantages and protection to wine retailers in Illinois, in violation of the Commerce Clause of the United States Constitution.

II.
PRIVILEGES AND IMMUNITIES CLAUSE VIOLATION—
OUT-OF-STATE WINE MERCHANT DENIED SAME PRIVILEGES AS ILLINOIS
CITIZENS WITH RESPECT TO SALE TO CONSUMERS

21. Plaintiffs repeat and re-allege paragraphs 1-20 as if set out fully herein.

22. Joseph Doust is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana. He is co-owner and operator of Lebamoff Enterprises in Fort Wayne.

23. Doust develops personal relationships with many of his customers, makes special wine purchases for them, consults with them about wine in person, by telephone

and by Internet, and sells and delivers wine to them. Some of his customers have moved to Illinois but want to continue to do business with him.

24. Some wines wanted by Mr. Doust's customers are difficult to obtain because they are old and only sold at auction, available only in limited allocated amounts or only for a limited time, or scarce because of their popularity.

25. Mr. Doust wants to practice his profession as a wine merchant in Illinois by consulting with, obtaining wines for, and delivering wines to Illinois residents, but is prevented from doing so by Illinois law.

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

27. No substantial reason exists for denying citizens of Indiana the same privilege to consult about, advise on, obtain, sell, deliver and ship wine to Illinois consumers as is given to citizens of Illinois.

28. Illinois' ban on wine sales and deliveries by out-of-state merchants denies Mr. Doust the privilege to engage in his occupation in the state upon the same terms as Illinois citizens, and therefore violates the Privileges and Immunities Clause in Article IV of the United States Constitution.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff seeks the following relief:

A. Judgment declaring 235 IL ST 5/5-1(d) and 235 IL ST 5/6-29.1(b), unconstitutional to the extent that they prohibit out-of-state wine retailers from selling, shipping and delivering wine directly to Illinois consumers, as a violation of the Commerce Clause of the United States Constitution.

B. Judgment declaring 235 IL ST 5/5-1(d) and 235 IL ST 5/6-29.1(b), unconstitutional to the extent that they prohibit out-of-state wine merchants from obtaining licenses and engaging in their occupations in Illinois, as a violation of the Privileges and Immunities Clause of the United States Constitution.

C. An injunction prohibiting Defendants from enforcing those statutes and requiring them to allow out-of-state wine retailers to sell, ship, and deliver directly to consumers in Illinois.

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

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

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

Respectfully submitted,

Attorneys for Plaintiffs

/s/ Robert D. Epstein

Robert D. Epstein (Indiana Attorney No. 6726-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
Rdepstein@aol.com

/s/ James A. Tanford

James A. Tanford (Indiana Attorney No. 16982-53)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 812-332-4966
Fax: 317-638-9891
tanfordlegal@gmail.com

/s/ Mark Elliot Furlane

Mark Elliott Furlane

Berger, Newmark & Fenchel P.C.

1753 North Tripp Avenue

Chicago, IL 60639

312-704-7223

mfurlane@bnf-law.com

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing all counsel of record:

/s/ Robert D. Epstein

Robert D. Epstein

Attorney for Plaintiffs

EXHIBIT B

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

Lebamoff Enterprises, Inc., et al.)	
Plaintiffs)	Case No: 16-cv-08607
)	
v.)	
)	Judge: Hon. William T. Hart
J.B. Pritzker, et al.)	
Defendants)	
)	
and)	
•)	
)	
Wine and Spirits Distributors of Illinois)	
Intervenor-Defendant)	

THE PLAINTIFFS' RULE 26(a) INITIAL DISCLOSURES

Pursuant to Fed. R. Civ. P. 26(a)(1)(A) and the Case Management Plan, the Plaintiffs herewith submit their Initial Disclosures.

I. Persons Potentially Having Discoverable Information:

1. All named parties or their representatives.
2. All Individuals listed on Defendant's and Intervenor-Defendant's Rule 26(a) Disclosures.

II. Documents

1. All Documents listed on Defendant's and Intervenor-Defendant's Rule 26(a) Disclosures.

III. Damages

Plaintiffs are claiming no monetary damages.

IV. Insurance

Plaintiffs are not aware of any relevant insurance policies.

Respectfully submitted,

Attorneys for Plaintiffs

/s/ Robert D. Epstein

Robert D. Epstein (Indiana Attorney No. 6726-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
Rdepstein@aol.com

/s/ James A Tanford

James A. Tanford (Indiana Attorney No. 16982-53)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 812-332-4966
Fax: 317-638-9891
tanfordlegal@gmail.com

/s/ Mark Elliot Furlane

Mark Elliott Furlane
Berger, Newmark & Fenchel P.C.
1753 North Tripp Avenue
Chicago, IL 60639
312-704-7223
mfurlane@bnf-law.com

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing all counsel of record:

/s/ Robert D. Epstein

Robert D. Epstein
Attorney for Plaintiffs

EXHIBIT C

Cap n' Cork sold to Indianapolis-based Big Red Liquors

By **Caleb Hatch** - June 23, 2021



Photo Supplied/Cap n' Cork

FORT WAYNE, Ind. (WOWO): Local liquor store chain Cap n' Cork is selling to Indianapolis-based Big Red Liquors.

The move, which was announced Wednesday, comes as Cap n' Cork co-owners and brothers-in-law Joe Doust and Andy Lebamoff plan to retire from the family-owned business.

The sale is expected to close in early July.

Founded in 1911 in Fort Wayne, Cap n' Cork has 15 total locations in Fort Wayne and New Haven. After the sale, the stores will continue to operate independently under the same name.

The sale will grow Big Red Liquors from 60 to 75 locations statewide.

"The decision to retire wasn't an easy one," said co-owner Andy Lebamoff. "We wanted to make sure we found a partner that would retain the integrity of the family business we've been building on for the last 110 years. We feel like we've found that in Big Red Liquors."

Caleb Hatch

[The Journal Gazette](#)[The Journal Gazette](#)[Subscribe/manage](#)[Log in](#)

- [FortWayne.com home](#)
- [Public notices](#)
- [Jobs](#)
- [Obituaries](#)
- [Celebrations](#)
- [Classifieds](#)
- [Advertising](#)

Thursday, June 24, 2021 1:00 am

Cap n' Cork chain sold to Indy retailer

Stores to maintain staff, branding

SHERRY SLATER | The Journal Gazette

A local liquor store chain that traces its beginnings to the 1933 repeal of Prohibition is being sold to an Indianapolis-based retailer, the owners announced Wednesday.

Big Red Liquors expects to close on its acquisition of Cap n' Cork early next month, according to a news release. Financial terms weren't disclosed. Joe Doust and Andy Lebamoff, Cap n' Cork's owners, are preparing to retire.

The brothers-in-law bought the chain from Lebamoff's father, George, in 1995. They expanded the business from eight stores to today's 15 locations in Fort Wayne and New Haven.

All the stores will remain open and operate under the Cap n' Cork brand under "combined Cap n' Cork and Big Red Liquors leadership," a news release said. The existing 160 employees are being offered jobs with the new owner.

Lebamoff learned his work ethic from his father. He described it as: "Don't stand around. Stay busy, wash windows, wash floors, clean the shelves. Talk to the customers, find out what they want. Move and rotate the stock, make it attractive. If you want to get ahead, you've got to work hard; then you can play hard."

"The decision to retire wasn't an easy one," Lebamoff said in a statement. "We wanted to make sure we found a partner that would retain the integrity of the family business we've been building on for the last 110 years. We feel like we've found that in Big Red Liquors."

Doust began working at the Georgetown Square location in 1978 and married Debbie Lebamoff, Andy's sister, in 1979. He acknowledged that change is difficult, but he added that combining the Cap n' Cork and Big Red operations will create efficiencies.

"We've built an exceptional team over the years, between our back-office staff and our long-tenured store managers and staff," he said in a statement. "They are our greatest assets. And now they are our Cap n' Cork

family legacy.”

With the acquisition, Big Red is increasing from 60 to 75 locations. The 40-year-old retailer now employs more than 450.

Don Rix, Big Red Liquors' CEO and president, said in a statement the company prioritizes serving communities responsibly.

“We consider it a great privilege to hold a liquor license,” he said, “and we take that responsibility very seriously.”

sslater@jg.net

Share this article

[Share on facebook](#) [Share on twitter](#) [Email story](#)

Copyright © 2021 www.journalgazette.net

600 W. Main Street

Fort Wayne IN 46802

EXHIBIT D

RICHARD J. PRENDERGAST, LTD.

ATTORNEYS AT LAW

111 WEST WASHINGTON STREET, SUITE 1100

CHICAGO, ILLINOIS 60602

(312) 641-0881 FAX (312) 641-3562

WEBSITE: www.rjpltd.com

RICHARD J. PRENDERGAST
SEAMUS C. PRENDERGAST
MICHAEL T. LAYDEN
DEIRDRE A. CLOSE
BRIAN C. PRENDERGAST
COLLIN M. BRUCK
DAVID J. RIVELLI
MARISSA N. PINTO

August 20, 2021

VIA ELECTRONIC DELIVERY

Robert D. Epstein
J. Alexander Tanford
Epstein, Cohen, Seif & Porter, LLP
50 S. Meridian Street, Suite 505
Indianapolis, Indiana 46204

Re: Lebamoff, et al. v. Pritzker, et al., Case No. 16-cv-08607

Bob and Alex:

This letter is transmitted pursuant to Rule 11 of the Federal Rules of Civil Procedure. As we discussed this morning, the owners of Lebamoff Enterprises, Inc., Joseph Doust and Andy Lebamoff, recently sold all 15 of their Fort Wayne alcohol retail shops to Big Red Liquors. It is our understanding that, as part of this transaction, Doust and Lebamoff have also transferred all of liquor licenses to Big Red Liquors and thus, are no longer legally permitted to engage in the sale of wine (in Indiana or otherwise).

Lebamoff and Doust publicly stated that the sale was done because they are exiting the wine industry permanently. See attached ("The decision to retire wasn't an easy one."). This announcement is not surprising, as any merger and acquisition of this nature would include a contractual restrictive covenant that prohibits Lebamoff and Doust from participating in the Indiana wine retail market for one or more years. If that is not correct, please promptly provide us a copy of the purchase and sale agreement to review.

As briefly described herein, Lebamoff and Doust's decision to exit the wine retail business deprives them of standing to challenge Illinois direct-shipping laws and, in turn, deprives the Court of subject matter jurisdiction over their claims for declaratory and injunctive relief. Further, given that Lebamoff and Doust are no longer in the business of selling wine, certain allegations in their complaint, and proposed findings of fact and proposed conclusions of law are no longer true.

Accordingly, we respectfully request that Lebamoff and Doust are voluntarily dismissed as plaintiffs in this litigation. We also request that you withdraw certain allegations and proposed findings related to Lebamoff and Doust that are indisputably no longer true. We believe that it is

necessary to address this issue – either by agreement or by motion – prior to the pre-trial conference on August 26, 2021.

I. Lebamoff And Doust Should Be Voluntarily Dismissed As Plaintiffs Because They No Longer Have Standing.

Lebamoff and Doust's departure from the wine industry deprives them of a personal stake in this litigation that is capable of redress. To establish Article III standing, "an actual controversy . . . must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). Here, quite obviously, the intervening event of Lebamoff's and Doust's voluntary exit of the wine industry deprives them of any personal stake in the outcome of this litigation.

Further, Lebamoff and Doust only seek prospective injunctive and declaratory relief. To obtain such relief, controlling law dictates that they must establish a real and immediate threat of future harm. *Cornucopia Inst. v. U.S. Dept. of Agric.*, 560 F.3d 673, 676 (7th Cir. 2009) (a plaintiff "who seeks injunctive relief may do so only upon alleging a 'real and immediate threat' of a future injury."); *Gilbert v. Illinois State Board of Education*, 2008 WL 4390150 at *6 (N.D. Ill., 2008) (finding a "federal court may not issue a declaratory judgment based on past illegal action that plaintiff is unlikely to face again."). Given that they are no longer in the business of selling wine, Lebamoff and Doust cannot establish any future injury imposed by Illinois direct-shipping laws. For these reasons, and others that will be raised by motion if need be, Lebamoff and Doust lack standing to pursue their claims, which should be voluntarily dismissed as moot.

II. Lebamoff And Doust Should Withdraw Their Allegations And Proposed Findings That Are No Longer True.

Various allegations in the complaint, proposed findings of fact and proposed conclusions of law assert or rely on the assertion that Lebamoff and Doust are in the business of selling wine. See SoF ¶¶ 2-9; ¶¶ CoL 3-4; Compl. ¶¶4-5, 16, 18-19. Those allegations and proposed findings are no longer true and should be withdrawn. *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664-65 (7th Cir.1992) (striking allegations that are "devoid of any factual basis"). For instance, the proposed findings of fact and proposed conclusions of law assert matters such as:

- Lebamoff Enterprises, Inc., is a Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana. SoF ¶ 2;
- Joseph Doust is co-owner and operator of Lebamoff Enterprises. SoF ¶ 3;
- Lebamoff carries some wines not available in Illinois. SoF ¶ 4;
- Lebamoff maintains an Internet web site, has previously handled deliveries and shipping of wine that was purchased from its retail stores or ordered through national wine clubs,

and intends to continue to do so. It would ship to Illinois if it were lawful to do so. SoF ¶ 6;

- If allowed to ship wine from its Indiana location to Illinois consumers, Lebamoff Enterprises would collect and remit all taxes required under the terms of a license, verify the age of the purchaser, make its premises available to Illinois officials for inspection and audits, and consent to the jurisdiction of the Illinois Liquor Control Commission and Illinois courts. SoF ¶ 8
- Lebamoff Enterprises, Inc., has standing. It has suffered an injury by being prevented from shipping wine to potential customers in Illinois, a benefit that in-state retailers enjoy. . . The cause of the injury is the law prohibiting an out-of-state wine retailer from shipping to Illinois consumers. The injury is redressable because the defendants may be enjoined from enforcing this ban, and Lebamoff will then be able to compete for business in Illinois. CoL ¶ 3

There is no dispute that these proposed findings, as well as the other allegations and proposed findings identified above, rest on the now-false assertion that Lebamoff and Doust are engaged in the business of selling wine in Indiana. Plaintiffs have an affirmative obligation to withdraw these allegations and proposed findings that are no longer true.

Accordingly, we ask that you please advise us next week whether you will agree to withdraw Lebamoff and Doust as plaintiffs and withdraw the now-false allegations and proposed findings related to their claims.

Respectfully,



Michael T. Layden

8/20/2021

Cap n' Cork sold to Indianapolis-based Big Red Liquors - WOWO 1190 AM | 107.5 FM

Cap n' Cork sold to Indianapolis-based Big Red Liquors

By Caleb Hatch · June 23, 2021



Photo Supplied/Cap n' Cork

FORT WAYNE, Ind. (WOWO): Local liquor store chain Cap n' Cork is selling to Indianapolis-based Big Red Liquors.

The move, which was announced Wednesday, comes as Cap n' Cork co-owners and brothers-in-law Joe Doust and Andy Lebamoff plan to retire from the family-owned business.

The sale is expected to close in early July.

Founded in 1911 in Fort Wayne, Cap n' Cork has 15 total locations in Fort Wayne and New Haven. After the sale, the stores will continue to operate independently under the same name.

The sale will grow Big Red Liquors from 60 to 75 locations statewide.

"The decision to retire wasn't an easy one," said co-owner Andy Lebamoff. "We wanted to make sure we found a partner that would retain the integrity of the family business we've been building on for the last 110 years. We feel like we've found that in Big Red Liquors."

Caleb Hatch

EXHIBIT E

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

Lebamoff Enterprises, Inc., et al.)	
<i>Plaintiffs</i>)	Case No. 1:16 cv 08607
)	
vs.)	Hon. William T. Hart
)	
Donald G. O'Connell, et al.)	
<i>Defendants</i>)	
)	
Wine & Spirits Distributors of Illinois)	
<i>Intervening defendant</i>)	

**PLAINTIFFS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Come now the plaintiffs, by counsel, and submit the following proposed findings of fact and conclusions of law.

A. Proposed findings of fact

1. Karen Berkley is a 70-year-old wine consumer who resides in Cook County, Illinois. She would like to be able to buy wine from out-of-state retailers and have it shipped because shopping at local stores is inconvenient because of her age, and she sometimes cannot find a particular wine locally. She has tried to order wine from out-of-state retailers, but they will not ship to her because Illinois law prohibits it. She would buy wine from out-of-state retailers and have it shipped if it were lawful to do so.

2. Lebamoff Enterprises, Inc., is a Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana. It has been in business for fifty-five years and has developed an extensive base of loyal customers who trust it to recommend, obtain, supply, sell and deliver wine to them. Some have moved to Illinois or have friends and family in Illinois to whom Lebamoff would ship wine if the ban on interstate shipping were lifted.

3. Joseph Doust is co-owner and operator of Lebamoff Enterprises. He resides in and is a citizen of Indiana.

4. Lebamoff carries some wines not available in Illinois.

5. Lebamoff has received inquiries about selling and shipping wine to Illinois but cannot do so because Illinois prohibits out-of-state retailers from shipping wine to Illinois consumers.

6. Lebamoff maintains an Internet web site, has previously handled deliveries and shipping of wine that was purchased from its retail stores or ordered through national wine clubs, and intends to continue to do so. It would ship to Illinois if it were lawful to do so.

7. Lebamoff would apply for an Illinois license to ship wine to Illinois consumers if one were available. It has not done so previously because no direct shipping license for out-of-state retailers is currently offered by Illinois officials.

8. If allowed to ship wine from its Indiana location to Illinois consumers, Lebamoff Enterprises would collect and remit all taxes required under the terms of a license, verify the age of the purchaser, make its premises available to Illinois officials for inspection and audits, and consent to the jurisdiction of the Illinois Liquor Control Commission and Illinois courts.

9. Lebamoff will not open a retail store in Illinois in order to gain direct shipping privileges. It would be prohibitively expensive, is not in its business plan, and would be useless because it would not allow it to ship wine from its Indiana inventory.

10. Donald G. O'Connell, Thomas Gibbons, Patricia Pulido Sanchez and Melody Spann Cooper are Commissioners of the Illinois Liquor and Control Commission, which enforces and administers the Illinois liquor control laws. Cynthia Berg has been appointed as its Chair.

11. To be sold in the United States, wine must be approved by the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB). Between 2015 and 2018, the TTB approved more than 443,000

wines for sale in the United States.

12. Illinois wholesalers have available for distribution less than one-quarter of the wines approved for sale by the TTB.

13. Thousands of wines of older vintages that were previously approved for sale in the United States are still available in small numbers at a few specialty wine stores, most of which are located outside Illinois.

14. Illinois wholesalers carry few old vintages or rare wines. Their profit is based on rapid turnover of inventory, not long-term storage or slow-selling niche wines.

15. Individual retailers typically carry only 500-3000 different wines.

16. The largest retailer in Illinois is Binny's Beverage Depot. It has approximately 13,000 wines for sale at its 40 retail stores around the state, which is 2.6% of the wines approved by the TTB.

17. In smaller towns outside the Chicago area with few wine stores, only around 1% of the wine approved for sale by the TTB is actually available locally. Even some common wines are not available.

18. Some consumers depend on knowledgeable wine retailers to advise them on what wines to purchase. In small cities outside the Chicago area, wine is sold primarily in grocery stores, pharmacies and small liquor stores that do not have such a wine adviser.

19. The existence of multiple retail outlets in an area does not increase the availability of wine, because all Illinois retailers must buy their wine from the same set of Illinois wholesalers.

20. Most retailers in Illinois do not carry rare, expensive, or old-vintage wines because they are hard to store, take up shelf space that could be used for faster selling wines, require special refrigerated storage units, and require a substantial per-bottle investment.

21. Illinois does not require all wine to pass through an in-state wholesaler, so a consumer can sometimes obtain wine not available locally by buying it directly from an out-of-state winery. This option is available only if the winery is located in the United States, has a web-site with a retail salesroom, and the wine is a current vintage and still in stock.

22. Foreign wines may not be ordered directly from the winery but are available to consumers only from retailers.

23. More than half of the wines approved for sale by the TTB come from foreign countries.

24. Most wine consumers buy wine for immediate consumption or as gifts, and make selections based primarily on price, brand loyalty and whatever is available at local retailers or grocery stores. They may request home delivery but do not order wine for delayed shipment either through a local retailer or an online retailer.

25. There also are a substantial number of specialty wine consumers who read wine publications such as the Wine Spectator (2 million readers), seek out specific highly rated wines based on reviews and their own experience, buy premium wine in quantity, store wine in home cellars, and maintain a collection of older vintages.

26. Many premium wines are hard to find locally because they are rare, produced only in small amounts, are older vintages, or are very expensive. First growth Bordeaux can cost \$1000 a bottle.

27. Rare, collectible and other premium wines are available only at a few specialty retailers most of which are located outside Illinois.

28. These specialty wine consumers drive the retailer-to-consumer direct shipping marketplace because it is the only convenient way to acquire premium wines. No one specialty retailer will carry all rare wines, so the ability to shop multiple online sources using

winesearcher.com or other internet search engine is necessary.

29. The retailer-to-consumer direct shipping market is also driven by the wine gift business, where wine is sent as part of a gift basket to friends, family, and business clients. Most of the retailers providing gift basket services are in California.

30. A wine retailer whose premises are physically located in Illinois can obtain a license from Illinois which allows it to take online orders and ship bottled wine directly to consumers in Illinois using common carriers or other third parties.

31. Lebamoff Enterprises, Inc., is not located in Illinois and cannot obtain a license that would allow it to sell and ship wine from its premises in Indiana to consumers in Illinois. No such license exists.

32. The ability of a retailer to sell online and ship to consumers' homes is a commercial advantage, because many people prefer home delivery, are looking for wine not available locally, or have age-related issues, disabilities or are under Covid-19 restrictions, that make shopping at a store difficult.

33. Illinois allows wineries in Illinois or located out-of-state to market their wine directly to consumers and ship it to their homes if the winery obtains a direct shipper license.

34. Illinois wineries, out-of-state wineries, national wine clubs and Illinois wine retailers market wine directly to Illinois consumers through newspapers and the Internet.

35. Illinois limits any dangers from mail-order wine sales by requiring the winery to obtain a winery shipper's license, limiting the quantity that can be shipped, and requiring age verification of the recipient.

36. The defendants have no data, records or other evidence showing that licensed winery shippers have failed to verify the age of purchasers or delivered wine to minors in Illinois.

37. Minors get no significant part of their alcohol from online wine shipping. They prefer beer and spirits, obtain alcohol opportunistically for immediate consumption, lack an address to which wine could be shipped, and usually do not have an independent credit card separate from their parents.

38. The ILCC does not consider online wine sales and shipping from licensed sellers a major safety issue and has no established enforcement program policing it. Its enforcement actions are directed toward preventing unlicensed shipping and sales to minors from Illinois bars and retailers.

39. National data confirm that direct-to-consumer wine shipping does not contribute to youth drinking. From 2006-2016, the number of states that allowed home wine deliveries grew from 26 to 45, but overall youth consumption steadily declined.

40. Online age verification services provided by AgeChecker, IDology, and other vendors are readily available to direct shippers.

41. Common carriers including FedEx and UPS provide shipping services for online wine sellers for \$2-15 a bottle that includes age verification upon delivery and the option to ship the wine to a FedEx or UPS store for pickup. In addition, they offer a service that requires an adult signature before delivery.

42. Responsible beverage server training for employees of Illinois off-premises retailers is not required.

43. Illinois allows in-state wine retailers and all wineries to market wine to consumers by various means, including Internet ads, and to ship wine directly to consumers.

44. During the period in which direct shipments of wine has been lawful in Illinois, there have been no instances in which tainted or unsafe bottled wine that posed a health risk was

offered for sale in Illinois by a direct shipper or a retailer. The only instances of tainted products have occurred in open bottles being used for by-the-drink orders at bars .

45. There are no known instances in which tainted or unsafe bottled wine that posed a health risk was offered for sale anywhere in the United States.

46. There is no evidence online wine sales increase alcohol-related traffic fatalities. The evidence shows fatalities declining over the same period as direct shipping has been increasing. In Illinois, there were 491 motor vehicle traffic fatalities in 2007, but only 418 fatalities 2017.

47. This is consistent with nationwide data that alcohol-related traffic fatalities have continued to decline even as direct shipping is increasing. There were 14,597 motor vehicle traffic fatalities in 2007, which fell to 12,747 fatalities in 2017.

48. There are approximately 1170 wine retailers in the United States which take orders online. Not all ship to all states, making the number of wine retailers that ship to any one state smaller.

49. Most wine retailers do not operate an online interstate shipping business because it is expensive and time-consuming to set up the website, requires licensing from each state, and requires that the retailer maintain separate accounting and record-keeping systems for each state

50. Illinois has 23,000 retail licensees in the state.

51. The ILCC enforcement staff is used primarily to conduct compliance checks, also called stings. In 2015-16, Illinois officials conducted 6425 compliance checks to determine if in-state retailers properly verified the age of purchasers. 1018 licensees (16%) failed. Few violations result in fines or license suspension. In 2017, the state imposed \$3625 total fines against 6 licensees and one 1-day suspension.

52. There is no evidence the ILCC has ever inspected the premises and inventory of either a

wholesaler or an off-premises retailer to look for tainted, illegal or unsafe bottled wine.

53. Allowing online sales and direct shipping of wine from out-of-state sources does not cause a loss of tax revenues. To the contrary, it increases revenue by increasing sales and collecting more taxes on those sales. When Maryland began to allow out-of-state wineries to obtain licenses to ship directly to consumers, 629 wineries obtained licenses and began shipping, which activity generated \$693,324 additional revenue from license fees, excise taxes and sales taxes. Its additional administrative costs were estimated to be \$100,000.

54. Illinois allows out-of-state wineries to ship directly to consumers if they collect and remit the same taxes as in-state wineries must remit.

55. Forty-five states allow wine to be shipped to consumers homes from out-of-state wineries, including Illinois.

56. Sixteen states and the District of Columbia allow shipments from out-of-state retailers.

57. Most states have created a licensing and reporting system for direct wine sales. In order to ship to consumers' homes, out-of-state sellers must obtain a license, remit state taxes, submit reports on what was shipped, consent to jurisdiction, allow audits and on-site inspections, and verify the age of the purchaser at the point of sale and on delivery.

58. In states that allow direct wine shipping, there are no credible reports of minors obtaining wine by having it shipped to their homes or of any other public health issue caused by direct-to-consumer wine shipping.

59. New Hampshire has allowed out-of-state retailers to ship wine to consumers for 20 years and has not experienced any difficulties or adverse consequences.

60. Nebraska allows out-of-state retailers to ship wine to consumers and has not experienced any difficulties or adverse public health consequences.

61. North Dakota allows out-of-state retailers to ship wine to consumers and has not experienced any issues with shipments to minors or other health and safety concerns.

62. Connecticut recently began to allow direct wine shipping by retailers. In the first six months, it issued 13 permits and has experienced no problems.

62. Oregon allows out-of-state retailers to ship wine to consumers and has not experienced any problems.

64. Wyoming allows out-of-state retailers to ship wine to consumers and has not experienced any difficulties, trouble or problems.

65. Illinois itself allowed out-of-state retailers to sell and ship wine directly to residents for 14 years under a reciprocity law from 1991-2005, and there is no evidence that any negative public health and safety problems occurred.

66. During the period in which direct shipments of wine from wineries has been lawful in Illinois, there have been no problems resulting from wine shipped from a properly licensed direct shipper. State enforcement actions have concerned unlawful shipping by unlicensed sellers.

67. Shipping costs for wine range from \$2 to \$15 per bottle, depending on the quantity, distance and shipping method. This raises the actual price of an online purchase compared to a local purchase, so the availability of direct-shipping primarily increases selection and customer convenience, and does not reduce the final price to consumers.

68. Online wine shipping shifts purchases from a local retailer to an online one. It does not increase the volume of wine purchased and consumed.

69. The prices of wines offered online from out-of-state retailers are not uniformly lower than the same wine offered by an Illinois retailer. Prices vary, are often cheaper at in-state sources, and many retailers offer rebate and discount cards to regular customers.

70. Illinois does not control the price of wine. There is no minimum pricing requirement and no prohibition against volume discounts. Wine can regularly be found at local retailers on sale for \$1-4 per bottle.

71. Illinois does not use taxes on alcoholic beverages to fund programs related to underage drinking or substance abuse prevention.

72. The Illinois General Assembly has asserted that banning direct shipping by out-of-state wine retailers is necessary to prevent youths from accessing alcoholic liquor; to protect revenue collections; and to protect the economy of the State.

B. Proposed Conclusions of Law.

1. Plaintiffs challenge Illinois law which, taken as a whole, allows in-state retailers to obtain a license permitting them to ship wine directly to consumers, but does not allow out-of-state retailers to do so, for the simple reason that they are located outside Illinois. The primary culprit is 235 ILCS 5/6-29.1(b), which prohibits the shipping of wine from a point outside this State to a person in this State. A retailer located in Illinois may obtain a license allowing it to ship wine throughout the state from its premises in Illinois, 235 ILCS 5/5-1(d), 235 ILCS 5/6-, but no equivalent license is available that would allow an out-of-state retailer to ship wine from its premises. See list of licenses in 235 ILCS 235 5/5-1. Shipping without a license is unlawful. 235 ILCS 5/2-1.

2. Karen Berkley has standing. She has suffered an injury by being prevented from ordering wine from out-of-state retailers. The cause of the injury is the law prohibiting an out-of-state wine retailer from shipping to Illinois consumers. The injury is redressable because the defendants may be enjoined from enforcing this ban and there are hundreds of wine retailers located outside Illinois which sell and ship wine to states where it is lawful to do so. *Cook*

County, Illinois v. Wolf, 962 F.3d 208, 218 (7th Cir. 2020). See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849-50 (7th Cir. 2000) (consumers have standing to challenge ban on direct shipping).

3. Lebamoff Enterprises, Inc., has standing. It has suffered an injury by being prevented from shipping wine to potential customers in Illinois, a benefit that in-state retailers enjoy. When the state erects a barrier like this which makes it more difficult for members of one group to obtain a benefit than it is for members of another group, the injury-in-fact is the denial of equal treatment resulting from the imposition of the barrier. *Doe v. Holcomb*, 883 F.3d 971, 978 (7th Cir. 2018). It is not necessary that the plaintiff have actually attempted to undertake the action prohibited by the statute. *Id.* The cause of the injury is the law prohibiting an out-of-state wine retailer from shipping to Illinois consumers. The injury is redressable because the defendants may be enjoined from enforcing this ban, and Lebamoff will then be able to compete for business in Illinois. See *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849-50 (7th Cir. 2000) (both seller and buyer have standing to challenge a ban on an interstate transaction).

4. The fact that Lebamoff has not previously applied for an Illinois liquor license does not defeat standing. No application for a permit is required when it would be futile to do so. *Sporhase v. Nebraska*, 458 U.S. 941, 944 n.2 (1982); *Unity Ventures v. Lake Co.*, 841 F.2d 770, 776 (7th Cir. 1988). Illinois has no license that would allow Lebamoff to ship wine from its Indiana premises to Illinois residents.

5. The defendants are properly sued in their official capacity for injunctive relief. They are Commissioners of the Illinois Liquor Control Commission (ILCC), which is charged by 235 ILCS 5/3-4 with carrying out the purposes of the Liquor Control Act. The *Ex parte Young* exception to sovereign immunity applies. *Doe v. Holcomb*, 883 F.3d 971, 975 (7th Cir. 2018).

6. In order to resolve a claim that a liquor law is unconstitutionally discriminating against interstate commerce, a court must consider both the Commerce Clause, U.S. Const., art. I, § 8, cl. 3, which generally prohibits such discriminatory rules, and the Twenty-First Amendment, U.S. Const., amend. XXI, § 2, which gives states fairly broad authority to regulate alcohol sales. Both provisions are parts of the same constitution and “each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.” *Brown-Forman Distillers Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573, 584-85 (1986).

7. A law violates the Commerce Clause if it treats out-of-state and in-state economic interests differently, burdening the former, and giving a competitive advantage to the latter. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). The ban on direct-to-consumer shipping by out-of-state wine retailers meets this definition because in-state retailers are allowed to ship to consumers and out-of-state retailers are not, which gives in-state retailers a competitive advantage in the important marketplace for online ordering and home delivery.

8. The Twenty-first Amendment allows states to impose even-handed burdens on commerce in alcoholic beverages, but does not permit states to discriminate against out-of-state interests. It gives states the authority to decide whether to require face-to-face sales or to allow online sales and home delivery, but “[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.” *Granholm v. Heald*, 544 U.S. at 493.

9. A State can justify a discriminatory state liquor law only if it proves that the different treatment actually advances a state interest closely related to its Twenty-first Amendment powers, which could not be advanced by reasonable non-discriminatory alternatives. *Granholm v. Heald*, 544 U.S. at 489-90; *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S.Ct 2449, 2474 (2019). The burden of proof is on the State and “concrete evidence” and “the clearest

showing is required.” *Granholm* at 490, 492. Mere speculation and unsupported assertions are insufficient. *Tenn. Wine* at 2474. This is an “exacting standard.” *Granholm* at 493.

10. Plaintiffs have established a violation of Commerce Clause. The ban against direct-to-consumer shipping in 235 ILCS 5/6-29.1(b) applies only to shipments by retailers originating from a point outside the state. Retailers located in Illinois are permitted to take online orders and ship wine to consumers throughout the state. 235 ILCS 5/5-1(d).

11. Plaintiffs have established that the ban on interstate shipping has significant adverse effects on interstate commerce by reducing the selection of wine available to Illinois consumers, especially those in smaller cities. It makes acquiring older, rare and collectible wine difficult because they are sold mostly at specialty retailers out side Illinois. It makes acquiring foreign wine difficult because they are sold only by retailers, most of whom are outside Illinois. Even if hundreds of wines are available locally and may satisfy the casual wine consumer, the wines valued and sought by specialty wine consumers and collectors are not available. The extent of the harm and number of consumers is not relevant, because there is no *de minimis* defense to a charge of discrimination under the Commerce Clause. *Assoc. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) (“actual discrimination ... is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred”); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988) (“neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown”).

12. Plaintiffs have also established that the ban on interstate shipping has a protectionist purpose. The Illinois General Assembly has declared that the ban is needed because “selling alcoholic liquor from a point outside this State through various direct marketing means, such as

catalogs, newspapers, mailers, and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor, to state revenue collection, and to the economy of this State.” 235 ILCS 5/6-29.1(b). The legislature did not explain why it found that only direct sales from out-of-state sources posed these threats other than that it threatened the local economy. The Commerce Clause “by its own force restricts state protectionism.” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S.Ct at 2461. The Twenty-first Amendment does not give states the power to enact protectionist laws, *id.* at 2468, so the State must prove that a ban on interstate competition is “unrelated to economic protectionism.” *Id.* at 2470. The state has failed to meet this burden.

13. The State has not shown that direct marketing to residents is a genuine threat to any state interest. Illinois allows in-state retailers, out-of-state wineries, in-state wineries, and national wine clubs to directly market their products through newspaper ads and the Internet. In any event, the State cannot constitutionally prevent wine retailers from advertising, marketing and engaging in other forms of commercial speech. 44 *Liquormart, Inc. v. Rhode Is.*, 517 U.S. 484, 505-06 (1994).

14. The State has not shown that direct shipping of wine poses any genuine threat to its efforts to prevent youths from accessing alcoholic liquor. The evidence shows to the contrary, that minors get no significant part of their alcohol from online wine shipping, that wine shipping does not increase youth consumption, and that Illinois does not even have an established enforcement program aimed at deterring shipping to minors. It shows that age verification services are available to shippers at the point of sale and point of delivery. The Supreme Court in *Granholm v. Heald* rejected the identical youth-access argument as unsupported by any evidence. 544 U.S. at 490.

15. The State has not shown that direct shipping of wine poses any genuine threat to its revenue collection. The evidence (and common sense) show to the contrary, that revenue is enhanced when a state creates a direct shipping program which brings more “gray market” sales into the system where they can be taxed. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 850 (noting that states make no real attempt to stop unlawful shipping to consumers). The Supreme Court in *Granholm v. Heald* rejected the identical diminished revenue justification as unsupported by any evidence. 544 U.S. at 491.

16. The Illinois General Assembly has also declared the need to “carefully *limit* direct shipment sales of wine” in order to promote temperance and minimize social problems associated with excessive alcohol consumption such as automobile fatalities, domestic violence, health problems, loss of productivity, and unemployment. 235 ILCS 5/6-29.1(a) (emphasis supplied). It did not declare that these interests justified a total ban, and the State has not shown that the direct shipment of wine poses such a serious threat to any of these interests that direct shipping must be banned instead of carefully regulated. The evidence is to the contrary, that overall consumption and associated social problems have been declining even as direct shipping is expanding. Forty-five states including Illinois allow direct shipping by wineries and sixteen allow direct shipping by retailers and none have reported any public health or safety problems. In any event, the Supreme Court in *Granholm v. Heald* rejected the argument that social problems associated with drinking justifies *banning* direct wine shipping, pointing out that a State can advance these goals by an even-handed system of licensing and regulation. 544 U.S. at 492.

17. The only evidence offered by the State of any potential adverse public health and safety problems from interstate wine shipping is a summary by William Kerr of economic studies

showing that lower prices for alcohol can increase consumption, and that increased consumption can lead to a host of social ills. This evidence does not meet the State's burden because it does not establish that wine shipped by out-of-state retailers is in fact cheaper than wine otherwise available to consumers, nor that wine (as opposed to beer and spirits) contributes to excessive drinking, nor that consumption of wine at home (as opposed to consumption at bars and restaurants) contributes to these problems.

18. The Illinois General Assembly also declared that direct shipment of wine should be carefully limited (not banned altogether) in order to maintain orderly distribution. 235 ILCS 5/6-29.1(a). The State has not shown that there is any serious threat to orderly distribution that would be caused by a licensing system for direct shipping. Indeed, it already uses such a system to allow out-of-state wineries to ship. 235 ILCS 5/6-29. In any event, the Seventh Circuit has already dismissed the "orderly market" justification as "a euphemism for reducing competition." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d at 851.

19. The mere fact that the ban on retailer direct shipping is part of Illinois' so-called "three-tier" system for regulating the distribution of alcoholic beverages does not make it constitutional. Although the use of a three-tier system is a legitimate way for a state to regulate alcohol, individual discriminatory regulations within that system are subject to Commerce Clause scrutiny. *Granholm v. Heald*, 544 U.S. at 488-89. In any event, Illinois does not have a three-tier system for wine. It allows wine to be sold by the producer directly to consumers without going through a wholesaler. 235 ILCS 5/5-1(a); 235 ILCS 5/6-29.

20. Even if the State had proved that direct wine shipping contributed to youth access, excessive consumption, revenue loss, or any other problem, it would still have to prove that no reasonable alternative existed that would minimize such problems. *Granholm v. Heald*, 544 U.S.

at 492-93. Illinois allows in-state retailers, in-state wineries, and out-of-state wineries to market, sell and ship wine to consumers. It mitigates any dangers by requiring that direct shippers get licenses, remit taxes, verify the age of the purchaser and comply with other regulations. This is exactly the reasonable nondiscriminatory alternative endorsed by the Supreme Court in *Granholm v. Heald*, 544 U.S. at 490-91. Whether a bottle of wine comes from a winery, an in-state retailer or an out-of-state retailer, the product being shipped is the same and the common carrier delivering it is the same. If the potential harm from one can be mitigated by licensing and regulation, so can the other. *Chemical Waste Mgmt., Inc. v. Hunt*, 504 US 334, 348 (1992).

21. The State has failed to prove that direct shipments from out of state retailers pose any kind of unique threat. Their only claim is that there are 400,000 retailers in the U.S., and if they all started shipping to Illinois, it would present a nightmare enforcement problem. The claim is disingenuous, because the evidence shows that only around 1170 retailers maintain any kind of internet sales and delivery service, and not all of them ship to all states. The State has presented no evidence why that small number of out-of-state retailers presents an enforcement problem, given that the ILCC already regulates 23,000 in-state retailers. In any event, the Supreme Court rejected this argument in *Granholm v. Heald*, holding that the fact that a state has greater regulatory control over in-state shippers than over out-of-state shippers “does not justify [a] discriminatory ban on direct shipping.” 544 U.S. at 490.

Respectfully submitted,
Attorneys for plaintiffs:

s/ James A. Tanford

James A. Tanford
Epstein Cohen Seif & Porter, LLC
50 S. Meridian St., Ste 505
Indianapolis IN 46204
Tel. 812-332-4966
Fax. 317-638-9891
tanfordlegal@gmail.com

Robert D. Epstein
Epstein Cohen Seif & Porter, LLC
50 S. Meridian St., Ste 505
Indianapolis IN 46204
Tel. 317-639-1326
rdepstein@aol.com

Mark Furlane
Berger, Newmark & Fenchel, P.C.
1753 N. Tripp Ave.
Chicago, IL 60639
Tel. 312-782-5050
Email: mfurlane@bnf-law.com

CERTIFICATE OF SERVICE

I certify that on November 2, 2020, the foregoing was filed with the Court through the ECF system which will provide notice to counsel of record for the defendants and intervening defendant.

s/ James A. Tanford

Epstein Cohen Seif & Porter, LLC