

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

TANNINS OF INDIANAPOLIS, LLC,)
d/b/a TASTINGS—A WINE EXPERIENCE,)
JACK BAILEY,)
STEVEN A. BASS,)
DAVID KITTLE,)
and)
BARRY BERNSON)

Plaintiffs,)

vs.)

Case No:

MATTHEW BEVIN, Governor of Kentucky,)
ANDREW BESHEAR, Attorney General)
of Kentucky,)
and)
NORMAN E. ARFLACK, Executive of)
Director of the Kentucky Department of Alcoholic)
Beverage Control)

Defendants.)

_____)

COMPLAINT

Plaintiffs make the following allegations 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 Kentucky law, practices, and regulations that allow in-state wine retailers to sell, deliver, and ship wine directly to consumers but prohibit out-of-state wine retailers from doing so. An out-of-state wine retailer, such as Tastings—A Wine Experience, and many other wine internet sellers throughout the United States, cannot sell, ship, and deliver to Kentucky consumers because Kentucky laws make this practice illegal. The plaintiffs seek a declaratory judgment that

this regulatory scheme is unconstitutional for two reasons: (1) it violates the Commerce Clause of the United States Constitution because it discriminates against out-of-state wine retailers engaged in interstate commerce, and (2) it violates the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution, because it denies non-resident wine merchants the privilege of engaging in their occupation in Kentucky on terms equivalent to those given to citizens of Kentucky. The plaintiffs seek a permanent injunction barring the defendants from enforcing these practices and regulations and requiring them to allow out-of-state wine retailers to sell, ship, and deliver wine to Kentucky consumers upon the same terms as in-state wine retailers.

JURISDICTION

1. This Court has jurisdiction to hear and adjudicate 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 arising under the United States Constitution.

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

PLAINTIFFS

3. Consumer Plaintiff, Steven A. Bass, is a resident of Louisville, Jefferson County, Kentucky. 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 wine collector and consumer of fine wine and would purchase wine from out-of-state wine retailers which would be added to his wine collection, and have those wines shipped to his residence in Kentucky, if Kentucky practices and regulations permitted him to do so.

4. Consumer Plaintiff, David Kittle, resides in Louisville, Jefferson County, Kentucky and is a wine consumer. 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 desires to purchase special wines that are difficult to locate. He would purchase wine from out-of-state wine retailers, and have those wines shipped to his residence in Kentucky, if Kentucky practices and regulations permitted him to do so.

5. Consumer Plaintiff, Barry Bernson, works in Louisville, Jefferson County, Kentucky. He is over the age of twenty-one, and is legally permitted to purchase, receive, possess and drink wine at his place of employment. He desires to purchase special wines that are difficult to locate. He would purchase wine from out-of-state wine retailers, and have those wines shipped to his place of employment in Kentucky, where a person over 21 is always available to sign for it, if Kentucky laws and regulations permitted him to do so.

6. Plaintiff, Tannins of Indianapolis, LLC, d/b/a Tastings—A Wine Experience (“Tastings”), is an Indiana limited liability company that operates a retail store, engages in internet sales, and makes direct-to-consumer deliveries where lawful. It has customers from all over the United States, including many from Kentucky. It has developed long-term relationships with customers for whom it makes special purchases. Tastings has received requests that it sell, ship, and deliver wine to Kentucky from customers, but is unable to do so because Kentucky law prohibits such transaction. It intends to sell, ship, and deliver wines directly to consumers in Kentucky if the rules and regulations prohibiting such sales and shipments are removed or declared unconstitutional.

7. Jack Bailey is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana. He owns and operates Tastings in Indiana.

8. Tastings maintains an Internet web site and has previously handled deliveries and shipping of wine to consumers that was purchased from its retail store.

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

DEFENDANTS

10. Defendants are sued in their official capacities.

11. Defendant, Matthew Bevin, is the Governor of Kentucky and is the chief executive officer.

12. Defendant, Andrew Beshear, is the Attorney General of Kentucky and is generally empowered to enforce Kentucky laws.

13. Defendant, Norman E. Arflack, is the Executive Director of the Kentucky Alcoholic Beverage Control, which is charged with enforcing Kentucky liquor control laws and regulations, including the ones challenged in this lawsuit.

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

Count I: Commerce Clause Violation

15. In the State of Kentucky, a resident wine retailer, pursuant to the terms of a retail package license, may sell, ship, and deliver wine from its inventory by common carrier directly to Kentucky consumers.

16. Tastings is not located in Kentucky, and its principal owner is not a Kentucky resident, so it is therefore not eligible to obtain a Kentucky retail package license or any other license that would allow it to sell and ship directly to consumers because KY. REV. STAT. § 243.100 imposes a 1-year residency requirement on applicants for retail licenses, and KY. REV. STAT. § 243.020 prohibits anyone from selling, delivering, or shipping wine into Kentucky without a license.

17. Steven A. Bass is a wine consumer, and he wants the opportunity to buy wine directly from Tastings and other wine retailers outside of Kentucky and to have these wines delivered to his residence.

18. He has contacted several out-of-state wine retailers either on the Internet or by phone in order to buy wines he cannot find in Kentucky but was unable to complete those purchases when he indicated he lived in Kentucky.

19. Many wine retailers who carry rare and unusual wine are located out of state including New York, Indiana, and California. Mr. Bass cannot afford the time and expense of traveling to out-of-state wine retailers to purchase a few bottles of rare wine and personally transport them home.

20. David Kittle is a wine consumer, and he wants the opportunity to buy wine directly from Tastings and other wine retailers outside of Kentucky and to have these wines delivered to his residence.

21. He has attempted to purchase wine from out-of-state wine retailers, including wine which he could not obtain either in his hometown or in Kentucky, and has been denied these purchases when he indicated he lived in Kentucky.

22. Some wines that he wants to buy are not available in retail stores in the Louisville area or elsewhere in Kentucky but are available from retail stores in other states. This includes older vintages no longer generally available except at specialty wine retailers located outside Kentucky, and current vintages that have sold out locally after receiving favorable reviews or because few bottles of limited production wine were allocated to Kentucky wholesalers.

23. Barry Bernson is a wine consumer, and he wants the opportunity to buy wine directly from Tastings and other wine retailers outside of Kentucky and to have these wines delivered to his place of employment in Louisville, Kentucky.

24. He has attempted to purchase wine from out-of-state wine retailers, including wine which he could not obtain in Kentucky and has been denied these purchases after indicating he wanted them shipped to Kentucky.

25. Some wines that he wants to buy are not available in retail stores in Kentucky but are available from retail stores in other states. This includes older vintages no longer generally available except at specialty wine retailers located outside Kentucky, and current vintages that have sold out locally after receiving favorable reviews or because few bottles of limited production wine were allocated to Kentucky.

26. The consumer Plaintiffs cannot complete the transactions described in paragraphs 17-25 above because the laws, regulations, and practices of Kentucky, including KY. REV. STAT. §§ 243.100(1)-(2) and 244.165 prohibit direct sales and shipments of wine from out-of-state wine retailers to in-state consumers and state officials will not issue any kind of license that would allow such transactions.

27. If Tastings were permitted to sell, ship, and deliver its wine directly to consumers in the State of Kentucky, it would obtain a license if one were available and would comply with the same rules concerning labeling, shipping, reporting, obtaining proof of age, and paying taxes as in-state wine retailers do.

28. By imposing a residency requirement upon applicants for liquor licenses and prohibiting out-of-state wine retailers from selling, shipping, and delivering wine directly to consumers while allowing in-state wine retailers to do so, the State of Kentucky is discriminating

against interstate commerce and protecting the economic interest of local businesses by shielding them from competition, in violation of the Commerce Clause of the United States Constitution.

Count II: Privileges and Immunities Clause Violation

29. Plaintiffs repeat and re-allege paragraphs 1-28 as if set out fully herein.

30. Jack Bailey is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana. He owns and operates Tastings—A Wine Experience in Indiana and makes his living in the wine business.

31. Mr. Bailey 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.

32. Mr. Bailey has also received requests from his customers to send wine to residents of Kentucky but was unable to complete those sales and ship the specifically requested wines because Kentucky law prohibits such transactions.

33. Some wines wanted by Mr. Bailey'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. Many of these wines are not available in Kentucky through its three-tier system.

34. Mr. Bailey wants to practice his profession as a wine merchant in Kentucky by consulting with, obtaining wines for, and delivery wines to Kentucky residents, but is prevented from doing so by Kentucky laws limiting licenses to Kentucky residents and prohibiting nonresidents from shipping directly to them.

35. Mr. Bailey is the owner of Tastings and has personally suffered economic harm by not being able to complete sales to Kentucky customers.

36. Mr. Bailey has not applied to Kentucky officials for a retail license because it would be futile to do so since he is not a resident of Kentucky.

37. If a license were available on terms equivalent to those for Kentucky citizens, Mr. Bailey would obtain it. He does not ask for the right to engage in the unlicensed sale of wine in Kentucky.

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

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

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

Request For Relief

WHEREFORE, Plaintiffs seek the following relief:

A. A judgment declaring KY. REV. STAT. §§ 243.100 (1)-(2), 243.240 (1), 244.165, and related laws and regulations unconstitutional to the extent that they prohibit out-of-state wine retailers from obtaining Kentucky retail licenses, selling, shipping, and delivering wine directly to a Kentucky consumer, as a violation of the Commerce Clause of the United States Constitution.

B. A judgment declaring KY. REV. STAT. §§ 243.100 (1)-(2), 243.240 (1), 244.165, and related laws and regulations that prohibit a nonresident from obtaining a Kentucky retail

license to sell, ship, and deliver wine directly to Kentucky consumers unconstitutional as a violation of the Privileges and Immunities Clause of the United States Constitution.

C. A permanent injunction prohibiting Defendants from enforcing those rules and regulations and requiring them to allow out-of-state wine retailers to obtain licenses and to sell, ship, and deliver wine directly to customers in Kentucky.

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,

/s/ J. Gregory Troutman

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