

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT BROCKIE,)
THE HOUSE OF GLUNZ, INC, and)
CHRISTOPHER DONOVAN,)
) Case No:
Plaintiffs,)
)
vs.)
)
GREGORY ABBOTT, Governor of Texas,)
KEN PAXTON, Attorney General of Texas,)
and ADRIAN BENTLEY NETTLES, Executive)
Director of the Texas Alcoholic Beverage)
Commission)
)
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 Texas 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 The House of Glunz, and many other wine internet sellers throughout the United States, cannot sell, ship, and deliver to Texas consumers because the Texas Alcoholic Beverage Code makes this illegal. The plaintiffs seek a declaratory judgment that this regulatory scheme is unconstitutional for two reasons: (1) it violates the Commerce Clause 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, because it denies nonresident wine merchants the privilege of engaging in their occupation in Texas on terms equivalent to those given to citizens of Texas. The plaintiffs seek an 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 Texas consumers upon the same terms as in-state wine retailers.

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 and other relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PLAINTIFFS

3. Consumer Plaintiff Robert Brockie resides in Dallas County, Dallas, Texas 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 their residence in Texas, if Texas practices and regulations permitted him to do so.

4. Plaintiff The House of Glunz, is an Illinois company that operates a retail store and engages in internet sales. It has customers from all over the country, including many from Texas. It has developed long-term relationships with customers for whom it

makes special purchases. It has received requests that it sell, ship, and deliver wine to Texas from customers, but is unable to do so as a result of its understanding of Texas rules, regulations, and practices. It intends to sell, ship, and deliver wines directly to consumers in Texas if the rules and regulations prohibiting such sales and shipments are removed or declared unconstitutional.

5. Christopher Donovan is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Illinois. He owns and operates The House of Glunz located in Illinois.

6. The House of Glunz maintains an Internet web site and has previously handled deliveries and shipping of wine that was purchased from its retail store.

7. 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

8. Defendants are sued in their official capacities.

9. Defendant Gregory Abbott is the Governor of Texas and is the chief executive officer.

10. Defendant Ken Paxton is the Attorney General of Texas and is generally empowered to enforce Texas laws.

11. Defendant Adrian Bentley Nettles is the Chairman of the Texas Alcoholic Beverage Commission, which is charged with enforcing Texas liquor control laws and regulations, 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.

Count I: Commerce Clause Violation

13. A package store located in Texas authorized to sell wine at retail may take orders by telephone or other means that do not require the consumer to appear in person at the store, and may sell, deliver and ship wine from its inventory to consumers, pursuant to Tex. Alco. Bev. Code §§ 22.01, 22.03, 24.01 and 24.03.

14. The House of Glunz is not located in Texas, is not owned by Texas residents and is not eligible for a Texas package store permit because Tex. Alco. Bev. Code §§ 6.01 and 6.03(g)-(k) require permit applicants to be Texas residents. Nonresidents may only import wine into Texas by selling it to a wholesaler pursuant to Tex. Alco. Bev. Code § 107.05.

15. The House of Glunz is prohibited from selling, delivering or shipping wine to consumers without a permit, Tex. Alco. Bev. Code §§ 11.01(a)(1) and 107.07

16. Robert Brockie is a wine consumer and he wants the opportunity to buy wine directly from The House of Glunz and other wine retailers outside of Texas and to have these wines delivered to his residence.

17. Brockie has attempted to purchase wine from out-of-state wine retailers, including wine which he could not find for sale in the Dallas area, but has been denied these purchases because the out-of-state retailer will not ship to Texas because of its laws.

18. Some wines that he wants to buy, he has not been able to find for sale in retail package stores in the Dallas area, but are available from retail stores in other states. This

includes older vintages no longer generally available except at specialty wine retailers located outside Texas, and current vintages that have sold out locally after receiving favorable reviews or because few bottles of limited production wine were allocated to Texas.

19. The Consumer Plaintiff cannot complete the transactions described in paragraphs 16-18 because the laws, regulations, and practices of Texas 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 permit that would allow such transactions.

20. If The House of Glunz were permitted to sell, ship, and deliver its wine directly to consumers in the State of Texas, 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.

21. By refusing to issue it a permit or provide other means for it to sell, ship, and deliver wine directly to consumers upon the same terms as in-state wine retailers, the State of Texas 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

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

23. Christopher Donovan is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Illinois. He owns and operates The House of Glunz in Illinois and makes his living in the wine business.

24. Mr. Donovan 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.

25. Mr. Donovan has also received requests from his customers to send wine to residents of Texas but was unable to ship the specifically requested wines because the laws, practices, and regulations of Texas prevent him from doing so

26. Some wines wanted by Mr. Donovan'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 Texas through its three-tier system.

27. Mr. Donovan wants to practice his profession as a wine merchant in Texas by consulting with, obtaining wines for, and arranging their delivery to Texas residents, but is prevented from doing so by Texas law, rules, and regulations.

28. Mr. Donovan has personally suffered economic harm by not being able to complete sales to Texas customers.

29. Mr. Donovan has not applied to Texas officials for a permit because it would be futile to do so, since Tex. Alco. Bev. Code § 6.03 will issue permits for the retail sale of wine only to residents of Texas, which he is not.

30. If a license or permit were available on terms equivalent to those for Texas citizens, Mr. Donovan would obtain it. He does not ask for the right to engage in the unlicensed sale of wine in Texas.

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

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

33. Texas's ban on wine sales and deliveries by out-of-state merchants denies Mr. Donovan the privilege to engage in his occupation in the state upon the same terms as Texas 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 Tex. Alco. Bev. Code §§ 11.01(a)(1), 6.03(g) and (k), 107.05, 107.07, and other practices and regulations that prohibit out-of-state wine retailers from selling, shipping, and delivering wine directly to a Texas consumer, unconstitutional as a violation of the Commerce Clause of the United States Constitution.

B. Judgment declaring Texas's law, practices and regulations that prohibit a nonresident from obtaining a permit to sell, ship, and deliver wine directly to Texas consumers unconstitutional as a violation of the Privileges and Immunities Clause of the United States Constitution.

C. An injunction prohibiting Defendants from enforcing those rules and regulations to the extent that they prohibit plaintiffs from selling and shipping wine directly to Texas consumers, and requiring them to allow out-of-state wine retailers to do so by issuing permits or other means.

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/ Rodney J. Gappelberg

Rodney J. Gappelberg (Texas Attorney No. 07626800)
Rodney J. Gappelberg, P.C.
12720 Hillcrest Rd., Suite 715
Dallas, TX 75230
Tel: 469-374-9900
Fax: 469-374-9906
gappelbergatty@gmail.com

/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/ Joseph Beutel

Joseph Beutel (Indiana Attorney No. 35085-49)
EPSTEIN COHEN SEIF & PORTER
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel: 317-639-1326
Fax: 317-638-9891
joe@beutellaw.com

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Robert Brockie, et al

(b) County of Residence of First Listed Plaintiff Dallas (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Rodney J. Gappelberg, P.C. 12720 Hillcrest Rd., Suite 715 Dallas, TX 75230 469-374-9900

DEFENDANTS

Gregory Abbott, Govenor, et al

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C 1983. Brief description of cause: Challenge of Constitutionality of Tex. Alco. Bev. Code §§ 11.01(a)(1), 6.03(g) and (k), 107.05, 107.07

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 07/12/2019 SIGNATURE OF ATTORNEY OF RECORD Rodney J. Gappelberg

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If a related case exists, whether pending or closed, insert the docket numbers and the corresponding judge names for such cases. A case is related to this filing if the case: 1) involves some or all of the same parties and is based on the same or similar claim; 2) involves the same property, transaction, or event; 3) involves substantially similar issues of law and fact; and/or 4) involves the same estate in a bankruptcy appeal.

Date and Attorney Signature. Date and sign the civil cover sheet.