

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

INDIANA FINE WINE & SPIRITS, LLC,

Plaintiff,

v.

DAVID COOK, Chairman, Indiana Alcohol and Tobacco Commission; JOHN KRAUSS, Vice Chairman, Indiana Alcohol and Tobacco Commission; DALE GRUBB, Commissioner, Indiana Alcohol and Tobacco Commission; and MARJORIE MAGINN, Commissioner, Indiana Alcohol and Tobacco Commission,

Defendants.

Case No. \_\_\_\_\_

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING  
THE CONSTITUTIONALITY OF STATE STATUTE**

Plaintiff, Indiana Fine Wine & Spirits, LLC d/b/a Total Wine & More (hereinafter “IFWS” or “Plaintiff”), hereby sues defendants David Cook, John Krauss, Dale Grubb, and Marjorie Maginn in their official capacities as members of the Indiana Alcohol and Tobacco Commission (“ATC”) for declaratory relief and a preliminary and permanent injunction, and states:

**PARTIES AND JURISDICTION**

1. Plaintiff IFWS is an Indiana limited liability company with a principal place of business in Bethesda, Maryland. The voting members of IFWS, who collectively hold 10 percent of the ownership interest, are two individual United States citizens who reside in Maryland. The nonvoting members of IFWS, who collectively hold 90 percent of the ownership interest, are five trusts whose ultimate beneficiaries (children of the voting members) are United States citizens but not residents of Indiana.

2. Defendant David Cook is the Chairman of the ATC.

3. Defendant John Krauss is the Vice Chairman of the ATC.

4. Defendant Dale Grubb is a Commissioner of the ATC.

5. Defendant Marjorie Maginn is a Commissioner of the ATC.

6. The four defendants, acting as the ATC, have authority to issue, deny, suspend, revoke, or not renew all alcoholic beverage permits, including the transfer permit sought by IFWS. Ind. Code § 7.1-2-3-9.

7. This action arises under Article I, Section 8, Clause 3 of the United States Constitution, as well as 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 2201 and 2202.

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

9. This Court has authority to issue declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because all defendants are residents of this State and one or more reside in this district, and because a substantial part of the events or omissions giving rise to the claim occurred in this district.

#### **FACTS COMMON TO ALL COUNTS**

11. IFWS has entered into a purchase agreement (Purchase Agreement) with MH Nora HG, LLC, for the purchase and transfer of Indiana Beer, Wine, and Liquor Package Store Dealer Permit No. DL49-31841 (the “Package Store Permit”) to IFWS. IFWS has paid into escrow for the benefit of the seller the full purchase price of the Package Store Permit.

12. The Package Store Permit authorizes its owner to operate a 26,000 square foot retail package store in the Nora Corners Shopping Center at 1460 E. 86th Street in Indianapolis, Indiana,

pursuant to a 10-year lease with the owner effective January 6, 2020 (the “Lease”). In contemplation of the transfer of the Package Store Permit, and to ensure that IFWS can open its contemplated package store in time for the critical holiday season, IFWS has incurred approximately \$40,000 in costs to design the site for a retail package store. IFWS has also incurred substantial, unrecoverable administrative and legal costs in contemplation of the transfer of the Package Store Permit in excess of \$60,000.

13. The Purchase Agreement and the Lease are both subject to IFWS successfully obtaining the approval of the Alcoholic Beverage Board of Marion County (“Local Board”) and the ATC for transfer of the permit. The Purchase Agreement automatically terminates if IFWS cannot obtain approval for the permit within 120 days after January 7, 2020. The Lease is terminable at the election of IFWS if the transfer is not approved by April 5, 2020.

14. IFWS applied with the ATC to transfer the Package Store Permit to IFWS. The ATC then assigned the transfer application to the Local Board to conduct a public hearing and recommend approval or denial. The Local Board’s duties are advisory only; authority to approve the transfer resides with the ATC. Ind. Code §§ 7.1-3-19-1 and -11(a); Ind. Code § 7.1-3-24-3.5(d).

15. IFWS’s application includes all information required by Indiana law for approval of the transfer. In addition, IFWS has the experience, knowledge, skill, good moral character, and other credentials to satisfy all valid requirements of Indiana law for owning and operating a retail liquor store. The individual owners of IFWS have vast experience in operating retail alcoholic beverage stores. IFWS is affiliated through common ownership with other entities that together own and operate 206 alcoholic beverage stores in 24 states other than Indiana, all trading under the Total Wine & More name.

16. Stores that operate under the Total Wine & More name are committed to offering the nation's best selection of alcoholic beverages, and to having the lowest prices on wine, spirits, and beer. IFWS desires to bring the Total Wine & More concept to Indiana consumers.

17. Finding a suitable location to open a business, particularly in a new state, is a time-intensive and costly process. IFWS has devoted hundreds of hours of time over the last 12 months studying the laws applicable to retail package store businesses in Indiana, evaluating the needs and desires of the residents in the state, identifying suitable real estate for its first flagship store, negotiating a lease, and acquiring a license that will allow it to operate its proposed package store business. These efforts lead to only one viable choice at this time: the Nora Corners Shopping Center, at 1460 E. 86th Street, in Indianapolis. The Nora Corners Center is optimal for an alcoholic beverage store using the Total Wine & More business model. It has outstanding road visibility, an ample parking field, easy ingress and egress, and a co-tenancy mix, including several national retailers, that will complement one another and provide the typical Total Wine customer an outstanding, one-stop shopping experience. Finding another location as suitable for IFWS is not feasible at this time.

18. IFWS has appointed a resident agent in the state of Indiana to accept service of process for IFWS. It has entered into a commercial lease at 1460 E. 86th Street in Indianapolis to serve as the premises for a package store. It expects to hire dozens of Indiana residents as management and staff employees to operate its first retail store in Marion County.

**COUNT I: COMMERCE CLAUSE VIOLATION**

19. Plaintiff alleges and incorporates by reference all allegations in the paragraphs above.

20. Section 7.1-3-21-5.4(b) of the Indiana Code (“Section 5.4(b)”) prohibits the ATC from issuing a dealer’s<sup>1</sup> permit for a package liquor store to a limited liability company unless “(1) at least sixty percent (60%) of the outstanding membership interest in the limited liability company is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years,” and “(2) the membership interest described in subdivision (1) constitutes a controlling interest in the limited liability company.” Other provisions of the Code impose similar in-state requirements on corporate, individual, and partnership applicants. *See* Ind. Code § 7.1-3-21-5 (corporations); § 7.1-3-21-3 (individuals); § 7.1-3-21-4 (partnerships); § 7.1-3-21-5.2 (limited partnerships).

21. Section 5.4(b) and the related in-state residency requirements violate the Dormant Commerce Clause in the U.S. Constitution and are therefore void and unenforceable. In 2009, the Indiana Attorney General reached that conclusion with respect to the materially identical corporate-residency requirement in § 7.1-3-21-5. A true and accurate copy of the Attorney General’s letter is attached hereto as **Exhibit A** (Greg Zoeller letter to Hon. P. Thomas Snow, Sep. 14, 2009). An Indiana appellate court reached the same conclusion, *Indiana Wholesale Wine & Liquor Co. v. State*, 662 N.E.2d 950 (Ind. Ct. App. 1996), although that decision was later vacated under the doctrine of constitutional avoidance. *Indiana Wholesale Wine & Liquor Co. v. State*, 695 N.E.2d 99 (Ind. 1998).

22. The unconstitutionality of Indiana’s in-state residency requirements was reinforced by the United States Supreme Court’s recent decision in *Tennessee Wine & Spirits Retailers Ass’n*

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<sup>1</sup> Indiana law classifies alcohol permits for the sale of alcohol for off-premises consumption as “dealer’s permits” – e.g., package liquor stores, grocery stores, and drug stores. “Retailer’s permits” refers to alcohol permits for on-premises consumption – e.g., restaurants. *See e.g.*, Ind. Code § 7.1-3-9-9 (liquor retailer); § 7.1-3-10-7 (liquor dealer).

v. *Thomas*, 139 S. Ct. 2449 (2019). In *Tennessee Wine*, the Court struck down Tennessee's two-year in-state residency requirement for a retail license to sell alcoholic beverages. The Court made clear that the nondiscrimination requirement in the Dormant Commerce Clause applies to applicants for retail licenses (or permits) to sell alcoholic beverages, and that a state law discriminating against out-of-state ownership of alcoholic-beverage permits cannot be saved by the Twenty-First Amendment if the predominant effect of the law is economic protectionism.

23. The predominant effect of Indiana's in-state residency requirements is economic protectionism within the meaning of *Tennessee Wine*. This is demonstrated in part by the absence of any consistent or rational Indiana public policy. Indiana's residency requirements for alcoholic beverage permits do not apply to permits issued to dining cars, boats, drug stores, grocery stores, hotels, airplanes, gaming sites, horse tracks, satellite facilities, and certain large restaurants. Ind. Code. § 7.1-3-21-6(a)(1) to -6(a)(10). The drug store and grocery store exceptions allow large out-of-state corporations like Walmart to sell alcoholic beverages in Indiana at some locations.

24. In 2006 the Indiana legislature eliminated the in-state residency requirements for permits issued to farm wineries and to wine and beer wholesalers. *See* Pub. L. No. 165-2006 (H.E.A. 1016). In 2004, it eliminated residency requirements for microbreweries. *See* Pub. L. No. 72-2004 (H.E.A. 1207).

25. In-state residency requirements for Indiana alcoholic beverage permits now apply only to owners of liquor stores and certain restaurant establishments selling less than \$100,000 in food per year. There is no rational basis to argue that the in-state residency requirement is necessary for these two classes of permittees, and no others. The remaining in-state residency requirements continue in effect solely to advance the protectionist interests of the local package store industry.

26. The intent and purpose of Indiana's in-state residency requirements is to protect in-state owners of package stores from economic competition by out-of-state owners. As recently as 2016, for instance, a Chicago-based retailer was planning to expand into Indiana through a corporation that met the in-state residency requirement at the time but gave an out-of-state person control over the corporation. The lobbyists of the in-state retail package store association and its members convinced the legislature to require that the in-state ownership interest in corporations, partnerships, and limited liability companies be a "controlling" interest in the corporation. *See* Pub. L. No. 214-2016, § 24 (HEA 1386) (amending Ind. Code §§ 7.1-3-21-5(b), 7.1-3-21-5.2(b), and 7.1-3-21-5.4(b)). The obvious purpose of the amendment, and the law itself, was economic protectionism.

27. The ATC considered Plaintiff IFWS's application during an open hearing on March 3, 2020. Notwithstanding controlling principles of federal law, as recently reaffirmed by the United States Supreme Court, all four defendants voted to deny IFWS's application on the ground that its owners do not satisfy the in-state residency requirements of Section 5.4(b). Vice Chairman Krauss commented at the hearing that the ATC was in a legal quagmire until a court or the Indiana General Assembly addresses the constitutionality of Section 5.4(b). A letter from Chairman Cook to IFWS the next day stated, as the sole ground for denying the application, that IFWS "does not meet the eligibility requirements as set out in IC 7.1-3-21-5.4 (b)(1) and is, therefore, deemed ineligible to hold a dealer's permit for a package liquor store in Indiana." A true and accurate copy of Chairman Cook's letter is attached hereto as **Exhibit B**.

28. There is an actual controversy between the parties because IFWS has applied for a transfer of the Package Store Permit to operate a package store business in Indiana and the ATC

has refused to approve the transfer solely because IFWS does not satisfy the residency requirements of Section 5.4(b).

29. The residency requirements of Section 5.4(b) violate the Dormant Commerce Clause of the United States Constitution and are not protected by the Twenty-First Amendment of the U.S. Constitution.

30. Defendants have not, and cannot, justify the burden on interstate commerce imposed by Section 5.4(b).

31. Defendants, acting under color of state law, have denied IFWS its rights, privileges, or immunities secured by the Constitution and laws of the United States, in particular the Dormant Commerce Clause. See 42 U.S.C. §§ 1983 and 1988.

#### **COUNT II: INJUNCTIVE RELIEF**

32. Plaintiff IFWS alleges and incorporates by reference all allegations in the paragraphs above.

33. IFWS has been harmed by the ATC's decision because Section 5.4(b) is being interpreted to prevent IFWS from entering the Indiana market for the retail sale of alcoholic beverages.

34. The statute is inconsistent with the Dormant Commerce Clause of the U.S. Constitution and is therefore unenforceable and void.

35. IFWS is likely to succeed on the merits of their challenge to Section 5.4(b) given that it is inconsistent with and violates the Dormant Commerce Clause of the U.S. Constitution.

36. Section 5.4(b) has, and will continue to, cause harm to IFWS.

37. Specifically, absent preliminary injunctive relief, IFWS will be irreparably harmed by the ATC's ruling because, among other things:



- a. IFWS has incurred over \$100,000 in architectural design and other costs in preparing to open a store at the 1460 E. 86th Street location and it cannot recoup those costs;
- b. The purchase and sale agreement automatically terminates if IFWS cannot obtain approval for the permit within 120 days after January 7, 2020;
- c. IFWS cannot replace the 1460 E. 86th Street location with an equally suitable site without substantial additional cost and delay;
- d. If IFWS does not obtain a permit by approximately May 1, 2020, it will be unable to open the store in time for the 2020 holiday season (November through early January), when alcoholic beverage retailers earn roughly 40 percent of their annual revenues; and
- e. A damages remedy is not available against the defendants because of the State's Eleventh Amendment immunity.

38. IFWS has no adequate remedy at law and faces irreparable harm unless this Court enjoins Section 5.4(b).

39. The balance of harms weighs in favor of IFWS in that the ATC has no legitimate interest in enforcing an unconstitutional state law.

40. An injunction is in the public's interests, as the ATC is not permitted to discriminate against out-of-state ownership of alcoholic-beverage permits in violation of federal law.

41. Additionally, Indiana residents will benefit when IFWS opens a new, clean, efficient, well-managed, and well-stocked store; and Indiana consumers will benefit from increased competition in the alcoholic beverage sector.

42. IFWS is entitled to a preliminary injunction, later to be made permanent, with respect to the residency requirements in Section 5.4(b).

**Count III – Declaratory Judgment**

43. Plaintiff IFWS alleges and incorporates by reference all allegations in the paragraphs above.

44. An actual and justiciable controversy exists between IFWS and the ATC regarding the constitutionality of Section 5.4(b) and enforceability of its residency requirements.

45. Pursuant to 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure, IFWS requests that the Court declare the residency requirements of Section 5.4(b) as null and void because they violate the United States Constitution.

**Prayer for Relief**

WHEREFORE, Plaintiff IFWS respectfully requests that the Court:

- a. Set this matter for a prompt hearing on Plaintiff's request for preliminary injunctive relief;
- b. Enter a judgment in Plaintiff's favor and against the defendants prohibiting the enforcement of the residency requirements of Indiana Code § 7.1-3-21-5.4(b);
- c. Issue a judgment in Plaintiff's favor declaring, pursuant to the Declaratory Judgments Act, that Indiana Code § 7.1-3-21-5.4(b) is void and of no force and effect and that IFWS is not disqualified for ownership of an Indiana package store permit by reason of its out-of-state ownership;
- d. Issue a preliminary injunction, later to be made permanent, enjoining the defendants from enforcing the residency requirements of Indiana Code § 7.1-3-21-5.4(b);

- e. Award Plaintiff its costs and attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988;  
and;
- f. Grant such other relief as the Court deems just.

March 6, 2020

Respectfully submitted,

\*\*Of counsel (to apply for pro hac admission): /s/ **Bryan H. Babb**

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