

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

State of Ohio, ex rel.	:	
Attorney General Dave Yost,	:	
	:	
Plaintiff,	:	Case No. 2:20-cv-3430
	:	
v.	:	Judge:
	:	
Wine.com, Inc., et al.,	:	
	:	
Defendants.	:	

**PLAINTIFF STATE OF OHIO'S
MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to 27 U.S.C. § 122a and Fed. R. Civ. P. 65, Plaintiff, the State of Ohio, on relation of Ohio Attorney General Dave Yost, respectfully moves this Court to issue a preliminary injunction enjoining Defendants—Wine.Com, Inc., U.S. Beverage Advertising Corp., Pacific Wine & Spirits, LLC, ShakeStir, LLC, Winc, Inc., Houdini, Inc., and AWS Hopkins, LLC (collectively “Defendants”)—from shipping any wine or spirituous liquor into the State of Ohio and requiring Defendants to comply with Ohio Rev. Code Chapters 4301 and 4303. A memorandum in support is attached.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ Marissa J. Palumbo

MARISSA J. PALUMBO (0089283)
Trial Counsel
Senior Assistant Attorney General
Ohio Attorney General’s Office
30 East Broad Street, 23rd Floor

Columbus, Ohio 43215
(614) 644-7257 – Telephone
ELSRReview@ohioattorneygeneral.gov

JONATHAN R. FULKERSON (0068360)
Deputy Attorney General
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-4320 – Telephone
jonathan.fulkerson@ohioattorneygeneral.gov

TRISTA M. TURLEY-MARTIN (0093939)
Associate Assistant Attorney General
Ohio Attorney General's Office
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 387-3387 – Telephone
trista.turley-martin@ohioattorneygeneral.gov

Counsel for Plaintiff, State of Ohio

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiff, the State of Ohio, on relation of its Attorney General Dave Yost (“Attorney General Yost”) brings this action under 27 U.S.C. § 122a, the Twenty-First Amendment Enforcement Act (“Enforcement Act”), to stop the flow of illegal liquor shipments into Ohio. A preliminary injunction is necessary to immediately stop the unlawful direct shipment of wine and spirits to Ohio consumers by each of the Defendants in this case—Wine.com, Inc. (“Wine.com”), U.S. Beverage Advertising Corp. (“ReserveBar”), Pacific Wine & Spirits, LLC (“Pacific Wine & Spirits”), ShakeStir, LLC (“Cocktail Courier”), Winc, Inc. (“Winc”), Houdini, Inc. (“Wine Country Gift Baskets”), and AWS Hopkins, LLC (“Ace Spirits”).

With respect to Defendants Wine.com, Winc, Wine Country Gift Baskets, and Ace Spirits, the State of Ohio requests a preliminary injunction requiring that Defendants (1) immediately cease shipping wine to consumers in the State of Ohio; (2) modify their websites and any other ordering systems (e.g. telephonic, mail order) so that orders do not result in direct-to-consumer shipments of wine into Ohio; (3) modify their websites and any other advertising materials to remove any statements indicating that consumers can order wine to be shipped to Ohio; (4) adequately train and educate their agents and employees that Defendants are not authorized to ship wine directly to consumers residing in the State of Ohio; and (5) grant the Ohio Attorney General and the Ohio Division of Liquor Control (“Division”) access to Defendants’ business records, upon demand, such that the Ohio Attorney General and the Division may monitor Defendants’ compliance with Ohio liquor laws while this action is pending.

With respect to Defendants ReserveBar, Pacific Wine & Spirits, Cocktail Courier, and Ace Spirits, the State of Ohio requests a preliminary injunction requiring that Defendants: (1)

immediately cease shipping spirits to consumers in the State of Ohio; (2) modify their websites and any other ordering systems (e.g. telephonic, mail order) so that orders do not result in the shipment of spirits directly to consumers residing in Ohio; (3) modify their websites and any other advertising materials to remove any statement indicating that consumers can order spirits to be shipped to Ohio; (4) adequately train and educate their agents and employees that Defendants are not authorized to sell and/or ship spirits directly to consumers residing in the State of Ohio; and (5) grant the Ohio Attorney General and the Division access to Defendants' business records, upon demand, such that the Ohio Attorney General and the Division may monitor Defendants' compliance with Ohio liquor laws while this action is pending. The State of Ohio is entitled to a such preliminary injunctive relief pursuant to the Enforcement Act and Fed. R. Civ. Pro. 65.

Under the Enforcement Act, a state attorney general may bring a civil action in federal court to enjoin violations of state laws regarding the transportation and importation of intoxicating liquor. There is irrefutable evidence that each and every Defendant engages in business practices that violate Ohio liquor laws – specifically, directly shipping online orders of wine and/or spirits to Ohio consumers. The direct shipment of wine or spirits to Ohio consumers is prohibited by Ohio law. Nonetheless, each Defendant fulfilled online orders for wine and/or spirits placed by an employee of the Ohio Division of Liquor Control and shipped those orders to the Ohio address given by the employee, which happened to be the address of the Division's headquarters. In addition to brazenly making illegal shipments to the Division's headquarters, at least four of the Defendants—Wine.com, Winc, Wine Country Gift Baskets, and Ace Spirits—directly shipped thousands of packages of wine or spirits to Ohio consumers in 2019, as evidenced by shipping data reported to the Division by common carriers FedEx and UPS.

The continued illegal shipment of wine and spirits into the State of Ohio causes irreparable harm to Ohio and Ohioans. In addition to hampering the State's ability to effectively enforce its liquor laws, it deprives Ohioans of public revenue generated from excise taxes, sales taxes, and profits from the sale of spirits, which in Ohio can only be sold by the Division. Ohio cannot seek monetary damages to compensate for these injuries. A preliminary injunction is the only recourse to prevent irreparable harm. Furthermore, the issuance of a preliminary injunction will not harm other parties. Defendants have no legally-cognizable interest in profiting from illegal business practices. Ohio consumers can continue to lawfully purchase wine and spirits from an array of retailers and agency stores across the state. Law-abiding, tax-paying businesses that sell wine in Ohio will benefit from the halting of illegal business practices. Finally, a preliminary injunction will benefit the public by ensuring that Ohio's democratically-approved liquor control laws are effectively enforced and the public revenue from taxes and spirits sales is collected.

The State of Ohio exceeds the requirements for a preliminary injunction enjoining Defendants from shipping wine and/or spirits to Ohio. To curtail Defendants' illegal liquor shipments, enable effective enforcement of the law, and ensure the fair collection of public revenue, the Court should grant the State's motion for a preliminary injunction.

II. SUMMARY OF RELEVANT FACTS

A. Wine.com, Winc, and Wine Country Gift Baskets directly shipped wine to Ohio in 2019 and 2020.

During the month of May 2020, Defendants Wine.Com, Winc, and Wine Country Gift Baskets each directly shipped wine into the State of Ohio, including to the very doorstep of the Division. Between May 13, 2020, and May 20, 2020, an employee of the Division, using a pseudonym, purchased wine online through each of the three aforementioned Defendants' websites. For each order, the employee requested shipment to 6606 Tussing Road, Reynoldsburg,

OH 43068 (the “Tussing Road address”). The Tussing Road address is the address of the Division’s headquarters. Each of the three aforementioned Defendants fulfilled the employee’s order by shipping wine to the Tussing Road address. These shipments were not isolated incidents. According to reports submitted to the Division by common carriers FedEx and UPS (“Division shipping data”), each of the three aforementioned Defendants made thousands of direct shipments of wine to Ohio in calendar year 2019.¹

The Division’s employee ordered a single bottle of prosecco wine from Defendant Wine.com through the website wine.com. Less than a week later, a package addressed to the employee’s pseudonym and containing the prosecco wine was delivered to the Tussing Road address. The order arrived in a box prominently displaying Wine.com’s name and company logo. According to the Division shipping data, Wine.com directly shipped approximately 24,000 packages containing wine to Ohio consumers in 2019.

The Division’s employee ordered a single bottle of sauvignon blanc wine from Defendant Winc through the website winc.com. Approximately one week later, a package addressed to the employee’s pseudonym and containing not one, but three, bottles of sauvignon blanc was delivered to the Tussing Road address. The order arrived in a box displaying Winc’s name. According to the Division shipping data, Winc directly shipped approximately 13,000 packages containing wine to Ohio consumers in 2019.

Finally, the Division’s employee ordered two bottles of wine—one bottle of cabernet sauvignon wine and one bottle of chardonnay wine—from Defendant Wine Country Gift Baskets

¹ Ohio law requires common carriers that ship intoxicating liquor within Ohio for delivery or use in Ohio to obtain an “H Permit” from the Division of Liquor Control. “H Permit” holders are required to submit monthly reports to the Division detailing shipments of beer or intoxicating liquor that are delivered to individuals or entities who do not hold a permit issued by the Division. These reports must include, among other things, the sender, recipient, weight, tracking number, and date of delivery of each shipment of beer or intoxicating liquor. Ohio Rev. Code 4303.22(B).

through the website winecountrygiftbaskets.com. Approximately one week later, a package addressed to the employee's pseudonym and containing the cabernet sauvignon wine and chardonnay wine was delivered to the Tussing Road address. The return address label on the package listed the sender as "Wine County Gift Baskets 4225 N. Palm St. Fullerton CA 92835-1045." According to the Division shipping data, Wine Country Gift Baskets directly shipped approximately 2,500 packages containing wine to Ohio consumers in 2019.

B. ReserveBar, Pacific Wine & Spirits, and Cocktail Courier directly shipped spirits to Ohio in 2020.

In addition to the controlled purchases of wine described above, the Division's employee made controlled purchases of spirits from Defendants ReserveBar and Cocktail Courier. The employee made these purchases under the same pseudonym that he used for the controlled purchases of wine and requested that the orders be shipped to the Tussing Road address. Both shipments were delivered to the Tussing Road address. Defendant Pacific Wine & Spirits fulfilled the ReserveBar order.

The Division's employee ordered a bottle of bourbon whiskey, a spirituous liquor, from ReserveBar through its website, reservebar.com. Approximately two weeks later, a package addressed to the employee's pseudonym and containing the bourbon whiskey was delivered to the Tussing Road address. The return address label on the package listed the sender as "Pacific Wines & Spirits 731 West Wilson Ave. GLENDALE CA 91203." According to the Division shipping data, Defendant Pacific Wine & Spirits directly shipped approximately 80 packages containing wine and/or spirits to Ohio in 2019.

The Division's employee also ordered a cocktail kit from Defendant Cocktail Courier, through its website, cocktailcourier.com. The kit that the employee ordered included three bottles of white tequila, a spirituous liquor. Approximately ten days later, a package addressed to the

employee's pseudonym and containing the cocktail kit was delivered to the Tussing Road address. The package included the three bottles of white tequila that were part of the cocktail kit. The order arrived in a box displaying the phrase "Cocktail Courier by ShakeStir." The return address label on the box read "FROM: COCKTAIL COURIER 1765 N ELSTON AVE STE 107 CHICAGO IL 60642."

C. Ace Spirits directly shipped both wine and spirits to Ohio in 2020.

The Division's employee purchased both a bottle of wine and a spirit from Defendant Ace Spirits. The employee made these purchases through Ace Spirits' website, acespirits.com. Specifically, the employee ordered one bottle of Riesling wine and one bottle of whiskey. Approximately one week later, a package addressed to the employee's pseudonym and containing the wine and whiskey was delivered to the Tussing Road address. The return address label on the package listed the sender as "Ace Wine and Spirits, 4 Shady Oak Road #18, Hopkins, MN 55343." According to the Division shipping data, Ace Spirits shipped approximately 1,500 packages containing wine or spirits to Ohio in 2019.

D. Defendants' direct shipments of intoxicating liquor to Ohio were illegal.

All of the aforementioned shipments of wine or spirits by the various Defendants were illegal.

Ohio Rev. Code 4301.58(B) provides in relevant part:

No person, personally or by the person's clerk, agent, or employee, who is not the holder of an [appropriate permit issued by the Division of Liquor Control], in force at the time, and authorizing the sale of beer, intoxicating liquor, or alcohol, or who is not an agent or employee of the division or the tax commissioner authorized to sell such beer, intoxicating liquor, or alcohol, shall sell, keep, or possess beer, intoxicating liquor, or alcohol for sale to any persons other than those authorized by Chapters 4301. and 4303. of the Revised Code to purchase any beer or intoxicating liquor, or sell any alcohol at retail.

Additionally, Ohio Rev. Code 4303.25 provides, in relevant part:

No person personally or by the person's clerk, agent, or employee shall manufacture, manufacture for sale, offer, keep, or possess for sale, furnish or sell, or solicit the purchase or sale of any beer or intoxicating liquor in this state, or transport, import, or cause to be transported or imported any beer, intoxicating liquor, or alcohol in or into this state for delivery, use, or sale, unless the person has fully complied with this chapter and Chapter 4301. of the Revised Code or is the holder of a permit issued by the division of liquor control and in force at the time.

Each of the named Defendants has violated Ohio Rev. Code 4301.58(B) and 4303.25 by selling wine and/or spirits directly to Ohio consumers.

Ohio law prohibits the direct shipment of wine to consumers, with one exception. *See generally* Ohio Rev. Code Chapter 4303. An entity that holds an "S Permit" issued by the Division may directly ship wine to Ohio consumers. Ohio Rev. Code 4303.232. None of the Defendants currently holds a valid "S Permit," nor did they hold a valid "S Permit" during May 2020. Therefore, any direct shipment of wine by any of the Defendants to Ohio consumers is a violation of Ohio law. Furthermore, the direct shipment of spirituous liquor to Ohio consumers is strictly prohibited. The Division of Liquor control is the sole authorized importer and distributor of spirits in the State of Ohio. Ohio Rev. Code 4301.10(A)(3); Ohio Rev. Code 4301.19. Therefore, any direct shipment of spirits by any of the Defendants to Ohio consumers is a violation of Ohio law.

III. LAW AND ARGUMENT

The issuance of a preliminary injunction is necessary to immediately stop Defendants' ongoing illegal liquor shipments into the State of Ohio. The Enforcement Act authorizes the issuance of a preliminary or permanent injunction upon a showing, by a preponderance of the evidence, that a violation of state law has taken place or is taking place. 27 U.S.C. § 122a(d)(1). To obtain a preliminary injunction, a state attorney general must also demonstrate: (1) the probability of irreparable injury if injunctive relief is not granted; and (2) evidence of a probability of success on the merits. 27 U.S.C. § 122a(d)(2). When deciding a motion for preliminary injunction pursuant to Fed. R. Civ. P. 65, a district court considers the following four factors: (1)

the moving party's likelihood of success on the merits; (2) whether the moving party will suffer an irreparable injury in absence of a preliminary injunction; (3) whether the issuance of a preliminary injunction will cause substantial harm to others; and (4) whether the issuance of a preliminary injunction will serve the public interest. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir.2000), citing *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir.1997). "These factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Leary* at 736.

In this case, all four factors support the issuance of a preliminary injunction prohibiting each Defendant from shipping wine and/or spirits into the State of Ohio. First, the State of Ohio is likely to prevail on the merits. Each and every Defendant illegally shipped a wine or spirit product directly to an employee of the Division. Furthermore, the shipping data reported to the Division by permitted common carriers FedEx and UPS establishes that several of the Defendants illegally shipped thousands of packages of wine or spirits directly to Ohio consumers last year.

Second, the State of Ohio cannot recover monetary damages from the Defendants. Therefore, Ohio and its citizens and law-abiding businesses will suffer an irreparable injury each day Defendants are not prevented from making illegal liquor shipments into the State. Each individual shipment by Defendants violates Ohio law and deprives Ohioans of public revenue derived from excise taxes, general sales taxes, and profits derived from the sale of spirits. The Enforcement Act does not provide for monetary damages against parties who violate state liquor laws. Therefore, an immediate injunction is required to enable Ohio to effectively enforce its laws and to prevent further deprivations of public revenue. Given the lack of available monetary compensation for these continuing damages, Ohio will suffer irreparable harm in the absence of such an injunction.

Third, the issuance of an injunction will not harm others. Defendants will not suffer any legally-cognizable harm because they have no right to profit from illegal shipments. Ohio consumers can still purchase wine and spirits from one of any number of permitted and law-abiding retailers. Additionally, the law-abiding, tax-paying businesses that make, distribute, and sell products for Ohio consumers will benefit from the removal of unfair illegal sales practices. Fourth, the issuance of an injunction will serve the public interest. The injunction will ensure the enforcement of liquor control laws that the democratically-elected Ohio General Assembly has deemed beneficial to its constituents. Furthermore, the injunction will halt the deprivation of public revenue generated by taxes and spirituous liquor sales, at a time when that revenue has been depleted by the effects of a historic global pandemic. With all four preliminary injunction factors weighing in favor of issuing an injunction, a complex balancing analysis is not required. The State of Ohio is entitled to a preliminary injunction against Defendants.

A. The State of Ohio is likely to prevail on the merits because it has direct evidence that each Defendant has illegally shipped liquor to Ohio.

Given the successful completion of controlled purchases from each Defendant by the Division of Liquor Control and the aggregate shipping data collected from FedEx and UPS, the State of Ohio exceeds the threshold required to establish a likelihood of success on the merits of this case. In order to establish a likelihood of success on the merits, “it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp., II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir.1997). In this instance, the State’s evidence does more than raise questions about whether Defendants have violated Ohio liquor laws; rather, the controlled purchases and shipping data conclusively establish that Defendants have violated Ohio law and will likely continue to do so absent an injunction.

1. The Twenty-First Amendment Enforcement Act authorizes Attorney General Yost to seek an injunction upon a showing that Defendants violated Ohio liquor laws.

As a state Attorney General, Attorney General Yost is entitled to seek injunctive relief to prevent the illegal importation or transportation of liquor into Ohio. The Twenty-First Amendment of the United States Constitution uniquely empowers each State to regulate the importation or transportation of liquor into its boundaries. U.S. Const. amend. XXI, § 2. Section 2 of the Twenty-First Amendment provides, “The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” *Id.* The Webb-Kenyon Act further clarifies each State’s authority to control the importation of liquor into its territory. The Webb-Kenyon Act provides:

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

27 U.S.C. § 122.

The Enforcement Act authorizes state Attorneys General to seek relief in the federal courts to enjoin violations of state laws regarding the importation or transportation of intoxicating liquor.

27 U.S.C. § 122a. The Enforcement Act provides, in part:

If the [state] attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that that would constitute a violation of State law regulating the importation or transportation of intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief

(including a preliminary or permanent injunction) against the person, as the attorney general determines necessary to—

- (1) restrain the person from engaging, or continuing to engage, in the violation; and
- (2) enforce compliance with the State law.

27 U.S.C. § 122a(b). The Enforcement Act defines “person” to include partnerships, corporations, companies, firms, societies, associations, joint stock companies, trusts, and other entities “capable of holding a legal or beneficial interest in property[.]” 27 U.S.C. § 122a(a)(3). A state attorney general is entitled to a permanent injunction upon a showing by a preponderance of the evidence that a violation of State liquor laws regarding importation or transportation of liquor has taken place or is taking place. 27 U.S.C. § 122a(d)(1).

2. Ohio law prohibits the direct shipment of wine and spirits to consumers in Ohio.

Ohio law prohibits the direct shipment of both wine and spirits to consumers. *See* Ohio Rev. Code 4301.58(B); Ohio Rev. Code 4303.25; *see also generally* Ohio Rev. Code Chapter 4303. Generally, wine is distributed and sold in Ohio under a “three-tier system.” *Tri-County Wholesale Distribs. v. Wine Group, Inc.*, 565 Fed.Appx. 477, 478 (6th Cir.2012). A wine manufacturer or importer (first tier) may sell wine to a wholesale distributor (second tier) who may then sell to a retailer (third tier). *Id.*; *see also, e.g.*, Ohio Rev. Code 4303.03 (permit for wine manufacturer); Ohio Rev. Code 4303.07 (permit for wholesale distributors of wine); Ohio Rev. Code 4303.12 (permit for retailers of wine). A retailer may then sell wine to consumers. Ohio Rev. Code 4303.12. Manufacturers/importers, wholesalers, and retailers must all hold permits issued by the Division. *See generally* Ohio Rev. Code Chapter 4303. No one person or entity may hold a permit in more than one “tier.” Under this three-tier system, the direct shipment of wine to Ohio consumers is prohibited. There is one exception to this prohibition. A wine manufacturer or importer that obtains an “S Permit” from the Division may ship directly to Ohio consumers. Ohio

Rev. Code 4303.232. Ohio law strictly prohibits the shipment of spirits to Ohio consumers. Ohio Rev. Code 4301.10(A)(3); Ohio Rev. Code 4301.19. Only the Division of Liquor Control, or agency stores contracted by the Division, may sell spirituous liquor at retail in Ohio. *Id.*

3. Evidence of the controlled buys by the Division's employee and the shipping data collected by the Division establish the State of Ohio's strong probability of success on the merits.

The evidence obtained from the controlled purchases of liquor by the Division's employee establishes that the State of Ohio is likely to prevail against all Defendants on the merits of this case. Each and every Defendant sold wine or spirits to an employee of the Division. Defendants were so reckless in their disregard of Ohio's liquor laws that they sent illegal shipments of wine and/or spirits to the doorstep of the agency responsible for enforcing Ohio's liquor laws. Additionally, the Division's shipping data, obtained from legally-mandated reports submitted to the Division by common carriers, shows that at least four of the Defendants illegally shipped thousands of packages of wine or liquor into Ohio last year. The State's evidence does not merely establish a possibility of success on the merits or raise a question going to the merits—it establishes a strong probability of success on the merits. This strong probability of success supports the issuance of a preliminary injunction prohibiting Defendants from continuing to ship wine or spirits into Ohio.

B. The State of Ohio will suffer irreparable injury in the absence of an injunction because the State will be deprived of the ability to effectively enforce its laws and collect public revenue from the taxation and sale of intoxicating liquor.

In the absence of a preliminary injunction, the State of Ohio will suffer irreparable harm to its ability to enforce the laws and collect public revenue. “A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not compensable by monetary damages.” *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir.2002), citing *Basicomputer*

Corp. v. Scott, 973 F.2d 507, 511 (6th Cir.1992). Each unlawful shipment of wine or spirits into Ohio impedes the State's ability to effectively administer, monitor compliance with, and enforce its liquor laws. The Ohio Revised Code establishes a Division of Liquor Control and a system of permits to ensure that all persons profiting from the sale of liquor to Ohioans do so in compliance with the law. *See generally* Ohio Rev. Code Chapters 4301 and 4303. Allowing Defendants to continue to operate outside this system impedes these compliance and law enforcement functions, and there is no recompense for this injury.

Additionally, each unlawful shipment of wine or spirits into Ohio deprives the State and its residents of public revenue. In addition to general state sales taxes, wine sold in Ohio is subject to an excise tax that is paid by permitted manufacturers and distributors. Ohio Rev. Code 4301.43(B) and 4301.432(B). If wine is sold outside the permitted system, those taxes cannot be properly assessed and collected. The direct sale of spirits deprives the State of both sales taxes and revenue derived from the sale of spirits. The Division is the only entity permitted to sell spirits in Ohio. The illegal sale and direct shipment of spirits to Ohio consumers causes financial losses to Ohio that impacts the statewide economy. Absent an injunction, the State will never be made whole for these ongoing and continuing violations.

The State of Ohio cannot be compensated by money damages for the injuries to its law enforcement and revenue. The Enforcement Act provides only for injunctive relief, not monetary damages. 27 U.S.C. § 122a. Therefore, if Defendants are not enjoined from continuing to violate Ohio's laws prohibiting the shipment of wine and spirits, Ohio and its residents will continue to suffer irreparable injury with each shipment. The necessity of preventing this irreparable injury merits the issuance of a preliminary injunction against Defendants.

C. The issuance of a preliminary injunction will not harm others because Defendants’ harms are not legally cognizable, consumers will not be harmed, and law-abiding businesses will benefit.

In addition to preventing further injury to the State or its residents, a preliminary injunction will not cause any substantial harm to the legally-cognizable interests of others. Any alleged “harm” that Defendants suffer as a result of being barred from profiting from the shipment of wine or spirits directly to consumers in Ohio is not a legally-cognizable harm, because those shipments are illegal. *See Lorillard Tobacco Co. v. Amouri’s Grand Foods, Inc.*, 453 F.3d 377, 382 (6th Cir.2006) (finding that an injunction prohibiting the sale of counterfeit goods did not cause a substantial harm to defendant, because the act was illegal in the first place). Meanwhile, Ohio’s consumers will still be able to purchase wine from any number of permitted retailers throughout Ohio and spirits from one of hundreds of agency stores that have contracted with the Division.² Therefore, an injunction will not cause substantial harm to consumers. Finally, a preliminary injunction will benefit law-abiding liquor manufacturers, distributors, and retailers who comply with Ohio’s laws and pay their fair share of taxes. These law-abiding businesses are harmed when competitors gain an unfair advantage by flouting the laws against direct shipment of liquor. The absence of any substantial harm to law-abiding consumers and businesses weighs heavily in favor of granting a preliminary injunction.

D. The issuance of an injunction will serve the public interest by ensuring that Ohio’s laws are enforced and Ohioans are not deprived of public revenue.

Finally, the issuance of a preliminary injunction will serve the public interest in much the same way it ameliorates the ongoing injuries to the State of Ohio and its residents—by ensuring the enforcement of Ohio laws and the proper collection of public revenue. When the plaintiff moving for preliminary injunction is seeking the enforcement of a statute, it is appropriate for the

² OHIO LIQUOR, *Select your OHLQ Location*, <https://www.ohlq.com/locations%20> (last visited July 1, 2020).

court to consider the democratically-elected legislature's judgment that enforcement of the statute is in the public interest. *Tri-County Wholesale Distribs.*, 565 Fed.Appx. at 483-84. The Sixth Circuit Court of Appeals has specifically considered the Ohio General Assembly's judgment that the enforcement of alcohol-related statutes is in the public interest. *Id.* (“[T]here is no dispute that the [Ohio Alcoholic Beverages Franchise Act] the distributors seek to enforce is one that the Ohio legislature passed through the ordinary democratic process. The Franchise Act therefore represents the legislature's judgment that enforcement of that statute is in the public interest.”). In this case, the liquor control laws at issue were also determined by the Ohio General Assembly to be in the public interest. The Division and Attorney General Yost have a duty to enforce those laws.

Furthermore, as noted above, the sale of wine and spirits generates public revenue for Ohio and Ohioans, including programs for job creation and economic development. The fair assessment of taxes and collection of public revenue is always in the public interest. Vindicating that interest is of particularly great urgency now. As a result of the historic COVID-19 pandemic, Ohio's tax revenues have plummeted while unemployment has risen sharply.³ Defendants should not be able to profit from the sale of liquor to Ohioans without paying their fair share to the public coffers. The issuance of a preliminary injunction will serve the public interest.

IV. CONCLUSION

Based on the foregoing, the State of Ohio respectfully requests a preliminary injunction under the Enforcement Act and Fed. R. Civ. P. 65. The State of Ohio has ample evidence that Defendants are illegally shipping wine and spirits into the State, including to the doorstep of the Division of Liquor Control. Unless this Court orders Defendants to immediately cease directing

³ Andre J. Tobias, *Ohio Tax Revenues Plummeted in April During First Full Month of Coronavirus Closures, New Numbers Show*, Cleveland.com (May 6, 2020), <https://www.cleveland.com/open/2020/05/ohio-tax-revenues-plummeted-in-april-during-first-full-month-of-coronavirus-closures-new-numbers-show.html>; Federal Reserve Bank of St. Louis, *Unemployment Rate in Ohio*, <https://fred.stlouisfed.org/series/OHUR> (last visited July 1, 2020).

illegal shipments of wine and spirits to Ohio consumers, this bold and emblazoned conduct will continue unabated, and Ohio will continue to suffer injuries to its law enforcement capabilities and revenue. Pursuant to the Enforcement Act, the State is entitled to a preliminary injunction to enforce its laws governing the transportation and importation of intoxicating liquor.

With respect to Defendants Wine.com, Winc, Wine Country Gift Baskets, and Ace Spirits, the State of Ohio requests a preliminary injunction requiring that Defendants (1) immediately cease shipping wine to consumers in the State of Ohio; (2) modify their websites and any other ordering systems (e.g. telephonic, mail order) so that orders do not result in direct-to-consumer shipments of wine into Ohio; (3) modify their websites and any other advertising materials to remove any statements indicating that consumers can order wine to be shipped to Ohio; (4) adequately train and educate their agents and employees that Defendants are not authorized to ship wine directly to consumers residing in the State of Ohio; and (5) grant the Ohio Attorney General and the Division access to Defendants' business records, upon demand, such that the Ohio Attorney General and the Division may monitor Defendants' compliance with Ohio liquor laws while this action is pending.

With respect to Defendants ReserveBar, Pacific Wine & Spirits, Cocktail Courier, and Ace Spirits, the State of Ohio requests a preliminary injunction requiring that Defendants: (1) immediately cease shipping spirits to consumers in the State of Ohio; (2) modify their websites and any other ordering systems (e.g. telephonic, mail order) so that orders do not result in the shipment of spirits directly to consumers residing in Ohio; (3) modify their websites and any other advertising materials to remove any statement indicating that consumers can order spirits to be shipped to Ohio; (4) adequately train and educate their agents and employees that Defendants are not authorized to sell and/or ship spirits directly to consumers residing in the State of Ohio; and

(5) grant the Ohio Attorney General and the Division access to Defendants' business records, upon demand, such that the Ohio Attorney General and the Division may monitor Defendants' compliance with Ohio liquor laws while this action is pending.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General

/s/ Marissa J. Palumbo

MARISSA J. PALUMBO (0089283)
Trial Counsel
Senior Assistant Attorney General
Ohio Attorney General's Office
30 East Broad Street, 23rd Floor
Columbus, Ohio 43215
(614) 644-7257 – Telephone
ELSReview@ohioattorneygeneral.gov

JONATHAN R. FULKERSON (0068360)
Deputy Attorney General
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-4320 – Telephone
jonathan.fulkerson@ohioattorneygeneral.gov

TRISTA M. TURLEY-MARTIN (0093939)
Associate Assistant Attorney General
Ohio Attorney General's Office
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-2980 – Telephone
trista.turley-martin@ohioattorneygeneral.gov

Counsel for Plaintiff, State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Motion for Preliminary Injunction*, and a true and accurate copy of all other filings in this action, have been sent by First-Class U.S. Mail, postage prepaid, on this 8th day of July, 2020 to:

Wine.com, Inc.
d/b/a Wine.com
c/o Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

Pacific Wine & Spirits, LLC
d/b/a Pacific Wine & Spirits
c/o Harutyun Kurazyun
1011 Highland Ave.
Glendale, CA 91202

Winc, Inc. (Formerly Club W, Inc.)
d/b/a Winc
c/o National Registered Agents, Inc.
160 Greentree Drive
Ste. 101
Dover, DE 19904

AWS Hopkins, LLC
d/b/a Ace Spirits
4 Shady Oak Road, #18
Hopkins, MN 55343

U.S. Beverage Advertising Corp.
d/b/a ReserveBar
c/o Lindsay Held
421 Main Street
Ridgefield, CT 06877

ShakeStir, LLC
d/b/a Cocktail Courier
c/o Corporation Service Company
251 Little Falls Drive
Wilmington, DE 19808

Houdini, Inc.
d/b/a Wine Country Gift Baskets
c/o Daniel M. Maguire
4225 N. Palm St.
Fullerton, CA 92835

/s/ Marissa J. Palumbo

MARISSA J. PALUMBO (0089283)
Trial Counsel
Senior Assistant Attorney General