

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA PETROLEUM MARKETERS)
AND CONVENIENCE STORE)
ASSOCIATION, THORNTONS, INC.,)
RICKER OIL COMPANY, INC.,)
FREEDOM OIL, LLC, and STEVE E. NOE,)

Plaintiffs,)

v.)

Civil Action No.: 1:13-cv-0784 RLY-MJD)

ALEX HUSKEY, in his official capacity as)
Chairman of the Indiana Alcohol and)
Tobacco Commission,)
THE INDIANA ALCOHOL AND)
TOBACCO COMMISSION, and)
THE STATE OF INDIANA,)

Defendants.)

**21st AMENDMENT, INC.'S BRIEF IN SUPPORT OF
MOTION TO INTERVENE AND FILE CROSS-CLAIM**

21st Amendment, Inc. (“21st Amendment”), by counsel, submits this Brief in support of its Motion to Intervene pursuant to Federal Rule of Civil Procedure 24 (“Rule 24”) in order to file an Answer to Plaintiffs’ Complaint and to bring a Cross-claim against Alex Huskey in his official capacity as Chairman of the Indiana Alcohol and Tobacco Commission, the Indiana Alcohol and Tobacco Commission, and the State of Indiana, and in support thereof, states as follows:

I. INTRODUCTION

Plaintiffs assert that they are seeking “equal protection” under the law, but their lawsuit really seeks to invalidate a single aspect of Indiana’s comprehensive regulatory scheme promulgated by the Indiana General Assembly in order to provide them with an insurmountable

competitive advantage over package liquor stores, such as 21st Amendment. Essentially they are asking this Court to ignore all of the other provisions of Indiana's liquor laws in order to slant the marketplace in their favor, which will undermine the stated intent of the General Assembly to limit the sale of alcohol. 21st Amendment seeks to intervene in this lawsuit to refute these contentions and to assert valid claims for equal protection that will uphold the intent of the General Assembly.

In their Complaint, the Plaintiffs ask this Court to invalidate and strike down portions of Indiana's alcohol regulatory scheme that govern the sale of chilled beer, specifically Indiana Code §§ 7.1-3-5-3 and 7.1-5-10-11, which permit package liquor stores to sell chilled beer. Plaintiffs assert that these statutes are "irrational and discriminatory," "arbitrary," and "unfair" because they do not also permit grocery and convenience stores the same privilege. Plaintiffs are able to make these arguments because they focus their attention only on two statutes and ignore the remainder of Indiana's alcohol regulatory scheme.

Notably absent from Plaintiffs' Complaint is any mention of the numerous statutes that impose dozens of restrictions upon package liquor stores, to which Plaintiffs are not subject. For example, unlike grocery and convenience stores, the commodities that package liquor stores can sell are strictly limited by statute. *See* IND. CODE § 7.1-3-10-5. Package liquor stores are further prohibited from allowing minors into their stores, including as employees, a regulation that does not apply to grocery and convenience stores. *See* IND. CODE §§ 7.1-5-7-9 – 7.1-5-7-13. Package liquor stores, unlike grocery and convenience stores, must also be located within an incorporated city or town and cannot be located within 200 feet of a school or church. *See* IND. CODE §§ 7.1-3-21-1; 7.1-3-21-11.

Furthermore, due to the tight quota restrictions placed on package liquor store permits, package liquor stores seeking a new permit generally pay hundreds of thousands of dollars for permits that can only be purchased via a private sale from a current permit holder or bid on in state-run auctions. *See* IND. CODE §§ 7.1-3-22-5, 7.1-3-22-9. Grocery and convenience stores, however, face far less onerous quota restrictions and, therefore, can obtain permits at a fraction of the cost. *See* IND. CODE § 7.1-3-22-4. Moreover, grocery and convenience stores enjoy a virtual monopoly on the sale of alcoholic beverages in unincorporated areas.

Nor do Plaintiffs address the interplay between the restrictions placed on package liquor stores and package liquor stores' privilege of selling chilled beer to their customers. Chilled beer is the most readily consumable of alcoholic beverages. Accordingly, it is rational that the General Assembly limited the sale of chilled beer to the most restrictive sales environment – package liquor stores. Plaintiffs, however, want the privilege to sell chilled beer while avoiding the many restrictions that the General Assembly has imposed on package liquor stores to regulate the sale of the most readily consumable alcoholic beverage. If Plaintiffs desire to be “equal” to package liquor stores under the law, they must also be willing to accept the other restrictions that the General Assembly has promulgated as necessary conditions for the sale of the chilled beer.

As a locally owned package liquor store chain with nineteen stores in the greater Indianapolis area, 21st Amendment has a vested interest in this litigation. Specifically, as a direct beneficiary of the current alcohol regulatory scheme that grants package liquor stores the exclusive privilege of selling chilled beer to its customers, 21st Amendment possesses a recognized interest in defending the current regulatory scheme. Furthermore, as the holder of a number of liquor permits – obtained at great cost by 21st Amendment – whose value is predicated

in a large part on the exclusive privilege to sell chilled beer, 21st Amendment has a vested interest in protecting the value of, and its property interest in, those permits. These interests will be greatly impeded by any ruling from this Court that invalidates or otherwise alters the current regulatory scheme. Neither the Plaintiffs nor the Defendants currently involved in this lawsuit are in a position to protect 21st Amendment's rights and interests. In fact, the Defendants' recently filed Answer does not address the concerns of 21st Amendment and does not assert most of the arguments, defenses, and cross-claims asserted by 21st Amendment which are necessary for this Court properly to address the issues raised by Plaintiffs.

Under the guise of "equal protection," Plaintiffs ask this Court to usurp the function of the Indiana General Assembly and accord Plaintiffs all of the benefits of being a package liquor store with none of the restrictions. They further ask this Court to ignore the General Assembly's stated goal of limiting the sale of alcoholic beverages and, instead, make the most readily consumable of alcoholic beverages more widely available in an environment with only the most cursory of restrictions. Accordingly, 21st Amendment seeks to intervene to persuade this Court: (1) to deny Plaintiffs any relief by deferring to the Indiana General Assembly regarding the formation of an alcohol regulatory scheme, which is its Constitutional function; (2) to uphold the validity of Indiana Code §§ 7.1-3-5-3 and 7.1-5-10-11; or, if the Court chooses to "equalize" the regulatory scheme devised by the Indiana General Assembly, (3) to enforce the current regulatory scheme equally upon those who wish to sell beer, wine and liquor by enforcing all of the current restrictions to which package liquor stores are subject upon grocery and convenience stores alike.

II. BACKGROUND FACTS

21st Amendment is a locally owned chain of package liquor stores. Affidavit of James A. James (“James Aff.”), ¶ 3, a copy of which is attached hereto as **Exhibit B**. Currently, there are nineteen 21st Amendment stores located in the greater Indianapolis area. Ex. B, James Aff., ¶ 4. 21st Amendment’s stores hold Type 217 package liquor store permits. Ex. B, James Aff., ¶ 5. Due to the current statutory quotas on Type 217 package liquor store permits, 21st Amendment must either purchase a permit from its current holder in a private sale or participate in a state-run auction anytime it wishes to acquire a permit for a new store. Ex. B, James Aff., ¶ 6. In these auctions, the Indiana Alcohol and Tobacco Commission (“ATC”) places a permit up for bid. Ex. B, James Aff., ¶ 7. Any person who is qualified and interested in the permit may bid at the state-run auction and the permit is awarded to the highest, qualified bidder. *Id.* The average cost of a Type 217 permit sold in the ATC’s 2011 auction was \$144,208. Ex. B, James Aff., ¶ 11. Recently, however, 21st Amendment has paid as much as \$475,000 for a single permit, purchased in a private sale. Ex. B, James Aff., ¶ 8. In the ATC’s 2008 auction, a Type 217 permit cost 21st Amendment \$400,000. Ex. B, James Aff., ¶ 9. Taken together, 21st Amendment has paid over \$3.3 million for its 21 permits. Ex. B, James Aff., ¶ 10.

Grocery and convenience stores operate under different permits, which are subject to far less restrictive quotas. Ex. B, James Aff., ¶ 12. Accordingly, they are significantly less expensive. *Id.* In the ATC’s 2011 auction, the average cost for a Type 115 grocery store permit was \$6,103. Ex. B, James Aff., ¶ 13.

Much of the value in the Type 217 permits arises from the exclusive privilege of package liquor stores to sell chilled beer to customers. Ex. B, James Aff., ¶ 15. Accordingly, if the current regulatory framework is changed and grocery and convenience stores are permitted to

sell chilled beer, the value of 21st Amendment's permits will be greatly reduced. Ex. B, James Aff., ¶ 16.

As a package liquor store, 21st Amendment is subject to a number of regulations that restrict how it does business. Ex. B, James Aff., ¶ 17. These include regulations on the type of commodities 21st Amendment can sell, the age of patrons allowed in its stores, the age and training of 21st Amendment's employees, and the locations of 21st Amendment's stores. Ex. B, James Aff., ¶ 18. These regulations drive up 21st Amendment's cost of doing business and limit its revenues. Ex. B, James Aff., ¶ 19. Grocery and convenience stores are not subject to these same regulations. Ex. B, James Aff., ¶ 20. Accordingly, these regulations put 21st Amendment at a competitive disadvantage. Ex. B, James Aff., ¶ 21. One of the few advantages 21st Amendment has in comparison to grocery and convenience stores is the privilege of selling chilled beer to its customers. Ex. B, James Aff., ¶ 22. If grocery and convenience stores are permitted to sell chilled beer, while avoiding the other restrictions unique to package liquor stores, 21st Amendment will suffer certain and irreparable harm. Ex. B, James Aff., ¶ 23.

III. ARGUMENT

A. 21st Amendment is Entitled to Intervene in this Lawsuit as a Matter of Right

Pursuant to Federal Rule of Civil Procedure 24(a)(2), a party seeking to intervene in an existing lawsuit must satisfy four requirements. *See Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir. 1995). First, the application to intervene must be timely. *Id.* Next, the intervenor must show an interest relating to the property or transaction that is the subject of the lawsuit. *Id.* Third, the intervenor must demonstrate that the disposition of the lawsuit may impair or impede the intervenor's ability to protect that interest. *Id.* Finally, the intervenor must demonstrate that the interest at issue is not adequately represented by the

existing parties. *Id.* 21st Amendment’s request to intervene satisfies each of these four requirements and, accordingly, its motion to intervene should be granted.

1. 21st Amendment’s Motion is Timely

“The test for timeliness is essentially one of reasonableness: ‘potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly.’” *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (citing *Nissei Sangyo America, Ltd. V. United States*, 31 F.3d 435, 438 (7th Cir. 1994)). In determining whether a motion to intervene is timely, courts must also consider the prejudice to the original parties if intervention is granted as well as the prejudice to the intervenor if the motion is denied. *Id.*

Here, the timeliness factor weighs heavily in favor of 21st Amendment’s motion to intervene. This suit was filed scarcely one month ago. Based on the Court’s current on-line docket, it does not appear that any dispositive motions have been filed or any hearings held. In fact, the Defendants’ original Answer was not filed until July 5, 2013 – only 14 days prior to the filing of 21st Amendment’s motion to intervene. Based upon the *de minimus* lapse of time between the filing of the Complaint – the absolute earliest point at which 21st Amendment could have known that its interests may be impaired by this litigation – and the filing of 21st Amendment’s motion, 21st Amendment’s motion plainly satisfies the first prong of the Rule 24(a)(2) test. *See, e.g., Reich*, 64 F.3d at 321-22 (permitting intervention three years after suit was filed and shortly before the close of discovery); *Ohio Cas. Ins. Co. v. Reed*, 2006 U.S. Dist. LEXIS 42328 (S.D. Ind. June 22, 2006) (permitting intervention 18 months after suit was filed and after substantial discovery had been completed); *Lahr v. United States*, 2010 U.S. Dist.

LEXIS 115068 (S.D. Ind. Oct. 28, 2010) (permitting intervention four weeks after the Court granted summary judgment).

2. 21st Amendment Has An Interest Relating to Property That is the Subject of this Lawsuit

The second prong of the Rule 24(a)(2) test requires that an intervenor claim “an interest relating to the property or transaction that is the subject of the action.” *Schipporeit*, 69 F.3d at 1380. What constitutes an “interest” for the purposes of Rule 24(a)(2) has not been defined. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009). Accordingly, courts have struggled to define what constitutes sufficient “interest” for the purposes of intervention, with many courts setting forth the unhelpful maxim that mere “economic interest” is not enough. *Id.* As noted by the Seventh Circuit in *Flying J*, however, “most civil litigation is based on nothing more than ‘economic interest.’” *Id.* Regardless of the difficulty in defining an “interest” for the purposes of Rule 24, it is clear that 21st Amendment has two separate – but equally compelling – interests in this litigation.

a. *As a Direct Beneficiary of the Current Regulatory Scheme, 21st Amendment has an Interest in Defending the Scheme*

The *Flying J* Court’s consideration of the “interest” component of Rule 24(a)(2) is particularly helpful with respect to the Court’s consideration of 21st Amendment’s motion to intervene. *Flying J* involved a lawsuit by a gasoline retailer to invalidate a provision of Wisconsin’s Uniform Sales Act that prohibited retailers from selling gasoline below a particular price point. *Flying J*, 578 F.3d at 570. The plaintiff sued to enjoin enforcement of the statute on grounds that it was preempted by federal law. The trial court agreed and issued an injunction, whereupon the State of Wisconsin ceased defending the law. *Id.* at 570-71. The Wisconsin Petroleum Marketers & Convenience Store Association then sought to intervene in order to either convince the trial court to reconsider the injunction or to appeal the trial court’s ruling.

The trial court denied their motion to intervene based in part on the Association's lack of interest. *Id.*

On appeal, the Seventh Circuit disagreed, holding that a private beneficiary of a statute intended to regulate an industry has sufficient interest in litigation related to that statute, provided that the private beneficiary will suffer a direct harm. *Id.* at 572. Finding that the Association's members would lose much or even all of their business to larger competitors if the statute was enjoined, the Seventh Circuit found the Association had sufficient interest to intervene. *See also New York Public Interest Research Group, Inc. v. Regents of the Univ. of the State of New York*, 516 F.2d 350 (2nd Cir. 1975) (finding pharmacists had economic interest sufficient for intervention as a matter of right in challenging regulation that barred advertising pharmaceutical drug prices).

Similarly, 21st Amendment is a direct beneficiary of Indiana Code § 7.1-3-5-3, which permits package liquor stores to sell chilled beer for consumption off the premises, and Indiana Code § 7.1-5-10-11, which prohibits other holders of beer dealer's permits from selling chilled beer. The current regulatory structure that permits package liquor stores, such as 21st Amendment, to sell chilled beer provides 21st Amendment with a competitive advantage over competitors such as grocery stores and convenience stores. Ex. B, James Aff., ¶ 22 In fact, a package liquor store's privilege to sell chilled beer is one of the few advantages granted to them under the Indiana alcohol regulatory structure. *Id.* Package liquor stores such as 21st Amendment, however, pay for this competitive advantage, both monetarily and in terms of additional regulatory compliance. Ex. B, James Aff., ¶¶ 8-11, 17-19.

Permits for package liquor stores are subject to quotas imposed by statute. By law, the ATC may issue only one package liquor store dealer's permit for every 8,000 persons within an

incorporated city or town. IND. CODE § 7.1-3-22-5. Due to this statutorily imposed limit on permits for package liquor stores, demand for permits exceeds supply. Ex. B, James Aff., ¶¶ 6, 8-10. Accordingly, existing package liquor store permits are occasionally auctioned off by the ATC pursuant to statute. See IND. CODE § 7.1-3-22-9. 21st Amendment recently paid \$400,000 to acquire a single package liquor store dealer's permit for its store located near 161st Street and Spring Mill Road. Ex. B, James Aff., ¶ 9. Altogether, 21st Amendment has paid over \$3.3 million dollars for its permits. Ex. B, James Aff., ¶ 10.

In contrast, one retailer's permit – such as those held by grocery stores and convenience stores – may be issued for every 2,000 to 6,000 persons within a city or town, depending on the city or town's size. IND. CODE § 7.1-3-22-3. Accordingly, these permits are far more plentiful and, therefore, are cheaper. Ex. B, James Aff., ¶ 12. Moreover, grocery and convenience stores that sell beer, wine and, in some cases, liquor may be located in incorporated or unincorporated areas. As a result, in unincorporated areas, grocery, drug and convenience stores enjoy a statutorily created monopoly on alcohol sales.

Furthermore, not only do package liquor stores generally pay far more for their permits than do grocery and convenience stores, they are also subject to far more regulation. For example, package liquor store employees are all required to have undergone a statutorily mandated alcohol training program and have obtained an employee's permit to sell alcoholic beverages. See IND. CODE § 7.1-3-1.5-13 and § 7.1-3-18-9. Grocery and convenience store employees, however, are not subject to these training and licensing requirements. Package liquor stores are also prohibited from allowing anyone under the age of eighteen on their premises. IND. CODE § 7.1-5-7-9. Grocery and convenience stores, however, are expressly permitted to allow minors on their premises, despite their sale of beer, wine, and, in some cases, liquor. IND.

CODE § 7.1-5-7-11. Moreover, grocery and convenience stores – unlike package liquor stores – may employ minors eighteen years of age or older at their stores. IND. CODE. § 7.1-5-7-13. Furthermore, unlike grocery stores and convenience stores, package liquor stores are prohibited from selling any goods other than those expressly permitted by IND. CODE § 7.1-3-10-5. As a result, package liquor stores must close on Sunday. IND. CODE § 7.1-3-1-14.

This panoply of regulations directed solely at package liquor stores drives up their cost of doing business. Ex. B, James Aff., ¶ 19. Package liquor stores like 21st Amendment incur significant costs in employing and training their employees. *Id.* They pay hundreds of thousands of dollars to obtain the proper permits either through private sales or auctions conducted by the State of Indiana. Ex. B, James Aff., ¶¶ 8-9, 11. Additionally, they are deprived of the opportunity to increase their sales and profits due to the limitations placed on the goods they are permitted to sell and the days and times at which they can be open for business. Ex. B, James Aff., ¶ 19. Due to the fact that they are excused from these onerous requirements, grocery and convenience stores are at a competitive advantage. Ex. B, James Aff., ¶ 21.

Accordingly, 21st Amendment, like the *Flying J* intervenor, is a direct beneficiary of the statutory regulations – IND. CODE § 7.1-3-5-3 and IND. CODE § 7.1-5-10-11 – challenged by the Plaintiffs in this lawsuit. Moreover, if Plaintiffs are successful in their quest to invalidate these statutes, 21st Amendment, like the *Flying J* intervenor, will suffer direct harm. Ex. B, James Aff., ¶ 23. Therefore, the Court should follow the Seventh Circuit’s precedent set forth in *Flying J* and find that 21st Amendment has a sufficient interest in this lawsuit pursuant to Rule 24(a)(2).

b. 21st Amendment as a Vested Interest in Protecting the Value of its Permits

As discussed *supra*, 21st Amendment pays hundreds of thousands of dollars for its permits either at state-run auctions or through private sales. Ex. B, James Aff., ¶¶ 8-11. A large

part of the value of these permits arises from the exclusive privilege for these permit holders to sell chilled beer to customers. Ex. B, James Aff., ¶ 15. If the current regulatory framework is changed as a result of this lawsuit, however, and grocery and convenience stores are permitted to sell chilled beer to customers, the value of 21st Amendment's permits will be greatly reduced. Ex. B, James Aff., ¶ 16.

21st Amendment has a recognized property interest in its permits. See *Honeycutt v. Ong*, 806 N.E.2d 52, 58 (Ind. Ct. App. 2004) (holder of issued alcohol sales permit has property interest in permit); *Lake County Bev. Co. v. 21st Amendment, Inc.*, 441 N.E.2d 1008 (Ind. Ct. App. 1982) (holder of liquor permit had sufficient property interest in permit to seek injunction requiring state alcoholic beverage commission to enforce regulations). Accordingly, 21st Amendment has a vested interest in defending the value of, and its property rights in, its permits, whose value will be reduced if Plaintiffs prevail in this lawsuit.

3. 21st Amendment's Interests Will be Impaired or Impeded by the Disposition of this Lawsuit

In addition to demonstrating that it possesses an interest in this litigation – as 21st Amendment has done *supra* – 21st Amendment must also demonstrate that those interests could be impaired by the outcome of this litigation. For the purposes of Rule 24(a)(2), “‘impairment’ exists if the decision of a legal question would, as a practical matter, foreclose rights of the proposed intervenor in a subsequent proceeding; foreclosure is to be measured in terms of *stare decisis*.” *Lake Investors Dev. Group, Inc. v. Egidi Dev. Group*, 715 F.2d 1256, 1260 (7th Cir. 1983) (reversing denial of intervention). In other words, impairment does not require the application of *res judicata*, rather an intervenor's interest is impaired if the outcome of the pending litigation would hinder the intervenor's ability to protect its interests in a subsequent suit. See, e.g., *JM*

McCormick Co., Inc. v. International Truck & Engine Corp., 2007 U.S. Dist. LEXIS 47746 at * 7-8 (S.D. Ind. June 29, 2007) (Young, J.).

As set forth above, 21st Amendment has two separate and compelling interests in preserving the current regulatory framework that grants package liquor stores the exclusive privilege to sell chilled beer to customers. If Plaintiffs prevail in this lawsuit, however, this Court will invalidate and strike down that very regulatory framework. Clearly, such a ruling would impair 21st Amendment's interest in the current regulatory scheme. Accordingly, the third part of the Rule 24(a)(2) test is easily satisfied.

4. 21st Amendment's Interests Will Not be Protected by the Current Parties

Having satisfied the first three prongs of the Rule 24(a)(2) test, 21st Amendment needs only to demonstrate that its interests may not be adequately represented by the current parties to the lawsuit. This test is satisfied if the intervenor shows that representation of its interests “**may be**” inadequate, and burden of making that showing should be treated as minimal. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10 (1972); *see also Rockies Express Pipeline, LLC v. Indiana State Nat'l Resources Comm'n*, 2009 U.S. Dist. LEXIS 11956 at * 7 (S.D. Ind. 2009) (Young, J.) (following *Trbovich* and granting motion to intervene).

21st Amendment has two separate, and equally important, interests in this lawsuit. The first is in defending the regulatory framework that directly benefits 21st Amendment, *e.g.* the statutes that permit package liquor stores alone to sell chilled beer to their customers. While 21st Amendment shares this goal with the named Defendants – defending the statutes – 21st Amendment also intends to pursue a separate goal as part of this litigation. Specifically, 21st Amendment seeks to make grocery and convenience stores truly equal to package liquor stores by asking this Court to issue a declaration that all entities that wish to sell beer, wine and liquor like package liquor stores must first comply with the regulations currently applicable to package

liquor stores. In fact, if granted leave to intervene, 21st Amendment will file a cross-claim against the named Defendants seeking to enforce the current regulations applicable to package liquor stores against all other retailers of beer, wine, and liquor. A copy of 21st Amendment's proposed Answer and Cross-claim is attached hereto as **Exhibit A**.

Accordingly, 21st Amendment's interests are clearly not aligned with either the current Plaintiffs – as 21st Amendment wishes to defend the legality of the chilled beer statutes – or the current Defendants – as 21st Amendment seeks to ensure that all entities that sell beer, wine, and liquor comply with all of the regulations that General Assembly has set forth to earn that privilege – a position the Defendants have not taken.

Furthermore, 21st Amendment also has an interest in protecting the value of, and its property interest in, the package liquor store licenses it holds. 21st Amendment has paid millions of dollars to obtain permits for its stores. Ex. B, James Aff., ¶ 10. It has done so, in part, through state-run auctions whose proceeds benefit the State. *see* IND. CODE § 7.1-3-22-9. A large portion of the value of these licenses lies in the fact that these licenses permit 21st Amendment to sell chilled beer to its customers while competing grocery and convenience stores cannot. Ex. B, James Aff., ¶ 15. Accordingly, 21st Amendment seeks to intervene in this lawsuit in part to protect the value of, and its property right in, these licenses sold by the state.

The Defendants, however, have no interest in defending and protecting the value of, and 21st Amendment's property rights in, its package liquor store licenses. In fact, the State is barred by statute from recognizing any property interest in a permittee's liquor license. *See* IND. CODE § 7.1-3-1-2; *cf Honeycutt v. Ong*, 806 N.E.2d 52, 58 (Ind. Ct. App. 2004) (“...[H]owever, the use of a permit, once granted, has the elements of property irrespective of what the Legislature may declare about the permit itself...”). Moreover, the Defendants' recently filed Answer has no

reference whatsoever to protecting the property interests of current holders of package liquor store permits. Accordingly, neither the State nor the Plaintiffs – who by virtue of their Complaint are the ones seeking to devalue 21st Amendment’s permits – will represent 21st Amendment’s interest in the value of, and its property interest in, its existing liquor license.

In summary, 21st Amendment’s motion to intervene is timely and seeks to protect interests that will be impaired by the outcome of the litigation and which are not otherwise represented by the current parties. As a result, 21st Amendment should be permitted to intervene in this lawsuit as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2).

B. 21st Amendment Should be Permitted to Intervene in This Action Because its Claims and Defenses Share Common Questions of Law and Fact with This Lawsuit

Assuming *arguendo* that 21st Amendment could not satisfy the four-part test to intervene as a matter of right – and it has done so – 21st Amendment should still be granted permission to intervene pursuant to Rule 24(b).

Rule 24(b) allows for permissive intervention where the intervenor shares claims and defenses in common with the main action. Permissive intervention may be granted more freely than intervention as a matter of right under Rule 24(a)(2) as the intervenor is not required to demonstrate either the “impair or impede” requirement nor the “interest” requirement of the 24(a)(2) test. *See, Flying J*, 578 F.3d at 573.

Here it is clear that 21st Amendment shares common claims and defenses with the parties currently before the Court. 21st Amendment seeks both to defend the validity and constitutionality of the regulatory scheme governing the sale of chilled beer in Indiana and to ensure that all entities selling beer, wine and liquor comply with all of the regulations with which the General Assembly has seen fit to require compliance in order to sell those products, *i.e.* the regulations currently applicable to package liquor stores. Thus, 21st Amendment’s claims and

defenses are similar to those asserted by the parties currently before the Court. Furthermore, given the infancy of this litigation, permitting 21st Amendment to intervene will not prejudice the existing parties. Accordingly, permissive intervention pursuant to Rule 24(b) is appropriate. *See, e.g., Schipporeit, Inc.*, 69 F.3d at 1381 (finding permissive intervention appropriate).

IV. CONCLUSION

For any or all of the foregoing reasons, 21st Amendment, Inc. respectfully asks that the Court grant its Motion to Intervene and for all other just and proper relief.

Respectfully submitted,

/s/ Aaron D. Grant

Michael A. Wukmer

Aaron D. Grant

ICE MILLER LLP

One American Square, Suite 2900

Indianapolis, IN 46282-0200

Michael.Wukmer@icemiller.com

Aaron.Grant@icemiller.com

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, a copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

John R. Maley
BARNES & THORNBURG LLP
Jmaley@btlaw.com

Mark J. Crandley
BARNES & THORNBURG LLP
mcrandley@btlaw.com

Kenneth L. Joel
Deputy Attorney General
Office of the Indiana Attorney General
Kenneth.Joel@atg.in.gov

/s/ Aaron D. Grant
Michael A. Wukmer
Aaron D. Grant

ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200
(317) 236-2100
(317)236-2219 FAX

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THE STATE OF INDIANA,)

Defendants.)

ANSWER AND CROSS-CLAIM

Intervenor 21st Amendment, Inc. (“21st Amendment”), by counsel, for its Answer and Cross-Claim to Plaintiffs’ Complaint for Declaratory Judgment and Injunctive Relief, states as follows:

PARTIES

1. Plaintiff the Indiana Petroleum Marketers and Convenience Store Association (“IPCA”) is an Indiana association that represents Indiana’s petroleum marketers, lube oil dealers and stores and truck stop operators (“IPCA stores”) and advances the interests of its members through various programs and services.

ANSWER: 21st Amendment admits that IPCA is an association that purports to represent Indiana's IPCA stores. 21st Amendment is without sufficient information to admit or deny the remaining allegations contained in paragraph 1 and, therefore, denies the same.

2. Plaintiff Thorntons Inc. ("Thorntons") is a Delaware corporation with its principal place of business in Louisville, Kentucky. It is a member of the IPCA and owns and operates stores in Indiana that sell beer under existing regulations as to the temperature of that beer.

ANSWER: 21st Amendment admits that Thorntons is the owner and operator of gas stations in Indiana that sell beer. 21st Amendment is without sufficient information to admit or deny the remaining allegations contained in paragraph 2 and, therefore, denies the same.

3. Plaintiff Ricker Oil Company Inc. ("Ricker") is an Indiana corporation with its principal place of business in Anderson, Indiana. It is a member of the IPCA and owns and operates stores in Indiana that sell beer under existing regulations as to the temperature of that beer.

ANSWER: 21st Amendment admits that Ricker is the owner and operator of gas stations in Indiana that sell beer. 21st Amendment is without sufficient information to admit or deny the remaining allegations contained in paragraph 3 and, therefore, denies the same.

4. Plaintiff Freedom Oil, LLC ("Freedom") is an Indiana limited liability company with its principal place of business in Warsaw, Indiana. It is a member of IPCA and owns and operates stores in Indiana that sell beer under existing regulations as to the temperature of that beer.

ANSWER: 21st Amendment admits that Freedom is the owner and operator of gas stations in Indiana that sell beer. 21st Amendment is without sufficient information to admit or deny the remaining allegations contained in paragraph 4 and, therefore, denies the same.

5. Plaintiff Steve E. Noe is a resident of Wayne County, Indiana.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in Paragraph 5 and therefore denies them.

6. Defendant Alex Huskey is the Chairman of the Indiana Alcohol and Tobacco Commission (“ATC”)

ANSWER: 21st Amendment admits the allegations contained in paragraph 6.

7. The ATC licenses and regulates nearly 10,000 permits for the manufacture or sale of alcoholic beverages at all restaurants, breweries, wineries, grocery stores, hotels, drug stores, package stores, stadiums, civic centers, social and fraternal clubs, horse tracks, and river boats throughout the State of Indiana. The ATC is the only agency in the state that regulates alcoholic beverages. As Chairman of the ATC, Huskey is the presiding officer at the meetings of the ATC.

ANSWER: 21st Amendment admits the allegations contained in paragraph 7.

8. The ATC is sued in this matter because it is charged with the task of enforcing the laws that the Plaintiffs assert are unconstitutional under the state and federal constitutions.

ANSWER: Paragraph 8 does nothing more than summarize Plaintiffs’ Complaint. As such, no facts are alleged and no response is required. To the extent that any facts are alleged, 21st Amendment denies them.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 in that the Complaint asserts claims arising under the Constitution and laws of the United States, and seeks a declaration of rights and other legal relations under the Constitution and laws of the United States

ANSWER: 21st Amendment admits the allegations contained in paragraph 9.

10. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the Defendants are located within this district and because a substantial part of the events giving rise to the claims asserted in the Complaint occurred in this district.

ANSWER: 21st Amendment admits the allegations contained in paragraph 10.

HISTORY OF REGULATION

11. In 1935, the Indiana General Assembly passed the Liquor Control Act, which regulated the sale of alcoholic beverages in the State of Indiana. Then, a beer dealer's permit allowed for the sale of alcoholic malt beverages to be consumed off of the premises. Act of March 11, 1935, ch. 226, 1935 Ind. Acts 1105.

ANSWER: 21st Amendment admits the existence of the Acts referenced in paragraph 11. 21st Amendment denies any remaining allegations or inferences in paragraph 11 inconsistent with the Acts.

12. Beer dealer's permits could be issued to proprietors of drug stores, grocery stores or confectioneries, or "to the proprietor of any store in good repute which deals in such other merchandise that the sale of alcoholic malt beverages is not incompatible therewith, or likely to contravene, the policies and purposes of this act." *Id.* at 1106. There is no mention in the 1935 Acts at which temperature the holders of a beer dealer's permit may or may not sell beer. *See id.* at 1105-06.

ANSWER: 21st Amendment admits the existence of the Act referenced in paragraph 12. 21st Amendment denies any allegations or inferences in paragraph 12 inconsistent with the Act.

13. The Liquor Control Act of 1935 also allowed for a liquor dealer's permit. *Id.* at 1129. A liquor dealer's permit allowed for the sale of alcoholic spirituous beverages to be

consumed off of the premises. *Id.* A liquor dealer's permit could be issued to the proprietor of a drug store, as long as the drug store held a permit issued by the Indiana Board of Pharmacy. *Id.* A liquor dealer's permit could also be issued to the proprietor of a package liquor store. *Id.* The Liquor Control Act of 1935 defined a package liquor store as "a place or establishment, the exclusive business of which shall be the sale in the original package of alcoholic spirituous and vinous beverages." *Id.* at 1130. Thus, under the Liquor Control Act of 1935, package liquor stores could only sell wine or hard alcohol, not beer. *See id.*

ANSWER: 21st Amendment admits the existence of the Act referenced in paragraph 13. 21st Amendment denies any allegations or inferences in paragraph 13 inconsistent with the Act.

14. In 1941, the Indiana General Assembly amended the language of the beer dealer's permit to prohibit the holder of the permit from selling alcoholic malt beverages that had been iced or cooled by the permit holder before or at the time of sale. Act of March 14, 1941, ch. 237, 1941 Ind. Acts 952-53. The 1941 Acts also created the Alcoholic Beverage Commission of Indiana. *Id.* at 927. There is no language in the Acts of 1941 that amends the rights of package liquor stores allowing them to sell beer at any temperature. *See id.* at 952-55.

ANSWER: 21st Amendment admits the existence of the Acts referenced in paragraph 14. 21st Amendment denies any allegations or inferences in paragraph 14 inconsistent with the Act.

15. The Indiana General Assembly amended the rights of package liquor store dealers in the 1953 Acts. In the 1953 Acts, package liquor store owners were permitted for the first time to sell alcoholic malt beverages, upon obtaining a beer dealer's permit. *See* Act of March 4, 1953, ch. 56, 1953 Ind. Acts 179. However, since the prohibition on the sale of cold or iced alcoholic malt beverages was still in effect, package liquor stores could still not sell cold alcoholic malt beverages. *Id.* at 180; Act of March 14, 1941, ch. 237, 1941 Ind. Acts 95253.

ANSWER: 21st Amendment admits the existence of the Acts referenced in paragraph 15. 21st Amendment denies any allegations or inferences in paragraph 15 inconsistent with the Acts.

16. On July 26, 1963, the Indiana Alcoholic Beverage Commission issued Bulletin #149, which stated that effective August I, 1963, package liquor store dealers would be authorized to sell cold beer for consumption off the premises. *State ex rel, Harris v. Superior Court of Marion Cty, (Room No, 4)*, 197 N.E.2d 634, 637 (Ind. 1964). The Indiana Supreme Court upheld the decision to allow the sale of iced and cold beer by packaged liquor stores in 1964 in *State ex rel. Harris v. Superior Court of Marion Co, (Room No. 4)*. *Id.* at 646.

ANSWER: 21st Amendment admits the existence of the Bulletin referenced in paragraph 16. 21st Amendment denies any allegations or inferences in paragraph 16 inconsistent with the Bulletin.

17. Bulletin #149 provided that package liquor stores would be permitted to sell cold beer for consumption off premises, “provided that such package liquor store dealer is located in a metropolitan area which, in the discretion of the Commission, is such as to afford full and adequate opportunity to police the sale of such cold beer and thereby protect the health, safety and welfare of the people of the state of Indiana.” Indiana Alcoholic Beverage Commission Bulletin #149, July 26, 1963.

ANSWER: 21st Amendment admits the existence of the Bulletin referenced in paragraph 17. 21st Amendment denies any allegations or inferences in paragraph 17 inconsistent with the Bulletin.

18. As such, the Bulletin allowed some cold beer sales based on the metropolitan location of the permit-holder’s business

ANSWER: 21st Amendment admits the existence of the Bulletin referenced in paragraph 18. 21st Amendment denies any allegations or inferences in paragraph 18 inconsistent with the Bulletin.

19. The Indiana General Assembly later incorporated the language of Bulletin #149 into the 1979 Acts, allowing package liquor store dealers to offer cold beer for sale which is currently codified in IND. CODE § 7.1-3-5-3.

ANSWER: 21st Amendment admits the existence of the Statute and Bulletin referenced in paragraph 19. 21st Amendment denies any allegations or inferences in paragraph 19 inconsistent with the Statute or Bulletin.

20. Despite the stated purpose in the Bulletin (which was later incorporated into the statute) of allowing cold beer sales only in “metropolitan” areas, many package liquor stores throughout Indiana operate in isolated rural areas that are not regularly policed in the same way as a metropolitan neighborhood.

ANSWER: 21st Amendment admits that some package liquor stores in Indiana operate outside of metropolitan areas. 21st Amendment denies the remaining allegations contained in Paragraph 20.

21. As just two examples, package liquor stores in rural areas in Nineveh (Johnson County) and Leesburg (Kosciusko County) sell cold beer despite their rural location. Photographs of these stores are included below:

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in Paragraph 21 and therefore denies them.

22. Full-size, true and accurate color copies of these photographs are attached hereto as Exhibits A and B, respectively.

ANSWER: 21st Amendment is without sufficient knowledge to admit or deny if the photographs attached as Exhibits A and B to Plaintiffs' Complaint are true and accurate copies of the package liquor stores they purport to depict.

CURRENT ALCOHOL REGULATIONS

23. Indiana's current statute prohibiting the sale of cold beer is IND. CODE § 7.1-5-10-11 which states, "[i]t is unlawful for the holder of a beer dealer's permit to offer or display for sale, or sell, barter, exchange or give away a bottle, can, container, or package of beer that was iced or cooled by the permittee before or at the time of the sale, exchange, or gift." IND. CODE § 7.1-5-10-11.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 23. 21st Amendment denies any allegations or inferences in paragraph 23 inconsistent with the Statute.

24. Indiana is the only state to regulate the temperature at which beer may be sold.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in Paragraph 24 and therefore denies them.

25. The temperature of beer does not control or alter its alcohol content.

ANSWER: Due to the vague and ambiguous nature of paragraph 25, 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in Paragraph 25 and therefore denies them.

26. Indiana allows holders of a beer dealer's permit to sell warm, non-cooled beer for consumption off of the premises. IND. CODE § 7.1-3-5-3.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 26. 21st Amendment denies any allegations or inferences in paragraph 26 inconsistent with the Statute.

27. Currently, drug stores, grocery stores, and package liquor stores may sell beer under an Indiana beer dealer's permit. IND. CODE § 7.1-3-5-2.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 27. 21st Amendment denies any allegations or inferences in paragraph 27 inconsistent with the Statute.

28. Included in the definition of grocery stores are convenience stores and food marts that are primarily engaged in selling goods that include bread, milk, soda, and snacks and can include the sale of automotive fuel. IND. CODE § 7.1-1-3-18.5 ("Licensed Grocery Stores").

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 28. 21st Amendment denies any allegations or inferences in paragraph 28 inconsistent with the Statute.

29. Indiana's current statutes and regulations do not make a distinction between treatments of beer dealer's permits in incorporated or unincorporated areas.

ANSWER: 21st Amendment admits the existence of the Statutes referenced in paragraph 29. 21st Amendment denies any allegations or inferences in paragraph 29 inconsistent with the Statutes.

30. A liquor dealer's permit allows the holder of the permit to sell liquor to customers for sale off the premises. IND. CODE § 7.1-3-10-7.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 30. 21st Amendment denies any allegations or inferences in paragraph 30 inconsistent with the Statute.

31. A wine dealer's permit allows the holder of either a beer dealer's or liquor dealer's permit to sell wine to customers for consumption off the premises, IND. CODE § 7.1-3-15-2; IND. CODE § 7.1-3.15-3.

ANSWER: 21st Amendment admits the existence of the Statutes referenced in paragraph 31. 21st Amendment denies any allegations or inferences in paragraph 31 inconsistent with the Statutes.

32. Notwithstanding IND. CODE § 7.1-5-10-11, package liquor stores are permitted to sell cold beer for off-premises consumption under an exemption granted by IND. CODE § 7.1-3-5-3.

ANSWER: 21st Amendment admits the existence of the Statutes referenced in paragraph 32. 21st Amendment denies any allegations or inferences in paragraph 32 inconsistent with the Statutes.

33. This gives package liquor stores an arbitrary and unfair advantage, which allows package liquor stores to sell cold beer at a premium price. It also prevents certain craft beer — which often must be cold pursuant to a brewer's specifications as to temperature — from being sold anywhere but at package liquor stores.

ANSWER: 21st Amendment denies the allegations contained in paragraph 33.

34. In many instances, package liquor stores selling cold beer operate in close proximity with Licensed Grocery Stores that are forbidden from doing so.

ANSWER: Due to the vague and ambiguous nature of paragraph 34, 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 34 and therefore denies them.

35. For instance, a package store operating in Anderson near Interstate 69 may sell cold beer yet a Licensed Grocery Store at the same location may not despite the fact that the two businesses share a wall and that the package liquor store is almost directly in front of the gas pumps maintained by the Licensed Grocery Store, as demonstrated by the following photograph.

ANSWER: Paragraph 36 contains no materials allegations and simply references an attached Exhibit. Accordingly, 21st Amendment does not need to respond to paragraph 36. To the extent a response is required, 21st Amendment denies any allegations or implications contained in paragraph 36.

36. A full size, true and accurate color copy of this photograph is attached hereto as **Exhibit C**.

ANSWER: 21st Amendment is without sufficient knowledge to admit or deny if the photograph attached as Exhibit C to Plaintiffs' Complaint is a true and accurate copy of the package liquor store it purports to depict.

37. The ATC may issue a brewer's permit to a brewery that manufactures fewer than 30,000 barrels of beer in a calendar year for sale or distribution in Indiana, and the holder of this permit may sell and deliver beer to a person holding a beer retailer's or beer dealer's permit. IND. CODE § 7.1-3-2-2.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 37. 21st Amendment denies any allegations or inferences in paragraph 37 inconsistent with the Statute.

38. However, these smaller breweries typically make specialized craft beer which must be kept cold for quality control purposes. This limits the market for smaller breweries and forces them to sell, outside of their breweries, through a more expensive and less effective distribution network.

ANSWER: 21st Amendment denies the allegations contained in paragraph 38.

39. Under current Indiana law, Licensed Grocery Stores may sell refrigerated wine and wine coolers that often have alcohol content higher than that of most types of beer,

ANSWER: 21st Amendment admits the existence of the Statutes referenced in paragraph 39. 21st Amendment denies any allegations or inferences in paragraph 39 inconsistent with the Statute.

40. In some cases, these refrigerated wine products can have almost three times the amount of alcohol as what is contained in most types of beer.

ANSWER: 21st Amendment admits the allegations contained in paragraph 40.

FACTS SPECIFIC TO IPCA

41. IPCA members' stores — including those operated by Thorntons, Ricker and Freedom — are grocery stores that provide convenient one-stop shopping for their customers (the "IPCA Member Stores").

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 41 and therefore denies them.

42. Because the IPCA Member Stores are designed to provide convenience, the stores are by their nature small. Because of the small size of the stores, the IPCA Member Stores cannot offer the same scope of products offered at, for instance, a supermarket.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 42 and therefore denies them.

43. Often, the IPCA Member Stores are located in areas where these larger stores are not as readily available to serve the local community.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 43 and therefore denies them.

44. The IPCA Member Stores have a ready-made distribution network that would allow convenient, low-cost distribution of its products through a central network.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 44 and therefore denies them.

45. Customers of the IPCA Member Stores expect to be able to purchase products such as bread, milk, soda, snacks, gas, beer, and other products all in the same place and at the same time when they frequent these establishments,

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 45 and therefore denies them.

46. Under current regulations, the IPCA Member Stores are able to sell beer under a beer dealer's permit only if it is not refrigerated,

ANSWER: 21st Amendment admits the existence of the Regulations referenced in paragraph 46. 21st Amendment denies any allegations or inferences in paragraph 46 inconsistent with the Regulations.

47. The IPCA Member Stores consistently demonstrate that they are more effective than liquor stores at obeying Indiana's alcohol laws, including preventing sales to minors. Between 2007 and 2012 (which represent the latest data available), Indiana package liquor stores

were 138 percent more likely to violate Indiana liquor laws than were Licensed Grocery Stores (including convenience stores) and pharmacies. Similarly, restaurants and bars – which may also sell refrigerated beer – were 1,376 percent more likely to violate Indiana liquor law than grocery stores or pharmacies over the same period of time.

ANSWER: 21st Amendment denies the allegations contained in paragraph 47.

48. IPCA Member Stores take seriously their commitment to comply with Indiana’s liquor laws and to encourage responsible consumption of alcohol, a commitment not always shared by other permit holders who may sell cold beer.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 48 and therefore denies them.

49. For instance, a package liquor store (which is able to sell cold beer) in South Bend, Indiana, near the campus of the University of Notre Dame includes a sign encouraging patrons to “Drink Like A Champion Today,” a play on a slogan used by the Notre Dame football team.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 49 and therefore denies them.

50. A full-size, true and accurate color copy of this photograph is attached hereto as **Exhibit D**.

ANSWER: 21st Amendment is without sufficient knowledge to admit or deny if the photograph attached as Exhibit D to Plaintiffs’ Complaint is a true and accurate copy of the package liquor store it purports to depict.

51. Similarly, other package liquors stores advertise along Indiana's roadways, encouraging Indiana drivers to purchase their products – including cold beer – while driving. Indeed, one such package liquor store boasts of having “the coldest beer” to passing motorists.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 51 and therefore denies them.

52. True and accurate copies of these photographs Exhibit E and Exhibit F.

ANSWER: 21st Amendment is without sufficient knowledge to admit or deny if the photographs attached as Exhibits E and F to Plaintiffs' Complaint are true and accurate copies of the package liquor stores they purport to depict.

53. The IPCA Member Stores lose a significant amount of revenue as a result of not being able to sell cold beer to their customers. This includes revenue lost when customers near Indiana's borders cross state lines to purchase cold beer and revenue lost by virtue of the fact that customers do not purchase additional items their other similar items at the same time out of convenience.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 53 and therefore denies them.

54. Indiana residents can drive across the state border to Illinois, Michigan, and Kentucky to purchase cold beer from grocery stores. In Ohio, they can not only buy cold beer at grocery stores, but they can buy it from drive through windows.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 54 and therefore denies them.

55. The inability of IPCA Member Stores to sell refrigerated beer impacts economic development in that owners of such stores can and do choose to locate stores in other states in

part because of the loss revenue from cold beer sales (and accompanying purchases) and the unfair competitive advantage current laws give to package liquor stores.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 55 and therefore denies them.

56. For instance, Thorntons has not constructed a new store in Indiana since 2006. The lost investment for each new store that could be constructed runs in the millions of dollars.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 56 and therefore denies them.

57. Thorntons invests tens of millions of dollars in new stores each year, but has chosen not to do so in Indiana since 2006 because of the restriction on cold beer sales. Indiana has lost millions of dollars in investments for each new store that would have otherwise been built. Indiana residents also lose the opportunity for employment in store construction, management and operation.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 57 and therefore denies them.

58. The inability for the IPCA Member Stores to sell cold beer is arbitrary and serves no legitimate purpose.

ANSWER: 21st Amendment denies the allegations contained in paragraph 58.

59. The IPCA's members have standing to bring this Complaint in their own right.

ANSWER: The allegation in paragraph 59 is a legal conclusion to which no factual response is required. To the extent that any facts are alleged, they are specifically denied.

60. Ricker, Thorntons, and Freedom have standing to bring this Complaint in their own right given the impact that Indiana's arbitrary restriction on the sale of cooled beer has on their business.

ANSWER: The allegation in paragraph 60 is a legal conclusion to which no factual response is required. To the extent that any facts are alleged, they are specifically denied.

61. Ricker, Thorntons, and Freedom have been injured by the acts of the Defendants in regulating the temperature of the beer they sell in an arbitrary manner that violates the state and federal constitution.

ANSWER: 21st Amendment denies the material allegations in paragraph 61.

62. This Complaint is brought by the IPCA under its stated goal of advancing the interests of its members, in this case selling cold beer, through various programs and services.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 62 and therefore denies them.

63. Neither the claims asserted in this Complaint, nor the relief requested requires the participation of individual IPCA stores.

ANSWER: The allegation in paragraph 63 is a legal conclusion to which no factual response is required. To the extent that any facts are alleged, they are specifically denied.

FACTS SPECIFIC TO NOE

64. Like millions of Hoosiers, Noe occasionally enjoys drinking an alcoholic beverage, including beer,

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 64 and therefore denies them.

65. Noe does not drink while driving and has never been arrested for an alcohol related offense.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 65 and therefore denies them.

66. Noe would purchase cold beer from convenience and grocery stores in Indiana if he had the opportunity.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 66 and therefore denies them.

67. Noe occasionally purchases cold beer from convenience stores in nearby New Paris, Ohio.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 67 and therefore denies them.

68. As recently as May 11, 2013, Noe was able to purchase a 12-pack of Bud Light beer from a Richmond package liquor store for \$13.36. This beer was chilled.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 68 and therefore denies them.

69. He purchased a 12-pack of Bud Light from a convenience store for \$10.69. Because of Indiana's liquor laws prohibiting the sale of cold beer at Licensed Grocery Stores, this beer was sold warm.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 69 and therefore denies them.

70. He purchased a 12-pack of Bud Light at a New Paris, Ohio convenience store for \$11.76. This beer was chilled.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 70 and therefore denies them.

71. Because of the virtual monopoly on the sale of cold beer enjoyed by package liquor stores that Indiana liquor law creates, the customers seeking cold beer must pay a premium to obtain cold beer from package liquor stores or, in areas near the state's borders, purchase cold beer from another source.

ANSWER: 21st Amendment denies the allegations contained in paragraph 71.

72. Many Indiana cities and towns are located near bordering states that allow the sale of cold beer in convenience stores and groceries.

ANSWER: 21st Amendment admits the allegations contained in paragraph 72.

73. In addition to Richmond, these locations include population centers such as Evansville, New Albany, Terre Haute, Gary, Fort Wayne, South Bend, Lawrenceburg and many others.

ANSWER: 21st Amendment admits the allegations contained in paragraph 73.

74. Like Noe, many customers in these areas may simply cross the border to purchase cold beer.

ANSWER: 21st Amendment admits the allegations contained in paragraph 74.

75. Indiana loses millions of dollars of revenue by the fact that these sales occur out-of-state.

ANSWER: 21st Amendment is without knowledge or information sufficient to either admit or deny the allegations contained in paragraph 75 and therefore denies them.

COUNT I — VIOLATION OF EQUAL PROTECTION

76. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-72 as though fully set forth herein.

ANSWER: 21st Amendment hereby incorporates its answers to the allegations in Paragraphs 1-75.

77. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend, XIV, § 1,

ANSWER: 21st Amendment admits the existence of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution referenced in paragraph 77. 21st Amendment denies any allegations or inferences in paragraph 77 inconsistent with the Clause.

78. The Equal Protection Clause directs that all persons similarly situated should be treated alike.

ANSWER: 21st Amendment admits the existence of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution referenced in paragraph 78. 21st Amendment denies any allegations or inferences in paragraph 78 inconsistent with the Clause.

79. IND. CODE §§ 7.1-3-5-3, and 7.1-5-10-11 together treat holders of an Indiana beer dealer’s permit who are not package liquor stores differently from all similarly situated lawful third-party beer sellers in all other states of the United States by prohibiting the sale of beer based upon the beer’s temperature at the time of sale,

ANSWER: 21st Amendment admits the existence of the Statutes referenced in paragraph 79. 21st Amendment denies any allegations or inferences in paragraph 79 inconsistent with the Statutes.

80. There is no rational basis for distinguishing between holders of a beer dealer's permit who are package liquor stores and holders of a beer dealer's permit who are not package liquor stores for the purposes of selling cold beer to customers.

ANSWER: 21st Amendment denies the allegations contained in Paragraph 80.

81. There is no rational basis for distinguishing between holders of a beer dealer's permit in Indiana who are prohibited from selling cold beer unless they are a package liquor store and similarly situated beer retailers in any other state in the United States, who are not prohibited from selling beer based upon the beer's temperature at the time of sale. Indeed, grocery stores may already sell cold beverages other than beer even though these beverages contain a greater alcohol content than beer.

ANSWER: 21st Amendment denies the allegations contained in paragraph 81.

82. Such differential treatment is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ANSWER: 21st Amendment denies the allegations contained in Paragraph 82.

COUNT II — VIOLATION OF EQUAL PRIVILEGES

83. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-79 as though fully set forth herein.

ANSWER: 21st Amendment hereby incorporates its answers to the allegations in Paragraphs 1-82.

84. The United States Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1.

ANSWER: 21st Amendment admits the existence of Article IV, Section 2, Chapter 1 of the United States Constitution referenced in paragraph 84. 21st Amendment denies any allegations or inferences in paragraph 84 inconsistent with the Constitution.

85. IND. CODE § 7.1-3-5-3 treats package liquor store holders of a beer dealer's permit differently from all other similarly situated holders of a beer dealer's permit in Indiana.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 85. 21st Amendment denies any allegations or inferences in paragraph 85 inconsistent with the Statute.

86. IND. CODE § 7.1-3-5-3 treats package liquor store holder of a beer dealer's permit differently from all other similarly situated beer dealer's permit holders in all other states in the United States.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 86. 21st Amendment denies any allegations or inferences in paragraph 86 inconsistent with the Statute.

87. IND. CODE § 7.1-5-10-11 , treats beer dealer's permit holders, that are not package liquor stores, in Indiana differently from all other similarly situated beer dealer's permit holders in the United States by prohibiting the sale of beer based upon the temperature of the beer at the time of sale.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 87. 21st Amendment denies any allegations or inferences in paragraph 87 inconsistent with the Statute.

88. There is no rational basis for this differential treatment.

ANSWER: 21st Amendment denies the allegations contained in paragraph 88.

89. IND. CODE §§ 7.1-3-5-3, 7.1-5-10-11 violate Article IV, Section 2 of the United States Constitution,

ANSWER: 21st Amendment denies the allegations contained in paragraph 89.

COUNT III — VIOLATION OF INDIANA EQUAL PRIVILEGES CLAUSE

90. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1- 79 as though fully set forth herein.

ANSWER: 21st Amendment hereby incorporates its answers to the allegations in Paragraphs 1-89.

91. The Indiana Constitution provides that “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Ind. Const. art I, § 23,

ANSWER: 21st Amendment admits the existence of Article I of the Indiana Constitution. 21st Amendment denies any allegations or inferences in paragraph 91 that are inconsistent with the Indiana Constitution.

92. IND. CODE § 7.1-3-5-3 treats package liquor store holders of a beer dealer’s permit differently from all other similarly situated holders of a beer dealer’s permit in Indiana.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 92. 21st Amendment denies any allegations or inferences in paragraph 92 inconsistent with the Statute.

93. IND. CODE § 7.1-5-10-11 treats beer dealer’s permit holders, that are not package liquor stores in Indiana differently from all other similarly situated beer dealer’s permit holders in Indiana that are package liquor stores by prohibiting the sale of beer based upon the temperature of the beer at the time of sale.

ANSWER: 21st Amendment admits the existence of the Statute referenced in paragraph 93. 21st Amendment denies any allegations or inferences in paragraph 93 inconsistent with the Statute.

94. There is no rational basis for this differential treatment.

ANSWER: 21st Amendment denies the material allegations in paragraph 94.

95. IND. CODE §§ 7.1-3-5-3, 7.1-5-10-11 violate Article I, Section 23 of the Indiana Constitution.

ANSWER: 21st Amendment denies the material allegations in paragraph 95,

COUNT IV — VIOLATION OF INDIANA CONSTITUTION ARTICLE I, SECTION 1

96. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs I -85 as though fully set forth herein.

ANSWER: 21st Amendment hereby incorporates its answers to the allegations in paragraphs 1-95.

97. The Indiana Constitution provides, “That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.” Ind. Const. art I, § 1.

ANSWER: 21st Amendment admits the existence of Article I of the Indiana Constitution. 21st Amendment denies any allegations or inferences contained in paragraph 97 that are inconsistent with the Indiana Constitution.

98. The Indiana Supreme Court has determined that “the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each compos mentis individual, of selecting what he will eat and drink,” *Herman v. State*, 8 Ind. 545, 558 (Ind. 1855),

ANSWER: 21st Amendment admits the existence of the Indiana Supreme Court's opinion in *Herman v. State*, 8 Ind. 545, 558 (Ind. 1855). 21st Amendment denies any allegations or inferences in Paragraph 98 that are inconsistent with that Opinion.

99. IND. CODE §§ 7.1-3-5-3, 7.1-5-10-11 interfere with an individual's right to select what they eat and drink, by not allowing a consumer of legal age to purchase beer based solely on the temperature at which it is sold.

ANSWER: 21st Amendment denies the allegations contained in Paragraph 99.

100. IND. CODE §§ 7.1-3-5-3, 7.1-5-10-11 violate Article I, Section 1 of the Indiana Constitution.

ANSWER: 21st Amendment denies the allegations contained in paragraph 100.

GENERAL DENIAL

21st Amendment denies any and all remaining allegations set forth in Plaintiffs' Complaint not herein previously admitted or denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief may be granted.
2. Plaintiffs' rights, privileges, and immunities secured under the Constitution or laws of the United States have not been violated by any alleged action, inaction, or omission of Defendants and Defendants, at all times, acted in compliance and consistent with the Constitution and laws of the United States.
3. Plaintiffs' rights, privileges, and immunities secured under the Constitution or laws of the State of Indiana have not been violated by any alleged action, inaction, or omission of Defendants and Defendants, at all times, acted in compliance and consistent with the Constitution and laws of the State of Indiana.

4. The statutes, rules, and policies challenged are constitutional.
5. Plaintiffs' claims are barred by the doctrine of laches, unclean hands, waiver and/or estoppel.
6. Plaintiffs lack standing to bring the claims in their Complaint.
7. Plaintiffs have failed to bring their claims within the applicable statute of limitations.
8. 21st Amendment reserves the right to amend its answer and defenses as more information is obtained.

WHEREFORE, Intervenor respectfully requests that Plaintiffs take nothing by way of their Complaint; that judgment be entered in 21st Amendment's favor; for the reasonable fees and costs relating to the defense of this action; and for all other just and proper relief in the premises.

CROSS-CLAIM

Introduction

Over the last several decades, the Indiana General Assembly has crafted a complex, comprehensive, and interdependent scheme of alcoholic beverage regulation, which is set forth in Title 7.1 of the Indiana Code. Title 7.1 consists of hundreds of pages of restrictions, exceptions, caveats, and alternatives – all relating to the distribution, sale, and consumption of alcoholic beverages. This complex, interdependent regulatory scheme generally accomplishes the General Assembly's stated goals of **limiting** the sale of alcohol and protecting the economic welfare, health, peace, and morals of the people of the State of Indiana. *See* IND. CODE § 7.1-1-1-1.

In accordance with their goals of limiting the sale of alcohol and promoting the welfare, health and morals of the people of Indiana, the General Assembly has seen fit to place the highest level of regulatory restrictions upon the stores selling the widest variety of alcohol – package liquor stores. The General Assembly has also seen fit to ensure that the most readily consumable alcoholic beverage – chilled beer – is sold exclusively by stores who adhere to the highest level of restrictions – again, package liquor stores. The General Assembly’s actions are rational and reasonable. Those actions also create a fundamental distinction between package liquor stores on one hand, and grocery, drug, and convenience stores on the other. In essence, because package liquor stores adhere to a complex and restrictive set of regulations they have been designated by the General Assembly as the retail establishment that may sell the widest variety and most readily consumable forms of alcoholic beverages. 21st Amendment sees no reason to alter this rational, reasonable and effective regulatory scheme.

Nevertheless, the Plaintiffs ask this Court to make them “equal” with package liquor stores. Contrary to the Plaintiffs’ arguments, however, equality cannot be achieved by focusing solely on the isolated sections of Title 7.1 addressing chilled beer. Rather, equality must be considered within the context of the complex, interdependent regulatory scheme carefully crafted over decades by the General Assembly. A failure to consider the overall context of the General Assembly’s alcoholic beverage regulatory scheme when addressing who may sell chilled beer will inevitably result in destroying the balance of regulations crafted by the General Assembly and throwing the entire scheme off-balance.

As a locally-owned chain of package liquor stores serving the greater Indianapolis community, 21st Amendment has a vested interest in ensuring that the alcoholic beverage regulatory scheme remains balanced and fair. 21st Amendment also has a vested interest in

protecting its property rights. Accordingly, 21st Amendment brings this cross-claim to ensure that any changes to the alcoholic beverage regulatory scheme remain fair and balanced and that the goals of the General Assembly are carried out. Specifically, 21st Amendment asks this Court to follow the mandate of the General Assembly and ensure that the General Assembly's goal of **limiting** the sale of alcoholic beverages is adhered to by enforcing the regulations set forth in Title 7.1 on all those who sell such beverages.

Parties

1. Cross-claimant 21st Amendment is an Indiana corporation with its principal place of business in Indianapolis, Indiana. 21st Amendment owns and operates nineteen package liquor stores in the greater Indianapolis area that operate pursuant to existing regulations regarding the operation of package liquor stores.

2. Cross-claim Defendant Alex Huskey is Chairman of the Indiana Alcohol and Tobacco Commission ("ATC").

3. The ATC licenses and regulates nearly 10,000 permits for the manufacture or sale of alcoholic beverages at all restaurants, breweries, wineries, grocery stores, hotels, drug stores, package liquor stores, and other locations throughout the State of Indiana. The ATC is the only agency in the State that regulates alcoholic beverages. As Chairman of the ATC, Huskey is the presiding officer at the meetings of the ATC.

4. The ATC is sued in this matter because it is charged with the task of enforcing the laws that 21st Amendment asserts are unconstitutional under the State and Federal Constitutions.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 in that the cross-claim asserts claims arising under the Constitution and laws

of the United States, and seeks a declaration of rights and other legal relations under the Constitution and laws of the United States.

6. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the Cross-Claim Defendants are located within this district and because a substantial part of the events giving rise to the claims asserted in the Cross-claim occurred in this district.

Current Regulations Unique to Package Liquor Stores

7. Indiana currently delineates three statutory categories of permits for the retail sale of alcohol to be consumed off-premises; a beer dealer's permit (IND. CODE §§ 7.1-3-5-1 – 7.1-3-5-3), a liquor dealer's permit (IND. CODE §§ 7.1-3-10-1 – 7.1-3-10-13), and a wine dealer's permit (IND. CODE §§ 7.1-3-15-1 – 7.1-3-15-3).

8. A beer dealer's permit may be issued to the proprietor of a drug store, grocery store, or a package liquor store. IND. CODE § 7.1-3-5-2.

9. A liquor dealer's permit may be issued to a package liquor store or the proprietor of a drug store who holds a license issued by the state board of pharmacy. IND. CODE § 7.1-3-10-2.

10. A wine dealer's permit may be issued to any person who holds either a beer dealer's permit or a liquor dealer's permit. IND. CODE § 7.1-3-15-2.

11. Thus, pursuant to the current regulations, package liquor stores, as well as grocery, drug and convenience stores may sell beer, wine, and – in some cases – liquor.

12. Despite the fact that drug, grocery and convenience stores are all licensed to sell beer, wine, and – in some cases – liquor, package liquor stores operate under significantly greater restrictions.

13. The following restrictions (together, the “Regulations”) apply only to package liquor stores:

- a. Package liquor stores can only sell the commodities enumerated in IND. CODE § 7.1-3-10-5.
- b. Package liquor stores cannot be located within 200 feet of a church or school. IND. CODE § 7.1-3-21-11.
- c. Package liquor stores must be located within an incorporated city or town. IND. CODE § 7.1-3-21-1.
- d. Individuals under the age of twenty-one are barred from package liquor stores. IND. CODE §§ 7.1-5-7-9; 7.1-5-7-13.
- e. Package liquor store employees must obtain special permits in order to sell alcohol. IND. CODE § 7.1-3-18-9.
- f. There may be only one package liquor store for every 8,000 inhabitants of an incorporated city or town, but there generally may be one grocery store or drug store selling beer for every 6,000 inhabitants.
- g. The holder of a package liquor store permit must be a resident of Indiana. IND. CODE § 7.1-3-21-3.
- h. Package liquor stores must close on Sunday. IND. CODE § 7.1-5-10-1(b).

14. The Regulations – which currently apply only to package liquor stores – give drug, grocery and convenience stores an arbitrary and unfair advantage as, with the exception of chilled beer, they can sell all of the same alcoholic beverages as package liquor stores but do not comply with the Regulations.

15. By virtue of their freedom from compliance with the Regulations, grocery, drug, and convenience stores provide much greater access to alcohol in direct contravention of the Title 7.1’s express goal of limiting access to alcohol.

16. In many instances, drug grocery, and convenience stores selling beer, wine, and/or liquor operate in close proximity with package liquor stores without having to abide by any of the Regulations.

21st Amendment is Harmed by the Defendants' Enforcement of These Irrational, Discriminatory and Arbitrary Regulations

17. 21st Amendment is a locally owned and operated chain of package liquor stores located in the greater Indianapolis area.

18. 21st Amendment incurs substantial costs in order to comply with the Regulations in the form of increased costs to hire and train employees – costs that drug and grocery stores avoid.

19. The Regulations also cost 21st Amendment substantial revenue, both due to 21st Amendment's inability to sell commodities other than those set forth by statute, – 21st Amendment cannot sell such basic items as cold water, cold soda, and grocery items – 21st Amendment's forced exclusion of patrons who wish to shop with their under-aged children, and 21st Amendment's inability to locate its stores in certain areas.

20. In total, the Regulations cost 21st Amendment millions of dollars in any given year.

**COUNT I
(VIOLATION OF FEDERAL EQUAL PROTECTION)**

21. 21st Amendment repeats the allegations in paragraphs 1 to 20 as if fully set forth herein.

22. As a package liquor store, 21st Amendment must comply with the Regulations in order to maintain the privilege of selling all varieties and types of alcohol beverages, which cost 21st Amendment millions of dollars a year in the form of increased operating costs and lost revenue.

23. Other retailers who sell alcoholic beverages, such as drug, grocery and convenience stores, do not have to comply with the Regulations despite their ability to sell, with

the exception of chilled beer, all of the same types of alcoholic beverages as package liquor stores.

24. The application of the Regulations to package liquor stores, but not to other retailers that sell the same types of alcoholic beverages, bears no rational relationship to a legitimate state interest.

25. Because of this lack of a rational relationship to a legitimate state interest, it is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America for the Defendants to fail to apply the more restrictive and limiting provisions of the Regulations to grocery, drug and convenience stores, and pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2022, 21st Amendment is entitled to a declaration that the Regulations , as those Regulations now apply to liquor stores, must be enforced against all retail stores selling beer, wine and/or liquor, and that the less restrictive regulations be eliminated.

**COUNT II
(VIOLATION OF INDIANA EQUAL PRIVILEGES CLAUSE)**

26. 21st Amendment repeats the allegations in paragraphs 1 to 25 as if fully set forth herein.

27. The Indiana Constitution provides that “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Ind. Const. art. I, § 23.

28. The Regulations treat package liquor stores differently from other similarly situated holders of beer dealer’s, wine dealer’s, and liquor dealer’s permits in Indiana.

29. The Regulations treat package liquor stores differently from other holders of beer dealer’s, wine dealer’s, and liquor dealer’s permits in Indiana by forcing package liquor stores to

comply with the Regulations while excusing other similarly situated alcohol dealers from compliance with those Regulations.

30. There is no rational basis for this differential treatment.

31. The Defendants' decision to permit alcohol retailers other than package liquor stores to sell beer, wine, and liquor without enforcing the Regulations against those retailers is irrational, discriminatory, arbitrary, capricious, and harmful to the public health.

32. The Regulations violate Article I, Section 23 of the Indiana Constitution.

33. Accordingly, 21st Amendment is entitled to a declaration that the Regulations, as such are now imposed on package liquor stores, must be enforced against all retail stores selling beer, wine and liquor

Respectfully submitted,

/s/ Aaron D. Grant

Michael A. Wukmer

Aaron D. Grant

ICE MILLER LLP

One American Square, Suite 2900

Indianapolis, IN 46282-0200

Michael.Wukmer@icemiller.com

Aaron.Grant@icemiller.com

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2013, a copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

John R. Maley
BARNES & THORNBURG LLP
Jmaley@btlaw.com

Mark J. Crandley
BARNES & THORNBURG LLP
mcrandley@btlaw.com

Kenneth L. Joel
Deputy Attorney General
Office of the Indiana Attorney General
Kenneth.Joel@atg.in.gov

Michael A. Wukmer
Aaron D. Grant

ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200
(317) 236-2100
(317)236-2219 FAX

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA PETROLEUM MARKETERS)
AND CONVENIENCE STORE)
ASSOCIATION, THORNTONS, INC.,)
RICKER OIL COMPANY, INC.,)
FREEDOM OIL, LLC, and STEVE E. NOE,)

Plaintiffs,)

v.)

Civil Action No.: 1:13-cv-0784 RLY-MJD

ALEX HUSKEY, in his official capacity as)
Chairman of the Indiana Alcohol and)
Tobacco Commission,)
THE INDIANA ALCOHOL AND)
TOBACCO COMMISSION, and)
THE STATE OF INDIANA,)

Defendants.)

AFFIDAVIT OF JAMES A. JAMES

I, James A. James, state as follows:

1. I am over the age of 18 and am competent to make this Affidavit. I have personal knowledge of the facts stated herein.

2. I am the President of 21st Amendment, Inc. ("21st Amendment"). In my role as President, I am responsible for the operation of 21st Amendment's liquor stores, including their compliance with the applicable state statutes and regulations. Accordingly, I am generally familiar with the regulatory framework governing the sale of alcohol in Indiana.

3. 21st Amendment is a locally owned chain of package liquor stores.

4. Currently, there are nineteen 21st Amendment stores located in the greater Indianapolis area.

EXHIBIT B

5. 21st Amendment's stores hold Type 217 package liquor store permits.

6. Due to the current statutory quotas on Type 217 permits, 21st Amendment must either participate in a state-run auction or locate a permit holder willing to sell a permit anytime it wishes to acquire a permit for a new store.

7. Based on my past involvement in these auctions, I understand that the Indiana Alcohol and Tobacco Commission ("ATC") places a permit up for bid. To the best of my knowledge, any person who is qualified and interested in the permit may bid at the state-run auction and the permit is awarded to the highest, qualified bidder.

8. Recently, 21st Amendment has paid as much as \$475,000 for a single permit in a private sale transaction. The permit is currently used for 21st Amendment's store located near 37th Street and Binford Boulevard.

9. Recently, 21st Amendment has paid as much as \$400,000 for a single permit for its store located at 161st Street and Spring Mill Road in a state-run auction.

10. Since 1971, 21st Amendment has paid over \$3.3 million for its Type 217 permits. The actual market value, however, is likely far higher. Since 2002, 21st Amendment has purchased ten permits, whose average cost has been \$261,500. Accordingly, the current market value of 21st Amendment's twenty-one Type 217 permits – 21st Amendment has two permits not currently assigned to a store – is closer to \$5.5 million.

11. At the 2011 ATC auction, the average price for a Type 217 package liquor store permit was \$144,208.

12. To the best of my knowledge, grocery and convenience stores operate under different permits, which rarely are part of the bidding process. Accordingly, they are significantly less expensive.

13. At the 2011 ATC auction, the average price of a Type 115 grocery store permit was \$6,103.

14. At the 2011 ATC auction, the ATC sold a number of Type 115 grocery store permits for Marion County for \$750 each.

15. Much of the value in the Type 217 package liquor store permits arises from the exclusive right of package liquor stores to sell chilled beer to customers.

16. Accordingly, if the current regulatory framework is changed and grocery and convenience stores are permitted to sell chilled beer, the value of 21st Amendment's permits will be greatly reduced.

17. As a package liquor store, 21st Amendment is subject to a number of regulations that restrict how it does business.

18. These include regulations on the type of commodities 21st Amendment can sell, the age of individuals allowed in its stores, the age and training of 21st Amendment's employees, and the locations of 21st Amendment's stores.

19. These regulations drive up 21st Amendment's cost of doing business and limit its revenues. 21st Amendment incurs significant costs in employing and training its employees. 21st Amendment also loses potential revenue due the restrictions on what commodities it can sell in its stores.

20. To the best of my knowledge, grocery and convenience stores are not subject to these same regulations.

21. Accordingly, these regulations put 21st Amendment at a competitive disadvantage.

22. One of the few advantages 21st Amendment has in comparison to grocery and convenience stores is the privilege of selling chilled beer to its customers.

23. If grocery and convenience stores are permitted to sell chilled beer, while avoiding the other restrictions unique to package liquor stores, 21st Amendment will suffer certain harm.

I AFFIRM UNDER THE PENALTIES FOR PERJURY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

James A. James