

June 6, 2012

**By Facsimile Transmission and Overnight Delivery**

Jeffrey R. Anderson  
Director  
Idaho State Liquor Division Administrative Office  
1349 East Beechcraft Court  
Boise, Idaho 83716

**Re: Notice of Intent to Sue**

Dear Director Anderson:

I have been retained to represent Ogden's Own Distillery (hereinafter "Ogden's Own"), the producer of "Fives Wives Vodka." This letter is to inform you of the intent of Ogden's Own to seek judicial review of your recent decision to bar the sale of "Five Wives Vodka" in the State of Idaho. In a desire to avoid unnecessary litigation, this letter demands that you reverse your rejection of special orders of "Five Wives Vodka" and that you not use this same basis to reject the product in a renewed request for general listing. Absent such a reversal of the decision and the underlying policy, we will assume that the matter will have to be submitted to a federal court for appropriate relief.

**Background**

In late February 2012, Ogden's Own properly completed and submitted the required forms to the State of Idaho for a general listing presentation on March 4, 2012. Despite this submission, the state elected not to general list the product. No explanation was given for the refusal to general list the product. When the business representative asked for information on appealing the refusal to general list the product, he was given a link on how to reapply for general listing later in the year.

Later, unable to acquire "Five Wives Vodka" through the general list process, various bars sought the product through "special orders." Businesses routinely acquire unlisted products by asking for their inclusion on the Special Order product line. Store managers are allowed to "initiate orders on behalf of licensee or consumers via the Special Order ordering routine."

<http://liquor.idaho.gov/Website Pages/Purchasing/NewProcedures.pdf>

One Idaho bar initiated a special order on or about May 17, 2012, on behalf of a bar in downtown Boise, with a request for six cases. That business was told verbally that, despite its business judgment that “Five Wives Vodka” would appeal to its customers, the state would not allow it to order the product. The only correspondence with the liquor store was a brief e-mail sent by the division to the liquor store manager, which stated: “Five Wives Vodka will never be sold in the state of Idaho.” The decision to deny special orders constitutes a practical ban on the sale of the product in the State of Idaho.

On May 20, 2012, the distributor representative for Ogden’s Own, Elite Spirits, sent a letter to the division asking for confirmation of the earlier decision to deny special orders. There was no response. As a result, Ogden’s Own sent a letter to your agency seeking to confirm its earlier position that “Five Wives Vodka will not be available in Idaho for special orders.”

On May 24, 2012, the company received a response from your agency with a statement from Howard Wasserstein, Deputy Director of the for the Procurement, Distribution and Retail Division, explaining, “We feel Five Wives Vodka concept is offensive to a prominent segment of our population and will not be carried.” Mr. Wasserstein has also sent out e-mail communications in which he admitted that the omission of some required information in the application for general listing was not the reason for denying the request. Rather, Mr. Wasserstein and you have confirmed that the “tie-breaker” in denying general listing was the conclusion that the name and packaging was offensive. Mr. Wasserstein expressly cited religious sensibilities in his decision, admitting, “yes, we felt it could be offensive to Mormons.” He later added an additional stated concern that women might be insulted if they researched the origins of the picture from the nineteenth century on the bottle and read the backstory behind it. He insisted that the bottle would be “offensive to a majority of our population.” He offered no explanation of the rejection of special orders for the product.

### **Cause of Action**

Throughout this process, Ogden’s Own has tried to discuss and resolve any problems or concerns with your agency. They applied for entry into the Idaho market in good faith as they have done in other states. Idaho is the only state to raise religious and social sensibilities as a basis to deny entry to this product. To make matters worse, the agency proceeded to engage in public attacks on the company and its products. Mr. Wasserstein opted to inform third parties that the product was an insult to Mormons and later pledged that it would never be sold in the State of Idaho. He then expanded these attacks with criticism of the picture on the bottle, suggesting a bizarre misogynist hidden message. When public criticism grew over the use of religious sensibilities as a criterion for blocking the sale of a product, both Mr. Wasserstein and yourself proceeded to attack the quality of the vodka—disparaging both the product and the producers at this small distillery. Just last Friday, you were quoted attacking the product as “low class” and not “something we want to have on our shelf, sitting next to Absolut vodka.”

My clients would be the last to disagree with your praise and high regard for Absolut vodka. They have never disparaged other products. Just as the distillers in Sweden are rightfully proud of Absolut, the distillers of Ogden's Own are equally proud of their product. While they are tiny in comparison to the Swedish company, these American distillers resent your suggestion that they should not be seen on the same shelf with Absolut. I am, frankly, astonished by the vitriol and venom directed at this small company because it had the temerity to ask to enter the Idaho market and then objected to being blocked by religious sensibilities.

There is no reason for Ogden's Own to respond tit-for-tat to these public attacks by you and Mr. Wasserstein. Unlike your vodka of choice, your power is not absolute. We have a court system designed to protect citizens and companies from arbitrary and abusive governmental actions. It is clear from the continuing attacks from your office that nothing short of a lawsuit will compel your agency to reconsider its decision as well as its underlying policy.

The actions of the agency constitute flagrant violations of the United States Constitution and, as such, exceed the authority given to you as a state official. The actions taken by your agency—as well as the product disparagement in public statements—have caused obvious injury to my client both within Idaho and nationally. Not only has your agency prevented businesses from acquiring “Five Wives Vodka,” but you have seen fit to attack the quality of the product in the media in response to a national outcry over your actions. Your actions reflect not only a lack of knowledge concerning this product, but a striking lack of understanding of the limits placed on government officials. Your conduct in this matter has been arbitrary, capricious, and abusive. Rather than responding to your conflicted and ad hominem attacks, my client will seek judicial review to vindicate its right of access to the Idaho market.

Your action reflects not only an unconstitutional purpose in barring this product, but an equally unconstitutional underlying policy that gives you the alleged authority to bar products that you deem offensive. The expected claims against your agency and the State of Idaho include, but are not necessarily limited to, the following:

1. *Interference with Interstate Commerce:* Your decision to bar a Utah vodka while facilitating the sale of similar Idaho products constitutes interference with interstate commerce under the Commerce Clause of Article I of the United States Constitution.

2. *Establishment of Religion:* As has been widely reported, your decision seeks to protect the sensibilities of members of the Church of Jesus Christ of Latter-Day Saints (LDS) who constitute a prominent segment of the state population. The Establishment Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 796 (10th Cir. 2009). As such, your action violates the prohibition of the Establishment Clause.

3. *Denial of Free Speech:* The action to bar the sale of “Five Wives Vodka” is a denial of the free speech rights of both Ogden’s Own and its individual officers. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 707 (1931). Your policy on the barring of distribution is both facially unconstitutional and unconstitutional as applied in this case.

4. *Denial of Due Process:* The decisions to bar special orders and to refuse to general list “Five Wives Vodka” were made without affording my client due process as guaranteed under the Due Process Clause of the Fourteenth Amendment. The agency not only denied my client both substantive and procedural due process, but has a policy that denies citizens and businesses any clear understanding of the distinction between prohibited and permissible conduct. *See City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

5. *Denial of Equal Protection:* The actions taken against Ogden’s Own treat this Utah distillery differently from other similarly situated companies in violation of the Fourteenth Amendment of the United States Constitution. Even assuming that this matter is reviewed under a rational basis test, the state could not justify such unequal treatment on the stated grounds of the agency. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”)

While there are additional causes of action that are likely to be included in our complaint, this impressive list of constitutional violations should serve to concentrate the mind of state officials and hopefully lead to some retrospection over the treatment of this company. In the end, this is not about one’s vodka of choice. It is about the right of fair and equal treatment for citizens in dealing with government agencies like your own. Businesses and citizens in Idaho have asked to buy “Five Wives Vodka,” and this small American business wants to sell that product in your state. The only barrier has been neither market demand nor consumer preference, but the arbitrary imposition of religious objections to the packaging of the product. Such a basis would not satisfy the lowest standard of scrutiny in a constitutional challenge.

### **REQUESTED ACTION**

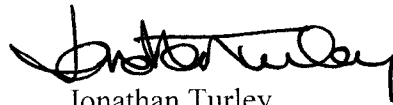
It remains the desire of my client to avoid the needless cost and time of litigation. There is no reason why your agency should continue to deny the ability of businesses in Idaho to sell this product, which is now approved for sale in other states. It is understandably difficult to admit error in a public controversy, but to defend such a facially unlawful decision would not serve the interests of your agency or, more importantly, the people of Idaho.

Accordingly, I ask that within ten (10) days you reverse your decision to deny special orders of “Five Wives Vodka.” Additionally, within ten (10) days, we ask that you confirm that you will reconsider the general listing of this product and review the

application without the determinative factor of protecting religious and social sensibilities. However, I cannot emphasize enough that the unprofessional and unfounded attacks by you and Mr. Wasserstein must end immediately if there is to be any hope of resolution without litigation. Obviously, if you intend to defend this decision in court or continue your attacks in the media, I would appreciate notice at your earliest convenience so that we can seek judicial relief as soon as possible.

Should you decide to litigate this matter, I would appreciate your conveying the name and contact information for your legal counsel for future communications.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Turley". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Jonathan Turley  
Counsel, Ogden's Own

cc: Lawrence G. Wasden, Idaho Attorney General  
Howard Wasserstein, Deputy Director for Procurement, Distribution, and Retail Operations