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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA

<p>14 ORION WINE IMPORTS, LLC and 15 PETER E. CREIGHTON,</p> <p style="text-align: right;">16 Plaintiffs,</p> <p style="text-align: center;">17 v.</p> <p>18 JACOB APPLESMITH, in his official 19 capacity as Director of the Central 20 Department of Alcoholic Beverage Control,</p> <p style="text-align: right;">21 Defendants.</p>	<p>2:18-cv-01721-KJM-DB</p> <p>DEFENDANT’S NOTICE OF MOTION TO DISMISS PLAINTIFFS’ SECOND AMENDED COMPLAINT</p> <p>[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]</p> <p>Date: December 21, 2018 Time: 10:00 a.m. Courtroom: 3 Judge: The Honorable Kimberly J. Mueller</p> <p>Action Filed: June 14, 2018</p>
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23 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

24 NOTICE IS HEREBY GIVEN that at the time, date, and in the court room indicated above,
 25 or as soon thereafter as the matter can be heard, at the Federal Court Building, 501 I Street,
 26 Sacramento, California, defendant Jacob Appelsmith will move the Court to dismiss plaintiffs’
 27 Second Amended Complaint. The motion will be based on the following grounds:
 28

1 1. Count I of plaintiffs' Second Amended Complaint fails to state a claim upon which
2 relief may be granted;

3 2. The Court lacks subject matter jurisdiction over the alleged Count II because both
4 plaintiffs lack Article III standing to bring the alleged Privileges and Immunities claim;

5 3. Count II of plaintiffs' Second Amended Complaint fails to state a claim upon which
6 relief may be granted; and

7 4. Defendant hereby certifies that the parties have met and conferred in a cordial and
8 professional manner regarding the motion to dismiss. The parties have discussed the motion via
9 telephone and via e-mail. The parties remain in disagreement as to whether Count I of the
10 Second Amended Complaint states an actionable claim as well as whether Count II of the Second
11 Amended Complaint is supported by Article III standing and states an actionable claim.

12 The motion to dismiss is based on this Notice, the Motion, the Memorandum of Points and
13 Authorities, the entire Court file, any other pleadings or evidence that may be presented at the
14 time of hearing, and matters of which the Court may take judicial notice.

15 Dated: October 17, 2018

Respectfully submitted,

16 XAVIER BECERRA
17 Attorney General of California
18 ANDREA R. AUSTIN
19 Supervising Deputy Attorney General

20 /s/ Lykisha D. Beasley

21
22 LYKISHA D. BEASLEY
23 Deputy Attorney General
24 Attorneys for Defendant
25 Jacob Appelsmith, Director of the
26 California Department of
27 Alcoholic Beverage Control

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CERTIFICATE OF SERVICE

Case Name: **Orion Wine Imports, LLC, and** No. **2:18-cv-01721-KJM-DB**
Peter E. Creighton v. Jacob
Applesmith

I hereby certify that on October 17, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT’S NOTICE OF MOTION TO DISMISS PLAINTIFFS’ SECOND AMENDED COMPLAINT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 17, 2018, at Sacramento, California.

Sylvia Sandoval

Declarant

/s/ Sylvia Sandoval

Signature

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 Attorney General of California
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10 IN THE UNITED STATES DISTRICT COURT
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14 **ORION WINE IMPORTS, LLC and**
 15 **PETER E. CREIGHTON,**
 16 Plaintiffs,
 17 v.
 18 **JACOB APPLESMITH, in his official**
 19 **capacity as Director of the California**
 20 **Department of Alcoholic Beverage Control**
 21 Defendant.

2:18-cv-01721-KJM-DB

**DEFENDANT’S MOTION TO DISMISS
 PLAINTIFFS’ SECOND AMENDED
 COMPLAINT**

[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]

Date: December 21, 2018
 Time: 10:00 a.m.
 Courtroom: 3
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INTRODUCTION

24 Although there are two plaintiffs of record in this action, there is only one interest at issue:
 25 Orion Wine Imports, LLC’s desire to conduct business within the State of California without
 26 complying with the California Alcoholic Beverage Control Act and its incorporated statutes,
 27 regulations, and foundational public policies. California’s regulatory scheme for controlling
 28 traffic in liquor is Constitutional and the complaint fails to state any claim for which relief may be

1 granted. Therefore, plaintiffs’ complaint should be dismissed entirely and without leave to
2 amend. Additionally, Plaintiffs’ singular interest in restructuring California’s Alcoholic Beverage
3 Control Act in order to better convenience Orion Wine Imports, LLC, specifically, warrants the
4 dismissal of the claims asserted by plaintiff Peter E. Creighton. Mr. Creighton lacks Article III
5 standing to assert the alleged causes of action. As a result, the complaint fails to state a claim for
6 which relief may be granted and also fails to present a case or controversy over which this Court
7 has jurisdiction.

8 **SUMMARY OF ALLEGED FACTS**

9 Plaintiff Orion Wine Imports, LLC (“Orion”) alleges that it is a company based in the state
10 of Florida and is in the business of importing and wholesaling wine produced outside of the
11 United States. First Amended Complaint (“FAC”) ¶ 4. Plaintiff Peter E. Creighton owns Orion.
12 FAC ¶ 5, 23. Orion alleges that the three-tier structure of California’s Alcoholic Beverage
13 Control Act is unconstitutional and erroneously insists that the regulations are unevenly applied.
14 FAC ¶¶ 9, 10, 12, 13, 25, 32. Orion seeks to circumvent California’s licensing structure in order
15 to import and sell wine directly to retailers in California. FAC ¶¶ 4, 15, 17.

16 **APPLICABLE LEGAL STANDARDS**

17 Pursuant to Federal Rule of Civil Procedure (“FRCP”), subdivision 12(b)(6), an alleged
18 cause of action may be dismissed for failure to state a claim upon which relief may be granted. A
19 plaintiff’s “factual allegations must be enough to raise a right to relief above the speculative
20 level.” Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555-556 (2007). Merely creating a
21 suspicion that there is a legally cognizable right of action is insufficient to survive a 12(b)(6)
22 motion. Id. Additionally, when evaluating a motion to dismiss, the Court is not required to
23 accept as true legal conclusions presented as factual allegations. Id. “[A]n unadorned, the-
24 defendant-unlawfully-harmed-me accusation” does not meet the plausibility pleading standard
25 and cannot survive a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

26 Furthermore, an action may also be appropriately dismissed under FRCP 12(b)(1) due to
27 lack of jurisdiction. Article III requires that federal courts only adjudicate actual cases and
28 controversies. U.S. Const. art. III, § 2, cl.1. “When presented with a claim for a declaratory

1 judgment, therefore, federal courts must take care to ensure the presence of an actual case or
2 controversy, such that the judgment does not become an unconstitutional advisory opinion.”
3 Rhodes v. Avon Products, Inc., 504 F.3d 1151, 1157 (9th Cir. 2007). “A suit brought by a
4 plaintiff without Article III standing is not a ‘case or controversy,’ and an Article III federal court
5 therefore lacks subject matter jurisdiction over the suit.” Cetacean Community. v. Bush, 386 F.3d
6 1169, 1174 (9th Cir. 2004). Article III standing requires injury, causation, and redressability.
7 City of Oakland v. Lynch, 798 F.3d 1159, 1163 (9th Cir. 2015). “It is the responsibility of the
8 complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial
9 resolution of the dispute and the exercise of the court's remedial powers.” Warth v. Seldin, 422
10 U.S. 490, 518 (1975).

11 ARGUMENT

12 I. COUNT I MUST BE DISMISSED BECAUSE IT FAILS TO STATE AN ACTIONABLE CLAIM.

13 Plaintiffs claim that California’s Alcoholic Beverage Control Act violates the Commerce
14 Clause of the United States Constitution. However, Plaintiffs have not alleged facts
15 demonstrating unconstitutional differential treatment of wine importers and wholesalers with
16 residency outside the state from those who do not have a residency outside of the state.

17 In support of the Commerce Clause violation claim, plaintiffs cite to California Business
18 and Professions Code sections 23661, 23374, 23775, and 23778. Section 23661 provides, in
19 relevant part:

20 “...alcoholic beverages may be brought into this state from without this state for
21 delivery or use within the state only by common carriers and only when the
22 alcoholic beverages are consigned to a licensed importer, and only when consigned
23 to the premises of the licensed importer or to a licensed importer or customs broker
24 at the premises of a public warehouse licensed under this division... A
25 manufacturer of distilled spirits may transport such distilled spirits into this state in
26 motor vehicles owned by or leased to the manufacturer, and operated by employees
27 of the manufacturer, if: (a) [s]uch distilled spirits are transported into this state from
28 a place of manufacture within the United States; and (b) [t]he manufacturer holds a
California distilled spirits manufacturer’s license; and (c) Delivery is made to the
licensed premises of such distilled spirits manufacturer.”

Cal. Bus. & Prof. Code § 23661.

1 Section 23374 explains: “any importer’s license authorizes the person to whom issued to become
2 an importer of alcoholic beverages specified in the license, to export the alcoholic beverages, and
3 to transfer the beverages to himself under another license.” Cal. Bus. & Prof. Code § 23374.

4 Section 23775 provides: “an importer's license shall be issued only to a person or manufacturer
5 who holds a license authorizing the sale for resale of the types of alcoholic beverages mentioned
6 in the importer's license.” Cal. Bus. & Prof. Code § 23775. Section 23378 establishes: “any
7 wholesaler’s license authorizes the sale of the alcoholic beverage specified in the license only to
8 persons holding licenses issued by the department authorizing the sale of the alcoholic beverage,
9 and authorizes the exportation of the alcoholic beverage.” Cal. Bus. & Prof. Code § 23378.

10 None of the four statutory provisions identified in Plaintiffs’ complaint call for or implement the
11 unequal treatment of business entities based on location. These regulations clearly apply to all
12 who wish to deal in the business of alcohol for consumption in California and are consistent with
13 Twenty-First Amendment which grants states vast authority to control, or ban if it so chooses, the
14 trafficking, sale, and consumption of alcohol.

15 **A. Plaintiffs’ Commerce Clause Claim Is Not Plausible On Its Face and Should Be**
16 **Dismissed.**

17 Although Plaintiffs’ complaint concludes that sections 23661, 23374, 23775, and 23778 of
18 the California Business and Professions Code are unconstitutional under the Commerce Clause, it
19 fails to set forth facts supporting the assertion that Orion is actually precluded from participating
20 in the dealing of wine in California in such a way that violates the law. Thus, Plaintiffs’ bare
21 allegations are insufficient to survive a motion to dismiss. Bell Atlantic Corp v. Twombly, 550
22 U.S. at 555-556 (2007).

23 Plaintiffs’ asserted claim for relief under the Commerce Clause is particularly untenable
24 when viewed in light of the applicable legal principles. As a foundational matter, “[i]t has long
25 been recognized that, ‘in the absence of conflicting legislation by Congress, there is a residuum of
26 power in the state to make laws governing matters of local concern which nevertheless in some
27 measure affect interstate commerce or even, to some extent, regulate it.’” Kassel v. Consolidated
28 Freightways Corporation of Delaware, 450 U.S. 662, 669 (1981). Furthermore, “a state

1 regulation does not become vulnerable to invalidation under the dormant Commerce Clause
2 merely because it affects interstate commerce.” National Association of Optometrists &
3 Opticians v. Harris, 682 F.3d 1144, 1148 (9th Cir. 2012). Finally, the 21st Amendment solidifies
4 the Constitutionality of California’s liquor regulatory scheme, including those specific provisions
5 cited by Plaintiffs. California, like other states, has the right to exercise virtually complete
6 control over how it regulates the importation and sale of alcohol within the state. California
7 Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). The
8 explicit grant of power to the states to engage in such regulation should not be overlooked nor
9 undercut by peripheral interpretations. Id. at 107, 111. In-keeping with these legal principles,
10 the Supreme Court has reiterated the unquestionable legitimacy of three-tier regulatory systems,
11 especially those that treat liquor *produced* out of a state the same as its local equivalent.
12 Granholm v. Heald, 544 U.S. 460, 489 (2005) (emphasis added.).

13 Here, Plaintiffs have not asserted any facts that reasonably challenge the applicability of
14 the legal hallmarks set forth above. Plaintiffs have not identified any Congressional legislation
15 that invalidates or even conflicts with the state statutory provisions they seek invalidate.
16 Plaintiffs have not alleged facts illustrating how the cited provisions are so burdensome on
17 interstate commerce that they are unconstitutional. Plaintiffs’ conclusory statements about the
18 alleged inability to participate in California’s wine industry do not explain nor illustrate an
19 impermissible burden on interstate commerce.

20 In addition to the standard Commerce Clause principles applied to the state regulations, the
21 21st Amendment imposes an even higher standard for liquor-based claims against a state.
22 Plaintiffs have also failed to meet this standard. The portions of the California Business and
23 Professions Code Plaintiffs have concluded are unconstitutional are, in fact, per se Constitutional.
24 Plaintiffs have not alleged any facts to support the notion that California has improperly exercised
25 its granted right of control over the importation and sale of alcohol in its state. Plaintiffs have not
26 pointed to any discriminatory wording in the cited the provisions nor have they demonstrated how
27 wine produced outside of California is treated differently than wine produced domestically.
28 Likewise, Plaintiffs have not alleged facts supporting the notion that the “unquestionably

1 legitimate” three-tier system providing discrete licenses for importation, wholesaling, and retail
2 services is suddenly unconstitutional. The options available to Orion are the same options
3 available to any other entity which seeks to participate in the wine industry in California.
4 Plaintiffs cannot reasonably claim otherwise and, indeed, have not set forth any facts tending to
5 prove otherwise. As a result, Plaintiffs’ Commerce Clause claim should be dismissed.

6 **B. Plaintiffs’ Commerce Clause Claim Fails to State Facts Undermining the**
7 **Neutrality of the Cited Statutory Provisions.**

8 Plaintiffs have failed to allege plausible facts demonstrating that sections 23661, 23374,
9 23775, and 23778 of the California Business and Professions Code are discriminatory on their
10 face, in their purpose, or in their effect. National Association of Optometrists & Opticians v.
11 Harris, 682 F.3d at 1150 (9th Cir. 2012). Plaintiffs’ complaint similarly fails to set forth factual
12 allegations demonstrating a potential right to relief based on *significant* burdens imposed on
13 interstate commerce by the cited provisions of the Code. Id. It is obvious the challenged
14 provisions are neither protectionist nor unreasonable. Rather, they explicitly serve to maintain the
15 integrity of the Constitutionally compliant and “unquestionably legitimate” three-tier liquor
16 regulatory system. Granholm v. Heald, 544 U.S. 460, 489 (2005). The statutory sections
17 identified by Plaintiffs as unconstitutional are neutral in their language and in their application
18 and, therefore, cannot reasonably be the basis of Plaintiffs’ alleged Commerce Clause claims.

19 The even-application of the licensing regulations cited in Plaintiffs’ complaint coupled
20 with the well-established law applicable to states’ governance of liquor warrant dismissal of
21 Count I of Plaintiffs’ complaint alleging a Commerce Clause violation. It is unnecessary for the
22 Court to examine the nuances of the cited provisions given that Plaintiffs have failed to allege
23 facts sufficient to state a plausible claim under the Commerce Clause.

24 **II. COUNT II MUST BE DISMISSED BECAUSE PLAINTIFF CREIGHTON LACKS STANDING**

25 The Privileges and Immunities clause contained in Article IV of the Constitution is
26 inapplicable to companies. Western & Southern Life Insurance Co. v. State Board of
27 Equalization, 451 U.S. 648, 656 (1981). Likewise, the Privileges and Immunities Clause is
28

1 inapplicable to individual plaintiffs whose alleged prospective injuries flow directly from the
2 alleged prospective injury to a corporation. See Chance Management, Inc. v. State of South
3 Dakota, 97 F.3d 1107, 1115-1116 (8th Cir. 1996); Smith Setzer & Sons, Inc. v. South Carolina
4 Procurement Review Panel, 20 F.3d 1311, 1317-1318 (4th Cir. 1994).

5 Plaintiffs' complaint makes it clear that Plaintiff Creighton is seeking redress as the owner
6 of Orion, meaning that his alleged injuries flow directly from the allegations regarding Orion's
7 ability to operate as a wine importer and wholesaler in California. Plaintiff Creighton has not
8 indicated the requisite injury, causation, and redressability for Article III standing, separate from
9 what is alleged by Orion. Plaintiffs cannot maneuver around the inapplicability of the Privileges
10 and Immunities Clause to business entities simply by also naming the owner of that business
11 entity as a plaintiff. Thus, dismissal of Count II of the complaint is warranted because Plaintiff
12 Creighton lacks standing to assert a claim under the Privileges and Immunities Clause on behalf
13 of his business and this Court does not have subject matter jurisdiction over such a claim.

14 **III. COUNT II MUST BE DISMISSED BECAUSE IT FAILS TO STATE AN ACTIONABLE CLAIM.**

15 In order to bring a cause of action under 42 U.S.C. § 1983, a plaintiff must plead that (1) a
16 defendant acting under the color of state law (2) deprived the plaintiff of rights secured by the
17 U.S. Constitution. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir.
18 1988). However, for a Section 1983 claim to proceed under the Privileges and Immunities Clause
19 of Article IV, there must be discrimination on the basis of out-of-state residency. Gianni v. Real,
20 911 F.2d 354, 357 (9th Cir. 1990). The absence of any disparate treatment of nonresidents is fatal
21 to a plaintiff's claims of violation of the Privileges and Immunities Clause. Id.

22 Assuming, *arguendo*, that Plaintiff Creighton did have standing to assert Constitutional
23 claims on behalf of a commercial business, he has failed to allege facts from which a reasonable
24 inference can be drawn that Defendant is violating his rights under the Privileges and Immunities
25 Clause. Setting aside the improper legal conclusions, Plaintiffs' complaint does not identify an
26 interest belonging to Plaintiff Creighton that is protected by the Privileges and Immunities
27 Clause. The challenged regulatory scheme, including California Business and Professions Code
28 sections 23361, 23774, 23775, and 23778 which were specifically cited as the basis for the

1 complaint, is applicable to all who wish to deal in liquor in the state of California. Due to the
2 absence of any disparate treatment of nonresidents within the challenged state laws, Count II
3 should be dismissed because it fails to state an actionable claim.

4 **CONCLUSION**

5 For the reasons discussed above, defendant respectfully requests that the Court dismiss the
6 entirety of Plaintiffs' Second Amended Complaint without leave to amend because they have not
7 and cannot state plausible claims for relief under the Commerce Clause or the Privileges and
8 Immunities Clause of the U.S. Constitution.

9 Dated: October 17, 2018

Respectfully submitted,

10 XAVIER BECERRA
11 Attorney General of California
12 ANDREA R. AUSTIN
13 Supervising Deputy Attorney General

14 */s/ Lykisha D. Beasley*

15
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CERTIFICATE OF SERVICE

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Sylvia Sandoval

Declarant

/s/ Sylvia Sandoval

Signature