XAVIER BECERRA, State Bar No. 118517
Attorney General of California
ANDREA R. AUSTIN, State Bar No. 173630
Supervising Deputy Attorney General
LYKISHA D. BEASLEY, State Bar No. 282907
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6110
Fax: (916) 324-5567
E-mail: Lykisha.Beasley@doj.ca.gov
Attorneys for Defendant
Jacob Appelsmith, Director of the
California Department of
Alcoholic Beverage Control

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ORION WINE IMPORTS, LLC and PETER E. CREIGHTON,

Plaintiffs,

v.

JACOB APPLESMITH, in his official capacity as Director of the California Department of Alcoholic Beverage Control,

Defendants.

2:18-cv-01721-KJM-DB

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date:	February 8, 2019
Time:	10:00 a.m.
Courtroom:	3
Judge:	The Honorable Kimberly J. Mueller
Action Filed:	June 14, 2018

Plaintiffs' Second Amended Complaint ("SAC") –which challenges California's wine import regulations – should be dismissed, in its entirety, without leave to amend because they have not and cannot assert factual allegations that raise a plausible right to relief under the Commerce Clause or the Privileges and Immunities Clause of Article IV of the United States Constitution.

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS FAIL TO STATE A CLAIM FOR RELIEF

Defendant's motion to dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6). Rule 12(b)(1) allows for dismissal due to lack of jurisdiction as U.S. Const. art. III, § 2, cl. 1 requires that federal courts only adjudicate actual cases and controversies. Rule 12(b)(6) provides that a complaint may be dismissed for failure to state a claim upon which relief can be granted, when as a matter of law there is a lack of a cognizable legal theory, or an insufficient factual basis to support a plaintiff's legal theory. *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir. 1990).

Plaintiffs' opposition argues that motions to dismiss are "viewed with disfavor . . . and rarely granted" and that if the pleadings suggest a legitimate claim that would entitle plaintiff to relief the motion should be denied. For this later proposition, Plaintiffs' cite *Moss v. U.S. Secret Service*, 572 F.3d 962, 969. Plaintiffs' argument misstates the law and the *Moss* opinion undermines their argument.

In *Moss*, the Ninth Circuit relied on the then-recent U.S. Supreme Court decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009), to assess whether Moss's complaint sufficiently alleged a constitutional violation. Citing *Iqbal*, the *Moss* court noted that "bare assertions . . . amount[ing] to nothing more that a 'formulaic recitation of the elements' of a constitution discrimination claim" are not entitled to an assumption of truth for the purposes of ruling on a motion to dismiss. (internal citations omitted.) *Moss*, at 969. The *Moss* court went on to state that, only after disregarding a complaint's conslusory allegations, does the court apply the plausibility standard. *Id*. "The plausibility standard is not akin to a 'probability requirement,'" it requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Thus, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" (internal citations omitted.) *Id*. Such is the case here.

Additionally, in cases with allegations similar to those here, the Ninth Circuit has held that motions to dismiss are a valuable legal tool used to test the legal sufficiency of a complaint. See,

North Star International v. Arizona Corporation Commission, 720 F.2d 578, 581 (9th Cir. 1983) (vague and conclusory allegations that assert state's security statutes violate the Commerce Clause properly disposed of via a motion to dismiss.). For the reasons outlined in Defendant's moving papers, as well as those set forth below, Plaintiffs' bare assertions fail to state any constitutional deprivation.

II. PLAINTIFFS' ATTEMPT TO DISMANTLE CALIFORNIA'S THREE-TIER REGULATORY SYSTEM UNDER THE GUISE OF A DISCRIMINATION CLAIM IS LEGALLY UNSOUND

In the SAC and their opposition papers, Plaintiffs allege that California's Alcoholic Beverage Control ("ABC") structure is in violation of the U.S. Constitution. Specifically, Plaintiffs contend that Business & Professions Code section 23661 violates the dormant Commerce Clause by prohibiting out-of-state wine importers from distributing their products directly to retailers in California. SAC, ¶ 8. However, that claim fails, as a matter of law.

States have broad power under section 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquors. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. In the exercise of this power, California – like may other states – has adopted a three-tier system regarding the importation and distribution of liquor. Defendant's motion at pp. 3-4. This system is codified under the California's ABC Act at Business & Professions Code section 23000, et. seq.[1]

A. PLAINTIFFS' ATTACK OF CALIFORNIA'S THREE-TIER SYSTEM IS INCONSISTENT WITH PREVAILING LAW

Plaintiffs' claim fails at the outset because it is inconsistent with the U.S. Supreme Court's recognition of the legitimacy of the three-tier system. In *Granholm v. Heald*, 544 U.S. 460, 488-489 (2005) the Supreme Court recognized the unquestionable legitimacy of a state-run three-tier regulatory system regarding the sale and distribution of liquor. *Granholm,* at 487 (held Michigan and New York statutes discriminated against interstate commerce because they effectively allowed only in-state wineries – to the exclusion of all out-of-state wineries – to bypass the States'

[1] All further statutory references are to the California Business and Professions Code, unless specifically stated otherwise.

distribution system and ship directly to consumers.) In its decision, the *Granholm* Court noted that the "'Twenty-first Amendment empowers [a state] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.'" *Id.* (quoting *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring in the judgment) (ellipses omitted)). The Court further explained that its decision invalidating two state laws as discriminatory did not "call into question the constitutionality of the three-tier system." *Id.* at 488 (such a conclusion "does not follow from our holding"). Consistent with Granholm, courts have rejected discrimination challenges to aspects of the three-tier system. See *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190-91 (2d Cir. 2009).

Here, Plaintiffs' allege that they are importers of wine produced outside of the United States, and that they sell that wine, wholesale, to retailers in Florida and elsewhere. SAC, ¶ 11. Plaintiffs assert that section 23661,[2] the middle tier of California's three-tier system, violates the Commerce Clause because it prohibits them from selling and delivering wine directly to retailers. Plaintiffs' Opp., Sec. III, p. 6, lines 3-4. Plaintiffs' claim fails for the following reasons:

In challenging California's requirement that an importer must deliver wine to a licensed wholesale premises before distribution to retailers, plaintiffs attack the three-tier system itself. Here, Plaintiffs' claim is not that Section 23661 subjects out-of-state importers to a three-tier system and exempts in-state importers. Rather, Plaintiffs contend that Section 23661 is unconstitutional because it does not exempt out-of-state importers from the three-tier system. There is no Constitutional basis for such a claim.

Plaintiffs assert that Section 23661 discriminates between importers based on residence. In essence, Plaintiffs are arguing that the three-tier system should be struck down simply because it requires Orion to comply with the middle tier regarding imports. However, in support of their argument, Plaintiffs fail to allege that any California-based businesses who imports wine

[2] Section 23661 states in pertinent part, "alcoholic beverages may be brought into this state from without this state for delivery or use within the state . . . only when the alcoholic beverages are consigned to a licensed importer, and only when consigned to the premises of the licensed importer or to a licensed importer or customs broker at the premises of a public warehouse licensed under this division."

produced out of the United States is permitted to bypass the same regulatory structure – which, essentially, is what Plaintiffs seek.

Although the SAC states that Plaintiffs "would agree to be subject to California regulations," Plaintiffs' lawsuit is premised on the fact that Orion does not want to be subject to California regulations, specifically, it's three-tier system. *See* SAC, ¶ 14. The fact that "Orion Wine Imports, LLC has no plans to open a facility, premise, or office in California" and allegedly, "cannot afford to do so" does not preclude Orion from doing business in California in a manner that complies with its licensing structure. *See* SAC, ¶ 15.

As the party challenging the statutes, Plaintiffs bear the burden of showing discrimination. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010). Such alleged discrimination must be between persons or entities who are similarly situated. *Id.* Plaintiffs have not and cannot do so. "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337-338 (2008) (internal quotation marks omitted). Economic protectionism or discrimination under the dormant Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of State of Oregon*, 511 U.S. 93, 99 (1994) (internal quotation marks omitted).

As a foundational matter, Section 23661 and other provisions of the Act dictate that an importer's license authorizes that person or entity (irrespective of their residency) to import, export, or transfer a specified alcoholic beverage to **any** licensed premises of a licensed importer or customs broker or a licensed public warehouse.[3] Cal. Bus. & Prof. Code § 23661. Plaintiffs claim that California law discriminates because an out-of-state importer must "open a new import/wholesale business in California with physical premises in the state which could import

[3] Indeed, by allowing for the use of licensed public warehouses, California has created an alternative option for the reception and storage of imported alcoholic beverages so facilitate compliance wit the middle tier if an entity does not have its own licensed premises or utilize a customs broker.

the wine from them and sell it to retailers." Plaintiffs' Opp., Sec. III, p. 6. That misunderstands California law. Under the State's three-tier system, all importers must deliver wine to a wholesale physical premise. The State, moreover, makes such premises available for out-of-state (and other) importers by permitting the use of licensed public warehouses. Cal. Bus. & Prof. Code § 23375. The Act describes a public warehouse as "any place licensed for the storage of, but not the sale of, alcohol or alcoholic beverages for the account of other licensees and includes United States custom bonded warehouses and United States internal revenue bonded warehouses when the bonded warehouses are used for storage of alcoholic beverages for the account of another licensee." Cal. Bus. & Prof. Code § 23036. Thus, any entity (including an out-of-state one) that lacks its own licensed wholesale business premises within the state may distribute its product to California retailers through this mechanism. That plaintiffs prefer not to have to go through any intermediate step before their products can be distributed to retailers does not amount to a constitutional violation. *Cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (Commerce Clause does not protect "particular structure or methods of operation"). California ABC law imposes no requirements on non-California companies that are not also imposed on California ones. This belies any claim of discrimination. *See CTS Corp. v. Dynamics Corp. of America* 481 U.S. 69, 87 (1987) (state law not discriminatory where it applies "whether or not the [affected company] is a domiciliary or resident" of the State); *see* also *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1042 (9th Cir. 2014) (no discrimination where law "treats all private companies exactly the same" (alterations and internal quotation marks omitted)). The assertions contained in Plaintiffs' SAC illustrate that they are not being excluded from participation in California's legitimate three-tier regulatory system, but rather they are choosing not to participate. Further, Plaintiffs' cite no statute that distinguishes between import entities headquartered and owned in California and those headquartered and owned elsewhere.

Plaintiffs' argument that the second tier of California's three-tier regulatory system is unlawful because there is no out-of-state exemption is unsound. For this reason, and those previously discussed, Plaintiffs' Commerce Clause challenge of Section 23661 should be dismissed, without leave to amend.

B. THE UNDERLYING FACTS OF GRANHOLM DO NOT SUPPORT PLAINTIFFS' CLAIMS

In their opposition to Defendant's motion to dismiss, Plaintiffs rely a great deal on *Granholm v. Heald*, 544 U.S. 460 to support the notion that they have stated a cognizable claim for relief under the dormant Commerce Clause. Plaintiffs' Opp., Sec. III-IV, p. 6-8. With respect to this case, the underlying facts of *Granholm* must be distinguished. The overarching alcoholic beverage control concepts relevant to this case were recognized in Granholm, including the broad authority granted to States by the Twenty-first Amendment and the enduring validity of the three-tier State regulatory system. *Granholm v. Heald*, 544 U.S. 460, 488-498 (2005). The holdings, however, pertain to distinguishable scenarios. Granholm stands for the idea that States cannot enact alcohol laws that favor in-state **producers** over out-of-state **producers**. *Granholm*, *supra*, 544 U.S. at 462, 489. Here, Plaintiffs have not made any allegation involving differential treatment amongst wineries based on an out-of-state versus in-state status.

III. PLAINTIFFS' HAVE NOT AND CANNOT DEMONSTRATE THE REQUISITE STANDING FOR A PRIVILEGES AND IMMUNITIES CLAIM

The Privileges and Immunities Clause of Article IV of the U.S. Constitution does not apply to corporations, such as Orion. U.S. Const. art. 4, § 2, cl. 1; *Metropolitan Washington Chapter v. District of Columbia*, 57 F.Supp.3d. 1, 20, fn. 9 (D.D.C. 2014). Plaintiffs' reliance upon *Citizens United* to support a contrary argument is misplaced. *Citizens United* is notably inapplicable to this case because it specifically and narrowly addressed corporate personhood within the context of the political free speech under the First Amendment. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). That holding does not extend to claims such as Plaintiffs' which challenge the States' broad power to regulate the importation and use of intoxicating liquors.

The SAC presents joint facts for both named Plaintiffs' in support of the asserted claims and does not allege an injury to Plaintiff Creighton that is separate from hypothetical deal between both named Plaintiffs and the Pour House. SAC, ¶ 14. As a result, Plaintiff Creighton also lacks standing under Article III because he has not adequately alleged injury, in fact, which requires

concrete and particularized harm. U.S. Const. art. 3, § 2, cl. 1; *Metropolitan Washington Chapter*, 57 F.Supp.3d. at 15.

Plaintiffs' Article IV Privileges and Immunities Claim must also be dismissed based on the discussion in Section II above. "The Privileges and Immunities Clause is violated when the challenged restriction deprives nonresidents of a privilege or immunity protected by the Clause, there is [no] substantial reason for the difference in treatment, . . . [and] the discrimination practiced against nonresidents [does not bear] a substantial relationship to the State's objective." [internal quotations omitted]. *A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865, 868 (3rd Cir. 1997) [internal quotations omitted]. Plaintiffs' claim is dependent upon residency-based discrimination and, in this case, there is none. *Gianni v. Real*, 911 F.2d 354, 357 (9th Cir. 1990). The challenged statute is neutral in its language and in its application, meaning Plaintiff Creighton's 42 U.S.C. § 1983 claim, even if he were asserting claims on his own behalf, lacks merit and cannot go forward. The facts alleged in the SAC do not suggest a right to relief based on a claim of disparate treatment of out-of-state wine importers, despite the conclusory legal arguments contained therein.

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CONCLUSION

Based on the nature of Plaintiffs' claims and allegations, Defendant's motion, and the foregoing reply discussion, Defendant respectfully requests that this Court dismiss Plaintiffs' SAC, without leave to amend.

Dated: February 1, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
ANDREA R. AUSTIN
Supervising Deputy Attorney General

/s/ Lykisha D. Beasley

LYKISHA D. BEASLEY
Deputy Attorney General
Attorneys for Defendant Jacob Appelsmith, Director of the California Department of Alcoholic Beverage Control

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CERTIFICATE OF SERVICE

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

I hereby certify that on February 1, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S REPLY IN SUPPORT 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 February 1, 2019, at Sacramento, California.

Sylvia Sandoval	/s/ Sylvia Sandoval
Declarant	Signature

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