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11 *Attorneys for plaintiffs Orion Wine Imports and Peter Creighton*

12 IN THE UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF CALIFORNIA

14 ORION WINE IMPORTS, LLC and )  
15 PETER E. CREIGHTON, )  
*Plaintiffs* )

16 vs )

17 JACOB APPLESMITH, in his official )  
capacity as Director of the California )  
18 Dept. of Alcoholic Beverage Control )  
*Defendant* )

No. 2:18-cv-01721-KJM-DB

) **PLAINTIFFS' MEMORANDUM**  
) **PROVIDING CITATIONS FOR**  
) **NEW AUTHORITY RAISED**  
) **AT THE HEARING**

) Date: February 8, 2019

) Time: 10:00 am

) Ctroom: 3

) Judge: Hon. Kimberly J. Mueller

1 On February 8, 2019, a hearing was held on Defendant Applesmith's motion to dismiss the  
2 complaint. At that hearing, in response to questions from the Court, Plaintiffs' counsel twice  
3 referred to legal authority that had not been included in his brief without providing the citations.

4 The citations are as follows:

5 1. In response to a question about whether this case could be disposed of on a motion to  
6 dismiss, Plaintiffs' counsel asserted that Supreme Court precedent held that all Commerce  
7 Clause claims required a fact-based assessment of the extent to which a law harmed interstate  
8 commerce and the extent to which it benefitted local economic activity, but did not cite the case.

9 The case counsel was referring to is *Brown-Forman Distillers Corp. v. N.Y. State Liquor*  
10 *Authority*, 476 U.S. 573, 578-79 (1986), which said:

11 This Court has adopted what amounts to a two-tiered approach to analyzing state  
12 economic regulation under the Commerce Clause. When a [statute] discriminates against  
13 interstate commerce, or when its effect is to favor in-state economic interests over out-of-  
14 state interests, we have generally struck down the statute without further inquiry... When,  
15 however, a statute has only indirect effects on interstate commerce and regulates even-  
16 handedly, we have examined whether the State's interest is legitimate and whether the  
17 burden on interstate commerce clearly exceeds the local benefits... We have also  
18 recognized that there is no clear line separating the [two] categor[ies].... In either situation  
19 the critical consideration is the overall effect of the statute on both local and interstate  
20 activity.

21 2. In response to a question about whether a nonresident importer like Orion could gain the  
22 privilege to distribute its wine directly to retailers simply by leasing space in a public warehouse,  
Plaintiffs' counsel asserted that California law did not permit this alternative, but did not provide  
the citations.\*

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\*Defense counsel also provided no specific citation in support of her argument that leasing  
warehouse space would allow Orion to ship wine to retailers.

1 The primary statute Plaintiffs' counsel was referring to is Cal. Bus. & Prof. Code § 23661  
2 which requires a nonresident importer to consign all wine being shipped into the state to an in-  
3 state importer before it is shipped to a public warehouse. The statute contains no provision that  
4 would exempt the out-of-state importer from the requirement that the wine first be consigned to  
5 an in-state importer and allow the nonresident to personally deliver the wine directly to retailers  
6 if space were leased at a public warehouse. The statute says:

7 [A]lcoholic beverages may be brought into this state ... only when the alcoholic  
8 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.

9 To the extent that § 23661 may be unclear, a combination of other statutes prohibits a  
10 nonresident importer from personally distributing its wine to retailers regardless of whether it  
11 initially ships the wine to a public warehouse. Alcoholic beverage transactions may be conducted  
12 only on the premises of an entity licensed to do engage in that activity. Cal. Bus. & Prof. Code §  
13 23355. Neither importers nor public warehouses are licensed to sell wine to retailers. Cal. Bus. &  
14 Prof. Code §§ 23036, 23374, 23374.6. Only wholesalers are allowed to do so, Cal. Bus. & Prof.  
15 Code § 23378, and retailers are allowed to buy wine only from wholesalers. Cal. Bus. & Prof.  
16 Code § 23402. Thus, an out-of-state importer would have to establish premises in the state and  
17 open a wholesale business. Only then could it ship wine to a public warehouse, transfer the wine  
18 to itself as a wholesaler, Cal. Bus. & Prof. Code § 23374, and then ship from the wholesale  
19 premises. It cannot count space leased in a public warehouse as its in-state premises because Cal.  
20 Rev. & Tax Code § 19192(B) provides that “the storing of ... products in a public warehouse ...  
21 does not constitute maintaining a permanent facility in this state.”

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*Attorney for Plaintiffs*

s/ James A Tanford  
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served through that system.

s/ James A Tanford  
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