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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)
 PETER E. CREIGHTON,) No. 2:18-cv-01721-KJM-DB
 15 *Plaintiffs*)
) **SECOND AMENDED COMPLAINT**
 16 vs)
)
 17 JACOB APPLESMITH, in his official)
 capacity as Director of the California)
 18 Dept. of Alcoholic Beverage Control)
Defendant)
 19)
 20)
 21)
 22)
 23)

1 Plaintiffs make the following allegations based upon information and belief, except for the
2 allegations pertaining to Plaintiffs, which are based upon personal knowledge.

3 **Introduction**

4 This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the
5 constitutionality of California Business & Prof. Code § 23661, which prohibits licensed wine
6 importers and wholesalers located in other states from importing, selling and delivering wine
7 directly to California-licensed retailers. California allows its own licensed wholesalers possessing
8 a California import license to do so. Plaintiffs seek a declaratory judgment that this statutory
9 scheme is unconstitutional for two reasons: (1) it violates the Commerce Clause of the United
10 States Constitution because it discriminates against interstate commerce by denying licensed
11 business located outside the state the right to import, sell and deliver wine to California-licensed
12 retailers upon the same or similar terms as in-state businesses, and (2) it violates the Privileges
13 and Immunities Clause in Article IV by denying nonresidents the privilege of engaging in their
14 profession as wine merchants on equivalent or similar terms to those given to citizens of
15 California. Plaintiffs seek an injunction barring the Defendant from enforcing this provision and
16 requiring him to permit out-of-state wine importers and wholesalers to do business in California
17 upon the same terms as in-state businesses.

18 **Jurisdiction**

19 1. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1331, which confers
20 original jurisdiction on federal district courts to hear all civil actions arising under the
21 Constitution, laws, or treaties of the United States.

22 2. The Court has authority to grant declaratory relief pursuant to 28 U.S.C. § 2201.

23 3. Plaintiffs do not request that the State be enjoined from collecting any tax due on the sale

1 of wine.

2 **Parties**

3 4. Plaintiff Orion Wine Imports, LLC, is a business entity located in Clearwater, Florida that
4 imports wine produced outside the United States; and is a Florida-licensed wholesaler that sells
5 wine to wholesalers around the country, Florida-licensed retailers and directly to retailers in other
6 states, where permitted.

7 5. Plaintiff Peter Creighton is a resident of Largo, Florida, who imports wine produced
8 outside the United States; and is a Florida-licensed wholesaler that sells wine to wholesalers
9 around the country, Florida-licensed retailers and directly to retailers in other states, where
10 permitted. He owns Orion Wine Imports

11 6. Defendant Jacob Applesmith is the Director of the California Department of Alcoholic
12 Beverage Control, with headquarters in Sacramento, California. He is charged by Cal. Business
13 & Prof. Code § 23053.1 with enforcing the California Alcoholic Beverages Control Act. He is
14 sued in his official capacity for prospective relief only.

15 **Count I: Commerce Clause Violation**

16 7. Under California Business & Professional Code § 23775, a business entity located within
17 the state can obtain importer and wholesaler licenses from Defendant, which permit it to import,
18 sell and deliver the wine to California-licensed retailers.

19 8. A business entity located outside the state cannot get a license from the Defendant which
20 would allow it to import, sell and deliver the wine directly to California-licensed retailers, but is
21 required by California Business & Professional Code § 23661 to deliver its wine only to
22 California importers or wholesalers who also possess a California importer license.

23 9. Under California Business & Professional Code §§ 23374, 23378, and 23775, a business

1 entity located within the state may hold both an importer and a wholesaler licenses, transfer
2 imported wine to itself as a wholesaler, and then sell and deliver the wine to California-licensed
3 retailers.

4 10. A business entity located outside the state that is both an importer and wholesaler may not
5 import, sell and deliver wine directly to California-licensed retailers, but is required by California
6 Business & Professional Code § 23661 to sell and deliver its wine only to California-licensed
7 importers or wholesalers who also possess a California importer license.

8 11. Orion Wine Imports, LLC, imports wine produced outside the United States and then
9 sells and delivers it at wholesale to licensed retailers in Florida and elsewhere, where permitted.
10 Because it is located in Florida and has no premises in California, it is prohibited from importing
11 selling and delivering wine directly to California-licensed retailers.

12 12. To sell its wine in California, Orion Wine Imports, LLC, must sell it to a California-
13 licensed importer or wholesaler who possesses a California importer's license, for resale, where
14 the wine must come to rest, which adds costs to distribution not faced by in-state importers and
15 reduces Orion Wine Imports, LLC's profit.

16 13. The requirement that Orion Wine Imports, LLC must use a separate wholesaler will
17 foreclose it altogether from selling and delivering some of its wine in California where the
18 demand is so small or the wine is so new and unknown that no wholesaler will agree to carry it.

19 14. If Orion Wine Imports, LLC were permitted to import, sell and deliver its wine directly to
20 California-licensed retailers, it would obtain a license if one were available, would comply with
21 the same rules concerning labeling, shipping, reporting, and paying taxes as in-state importers
22 and wholesalers do, and would agree to be subject to California regulations.

23 15. Orion Wine Imports, LLC has no plans to open a facility, premise, or office in California,

1 and cannot afford to do so.

2 16. By refusing to issue a license to out-of-state importers or wholesalers that would allow
3 them to import, sell and deliver wine to California-licensed retailers upon the same or similar
4 terms as in-state importers and wholesalers, the State of California is discriminating against
5 interstate commerce and protecting the economic interest of local businesses by shielding them
6 from competition, in violation of the Commerce Clause of the United States Constitution.

7 17. In or about May 2018, Plaintiffs entered into business discussions directly with Dean
8 Schaecher (Schaecher), owner of the "Pour House," a California licensed retail wine shop located
9 in Truckee, California. Plaintiffs and Schaecher agreed in principal that Plaintiffs would send
10 wine to Schaecher and the Pour House for retail sale and that Schaecher and the Pour House
11 would pay for it.

12 18. After reviewing applicable California law, Plaintiffs and Schaecher and the Pour
13 House, concluded that such direct sales from Plaintiffs to Schaecher and the Pour House were not
14 permitted under California law. Because neither party was willing to risk violation of California
15 law concerning their intended transaction, the agreement was voided.

16 19. Plaintiffs were thereby prevented from engaging in interstate commerce with
17 Schaecher and the Pour House, and were unable to sell wine, losing sales, profits, and the
18 prospect of establishing a long term contract to supply wine to Schaecher and the Pour House.

19 20. The injury and damage described in paragraphs 17, 18, and 19 above, is a direct result
20 of the unfair application of California law prohibiting direct sales from an out-of-state importer
21 and wholesaler, such as Plaintiffs, to an in-state retailer such as Schaecher and The Pour House.
22 But for the prohibitions resulting from application of California law as alleged above, Plaintiffs
23 and Schaecher and the Pour House would have entered into a contract by which Plaintiffs would

1 have shipped wine directly to Schaecher and the Pour House resulting in a economic benefit to
2 each.

3 21. The laws referred to above should be declared unconstitutional and unenforceable in
4 order to remove the barrier to the transaction between Plaintiffs and Schaecher and the Pour
5 House, who will then be able to complete the above transaction in accordance with uninhibited
6 application of the Commerce Clause.

7 **Count II: Privileges and Immunities Clause Violation**

8 22. Plaintiffs repeat and re-allege paragraphs 1-16 as if set out fully herein.

9 23. Peter Creighton is a professional wine importer, merchant and wholesaler who resides
10 in and is a citizen of Florida. He is owner and operator of Orion Wine Imports, LLC in
11 Clearwater, Florida.

12 24. Creighton imports wine produced outside the United States, markets it to wine
13 retailers and restaurants, and sells and delivers it to retailers within and outside Florida, where
14 permitted.

15 25. Creighton cannot ensure that the wine can be provided at a competitive price with a
16 stable supply chain unless he can distribute it directly without having to go through a third-party
17 wholesaler who would raise the price, possibly fail to maintain an adequate supply, or decide
18 suddenly to discontinue carrying it.

19 26. A wine importer and wholesaler located in California can market, sell and deliver its
20 wine to California-licensed retailers and assure them of a consistent price and reliable supply
21 chain without having to use a third-party wholesaler.

22 27. Creighton wants to practice his profession as a wine merchant and importer, to
23 market, sell and deliver the wine he imports directly to The Pour House and other California

1 retailers, but is prevented from doing so by the California Alcoholic Beverages Control Act.

2 28. As a nonresident, Creighton is not eligible to apply for a license that would allow him
3 to engage in his occupation as a wine merchant in California upon same or similar terms to those
4 given to California residents. It is not economical for him to setup a California-based business
5 operation.

6 29. If a license were available, Creighton would obtain it. He does not ask for the right to
7 engage in the unlicensed sale and delivery of wine in California.

8 30. Importing wine and selling it to California-licensed retailers is a lawful activity for
9 citizens of California, who may obtain licenses to do so.

10 31. No substantial reason exists for denying citizens of Florida the same privilege to
11 import, sell and deliver wine to California-licensed retailers as is given to citizens of California.

12 32. California's requirement that all wine coming into the state must go to a third-party
13 importer or wholesaler and its prohibition against issuing importer and wholesaler licenses to
14 nonresidents, denies Mr. Creighton the privilege to engage in his occupation in the state upon the
15 same or similar terms as California citizens, and therefore violates the Privileges and Immunities
16 Clause in Article IV of the United States Constitution.

17 **Request for relief**

18 WHEREFORE, Plaintiffs seeks the following relief:

19 A. Judgment declaring California Business & Professional Code § 23661 unconstitutional
20 as a violation of the Commerce Clause of the United States Constitution.

21 B. Judgment declaring California Business & Professional § 23661 unconstitutional as a
22 violation of the Privileges and Immunities Clause of the United States Constitution.

23 C. An injunction prohibiting Defendant from enforcing that statute and requiring them to

1 allow out-of-state wine importers and distributors to obtain licenses, under the same or similar
2 economic licensure terms, and to import, sell and deliver wine directly to California-licensed
3 retailers.

4 D. Plaintiffs do not request that the State be enjoined from collecting any tax due on the
5 sale of wine.

6 E. An award of costs and expenses, including reasonable attorneys' fees pursuant to 42
7 U.S.C. § 1988.

8 F. Such other relief as the Court deems appropriate to afford Plaintiffs full relief.

Respectfully submitted,
Attorneys for Plaintiffs

/s/ James A Tanford

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2018, 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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