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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,

Defendant.

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

ORDER

Plaintiffs Orion Wine Imports, LLC (“Orion”) and Peter E. Creighton bring this action under 42 U.S.C. § 1983 challenging the constitutionality of California Business & Professions Code section 23661 (“section 23661”) and related California statutes, which permit alcoholic beverages to be imported into California only when consigned and delivered to a licensed importer at the importer’s licensed premises or at a licensed public warehouse. Second Am. Compl. (“SAC”), ECF No. 32. Defendant Jacob Applesmith moves to dismiss plaintiffs’ Second Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot., ECF No. 33-1. Plaintiffs filed an opposition, ECF No. 35, and defendant a reply, ECF No. 42. The court held a hearing on the motion to dismiss, at which James Tanford appeared for plaintiffs, Lykisha Beasley appeared for defendant, and Brian Rocca and Robert Brundage

1 appeared for amici California Beer and Beverage Distributors (“CBBD”) and Wine and Spirits
2 Wholesalers of California (“WSWC”). As explained below, the court GRANTS defendant’s
3 motion to dismiss and grants plaintiffs leave to amend.

4 I. BACKGROUND

5 A. Plaintiffs’ Claims

6 Plaintiff Orion is a Florida-based and -licensed importer and wholesaler of wine
7 that would like to import, sell and deliver its products directly to California retailers. SAC ¶¶ 4,
8 17–20. Plaintiff Peter Creighton is a Florida resident and a Florida-licensed wine importer and
9 wholesaler, as well as the owner and operator of Orion. *Id.* ¶¶ 5, 23. Creighton seeks to practice
10 his profession and market, sell and deliver wine directly to California retailers. *Id.* ¶ 27.
11 Defendant Jacob Applesmith is sued in his official capacity as the Director of the California
12 Department of Alcoholic Beverage Control. *Id.* ¶ 6.

13 Plaintiffs seek a declaratory judgment that section 23661 discriminates against
14 interstate commerce in violation of the Commerce Clause and the Privileges and Immunities
15 Clause of Article IV of the U.S. Constitution. *Id.* at 7. Plaintiffs also seek to enjoin California
16 from enforcing section 23661 and to require the State to permit out-of-state wine importers and
17 wholesalers to obtain licenses under the same or similar licensure terms as in-state importers and
18 wholesalers, as well as to import, sell and deliver wine directly to California retailers. *Id.* at 7–8.
19 Section 23661 is a provision of California’s Alcoholic Beverage Control Act (“ABC Act”)
20 regulating where imported alcoholic beverages are to be consigned and delivered upon arrival in
21 California. Specifically, the statute provides in pertinent part that:

22 [A]lcoholic beverages may be brought into this state from without
23 this state for delivery or use within the state only by common carriers
24 and only when the alcoholic beverages are consigned to a licensed
25 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.

26 Cal. Bus. & Prof. Code § 23661.

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1 B. California’s Three-Tiered Distribution and Licensing Scheme

2 As a provision of the ABC Act, section 23661 is part of California’s three-tiered
3 licensing scheme for the sale and distribution of alcoholic beverages. The three tiers refer to:
4 (1) manufacturers of alcoholic beverages, (2) wholesalers and (3) retailers. *Id.* § 23320(a). Under
5 the three-tier system, a manufacturer generally sells its wine to a licensed wholesaler, who then
6 sells and delivers the wine to a licensed in-state retailer. *Id.* §§ 23356(b), 23378. The retailer, in
7 turn, sells the wine to consumers. *Id.* §§ 23026, 23394, 23402. Importers typically fit into this
8 system at the manufacturer and wholesaler tiers. *Id.* § 23017. The holder of an importer’s license
9 cannot sell or deliver wine to retailers unless it also has a wholesaler’s license. *Id.* §§ 23374,
10 23374.5, 23374.6, 23775. If an importer also holds a wholesaler’s license, then the importer can
11 transfer the imported beverages to itself under the wholesaler’s license and use the wholesaler’s
12 license to sell to retailers. *Id.* §§ 23374, 23378, 23402.

13 Section 23661, the statute at issue here, requires imported alcoholic beverages to
14 be consigned only to licensed importers and delivered to licensed importers either at their
15 licensed premises or at a licensed public warehouse. *Id.* § 23661. The statute thus regulates
16 where in the three-tier structure alcoholic beverages are to be consigned and delivered upon
17 arrival in California, funneling imported alcoholic beverages into California’s three-tier system at
18 the manufacturer or wholesaler levels. The statute also regulates where imported alcoholic
19 beverages may be physically delivered: to a licensed importer either at its licensed premises or at
20 a licensed public warehouse. A public warehouse is “any place licensed for the storage of, but
21 not for sale of, alcohol, or alcoholic beverages, for the account of other licensees.” *Id.* §§ 23036,
22 23375 (“A public warehouse license authorizes the storage of alcoholic beverages for the account
23 of another licensee”). California law allows an “out-of-state business” to obtain a license to
24 have alcoholic beverages come “to rest, [be] stored, and [be] shipped from” a licensed public
25 warehouse. *Id.* § 24041.

26 Plaintiffs allege California’s three-tiered scheme discriminates against out-of-state
27 wholesalers and importers of wine. SAC at 2. They allege a business located within California
28 can obtain a combination of licenses allowing it to import, sell and deliver wine directly to

1 California retailers, while a business located outside California cannot obtain the same
2 combination of licenses and must instead sell its wine to in-state importers or wholesalers, who
3 may then deliver the wine to California retailers. *Id.* ¶¶ 7–10.

4 C. Procedural Background

5 Plaintiffs filed their original complaint on June 14, 2018. ECF No. 1. On July 10,
6 2018, before defendant filed an answer, plaintiffs filed a First Amended Complaint. ECF No. 10.
7 Defendant then moved to dismiss. ECF No. 15-1. On August 10, 2018, while defendant’s
8 motion to dismiss was pending, plaintiffs filed a motion seeking leave to file a second amended
9 complaint. ECF No. 17-1. The court granted plaintiffs’ motion to amend and denied defendant’s
10 motion to dismiss as moot. ECF No. 31. Plaintiffs filed their Second Amended Complaint on
11 October 3, 2018, ECF No. 32, and defendant refiled his motion to dismiss on October 17, 2018,
12 ECF No. 33-1. Plaintiffs filed their opposition to the motion to dismiss on November 7, 2018,
13 ECF No. 35, and a response to CBBB and WSWC’s amicus brief on January 29, 2019, ECF No.
14 40. Defendant filed his reply on February 1, 2019. ECF No. 42. Following the hearing on the
15 motion, plaintiffs filed a supplemental memorandum, ECF No. 44, to which defendant filed
16 objections, ECF No. 45. Plaintiffs then opposed the objections, ECF No. 46, and the court
17 permitted defendant to respond, ECF Nos. 47 (Minute Order), 48 (Response).

18 On June 27, 2019, plaintiffs filed a Notice of Relevant Decision by the Supreme
19 Court in *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (2019). ECF
20 No. 49. Defendant filed a Statement of Non-Opposition to plaintiffs’ Notice of Relevant
21 Decision. ECF No. 51. While the court has reviewed the new Supreme Court decision, that
22 decision does not affect the court’s decision here. Moreover, the court does not rely on plaintiffs’
23 arguments in connection with their Notice, and so need not allow defendant the opportunity for a
24 response. Assuming plaintiffs amend their complaint as provided by this order, the *Tennessee*
25 *Wine & Spirits Retailers Association* decision may of course inform future motion practice before
26 the court.

1 II. LEGAL STANDARD

2 A. Rule 12(b)(1)

3 The U.S. Constitution “limits the jurisdiction of federal courts to ‘Cases’ and
4 ‘Controversies.’” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). “Standing to sue is a
5 doctrine rooted in the traditional understanding of a case or controversy.” *Spokeo, Inc. v. Robins*,
6 136 S. Ct. 1540, 1547 (2016); *see also Lujan*, 504 U.S. at 560 (“[T]he core component of
7 standing is an essential and unchanging part of the case-or-controversy requirement of Article
8 III.”).

9 A plaintiff possesses Article III standing only if he or she has “(1) suffered an
10 injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is
11 likely to be redressed by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*,
12 504 U.S. at 560). To establish an injury in fact, the plaintiff must show the defendant infringed
13 on the plaintiff’s legally protected interest in a “concrete and particularized” manner that is
14 “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (internal quotations
15 and citations omitted). “A ‘concrete’ injury must be ‘de facto’; that is, it must actually exist.”
16 *Spokeo*, 136 S. Ct. at 1548 (citing Black’s Law Dictionary 479 (9th ed. 2009)).

17 Lack of standing is “properly raised in a motion to dismiss under Federal Rule of
18 Civil Procedure 12(b)(1), not Rule 12(b)(6).” *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).
19 “Rule 12(b)(1) jurisdictional attacks can be either facial or factual.” *Id.* “In a facial attack, the
20 challenger asserts that the allegations contained in a complaint are insufficient on their face to
21 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
22 2004). “[I]n a factual attack, the challenger disputes the truth of the allegations that, by
23 themselves, would otherwise invoke federal jurisdiction.” *Id.* A “district court resolves a facial
24 attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as
25 true and drawing all reasonable inferences in the plaintiff’s favor, the court determines whether
26 the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane*
27 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.
28 2013)). In a factual attack, however, the court may review evidence outside the pleadings to

1 resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*,
2 850 F.2d 558, 560 (9th Cir. 1988). “Once the moving party has converted the motion to dismiss
3 into a factual motion by presenting affidavits or other evidence properly brought before the court,
4 the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its
5 burden of establishing subject matter jurisdiction.” *Savage v. Glendale Union High Sch.*,
6 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th
7 Cir. 1989)).

8 Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of
9 establishing the elements to satisfy Article III standing. *See Spokeo*, 136 S. Ct. at 1547. “Where,
10 as here, a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’
11 each element.” *Id.* (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

12 B. Rule 12(b)(6)

13 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a
14 complaint for “failure to state a claim upon which relief can be granted.” A court may dismiss
15 “based on the lack of cognizable legal theory or the absence of sufficient facts alleged under a
16 cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990),
17 *overruled on other grounds*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

18 Although a complaint need contain only “a short and plain statement of the claim
19 showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), to survive a motion to
20 dismiss this short and plain statement “must contain sufficient factual matter . . . to ‘state a claim
21 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
22 *Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something more than “an
23 unadorned, the-defendant-unlawfully-harmed-me accusation” or “‘labels and conclusions’ or ‘a
24 formulaic recitation of the elements of a cause of action.’” *Id.* (quoting *Twombly*, 550 U.S. at
25 555). Determining whether a complaint will survive a motion to dismiss for failure to state a
26 claim is a “context-specific task that requires the reviewing court to draw on its judicial
27 experience and common sense.” *Id.* at 679. Ultimately, the inquiry focuses on the interplay
28

1 between the factual allegations of the complaint and the dispositive issues of law in the action.
2 *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

3 In making this context-specific evaluation, this court must construe the complaint
4 in the light most favorable to the plaintiff and accept its factual allegations as true. *Erickson v.*
5 *Pardus*, 551 U.S. 89, 93–94 (2007) (citing *Twombly*, 550 U.S. at 555–56). This rule does not
6 apply to “a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quoting
7 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)), “allegations that contradict matters properly
8 subject to judicial notice,” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001),
9 *opinion amended on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001), or material attached to or
10 incorporated by reference into the complaint, *see id.* A court’s consideration of documents
11 attached to a complaint, documents incorporated by reference in the complaint, or matters of
12 judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United*
13 *States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *Parks Sch. of Bus., Inc. v. Symington*,
14 51 F.3d 1480, 1484 (9th Cir. 1995); *cf. Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977,
15 980 (9th Cir. 2002) (even though court may look beyond pleadings on motion to dismiss,
16 generally court is limited to face of the complaint on 12(b)(6) motion).

17 **III. DISCUSSION**

18 Plaintiffs’ Second Amended Complaint alleges section 23661 and related state
19 statutory provisions violate the Commerce Clause and the Privileges and Immunities Clause of
20 Article IV of the U.S. Constitution. SAC ¶¶ 7–32. Defendant moves to dismiss the Second
21 Amended Complaint, asserting plaintiffs have failed to state either claim under Rule 12(b)(6) and
22 lack standing to bring their Privilege and Immunities claim under Rule 12(b)(1). Mot. at 1–2.

23 **A. Commerce Clause Claim**

24 Plaintiffs allege California’s three-tier regulatory scheme discriminates against
25 interstate commerce in violation of the Commerce Clause. *See* SAC ¶¶ 7–16. Defendant moves
26 to dismiss plaintiffs’ Commerce Clause claim under Rule 12(b)(6), arguing plaintiffs have not
27 alleged facts establishing unconstitutional discrimination. Mot. at 3.

28

1 The Commerce Clause both expressly grants Congress the power to regulate
2 commerce among the several states, *see* U.S. Const. art. I, § 8, cl. 3, and implicitly limits the
3 states’ power to discriminate against interstate commerce. *See, e.g., New Energy Co. of Ind. v.*
4 *Limbach*, 486 U.S. 269, 273 (1988). The Commerce Clause “encompasses an implicit or
5 ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate
6 commerce.” *Healy v. The Beer Inst., Inc.*, 491 US. 324, 326 n.1 (1989). The Dormant Commerce
7 Clause typically applies when a state attempts to regulate or control economic conduct wholly
8 outside its borders with the goal of protecting in-state economic interests from out-of-state
9 competitors. *See New Energy*, 486 U.S. at 273–74 (citing cases). “[I]n all but the narrowest
10 circumstances, state laws violate the Commerce Clause if they mandate ‘differential treatment of
11 in-state and out-of-state economic interests that benefits the former and burdens the latter.’”
12 *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl.*
13 *Quality of Or.*, 511 U.S. 93, 99 (1994)).

14 Dormant Commerce Clause challenges proceed under a two-step analysis. *Brown-*
15 *Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986). In the first
16 step, a court determines whether “a state statute directly regulates or discriminates against
17 interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-
18 state interests.” *Id.* at 579. When a plaintiff shows a state statute discriminates against out-of-
19 state interests on its face, in its purpose or in its practical effect, then the statute is generally
20 invalid *per se* and subject to strict scrutiny. *Id.* If a plaintiff satisfies this burden, then the
21 discriminatory law may survive only if the state can demonstrate the law “advances a legitimate
22 local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”
23 *New Energy*, 486 U.S. at 278. At the second step, if the challenged state statute applies “even-
24 handedly” to in-state and out-of-state interests and only incidentally burdens interstate commerce,
25 then a court applies the Supreme Court’s balancing test set forth in *Pike v. Bruce Church, Inc.*,
26 397 U.S. 137, 142 (1970). *See Brown-Forman*, 476 U.S. at 579. Under *Pike*, a court should
27 uphold the challenged state statute unless the burden imposed on interstate commerce is “clearly
28 excessive in relation to the putative local benefits.” 397 U.S. at 142 (citing *Huron Portland*

1 *Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)). “The burden remains on the party
2 challenging the statute to establish that the burden on interstate commerce is clearly excessive in
3 relation to the putative local benefits.” *Black Star Farms, LLC v. Oliver*, 544 F. Supp. 2d 913,
4 920 (9th Cir. 2008) (citing *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 399 (9th Cir.
5 1995)).

6 1. Whether Section 23661 and Related Statutes Are Discriminatory

7 Plaintiffs assert certain provisions of California’s ABC Act regulating the
8 importation of wine discriminate against out-of-state interests. *See* Opp’n at 4–6. Specifically,
9 plaintiffs allege that under California Business & Professions Code sections 23374, 23378, 23661
10 and 23775, an in-state importer can legally import wine under its importer license, transfer it to
11 itself under its wholesaler license and distribute it to retailers, but out-of-state importers may not.
12 SAC ¶¶ 7–10; Opp’n at 5–6. Plaintiffs further allege out-of-state importers cannot obtain this
13 combination of licenses and must instead sell their wine to an in-state importer or wholesaler and
14 let the in-state entity distribute it to retailers. SAC ¶¶ 8–11; Opp’n at 5–6. Defendant disagrees
15 with plaintiffs’ characterization of the law, asserting California law requires all importers to
16 deliver wine to a physical premises in the state; any entity lacking its own licensed wholesale
17 business premises in California, including non-resident importers, may distribute directly to
18 California retailers if it leases space in a licensed public warehouse. Reply at 5–6.

19 On their face, none of the challenged provisions mandates “differential treatment
20 of in-state and out-of-state economic interests that benefits the former and burdens the latter.”
21 *Or. Waste Sys.*, 511 U.S. at 99. The four statutes cited in plaintiffs’ Second Amended Complaint
22 do not distinguish between in-state and out-of-state entities, let alone prescribe unequal treatment
23 based on geographic location. *See* Cal. Bus. & Prof. Code §§ 23374, 23378, 23661, 23775.
24 Section 23661, in particular, requires that all alcohol imported into California be consigned for
25 delivery at either the importer’s premises or a licensed public warehouse; because these premises
26 are places for delivery of alcohol imported into California, they necessarily must be located in
27 California. Under California Business & Professions Code section 24041, Orion or any other
28 “out-of-state business” may apply for and obtain either or both an importer’s and/or wholesaler’s

1 “license” in California to have alcohol come to rest, be stored, and be shipped from a licensed
2 public warehouse. Therefore, the law, by its terms, applies equally to in-state and out-of-state
3 importers because the statutes at issue require all importers to have a physical premises in
4 California at which to receive delivery of imported alcohol. Accordingly, plaintiffs’ challenge
5 rests on the assertion that the statutory provisions at issue are discriminatory in effect.

6 Plaintiffs argue section 23661 and the related ABC Act provisions create an
7 economic barrier that benefits in-state importers and burdens out-of-state importers because the
8 “only way the Plaintiffs could sell the wine they have imported . . . directly to California retailers
9 would be to open a new import/wholesale business in California with physical premises in the
10 state.” Opp’n at 6. In effect, plaintiffs argue section 23661 requires them to establish a physical
11 presence in California to sell their wine on an equal basis with California-based importers. To
12 support their contention, plaintiffs cite *Granholm v. Heald* for the proposition that “the high cost
13 of opening a second facility in a distant state is relevant in assessing discriminatory effect” and
14 “requiring an out-of-state firm to establish in-state premises in order to compete on equal terms”
15 violates the Commerce Clause. Opp’n at 6 (citing *Granholm*, 544 U.S. at 475).

16 At hearing on the motion, however, it became apparent that the basis for plaintiffs’
17 Commerce Clause claim is unclear, as the parties expressed confusion as to whether plaintiffs can
18 obtain the licenses they seek as out-of-state importers. Both defense counsel and counsel for
19 amici asserted plaintiffs could obtain the combination of importer’s and wholesaler’s licenses
20 allowing plaintiffs to import wine, transfer it to themselves by leasing space in a public
21 warehouse and sell it directly to California retailers on equal terms as California-based entities.
22 Plaintiffs’ counsel, in contrast, argued for the first time that plaintiffs cannot obtain this
23 combination of licenses even if they lease public warehouse space in California. Further
24 compounding this confusion is the fact that the threadbare allegations in the Second Amended
25 Complaint do not focus the issue to make clear how the California law at issue here is
26 discriminatory other than to generally allege that because plaintiff Orion “is located in Florida
27 and has no premises in California, it is prohibited from importing, selling and delivering wine
28 directly to California-licensed retailers.” SAC ¶ 11; *see also id.* ¶¶ 8, 10 (alleging out-of-state

1 entities cannot get license allowing them to “import, sell and deliver wine directly to California-
2 licensed retailers”). Taking into account the arguments made by plaintiffs’ counsel at hearing,
3 especially on the public warehouse option, which do not appear to be consistent with the
4 allegations in plaintiffs’ Second Amended Complaint, plaintiffs have not clearly advanced a
5 coherent claim regarding the alleged discriminatory economic burden imposed by section 23661.

6 The post-hearing memoranda submitted by the parties do not clarify whether
7 plaintiffs could obtain the licenses they seek by leasing public warehouse space. Plaintiffs
8 provided citations to additional authority and asserted they can gain the privilege of distributing
9 wine directly to retailers only by opening a permanent business in California, not by leasing
10 warehouse space. Pls.’ Mem. Providing Citations for New Authority Raised at the Hearing, ECF
11 No. 44, at 2–3. Defendant responded that plaintiffs misstate the law regarding their ability to
12 conduct business on the same basis as California-based importers. Def.’s Resp. to Pls.’ Post-
13 Hearing Mem., ECF No. 48, at 3–4.

14 The inconsistency between and among the pleadings, briefing and arguments in
15 this case regarding whether and to what extent plaintiffs must establish a physical presence in
16 California to obtain the licenses they seek precludes the court’s reasoned evaluation of plaintiffs’
17 claim, such as it is, and determination of its viability. Moreover, plaintiffs’ barebones pleading
18 exposes the absence of a full understanding of the regulatory structure and where there is a
19 possibility of obtaining licenses after leasing public warehouse space.

20 For these reasons, the court GRANTS defendant’s motion to dismiss plaintiffs’
21 Commerce Clause claim, but with leave to amend if possible subject to Federal Rule of Civil
22 Procedure 11.

23 B. Privileges and Immunities Claim

24 In their second claim, plaintiffs argue section 23661 and the related ABC Act
25 statutes violate the Privileges and Immunities Clause of Article IV, Section 2 of the U.S.
26 Constitution. SAC ¶¶22–32. Under that Clause, “[t]he Citizens of each State [are] entitled to all
27 Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1. The
28 Clause protects those privileges and immunities that are “fundamental,” meaning it does not

1 categorically prevent states from using state citizenship or residency as a distinguishing factor.
2 *McBurney v. Young*, 569 U.S. 221, 226 (2013). Defendant first moves to dismiss plaintiffs’
3 Privileges and Immunities claim under Rule 12(b)(1), arguing neither Orion nor Creighton has
4 standing. Mot. at 6–7. Defendant also moves to dismiss under Rule 12(b)(6), asserting plaintiffs
5 have failed to state a claim because the Second Amended Complaint does not allege an interest
6 belonging to Creighton that is protected by the Privileges and Immunities Clause and plaintiffs
7 have not identified any disparate treatment. Mot. at 7–8.

8 1. 12(b)(1) Lack of Standing

9 Defendant argues both plaintiffs lack standing to bring their Privileges and
10 Immunities claim. Mot. at 6–7; Reply at 7–8. Specifically, defendant asserts Orion has no
11 standing under the Privileges and Immunities Clause because it is a corporation and Creighton
12 lacks standing because his alleged prospective injuries flow directly and solely from the alleged
13 injury to Orion. Mot. at 6–7; Reply at 7–8. Plaintiffs counter that after the Supreme Court’s
14 decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), a corporation may have standing under
15 the Privileges and Immunities Clause. Opp’n at 8. Plaintiffs also attempt to distinguish the cases
16 cited by defendant for the proposition that Creighton lacks standing by arguing those cases
17 involved shareholders attempting to bring personal claims based solely on an injury to the
18 corporation when the shareholders had no other stakes in the dispute, while Creighton personally
19 wants to do business in California independently of whether Orion may do so. Opp’n at 8–9.

20 Addressing first the standing of Orion, the Supreme Court has held the Privileges
21 and Immunities Clause of Article IV does not apply to corporations. *W. & S. Life Ins. Co. v. State*
22 *Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981). Neither the Supreme Court nor the Ninth
23 Circuit has extended the rule barring corporations from bringing a Privileges and Immunities
24 claim to unincorporated associations, such as a limited liability company (“LLC”) like Orion.
25 Some circuit courts have elected to do so, however. *See, e.g., W.C.M. Window Co., Inc. v.*
26 *Bernardi*, 730 F.2d 486, 493 (7th Cir. 1984) (unincorporated association “is not a natural person”
27 and thus “not a citizen” for purposes of Privileges and Immunities Clause); *Am. Trucking Ass’ns,*
28 *Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir. 1982) (declining to consider Privileges and Immunities

1 claim asserted by federation of trucking associations). Plaintiffs cite no authority for the
2 proposition that the bar should not also apply to an LLC. Nothing in *Citizens United*, in which
3 the Court confronted the issue of whether the government may suppress political speech by
4 corporations or other associations, suggests the holding of that case extends beyond the First
5 Amendment context. *See Citizens United*, 558 U.S. at 319, 365. Accordingly, the court
6 concludes, Orion cannot raise a Privileges and Immunities claim.

7 Turning to Creighton’s standing, at least two circuit courts have held the Privileges
8 and Immunities Clause does not protect injuries to individual plaintiffs flowing directly and solely
9 from the corporation’s injury. *See Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1115–16
10 (8th Cir. 1996); *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1317
11 (4th Cir. 1994). In *Chance Management*, South Dakota denied a corporation a license to operate
12 a video lottery machine because the corporation could not meet the requirement that South
13 Dakota residents hold a majority ownership interest in the corporation. 97 F.3d at 1108. The
14 Eighth Circuit held the individual plaintiff, a Wyoming resident who did not apply individually
15 for a license, lacked standing under the Privileges and Immunities Clause because his only injury
16 flowed from his status as a shareholder of a corporation. *Id.* at 1115–16. In *Smith Setzer & Sons*,
17 the individual plaintiff was the president and a shareholder of a corporation claiming the
18 corporation’s loss of profits injured him as well. 20 F.3d at 1316–17. The Fourth Circuit held the
19 individual plaintiff did not have standing to bring a claim under the Clause because his injury was
20 merely “derivative” of the injury to the corporation. *Id.* at 1317.

21 Here, plaintiff’s allegations compel the same result. The Second Amended
22 Complaint alleges California law precluded “Plaintiffs” from entering into a contract with the
23 “Pour House,” a wine shop in Truckee, California. SAC ¶¶ 17–20. Plaintiffs allege no other
24 injury specific to Creighton. Therefore, although plaintiffs claim Creighton suffered an
25 individual injury because he personally wants to engage in the wine distribution business in
26 California, Opp’n at 9, the alleged injury suffered by Creighton in this case, as pled, arises
27 directly and solely out of his status as the owner of Orion.
28

1 Plaintiffs attempt to distinguish this case by relying on *Council of Insurance*
2 *Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008), to argue that individual
3 plaintiffs do not lose their right to bring a claim under the Privileges and Immunities Clause
4 simply because they own a business. Opp'n at 9. The individual plaintiff in *Molasky-Arman*, a
5 California resident, insurance agent and managing director of an insurance broker who sought to
6 do business in Nevada, alleged Nevada law precluded her from doing business on substantially
7 equal terms as Nevada-based agents. *Molasky-Arman*, 522 F.3d at 932. The Ninth Circuit held
8 the individual plaintiff had standing. *Id.* But unlike in this case, that plaintiff alleged a
9 particularized injury to herself as an individual separate from any injury to the entity. *See id.* at
10 929, 932.

11 The court similarly finds plaintiffs' out-of-circuit authority unpersuasive. In *A.L.*
12 *Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865, 868 n.4, 871 (3rd Cir. 1997), the Third Circuit
13 held the individual plaintiffs, nonresident construction workers, had standing to bring a Privileges
14 and Immunities claim challenging a Pennsylvania law that required contractors to employ only
15 Pennsylvania residents as laborers and mechanics on Commonwealth-funded work projects.
16 Unlike in the instant case, however, not only were the individual plaintiffs not the owners of the
17 corporation, but their claimed injury also was not derivative of the injury to the contractor; under
18 the law, the contractor could still receive payment for public works projects if it did not employ
19 nonresident workers, but the individual plaintiffs could not work on these projects. *See id.* at
20 867–68. In *McBurney v. Cuccinelli*, 616 F.3d 393, 398, 404 (4th Cir. 2010), the Fourth Circuit
21 held one of the individual plaintiffs challenging a Virginia law that denied nonresidents access to
22 its Freedom of Information process had standing, even though he was the sole proprietor of the
23 business that had contracted to supply the requested information. The court concluded the
24 individual plaintiff's allegations that he was the sole proprietor of the business and that the law
25 made it impossible for him to pursue his common calling stated sufficient facts to support
26 standing. *Id.* at 404 & n.8. Even if the court were persuaded by this nonbinding precedent,
27 however, plaintiffs have not alleged Creighton is the sole proprietor of Orion or that he suffered a
28 direct and independent injury. *See Woods View II, LLC v. Kitsap County*, 484 F. App'x 160, 161

1 (9th Cir. 2012) (sole member of LLC engaged in real estate development lacked standing to bring
2 individual § 1983 claims against County and County officials when member’s financial losses
3 were “derivative of [the LLC’s] own losses” and member “was not injured directly and
4 independently of the limited liability company”).

5 For the reasons set forth above, the court finds both Orion and Creighton lack
6 standing to pursue their Privileges and Immunities claim. The court GRANTS defendant’s
7 motion to dismiss plaintiffs’ Privileges and Immunities claim under Rule 12(b)(1). Because
8 neither plaintiff has standing, the court declines to reach the merits of plaintiffs’ claim under Rule
9 12(b)(6) at this stage, although it will allow leave to amend to the extent possible.

10 C. Leave to Amend

11 Federal Rule of Civil Procedure 15(a)(2) provides, “[t]he court should freely give
12 leave [to amend pleadings] when justice so requires” and the Ninth Circuit has “stressed Rule
13 15’s policy of favoring amendments,” *Ascon Props. Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160
14 (9th Cir. 1989) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987);
15 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). “In exercising its discretion [to grant
16 or deny leave to amend] ‘a court must be guided by the underlying purpose of Rule 15—to
17 facilitate decision on the merits rather than on the pleadings or technicalities.’” *Leighton*,
18 833 F.2d at 186 (quoting *Webb*, 655 F.2d at 979). However, “the liberality in granting leave to
19 amend is subject to several limitations.” *Ascon Props.*, 866 F.2d at 1160 (citing *Leighton*,
20 833 F.2d at 186). “Leave need not be granted where the amendment of the complaint would
21 cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility,
22 or creates undue delay.” *Id.* (citing *Leighton*, 833 F.2d at 186). In addition, a court should look
23 to whether the plaintiff has previously amended the complaint, as “the district court’s discretion is
24 especially broad ‘where the court has already given a plaintiff one or more opportunities to amend
25 [its] complaint.’” *Id.* at 1161 (alteration in original) (quoting *Leighton*, 833 F.2d at 186 n.3).

26 Plaintiffs’ Second Amended Complaint contains threadbare allegations that,
27 among other things, do not explain the claimed discrimination under California’s ABC Act in a
28 way that allows the court to accurately assess the viability of plaintiffs’ claim that the law claimed

1 has a discriminatory effect, if any. Further, plaintiffs' allegations do not provide sufficient
2 information about any distinct injury to Creighton as an individual to support his standing to raise
3 a Privileges and Immunities claim. For these reasons, the court grants plaintiffs leave to amend
4 their complaint to address these issues, if they can while complying fully with Rule 11.

5 IV. CONCLUSION

6 As explained above, the court ORDERS as follows:

- 7 1. Defendant's motion to dismiss plaintiffs' Second Amended Complaint,
8 ECF No. 33-1, is GRANTED. The court grants plaintiffs leave to amend
9 only as to the issues identified by the court above.
- 10 2. Plaintiffs are ordered to file any amended complaint within twenty-one
11 (21) days of the date this order is filed.

12 IT IS SO ORDERED.

13 DATED: August 15, 2019.

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16 UNITED STATES DISTRICT JUDGE
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