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*Attorneys for plaintiffs Orion Wine Imports and Peter Creighton*

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ORION WINE IMPORTS, LLC and )  
PETER E. CREIGHTON, ) No. 2:18-cv-01721-KJM-DB  
*Plaintiffs* )  
) **THIRD AMENDED COMPLAINT**  
vs )  
)  
JACOB APPLESMITH, in his official )  
capacity as Director of the California )  
Dept. of Alcoholic Beverage Control )  
*Defendant* )

1 Plaintiffs make the following allegations based upon information and belief, except for the  
2 allegations pertaining to the 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 Cal. Bus. & Prof. Code § 23661, which requires wine being shipped into  
6 California from an out-of-state location must be consigned to a California-based importer and  
7 come to rest at its premises or space it has leased in a public warehouse. This provision  
8 effectively prohibits wine importers and wholesalers located outside California from selling and  
9 delivering wine directly to California-licensed retailers, a privilege enjoyed by importers and  
10 wholesalers located in California. The requirement that wine being shipped from out of state  
11 must be consigned to a California importer imposes costs on non-resident wine sellers not borne  
12 by businesses located in the state, giving in-state wine distributors an economic advantage over  
13 their out-of-state competitors. Plaintiffs seek a declaratory judgment that this statutory scheme is  
14 unconstitutional for two reasons: (1) it violates the Commerce Clause of the United States  
15 Constitution because it discriminates against interstate commerce and protects the economic  
16 interests of in-state businesses and (2) it violates the Privileges and Immunities Clause in Article  
17 IV because it denies nonresidents the privilege of engaging in their profession as wine merchants  
18 on the same terms as those given to citizens of California. Plaintiffs seek an injunction barring  
19 the defendant from enforcing this provision and requiring him to permit out-of-state wine  
20 importers and wholesalers to sell and deliver wine directly to California retailers without having  
21 to go through the extra step of consigning the wine to a California importer.

### 22 **Jurisdiction**

23 1. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1331, which confers

1 original jurisdiction on federal district courts to hear all civil actions arising under the  
2 Constitution, laws, or treaties of the United States.

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

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

### 6 **Parties**

7 4. Plaintiff Orion Wine Imports, LLC, is a limited liability company located in Clearwater,  
8 Florida that imports wine from various countries outside the United States and distributes it at  
9 wholesale to licensed wine retailers in Florida and in other states where it is permitted to do so.

10 5. Plaintiff Peter Creighton is a resident of Safety Harbor, Florida, who travels to foreign  
11 wine-producing countries, buys wine from foreign wineries, imports the wine, and markets it to  
12 retailers, restaurants, and hotels, including chains, with premises outside Florida. He owns Orion  
13 Wine Imports, LLC, and is the sole member of the LLC.

14 6. Defendant Jacob Applesmith is the Director of the California Department of Alcoholic  
15 Beverage Control, with headquarters in Sacramento, California. He is charged by Cal. Bus. &  
16 Prof. Code § 23053.1 with enforcing the California Alcoholic Beverages Control Act, including  
17 § 23661. He is sued in his official capacity for prospective relief only.

### 18 **Count I: Commerce Clause Violation**

19 7. A limited liability company (LLC) located in California can obtain an importer license  
20 from the defendant which allows it to import and store wine, and a wholesaler license which  
21 allows it to sell and deliver that wine directly to California-licensed retailers without having to  
22 consign it to a separate importer, acquire additional premises, or hire additional employees as  
23 agents.

1 8. An LLC with a principal office in California is eligible for an importer license pursuant to  
2 Cal. Bus. & Prof. Code §§ 23320(9) and 23017; and a wholesale license pursuant to Cal. Bus. &  
3 Prof. Code §§ 23320(17) and 23378. Both licenses are required because the importer is  
4 authorized to import and store the wine, but only a wholesaler may sell and deliver it to a retailer.  
5 Cal. Bus. & Prof. Code § 23374 allows the licensee to transfer the wine stored under the importer  
6 license to himself as a wholesaler, without cost, and then sell and deliver it from his premises  
7 directly to California-licensed retailers.

8 9. Orion Wine Imports LLC (“Orion”) is located outside California and is prohibited from  
9 selling and delivering wine directly to California-licensed retailers from its own facilities because  
10 those facilities are located outside the state, and Cal. Bus. & Prof. Code § 23661 requires that all  
11 wine from out-of-state distributors must be consigned to a California-based importer with  
12 premises in the state.

13 10. An importer may own its own storage facility or may lease storage space at a public  
14 warehouse.

15 11. Orion imports and distributes wine from various countries to licensed retailers and  
16 restaurants in states where it is allowed to do so, from its premises in Florida. It has no premises  
17 or storage facilities in California.

18 12. The wine trade is highly competitive. There are thousands of wineries around the world  
19 which would like to sell their products in the United States, and hundreds of importers seeking  
20 contracts to distribute it.

21 13. Some of the importers distributing imported wines in direct competition with Orion are  
22 located in California, including Vine Connections and The Global Vineyard.

23 14. Retailers usually stock relatively few wines from foreign appellations within any given

1 price range, and restaurants may only list one or two of a particular foreign varietal. The cost per  
2 unit to the retailer is a major factor in a retailer's decision which wines to carry.

3 15. When a retailer offers several wines of similar type and quality, price is an important  
4 factor in most consumers' decisions which to purchase, and they will select less expensive ones.

5 16. If Orion consigns its wine to a California importer and wholesaler, that entity will  
6 customarily mark up the cost by 25-33% before distributing it to retailers, making the wine more  
7 expensive than competing wines distributed directly by California-based importers and  
8 wholesalers, and reducing its competitiveness.

9 17. To obtain its own licenses to import and wholesale wine, Orion would have to establish a  
10 physical presence in California. It would have to either build a storage facility in California or  
11 pay for the services of a public warehouse to comply with Cal. Bus. & Prof. Code § 23661.

12 18. To handle the wine being imported, stored and shipped through this new entity, Orion  
13 would have to hire at least one California-based employee or agent.

14 19. To meet the requirements of Cal. Bus. & Prof. Code § 23405.2 and the California  
15 Department of Alcoholic Beverage Control that records of sales, inventory, taxes and ownership  
16 be maintained and available for inspection in California, Orion would have to open a principal  
17 office in California.

18 20. The expense of creating the physical presence necessary to qualify for California licenses  
19 to import and wholesale wine would add significantly to the cost of distributing the wine,  
20 compared to the cost if Orion could ship directly from its Florida premises, making the wine  
21 more expensive than competing wines distributed directly by California-based importers and  
22 wholesalers, and reducing its competitiveness.

23 21. Orion already has storage and distribution facilities in Florida and can ship wine to

1 California retailers by common carrier, as it does in states where allowed. It has no business need  
2 to establish additional premises in California and cannot afford to do so if it wants to remain  
3 competitive.

4 22. If Orion were permitted to sell and deliver its wine directly to California-licensed retailers  
5 from its Florida location, it would obtain California importer and wholesaler licenses and comply  
6 with same state regulations concerning labeling, shipping, reporting, and paying taxes as in-state  
7 importers and wholesalers do.

8 23. In May 2018, Peter Creighton entered into business discussions directly with Dean  
9 Schaecher owner of the Pour House, a California licensed retail wine shop located in Truckee,  
10 California. They agreed in principal that Orion would sell and ship wine to the Pour House for  
11 retail sale.

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

16 25. Orion was thereby prevented from engaging in interstate commerce and was unable to sell  
17 wine, losing sales, profits, and the prospect of establishing a long term contract to supply wine.

18 26. The injury and damage described in paragraphs 23 to 25 are a direct result of the  
19 California law that prohibits direct-to-retailer sales from an out-of-state licensed wholesaler, such  
20 as Orion. But for the prohibition, and if Orion had the same direct-sale privileges as California  
21 importers and wholesalers, the parties would have entered into a contract by which Orion would  
22 have sold and shipped wine directly to the Pour House resulting in a economic benefit to each.

23 27. California's statutory scheme imposes extra requirements on out-of-state wine

1 wholesalers that are not imposed on those in the state, which effectively prevent out-of-state  
2 wholesalers from selling and delivering wine directly to retailers, and which give a competitive  
3 advantage and economic protection to in-state wine distributors, and therefore discriminates  
4 against interstate commerce in violation of the Commerce Clause of the United States  
5 Constitution.

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

7 28. Plaintiffs repeat and re-allege paragraphs 1-27 as if set out fully herein.

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

11 30. Mr. Creighton imports wine from various foreign countries through his LLC and  
12 personally markets it to restaurants, hotel chains, and other retailers with locations in Florida and  
13 other states, but is unable to sell wine directly to retailers in California.

14 31. Orion Wine Imports LLC is a limited liability company in which profits pass through the  
15 entity, go directly to Mr. Creighton, and are reported by him on his personal tax return. No profits  
16 are retained by the LLC or distributed to any other person.

17 32. In May 2018, Peter Creighton marketed his wine to Dean Schaecher, owner of the Pour  
18 House, a retail wine shop in Truckee, California, and agreed that Creighton would sell and  
19 deliver wine to the Pour House for retail sale.

20 33. After determining that California law did not permit Creighton to deliver wine directly to  
21 a California-licensed retailer, the parties voided the agreement.

22 34. Mr. Creighton personally lost the profits that would have been earned from the wine sold  
23 to the Pour House, and the prospect of establishing a long term business relationship with it.

1 35. It is not economically feasible for Mr. Creighton to consign wine sold to the Pour House  
2 to a California-based importer and wholesaler because that entity will mark up the cost by 25-  
3 33% before delivering it, making the wine more expensive than competing wines distributed  
4 directly by California-based wholesalers, reducing the likelihood it can be sold successfully at  
5 retail.

6 36. It is not economically feasible for Mr. Creighton to open a second wine importer and  
7 wholesaler business in California in order to sell and deliver wine to the Pour House and market  
8 it to other California retailers, because the expense of creating the in-state physical presence  
9 necessary to qualify for California licenses would add significantly to the cost of distributing the  
10 wine, compared to the cost if he could ship directly from Orion's Florida premises, making the  
11 wine more expensive than competing wines distributed directly by California-based importers  
12 and wholesalers, and reducing its competitiveness.

13 37. Mr. Creighton lives in Florida, operates Orion Wine Imports LLC in Florida, and already  
14 has storage and distribution facilities in Florida that could ship wine directly to California-  
15 licensed retailers by common carrier if it were lawful to do so. He has no business need to  
16 establish additional premises in California and cannot afford to do so if he wants to be able to  
17 offer wine to retailers at a competitive price.

18 38. California law has created a licensing scheme that gives its own residents the privilege to  
19 market, sell and deliver wine to California-licensed retailers.

20 39. California does not allow nonresidents like Mr. Creighton to engage in the marketing,  
21 selling and delivering of wine to retailers upon the same terms as California citizens because it  
22 requires nonresidents to consign their wine shipments to resident businesses or become residents  
23 themselves.

1 40. Mr. Creighton wants to engage in his profession as a wine merchant, to market, sell and  
2 deliver the wine he imports through Orion directly to The Pour House and other California  
3 retailers from his principal business premises in Florida, but is prevented from doing so by Cal.  
4 Bus. & Prof. Code § 23661 and related statutes.

5 41. If an importer and wholesaler licenses were available that allowed him to deliver wine  
6 from Florida directly to California retailers, Mr. Creighton would obtain it; he does not ask for  
7 the right to engage in the unlicensed sale and delivery of wine in California.

8 42. No substantial reason exists for denying residents of Florida the same privilege to sell and  
9 deliver wine from their premises directly to California-licensed retailers that California gives to  
10 its own citizens.

11 43. California's requirement that wine coming into the state may not be shipped directly to a  
12 retailer, but must come to rest at a California importer's premises, denies Mr. Creighton the  
13 privilege to engage in his occupation in the state upon the same terms as California citizens, and  
14 therefore violates the Privileges and Immunities Clause in Article IV of the United States  
15 Constitution.

16 **Request for relief**

17 WHEREFORE, Plaintiffs seeks the following relief:

18 A. Judgment declaring Cal. Bus. & Prof. Code § 23661 unconstitutional as a violation of the  
19 Commerce Clause of the United States Constitution.

20 B. Judgment declaring Cal. Bus. & Prof. Code § 23661 unconstitutional as a violation of the  
21 Privileges and Immunities Clause of Article IV of the United States Constitution.

22 C. An injunction prohibiting Defendant from enforcing that statute, and requiring Defendant  
23 to allow Plaintiffs to sell and deliver wine directly to California retailers without consigning it to

1 a California importer.

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

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

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

7 Respectfully submitted,  
8 *Attorneys for Plaintiffs*

9 /s/ James A Tanford

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 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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