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9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12

13
 14 **ORION WINE IMPORTS, LLC and**
PETER E. CREIGHTON,

15 Plaintiffs,

16
 17 v.

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

20 Defendants.

2:18-cv-01721-KJM-DB

**DEFENDANT’S MOTION TO DISMISS
 PLAINTIFFS’ THIRD AMENDED
 COMPLAINT**

[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]

Date: November 22, 2019
 Time: 10:00 a.m.
 Courtroom: 3
 Judge: The Honorable Kimberly J.
 Mueller

Action Filed: June 14, 2018

21
 22
 23 **INTRODUCTION**

24 Plaintiffs’ third amended complaint (“TAC”), like its previous iterations, centers on Orion
 25 Wine Imports, LLC’s desire to conduct business within the State of California without complying
 26 with the California Alcoholic Beverage Control Act and its incorporated statutes, regulations, and
 27 foundational public policies. On August 16, 2019 the Court granted Defendant’s motion to
 28 dismiss Plaintiffs’ dormant Commerce Clause and Privileges and Immunities claims, but

1 permitted Plaintiffs an additional opportunity to amend. ECF No. 52. Specifically, the Court
2 identified the following deficiencies: 1) Plaintiffs failed to “make clear how the California law at
3 issue here is discriminatory other than to generally allege that because plaintiff Orion ‘is located
4 in Florida and has no premises in California, it is prohibited from importing, selling and
5 delivering wine directly to California-licensed retailers;” 2) Plaintiffs did not address the public
6 warehouse option; 3) Plaintiffs did not cite any authority supporting the contention that while
7 corporations are barred from asserting Article IV Privileges and Immunities claims, LLCs are not;
8 and 4) Plaintiffs failed to sufficiently allege that Plaintiff Creighton suffered a direct and
9 independent injury for the purposes of the Article IV Privileges and Immunities Clause. ECF No.
10 52 at pp. 10-14. Plaintiffs’ TAC does not cure those defects.

11 On the contrary, the conclusions and assertions contained within the TAC fall short of
12 federal pleading standards and do not raise a right to relief for Orion Wine Imports, LLC
13 (“Orion”) or its sole proprietor, Peter Creighton. Each plaintiff, again, fails to demonstrate
14 Article III standing and is unable to state a valid claim for relief. Accordingly, the motion of
15 Defendant Jacob Appelsmith, Director of the California Department of Alcoholic Beverage
16 Control, to dismiss the Plaintiffs’ dormant Commerce Clause claim and their Article IV
17 Privileges and Immunities claim should be granted without further leave to amend.

18 **SUMMARY OF ALLEGED FACTS**

19 Orion alleges that it is a limited liability company based in Clearwater Florida and is in the
20 business of importing and wholesaling wine produced outside of the United States. TAC ¶ 4.
21 Plaintiff Peter E. Creighton owns and operates Orion. TAC ¶¶ 5, 23, 26, 29-31. Orion alleges
22 that the wine importation provisions of California’s Alcoholic Beverage Control Act are
23 unconstitutional on the ground that California Business and Professions Code section 23661
24 discriminates against nonresidents of California, in violation of the dormant Commerce Clause.¹
25 TAC ¶¶ 8, 9. Creighton also alleges that the same provisions prevent him from operating Orion
26 in California, in violation of the Privileges and Immunities Clause of Article IV of the U.S.

27 _____
28 ¹ All further statutory references are to the California Business and Professions Code,
unless otherwise stated.

1 Constitution. TAC ¶¶ 28-31, 36, 37, 43. Plaintiffs seek an injunction prohibiting Defendant from
2 enforcing Section 23661 and associated statutes and forcing the State to permit Orion to engage in
3 direct sales to California retailers from its Florida distribution facility, bypassing the middle-tier
4 of California’s three-tier alcohol regulatory system. TAC ¶¶ 9, 21, 43, “Request for Relief.”

5 **APPLICABLE LEGAL STANDARDS**

6 Pursuant to Federal Rule of Civil Procedure (“FRCP”) 12(b)(6), an alleged cause of action
7 may be dismissed for failure to state a claim upon which relief may be granted. A plaintiff’s
8 “factual allegations must be enough to raise a right to relief above the speculative level.” *Bell*
9 *Atlantic Corp v. Twombly*, 550 U.S. 544, 555-556 (2007). Merely creating a suspicion that there
10 is a legally cognizable right of action is insufficient to survive a 12(b)(6) motion. *Id.*
11 Additionally, when evaluating a motion to dismiss, the Court is not required to accept as true
12 legal conclusions presented as factual allegations. *Id.* “[A]n unadorned, the-defendant-
13 unlawfully-harmed-me accusation” does not meet the plausibility pleading standard and cannot
14 survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 Furthermore, an action may also be dismissed under FRCP 12(b)(1) due to lack of
16 jurisdiction. Article III of the U.S. Constitution requires that federal courts only adjudicate actual
17 cases and controversies. U.S. Const. art. III, § 2, cl. 1. “When presented with a claim for a
18 declaratory judgment, therefore, federal courts must take care to ensure the presence of an actual
19 case or controversy, such that the judgment does not become an unconstitutional advisory
20 opinion.” *Rhodes v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007). “A suit brought
21 by a plaintiff without Article III standing is not a ‘case or controversy,’ and an Article III federal
22 court therefore lacks subject matter jurisdiction over the suit.” *Cetacean Community. v. Bush*,
23 386 F.3d 1169, 1174 (9th Cir. 2004). Article III standing requires injury, causation, and
24 redressability. *City of Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015). “It is the
25 responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to
26 invoke judicial resolution of the dispute and the exercise of the court's remedial powers.” *Warth*
27 *v. Seldin*, 422 U.S. 490, 518 (1975). “A district court may deny a plaintiff leave to amend if it
28 determines that allegation of other facts consistent with the challenged pleading could not

1 possibly cure the deficiency, or if the plaintiff had several opportunities to amend its complaint
2 and repeatedly failed to cure the deficiencies.” *Telesaurus VPC, LLC v. Power*, 623 F.3d 998,
3 1003 (9th Cir. 2010) (internal quotations and citations omitted).

4 ARGUMENT

5 **I. PLAINTIFFS FAIL TO ALLEGE FACTS DEMONSTRATING THAT CALIFORNIA BUSINESS & 6 PROFESSIONS CODE SECTION 23661 IS DISCRIMINATORY AND VIOLATES THE DORMANT 7 COMMERCE CLAUSE.**

8 Plaintiffs claim that California’s Alcoholic Beverage Control Act violates the dormant
9 Commerce Clause of the United States Constitution. Specifically, Plaintiffs allege that California
10 Business and Professions Code section 23661 is unconstitutional because it “effectively prohibits
11 wine importers and wholesalers located outside California from selling and delivering wine
12 directly to California-licensed retailers, a privilege enjoyed by importers and wholesalers located
13 in California.” TAC, p. 2, “Introduction.” This claim lacks merit. Section 23661 is neutral on its
14 face and in its application. The statute simply requires that all wine “brought into [California]
15 from without this state for delivery or use within the state” be received by a licensed importer and
16 come to rest at a licensed premises prior to being sold to a licensed retailer. Cal. Bus. & Prof.
17 Code § 23661. As noted in the Court’s previous Order granting Defendant’s motion, the
18 challenged statute does not draw any distinction between importers domiciled in California and
19 importers domiciled out-of-state. ECF No. 52 at pp. 9-10.

20 Orion is not prohibited from importing wine into California and participating as a bona fide
21 wholesaler, if it so chooses. As discussed below, California’s regulatory scheme provides for a
22 variety of licenses, including those for importers, wholesalers, and public warehouses. However,
23 the location of one’s domicile has no bearing on the ability to obtain wine importer and/or
24 wholesaler licenses in California. Similarly, residency has no bearing on the permitted use of a
25 licensed public warehouse, meaning an individual or business that happens to be located out-of-
26 state would utilize a public warehouse in the same exact manner as someone who lives in
27 California.

28 For example, Orion, a Florida company, and its representatives may obtain, *inter alia*, the
following licenses in California: 1) pursuant to Section 23374, a “Type 09” beer and wine

1 importer's license, which does not have sale privileges but permits the holder to import and
2 export alcoholic beverages and to transfer the beverages to him or herself under another license;
3 2) pursuant to Section 23374.6, a "Type 10" beer and wine importer's general license, which
4 permits an out-of-state vendor to import beer or wine in its own name and use the services of a
5 licensed public warehouse for importation, storage, and distribution of beer and wine to
6 authorized licensees (this type of license is also frequently used by agents for out-of-state
7 breweries or wineries); and 3) pursuant to Section 23779, a "Type 17" beer and wine wholesaler
8 license, which primarily allows wholesalers to sell to retailers, but also permits incidental sales to
9 other supplier-type licensees.² See Cal. Bus. & Prof. Code §§ 23661, 23374, 23374.6, 23379.
10 Additionally, Sections 23036, 23375, and 23661 provide for a "Type 14" public warehouse
11 license, which relieves importers of the necessity of establishing their own private warehouse by
12 allowing their imported alcohol to come to rest at a public warehouse and be stored there for the
13 importer, prior to being sold to another authorized licensee. Cal. Bus. & Prof. Code §§ 23036,
14 23661, 23375, 24041. These licenses demonstrate that all importers, whether located in-state or
15 out-of-state, are treated the same. Although Plaintiffs' TAC disregards the aforementioned
16 licenses and summarily alleges that California's licensing scheme is protectionist, it is clear that
17 their dormant Commerce Clause discrimination claim fails, as a matter of law.

18 In order to advance their dormant Commerce Clause claim, Plaintiffs must allege facts
19 showing that Section 23661 is discriminatory on its face, in its purpose, or in its effect. *National*
20 *Association of Optometrists & Opticians v. Harris*, 682 F.3d at 1150 (9th Cir. 2012). Plaintiffs
21 have not alleged facts demonstrating unconstitutional discriminatory treatment of wine importers
22 and wholesalers with residency outside the state from those who reside in the state. Instead, the
23 complaint appears to proffer a false choice, not unlike that proffered by the plaintiffs in *Black*
24 *Star Farms LLC v. Oliver*, 600 F.3d 1225, 1234 (9th Cir. 2010) – the State must either dismantle
25 its three-tier licensing scheme or create a special license for Plaintiffs who will only accept

26 ² Summary descriptions of the utility of the Type 09, 10, 14 and 17 California Department
27 of Alcoholic Beverage Control licenses may be found on the Department's official website at
28 <https://www.abc.ca.gov/licensing/license-types/> and the applicable fee schedule is set forth in
Business and Professions Code section 23320.

1 preferential treatment to access to its wine market.³ However, the dormant Commerce Clause is
2 not a tool invoked to “equalize inherent marketing advantage[s]” that are the natural result of
3 proximity. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1234 (9th Cir. 2010). Further, no
4 discriminatory treatment exists here, as Section 23661 and its related licensing provisions do not
5 discriminate against wine because it came from outside of California, and Plaintiffs have not
6 alleged any facts to the contrary. The lack of residency-based differential treatment means that
7 Plaintiffs have not raised a right to relief under the dormant Commerce Clause. Moreover, this is
8 Plaintiffs’ third attempt to state a valid claim. Count I of the complaint should be dismissed
9 without leave to amend.

10 California, like many others states, has adopted a three-tier regulatory system that requires
11 separate licenses for producers, wholesalers, and retailers. *Granholm v. Heald*, 544 U.S. 460, 466
12 (2005); *see also* Cal. Bus. & Prof. Code §§ 23356, 23378; ECF No. 52 at p. 3. California’s three-
13 tier scheme is a legitimate exercise of its authority under the Twenty-First Amendment.
14 *Granholm*, 544 U.S. at 466. Indeed, these kinds of three-tier systems are “preserved by a
15 complex set of overlapping state and federal regulations.” *Id.* The usage of a three-tier system to
16 prevent vertical integration within a State’s alcoholic beverage industry remained undisturbed in
17 the Supreme Court’s most recent Twenty-First Amendment opinion, as it focused on durational
18 residency requirements. *Tennessee Wine and Spirits Retailers Association v. Thomas*, -- U.S. --,
19 139 S. Ct. 2449, 2474 (2019).

20 Here, Orion is essentially requesting that this Court dismantle California’s legitimate three-
21 tier system. Direct-to-retailer sales of wine is not permitted to any importer under California’s
22 regulatory scheme and Plaintiffs have not identified any statutory or case law authority that
23 requires California to create an exception to its licensing system enabling out-of-state wine
24 importers to engage in direct-to-retailer sales, an option that is not available to any in-state wine

25 ³ In *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010), the Court of Appeals
26 affirmed the district court’s grant of summary judgment to the State of Arizona, holding that two
27 exceptions to Arizona’s three-tier regulatory system, the “small winery” exception and the “in
28 person” purchase exception, were not subject to strict scrutiny and did not violate the dormant
Commerce Clause. The Court recognized that an out-of-state commercial winery sought to have
the Court invalidate all burdens on direct-to-consumer shipment, including those that were only
incidental, under the guise of discrimination under the dormant Commerce Clause. *Id.* at 1234.

1 importer. Notably, Plaintiffs conclusory argument that a license exists for California limited
2 liability companies to engage in direct-to-retailer wine sales lacks a citation to any authority. *See*
3 TAC ¶ 7. Plaintiffs’ complaint also lacks any reference to Section 24041, which, as noted by the
4 Court in its Order granting Defendant’s motion, specifically allows an out-of-state business’s
5 alcoholic beverages to “come to rest, [be] stored, and [be] shipped from a public warehouse in
6 California.” Cal. Bus. & Prof. Code § 24041; ECF No. 52 at p. 3. The conclusory arguments
7 contained within the TAC and the injunctive relief sought reflect Plaintiffs’ desire to have this
8 Court create an advantage for them, as it is clear that the challenged statutes, which are integral to
9 California’s three-tier system, are neutral and non-discriminatory.

10 **II. PLAINTIFF CREIGHTON MAY NOT ASSERT A DERIVATIVE ARTICLE IV PRIVILEGES AND**
11 **IMMUNITIES CLAIM, SO COUNT II MUST BE DISMISSED FOR LACK OF STANDING.**

12 As stated by the U.S. Supreme Court, “[t]he constitutional limits on standing eliminate
13 claims in which the plaintiff has failed to make out a case or controversy between himself and the
14 defendant.” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). Here, Plaintiffs
15 have failed to assert facts establishing a viable Privileges and Immunities claim.

16 First, the Privileges and Immunities Clause contained in Article IV of the Constitution is
17 does not protect corporations or LLCs. *Western & Southern Life Insurance Co. v. State Board of*
18 *Equalization*, 451 U.S. 648, 656 (1981), see also *Aqua Harvesters, Inc. v. New York State*
19 *Department of Environmental Conservation*, No. 17-CV-1198, 2019 WL 3037866, at 48 n.59
20 (E.D.N.Y. July 11, 2019). Thus, Orion – an LLC – cannot state a claim. *Id.*; TAC ¶ 4.

21 Likewise, the Privileges and Immunities Clause is inapplicable to an individual plaintiff
22 whose alleged prospective injuries flow directly from the alleged prospective injury to a
23 corporation. *See Chance Management, Inc. v. State of South Dakota*, 97 F.3d 1107, 1115-1116
24 (8th Cir. 1996); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d
25 1311, 1317-1318 (4th Cir. 1994). Therefore, the claim must be dismissed.

26 Plaintiffs’ current complaint, like the previous versions, continues to allege that Plaintiff
27 Creighton is seeking redress as the owner of Orion, meaning that Creighton’s alleged injuries
28 flow directly from the allegations regarding Orion’s ability to operate as a wine importer and

1 wholesaler in California. Plaintiff Creighton has not alleged the requisite injury, causation, and
2 redressability for Article III standing, separate from what is alleged by Orion. Specifically, only
3 one proposed business deal is alleged, and it involved Orion selling imported wine to The Pour
4 House, a California retailer. TAC ¶ 23. According the complaint, Plaintiff Creighton’s claim is
5 based on his desire to “deliver the wine he imports through Orion directly to The Pour House and
6 other California retailers from his principal business premises in Florida.” TAC ¶ 40. Clearly,
7 Creighton’s alleged injury is not independent of that of Orion. Creighton’s prospective financial
8 losses would be derivative of Orion’s losses. Thus, Creighton lacks standing to bring the asserted
9 Article IV Privileges and Immunities claim and Count II of Plaintiffs’ complaint should be
10 dismissed on that basis. *Woods View II, LLC v. Kitsap County*, 484 F. Appx. 160, 161 (9th Cir.
11 2012). Additionally, this count should be dismissed without leave to amend given that Plaintiff
12 Creighton has had several opportunities to state a valid claim and has not done so.

13 **III. COUNT II ALSO FAILS TO PLEAD FACTS SUFFICIENTLY ALLEGING A VIOLATION OF**
14 **RIGHTS UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV OF THE U.S.**
15 **CONSTITUTION, AND SHOULD BE DISMISSED.**

16 For a Section 1983 claim to proceed under the Privileges and Immunities Clause of Article
17 IV, there must be discrimination on the basis of out-of-state residency. *Gianni v. Real*, 911 F.2d
18 354, 357 (9th Cir. 1990). The absence of any disparate treatment of nonresidents is fatal to a
19 plaintiff’s claims of violation of the Privileges and Immunities Clause. *Id.*

20 Assuming, *arguendo*, that Plaintiff Creighton sufficiently alleged standing to assert his
21 Privileges and Immunities claim the complaint fails to state a claim. Setting aside the improper
22 legal conclusions, Plaintiffs’ complaint does not identify an interest belonging to Plaintiff
23 Creighton that is protected by the Privileges and Immunities Clause. The revised complaint still
24 lacks the sufficient factual allegations required by the federal pleading standard and, instead,
25 relies upon unadorned accusations that misstate the relevant law. *Ashcroft v. Iqbal*, 556 U.S. 662,
26 678 (2009). The challenged statute, Section 23661, is neutral in its text and in its application, and
27 Plaintiffs have not set forth facts addressing their conclusion that they are “prohibited” from
28 obtaining the variety of ABC licenses made available to them. Due to the absence of any
disparate treatment of nonresidents within the challenged state laws and Plaintiffs continued

1 failure to allege more than labels and conclusions in support of the Privileges and Immunities
2 claim, Count II should, again, be dismissed without leave to amend because it fails to state an
3 actionable claim. *Id.*

4 **CONCLUSION**

5 For the reasons set forth above, Defendant Appelsmith respectfully requests that the Court
6 dismiss Plaintiffs' Third Amended Complaint in its entirety and without leave to amend.

7
8 Dated: October 11, 2019

Respectfully submitted,

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10 Attorney General of California
11 ANDREA R. AUSTIN
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12 */s/ Lykisha D. Beasley*

13
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California Department of
Alcoholic Beverage Control

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CERTIFICATE OF SERVICE

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

I hereby certify that on October 11, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT’S MOTION TO DISMISS PLAINTIFFS’ THIRD 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 October 11, 2019, at Sacramento, California.

Jenny Thirakul
Declarant

/s/ Jenny Thirakul
Signature