

No. 20-15447

---

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

ORION WINE IMPORTS, LLC, and PETER CREIGHTON  
*Plaintiffs-Appellants*

vs.

JACOB APPLESMITH, in his official capacity as Director of the  
California Department of Alcoholic Beverage Control,  
*Defendant-Appellee*

---

On Appeal from the U. S. District Court for the Eastern District of  
California, D.C. No. 2:18-cv-01721-KJM-DB  
Hon. Kimberly J. Mueller, U.S. District Judge

---

**APPELLANTS' EXCERPTS OF RECORD**

---

James A. Tanford  
Robert D. Epstein  
Epstein, Cohen, Seif & Porter, LLP  
50 S. Meridian St., Suite 505  
Indianapolis IN 46204  
tanfordlegal@gmail.com  
Rdepstein@aol.com  
tel (317) 639-1326  
fax (317) 638-9891

*Attorneys for Plaintiffs-Appellants*

## INDEX

A. Notice of Appeal, Doc. No. 68 .....	1
B. Judgment, Doc. No. 67 .....	3
C. Opinion and Order, Doc. No. 66 .....	4
D. Defendant's Motion to Dismiss, Doc. No. 56 .....	15
E. Third Amended Complaint, Doc. No. 53 .....	18
F. Trial Court Docket .....	28
G. Certificate of Service .....	36



**CERTIFICATE OF SERVICE**

I hereby certify that on the 12th day of March, 2020, 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

James A. Tanford (Indiana Attorney No. 16982-53)

EPSTEIN COHEN SEIF & PORTER

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

**JUDGMENT IN A CIVIL CASE**

**ORION WINE IMPORTS, LLC, ET AL.,**

**CASE NO: 2:18-CV-01721-KJM-DB**

**v.**

**JACOB APPELSMITH, ET AL.,**

---

**Decision by the Court.** This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

**IT IS ORDERED AND ADJUDGED**

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE  
COURT'S ORDER FILED ON 2/21/2020**

**Keith Holland**  
Clerk of Court

**ENTERED: February 21, 2020**

by: /s/ L. Mena-Sanchez  
Deputy Clerk

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 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. Third Am. Compl. ("TAC"), ECF No. 53. Defendant Jacob Applesmith moves to dismiss plaintiffs' Third Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot., ECF No. 56-1. Plaintiffs filed an opposition, ECF No. 57, and defendant a reply, ECF No. 61. The court held a hearing on the motion to dismiss, at which James A. Tanford appeared for plaintiffs, Lykisha Beasley appeared for defendant, and Robert A. Brundage appeared for amici California Beer and Beverage Distributors ("CBBD") and Wine and Spirits Wholesalers of California ("WSWC").

1 As explained below, the court GRANTS the motion.

2 I. BACKGROUND

3 The facts of this case were laid out in the court's prior order on the original motion  
4 to dismiss, and the court reproduces them as necessary here. *See* Order, ECF No. 52 at 2–4.  
5 Plaintiff Orion Wine Imports, LLC is a Florida-based and -licensed importer and wholesaler of  
6 wine that would like to import, sell and deliver its products directly to California retailers. TAC  
7 ¶¶ 4, 22-23. Plaintiff Peter Creighton is a Florida resident and sole member of Orion Wine  
8 Imports, LLC. *Id.* ¶¶ 5, 29. As sole member of the LLC, Creighton collects all profits from  
9 Orion and reports them on his personal tax return. *Id.* ¶ 31. Creighton travels to various wine-  
10 producing foreign countries, buys wine from foreign wineries, imports the wine through Orion,  
11 and markets the wine to retailers, restaurants and hotels. *Id.* ¶¶ 5, 30. Creighton seeks to practice  
12 his profession and market, sell and deliver wine directly to California retailers. *Id.* ¶ 40.  
13 Defendant Jacob Applesmith is sued in his official capacity as the Director of the California  
14 Department of Alcoholic Beverage Control. *Id.* ¶ 6.

15 California Business and Professions Code section 23661 is a provision of  
16 California's Alcoholic Beverage Control Act ("ABC Act") regulating where alcoholic beverages  
17 imported from outside California are to be consigned and delivered upon arrival in the state.  
18 Plaintiffs seek a declaratory judgment that section 23661 discriminates against interstate  
19 commerce in violation of the Commerce Clause and the Privileges and Immunities Clause of  
20 Article IV of the U.S. Constitution. *Id.* at 9–10. Plaintiffs also seek to enjoin California from  
21 enforcing section 23661 and to require the State to permit plaintiffs to sell and deliver wine  
22 directly to California retailers without consigning it to a California importer. *Id.* at 9–10.  
23 Specifically, the challenged statute provides in pertinent part as follows:

24 [A]lcoholic beverages may be brought into this state from without  
25 this state for delivery or use within the state only by common carriers  
26 and only when the alcoholic beverages are consigned to a licensed  
27 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.

28 Cal. Bus. & Prof. Code § 23661.

1 As a provision of the ABC Act, section 23661 is part of California's three-tiered  
2 licensing scheme for the sale and distribution of alcoholic beverages. The three tiers refer to:  
3 (1) manufacturers of alcoholic beverages, (2) wholesalers and (3) retailers. *Id.* § 23320(a). Under  
4 the three-tier system, a manufacturer generally sells its wine to a licensed wholesaler, who then  
5 sells and delivers the wine to a licensed in-state retailer. *Id.* §§ 23356(b), 23378. The retailer, in  
6 turn, sells the wine to consumers. *Id.* §§ 23026, 23394, 23402. Importers typically fit into this  
7 system at the manufacturer and wholesaler tiers. *Id.* § 23017. The holder of an importer's license  
8 cannot sell or deliver wine to retailers unless it also has a wholesaler's license. *Id.* §§ 23374,  
9 23374.5, 23374.6, 23775. If an importer also holds a wholesaler's license, then the importer can  
10 transfer the imported beverages to itself under the wholesaler's license and use the wholesaler's  
11 license to sell to retailers. *Id.* §§ 23374, 23378, 23402. An LLC holding a license under the Act  
12 "shall maintain a record of its members at the principal office of the company in California and  
13 the record of its members shall be available to the department for inspection." *Id.* § 23405.2.

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

27 Plaintiffs allege California's three-tiered scheme discriminates against out-of-state  
28 wholesalers and importers of wine. TAC at 2. They allege a business located within California



1 can obtain a combination of licenses allowing it to import, sell and deliver wine directly to  
2 California retailers, while a business located outside California cannot obtain the same  
3 combination of licenses and must instead sell its wine to in-state importers or wholesalers, who  
4 may then deliver the wine to California retailers. *Id.* ¶¶ 7–10. They allege the statute requires all  
5 wine from out-of-state distributors “must be consigned to a California-based importer with  
6 premises in the state.” *Id.* ¶ 9. They further allege if Orion wanted to obtain California importer  
7 and wholesale licenses, it would have to open a physical office in California to meet the  
8 requirement that records of “sales, inventory, taxes, and ownership be maintained and available  
9 for inspection in California,” that Orion claims is mandated by section 23405.2. *Id.* ¶ 19.

10 Defendant contests plaintiffs’ characterization of the effect of the law. He points  
11 out there is no requirement in the statutes at issue that any licensee be “California-based” as  
12 Orion alleges. Mem. P. & A., ECF No. 56-1 at 4. He also contends plaintiffs fail to address the  
13 alternative provided for in section 23661 to consigning wine to a licensed importer: namely,  
14 consigning it to a licensed public warehouse. *Id.* Defendant asserts Orion, as an out-of-state  
15 business, can obtain the importer’s and wholesaler’s licenses and consign its wine at a licensed  
16 public warehouse. *Id.* at 5.

17 On August 16, 2019, the court granted defendant’s motion to dismiss plaintiffs’  
18 Second Amended Complaint. Order, ECF No. 52. At the same time, the court granted plaintiffs  
19 leave to amend their Commerce Clause claim to clarify whether and to what extent they must  
20 establish a physical presence in California to obtain the licenses they seek. Order at 11. The  
21 court also granted plaintiffs leave to amend their Privileges and Immunities claim to establish  
22 Creighton’s standing as an individual with an injury distinct from that alleged by Orion, if  
23 possible. Order at 15.

24 Plaintiffs filed their Third Amended Complaint shortly thereafter, ECF No. 53, and  
25 defendant filed the instant Motion to Dismiss, ECF No. 56. Plaintiffs oppose. ECF No. 57.  
26 Amici CBBD and WSWC (“the amici”) filed an amicus brief. ECF No. 58. Plaintiffs filed a  
27 motion to strike the amicus brief, ECF No. 59, which the court granted only insofar as amici  
28 purported to offer evidence, but denied as to the balance of the brief. ECF No. 60. Defendant

1 filed a reply brief. ECF No. 61. Plaintiffs filed a reply to the amicus brief. ECF No. 62. Amici  
2 replied to plaintiffs' reply. ECF No. 63. As allowed by the court, defendant replied to plaintiffs'  
3 reply. ECF No. 64.

## 4 II. LEGAL STANDARD

### 5 A. Rule 12(b)(1)

6 The U.S. Constitution "limits the jurisdiction of federal courts to 'Cases' and  
7 'Controversies.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). "Standing to sue is a  
8 doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*,  
9 136 S. Ct. 1540, 1547 (2016); *see also Lujan*, 504 U.S. at 560 ("[T]he core component of  
10 standing is an essential and unchanging part of the case-or-controversy requirement of Article  
11 III.").

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

20 Lack of standing is "properly raised in a motion to dismiss under Federal Rule of  
21 Civil Procedure 12(b)(1), not Rule 12(b)(6)." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).  
22 "Rule 12(b)(1) jurisdictional attacks can be either facial or factual." *Id.* "In a facial attack, the  
23 challenger asserts that the allegations contained in a complaint are insufficient on their face to  
24 invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.  
25 2004). "[I]n a factual attack, the challenger disputes the truth of the allegations that, by  
26 themselves, would otherwise invoke federal jurisdiction." *Id.* A "district court resolves a facial  
27 attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as  
28 true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether

1 the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane*  
2 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir.  
3 2013)). In a factual attack, however, the court may review evidence outside the pleadings to  
4 resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*,  
5 850 F.2d 558, 560 (9th Cir. 1988). "Once the moving party has converted the motion to dismiss  
6 into a factual motion by presenting affidavits or other evidence properly brought before the court,  
7 the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its  
8 burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*,  
9 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th  
10 Cir. 1989)).

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

15 B. Rule 12(b)(6)

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

21 Although a complaint need contain only "a short and plain statement of the claim  
22 showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), to survive a motion to  
23 dismiss this short and plain statement "must contain sufficient factual matter . . . to 'state a claim  
24 to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting  
25 *Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something more than "an  
26 unadorned, the-defendant-unlawfully-harmed-me accusation" or "'labels and conclusions' or 'a  
27 formulaic recitation of the elements of a cause of action.'" *Id.* (quoting *Twombly*, 550 U.S. at  
28 555). Determining whether a complaint will survive a motion to dismiss for failure to state a

1 claim is a “context-specific task that requires the reviewing court to draw on its judicial  
2 experience and common sense.” *Id.* at 679. Ultimately, the inquiry focuses on the interplay  
3 between the factual allegations of the complaint and the issues of law that are dispositive in the  
4 action. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

5 In making this context-specific evaluation, this court must construe the complaint  
6 in the light most favorable to the plaintiff and accept its factual allegations as true. *Erickson v.*  
7 *Pardus*, 551 U.S. 89, 93–94 (2007) (citing *Twombly*, 550 U.S. at 555–56). This rule does not  
8 apply to “a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quoting  
9 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)), “allegations that contradict matters properly  
10 subject to judicial notice,” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001),  
11 *opinion amended on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001), or material attached to or  
12 incorporated by reference into the complaint, *see id.* A court’s consideration of documents  
13 attached to a complaint, documents incorporated by reference in the complaint, or matters of  
14 judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United*  
15 *States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *Parks Sch. of Bus., Inc. v. Symington*,  
16 51 F.3d 1480, 1484 (9th Cir. 1995); *cf. Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977,  
17 980 (9th Cir. 2002) (even though court may look beyond pleadings on motion to dismiss,  
18 generally court is limited to face of the complaint on 12(b)(6) motion).

### 19 III. DISCUSSION

#### 20 A. Motion to Strike

21 Plaintiffs’ motion to strike the amicus brief asserts the Declaration of Robert  
22 Brundage is inadmissible, tainting the motion. Pl.’s Mot. to Strike Amicus Br., ECF No. 59-1 at  
23 2-3. The declaration purports to show The Pour House, a retail wine shop in Truckee, California,  
24 has no importer’s license. Amici contend The Pour House’s lack of an importer’s license would  
25 makes its receipt of wine on its first entry into the state unlawful for various reasons unrelated to  
26 section 23661, and thus plaintiffs’ proposed transaction with the Pour House is unlawful  
27 regardless of the challenged law. Plaintiffs are correct that amici are not, absent a grant of  
28 intervention, parties to an action and therefore cannot offer evidence on their own. *WildEarth*

1 *Guardians v. Jeffries*, 370 F. Supp. 3d 1208, 1228 (D. Or. 2019) (citing *United States v. Oregon*,  
2 745 F.2d 550, 553 (9th Cir. 1984)). The court does not consider the Brundage declaration in  
3 reaching its decision.

4 In any event, the absence of a declaration purportedly showing The Pour House's  
5 lack of an importer's license is immaterial. The Third Amended Complaint does not allege The  
6 Pour House has such a license, nor do plaintiffs argue they need one. Plaintiffs agreed at hearing  
7 that they do not contend The Pour House has an importer's license, or indeed that they could get  
8 one as a retailer.

9 B. Standing

10 Amici CBBD and WSWC raise the issue of plaintiffs' standing. Although they are  
11 non-parties, amici rightly point out that standing is jurisdictional and the court has an independent  
12 obligation to examine its jurisdiction over the case. *United States v. Hays*, 515 U.S. 737, 742  
13 (1995); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). A court may consider an  
14 issue raised by an amicus *sua sponte* if it touches on fundamental issues of the court's  
15 jurisdiction. *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992)  
16 (considering federalism and comity issue raised by amici).

17 Plaintiffs' alleged injury with respect to both the dormant Commerce Clause claim  
18 and the Privileges and Immunities claim is the inability to ship wine directly to a California  
19 retailer without the added burden of consigning it to an importer or public warehouse. TAC  
20 ¶¶ 22-27, 43. Specifically, plaintiffs allege they had an agreement in principle to sell wine to The  
21 Pour House in Truckee, California, a retail wine shop, but had to renege on the agreement when it  
22 became apparent that the proposed sale of wine directly from Orion to The Pour House would  
23 violate California law. TAC ¶¶ 23-24. Plaintiffs allege their injury is caused by "the California  
24 law that prohibits direct-to-retailer sales from an out of state licensed wholesaler, such as Orion."  
25 TAC ¶ 26. Plaintiffs pray for a judgment declaring California Business & Professions Code  
26 section 23661 unconstitutional, enjoining defendant from enforcing it, and "requiring Defendant  
27 to allow Plaintiffs to sell and deliver wine directly to California retailers without consigning it to  
28 a California importer." TAC at 9-10.

1 A plaintiff challenging the validity of a statute cannot establish either causation or  
2 redressability where another statute not subject to challenge would continue to effect the same  
3 injury. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 228 (2003) (holding  
4 challengers to § 307 of Bipartisan Campaign Reform Act (BCRA) lacked standing because they  
5 would continue to suffer same injury due to § 315 of Federal Election Commission Act whether  
6 or not BCRA § 307 could be enforced); *Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 457  
7 F.3d 941, 953 (9th Cir. 2006) (finding no standing where challenge to NRC rulemaking would  
8 not invalidate Department of Transportation regulation with same effect.); *San Diego Gun Rights*  
9 *Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (finding no causation or redressability where  
10 challenged law was not the only factor raising price of firearms).

11 The Third Amended Complaint identifies the source of plaintiffs' injury variously  
12 as "the California law that prohibits direct-to-retailer sales from an out-of-state licensed  
13 wholesaler," TAC ¶ 26, "California's statutory scheme," *id.* ¶ 27, and "a licensing scheme that  
14 gives its own residents the privilege to market, sell and deliver wine to California-licensed  
15 retailers," *id.* ¶ 38. But the only specific statutes plaintiffs identify as causing injury are  
16 California Business & Professions Code sections 23661 and 23405.2. *Id.* ¶¶ 17, 19. The prayer  
17 for relief asks only for the invalidation of section 23661 and for the court to enjoin defendant so  
18 as "to allow Plaintiffs to sell and deliver wine directly to California retailers without consigning it  
19 to a California importer." *Id.* at 9–10.

20 Irrespective of section 23661's requirement that out-of-state alcoholic beverages  
21 be first consigned to an importer's facility or public warehouse, plaintiffs' proposed transaction  
22 would still be barred by other provisions of the ABC Act that plaintiffs do not challenge here.  
23 Plaintiffs assert in their briefs, and again at hearing, that section 23661 is the only thing  
24 precluding them from consummating their transaction. Reply to Amicus Br., ECF No. 59-2 at 3  
25 ("Amici cite no statute that would continue to prohibit Orion from selling and shipping wine  
26 directly to The Pour House if the physical-presence rule in § 23661 were declared  
27 unconstitutional."). Although plaintiffs claim "[s]ection 23017 defines an importer as the entity  
28 that brings wine into the state," this mischaracterizes the law in a way fatal to their claim. *Id.* at



1 4. Section 23017(b) does not define an importer as the person initiating the transit of wine into  
2 the state. Rather, an importer is the person “to whom delivery is first made in this State of  
3 alcoholic beverages brought into this State from without this State for delivery or use within this  
4 State.” Cal. Bus. & Prof. Code § 23017(b).

5 Various importer licenses are available under the ABC Act. *See id.*  
6 §§ 23320(b)(9) and (b)(10) (beer and wine importer’s license and beer and wine importer’s  
7 general license). Importer licenses authorize the license holder to be an importer, as defined in  
8 section 23017. *Id.* § 23374. Performing any act authorized under a license without possessing  
9 that license is a crime. *Id.* § 23300. Common carriers transporting alcoholic beverages from out  
10 of state must obtain a delivery receipt from a licensed importer on delivery. *Id.* § 23667. A  
11 carrier hired to deliver alcoholic beverages from out of state to a consignee without an importer’s  
12 license or customs broker license must instead report the lack of a license and the shipment  
13 becomes forfeit to the state. *Id.* § 23668.

14 Here, the statute plaintiffs challenge, section 23661, has not caused, either actually  
15 or proximately, their alleged injury. Nor would invalidating the statute redress plaintiffs’ injury.  
16 If Orion causes the wine to be delivered to The Pour House in the first instance, The Pour House  
17 is by definition an importer; if The Pour House receives the wine without a license, it is liable  
18 under the Act for performing the acts of an importer while unlicensed. *Id.* § 23300. The common  
19 carrier would be unable to deliver the wine to The Pour House unless The Pour House were an  
20 importer. The Third Amended Complaint alleges it was not only plaintiffs’ concern about  
21 liability that sunk the Pour House transaction; The Pour House was also not willing to fulfill the  
22 agreement out of fear of its own liability. TAC ¶ 24 (“[b]ecause neither party was willing to risk  
23 violation of California law concerning their intended transaction the agreement was voided.”).  
24 Because the inability to complete the proposed transaction is caused by all of these statutory  
25 prohibitions, it is not caused exclusively by the statute on which plaintiffs rely. As a result,  
26 invalidating section 23661 will not remedy the inability of Orion to sell wine directly to The Pour  
27 House.

28 For these reasons, the court dismisses the operative complaint for lack of standing.

For the foregoing reasons, defendants' motion to dismiss is GRANTED without leave to amend. At hearing, plaintiffs clarified they did not intend to seek further amendment of their complaint if the court dismissed it, as it now has. This order resolves filings ECF Nos. 56 and 59.

**DATED: February 19, 2020.**

ER-14



Case 2:18-cv-01721-KJM-DB Document 56 Filed 10/11/19 Page 1 of 3

XAVIER BECERRA, State Bar No. 118517  
 Attorney General of California  
 ANDREA R. AUSTIN, State Bar No. 173630  
 Supervising Deputy Attorney General  
 LYKISHA D. BEASLEY, State Bar No. 282907  
 Deputy Attorney General  
 1300 I Street, Suite 125  
 P.O. Box 944255  
 Sacramento, CA 94244-2550  
 Telephone: (916) 210-6110  
 Fax: (916) 324-5567  
 E-mail: Lykisha.Beasley@doj.ca.gov  
*Attorneys for Defendant*  
*Jacob Appelsmith, Director of the*  
*California Department of*  
*Alcoholic Beverage Control*

IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

2:18-cv-01721-KJM-DB

**DEFENDANT'S NOTICE OF 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

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that at the time, date, and in the court room indicated above,  
 or as soon thereafter as the matter can be heard, at the Federal Court Building, 501 I Street,  
 Sacramento, California, defendant Jacob Appelsmith will move the Court to dismiss plaintiffs'  
 Third Amended Complaint. The motion will be based on the following grounds:

1           1.     Count I of plaintiffs' Third Amended Complaint fails to state a claim upon which  
2 relief may be granted;

3           2.     The Court lacks subject matter jurisdiction over the alleged Count II because both  
4 plaintiffs lack Article III standing to bring the alleged Privileges and Immunities claim;

5           3.     Count II of plaintiffs' Third Amended Complaint fails to state a claim upon which  
6 relief may be granted; and

7           4.     Defendant hereby certifies that the parties have met and conferred in a cordial and  
8 professional manner regarding the motion to dismiss. The parties have discussed the motion via  
9 via e-mail. The parties remain in disagreement as to whether Count I of the Third Amended  
10 Complaint states an actionable claim as well as whether Count II of the Third Amended  
11 Complaint is supported by Article III standing and states an actionable claim.

12           The motion to dismiss is based on this Notice, the Motion, the Memorandum of Points and  
13 Authorities, the entire Court file, any other pleadings or evidence that may be presented at the  
14 time of hearing, and matters of which the Court may take judicial notice.

15 Dated: October 11, 2019

Respectfully submitted,

16 XAVIER BECERRA  
17 Attorney General of California  
18 ANDREA R. AUSTIN  
Supervising Deputy Attorney General

19 /s/ Lykisha D. Beasley

20  
21 LYKISHA D. BEASLEY  
22 Deputy Attorney General  
*Attorneys for Defendant*  
*Alcoholic Beverage Control*

23 SA2018101846  
24 14189398.docx  
25  
26  
27  
28

**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 NOTICE OF 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

SA2018101846  
14191587.docx

1 ROBERT D. EPSTEIN, Indiana Bar No. 6726-49  
2 JAMES A. TANFORD, Indiana Bar No. 16982-53  
Epstein Cohen Seif & Porter LLP  
3 50 S. Meridian St., Suite 505  
Indianapolis IN 46204  
4 Tel (317) 639-1326  
Fax (317) 638-9891  
5 Rdepstein@aol.com  
tanfordlegal@gmail.com  
6

7 JAMES E. SIMON, State Bar No. 62792  
RAVN WHITINGTON State Bar No. 281758  
8 Porter Simon PC  
40200 Truckee Airport Rd, Suite One  
9 Truckee CA 96161  
Tel (530) 587-2002, Fax (530) 587-1316  
10 simon@portersimon.com

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

**THIRD AMENDED COMPLAINT**

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.

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

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

**WHEREFORE, Plaintiffs seeks the following relief:**

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

ER-26

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

James A. Tanford (Indiana Attorney No. 16982-53)  
Robert D. Epstein (Indiana Attorney No. 6726-49)  
10 EPSTEIN COHEN SEIF & PORTER  
50 S. Meridian St., Suite 505  
11 Indianapolis, IN 46204  
Tel: 317-639-1326; Fax: 317-638-9891  
12 tanfordlegal@gmail.com  
Rdepstein@aol.com

13 /s/ James E. Simon

14 James E. Simon (State Bar No. 62792)  
Ravn Whittington (State Bar No. 2817582)  
15 PORTER SIMON  
40200 Truckee Airport Road, Suite One  
16 Truckee, CA 96161  
Tel: 530-587-2002  
17 simon@portersimon.com  
whittington@portersimon.com

18 CERTIFICATE OF SERVICE

19 I hereby certify that on the 6th day of September, 2019, I electronically filed the foregoing  
20 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.

21 /s/ James A Tanford

22 James A. Tanford (Indiana Attorney No. 16982-53)  
23 EPSTEIN COHEN SEIF & PORTER

CIVIL, APPEAL, CLOSED

**U.S. District Court**  
**Eastern District of California - Live System (Sacramento)**  
**CIVIL DOCKET FOR CASE #: 2:18-cv-01721-KJM-DB**

Orion Wine Imports, LLC et al v. Applesmith  
Assigned to: Chief District Judge Kimberly J. Mueller  
Referred to: Magistrate Judge Deborah Barnes  
Case in other court: USCA, 20-15447  
Cause: 28:1343 Violation of Civil Rights

Date Filed: 06/14/2018  
Date Terminated: 02/21/2020  
Jury Demand: None  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

Date Filed	#	Docket Text
06/14/2018	<u>1</u>	COMPLAINT against Jacob Applesmith by Peter E. Creighton, Orion Wine Imports, LLC. Attorney Simon, James Ernest added. (Filing fee \$ 400, receipt number 0972-7716133) (Attachments: # <u>1</u> Civil Cover Sheet)(Simon, James) (Entered: 06/14/2018)
06/14/2018	<u>2</u>	SUMMONS ISSUED as to *Jacob Applesmith* with answer to complaint due within *21* days. Attorney *Jim Simon* *Porter Simon* *40200 Truckee Airport Rd., Suite 1* *Truckee, California 96161*. (Reader, L) (Entered: 06/14/2018)
06/14/2018	<u>3</u>	CIVIL NEW CASE DOCUMENTS ISSUED; Initial Scheduling Conference set for 10/25/2018 at 02:30 PM in Courtroom 3 (KJM) before District Judge Kimberly J. Mueller. (Attachments: # <u>1</u> Standing Order, # <u>2</u> Consent Form, # <u>3</u> VDRP) (Reader, L) (Entered: 06/14/2018)
06/28/2018	<u>4</u>	PRO HAC VICE APPLICATION and PROPOSED ORDER submitted by Peter E. Creighton, Orion Wine Imports, LLC for attorney James A. Tanford to appear Pro Hac Vice. (Filing fee \$ 225, receipt number 0972-7739644) (Simon, James) (Entered: 06/28/2018)
06/28/2018	<u>5</u>	PRO HAC VICE APPLICATION and PROPOSED ORDER submitted by Peter E. Creighton, Orion Wine Imports, LLC for attorney Robert D. Epstein to appear Pro Hac Vice. (Filing fee \$ 225, receipt number 0972-7739707) (Simon, James) (Entered: 06/28/2018)
06/28/2018	<u>6</u>	PRO HAC VICE APPLICATION and PROPOSED ORDER submitted by Peter E. Creighton, Orion Wine Imports, LLC for attorney Kristina Swanson to appear Pro Hac Vice. (Filing fee \$ 225, receipt number 0972-7739723) (Simon, James) (Entered: 06/28/2018)
06/28/2018	<u>7</u>	CORPORATE DISCLOSURE STATEMENT by Plaintiff Orion Wine Imports, LLC. (Simon, James) (Entered: 06/28/2018)
07/09/2018	<u>8</u>	[DISREGARD - NO CASE NUMBER - SEE <u>10</u> FIRST AMENDED COMPLAINT] against Jacob Applesmith by Peter E. Creighton, Orion Wine Imports, LLC.(Simon, James) Modified on 7/10/2018 (Benson, A.). (Entered: 07/09/2018)

07/09/2018	<u>9</u>	CIVIL COVER SHEET by Peter E. Creighton, Orion Wine Imports, LLC (Simon, James) (Entered: 07/09/2018)
07/10/2018	<u>10</u>	FIRST AMENDED COMPLAINT by Orion Wine Imports, LLC (Attachments: # <u>1</u> Civil Cover Sheet)(Simon, James) Modified on 7/10/2018 (Benson, A.). (Entered: 07/10/2018)
07/10/2018	<u>11</u>	SUMMONS ISSUED as to *Jacob Appelsmith* with answer to complaint due within *21* days. Attorney *James Ernest Simon* *Porter Simon* *40200 Truckee Airport Road* *Truckee, CA 96161*. (Benson, A.) (Entered: 07/10/2018)
07/13/2018	<u>12</u>	PRO HAC VICE ORDER signed by District Judge Kimberly J. Mueller on 7/12/2018 ORDERING Attorney James A. Tanford, to appear for Peter E. Creighton, and Orion Wine Imports, LLC. (Reader, L) (Entered: 07/13/2018)
07/13/2018	<u>13</u>	PRO HAC VICE ORDER signed by District Judge Kimberly J. Mueller on 7/12/2018 ORDERING Attorney Kristina M. Swanson, to appear for Peter E. Creighton, and Orion Wine Imports, LLC.(Reader, L) (Entered: 07/13/2018)
07/24/2018	<u>14</u>	PRO HAC VICE ORDER signed by District Judge Kimberly J. Mueller on 7/24/18: Added attorney Robert D. Epstein, PHV for Peter E. Creighton and Orion Wine Imports, LLC. (Kaminski, H) (Entered: 07/24/2018)
08/01/2018	<u>15</u>	MOTION to DISMISS by Jacob Appelsmith. Attorney Beasley, Lykisha D added. Motion Hearing set for 9/21/2018 at 10:00 AM in Courtroom 3 (KJM) before District Judge Kimberly J. Mueller. (Attachments: # <u>1</u> Motion to Dismiss, # <u>2</u> Declaration)(Beasley, Lykisha) Modified on 8/2/2018 (Kaminski, H). (Entered: 08/01/2018)
08/03/2018	<u>16</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: On the court's own motion, the Status (Pretrial Scheduling) Conference set for 10/25/2018 is VACATED and ADVANCED to 9/21/2018 at 10:00 AM in Courtroom 3 before District Judge Kimberly J. Mueller, with the filing of a joint status report due seven days prior. (Text Only Entry) (Schultz, C) (Entered: 08/03/2018)
08/10/2018	<u>17</u>	MOTION to AMEND <u>8</u> Amended Complaint by Peter E. Creighton, Orion Wine Imports, LLC. Motion Hearing set for 9/21/2018 at 10:00 AM in Courtroom 3 (KJM) before District Judge Kimberly J. Mueller. (Attachments: # <u>1</u> Memorandum, # <u>2</u> Proposed Second Amended Complaint)(Tanford, James) Modified on 8/13/2018 (Kaminski, H). (Entered: 08/10/2018)
08/22/2018	<u>18</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: Due to a scheduling conflict and on the court's own motion, the Status (Pretrial Scheduling) Conference and Motion Hearing as to Defendant's Motion to Dismiss (ECF No. <u>15</u> ) and Plaintiffs' Motion to Amend (ECF No. <u>17</u> ) set for 9/21/2018 is VACATED and ADVANCED to 9/19/2018 at 2:00 PM in Courtroom 3 before District Judge Kimberly J. Mueller. Filing deadlines related to the pending motions are reset as provided by Local Rule 230. The parties shall file a joint status report seven days prior to the new date of the status conference. (Text Only Entry) (Schultz, C) (Entered: 08/22/2018)



08/23/2018	<u>19</u>	OPPOSITION by Peter E. Creighton, Orion Wine Imports, LLC to <u>15</u> Motion to Dismiss. (Tanford, James) (Entered: 08/23/2018)
09/05/2018	<u>20</u>	OPPOSITION by Jacob Appelsmith to <u>17</u> Motion to Amend. (Attachments: # <u>1</u> Proof of Service)(Beasley, Lykisha) (Entered: 09/05/2018)
09/10/2018	<u>21</u>	REPLY by Plaintiffs in SUPPORT of <u>17</u> Motion to Amend. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B)(Tanford, James) Modified on 9/14/2018 (Mena-Sanchez, L). (Entered: 09/10/2018)
09/10/2018	<u>22</u>	NOTICE of APPEARANCE by Brian C. Rocca on behalf of California Beer and Beverage Distributors. Attorney Rocca, Brian C. added. (Rocca, Brian) (Entered: 09/10/2018)
09/10/2018	<u>23</u>	STIPULATION and PROPOSED ORDER for California Beer and Beverage Distributors and Wine and Spirits Wholesalers of California to Participate as Amici in Connection With Pleadings Challenges by California Beer and Beverage Distributors. (Rocca, Brian) (Entered: 09/10/2018)
09/12/2018	<u>24</u>	JOINT STATUS REPORT by Peter E. Creighton, Orion Wine Imports, LLC. (Tanford, James) (Entered: 09/12/2018)
09/14/2018	<u>25</u>	NOTICE of APPEARANCE by Michael Brill Newman on behalf of California Beer and Beverage Distributors. Attorney Newman, Michael Brill added. (Newman, Michael) (Entered: 09/14/2018)
09/14/2018	<u>26</u>	STIPULATION and ORDER signed by District Judge Kimberly J. Mueller on 9/13/2018 ORDERING that the Amici shall be permitted to participate as amici in connection with pleadings challenges in this action, including by filing a brief in advance of the next hearing scheduled in this action.(Washington, S) (Entered: 09/14/2018)
09/14/2018	<u>27</u>	AMICUS CURIAE BRIEF by California Beer and Beverage Distributors. (Rocca, Brian) Modified on 9/17/2018 (Kaminski, H). (Entered: 09/14/2018)
09/18/2018	<u>28</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: On the court's own motion, the Status (Pretrial Scheduling) Conference and Motion Hearing as to Defendant's Motion to Dismiss (ECF No. <u>15</u> ) and Plaintiffs' Motion to Amend (ECF No. <u>17</u> ) set for 9/19/2018 is VACATED and RESET for 10/19/2018 at 10:00 AM in Courtroom 3 before District Judge Kimberly J. Mueller. (Text Only Entry)(Schultz, C) (Entered: 09/18/2018)
09/18/2018	<u>29</u>	AMENDED NOTICE of Appearance by Wine and Spirits Wholesalers of California re <u>25</u> Notice of Appearance. (Newman, Michael) Modified on 9/18/2018 (Kaminski, H). (Entered: 09/18/2018)
09/28/2018	<u>30</u>	NOTICE of ACTION by U.S. Supreme Court by All Plaintiffs. (Tanford, James) (Entered: 09/28/2018)
10/02/2018	<u>31</u>	ORDER signed by District Judge Kimberly J. Mueller on 10/1/2018 GRANTING <u>17</u> Motion to Amend the Complaint and DIRECTING Plaintiffs to file their second amended complaint 21 days of the date this order is filed. Defendant's <u>15</u> Motion to Dismiss is DENIED AS MOOT with leave to refile upon the filing of a second amended complaint. The court VACATES the hearing on those motions and



		RESETS the status (pretrial scheduling) conference for 12/13/2018, at 02:30 PM, in Courtroom 3 (KJM), before District Judge Kimberly J. Mueller. The parties shall file a joint status report 7 days prior to the new date of the status conference. (York, M) (Entered: 10/02/2018)
10/03/2018	<u>32</u>	SECOND AMENDED COMPLAINT against Jacob Appelsmith by Peter E. Creighton, Orion Wine Imports, LLC.(Tanford, James) (Entered: 10/03/2018)
10/17/2018	<u>33</u>	MOTION to DISMISS by Jacob Appelsmith. Motion Hearing SET for 12/21/2018 at 10:00 AM in Courtroom 3 (KJM) before District Judge Kimberly J. Mueller. (Attachments: # <u>1</u> Motion to Dismiss)(Beasley, Lykisha) Modified on 10/18/2018 (Mena-Sanchez, L). (Entered: 10/17/2018)
10/18/2018	<u>34</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: On the court's own motion, the Status (Pretrial Scheduling) Conference set for 12/13/2018 is VACATED and RESET for 12/21/2018 at 10:00 AM in Courtroom 3 before District Judge Kimberly J. Mueller, with the filing of a joint status report due seven days prior. (Text Only Entry) (Schultz, C) (Entered: 10/18/2018)
11/07/2018	<u>35</u>	MEMORANDUM by Plaintiffs in OPPOSITION to <u>33</u> Motion to Dismiss. (Tanford, James) Modified on 11/8/2018 (Mena-Sanchez, L). (Entered: 11/07/2018)
11/16/2018	<u>36</u>	REVISED <u>27</u> AMICUS CURIAE BRIEF by California Beer and Beverage Distributors. (Rocca, Brian) (Entered: 11/16/2018)
12/05/2018	<u>37</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: On the court's own motion, the Status (Pretrial Scheduling) Conference and Motion Hearing as to Defendant's Motion to Dismiss (ECF No. <u>33</u> ) set for 12/21/2018 is VACATED and ADVANCED to 12/20/2018 at 10:00 AM in Courtroom 3 before District Judge Kimberly J. Mueller. (Text Only Entry) (Schultz, C) (Entered: 12/05/2018)
12/14/2018	<u>38</u>	STIPULATION and PROPOSED ORDER to Continue Status Conference and Hearing on Defendant's Motion to Dismiss by Jacob Appelsmith. (Beasley, Lykisha) Modified on 12/17/2018 (Washington, S). (Entered: 12/14/2018)
12/17/2018	<u>39</u>	STIPULATION and ORDER signed by District Judge Kimberly J. Mueller on 12/17/2018 ORDERING the <u>33</u> Motion to Dismiss hearing is CONTINUED to 2/8/2019 at 10:00 AM in Courtroom 3 (KJM) before District Judge Kimberly J. Mueller. (Washington, S) (Entered: 12/17/2018)
01/29/2019	<u>40</u>	RESPONSE by Peter E. Creighton, Orion Wine Imports, LLC to <u>36</u> Brief. (Tanford, James) (Entered: 01/29/2019)
02/01/2019	<u>41</u>	JOINT STATUS REPORT by Peter E. Creighton, Orion Wine Imports, LLC. (Tanford, James) (Entered: 02/01/2019)
02/01/2019	<u>42</u>	REPLY by Jacob Appelsmith in support of <u>33</u> Motion to Dismiss. (Beasley, Lykisha) (Entered: 02/01/2019)
02/08/2019	<u>43</u>	MINUTES for MOTION HEARING held before District Judge Kimberly J. Mueller on 2/8/2019. Attorney, James Tanford, present for Plaintiffs. Attorney, Lykisha Beasley, present for Defendant Jacob Appelsmith. Attorney, Robert

		Brundage and Brian Rocca, present for Amicus Curiae California Beer and Beverages Distributors. The court heard oral argument as to Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint (ECF No. <u>33</u> ). The court took the matter under submission. A written order will issue to resolve the pending motion. The court advised the parties that in light of their arguments today, it was not prepared proceed with the scheduling conference; however, the court may require the parties to file an updated joint status report after the pending motion is resolved. Court Reporter: Kimberly Bennett. (Text Only Entry) (Schultz, C) (Entered: 02/08/2019)
02/13/2019	<u>44</u>	MEMORANDUM by Peter E. Creighton, Orion Wine Imports, LLC re (#43) Motion Hearing. (Tanford, James) Modified on 2/15/2019 (Washington, S). (Entered: 02/13/2019)
02/15/2019	<u>45</u>	OBJECTIONS by Defendant Jacob Appelsmith to <u>44</u> Memorandum. (Beasley, Lykisha) (Entered: 02/15/2019)
02/18/2019	<u>46</u>	OPPOSITION to <u>45</u> Objections, by Peter E. Creighton, Orion Wine Imports, LLC . (Tanford, James) Modified on 2/19/2019 (Huang, H). (Entered: 02/18/2019)
02/28/2019	<u>47</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: Upon reviewing Plaintiffs' Memorandum (ECF No. <u>45</u> ) Providing Citations for New Authority Raised at the Motion Hearing and Defendant's Objections (ECF No. <u>44</u> ), the court will allow Defendant to file a brief response, equal in length to Plaintiff's post-hearing Memorandum, to be filed within 7 days. (Text Only Entry) (Schultz, C) (Entered: 02/28/2019)
03/07/2019	<u>48</u>	RESPONSE by Jacob Appelsmith to <u>44</u> Memorandum. (Attachments: # <u>1</u> Proof of Service)(Beasley, Lykisha) Modified on 3/8/2019 (Kaminski, H). (Entered: 03/07/2019)
06/27/2019	<u>49</u>	NOTICE of RELEVANT DECISION by Supreme Court of US, by All Plaintiffs re <u>33</u> Motion to Dismiss. (Attachments: # <u>1</u> Points and Authorities)(Tanford, James) Modified on 6/28/2019 (Mena-Sanchez, L). (Entered: 06/27/2019)
07/01/2019	<u>50</u>	DESIGNATION of COUNSEL FOR SERVICE. Attorney Kristina M. Swanson, PHV terminated. (Tanford, James) Modified on 7/2/2019 (Zignago, K.). (Entered: 07/01/2019)
07/05/2019	<u>51</u>	STATEMENT of NON-OPPOSITION by Jacob Appelsmith re <u>49</u> Notice of Relevant Decision. (Beasley, Lykisha) Modified on 7/9/2019 (Benson, A.). (Entered: 07/05/2019)
08/16/2019	<u>52</u>	ORDER signed by District Judge Kimberly J. Mueller on 8/15/2019 GRANTING <u>33</u> Motion to Dismiss plaintiffs' Second Amended Complaint. The court GRANTS Plaintiffs leave to amend only as to the issues identified. Plaintiffs are ORDERED to file any amended complaint within 21 days of the date this order is filed. (Reader, L) (Entered: 08/16/2019)
09/06/2019	<u>53</u>	THIRD AMENDED COMPLAINT against All Defendants by Peter E. Creighton, Orion Wine Imports, LLC.(Tanford, James) (Entered: 09/06/2019)

09/13/2019	<u>54</u>	STIPULATION and PROPOSED ORDER for Extension of Time re <u>53</u> Amended Complaint by Jacob Appelsmith, Jacob Applesmith. (Beasley, Lykisha) (Entered: 09/13/2019)
09/18/2019	<u>55</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: The parties' Stipulated Request for Extension of Time (ECF No. <u>54</u> ) is GRANTED. Accordingly, the deadline for Defendant to respond to Plaintiffs' Third Amended Complaint (ECF No. <u>53</u> ) is EXTENDED to 10/11/2019. (Text Only Entry) (Schultz, C) (Entered: 09/18/2019)
10/11/2019	<u>56</u>	MOTION to DISMISS by Jacob Appelsmith. Motion Hearing set for 11/22/2019 at 10:00 AM in Courtroom 3 (KJM) before District Judge Kimberly J. Mueller. (Attachments: # <u>1</u> Motion to Dismiss)(Beasley, Lykisha) Modified on 10/15/2019 (Coll, A). (Entered: 10/11/2019)
11/05/2019	<u>57</u>	OPPOSITION by Peter E. Creighton, Orion Wine Imports, LLC to <u>56</u> Motion to Dismiss. (Tanford, James) (Entered: 11/05/2019)
11/06/2019	<u>58</u>	AMICUS CURIAE BRIEF of California Beer and Beverage Distributors and Wine and Spirits Wholesalers of California. (Attachments: # <u>1</u> Declaration of Robert A. Brundage)(Brundage, Robert) Modified on 11/7/2019 (Becknal, R). (Entered: 11/06/2019)
11/13/2019	<u>59</u>	MOTION to STRIKE submission by Amicus or for leave to file reply brief re <u>58</u> Brief, <u>56</u> Motion to Dismiss. by Peter E. Creighton, Orion Wine Imports, LLC. Motion Hearing set for 11/22/2019 at 10:00 AM in Courtroom 3 before District Judge Kimberly J. Mueller. (Attachments: # <u>1</u> Memorandum Brief, # <u>2</u> Exhibit Proposed Reply Brief)(Tanford, James) Modified on 11/14/2019 (Reader, L). (Entered: 11/13/2019)
11/15/2019	<u>60</u>	MINUTE ORDER issued by Courtroom Deputy C. Schultz for District Judge Kimberly J. Mueller: Plaintiffs' Motion to Strike (ECF No. <u>59</u> ) is GRANTED in PART and DENIED in PART. The court will entertain the Amicus Curiae Brief of California Beer and Beverage Distributors and Wine and Spirits Wholesalers of California (ECF No. <u>58</u> ), but will not consider the Declaration of Robert A. Brundage (ECF No. 58-1). The court GRANTS leave to plaintiffs to file the proposed reply brief. (ECF No. 59-2). Further briefing by defendant or Amici Curiae in response to plaintiffs' reply brief, if any, shall be filed on or before 11/20/2019. (Text Only Entry). (Schultz, C) (Entered: 11/15/2019)
11/15/2019	<u>61</u>	REPLY by Jacob Appelsmith re <u>53</u> Amended Complaint. (Beasley, Lykisha) (Entered: 11/15/2019)
11/18/2019	<u>62</u>	REPLY by Peter E. Creighton, Orion Wine Imports, LLC to <u>58</u> Brief. (Tanford, James) Modified on 11/18/2019 (Coll, A). (Entered: 11/18/2019)
11/20/2019	<u>63</u>	REPLY by California Beer and Beverage Distributors re <u>62</u> Reply. (Brundage, Robert) (Entered: 11/20/2019)
11/20/2019	<u>64</u>	REPLY by Jacob Appelsmith re <u>62</u> Reply. (Beasley, Lykisha) (Entered: 11/20/2019)
11/22/2019	<u>65</u>	MINUTES for MOTION HEARING held before District Judge Kimberly J. Mueller on 11/22/2019. Attorney, James Tanford, present for Plaintiffs. Attorney, Lykisha Beasley, present for Defendant. Attorney, Robert Brundage, present for

		Amicus Curiae California Beer and Beverage Distributors. After hearing oral argument as to Defendant's Motion to Dismiss (ECF No. <u>56</u> ), the court took the matter under submission. A written order will issue. Court Reporter: Diane Shepard. (Text Only Entry) (Schultz, C) (Entered: 11/22/2019)
02/21/2020	<u>66</u>	ORDER signed by Chief District Judge Kimberly J. Mueller on 2/19/2020 GRANTING <u>56</u> Motion to Dismiss without leave to amend. At hearing, Plaintiffs clarified they did not intend to seek further amendment of their complaint if the court dismissed it, as it now has. CASE CLOSED. (Mena-Sanchez, L) (Entered: 02/21/2020)
02/21/2020	<u>67</u>	JUDGMENT dated *2/21/2020* pursuant to order signed by Chief District Judge Kimberly J. Mueller on 2/19/2020. (Mena-Sanchez, L) (Entered: 02/21/2020)
03/12/2020	<u>68</u>	NOTICE of APPEAL by Peter E. Creighton, Orion Wine Imports, LLC as to <u>67</u> Judgment, <u>66</u> Order on Motion to Dismiss,. (Filing fee \$ 505, receipt number 0972-8790737) (Tanford, James) (Entered: 03/12/2020)
03/12/2020	<u>69</u>	REPRESENTATION STATEMENT filed by Plaintiffs Peter E. Creighton, Orion Wine Imports, LLC re <u>68</u> Notice of Appeal. (Tanford, James) (Entered: 03/12/2020)
03/13/2020	<u>70</u>	APPEAL PROCESSED to Ninth Circuit re <u>68</u> Notice of Appeal filed by Peter E. Creighton, Orion Wine Imports, LLC. Notice of Appeal filed *3/12/2020*, Complaint filed *6/14/2018* and Appealed Order / Judgment filed *2/21/2020*. Court Reporter: *K. Bennett, D. Shepard*. *Fee Status: Paid on 3/12/2020 in the amount of \$505.00* (Attachments: # <u>1</u> Appeal Information) (Benson, A.) (Entered: 03/13/2020)
03/17/2020	<u>71</u>	USCA CASE NUMBER 20-15447 for <u>68</u> Notice of Appeal filed by Peter E. Creighton, Orion Wine Imports, LLC. (York, M) (Entered: 03/17/2020)
04/03/2020	<u>72</u>	NOTICE That No Transcript Will Be Ordered by All Plaintiffs re <u>68</u> Notice of Appeal. (Tanford, James) (Entered: 04/03/2020)
04/08/2020	<u>73</u>	RESPONSE by Jacob Appelsmith to <u>72</u> Notice that no transcript will be ordered. (Beasley, Lykisha) Modified on 4/9/2020 (Reader, L). (Entered: 04/08/2020)
04/10/2020	<u>74</u>	NOTICE that No Transcript Will Be Ordered by All Plaintiffs. (Tanford, James) Modified on 4/13/2020 (Coll, A). (Entered: 04/10/2020)
04/13/2020	<u>75</u>	TRANSCRIPT REQUEST by California Beer and Beverage Distributors. Court Reporter Diane Shepard. (Brundage, Robert) (Entered: 04/13/2020)
04/24/2020	<u>76</u>	TRANSCRIPT of Proceedings held on November 22, 2019, before Chief District Judge Kimberly J. Mueller, filed by Court Reporter Diane Shepard, Phone number 916-554-7460 E-mail diane.shepard@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 5/15/2020. Redacted Transcript Deadline set for 5/26/2020. Release of Transcript Restriction set for 7/23/2020. (Shepard, D) (Entered: 04/24/2020)

05/08/2020	<u>77</u>	TRANSCRIPT REQUEST by California Beer and Beverage Distributors for proceedings held on 11/22/2019 before Judge Kimberly J. Mueller. Court Reporter Diane Shepard. (Beasley, Lykisha) (Entered: 05/08/2020)
05/08/2020	<u>78</u>	TRANSCRIPT REQUEST by Jacob Appelsmith for proceedings held on 11/22/2019 before Judge Kimberly J. Mueller. Court Reporter Diane Shepard. (Beasley, Lykisha) (Entered: 05/08/2020)

PACER Service Center			
Transaction Receipt			
06/14/2020 17:13:50			
PACER Login:	jatanford:2577204:0	Client Code:	
Description:	Docket Report	Search Criteria:	2:18-cv-01721-KJM-DB
Billable Pages:	6	Cost:	0.60

## **CERTIFICATE OF SERVICE**

I hereby certify that on June 16, 2020, I electronically filed the foregoing Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users will and will be served by the CM/ECF system.

**s/ James A. Tanford**

James A. Tanford