

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

ORION WINE IMPORTS, LLC and)
PETER E. CREIGHTON,)
)
 Plaintiffs)
)
 vs.)
)
 JACOB APPLESMITH, in his official capacity as)
 Director of the California Department of)
 Alcoholic Beverage Control)
)
 Defendant.)

COMPLAINT

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

Introduction

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of California Business & Professional Code § 23361, which prohibits licensed wine importers and wholesalers, located in other states, from importing, selling and delivering wine directly to California-licensed retailers. California allows its own licensed wholesalers, possessing a California import license, to do so. Plaintiffs seek a declaratory judgment that this statutory scheme is unconstitutional for two reasons: (1) it violates the Commerce Clause of the United States Constitution because it discriminates against interstate commerce by denying licensed businesses located outside the state the right to import, sell and deliver wine to California-licensed retailers upon the same or similar terms as in-state businesses, and (2) it violates the Privileges and Immunities Clause in Article IV by denying nonresidents the privilege of engaging in their profession as wine merchants on equivalent or similar terms to those given to

citizens of California. Plaintiffs seek an injunction barring the Defendant from enforcing this provision and requiring him to permit out-of-state wine importers and wholesalers to do business in California upon the same or similar terms as in-state businesses.

Jurisdiction

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

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

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

Parties

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

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

6. Defendant Jacob Applesmith is the Director of the California Department of Alcoholic Beverage Control, with headquarters in Sacramento, California. He is charged by California Business & Professional Code § 23053.1 with enforcing the California Alcoholic Beverages

Control Act. He is sued in his official capacity for prospective relief only.

Count I: Commerce Clause Violation

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

8. A business entity located outside the state cannot get a license from the Defendant which would allow it to import, sell and deliver wine directly to California-licensed retailers, but is required by California Business & Professional Code § 23361 to sell and deliver its wine only to California importers or wholesalers, who also possess a California importer license.

9. Under California Business & Professional Code §§ 23774, 23775 and 23778, a business entity located within the state may hold both importer and a wholesaler licenses, transfer imported wine to itself as a wholesaler, and then sell and deliver the wine to California-licensed retailers.

10. A business entity located outside the state that is both an importer and wholesaler may not import, sell and deliver wine directly to California-licensed retailers, but is required by California Business & Professional Code § 23361 to sell and deliver its wine only to California-licensed importers or wholesalers, who also possess a California importer license.

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

12. To sell its wine in California, Orion Wine Imports, LLC must sell it to a California-licensed importer or wholesaler, who possesses a California importer's license, for

resale where the wine must come to rest, which adds costs to distribution not faced by in-state importers or wholesalers and reduces Orion Wine Imports, LLC's profit.

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

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

15. Orion Wine Imports, LLC has no plans to open a facility, premise, or office in California, and cannot afford to do so.

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

Count II: Privileges and Immunities Clause Violation

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

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

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

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

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

22. Creighton wants to practice his profession as a wine merchant and importer, to market, sell and deliver the wine he imports directly to The Pour House and other California retailers, but is prevented from doing so by the California Alcoholic Beverages Control Act.

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

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

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

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

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

Request for relief

WHEREFORE, Plaintiffs seeks the following relief:

A. Judgment declaring California Business & Professional Code § 23361 unconstitutional as a violation of the Commerce Clause of the United States Constitution.

B. Judgment declaring California Business & Professional § 23361 unconstitutional as a violation of the Privileges and Immunities Clause of the United States Constitution.

C. An injunction prohibiting Defendant from enforcing that statute and requiring them to allow out-of-state wine importers and distributors to obtain licenses, under the same or similar economic licensure terms, and to import, sell and deliver wine directly to California-licensed retailers.

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

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

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

Respectfully submitted,

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
ORION WINE IMPORTS, LLC and
PETER E. CREIGHTON,
(b) County of Residence of First Listed Plaintiff Pinellas County, FL
(c) Attorneys (Firm Name, Address, and Telephone Number)
Jim Simon (California Attorney No. SBN 62792)
PORTER SIMON 40200 Truckee Airport Road, Suite One
Truckee, CA 96161 530-587-2002

DEFENDANTS
JACOB APPLESMITH, in his official capacity as
Director of the California Department of
Alcoholic Beverage Control
County of Residence of First Listed Defendant Sacramento County, CA
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
U.S. Government Plaintiff
U.S. Government Defendant
Federal Question (U.S. Government Not a Party)
Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. 1983
Brief description of cause:
Civil rights action challenging constitutionality of California Business & Professional Code § 23361

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 6-14-18 SIGNATURE OF ATTORNEY OF RECORD
FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING FPP JUDGE MAG. JUDGE