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*Jacob Applesmith, Director of the*  
 8 *California Department of*  
*Alcoholic Beverage Control*

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  
 16 Plaintiffs,  
 17  
 18 **v.**  
 19 **JACOB APPLESMITH, in his official**  
**capacity as Director of the California**  
**Department of Alcoholic Beverage Control**  
 20 Defendant.

2:18-cv-01721-KJM-DB

**NOTICE OF DEFENDANT'S MOTION  
 TO DISMISS PLAINTIFFS' FIRST  
 AMENDED COMPLAINT**

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

Date: September 21, 2018  
 Time: 10:00 a.m.  
 Courtroom: 3  
 Judge: The Honorable Kimberly J. Mueller

Action Filed: June 14, 2018

22 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

23 NOTICE IS HEREBY GIVEN that at the time, date, and in the court room indicated above,  
 24 or as soon thereafter as the matter can be heard, at the Federal Court Building, 501 I Street,  
 25 Sacramento, California, defendant Jacob Applesmith will move the Court to dismiss plaintiffs'  
 26 First Amended Complaint. The motion will be based on the following grounds:  
 27  
 28

1           1.     Count I of plaintiffs' First 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' First 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 telephone and via e-mail. The parties remain in disagreement as to whether Count I of the First  
10 Amended Complaint states an actionable claim as well as whether Count II of the First 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: August 1, 2018

Respectfully submitted,

16                   XAVIER BECERRA  
17                   Attorney General of California  
18                   DAVID J. NEILL  
19                   Supervising Deputy Attorney General

20                   /s/ Lykisha D. Beasley

21  
22                   LYKISHA D. BEASLEY  
23                   Deputy Attorney General  
24                   Attorneys for Defendant  
25                   Jacob Applesmith, Director of the  
26                   California Department of  
27                   Alcoholic Beverage Control

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**CERTIFICATE OF SERVICE**

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

I hereby certify that on August 1, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**NOTICE OF DEFENDANT’S MOTION TO DISMISS PLAINTIFFS’ FIRST  
AMENDED COMPLAINT  
[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]**

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 August 1, 2018, at Sacramento, California.

Francina M. Stevenson

Declarant

*/s/ Francina M. Stevenson*

Signature

1 XAVIER BECERRA, State Bar No. 118517  
 Attorney General of California  
 2 DAVID J. NEILL, State Bar No. 186997  
 Supervising Deputy Attorney General  
 3 LYKISHA D. BEASLEY, State Bar No. 282907  
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**PLAINTIFFS’ FIRST AMENDED**  
**COMPLAINT**  
**[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]**  
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21  
 22 **INTRODUCTION**

23 Although there are two plaintiffs of record in this action, there is only one interest at issue:  
 24 Orion Wine Imports, LLC’s desire to conduct business within the State of California without  
 25 complying with the California Alcoholic Beverage Control Act and its incorporated statutes,  
 26 regulations, and foundational public policies. California’s regulatory scheme for controlling  
 27 traffic in liquor is Constitutional and the complaint fails to state any claim for which relief may be  
 28

1 granted. Therefore, plaintiffs’ complaint should be dismissed entirely. Additionally, plaintiffs’  
2 singular interest in restructuring California’s Alcoholic Beverage Control Act in order to better  
3 convenience Orion Wine Imports, LLC, specifically, warrants the dismissal of the claims asserted  
4 by plaintiff Peter E. Creighton. Mr. Creighton lacks Article III standing to assert the alleged  
5 causes of action. As a result, the complaint fails to present a case or controversy over which this  
6 Court has jurisdiction.

7 **SUMMARY OF ALLEGED FACTS**

8 Plaintiff Orion Wine Imports, LLC (“Orion”) alleges that it is a company based in the state  
9 of Florida and is in the business of importing and wholesaling wine produced outside of the  
10 United States. First Amended Complaint (“FAC”) ¶ 4. Plaintiff Peter E. Creighton owns Orion.<sup>1</sup>  
11 FAC ¶ 5, 23. Orion alleges that the structure of California’s Alcoholic Beverage Control Act is  
12 unconstitutional and erroneously insists that the regulations are unevenly applied. FAC ¶¶ 9, 10,  
13 12, 13, 25, 32. Orion seeks to circumvent California’s licensing structure in order to import and  
14 sell wine directly to retailers in California. FAC ¶¶ 4, 15, 17.

15 **APPLICABLE LEGAL STANDARDS**

16 Pursuant to Federal Rule of Civil Procedure (“FRCP”), subdivision 12(b)(6), an alleged  
17 cause of action may be dismissed for failure to state a claim upon which relief may be granted. A  
18 plaintiff’s “factual allegations must be enough to raise a right to relief above the speculative  
19 level.” Bell Atlantic Corp v. Twombly, 550 U.S. 544, 555-556 (2007). Merely creating a  
20 suspicion that there is a legally cognizable right of action is insufficient to survive a 12(b)(6)  
21 motion. Id. Additionally, when evaluating a motion to dismiss, the Court is not required to  
22 accept as true legal conclusions presented as factual allegations. Id.

23 Furthermore, an action may also be appropriately dismissed under FRCP 12(b)(1) due to  
24 lack of jurisdiction. Article III requires that courts only adjudicate actual cases and controversies.  
25 U.S. Const. art. III, § 2, cl.1. “When presented with a claim for a declaratory judgment, therefore,

26 \_\_\_\_\_  
27 <sup>1</sup> Defendant respectfully requests that the Court take judicial notice that the Florida  
28 Secretary of State’s records reflect that Orion’s Registered Agent is plaintiff Peter E. Creighton of  
Creighton Investments, LLC. Please see Exhibit A attached to the Declaration of Lykisha D.  
Beasley in Support of Defendant’s Motion to Dismiss Plaintiffs’ First Amended Complaint.

1 federal courts must take care to ensure the presence of an actual case or controversy, such that the  
2 judgment does not become an unconstitutional advisory opinion.” Rhodes v. Avon Products,  
3 Inc., 504 F.3d 1151, 1157 (9th Cir. 2007). “A suit brought by a plaintiff without Article III  
4 standing is not a ‘case or controversy,’ and an Article III federal court therefore lacks subject  
5 matter jurisdiction over the suit.” Cetacean Community. v. Bush, 386 F.3d 1169, 1174 (9th Cir.  
6 2004). Article III standing requires injury, causation, and redressability. City of Oakland v.  
7 Lynch, 798 F.3d 1159, 1163 (9th Cir. 2015). “It is the responsibility of the complainant clearly to  
8 allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and  
9 the exercise of the court's remedial powers.” Warth v. Seldin, 422 U.S. 490, 518 (1975).

## 10 ARGUMENT

### 11 I. COUNT I MUST BE DISMISSED BECAUSE IT FAILS TO STATE AN ACTIONABLE CLAIM.

12 Plaintiffs claim that California’s Alcoholic Beverage Control Act violates the Commerce  
13 Clause of the United States Constitution. However, plaintiffs have not alleged facts  
14 demonstrating unconstitutional differential treatment of wine importers and wholesalers with  
15 residency outside the state from those who do not have a residency outside of the state.

16 In support of the Commerce Clause violation claim, plaintiffs cite to California Business  
17 and Professions Code sections 23361, 23774, 23775, and 23778. Section 23361 states: “A person  
18 holding a brandy manufacturer's license may also sell grape brandy, fruit brandy, or spirits of  
19 wine to licensed wine growers for use by the latter in the production of wine and the production  
20 or manufacturing of alcohol for the United States Government, and beverage brandy for sale to  
21 consumers for consumption off the premises.” Cal. Bus. & Prof. Code § 23361. Section 23774  
22 explains: “the provisions of Sections 23771 and 23772 do not prevent the issuance of a distilled  
23 spirits wholesale license to any person who, on July 1, 1937, owned or operated a business which  
24 for five years immediately preceding that date had maintained and operated in this State a bona  
25 fide jobbing and distributing establishment for the sale to retail dealers of goods, wares, and  
26 merchandise, the major portion of which business at a time five years preceding July 1, 1937, was  
27 goods, wares, and merchandise other than alcoholic beverages.” Cal. Bus. & Prof. Code § 23774.  
28 Section 23775 provides: “an importer's license shall be issued only to a person or manufacturer

1 who holds a license authorizing the sale for resale of the types of alcoholic beverages mentioned  
2 in the importer's license.” Cal. Bus. & Prof. Code § 23775. Section 23778 mandates: “a distilled  
3 spirits wholesaler's license shall not be held by any person unless at all times throughout the  
4 license year he has on his wholesale premises a reasonable stock of distilled spirits, as determined  
5 by the department, for which he has fully paid lawful money or its equivalent.” Cal. Bus. & Prof.  
6 Code § 23778. None of those four provisions call for or implement the unequal treatment of  
7 business entities based on location. These regulations clearly apply to all who wish to deal in the  
8 business of alcohol for consumption in California and are consistent with Twenty-First  
9 Amendment which grants states vast authority to control, or ban if it so chooses, the trafficking,  
10 sale, and consumption of alcohol.

11 Plaintiffs’ complaint fails to state an actionable claim under the Commerce Clause and, as a  
12 result, Count I should be dismissed.

13 **II. COUNT II MUST BE DISMISSED BECAUSE PLAINTIFF CREIGHTON LACKS STANDING**

14 The Privileges and Immunities clause contained in Article IV of the Constitution is  
15 inapplicable to companies. Western & Southern Life Insurance Co. v. State Board of  
16 Equalization, 451 U.S. 648, 656 (1981). Likewise, the Privileges and Immunities Clause is  
17 inapplicable to individual plaintiffs whose alleged prospective injuries flow directly from the  
18 alleged prospective injury to a corporation. See Chance Management, Inc. v. State of South  
19 Dakota, 97 F.3d 1107, 1115-1116 (8th Cir. 1996); Smith Setzer & Sons, Inc. v. South Carolina  
20 Procurement Review Panel, 20 F.3d 1311, 1317-1318 (4th Cir. 1994).

21 Plaintiffs’ complaint makes it clear that Plaintiff Creighton is seeking redress as the owner of  
22 Orion, meaning that his alleged injuries flow directly from the allegations regarding Orion’s  
23 ability to operate as a wine importer and wholesaler in California. Plaintiff Creighton has not  
24 indicated the requisite injury, causation, and redressability for Article III standing, separate from  
25 what is alleged by Orion. Plaintiffs cannot maneuver around the inapplicability of the Privileges  
26 and Immunities Clause to business entities simply by also naming the owner of that business  
27 entity as a plaintiff. Thus, dismissal of Count II of the complaint is warranted because Plaintiff  
28

1 Creighton lacks standing to assert a claim under the Privileges and Immunities Clause on behalf  
2 of his business and this Court does not have subject matter jurisdiction over such a claim.

3 **III. COUNT II MUST BE DISMISSED BECAUSE IT FAILS TO STATE AN ACTIONABLE CLAIM.**

4 In order to bring a cause of action under 42 U.S.C. § 1983, a plaintiff must plead that (1) a  
5 defendant acting under the color of state law (2) deprived the plaintiff of rights secured by the  
6 U.S. Constitution. Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir.  
7 1988). However, for a Section 1983 claim to proceed under the Privileges and Immunities Clause  
8 of Article IV, there must be discrimination on the basis of out-of-state residency. Gianni v. Real,  
9 911 F.2d 354, 357 (9th Cir. 1990). The absence of any disparate treatment of nonresidents is fatal  
10 to a plaintiff's claims of violation of the Privileges and Immunities Clause. Id.

11 Assuming, *arguendo*, Plaintiff Peter E. Creighton did have standing to assert Constitutional  
12 claims on behalf of a commercial business, he has failed to allege facts from which a reasonable  
13 inference can be drawn that Defendant is violating his rights under the Privileges and Immunities  
14 Clause. Setting aside the improper legal conclusions, plaintiffs' complaint does not identify an  
15 interest belonging to Plaintiff Creighton that is protected by the Privileges and Immunities  
16 Clause. The challenged regulatory scheme, including California Business and Professions Code  
17 sections 23361, 23774, 23775, and 23778 which were specifically cited as the basis for the  
18 complaint, is applicable to all who wish to deal in liquor in the state of California. Due to the  
19 absence of any disparate treatment of nonresidents within the challenged state laws, Count II  
20 should be dismissed because it fails to state an actionable claim.

21 **CONCLUSION**

22 For the above stated reasons, defendant respectfully requests that the motion to dismiss  
23 plaintiffs' First Amended Complaint be granted.

24 ///

25 ///

26 ///

27 ///

28 ///



1 Dated: August 1, 2018

Respectfully submitted,

2 XAVIER BECERRA  
3 Attorney General of California  
4 DAVID J. NEILL  
5 Supervising Deputy Attorney General

6 /s/ Lykisha D. Beasley

7  
8 LYKISHA D. BEASLEY  
9 Deputy Attorney General  
10 *Attorneys for Defendant*  
11 *Jacob Applesmith, Director of the*  
12 *California Department of*  
13 *Alcoholic Beverage Control*

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**CERTIFICATE OF SERVICE**

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

I hereby certify that on August 1, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT’S MOTION TO DISMISS PLAINTIFFS’  
FIRST 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 August 1, 2018, at Sacramento, California.

Francina M. Stevenson  
Declarant

/s/ Francina M. Stevenson  
Signature

1 XAVIER BECERRA, State Bar No. 118517  
 Attorney General of California  
 2 DAVID J. NEILL, State Bar No. 186997  
 Supervising Deputy Attorney General  
 3 LYKISHA D. BEASLEY, State Bar No. 282907  
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 14 **ORION WINE IMPORTS, LLC and**  
**PETER E. CREIGHTON,**

2:18-cv-01721-KJM-DB

15  
 16 Plaintiffs,

**DECLARATION OF LYKISHA D.  
 BEASLEY IN SUPPORT OF  
 DEFENDANT'S MOTION TO DISMISS  
 PLAINTIFFS' FIRST AMENDED  
 COMPLAINT**

17 v.

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

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

20 Defendant.

Date: September 21, 2018  
 Time: 10:00 a.m.  
 Courtroom: 3  
 Judge: The Honorable Kimberly J.  
 Mueller

21  
 22 Action Filed: June 14, 2018

23 I, LYKISHA D. BEASLEY, declare as follows:

24 1. I am an attorney at law licensed to practice before this Court, and I am a Deputy  
 25 Attorney General for the Office of the Attorney General of the State of California.  
 26  
 27  
 28

1           2. I am a Deputy Attorney General who is responsible for handling issues arising from  
2 the above-captioned matter on behalf of the California Department of Alcoholic Beverage  
3 Control.

4           3. I make this Declaration of my own personal knowledge, except for those matters that  
5 are stated to be based on information and belief, and as to those matters, I believe them to be true.  
6 If called as a witness, I could competently testify to the matters of which I have personal  
7 knowledge.

8           4. Attached hereto as Exhibit A is a true and correct copy of the registration information  
9 retained by the Florida Department of State, Division of Corporations. I retrieved and printed this  
10 information on July 24, 2018 at approximately 4:13 p.m.

11           I declare under penalty of perjury under the laws of the United States of America that the  
12 foregoing is made on personal knowledge and is true and correct and that I am competent to  
13 testify to the facts set forth in this Declaration if called as a witness.

14  
15 Executed this 1st day of August, 2018.



16  
17  
18 LYKISHA D. BEASLEY

19  
20  
21  
22  
23 SA2018101846  
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# **EXHIBIT A**



[Department of State](#) / [Division of Corporations](#) / [Search Records](#) / [Detail By Document Number](#) /

**Detail by Entity Name**

Florida Limited Liability Company  
ORION WINE IMPORTS, LLC

**Filing Information**

**Document Number** L15000150702  
**FEI/EIN Number** 47-5286022  
**Date Filed** 09/02/2015  
**Effective Date** 09/01/2015  
**State** FL  
**Status** ACTIVE

**Principal Address**

4900 CREEKSIDE DRIVE  
SUITE D  
CLEARWATER, FL 33760

Changed: 04/09/2016

**Mailing Address**

7891 LANTANA CREEK ROAD  
LARGO, FL 33777

**Registered Agent Name & Address**

CREIGHTON, PETER E  
7891 LANTANA CREEK ROAD  
LARGO, FL 33777

**Authorized Person(s) Detail****Name & Address**

Title MGR

CREIGHTON INVESTMENTS, LLC  
7891 LANTANA CREEK ROAD  
LARGO, FL 33777

**Annual Reports**

Report Year	Filed Date
2016	04/09/2016
2017	04/23/2017
2018	04/22/2018

**Document Images**

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<a href="#">09/02/2015 -- Florida Limited Liability</a>	<a href="#">View image in PDF format</a>





**CERTIFICATE OF SERVICE**

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Name: *E. Creighton v. Jacob Applesmith*

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MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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Francina M. Stevenson

Declarant

*/s/ Francina M. Stevenson*

Signature