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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CALIFORNIA RESTAURANT ASSOCIATION,

a California nonprofit mutual benefit corporation,

Plaintiff,

v.

CITY OF BERKELEY,

Defendant.

Case No. 3:19-cv-07668-YGR

CALIFORNIA RESTAURANT ASSOCIATION'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE

Judge: Hon. Yvonne Gonzalez Rogers
Action Filed: Nov. 21, 2019

The Plaintiff California Restaurant Association ("CRA") hereby respectfully submits this opposition to Defendant City of Berkeley's ("Berkeley's") Request for Judicial Notice in Support of Motion to Dismiss Complaint (ECF No. 18-1) ("Request" or "Request for Judicial Notice").

INTRODUCTION AND BACKGROUND

Berkeley filed a Motion to Dismiss the CRA's Complaint (ECF No. 18) on January 13, 2020. In support of its Motion to Dismiss, Berkeley filed a Request for Judicial Notice, seeking judicial notice of the following:

(1) Berkeley's Ordinance No. 7,672-N.S. ("Berkeley Ordinance") (Exhibit 1);

(2) A staff recommendation letter submitted to the Berkeley City Council for a city council meeting on July 9, 2019 (Exhibit 2);

(3) A letter transmitting the Berkeley Ordinance to the California Building Standards Commission ("CBSC") (Exhibit 3);

(4) A staff recommendation letter submitted to the Berkeley City Council for a city council meeting on December 3, 2019 (Exhibit 4);

(5) A letter transmitting an application for locally adopted energy standards ("Reach Code") to the California Energy Commission ("CEC") (Exhibit 5);

(6) Excerpts of the Berkeley Municipal Code (Exhibit 6);

(7) Excerpts of the 2019 Building Energy Efficiency Standards for Residential and Nonresidential Buildings ("2019 Building Energy Efficiency Standards") (Exhibit 7);

(8) Sacramento Metropolitan Air Quality Management District Rule 414 (Exhibit 8);

(9) Excerpts of the 2019 Residential Compliance Manual (Exhibit 9);

(10) The entirety of the California Building Standards Code;[1] and

(11) "[T]he fact that local jurisdiction in California commonly adopt zoning provisions that prohibit construction of commercial or multifamily residential buildings in certain districts." ("Berkeley Statement") Request at 2.

Berkeley submits copies of the nine exhibits as attachments to a declaration by Christopher D. Jensen ("Jensen Declaration").

[1] Although Berkeley did not submit the California Building Standards Code as an exhibit, for ease of reference this Opposition will refer to the Code as Exhibit 10.

Berkeley further asks that, if the Court denies the request for judicial notice for any of the exhibits, "the Court consider the [Jensen Declaration] and attached exhibits as *evidence* in support of the City's Motion to Dismiss." Request at 3 (emphasis added). And Berkeley attaches an additional declaration by Sarah Moore, a City employee ("Moore Declaration"). ECF No. 18-11.

ARGUMENT

As a general rule, "district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6)." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). The court must accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Similarly, a court must resolve a facial attack to jurisdiction under Rule 12(b)(1) "as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction."[2] *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014); *see also Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000).

Judicial notice reflects an exception to this general bar on consideration of extrinsic evidence. *Khoja*, 899 F.3d at 998. Rule 201 governs judicial notice of "adjudicative facts," and states that the court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice is a narrow exception to the general rule of considering only the pleadings in a 12(b)(6) motion. The Ninth Circuit recently noted that the "overuse and improper application" of judicial notice can result in "unintended and harmful results." *Khoja*, 899 F.3d at

[2] Although the court "may review evidence beyond the complaint" "[i]n resolving a *factual* attack on jurisdiction," such review is reserved for factual challenges to "the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (emphasis added). Given that Berkeley's jurisdictional challenge in this case is a facial one, not a factual one, the ordinary standards for assessing a motion to dismiss apply.

998. "If defendants are permitted to present their own version of the facts at the pleading stage — and district courts accept those facts as uncontroverted and true — it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently 'plausible' claim for relief." *Id*.

Here, Berkeley improperly seeks to use judicial notice as a vehicle to contest the facts in the Complaint. As to Exhibits 1-10, Berkeley attempts to rely upon the *truth* of the facts contained in regulations or public records, rather than their mere existence. As to the Berkeley Statement, Berkeley asks this Court to assume a contested fact supported by no cited evidence. And as to the Moore and Jensen Declarations, Berkeley may not rely upon extrinsic evidence in contesting the sufficiency of the pleadings (under Rule 12(b)(1) or Rule 12(b)(6)).

I. JUDICIAL NOTICE IS ONLY PROPER AS TO THE EXISTENCE OF REGULATIONS OR PUBLIC RECORDS, NOT DISPUTED CONTENT.

"Courts routinely take judicial notice of state or federal statutes and regulations" as well as government publications. *Martinez v. Welk Grp., Inc.*, 2011 WL 90313, at *2 (S.D. Cal. Jan. 11, 2011); *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 (9th Cir. 2007) (taking judicial notice of guidelines published by the Defense Security Cooperation Agency of the U.S. Department of Defense); *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111, 1116 (C.D. Cal. 2010) (taking judicial notice of the FDA Food Labeling Guide). Similarly, "[c]ourts may take judicial notice of *undisputed* matters of public record." *Martinez*, 2011 WL 90313, at *2 (emphasis added) (citing *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)); *see also Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 2019 WL 2610965, at *5 (C.D. Cal. Apr. 19, 2019) ("[T]he Court takes judicial notice . . . because they are public agency records not subject to reasonable dispute.").

However, the judicial notice extends to only their "existence." *Martinez*, 2011 WL 90313, at *2; *Agua Caliente Band of Cahuilla Indians*, 2019 WL 2610965, at *5 (taking judicial notice of a decree "for the existence of the document"). The *content* of such statutes and regulations are not "adjudicative facts" to which Rule 201 is addressed. *See* 21B Charles Alan Wright, Arthur R. Miller & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5103.1 (2d ed. 2019) ("The Advisory Committee excluded "judicial notice of law" from the scope of Rule 201."). "[T]he court

may not take judicial notice of '*disputed* facts stated in public records.'" *Martinez*, 2011 WL 90313, at *2 (emphasis in original) (quoting *Lee v. City of L.A.*, 250 F.3d 668, 690 (9th Cir. 2001)). In other words, the only "fact" that can be judicially noticed as to these public records is the *fact* of their existence.

Berkeley repeatedly blurs the line between the *existence* of the records and the truth of their content. The CRA objects to judicial notice of the *truth* of any statements in these exhibits.

A. Exhibits 1 And 6-10

Exhibit 1 is the Berkeley Ordinance and Exhibits 6-10 represent various other codes, regulations, or a government publication. As discussed above, the *existence* of these documents is suitable for judicial notice. However, in the Motion to Dismiss, Berkeley on occasion blurs the line between the fact of a public record and what Berkeley understands to be the effect of the public record. For example, in citing to the Berkeley Ordinance (Exhibit 1), the Motion states: "*Consistent with these provisions to ensure compliance with the Energy Code*, the Ordinance expressly disavows any intention to amend the Energy Code or to set standards regulating the use of appliances." Motion at 4 (emphasis added). Whether the Ordinance is in fact compliant with the Energy Code is a legal issue at the heart of this action and is unsuitable for judicial notice. The CRA thus respectfully requests that the Court explicitly limit judicial notice of Exhibits 1 and 6-10 to the limited purpose of recognizing their existence.

B. Exhibits 2 And 4

Berkeley requests judicial notice of two staff recommendation letters to the City Council. *See* ECF No. 18-3 (Exhibit 2), ECF No. 18-5 (Exhibit 4) (collectively, "Staff Recommendation Letters"). As Berkeley argues, "staff reports . . . are appropriate for judicial notice." *Lamle v. City of Santa Monica*, 2010 WL 3734868, at *5 (C.D. Cal. July 23, 2010), *report and rec. adopted*, 2010 WL 3734864 (C.D. Cal. Sept. 22, 2010). But Berkeley fails to mention that the same opinion immediately thereafter rejects "judicial notice of the *content* of those reports which may contain opinions that are the subject of dispute in this litigation." *Id.* at *5 n.11 (emphasis added).

Here, Berkeley does not seek merely to have the existence of the Staff Recommendation Letters judicially noticed, but also the "information contained" therein. Request at 1. The Staff

Recommendation Letters are replete with factually and legally contested statements, such as that "it would be feasible, cost effective and legally permitted to ban natural gas outright for all building types today." ECF No. 18-3 at 20. And Berkeley cites the Staff Recommendation Letters for these sorts of hotly contested propositions. For example, the Motion to Dismiss cites Exhibit 4 for the propositions that reach codes "require cost-effective increases in energy efficiency" and that its Reach Code "will complement the Natural Gas Infrastructure Ordinance by creating incentives for all-electric construction where it is feasible," to support the implementation of Berkeley's ban. Motion at 5, 16.

Berkeley thus requests exactly what the law prohibits; the Court may not take judicial notice of the disputed contents *contained* in the exhibits, only of their existence. And the mere existence of the letters is not relevant to any disputed issue in the Motion to Dismiss.[3]

C. Exhibits 3 And 5

Berkeley similarly requests judicial notice of two letters, one transmitting the Berkeley Ordinance to the CBSC and the other transmitting the Reach Code to the CEC. *See* ECF No. 18-4 (Exhibit 3), ECF No. 18-6 (Exhibit 5) (collectively, "Agency Letters"). The CRA does not object to judicial notice of the Agency Letters for the limited purpose of recognizing the *fact* that Berkeley transmitted these ordinances (insofar as that were relevant to a disputed issue).

But this again is not what Berkeley seeks. Berkeley requests that the Court take judicial notice of "*the information contained*" in these Agency Letters. Request at 1 (emphasis added).

[3] The fact that Berkeley adopted a reach code is better established by the Reach Code itself, not by lengthy letters conveying recommendations and characterizations. When the only permissibly noticed fact is "not necessary," the Court should reject the Request. *See Copeland v. Liberty Life Assurance Co. of Bos.*, 2015 WL 4194192, at *3 (N.D. Cal. July 10, 2015); *California Pac. Reg'l Med. Ctr. v. Glob. Excel Mgmt., Inc.*, 2013 WL 2436602, at *2 (N.D. Cal. June 4, 2013); *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006) ("We decline to take judicial notice of the two Staff Reports, as they are not relevant to the resolution of this appeal."); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir. 1998) (declining to take judicial notice of election results that "do not tell us if any of the winning candidates were Hispanic-preferred, the relevant issue in this appeal"); *Khoja*, 899 F.3d at 1000 n.5 (9th Cir. 2018) (quoting 21B Charles Alan Wright, Arthur R. Miller & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5104 (2d ed. 2005), for the proposition that "[a]n irrelevant fact could hardly be an 'adjudicative fact'").

And this the Court cannot do. *See Martinez*, 2011 WL 90313, at *3 ("The Court cannot take judicial notice of Exhibit C to the extent Defendants offer the exhibit for the contents of the Public Report."). Although Berkeley describes the Agency Letters as mere "cover letters" transmitting documents to the various state agencies, *see* Request at 1-2, the Agency Letters in fact contain Berkeley's justifications for its ordinances and Exhibit 3 also includes extensive enclosures. In Exhibit 3, Berkeley chose to submit, in addition to the cover letter, lengthy enclosures such as two studies on cost-effectiveness spanning more than 200 pages. *See* ECF 18-4 at 87-321. And in Exhibit 5, the letter states, "Berkeley has adopted these local Energy Code amendments to meet local climate action goals, to assist in the State's goal of zero net carbon emissions by 2045, and to create safer, healthier, cost-effective new buildings." ECF No. 18-6 at 2. These contents are heavily disputed in this lawsuit. Like the Staff Recommendation Letters, these Agency Letters thus appear to be an improper attempt by Berkeley to "present [its] own version of the facts" at this pleadings stage. *See Khoja*, 899 F.3d at 999.

Berkeley also repeatedly blurs the line between the *fact* of the transmittal, Berkeley's purpose in transmitting documents to the state agencies, and what the transmittal actually accomplishes. For example, citing to Exhibit 3, the Motion states that Berkeley sent the Ordinance "in deference to" the CBSC despite not being required to do so under the California Building Standards Code. Motion at 4. Other than the fact of transmittal, that statement is heavily disputed by the CRA. *See* Pl.'s Opp. to Motion to Dismiss at 23-24. Also, citing to Exhibit 5, the Motion states that Berkeley's Reach Code, **which is not the Berkeley Ordinance at issue in this case**, "establish[es] or modif[ies] energy efficiency standards for all-electric or mixed-fuel construction." Motion at 23-24. To the extent Berkeley attempts to use the Agency Letters to establish anything more than the *fact* of the transmittal, this citation is entirely improper. The CRA thus respectfully requests that the Court deny the Request for Judicial Notice of Exhibits 3 and 5, or, at a minimum, explicitly limit notice solely to the fact of transmittal.

II. BERKELEY'S "STATEMENT" IS AN UNVERIFIED GENERALIZATION NOT SUBJECT TO JUDICIAL NOTICE.

In addition to the regulations and public records attached as exhibits, Berkeley submits for judicial notice the following Statement: "the fact that local jurisdiction[s] in California commonly adopt zoning provisions that prohibit construction of commercial or multifamily residential buildings in certain districts." Request at 2. Berkeley uses this Statement in support of its argument that its Ordinance does not create building standards and thus is not preempted by state and federal law. Berkeley provides no document or source of verification for this Statement.

The Berkeley Statement is certainly "subject to reasonable dispute." *See* Fed. R. Evid. 201(b). Berkeley uses it to imply that local governments have the authority to impose a building standard, in direct contravention of the CRA's claims. Moreover, on its face it is fraught with ambiguities; the use of undefined terms, such as "local jurisdiction," "commonly," and "certain districts," prohibits judicial notice. *See Romero v. Holder*, 584 F. App'x 584, 585 (9th Cir. 2014) ("We deny Romero's request for judicial notice of generalized conditions in Guatemala."); *Miller v. City of L.A.*, 2014 WL 12614470, at *15 (C.D. Cal. May 22, 2014) ("[T]he Court denies Miller's request that it take judicial notice of the factual statement in the 2006 letter — that undefined City entities have an undefined duty to protect against and prevent harassment."). Berkeley then abandons the wording in its own Statement ("commonly") in favor of "virtually every." Motion at 22. Further, if this were in fact "generally known" or "accurately and readily determined," *see* Fed. R. Evid. 201(b), Berkeley should have been able to document its accuracy. The Court should deny Berkeley's request for judicial notice of the Berkeley Statement.

III. BERKELEY'S DECLARATIONS SHOULD BE BARRED AS EXTRINSIC EVIDENCE.

Finally, Berkeley submits two declarations, the Jensen and Moore Declarations,[4] in support

[4] Berkeley does not even request judicial notice of the Moore Declaration, and in any event, it would be improper: the Moore Declaration is not a public record and Berkeley seeks to rely on the truth of the factual assertions contained therein. *See* Fed. R. Evid. 201(b) (judicial notice limited to adjudicative facts that are "generally known," or that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); Motion at 5, 15 n.5, 16 (relying on truth of factual assertions in Moore Declaration).

of its Motion to Dismiss, and asks that the Exhibits to the Jensen Declaration be admitted as evidence if they are not subject to judicial notice.[5] This extrinsic evidence is not appropriate in evaluating a Motion to Dismiss.

It is black letter law that a motion to dismiss is decided based on the well-pleaded facts of the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Leite*, 749 F.3d at 1121 (applying the same standard to facial challenges to jurisdiction). As noted above, "district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6)," and the only exceptions to this bar against extrinsic evidence are judicial notice (addressed above in Section I) and incorporation-by-reference. *Khoja*, 899 F.3d at 998. No showing has been made that these Declarations meet either exception. The facts in the Declarations are not contained in the Complaint, and they are not appropriately considered at this time. Accordingly, the Court should deny Berkeley's request for the Court to consider the Moore Declaration or any Exhibit as evidence.[6]

CONCLUSION

For the foregoing reasons, the CRA respectfully requests that the Court deny Berkeley's Request or grant the Request in part only as to the existence of Exhibits 1 and 6-10.

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[5] To the extent Berkeley is mistakenly requesting the entry of evidence when it is in fact seeking incorporation-by-reference, the CRA does not object to incorporation of the Berkeley Ordinance (Exhibit 1), excerpts of the Berkeley Municipal Code (Exhibit 6), and excerpts of the 2019 Building Energy Efficiency Standards (Exhibit 7), as those codes and regulations are featured in the Complaint. No other exhibit is referenced in the Complaint, and none even arguably "forms the basis of" the CRA's claims. *See Khoja*, 899 F.3d at 1002 (allowing incorporation-by-reference "if the complaint refers extensively to the document or the document forms the basis of the plaintiff's claim").

[6] If for any reason the court decides to consider the Exhibits as evidence and convert Berkeley's Motion into a summary judgment motion, the CRA respectfully requests that the Court notify the CRA of its intent to do so and offer the CRA a chance to object to the evidence and to present briefing on summary judgment. *See* Fed. R. Civ. P. 56(c)(2), (f); *see also United States v. Shiozawa*, 2013 WL 3297081, at *4 (N.D. Cal. June 28, 2013) ("As a general rule, in order to convert a motion to dismiss into a motion for summary judgment, the Court must provide Defendant with notice and any opportunity to respond.") (internal quotation marks omitted); *Rogers v. Berryhill*, 2018 WL 1794437, at *1 (N.D. Cal. Apr. 16, 2018) (requiring additional briefing from the parties after notifying them of the intent to convert a motion to dismiss into a motion for summary judgment).

Dated: February 10, 2020

Respectfully submitted,

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