Courtland L. Reichman (CA Bar No. 268873)
REICHMAN JORGENSEN LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
Telephone: (650) 623-1401
Facsimile: (650) 623-1449
creichman@reichmanjorgensen.com

Sarah Jorgensen (*Pro Hac Vice*)
REICHMAN JORGENSEN LLP
1201 West Peachtree Street, Suite 2300
Atlanta, GA 30309
Telephone: (404) 609-1040
Facsimile: (650) 623-1449
sjorgensen@reichmanjorgensen.com

Attorneys for Plaintiff
California Restaurant Association

Gary J. Toman (*Pro Hac Vice*)
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL LLP
3344 Peachtree Road NE, Suite 2400
Atlanta, GA 30326
Telephone: (404) 876-2700
Facsimile: (404) 875-9433
gtoman@wwhgd.com

Kylie Chiseul Kim (*Pro Hac Vice Pending*)
KELLOGG, HANSEN, TODD, EVANS, FIGEL & FREDERICK LLP
1615 M St NW #400
Washington, DC 20036
Telephone: (202) 326-7924
Facsimile: (202) 326-7999
kkim@kellogghansen.com

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 SURREPLY ON DEFENDANT'S MOTION TO DISMISS ON THE ISSUE OF TWO NEW EXHIBITS

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

Pursuant to the Court's Order, ECF No. 32, Plaintiff California Restaurant Association ("CRA") respectfully submits its surreply addressing new evidence submitted by Defendant City of Berkeley ("Berkeley") with its Reply in Support of Motion to Dismiss (ECF No. 24, "Reply").

Berkeley submitted a CEC resolution approving a *different* Berkeley ordinance (the "Resolution"), and a letter dated February 16, 2020, from the CEC's Executive Director (the "Letter") asserting that Berkeley did not have to submit its natural gas ban to the CEC for approval because it "is not an energy efficiency standard subject to review by the CEC." *See* Exhibits 1 and 2 to Supplemental Request, ECF Nos. 24-2 and 24-3. To the extent even considered,[1] the only relevance of the CEC Resolution is to highlight the fact that Berkeley passed a duplicative natural gas ordinance through the required reach code process *after* unlawfully ignoring those same procedures with its first ordinance. It bypassed these procedures the first time when it rushed to lay claim to being the "first-in-the-nation" natural gas ban. Further, the CEC Letter is inadmissible on the merits at the pleading stage, and it has no bearing on standing, for which it was not even cited. It does, however, eliminate Berkeley's primary jurisdiction argument as a matter of law.

A. The Evidence Is Irrelevant To Rule 12(b)(1) And Was Not Cited For That Purpose.

Berkeley now re-positions its argument on standing in its Reply by demanding that the CRA provide evidence to prove that some member would be affected, *see* Reply, ECF No. 24, at 2-5.[2] But Berkeley's challenge is still facial, not factual: it claims the Complaint must name a member injured by the ban or who applied for a permit and was denied. There is no such legal requirement, as argued in previous briefing. And Berkeley has failed to meet its burden of

[1] The CRA has opposed Berkeley's request for judicial notice of the new exhibits. ECF No. 28.

[2] Berkeley did not make a factual challenge to standing in its opening brief: it did not challenge the truth of the allegations of injury, but only challenged whether the injury as alleged was sufficient to confer standing. *See* Mot. to Dismiss, ECF No. 18, at 10. And it did not submit any evidence to dispute the CRA's allegations of injury. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (holding that although the court "may review evidence beyond the complaint" such review is reserved for *factual* challenges to "the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction"). All of Berkeley's exhibits were proffered in support of its Rule 12(b)(6) motion to dismiss. Berkeley's Reply also ignores the CRA's offer to file the information of an affected member under seal if deemed necessary. Opp. To Mot. To Dismiss, ECF No. 22, at 13-14, n.5.

production on injury if it makes a facial challenge, *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1151 (9th Cir. 2019), and so its argument fails on this basis as well. But more to the point, Berkeley did not offer either the Letter or the Resolution on standing — indeed, neither has any bearing on whether any standing allegation is true.[3]

B. The New Exhibits Should Not Be Considered For Rule 12(b)(6), And At Most Raise Factual Disputes That Require Full Review.

Berkeley relies upon the new exhibits in support of its 12(b)(6) motion to dismiss the CRA's claim that the ban on natural gas is preempted by the state Energy Code. *See* Reply at 11-12. Berkeley argues that it was not required to submit its ban to the CEC for approval because it is not an "energy conservation . . . standard," and that this is confirmed by the Resolution approving Berkeley's *other* reach code and by the CEC's opinion in the Letter. Reply at 12.

This reliance on external evidence is plainly improper on a Rule 12(b)(6) motion to dismiss: "Generally, 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). Berkeley seeks to present its "own version of the facts at the pleading stage" — exactly what the cases prohibit. *Id.* If the Court were to consider external evidence and convert this into a motion for summary judgment, it would have to provide notice and an opportunity to be heard — including discovery on these disputed facts. *United States v. Shiozawa*, 2013 WL 3297081, at *4 (N.D. Cal. June 28, 2013).

And indeed, the new exhibits raise disputed fact questions as to state preemption under the Energy Code: that the CEC reviewed other city ordinances banning natural gas infrastructure in new construction creates a fact question because this contradicts the CEC's approach in the Letter as to the Berkeley ordinance. *See* CRA Opp. to Second RJN, ECF Nos. 28 to 28-6, Exhs. 1-6 (CEC resolutions approving six local gas bans). What is more, contrary to the Executive Director's assertion in the Letter, the CEC resolutions themselves describe the bans as "locally adopted energy standards" and state the bans provide "energy demand reductions, energy savings,

[3] Berkeley's other main argument on standing is that its claimed exemptions to the ban preclude a facial challenge, but the Resolution has no relevance to this issue, and indeed, Berkeley did not cite it for this point.

and other benefits exceeding those of the 2019 Energy Code." *E.g.*, *id.* at Exh. 1.

Relying solely on the Letter, Berkeley argues that its ban does not fall within the statutory definition of an "energy conservation . . . standard" in Public Resource Code Section 25402.1(h), and therefore did not have to be submitted to the CEC. Reply at 12.[4] But the Letter is not binding and is contradicted by the CEC's own treatment of other locally adopted natural gas bans. Moreover, this argument involves a complex statutory structure that is not suitable to resolve on a motion to dismiss, without full briefing.[5] Perhaps more importantly, this argument embodies exactly the reason Berkeley's ban is preempted: Berkeley is trying to end-run the requirements of the Energy Code. In its proceedings to adopt the ban, Berkeley repeatedly recognized that it could not directly ban natural gas in buildings without running afoul of the Energy Code, so Berkeley instead sought to reach the same result but avoid the onerous requirements of state law by proclaiming it was only regulating natural gas infrastructure.[6] It is hard to see how such a ban, plainly intended to eliminate "obsolete" natural gas in buildings, would not fall within the meaning of "energy conservation standard." Berkeley cannot just declare by fiat that its ban is not an "energy conservation" standard — and the CEC's Letter does not change that.

C. The CEC Letter Undermines Berkeley's Claim Of Primary Jurisdiction.

The existence of an opinion letter from the CEC resolves Berkeley's primary jurisdiction argument, in which it urged the court to wait for "an opinion (whether binding or nonbinding) from the Energy Commission." *See* Mot. to Dismiss, ECF No. 18, at 15-16. The Court now has the

---

[4] Berkeley uses the Resolution to suggest it followed the reach code process properly, but whether Berkeley's *other* ordinance fell within the terms of the statute has no bearing on whether the natural gas ban currently at issue is an "energy conservation . . . standard."

[5] For example, neither the statute nor the Energy Code uses the term "energy efficiency standards;" and while Code Cal. Reg. Section 10-106 uses the term "energy standards," that section was intended explicitly to implement Section 25402.1(h) and thus should not be read to have a different meaning from "energy conservation standards."

[6] *E.g.*, K. Harrison et al., *Adopt an Ordinance Adding a New Chapter 12.80 to the Berkeley Municipal Code Prohibiting Natural Gas Infrastructure in New Buildings*, July 9, 2019, at 6 (noting that requiring electric water heaters would amend the state energy code); *id.* at 3 ("This ordinance differs from the reach code approach in that it leverages the City's [police power], and as a result avoids CEC regulations associated with asking permission to amend energy efficiency standards.")

benefit of the CEC's interpretation and the CEC has declared it will not conduct further proceedings; there is no need to delay this case to await the CEC's opinion.

As the CRA explained in its opposition to the motion to dismiss, the statutory structure and provisions made apparent that the CEC was not authorized to address the questions at issue and could at most issue a nonbinding opinion, as it has now done. CRA Opp. To Mot. To Dismiss, ECF No. 22, at 18. Berkeley suggests that the Letter supports the conclusion that the Court should rely on the doctrine of primary jurisdiction to defer to state agencies. Reply at 15. But the Letter's only significance on this point is to *confirm* that delaying or deferring court review for an agency decision is unwarranted — the agency has already spoken.

Berkeley also argues that the state law claims are "moot," but this prejudges the merits of the dispute as a reason to defer. The Court must interpret for itself whether the statutory provisions require Berkeley to submit its ban to the CEC. In this regard, Berkeley cites no case suggesting that the CEC's interpretation of the phrase "energy standards" is dispositive or even entitled to deference. *See* Mot. to Dismiss, ECF No. 18, at 16 (acknowledging the CEC's interpretation would be "nonbinding"). The CEC simply does not have the power to override the courts in a matter of statutory interpretation. Further, the substance of the Letter is disputed, and, at the least, brings into question the Letter's conclusory assertion of lack of jurisdiction and highlights the need for Court review and consideration.

Accordingly, the CRA respectfully requests that the Court find that that these new exhibits are disputed factual evidence and should not be considered for Rule 12(b)(6), have no bearing on Rule 12(b)(1), and render moot the claim for primary jurisdiction. This Court should deny the motion to dismiss and allow the case to proceed on these important factual and legal issues.

Dated: March 27, 2020

Respectfully submitted,

REICHMAN JORGENSEN LLP

/s/ Courtland L. Reichman
Courtland L. Reichman (CA Bar No. 268873)
creichman@reichmanjorgensen.com
REICHMAN JORGENSEN LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
Telephone: (650) 623-1401
Facsimile: (650) 623-1449

Sarah Jorgensen (*Pro Hac Vice*)
sjorgensen@reichmanjorgensen.com
REICHMAN JORGENSEN LLP
1201 West Peachtree Street, Suite 2300
Atlanta, GA 30309
Telephone: (404) 609-1040
Facsimile: (650) 623-1449

Gary J. Toman (*Pro Hac Vice*)
gtoman@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL LLP
3344 Peachtree Road NE, Suite 2400
Atlanta, GA 30326
Telephone: (404) 876-2700
Facsimile: (404) 875-9433

Kylie Chiseul Kim (*Pro Hac Vice Pending*)
KELLOGG, HANSEN, TODD, EVANS, FIGEL & FREDERICK LLP
1615 M St NW #400
Washington, DC 20036
Telephone: (202) 326-7924
Facsimile: (202) 326-7999

Attorneys for Plaintiff
California Restaurant Association