Farimah F. Brown, City Attorney, SBN 201227
Christopher D. Jensen, Deputy City Attorney, SBN 235108
BERKELEY CITY ATTORNEY'S OFFICE
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960
cjensen@cityofberkeley.info

Attorneys for Defendant CITY OF BERKELEY

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiff,

v.

CITY OF BERKELEY,

Defendant.

No. 4:19-CV-07668-YGR

**CITY OF BERKELEY'S RESPONSE TO SURREPLY TO MOTION TO DISMISS**

Judge: Hon. Yvonne Gonzalez Rogers

*Matter Submitted on the Papers (See Dkt #31)*

## I. INTRODUCTION

On March 20, 2020, the Court entered an order authorizing Plaintiff California Restaurant Association ("Plaintiff") to file a surreply "that is limited to the topic of the new evidence – the CEC resolution and letter – introduced by Berkeley in its reply." Dkt. #32 at 1. Plaintiff has used the opportunity to file a surreply to lie to the Court, in a desperate attempt to avoid dismissal of a claim for violation of the California Energy Code that made no sense when it was filed and is even less convincing now, after the California Energy Commission has determined that the claim has no merit. The Court should dismiss that claim and each of the other claims for relief in Plaintiff's Complaint and enter judgment in favor of the City.

## II. ARGUMENT

### A. Plaintiff's Surreply Relies on Misrepresentations Regarding the Nature of Local "Reach Code" Energy Code Amendments in a Desperate Attempt to Avoid Dismissal of Its Energy Code Claim.

Plaintiff has used the opportunity to file a surreply to attempt to mislead the Court into believing the California Energy Commission has approved "local gas bans" in other jurisdictions. Surreply (Dkt. #33) at 2. This is false. These purported "gas bans" are actually local "reach code" amendments to the Energy Code that provide builders with both electric-only and mixed-fuel (*i.e.*, natural gas and electric) pathways for Energy Code compliance. *See*, *e.g.*, Opp. to Supp. Request for Judicial Notice (Dkt. #28), Exh. 1 ("Resolution Approving the City of Brisbane's Locally Adopted Building Energy Efficiency Standards"); *see also id.*, Exhs. 2-6. The Energy Commission approved similar Energy Code amendments adopted by the City on February 20, 2020. Supplemental Request for Judicial Notice ("Supp. RJN") (Dkt. #24-1), Exh. 1 ("Resolution Approving the City of Berkeley's Locally Adopted Building Energy Efficiency Standards"). There is no dispute that these "reach codes" set energy efficiency standards, and Plaintiff does not challenge the validity of the City's local Energy Code amendments.

In contrast, the Energy Commission's February 6, 2020 letter to Berkeley City Councilmember Kate Harrison expressly "confirm[s] the CEC's understanding that Chapter 12.80 of the Berkeley Municipal Code, prohibiting natural gas infrastructure in new buildings effective January 1, 2020, is not an energy efficiency standard subject to review by the CEC."

Supp. RJN, Exh. 2 at 1. The Energy Commission could not have been clearer in stating that it has elected to treat the City's Natural Gas Infrastructure Ordinance differently than electric-preferred reach codes adopted by the City of Berkeley and other jurisdictions. Plaintiff's attempt to confuse the Court into believing that these reach code Energy Code amendments are "gas bans" is perplexing, troubling, and ineffective.

**B. The Energy Commission's February 6 Letter Is Subject to Judicial Notice and May Be Considered by the Court in Connection with the City's Rule 12(b)(6) Motion.**

Plaintiff's suggestion that the Court may not consider the Energy Commission's February 6, 2020 letter in connection with the City's Rule 12(b)(6) motion ignores the long-establishes principle that Rule 12(b)(6) motions `may be decided based on "facts susceptible to judicial notice" as well as the allegations in the Complaint itself. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). The Energy Commission letter is properly subject to judicial notice, and no timely objection to the City's Supplemental Request for Judicial Notice was filed. See Civ. L.R. 7-3(d)(1); *Tomada v. Home Depot U.S.A., Inc.*, 2014 WL 2538792, at *6 (N.D. Cal. June 3, 2014) (overruling objections on the ground that they were untimely). The Court can and should consider the February 6 letter in connection with the City's Rule 12(b)(6) motion.

**C. The Energy Commission's February 6 Letter Supports the Common Sense Conclusion That Natural Gas Infrastructure Ordinance Is Not an Energy Conservation Standard.**

Plaintiff's only substantive argument in its surreply is a contention that the Court should disregard the California Energy Commission's determination that the City complied with the Energy Code.[1] This argument ignores controlling law. While not dispositive, the Energy Commission's opinion regarding the scope of its own jurisdiction should be given considerable weight, and in any event that opinion is entirely consistent with a plain meaning, common sense interpretation of the relevant statute.

[1] Plaintiff's further attempt to justify its failure to present evidence to support its alleged standing to bring suit (Surreply at 1-2) is well outside the scope of the Court's order authorizing a surreply. The Court should disregard this argument.

When reviewing a state agency's interpretation of the state law, the court must afford the same level of deference state courts would afford the agency. *United States v. United States Bd. of Water Commissioners*, 893 F.3d 578, 596 (9th Cir. 2018); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 911 (9th Cir. 2003), *aff'd,* 546 U.S. 21 (2005); *see also Idaho Dep't of Health & Welfare v. U.S. Dep't of Energy*, 959 F.2d 149, 152 (9th Cir. 1992) (citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986)) (observing that court of appeals "ordinarily grants substantial deference to such interpretations. If an agency's interpretation is a reasoned and consistent view of its regulations, we will not substitute our own interpretation for that of the agency[].") California courts accord "considerable judicial deference" to legal interpretations of state agencies charged with administering and enforcing a statute. *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 262–63 (2016) (*quoting Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 801(1999)), *as modified on denial of reh'g* (Mar. 15, 2017); *see also Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998) (noting role of agency "expertise" in deference given to state agency).

Here, the Energy Commission reached the common sense conclusion that an ordinance limiting the installation of Natural Gas Infrastructure in Newly Constructed Buildings—which does not regulate or even mention energy efficiency—does not establish "energy conservation or energy insulation standards" within the meaning of Public Resources Code § 25402.1(h). *See* Supp. RJN, Exh. 2. The Court should follow the Energy Commission's interpretation first and foremost because it is a correct interpretation of the plain meaning of the statute, and secondarily because the Court should defer to a reasonable interpretation of a state law by the state agency that is charged with administering and enforcing that law.

Finally, this is unquestionably a legal question that the Court may decide without resolving any factual disputes. The Energy Commission letter is simply interpreting the plain meaning of the Public Resources Code to conclude that Plaintiff's Energy Code claim lacks merit. The purported "disputed fact questions" that Plaintiff cites (Surreply at 2) are wholly fabricated, and are based on Plaintiff's misrepresentation of the contents of the reach code Energy Code amendments adopted by the City of Berkeley and other local jurisdictions. The Court should reach the same conclusion as the Energy Commission and should dismiss

Plaintiff's Energy Code claim.

## III. CONCLUSION

Plaintiff's willingness to lie to the Court in its Surreply underlines the significance of the issues raised by this case. Decades of inaction at the federal level have compelled state and local governments to undertake their own initiatives to combat climate change. The Berkeley ordinance at issue in this case is a measured approach that applies only to new construction and contains exemptions to ensure that limitations on the installation of new Natural Gas Infrastructure are applied lawfully and fairly. The California state government has approved this approach. Plaintiff nevertheless asks this Court to rule that state law prohibits the City from taking these measured steps to limit greenhouse gas emissions from new construction, as well as requesting the Court to rule that a federal law that regulates the efficiency of household appliances leaves state and local governments hostage to federal inaction on climate change.

The Court should not adopt Plaintiff's strained interpretation of state and federal law to block the City's lawful, carefully calibrated attempt to address a dire (if relatively slow moving) crisis that the federal government is ignoring. The Court should dismiss all of Plaintiff's claims for relief with prejudice and enter judgment in favor of the City.

Dated: April 3, 2020

BERKELEY CITY ATTORNEY'S OFFICE

By: /s/Christopher D. Jensen
Farimah Brown
Christopher D. Jensen

Attorneys for Defendant City of Berkeley