UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL FUR TRADE FEDERATION,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

Case No. 20-cv-00242-RS

ORDER GRANTING MOTIONS TO DISMISS AND DENYING MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE

I. INTRODUCTION

Defendant the City and County of San Francisco has enacted an Ordinance amending its health code to ban the sale and manufacture of animal fur products within its boundaries ("the Fur Ban"). Shortly after the Fur Ban went into effect, plaintiff the International Fur Trade Federation ("IFF") brought this action against San Francisco and its Director of Public Health in his official capacity (collectively, "defendants"), challenging the constitutionality of the Fur Ban under the Dormant Commerce Clause. Defendants now move to dismiss under Rule 12(b)(6), arguing IFF has failed to state a claim. Intervenors the Humane Society of the United States and the Animal Legal Defense Fund have also moved to dismiss on substantially the same grounds. The motions will therefore be analyzed together. Pursuant to Civil Local Rule 7-1(b), the motions are suitable for disposition without oral argument, and the hearing set for July 23, 2020 is vacated. For the reasons set forth below, the motions to dismiss are granted with leave to amend. In light of this, IFF's motion for summary judgment is denied without prejudice.

II. BACKGROUND[1]

In 2018, the San Francisco Board of Supervisors voted to ban the sale and manufacture of fur within its jurisdiction. The Fur Ban went into effect on January 1, 2019, and made it unlawful to manufacture, sell, offer for sale, display for sale, give, donate, or otherwise distribute fur products in San Francisco. It gave entities who had obtained fur products before March 20, 2018 the rest of 2019 to sell off that inventory. A more complete ban then went into effect on January 1, 2020. However, the Fur Ban still contains several exceptions—for example, fur sold at second-hand stores. The Board of Supervisors made several findings to support the Fur Ban, including that the fur industry allows animal cruelty, consumes significant energy as compared to other clothing production, and pollutes the air and water. The same day the Fur Ban took effect, the State of California made it unlawful to trap fur-bearing mammals within its borders for the purpose of recreation or commerce. Furthermore, no animals are raised or trapped anywhere in San Francisco for their fur.

San Francisco's Director of Public Health is charged with enforcing the Fur Ban. At some point after it took effect, a Frequently Asked Questions ("FAQs") page about the Fur Ban appeared on the Department of Public Health ("the Department") website. One of the FAQs inquired whether a retailer not located in San Francisco would violate the Fur Ban by selling fur products via its website to a consumer whose shipping address was in San Francisco. The Department took the position that such a situation would violate the Fur Ban. Sometime after this lawsuit was filed, the Department changed its position. The FAQ page now states: "The Department is not enforcing the ordinance against retailers with no physical presence in the City. If the Department decides in the future to pursue enforcement against retailers with no physical

[1] Facts are taken from the complaint and must be credited for the purposes of deciding the motions to dismiss. In addition, defendants request judicial notice be taken of two documents: the text of the Fur Ban, and Frequently Asked Questions about the Fur Ban appearing on the San Francisco Department of Public Health website. Both documents are matters of public record whose accuracy can readily be determined. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). IFF does not oppose the request. It is thus granted.

presence in the City, the Department will provide the public with advance notice regarding the Department's change in enforcement policy." This revision is consistent with the position taken by San Francisco's Controller during the legislative process that the Fur Ban does not apply to out-of-state or online sales. As to its economic impact, the Controller estimated annual fur sales in San Francisco to be around $11 million in 2012. The Chamber of Commerce estimates the loss caused by the Fur Ban to San Francisco retailers who carry fur to be around $45 million annually.

III. LEGAL STANDARD

Rule 12(b)(6) governs motions to dismiss for failure to state a claim. A complaint must contain a short and plain statement of the claim showing the pleader is entitled to relief. Fed. R. Civ. P. 8(a). While "detailed factual allegations" are not required, a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A Rule 12(b)(6) motion tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Thus, dismissal under Rule 12(b)(6) may be based on either the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged" under a cognizable legal theory. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). When evaluating such a motion, courts generally "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). However, "[t]hreadbare recital of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

IV. DISCUSSION

A. Declaratory Judgment

Count One of the complaint[2] requests a declaratory judgment that the Fur Ban is not

[2] Defendants filed a motion to dismiss IFF's initial complaint. Instead of responding, IFF elected to file a First Amended Complaint ("FAC"). The FAC is now the operative complaint.

enforceable against retailers who ship fur products to consumers at a San Francisco address from a location outside San Francisco. The Declaratory Judgment Act provides that a federal court may issue a declaratory judgment in "a case of actual controversy…whether or not further relief is sought." 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). "[T]he phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'controversies' that are justiciable under Article III." *MedImmune*, 549 U.S. at 126 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). Whether an actual controversy exists depends on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127. "In the absence of a controversy of sufficient immediacy and reality, a district court lacks jurisdiction to issue a declaratory judgment." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 855–56 (9th Cir. 1985) (internal quotations omitted) (citing *Sellers v. Regents of the Univ. of Cal.*, 432 F.2d 493, 499–500 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971)). An immediate controversy must exist at each stage of review. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Where there exists "no threat of enforcement" and "no showing that…authorities have any intention of prosecuting," relief is not proper. *Sellers*, 432 F.2d at 493.

The enforcement action which IFF seeks a declaratory judgment to prevent—that is, a situation in which the Department enforces the Fur Ban against retailers outside San Francisco who take orders from and ship fur products to consumers with San Francisco addresses—is purely hypothetical. In fact, the Department has expressly disavowed any intention of enforcing the Fur Ban in this way via the FAQs on its website, of which defendants themselves request judicial notice be taken. The FAQs clearly state the Department will provide public notice should its interpretation of the Fur Ban change. Defendants will be expected to give reasonable notice that complies with the requirements of due process; should they not, an immediate controversy will exist, and IFF may seek redress. Absent such a shift, however, jurisdiction to issue the declaratory judgment which IFF requests is lacking.

IFF cites no authority for its proposition that a declaratory judgment may issue to prevent the enforcement of a law in a way which the charged enforcer has explicitly disavowed going forward, and where the enforcer has never in the past enforced the law as such. Furthermore, the distinction which IFF attempts to draw between cases in which an enforcer has submitted an affidavit swearing it will not enforce a law in a certain way, and those in which the enforcer represents an identical position to a Court in its unsworn briefings, is not borne out by the cases it cites. The cases in which the enforcer submitted an affidavit do not state that the reason declaratory judgment was not proper in those cases was due to the form of the enforcer's promises, i.e., the affidavit. Furthermore, while IFF is correct that cases from outside the Ninth Circuit are not controlling here, its position is not borne out by Ninth Circuit law itself. The allegation in the complaint that "IFF members now face prosecution by Defendants when their products are shipped to persons in San Francisco, even after title has passed from a seller outside San Francisco" is clearly put to rest by the Department's FAQs; put differently, the allegation is not plausible. The motion to dismiss Count One is thus granted.

B. Dormant Commerce Clause

The remaining three counts assert various claims under the Dormant Commerce Clause. Count Two alleges the Fur Ban places a substantial burden on interstate and foreign commerce without a "legitimate local purpose." Counts Three and Four allege the Fur Ban places a burden on interstate and foreign commerce, respectively, which outweighs its "putative local benefits."

The Constitution gives Congress the power to "regulate Commerce…among the several states." U.S. Const., Art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)). "This limitation on the states to regulate commerce is known as the dormant Commerce Clause." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937,

947 (9th Cir. 2013) (internal quotations omitted). "The primary purpose of the dormant Commerce Clause is to prohibit 'statutes that discriminate against interstate commerce' by providing benefits to 'in-state economic interests' while 'burdening out-of-state competitors.'" *Id.* at 947 (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) and *Dep't of Revenue v. Davis*, 553 U.S. 328, 337 (2008)). The Dormant Commerce Clause applies equally to state and local government actions. *See, e.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007).

"The Supreme Court has adopted a 'two-tiered approach to analyzing state economic regulation under the Commerce Clause.'" *Eleveurs*, 729 F.3d at 948 (quoting *Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986)). Regulations that (1) "discriminate against interstate commerce" or (2) "directly regulat[e] extra-territorial conduct" are generally "struck down…without further inquiry." *Id.* at 948–49 (internal quotations omitted); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (explaining that such laws "face a virtually per se rule of invalidity"). However, regulations that (3) "regulate even-handedly to effectuate a legitimate local public interest…will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Wayfair*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Thus, "[i]f a legitimate local purpose is found, the question becomes one of degree." *Pike*, 397 U.S. at 142. "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

In the present case, IFF does not allege that the Fur Ban discriminates on its face against interstate commerce or that the Fur Ban directly regulates extraterritorial conduct. Instead, the three counts in the complaint each arise under the third Dormant Commerce Clause theory: the *Pike* test. Under *Pike*, the plaintiff must first make a threshold showing that the law at issue "imposes a substantial burden" before the court can weigh the law's burdens against its benefits or inquire into "whether the benefits of the challenged laws are illusory." *Eleveurs*, 729 F.3d at 951–52. *See also Optometrists*, 682 F.3d at 1155 ("If a regulation merely has an effect on interstate

commerce, but does not impose a significant burden on interstate commerce, it follows that there cannot be a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits' under *Pike*."). "[M]ost statutes that impose a substantial burden on interstate commerce do so because they are discriminatory." *Eleveurs*, 729 F.3d at 952 (internal citation omitted). "[L]ess typically, statutes impose significant burdens on interstate commerce as a consequence of inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Id.*

In the present case, IFF argues neither that the Fur Ban is discriminatory—as explained above, the allegations each arise under the third Dormant Commerce Clause theory—nor that fur regulation is inherently national or requires a uniform system of regulation. Rather, IFF appears to propose several alternative ways of demonstrating the threshold "substantial burden." However, none of these alternatives are available under Ninth Circuit law.

First, IFF attempts to demonstrate a "substantial burden" by stating the annual economic impact of the Fur Ban on San Francisco retailers which sell fur will be $45 million. However, IFF quotes no authority for the proposition that any absolute amount of economic impact can itself demonstrate a substantial burden. To allow this method of demonstrating a substantial burden would conflate the threshold showing required with the burden/benefit balancing that follows.

Second, IFF argues the Fur Ban regulates "wholly out-of-state conduct," which demonstrates a substantial burden under *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015). In *Christies*, the plaintiffs were challenging a California law which required fine art sellers to pay a royalty to the artist if the sale took place in California or if the seller resided in California. The state took the position that the royalty requirement would apply to a California resident with a part-time apartment in New York, who bought art from a North Dakota artist for that New York apartment and then resold it to another New Yorker. The Court differentiated the regulation of such "wholly out-of-state conduct" from "state laws that regulate[] in-state conduct with allegedly significant out-of-state practical effects." *Id.* at 1324. *Christies* does not advance IFF's position because the Fur Ban only regulates conduct within San Francisco which may have

significant out-of-state practical effects. San Francisco is only attempting to ban the sale and manufacturing of furs within its borders; should a San Francisco resident travel out of state and purchase fur—or purchase fur online from an out-of-state retailer, as explored above—the Fur Ban would not apply. That fur manufacturing happens not to occur in San Francisco, and thus that fur sold in San Francisco is necessarily manufactured outside the jurisdiction, only means that the Fur Ban will have "significant out-of-state practical effects," not that the Fur Ban regulates "wholly out-of-state conduct." Put differently, the Fur Ban does not apply to fur products that are manufactured and sold wholly out of state, rendering *Christies* inapposite.

Third, IFF's allegation that the Fur Ban amounts to a "complete import and sales ban" and thus imposes a substantial burden is both factually incorrect and not borne out by the relevant law. The Ninth Circuit has drawn a distinction between laws which proscribe a business's preferred method of operation, which do not violate the Dormant Commerce Clause, and laws which prevent the operation of those businesses outright, which do. *See Eleveurs*, 729 F.3d at 952–53; *Optometrists*, 682 F.3d at 1154–55; *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 847 (9th Cir. 2013). This distinction derives from the Supreme Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), in which a Maryland law prohibiting oil producers and refiners from operating retail service stations within the state was at issue. The Court found that simply because no Maryland-based oil producers or refiners existed, and thus that the burden of the law fell solely on out-of-state parties, did not itself establish a "substantial burden" because the Dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127–28. Ninth Circuit cases have repeatedly emphasized this distinction between laws which "preclude[] a preferred, more profitable method of operating in a retail market," *Optometrists*, 682 F.3d at 1154, or "shift[] business from one competitor to another," *Yakima*, 731 F.3d at 847, and those which "impair the free flow of materials and products across state borders," *Optometrists*, 682 F.3d at 1155, or amount to a "complete import and sales ban," *Eleveurs*, 729 F.3d at 950. The latter impose a substantial burden on interstate commerce; the former do not.

Because, the Fur Ban simply precludes a preferred, and perhaps more profitable, method of selling and/or manufacturing fur, it does not impose a substantial burden under the *Exxon* line of cases. As discussed above, retailers who want to sell fur to San Francisco residents may do so online. Manufacturers of fur products (although none in San Francisco appear to exist) may move their production elsewhere. Alternatively, faux fur may be sold or manufactured instead. While the Fur Ban may shift business to competitors with better infrastructure to sell fur online, existing manufacturing facilities outside San Francisco, or expertise in faux fur, the Dormant Commerce Clause provides no impediment. Fur manufactured outside San Francisco may still flow freely into the city if it is purchased online; it just cannot be sold at brick-and-mortar stores. That is, the Fur Ban is not a "complete import and sales ban," and thus does not run afoul of *Exxon* and the derivative Ninth Circuit cases.

Finally, and conclusively, even if IFF's arguments above were compelling, the Ninth Circuit has recently emphasized there are only two ways to make the "substantial burden" showing. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) ("Only a small number of cases invalidating laws under the dormant Commerce Clause have involved laws that were genuinely nondiscriminatory. These cases address state regulation of activities that are inherently national or require a uniform system of regulation—most typically, interstate transportation…." (internal alterations, citations, and quotations omitted)). If the substantial burden showing is not made, an inquiry into the benefits of the law is inappropriate. *See id.* at 1147; *Eleveurs*, 729 F.3d at 952; *Optometrists*, 682 F.3d at 1156–57.[3]

A number of cases mentioned by IFF confirm its confusion regarding the proper legal standard. *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994), which IFF cites for the proposition that there are more than two ways to make a substantial burden showing,

[3] Fur Europe Aisbl International Association and the National Trappers Association have each moved for leave to file an amicus curiae brief. Both amicus briefs are primarily directed at disputing defendants' rationales for imposing the Fur Ban. However, as explained, these rationales cannot be questioned, because IFF has failed to demonstrate a "substantial burden." The motions are thus both denied without prejudice.

was about the burden/benefit balancing required after a threshold substantial burden showing has been made, not about the threshold itself. More recent Ninth Circuit cases have emphasized the need for the threshold showing. *See Chinatown*, 794 F.3d at 1147; *Eleveurs*, 729 F.3d at 952; *Optometrists*, 682 F.3d at 1156–57. Furthermore, in *North American Meat Institute v. Becerra*, No. 19-cv-08569, 2020 WL 919153 (C.D. Cal. Feb. 24, 2020), which IFF cites for the proposition that the benefits of a law must be "local" for it to survive the Dormant Commerce Clause, a threshold "substantial burden" had been demonstrated by the law-at-issue's discrimination against interstate commerce, i.e., the first method of demonstrating a Dormant Commerce Clause violation. As addressed above, no such discrimination is alleged here, which is precisely why IFF's claims only arise under the third Dormant Commerce Clause theory. IFF may not agree with the Ninth Circuit's interpretation of *Pike*, and in particular the threshold substantial burden requirement, but Ninth Circuit law must be followed in this forum.

Thus, as IFF has failed to demonstrate a "substantial burden" as a matter of law, it has failed to state a plausible claim. IFF's arguments about the absence of a "legitimate local purpose" cannot be reached, because it has failed to make the required threshold showing. Nor are its arguments about the availability of less burdensome alternatives to the Fur Ban availing. *See Eleveurs*, 729 F.3d at 953 ("For us to invalidate a statute based on the availability of less burdensome alternatives, the statute would have to impose a significant burden on interstate commerce, which is not the case here." (internal alteration and quotations omitted)). Counts Two, Three, and Four must therefore be dismissed.

V. CONCLUSION

For the reasons set forth above, the motions to dismiss, ECF No. 30, 33, are granted in their entirety. However, IFF will be given leave to amend to the extent it can plausibly allege facts which address the deficiencies identified in this Order. Any amended complaint must be filed within 21 days of this Order. Furthermore, IFF's motion for summary judgment, ECF No. 35, is denied without prejudice as moot. Finally, as explained above, the motions for leave to file amicus curiae briefs, ECF No. 44, 48, are denied without prejudice, and the request for judicial notice,

ECF No. 31, is granted.

IT IS SO ORDERED.

Dated: July 16, 2020

RICHARD SEEBORG
United States District Judge

United States District Court
Northern District of California