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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NORCAL OUTDOOR MEDIA, LLC,

Plaintiff,

v.

XAVIER BECERRA, in his
official capacity as the
Attorney General of
California, ADETOKUNBO
OMISHAKIN, in his official
capacity as Director of the
California Department of
Transportation,

Defendants.

No. 2:19-cv-02338-JAM-DB

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

NorCal Outdoor Media, LLC ("Plaintiff") continues to pursue its challenge to the California Outdoor Advertising Act ("OAA"), Cal. Bus. & Prof. Code § 5200 et seq., see First Am. Compl. ("FAC"), ECF No. 32, after the Court granted Adetokunbo Omishakin's ("Defendant") motion for judgment on the pleadings, see Order Granting Mot. for J. on Plead. ("Order JOP"), ECF No. 28. The Court granted Defendant's previous motion because Plaintiff lacked standing to pursue its claims. Id. Never having sought a permit from the California Department of

1 Transportation ("CalTrans") to erect its billboards, Plaintiff's
2 injury proved to be purely hypothetical. Id. at 9.

3 Here, too, Plaintiff fails to state a concrete injury under
4 the sign ordinance. As a result, the Court GRANTS Defendant's
5 Motion to Dismiss ("Mot."), ECF No. 34.¹

6
7 I. OPINION

8 Plaintiff's FAC alleges the OAA violates its free speech,
9 equal protection, and due process rights under the United States
10 and California Constitutions. See FAC ¶¶ 87-95, 96-102, 107-111.
11 Defendant argues Plaintiff lacks standing, the claims are unripe,
12 and Plaintiff failed to state cognizable claims under either the
13 First and Fourteenth Amendments to the United States Constitution
14 or the California Constitution's equivalent provisions. See
15 generally Mot. Defendant further argues the Court should decline
16 to exercise supplemental jurisdiction over the state law claims
17 and the prayer for monetary damages violates the Eleventh
18 Amendment to the United States Constitution and California's
19 Government Claims Act. Id. Plaintiff opposes the motion.
20 Opp'n, ECF No. 35.

21 A. Standing

22 Standing is a "threshold question" in "determining the power
23 of the court to entertain the suit." Warth v. Seldin, 422 U.S.
24 490, 498 (1975). To establish standing, a "plaintiff must have
25 (1) suffered an injury in fact, (2) that is fairly traceable to
26

27 ¹ This motion was determined to be suitable for decision without
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was
scheduled for March 23, 2021.

1 the challenged conduct of the defendant, and (3) that is likely
2 to be redressed by a favorable judicial decision.” Spokeo, Inc.
3 v. Robins, 136 S. Ct. 1540, 1547 (2016), as revised (May 24,
4 2016). Insofar as the injury in fact is concerned, Plaintiff
5 must show it suffered “an invasion of a legally protected
6 interest” that is “concrete and particularized” and “actual or
7 imminent, not conjectural or hypothetical.” Lujan v. Defs. of
8 Wildlife, 504 U.S. 555, 560-61 (1992). The injury-in-fact test
9 “requires that the party seeking review be himself among the
10 injured.” Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

11 This time around, Plaintiff focuses on the fact that non-
12 party San Joaquin County has not issued Plaintiff a sign permit.
13 FAC ¶¶ 51-53. Plaintiff alleges the County has not issued it a
14 sign permit because CalTrans has not issued it an outdoor
15 advertising permit. FAC ¶ 54. However, as before, Plaintiff
16 never applied for a permit with CalTrans. Thus: “Plaintiff was
17 never denied a permit. Which means Plaintiff was never told the
18 reason for the denial, nor given the opportunity to appeal it.
19 This also means that Plaintiff does not know whether the appeal
20 would have been successful or whether it would have resulted in
21 civil penalties.” Order JOP at 7. Plaintiff’s inability to
22 obtain a permit from San Joaquin County is not connected to any
23 action taken by CalTrans. It is only traceable to Plaintiff’s
24 inaction.

25 That CalTrans requires written evidence from Plaintiff that
26 San Joaquin County consents to the billboard as part of its
27 permit application does not prevent Plaintiff from applying for
28 an outdoor advertising permit from CalTrans. See Opp’n at 13;

1 FAC ¶¶ 56, 59. That San Joaquin County will not provide written
2 evidence unless Plaintiff first obtains approval for the
3 billboard from CalTrans raises a potential issue with San Joaquin
4 County's permitting process, not CalTran's. As Defendant notes,
5 Plaintiff does not cite any authority that stands for the
6 proposition that San Joaquin County's failure to issue a permit
7 under its own sign ordinance gives Plaintiff standing to
8 challenge the OAA—an entirely different set of regulations.
9 Reply at 2, ECF No. 38. As a result, the factual allegations in
10 the FAC are not fairly traceable to Defendant. See Spokeo, 136
11 S. Ct. at 1547 (the injury must be fairly traceable to the
12 challenged conduct of the defendant).

13 Plaintiff's argument that its speech is chilled "because
14 there is no time period by which [CalTrans] must grant or deny a
15 permit application" has no teeth. Opp'n at 13. Pursuant to the
16 OAA, CalTrans "shall, within 10 days after compliance and upon
17 payment by the applicant of the fee provided by this chapter,
18 issue a permit" Cal. Bus. & Prof. C. § 5358. And
19 Plaintiff's reliance on Desert Outdoor Advertising Inc. v. City
20 of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) is misplaced.
21 There, the city brought an enforcement action against the
22 plaintiff and compelled the plaintiff to remove its signs. Id.
23 at 818. As a result, the plaintiff had standing to challenge the
24 city's sign ordinance. Id. Here, CalTrans has not initiated any
25 sort of enforcement action against Plaintiff.

26 Advertising companies like Plaintiff's do not have standing
27 to challenge the provisions of a sign ordinance that have not
28 been invoked against it. Get Outdoors II, LLC. v. City of San

1 Diego, 506 F. 3d 886, 892 (9th Cir. 2007). No provision of the
2 OAA has been invoked against Plaintiff because Plaintiff has not
3 sought a permit with CalTrans. Plaintiff has not alleged an
4 invasion of a legally protected interest that is either concrete
5 and particularized or actual and imminent. See Lujan, 504 U.S.,
6 at 560-61. Considering Plaintiff's FAC suffers from the same
7 defects as Plaintiff's original complaint, the Court dismisses
8 Plaintiff's FAC with prejudice. See Deveraturda v. Globe
9 Aviation Sec. Servs., 454 F.3d 1043, 1049 (9th Cir. 2006) (courts
10 need not grant leave to amend where amendment would be futile).

11 B. Sanctions

12 Plaintiff exceeded the Court's 15-page limit on opposition
13 memoranda. See Opp'n; see also Order re Filing Requirements
14 (Order), ECF No. 3-2. Violations of the Court's standing order
15 require the offending counsel (not the client) to pay \$50.00 per
16 page over the page limit to the Clerk of the Court. Order at 1.
17 Moreover, the Court will not consider arguments made past the
18 page limit. Id. In total, Plaintiff's opposition memorandum
19 exceeded the Court's page limit by 8.5 pages. Plaintiff's
20 counsel must therefore send a check payable to the Clerk for the
21 Eastern District of California for \$425.00 no later than seven
22 days from the date of this order.

23
24 II. ORDER

25 For the reasons set forth above, Defendant's Motion to
26 Dismiss is GRANTED WITHOUT LEAVE TO AMEND. Plaintiff lacks
27 standing to pursue its claims. Because Plaintiff lacks standing,
28 this Court need not address whether Plaintiff's claims are ripe

1 or whether Plaintiff adequately stated a claim under Rule
2 12(b)(6). Fleck & Assocs., Inc. v. City of Phoenix, 471 F.3d
3 1100, 1102 (9th Cir. 2006) ("Because [the plaintiff] lacked
4 standing . . . the district court lacked subject matter
5 jurisdiction and should have dismissed the complaint on that
6 ground alone.").

7 IT IS SO ORDERED.

8 Dated: April 26, 2021

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11 JOHN A. MENDEZ,
12 UNITED STATES DISTRICT JUDGE
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