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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AMERICAN FINANCIAL SERVICES ASSOCIATION & NEVADA CREDIT UNION LEAGUE & NEVADA BANKERS ASSOCIATION, Plaintiff(s), vs. MARY YOUNG, in her official capacity as Commissioner of the Financial Institutions Division of the Nevada Department of Business and Industry, AARON D. FORD, in his official capacity as Nevada Attorney General, Defendant(s).	Case No. 2:19-cv-01708-APG-EJY **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendants, Sandy O'Laughlin and Attorney General Aaron D. Ford, in their official capacities, by and through their counsel, move to dismiss Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This Court should dismiss Plaintiffs' first amended complaint. To avoid the dismissal their first amended complaint deserves, Plaintiffs speculate at paragraphs 29-33 that a parade of horribles may befall their members in the future without pleading facts

demonstrating plausibility, let alone that plaintiffs' members face an imminent threat that those speculative happenings may actually occur. Plaintiffs have done nothing to avoid the application of the bedrock principle of law an Article III case or controversy cannot solely rest on the existence of a proscriptive statute. Dismissal is warranted.

II. Background

A. Plaintiffs' original complaint and motion for preliminary injunction

Plaintiffs filed their original complaint on October 1, 2019. ECF No. 1. Plaintiffs filed suit the day Nevada Senate Bill 311 took effect. *Id*. at ¶17. Because Plaintiffs filed suit on the day the law took effect, Plaintiffs pled no facts showing threats of enforcement, investigations, receipt of orders to show cause demanding compliance, or customer requests to their members. Plaintiffs speculated that the mere existence of Section 3 of SB 311 required their members to violate customer privacy. *Id*. at ¶¶23 and 25. Plaintiffs opined that SB 311 was unwise policy because it would be unworkable in practice. *Id*. at ¶24.

Plaintiffs then moved for preliminary injunctive relief on October 8. ECF No. 7. Plaintiffs speculated about a number of putative harms that may occur in the future. They wrote that they would be forced to comply with a state law that they believed violated federal law. *Id*. at 10:16-17. Plaintiffs raised the individual privacy rights of consumers without explaining how Plaintiffs would have a right to initiative suit on their behalf. Id. at 10:22-25. Finally, Plaintiffs argued they would be branded "perpetrators of marital discrimination" if Section 3 of SB 311 went into effect. *Id*. at 11:3-4.

B. Plaintiffs in their first amended complaint assert new, but equally speculative, future harms to try to create a case or controversy where none exists

Plaintiffs sought more time to file their amended complaint. ECF No. 31. Plaintiffs stated reason was to finish consulting with their respective members and thereafter finalize the First Amended Complaint. *Id*. at 1:9-10. Presumably, those discussions would have led to concrete facts demonstrating an actual or imminent injury from Section 3 of SB 311, which had been in effect since October 1, 2019.

Plaintiffs filed their first amended complaint on February 20, 2020. ECF No. 33. Rather than actually plead concrete facts, Plaintiffs alleged the following, which may occur in the future.

1. Data furnishing agreements

Plaintiffs assert that their members are parties to data furnishing agreements. *Id.* at ¶29. Plaintiffs allege those agreements require their members to "refrain from pulling credit information without having permissible purposes to do so." *Id.* Notably absent, is any factual pleading that says that such a request has actually occurred, which Plaintiffs' members have refused. *Id.* Moreover, Plaintiffs do not allege that because of Section 3 of SB 311 they are in breach of data furnishing agreements. *Id.*

2. Existing loan securitization agreements

Plaintiffs then assert that Section 3 of SB 311 may interfere with Plaintiffs' members' ability to perform under pooling and servicing agreements. *Id.* at ¶30. Plaintiffs assert their members are parties to these agreements, which contain a warranty that Plaintiffs' members will continue to comply with federal law. *Id.* Again, notably absent from Plaintiffs' allegation is concrete facts indicating that the bondholders whom Plaintiffs fear have actually asserted that plaintiffs' members are in breach due to Section 3 of SB 311's passage. *Id.*

3. Business licenses

Plaintiffs then allege that their members have various licenses from various jurisdictions. *Id.* at ¶31. Plaintiffs vaguely allege that they must report their compliance with state and federal law. *Id.* Plaintiffs do not allege that any officer in charge of those various jurisdictions has in fact taken disciplinary action against them or even threatened to do so based on SB 311's passage. *Id.*

4. CFPB examination

Plaintiffs allege that their members may run afoul of the Consumer Financial Protection Bureau. *Id.* at ¶32. Plaintiffs allege in opaque fashion that their members are "significantly more likely to fail an exam by the CFPB. *Id.* Plaintiffs do not allege that

this has actually occurred or that the CFPB has even mentioned Section 3 of SB 311 to Plaintiffs' members, let alone threatened them with the failure of a CFPB exam. *Id.*

5. Comptroller of the Currency Consumer Compliance Handbook

Finally, Plaintiffs allege that the Comptroller of the Currency has a handbook that teaches them to comply with "*all* applicable laws and regulations." *Id.* at ¶33 (italics in original). This allegation appears to suggest that Plaintiffs' members are in danger of being viewed as scofflaws and legal risks as a result of SB 311. *Id.* Plaintiffs pled no facts to support their conclusory allegation such as an actual legal threat or an actual reputational harm. *Id.*

6. Plaintiffs use Attorney General Ford's defense of complaint that this Court dismissed as a reason to allege another baseless suit against him

Plaintiffs allege that "[i]f Plaintiffs' Members have not already violated [Section 3 of SB 311], they will necessarily do so in the immediate future." *Id.* at ¶35. Because Plaintiffs have absolutely zero facts to support their conclusory allegation, Plaintiffs allege that the Attorney General successful defense against Plaintiffs' original complaint and motion for preliminary injunction to justify suing him again:

> …[T]he defendants opposed Plaintiffs' motion for preliminary injunction that would have enjoined enforcement of SB 311, thereby further demonstrating that defendants actually intended to enforce the statute.

Id. at ¶38. *Worse still*, General Ford declined to allow Plaintiffs to play Attorney General for a day and accept Plaintiffs' demand to unilaterally stay enforcement of Section 3 of SB 311. *Id.* at ¶39. Plaintiffs' remaining allegations are regurgitations of conclusory allegations of speculative injuries that this Court has already rejected. *Id.* at ¶36 and 40-41.

III. Legal standards

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for dismissal for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A jurisdictional attack pursuant to Rule 12(b)(1) may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes 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). In a facial attack on subject matter jurisdiction, the court assumes the factual allegations of the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009).

III. Legal argument

A. A sharp disagreement over a law is not a case or controversy

This Court can only hear "cases and controversies" under Article III. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993). A case is ripe for adjudication only if it presents "issues that are 'definite and concrete, not hypothetical or abstract.'" *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (quoting *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d. 1144, 1153 (9th Cir. 2017)). To be sure, the difference between an abstract question and a "case or controversy" is one of degree. *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). But, accepting Plaintiffs' construction of a case or controversy would unmoor that phrase from its legal meaning.

Plaintiffs' first amended complaint, like its original complaint that Plaintiffs filed on the day Section 3 of SB 311 became effective, is not ripe. In considering the ripeness doctrine in pre-enforcement cases, the court asks whether there is a "credible threat," or an "actual and well- founded fear" that enforcement action would be taken against the plaintiff. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Virginia v. American Booksellers Assn. Inc.,* 484 U.S. 383, 393 (1988). Over four months after Section 3 of SB 311 became law, nothing has changed to provide support for the conclusory allegations this Court already rejected.

Plaintiffs do not allege facts supporting a well-founded fear of an enforcement action. Plaintiffs do not allege that their members have received a single inquiry regarding Section 3 of SB 311. Plaintiffs do not allege single request from a consumer or threat of suit to enforce Section 3 of SB 311. Plaintiffs do not allege that there is a history of administrative enforcement. Plaintiffs do not allege that the FID has ever indicated it will enforce Section 3 of SB 311 against their members. Plaintiffs do not indicate the FID is conducting an

investigation under Section 3 of their members. Plaintiffs have not received an order to show cause threatening administrative enforcement. Plaintiffs do not indicate that General Ford has indicated he will enforce Section 3. Over four months after Section 3 of SB 311 became law, nothing has changed.

At most, Plaintiffs have demonstrated a strong disagreement with Section 3 of SB 311. That is not enough to establish a case or controversy. Plaintiffs pled no facts demonstrating that an enforcement action of any kind has occurred or is certainly impending and poses an imminent threat, so as to establish ripeness. "It is axiomatic that differing views of the law are not enough to satisfy Article III." *Shell Gulf of Mex. Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle] III's requirements." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

Plaintiffs' new allegations cannot save its amended complaint from dismissal. The putative injuries they allege at paragraphs 29-32 are hypothetical, conjectural, and speculative. They do not show a controversy of "sufficient immediacy and reality" to deserve a declaratory judgment from this Court. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Plaintiffs do not allege that any bond holder has asserted that Plaintiffs' members were actually in breach of a loan securitization agreement, let alone filed suit to assert such a breach. Plaintiffs do not allege that any licensing authority, or the CFPB has threatened any action against Plaintiffs' members. Finally, Plaintiffs' conclusory allegations about "increased legal and reputational risks" do not pass muster. However, "general averments" and "conclusory allegations" will not suffice to show injury in fact. *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888 (1990).

This Court should also dismiss Plaintiffs' suit after evaluating the prudential ripeness factors. To evaluate the prudential component of ripeness, we weigh two considerations: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). "'A

claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir.1999), quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989). "'To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009), quoting *US West Commc'ns*, 193 F.3d at 1118.

This Court should refuse Plaintiffs' invitation to prematurely rule on the constitutionality of Section 3 of SB 311. Its meaning has not been finalized. Months have gone by since the law became effective. Plaintiffs do not allege that they have received one request from a consumer under the law. Plaintiffs do not allege that they are the subject of any actual enforcement action or even the threat of one. Plaintiffs have not articulated actual hardships with specific facts. In *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, (1952), the Supreme Court stated that "the declaratory judgment procedure will not be used to preempt and prejudice issues that are committed for initial decision to an administrative body." *Id.* at 246, 73 S.Ct. 236. This Court should not deny the Division of any ability to administer Section 3 of SB 311.

B. Attorney General Ford is not a proper party to this suit

General Ford is not a proper party. "Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Long v. Van de Kamp,* 961 F.2d 151, 152 (9th Cir.1992). General Ford's laudable efforts to combat discrimination generally have no nexus to Section 3 specifically. Plaintiffs never point to factual allegations where General Ford has indicated he intends to bring any action under Section 3 against them or their members. General Ford's successful efforts to beat back Plaintiffs improper original complaint do not count as facts showing that a genuine indication that he intends to use his supervisory powers against Plaintiffs' interests.

/ / /

III. Conclusion

For these reasons, dismissal is warranted.

Dated: March 24, 2020.

AARON FORD
Attorney General

By: /s/ VIVIENNE RAKOWSKY
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on March 24, 2020, I filed the foregoing document via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically.

/s/ Michele Caro
An employee of the office of the
Nevada Attorney General