

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO
COMPANY, et al,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity
as Attorney General of California; and
SUMMER STEPHAN, in her official
capacity as District Attorney for the
County of San Diego,

Defendants.

Case No.: 22-cv-01755-CAB-WVG

**ORDER GRANTING MOTION TO
DISMISS**

[Doc. Nos. 31, 32]

This matter is before the Court on Defendants’ motion to dismiss [Doc. No. 31].¹
The motion has been fully briefed, and oral argument was held on March 14, 2023. For the
reasons set forth below, the motion is **GRANTED**.

I. BACKGROUND

In November 2022, California voters approved Senate Bill 793 (“S.B. 793”), a bill
prohibiting the retail sale of “flavored tobacco products” within the State of California.

¹ Defendant Summer Stephan filed a motion for joinder [Doc. No. 32] in Defendant Attorney General Bonta’s motion to dismiss. The ruling on this motion to dismiss applies to both Defendants.

1 S.B. 793 as codified states that “a tobacco retailer, or any of the tobacco retailer’s agents
 2 or employees, shall not sell, offer for sale, or possess with intent to sell or offer for sale, a
 3 flavored tobacco product or a tobacco product flavored enhancer.” Cal. Health & Safety
 4 Code § 104559.5(b)(1). As mentioned in the Complaint, “the original motivation for
 5 California’s ban on flavored tobacco products was to prevent youth usage of tobacco
 6 products.” [Doc. No. 1 at ¶ 24]. The California legislature engaged in several deliberations
 7 prior to writing the final bill, considering statistics about youth usage of flavored tobacco
 8 products and evidence related to the deaths and harms caused by the sustained use of
 9 tobacco. [Doc. No. 31 at 12].

10 On November 9, 2022, immediately following the November 2022 election,
 11 Plaintiffs brought this lawsuit against Defendants Attorney General Robert Bonta and San
 12 Diego County District Attorney Summer Stephan. The Complaint alleges that S.B. 793
 13 (1) is preempted by the Smoking Prevention and Tobacco Control Act, (“TCA”) Pub. L.
 14 No. 111-31, 123 Stat. 1776 (2009) and (2) violates the dormant Commerce Clause.² The
 15 Ninth Circuit’s decision in *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th
 16 542 (9th Cir. 2022), *cert. denied sub nom., R.J. Reynolds Tobacco Co. v. County of Los*
 17 *Angeles, CA*, No. 22-338, 2023 WL 2227660 (U.S. Feb. 27, 2023), bars the Preemption
 18 claim. Thus, the only question for this Court to consider is whether Plaintiffs have
 19 sufficiently stated a claim under the dormant Commerce Clause.

20 II. STANDARD FOR REVIEW

21 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense
 22 that the complaint “fail[s] to state a claim upon which relief can be granted”—generally
 23 referred to as a motion to dismiss. The Court evaluates whether a complaint states a
 24 recognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure
 25

26
 27 ² Plaintiffs also filed a motion for preliminary injunction and injunction pending appeal [Doc. No. 13]
 28 pertaining to their Preemption claim. This Court denied that motion, and the denial was later affirmed by
 the Ninth Circuit. [Doc. No. 37].

1 8(a)(2), which requires a “short and plain statement of the claim showing that the pleader
 2 is entitled to relief.” Although Rule 8 “does not require ‘detailed factual allegations,’ . . . it
 3 [does] demand . . . more than an unadorned, the defendant-unlawfully-harmed-me
 4 accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
 5 *Twombly*, 550 U.S. 544, 555 (2007)).

6 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
 7 accepted as true, to ‘state a claim of relief that is plausible on its face.’” *Id.* (quoting
 8 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
 9 when the collective facts pled “allow . . . the court to draw the reasonable inference that
 10 the defendant is liable for the misconduct alleged.” *Id.* There must be “more than a sheer
 11 possibility that a defendant has acted unlawfully.” *Id.* Facts “merely consistent with a
 12 defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*,
 13 550 U.S. at 557). The Court need not accept as true “legal conclusions” contained in the
 14 complaint, *id.*, or other “allegations that are merely conclusory, unwarranted deductions of
 15 fact, or unreasonable inferences,” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998
 16 (9th Cir. 2010).

17 **III. DISCUSSION**

18 Defendants argue S.B. 793 does not violate the dormant Commerce Clause because
 19 it does not directly regulate out-of-state commerce, favor in-state businesses, or impose
 20 excessive burdens on out-of-state commerce. Plaintiffs argue S.B. 793 violates the dormant
 21 Commerce Clause because it attempts to control the actions of out-of-state manufacturers.
 22 Plaintiffs fail to state a claim.

23 **A. Dormant Commerce Clause**

24 The Commerce Clause grants Congress the power to “regulate Commerce with
 25 foreign Nations, and among the several States, and with Indian tribes.” U.S. Const. art. I,
 26 § 8, cl. 3. The Clause “has long been understood to have a ‘negative’ aspect that denies the
 27 States the power unjustifiably to discriminate against or burden the interstate flow of
 28 articles of commerce.” *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*,

1 511 U.S. 93, 98 (1994). This “dormant” Commerce Clause is “driven by concern about
 2 ‘economic protectionism—that is, regulatory measures designed to benefit in-state
 3 economic interests, by burdening out-of-state competitors.’” *Dep’t of Revenue of Ky. v.*
 4 *Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S.
 5 268, 273-74 (1998)).

6 The dormant Commerce Clause is violated if a state regulation discriminates against
 7 interstate commerce. “If a statute discriminates against out-of-state entities on its face, in
 8 its purpose, or in its practical effect, it is unconstitutional unless ‘it serves a legitimate local
 9 purpose, and this purpose could not be served as well by available nondiscriminatory
 10 means.’” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013)
 11 (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). The dormant Commerce Clause also
 12 bars states from discriminating against out-of-state entities by “directly control[ing]
 13 commerce occurring wholly outside the boundaries of a State,” also known as the
 14 extraterritoriality doctrine. *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989). Finally, if a
 15 state regulation is not discriminatory, it should be upheld, “unless the burden imposed on
 16 [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v.*
 17 *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

18 **1. S.B. 793 Does Not Discriminate Against Out-Of-State** 19 **Commerce**

20 A statute is not “invalid merely because it affects in some way the flow of commerce
 21 between the states.” *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). A
 22 statute that “treat[s] all private companies exactly the same” does not discriminate against
 23 interstate commerce. *See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste*
 24 *Mgmt. Auth.*, 550 U.S. 330, 342 (2007). The Ninth Circuit has further found that a state
 25 law ban that treats all entities the same and prohibits an item regardless of its origin is not
 26 discriminatory. *See Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1146 (9th
 27 Cir. 2015) (finding a law banning the possession and sale of shark fins in California was
 28 not discriminatory where out-of-state shark fins would not be able to be sold in California);

1 *See also Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 948
 2 (9th Cir. 2013) (finding a law banning the sale of a product that was “the result of force
 3 feeding birds” was not discriminatory when the ban applied to both intrastate and interstate
 4 products).

5 Plaintiffs have not alleged facts sufficient to demonstrate that S.B. 793 is
 6 discriminatory on its face, in its purpose, or in its practical effects. The text of S.B. 793
 7 does not expressly discriminate against out-of-state entities, as it only regulates the actions
 8 of retailers in California. *See* Cal. Health & Safety Code § 104559.5. Additionally, the
 9 purpose of S.B. 793 was to promote the health and safety of California residents, not
 10 discriminate against out-of-state entities.

11 Plaintiffs’ opposition argues that the practical effects of S.B. 793 “fall almost
 12 entirely on out-of-state entities” because the majority of flavored tobacco products are
 13 manufactured outside of California. [Doc. No. 34 at 5]. Specifically, Plaintiffs argue that
 14 S.B. 793 “tells out-of-state tobacco manufacturers that they may not add characterizing
 15 flavors to their tobacco products before distributing them for retail sale in one of the
 16 Nation’s largest markets.” [Doc. No. 34 at 5]. There is no such assertion in the language of
 17 S.B. 793. Manufacturers are only mentioned in S.B. 793 in reference to how retailers are
 18 to determine whether a product constitutes a prohibited flavored tobacco product. *See* §
 19 104559.5. Furthermore, the only discrimination alleged in the Complaint is that out-of-
 20 state Plaintiffs are harmed because the ban “severely restricts their ability to market and
 21 sell such products to customers in California.” [Doc. No. 1 at ¶ 52]. The Complaint does
 22 not assert that S.B. 793 attempts to treat any out-of-state entities differently from in-state
 23 entities. All manufacturers, regardless of geographic location, are now potentially
 24 restricted in the marketability and sale of flavored tobacco products. For these reasons, the
 25 Court does not find that S.B. 793 discriminates against out-of-state entities.

26 **2. S.B. 793 Does Not Violate the Extraterritoriality Doctrine**

27 A statute that “controls commerce occurring wholly outside the boundaries of a State
 28 exceeds the inherent limits of the enacting State’s authority and is invalid regardless of

whether the statute’s extraterritorial reach was intended by the legislature.” *Healy*, 491 U.S. at 336. However, the extraterritoriality doctrine as applied in *Healy* extends only to price-fixing statutes. *See Ass’n des Eleveurs de Canards et d’Oies du Quebec*, 729 F.3d at 951 (finding *Healy* inapplicable where the state statute did not impose any prices for the banned products and did not tie in-state prices to out-of-state prices). Furthermore, even if a statute has “significant extraterritorial effects,” it does not violate the dormant Commerce Clause “when those effects result from the regulation of in-state conduct.” *Chinatown Neighborhood Ass’n*, 794 F.3d at 1145.

Plaintiffs argue that S.B. 793 violates the extraterritoriality doctrine because its practical effects fall solely on out-of-state entities. In oral argument, Plaintiffs cited *Healy* as a basis for its extraterritoriality argument, but *Healy* is inapplicable. S.B. 793 is not a price-fixing statute, as it does not impose any prices for flavored tobacco products or relate California prices to out-of-state prices for these products. Additionally, any significant extraterritorial effects of S.B. 793 would result from the regulation of conduct occurring only in California. S.B. 793 solely controls the actions of retailers located within California by preventing them from selling flavored tobacco products. S.B. 793 does not control the retail sales of these products in other states, nor does it control the ability of manufacturers in or outside of California to continue manufacturing flavored tobacco products. In fact, manufacturers are still permitted to manufacture flavored tobacco products in California.

Accordingly, the Court does not find that the extraterritoriality doctrine is implicated by S.B. 793, and Plaintiffs have not established that S.B. 793 is discriminatory on its face, in its purpose, or in its practical effect.

3. S.B. 793 Does Not Unduly Burden Out-of-State Entities

A nondiscriminatory state law may still be invalidated under the dormant Commerce Clause if it substantially burdens interstate commerce. *Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 528 (9th Cir. 2009). “A Plaintiff must first show that the statute imposes a substantial burden before the Court will determine if the benefits of the challenged law are illusory.” *Ass’n des Eleveurs de Canards et d’Oies*

1 *du Quebec*, 729 F.3d at 951-52. Most statutes that impose a burden on interstate commerce
2 do so because they are discriminatory. *Id.*

3 Plaintiffs make the conclusory allegation that the “ban imposes burdens on out of
4 state commerce,” [Doc. No. 1 at ¶ 66], but they do not allege facts supporting this
5 conclusion. In their opposition, Plaintiffs argue that out-of-state commerce is burdened by
6 forcing out-of-state manufacturers to change their operations, with costs of “tens of billions
7 of dollars.” [Doc. No. 34 at 13]. Even if the Court were to accept that S.B. 793 would cause
8 financial loss to the tobacco industry, that burden alone is not excessive enough for the
9 Court to find that the ban substantially burdens interstate commerce. *See Nat’l Ass’n of*
10 *Optometrists*, 567 F.3d at 528 (declining to find a dormant Commerce Clause violation
11 where the only burden identified was plaintiffs’ financial losses).

12 Plaintiffs’ argument that S.B. 793 unconstitutionally undermines the requirement for
13 national uniform standards in the production of flavored tobacco products is unpersuasive.
14 S.B. 793 does not impose any standard of manufacturing on tobacco products. It does not
15 require manufacturers to grow or process their products in any particular manner that
16 departs from any national uniform standard. Plaintiffs have not demonstrated how S.B.
17 793’s prohibition of the retail sale of flavored tobacco products within the State of
18 California requires out-of-state manufacturers to change or depart in any way from
19 nationally uniform standards of production of such products.

20 S.B. 793 does not set standards of manufacture or marketing contrary to federal
21 national standards, it is California’s decision to opt out of the market for those flavored
22 tobacco products. The TCA expressly preserved to state authority the right to place
23 restrictions on the retail sale of a tobacco product, including its sale altogether. *See Cnty.*
24 *of Los Angeles*, 29 F.4th at 555 (“Congress allowed the federal government to set the
25 standards regarding how a product would be manufactured and marketed, but has left
26 states, localities, and tribal entities the ability to restrict or opt out of that market
27 altogether.”). S.B. 793 does not unconstitutionally violate federal regulation of tobacco
28 product manufacture.

1 Plaintiffs' argument, citing *Schollenberger v. Pennsylvania*, 171 U.S. 1, 25 (1898),
 2 that a state law that bans within its state the sale of federal taxed products is invalid is also
 3 not persuasive. Under the TCA provisions, Congress allows states to place restrictions,
 4 including bans, on the retail sale of federally taxed tobacco products within a state.
 5 California is not bound to furnish a market for flavored tobacco products even if by opting
 6 out of that market it lessens the revenue of the general government. *See Austin v.*
 7 *Tennessee*, 179 U.S. 343, 349, (1900) (affirming a Tennessee law making it a misdemeanor
 8 to sell cigarettes in Tennessee).

9 For these reasons, the Court does not find that an undue burden has been imposed
 10 by S.B. 793.³

11 **B. Leave to Amend**

12 Plaintiffs ask the Court to grant leave to amend or stay this case until the Supreme
 13 Court issues a decision in *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir.
 14 2021). Leave to amend may be denied "if the proposed amendment either lacks merit or
 15 would not serve any purpose because to grant it would be futile in saving the plaintiff's
 16 suit." *Chinatown Neighborhood Ass'n*, 794 F.3d at 1144. The Court finds that any future
 17 amendment would be futile. The Court also declines to stay this case pending the decision
 18 in *National Pork*.

19 **IV. CONCLUSION**

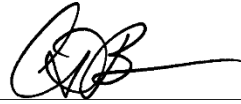
20 Because Plaintiffs' first claim of Preemption is barred by the Ninth Circuit's decision
 21 in *County of Los Angeles*, Plaintiffs' Preemption claim (Count One) is **DISMISSED as**
 22 **moot**. Because S.B. 793 does not discriminate against or impose an undue burden on
 23 interstate commerce, the Court finds that the Complaint has not stated a claim under the
 24

25
 26
 27 ³ Because S.B. 793 is not discriminatory and does not impose a significant burden on interstate
 28 commerce, the Court need not assess the benefits of the law and the availability of less-burdensome
 alternatives. *See Chinatown Neighborhood Ass'n*, 76 F.3d at 1147.

1 dormant Commerce Clause. Accordingly, Plaintiffs' dormant Commerce Clause claim
2 (Count Two) is **hereby DISMISSED with prejudice.**

3 It is **SO ORDERED.**

4
5 Dated: March 15, 2023



Hon. Cathy Ann Bencivengo
United States District Judge