IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

PLANT-BASED FOODS ASSOCIATION and TURTLE ISLAND FOODS SPC, *Plaintiffs,* v. KEVIN STITT, *in his official capacity*; and BLAYNE ARTHUR, *in her official capacity*, *Defendants.*	No. 20-cv-0938-F

DEFENDANTS' MOTION TO DISMISS PLAINTIFF, PLANT-BASED FOODS ASSOCIATION

Defendants respectfully move this Court for an order dismissing Plant-Based Foods Association ("PBFA") as a plaintiff for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) and for failure to establish a case and controversy under Article III, Section 2 of the United States Constitution. In the alternative, Defendants move this Court for an order compelling PBFA to cooperate in discovery as explained in Defendant Blayne Arthur's Conditional Motion to Compel, filed contemporaneously herewith.

PBFA, an organizational plaintiff, brought this lawsuit on behalf of its members, who PBFA alleged are injured by the Oklahoma Meat Consumer Protection Act ("Oklahoma Act"). Yet, PBFA denies it has an organizational injury, has failed to provide any evidence of its members' alleged injuries, and *refuses* to provide any evidence on behalf of its members not within its direct custody or control. Accordingly, PBFA lacks standing, and it should either be dismissed as a party under this motion or compelled to cooperate under the companion motion. Unless PBFA is either dismissed or compelled to cooperate in discovery, it will waste Defendants' resources with vague allegations of injury that it refuses to prove.

BACKGROUND

1. On November 1, 2020, H.B. 3806, also known as the Oklahoma Meat Consumer Protection Act, became effective. *See* Okla. Enr. H.B. No. 3806 (Reg. Sess. 2020); *see also* OKLA. STAT. tit. 2, § 5-107.

2. On September 16, 2020, Plaintiffs filed this lawsuit challenging the constitutionality of the Oklahoma Act, Doc. 1, and on November 9, 2021, Plaintiffs filed their Amended Complaint for Declaratory and Injunctive Relief, Doc. 59.

3. Plaintiff PBFA "is a nonprofit trade association that represents the leading manufacturers and sellers of 100% plant-based foods, including plant-based meat producers." Doc. 59 at ¶ 14.

4. PBFA brought its suit on behalf of its members, who PBFA alleges "are directly and financially harmed by the Act[,]"*id.* at ¶ 72, bear an allegedly "astronomical" burden to comply with the Act, *id.* at ¶ 70, and are "required to make significant changes to their marketing and packaging in order to attempt to comply with the Act[,]" *id.* ¶ 103; *see also id.* at ¶¶ 6, 11, 64, 73, 81, 96 (describing alleged injuries to PBFA members).

5. Thus, PBFA seeks declaratory judgment and injunctive relief "preventing the enforcement of the Act, both on its face and as applied to . . . PBFA's members . . . ." *Id.* at pp. 35-36.

6. One of PBFA's members, Turtle Island Foods SPC d/b/a the Tofurky Company ("Tofurky"), is a named Plaintiff in the suit and seeks the same relief as PBFA. *See, e.g., id.* ¶¶ 6, 11, 24, pp. 35-36.

7. In response to written discovery requests related to the application of the Oklahoma Act to PBFA's members, PBFA responded with the following:

- "As a membership organization, PBFA itself is not subject to federal labeling laws as it does not produce any food products." PBFA's Resp. to Defs.' First Disc. Reqs., attached as Ex. 1, at 6
- "PBFA is a member-based organization; it does not produce any products, including plant-based meat products. As such, labeling laws are inapplicable to the organization." *Id.* at 10
- "PBFA is a member-based organization; it does not produce any products, including plant-based meat products. As such, labeling laws are inapplicable to the organization." *Id.* at 12.

8. PBFA likewise refused to supply any responsive information on behalf of its members not within PBFA's direct custody or control, making variations of the following blanket objections:

> [A]nswering as to the private, internal, confidential, and business operations of an excess of these 165 member companies is unduly burdensome and not relevant to the claims or defenses in this case, and is beyond PBFA's possession, custody, or control.

Id. at 5-6; *see also, e.g., id.* at 2, 4, 6-10, 12, 15, 21-24. PBFA noted in some responses that it "is not privy to the communications of its hundreds of member companies . . . ." *Id.* at 6.

9. Following a meet-and-confer between counsel on PBFA's deficient discovery responses, PBFA's counsel confirmed that PBFA refuses to conduct a reasonable inquiry of its members for discoverable information or supply any discoverable information on behalf of its members in discovery. PBFA's counsel explained:

> PBFA's discovery obligations extend to documents and information in their possession, custody, or control. This does not constitute documents or information solely in the possession, custody, or control of PBFA's private member companies.

Letter from Howell to Weaver (Sept. 7, 2022), attached as Ex. 2, at 1.

10. Plaintiffs describe in the First Amended Complaint: "[n]otably, neither the FDA, the FTC, the Oklahoma state Attorney General's office, or any consumer-led lawsuits have ever opted to take enforcement action against a plant-based meat product …." Doc. 59 at ¶ 82; *see also id.* at ¶ 30, 42, 44, 47.

11. Defendants confirmed in written discovery responses that "[t]here have been no enforcement actions concerning deceptive labeling or marketing of PB or CC Meat Products under the Act." Defs.' Resp. to Pls.' First Set of Interrogatories, attached as Ex. 3 at 6.

12. Plaintiffs likewise admit they have "no direct or indirect knowledge of any efforts, actions, or attempts by any Oklahoma state official to enforce or prosecute the Oklahoma Act against [its] Members." Ex. 1 at 45; *see also* Tofurky's Resp. to Defs.' First Disc. Reqs., attached as Ex. 4, at 46.

ARGUMENT AND AUTHORITIES

Article III limits federal court jurisdiction to actual cases and controversies. *See* U.S. CONST. art. III, § 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). One of the three doctrines within the case-and-controversy requirement is standing. *See Brown v. Buhman*, 822 F.3d 1151, 1163 (10th Cir. 2016). To show standing, "[t]he party invoking federal jurisdiction bears the burden of establishing" an injury in fact, or "an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not "conjectural" or "hypothetical,"' . . . a causal connection between the injury and the conduct complained of[,]" and a likelihood "the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561, 560.

Importantly, "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *see also Warth v. Seldin,* 422 U.S. 490, 498 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit."); Fed. R. Civ. P. 12(h)(3). Along those lines, then, a "court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Standing "is not 'an ingenious academic exercise in the conceivable,'" but requires "a factual showing of perceptible harm." *Id.* (citation omitted).

I. PBFA LACKS AN ORGANIZATIONAL INJURY.

Here, PBFA raises no independent injuries for itself, either in the complaint or in subsequent discovery. PBFA affirmatively admits the law at issue does not apply to them. *See supra* p. 3, ¶ 7; *see also Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 549 (10th Cir. 2016) ("Absent any testimony indicating that [the organizations] intended to engage in conduct that might violate [the law], . . . plaintiffs failed to establish any of these organizations had standing to challenge [the law] in their own right."). Although PBFA may plausibly assert an organizational *interest and concern* with the Oklahoma Act, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved . . . .'" *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also Mountain States Legal Found. v. Costle*, 630 F.2d 754, 767 (10th Cir. 1980) ("There is no contention that Mountain

States will suffer loss of membership, sustain financial loss or any other impairment as a result of the actions of the EPA, whether actually taken or threatened."). Accordingly, as a matter of law, PBFA cannot establish organizational standing.

II. PBFA LACKS ASSOCIATIONAL STANDING.

When "suing on behalf of its members," an organizational plaintiff "has standing only '[1] when its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1241 (10th Cir. 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Env. Services*, 528 U.S. 167, 181 (2000)).

Furthermore, an organization cannot escape dismissal for lack of standing by indefinitely pointing to conclusory allegations in the complaint. Instead, a court should dismiss a complaint for lack of standing if the plaintiff "fail[s] to 'submit affidavits ... showing, through specific facts ... that one or more of [its] members would ... be "directly" affected' by the allegedly illegal activity." *Summers,* 555 U.S. at 498 (*quoting Lujan*, 504 U.S. at 563); *see also id.* ("[We] have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."); *Warth*, 422 U.S. at 501. ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing."). If "standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth*, 422 U.S. at 502.

PBFA fails to carry its burden of establishing associational standing because it cannot establish two of the three requisite elements: that its members otherwise have standing to sue in their own right and that the nature of the case does not require the participation of the individual affected members as plaintiffs to resolve the claims. Dismissal is therefore proper.

A. PBFA's members do not otherwise have standing to sue in their own right.

In order to establish the first element of associational standing, an organization must prove its "members satisfied 'the injury, causation, and redressability requirements derived from Article III.'" *Hickenlooper*, 823 F.3d at 550 (citation omitted); *see also* 13A Fed. Prac. & Proc. § 3531.9.5 (Wright & Miller 3d ed.) ("The standing of individual members is evaluated as if they had brought suit directly."). Simply put, PBFA has not done that and is unequivocally refusing to do that. *See supra* p. 3, ¶ 7. PBFA refuses to provide any discoverable information about any of its members' injuries. After an opportunity to engage in the discovery process and provide that evidence, PBFA has failed to produce a single document evidencing any actual or imminent injury to a single member. PBFA has provided nothing more than conclusory allegations of non-specific harm in their Complaint and the most generic of responses to written discovery. *See supra* Background. In the absence of any specific allegation of injury on behalf of even a single member, let alone a scintilla of proof to support such an allegation, PBFA cannot carry its burden of establishing associational standing.

More importantly, *no PBFA member* can establish standing in their own right as a matter of law. Although a plaintiff need not wait until an actual arrest or prosecution to challenge a suspect statute, standing only lies when a plaintiff establishes a *credible threat* of prosecution and an intent to engage in conduct prohibited under the statute. *See Nat'l Council for Improved Health*

v. Shalala, 122 F.3d 878, 884-885 (10th Cir. 1997); *Phelps v. Hamilton*, 122 F.3d 1309, 1327 (10th Cir. 1997). As the U.S. Supreme Court and Tenth Circuit explain:

> When plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court.

Shalala, 122 F.3d 878, 884 (10th Cir. 1997) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979)). In the absence of a credible threat of prosecution, a plaintiff cannot "present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 298.

Here, worse than failing to *allege* a credible threat of prosecution,[1] PBFA has been unable to come up with a single state action threatening or enforcing the Oklahoma Act against any PBFA member in the *almost two years* since the Act has been in force. PBFA confirms as much both in the complaint and in responses to discovery requests. *See* Doc. 59 at ¶ 82 ("Notably, neither the FDA, the FTC, the Oklahoma state Attorney General's office, or any consumer-led lawsuits have ever opted to take enforcement action against a plant-based meat product out of concern for consumer confusion."); Ex. 1 at 45 (admitting PBFA has "no direct or indirect knowledge of any efforts, actions, or attempts by any Oklahoma state official to enforce or prosecute the Oklahoma Act against [its] Members."); Ex. 4 at 46 (Tofurky

[1] Plaintiffs' First Amended Complaint fails to plausibly allege a credible threat of prosecution. Instead, Plaintiffs rely on conclusory statements and speculative allegations about what the Oklahoma Act "would require" (Doc. 59 at ¶¶ 64, 102), "will" require (*id.* at ¶ 103), "potentially" requires (*id.* at ¶¶ 66, 73, 87), "seemingly require[s]" (*id.* at ¶ 73), "attempts" to do (*id.* at ¶ 66), "would . . . force companies" to do (*id.* at ¶ 76), and is "unclear" about (*id.* at ¶¶ 75, 109); as well as supposed injuries, harms, or risks that "would[,]" "could[,]" "may[,]" or "likely" result from complying with the Oklahoma Act (*id.* at ¶¶ 55, 79, 81, 103-104).

admitting the same). Defendants have also confirmed the State has not initiated any enforcement actions in discovery. Ex. 3 at 4 ("At this point, no guidance has issued and no enforcement actions have occurred."); *id.* at 6 ("There have been no enforcement actions concerning deceptive labeling or marketing of PB or CC Meat Products under the Act.").

In sum, PBFA cannot present any evidence of any threatened or actual prosecution, and in the absence of any enforcement action after two years, any claim that a prosecution is possible, let alone likely, is unfounded. Nor can PBFA identify a single member who can claim a credible threat of prosecution, because no member can establish any concrete, actual and imminent injury from the Oklahoma Act. This issue matters because Plaintiff Tofurky has likewise failed support its purported injuries, and PBFA's vague assertions of unidentified injuries to unidentified members thus appear calculated to prejudice Defendants' ability to secure the just, speedy, and inexpensive resolution of this lawsuit. *See, e.g.,* Fed. R. Civ. P. 1.

Despite ample opportunity to come forward with actual evidence, neither PBFA nor Tofurky has produced a single document to support their histrionic allegations that "[p]lant-based meat producers across the country, including Tofurky and other PBFA members, would be forced to spend millions of dollars to develop Oklahoma-specific labels or abandon the Oklahoma market" as a result of the Oklahoma Act. *Id.* at ¶ 6. Quite the opposite, Tofurky admits it is still using nationwide packaging. *See* Ex. 4. at 45 (admitting Tofurky has not created one set of packaging labels for products sold only in Oklahoma).[2] The fact that Tofurky has

[2] The complaint and Tofurky's discovery responses further illustrate Tofurky appears to be perfectly capable of (and already) complying with Oklahoma and other state and federal labeling laws, with no difficulty. *See, e.g.,* Doc. 59 at ¶ 20 (describing that Tofurky products "are all prominently marketed and packaged as vegan and 100% plant-based, with labels that unmistakably convey that they are "PLANTBASED."); *id.* at ¶ 25 (explaining that "Tofurky's

not created a different set of packaging labels for Oklahoma confirms the total absence of any actual or imminent financial harm resulting from the Oklahoma Act.

Simply put, PBFA has not and cannot establish its members have standing in their own right sufficient to invoke this Court's jurisdiction. PBFA does not even attempt to establish the other named plaintiff and its member, Tofurky, has suffered any injury in fact. And even it could, PBFA certainly should not be allowed to participate as a plaintiff in this case solely to cloud the case and prejudice Defendants by making unsubstantiated allegations of other members' injuries while refusing to cooperate in discovery related to those allegations. This Court should therefore dismiss PBFA for lack of associational standing.

B. The claims asserted and the relief requested require the participation of individual members in the lawsuit.

Even if PBFA could establish one or more members had an actual and imminent injury, PBFA cannot establish that the "nature of the case does not require the participation of the individual affected members as plaintiffs to resolve the claims or prayers for relief at issue." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977) (citation omitted). This third element to associational standing is a prudential requirement "focusing on these matters of administrative convenience and efficiency . . . ." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996).

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labels and marketing materials unmistakably convey to the public that the foods are made using exclusively ingredients that do not involve animals, using prominent language like: "Made From Plants," and "plant-based," and "veggie" or "vegetarian."); *id.* at pp. 9-11 (displaying images of product packaging that appears facially consistent with the Oklahoma Act); Ex. 1 at 9-10 (describing discussions between Tofurky's marketing manager and compliance counsel about "implications of the Act . . . and necessary steps as a result of the Act.").

Here, PBFA's refusal to cooperate in meaningful discovery on behalf of its individual members is reason alone to find resolution of this case requires individual participation.[3] If PBFA has no evidence of member injury in its custody, then participation of an actual individual or individual organization affected by Oklahoma's law is necessary to resolve Plaintiffs' claims. Although Defendants contend that Plaintiffs' claims present purely legal questions that can and should be resolved by this Court, an *efficient* presentation of defenses may require Defendants to engage in examination of Plaintiffs' allegations of fact, as well narrowing of undisputed issues.

For example, even Defendants' presentation of this jurisdictional question has been aided by the discovery process, which confirmed the absence of any credible threat of prosecution and concrete or imminent injury. *See supra* pp. 8-9. Additionally, to the extent Plaintiffs' dormant commerce claim survives to *Pike* balancing, which is doubtful given Plaintiffs cannot establish competition between substantially similar in-state and out-of-state entities as a threshold matter,[4] Plaintiffs must establish the Oklahoma Act imposes a burden on interstate commerce "clearly excessive in relation to the putative local benefit." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). How PBFA could allege, let alone establish, a clearly

[3] After all, as a threshold standing matter, a plaintiff must go beyond stating that its "members" are injured and comply with the "requirement of naming the affected members" unless "all the members of the organization are affected by the challenged activity." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009). Even that PBFA has refused to do.

[4] *See, e.g.,* Doc. 59 at ¶ 39 (describing that "all" plant-based meat producers "are located outside of Oklahoma . . . ."); Ex. 4 at 14 ("Tofurky is unaware of a single plant-based meat producer based in the state of Oklahoma."); *id.* at 44-45 (admitting that the Oklahoma Act "applies in the same manner to both in-state and out-of-state plant-based meat producers if in-state plant-based meat producers exist.").

excessive burden on interstate commerce without evidence of its members injuries or individual participation of its allegedly injured members is uncertain. *See, e.g., supra* Section II(A). And how Defendants could efficiently present defenses to such vague allegations without either PBFA's evidence of injury to member or involvement of those individual members is even less clear.

After expressly disclaiming any application of the Oklahoma Act to PBFA and refusing to supply responsive information on behalf of its members, allowing PBFA's continued participation in this lawsuit would provide no meaningful or prudential benefit to this Court. Instead, PBFA's continued participation will result in excessive, unnecessary, and prejudicial burden upon Defendants and perpetual games of pre-trial hide-the-ball. *Cf.* Fed. R. Civ. P. 1.

Having no injury to itself and refusing to participate in the discovery process on behalf of its individual members, PBFA will instead point to the presence of Tofurky as a co-plaintiff to this suit. But PBFA cannot establish that the nature of the case does not require individual participation if the only affected member is individually participating. PBFA's involvement is superfluous and burdensome so long as it refuses to cooperate in discovery. Dismissal is the proper remedy in light of that refusal. In the alternative, this Court should compel PBFA to participate in discovery on behalf of its members, granting the relief sought in Defendants' Conditional Motion to Compel.

CONCLUSION

For these many reasons, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), Defendants respectfully request this Court enter an order dismissing Plaintiff Plant-Based Foods Association as a plaintiff, and for all such other and further relief as this Court deems just. In

the alternative, Defendants respectfully request this Court grant the Conditional Motion to Compel filed contemporaneously herewith.

Respectfully submitted,

s/*Audrey A. Weaver*

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