Noted for Hearing: The Hon. Jason Poydras
Feb. 14, 2025, at 10 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GRE DOWNTOWNER LLC, a Washington limited liability company, d/b/a ADDISON ON FOURTH,

Plaintiff,

v.

CITY OF SEATTLE,

Defendant.

No. 24-2-24318-6 SEA

**APPENDIX** TO PLAINTIFF GRE DOWNTOWNER LLC'S OPPOSITION TO DEFENDANT CITY OF SEATTLE'S MOTION TO DISMISS







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DATED: February 3, 2025

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## DECLARATION OF SERVICE

I, Malaika R. Thompson, declare that I am a Practice Assistant employed by the law firm Stoel Rives LLP, a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101.

On February 3, 2025, I caused a copy of the foregoing document to be served upon the following individual(s) in the manner indicated below:

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DATED this 3rd day of February at Kent, Washington.

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COLONY COVE PROPERTIES, LLC
v.
CITY OF CARSON, et al.

CV 14-3242 PSG (PJWx)
|
Filed 12/18/2014

**Attorneys and Law Firms**

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**Proceedings (In Chambers): Order GRANTING IN PART and DENYING IN PART Defendants' motion to dismiss.**

Philip S. Gutierrez, United States District Judge

***1** Before the Court is Defendant City of Carson (the "City") and Defendant City of Carson Mobilehome Park Rental Review Board's (the "Board") (together, "Defendants") motion to dismiss Plaintiff's complaint. Dkt. # 12. The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After reviewing the moving, opposing, and reply papers, the Court GRANTS IN PART and DENIES IN PART Defendants' motion.

I. Introduction

This case involves constitutional challenges to the Board's application of the City's Mobilehome Space Rent Control Ordinance (the "Ordinance"). Specifically, Plaintiff Colony Cove Properties, LLC ("Colony Cove" or "Plaintiff") alleges that the Board's decisions denying it rent increases for the amount requested on five consecutive years (from 2008 to 2012)—and, thus, forcing it to operate at a loss—constitute an as-applied Taking in violation of the Fifth Amendment of the United States. *Compl.* ¶¶ 70-73. Colony Cove seeks damages and attorneys' fees for this alleged violation. *Id.* ¶ 73.

Colony Cove brings its second cause of action under the Due Process Clause of the Fourteenth Amendment. *Id.* ¶¶ 79-80. Dissatisfied with the Board's decisions, Colony Cove sought five writs of administrative mandamus in California state courts. *See id.* ¶¶ 49-69. According to Plaintiff, California courts denied it due process under the Fourteenth Amendment because they applied a deferential standard—a substantial evidence standard—when reviewing the Board's decisions instead of exercising independent judgment as required under *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). *Id.* ¶¶ 74-80. Colony Cove requests that the Court either "engage in independent review of the administrative records for each of the petitions" and "award damages against the City on the appropriate, nonconfiscatory rent-levels set by the Court" or issue an injunction ordering the City to "permit Colony Cove to charge rents at appropriate, nonconfiscatory levels in an amount to be proved at trial." *Id.* ¶ 79. Colony Cove also claims that it is entitled to attorneys' fees for the Due Process violation.

Lastly, Colony Cove's third claim is for Declaratory Relief. *Id.* ¶¶ 81-83. Colony Cove requests a judicial declaration that the City's Ordinance, as applied to Colony Cove, is unconstitutional. *Id.* ¶¶ 82-83.

Defendants' motion to dismiss brings an array of challenges to Plaintiff's Complaint. *See generally Mot.* First, Defendants argue that all three causes of action should be dismissed for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). *See Notice of Mot.* 2:7-9. Defendants also claim that Plaintiff's takings cause of action should be dismissed to the extent that it is based on litigation of Board decisions currently pending in California state court because it is not ripe for adjudication. *Id.* 2:10-12. According to Defendants, Plaintiff's takings claim is precluded by *Res Judicata*— in its entirety—and

  

*Collateral Estoppel*— as to certain elements—to the extent that it is based on challenges to Board decisions that have been litigated in California state court. *Id.* 2:13-16.

***2** Defendants also submit that Plaintiff fails to state its due process claim and that the Court does not have subject matter jurisdiction to hear it under the *Rooker-Feldman* doctrine. *Id.* 2:17-20. Defendants also maintain that the Court should abstain from hearing Plaintiff's claims under *Younger v. Harris,* 401 U.S. 37 (1971) because "this action would have the practical effect of mooting and interfering with Colony Cove's pending state court proceedings" or under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) because the "federal constitutional issues here could be mooted by resolution of Colony Cove's pending state court proceedings." *Id.* 2:21-3:11. Defendants finally aver that Plaintiff's request for declaratory and injunctive relief is inappropriate because Plaintiff seeks monetary damages. *Mot.* 25:5-18.

II. Background

The City enacted the Ordinance in 1979 to regulate rent in mobilehome parks. *Compl.* ¶ 11. The Ordinance established the Board, an entity charged with hearing and determining rent adjustment applications. *Id.*; Carson, Cal. Mun. Code § 4702(a). Under the Ordinance, the Board "shall grant such rent increases as it determines to be fair, just and reasonable." Carson, Cal. Mun. Code § 4704(g); *Compl.* ¶ 14. "A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner." Carson, Cal. Mun. Code § 4704(g). Plaintiff alleges that review of the Board's decisions is permissible under California law "only by pursuing a writ of administrative mandate upon a showing that the Board's decision was not supported by substantial evidence with substantial deference to the Board's determinations." *Compl.* ¶ 11.

When evaluating rent adjustment applications the Board "shall" consider eleven factors enumerated in the Ordinance "and any Guidelines adopted by the City Council, as well as any other relevant factors" with "no one (1) factor" being "determinative." Carson, Cal. Mun. Code § 4704(g). The eleven factors listed include: changes in the Consumer Price Index ("CPI"), the "rent lawfully charged for comparable mobilehome spaces," "[c]hanges in reasonable operating and maintenance expenses" and the "amount and quality of services provided by the applicant to the affected tenant." *Id.*

In addition to adopting the Ordinance, the City adopted "Guidelines for Implementation of the Mobilehouse Space Rent Control Ordinance" (the "Guidelines"). *Compl.* The Guidelines were revised in 1998 in order to make them consistent with the Ordinance. *See RJN, Ex. B.* Plaintiff states in the Complaint that the Guidelines "have the force of law" and are designed and intended to "set the reasonable expectations of investors and park owners in the City." *Compl.* ¶ 12. The Guidelines provide, however, that they "are intended to assist the Board in implementing the Ordinance" and that "the purpose of the Ordinance and the provisions of the Ordinance are controlling." *Defendants' Request for Judicial Notice* ("RJN"), *Ex. B.*

Since the 1998 amendment to the Guidelines, the Guidelines have provided that "[d]ebt [s]ervice necessarily incurred to operate the park after adoption of the Ordinance is generally an allowable operating expense if the financing arrangements were prudent and consistent with customary business practice" and that "[d]ebt service incurred after adoption of the Ordinance to purchase a park may be an allowable operating expense if the purchase price paid was reasonable in light of the rent allowed under the Ordinance and involved prudent and customary financing practices." *RJN, Ex. B.* The Guidelines also provide that in addition to the eleven factors enumerated in the Ordinance, the Board "may" consider a Gross Profit Maintenance analysis which "compares the gross profit level expected from the last rent increased granted to the park prior to the current application ("target profit") to the gross profit shown by the current application." *Id.* This analysis is "an aid to assist the Board in applying the factors in the Ordinance" and "is not intended to create any entitlement to any particular rent increase." *Id.*

***3** In April of 2004, Colony Cove purchased Colony Cove Mobile Estates ("the Park"), a mobilepark located in Carson, California, for approximately $23,050,000. *Compl.* ¶¶ 2, 19. Colony Cove financed around $18 million of the purchase price from G.E. Capital. *Id.* ¶ 21. According to Colony Cove, at the time that it purchased the Park, the City "always (or virtually always) considered a park owner's debt service when disposing of fair return rent applications." *Id.* ¶ 17. Colony Cove alleges that it was entitled to include debt service as an allowable expense and that this belief is reasonable "based in part on the terms of the Ordinance and Guidelines and also based on how the Board had analyzed and calculated rents previously in the City." *Id.* ¶¶ 17, 22.

In 2006, however, the City amended the Guidelines to

"provide additional analytical tools to evaluate pending applications for rent increase" and to "help ... assure that the mobilehome park owners within the City receive[d] a constitutional fair return on their investments." *RJN, Ex. C* ("2006 Amendment"). The 2006 Amendment states that the Board "may also consider, a 'maintenance of net operating income analysis,' which compares the net operating income (NOI) level expected from the last rent increase granted to a park owner and prior to any pending rent increase application (the so-called "target NOI") to the NOI demonstrated in any pending rent increase application" but in which "changes in debt service expenses are not to be considered in the analysis." *Id.* According to the 2006 Amendment, the "analysis is another aid to assist the Board in the factors in the Ordinance" and "is not intended to create any entitlement to any particular rent increase." *Id.*

On or about September 28, 2007, Colony Cove submitted a rent increase application ("Year 1 Application"). *Compl.* ¶ 23. According to Colony Cove, it submitted evidence that a rent increase of approximately $200 per space per month was necessary for Colony Cove to earn a fair return on its investment, but was only granted a rent increase of $36.74 per space per month. Colony Cove alleges that the Board reached this result "by refusing to consider Colony Cove's debt service" which resulted in a six-figure loss on its investment. *Id.* ¶¶ 23-30. Colony Cove submitted additional rent increase applications on or about September 28, 2008 ("Year 2 Application"), September 29, 2009 ("Year 3 Application"), September 29, 2010 ("Year 4 Application"), and March 2, 2012 ("Year 5 Application"). *Id.* ¶¶ 31-47. Colony Cove pleads that each time, the Board ignored Colony Cove's debt service payments and ignored evidence contained in the application granting substantially less than was necessary for it to earn a fair return and forcing it to incur losses as to its investment. *Id.*

Colony Cove filed a complaint against Defendants in this Court on October 27, 2008 asserting facial and as-applied takings and due process claims, a state claim seeking a writ of administrative mandate under California law, and requesting declaratory relief. *Compl.* ¶ 49. The Court granted a motion to dismiss—affirmed by the Ninth Circuit in March 2011—filed by Defendants holding that Plaintiff's facial challenges were barred by the statute of limitations because the "City's rent control guidelines did not restart the limitations period on the original rent control ordinance;" and that the as-applied takings claim was not ripe because "Colony Cove had not yet pursued an action in state court." *Id.* ¶¶ 51-52.

On December 23, 2009, Colony Cove filed a state writ claim challenging the Year 1 Application Board decision and on February 3, 2010, challenging the Year 2 Application Board decision. *Id.* ¶¶ 55. The Superior Court denied Colony Cove's writ challenging the Year 1 application finding that the City "may choose to regulate pursuant to any fairly constructed formula" and that "the landlord cannot insist that a fair return must be calculated on the basis of what it paid for the mobile home park." *Id.* ¶ 57. According to Plaintiff, it stipulated with Defendants to judgment in favor of the City as to the writ challenging the Year 2 Application Board decision acknowledging that "the same trial judge was going to make the same ruling on the City's decision on the Year 2 Applications." *Id.* ¶ 58. Colony Cove appealed the two judgments and the California Court of Appeal affirmed the trial court's denial of the writs challenging the Year 1 and Year 2 Applications on October 21, 2013. *Id.* ¶ 62. These judgments became final on January 28, 2014. *Id.* ¶ 66.

***4** Colony Cove also filed writ petitions challenging the Board's decisions as to the Years 3 to 5 Applications. *Id.* ¶ 60. According to the Complaint, the parties have agreed in principle that the same result would be obtained in California courts regarding these writ applications, but the parties have failed to file a stipulation to that effect. *Id.* ¶ 67. The writ petitions litigating the Year 3 and Year 5 Applications are still pending in California state court. *Declaration of Jeff M. Malawy in Support of Motion to Dismiss Complaint* ("Malawy Decl.") ¶¶ 2-4. The writ petition based on the Year 4 Application decision, however, was dismissed on September 9, 2014 by a California Superior Court. *See Defendants' Supplemental Request for Judicial Notice* ("Supplemental RJN"), *Exs. A, B.*

Plaintiff filed this action on April 28, 2014.

## III. Legal Standard

### A. Rule 12(b)(1)

A plaintiff must "have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (citation omitted). The "irreducible constitutional minimum" of Article III standing has three elements: (1) the plaintiff must have suffered an "injury in fact," meaning a concrete and particularized injury that is actual or imminent; (2) the injury must be causally related to the defendant's challenged actions; and (3) it must be "likely" that the

  

injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). The plaintiff, as the party invoking federal jurisdiction, has the burden of establishing these elements. *See Lujan*, 504 U.S. at 561.

Article III standing bears on the court's subject matter jurisdiction, and is therefore subject to challenge under Federal Rule of Civil Procedure 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). Rule 12(b)(1) attacks on subject matter jurisdiction can be factual or facial. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). When evaluating a factual attack the court may consider evidence and matters subject to judicial notice without converting the motion into a motion for summary judgment. *See id.*; *Maya*, 658 F.3d at 1067; *Safe Air for Everyone*, 373 F.3d at 1039.

B. Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a Rule 12(b)(6) motion, the court must accept the facts pleaded in the complaint as true, and construe them in the light most favorable to the plaintiff. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009). The court, however, is not required to accept "legal conclusions ... cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. The Court may consider documents that have been judicially noticed. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001), *overruled on other grounds*, *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002).

***5** After accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff, the court must determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 556 U.S. at 679-80. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.... The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

## IV. Discussion

### A. Requests for Judicial Notice

As an initial matter, the Court addresses Defendants' two requests for judicial notice. Defendants' first request involves certain records related to proceedings in other courts that Defendants are using to support their *Res Judicata* and *Collateral Estoppel* arguments; city ordinances and resolutions; and corporate filings. *See RJN*, Dkt. # 13. Defendants' supplemental requests involves records related to proceedings in other courts that were published after Defendants filed their papers in support of the present motion. *See Supplemental RJN,* Dkt. # 24. The Court may take judicial notice of and consider matters that are not subject to reasonable dispute, including public records. *See* Fed. R. Evid. 201(b); *Dudum v. Arntz*, 640 F.3d 1098, 1101 n.6 (9th Cir. 2011) (taking judicial notice of a verifiable public record); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.") (internal quotations omitted); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F. 3d 1022, 1025 fn. 2 (taking judicial notice of city ordinances). Plaintiff objects to the request arguing that "[w]hile the existence of records of a public agency is judicially noticeable, legislative facts contained in the City agency resolutions are not." *Opp. to RJN.* The Court agrees. *See Lee v. City of Los Angeles*, 250 F. 3d 668, 689-90 (finding that district court erred in taking judicial notice of disputed facts in public records). Accordingly, the Court GRANTS both of Defendants' requests. The Court takes notice of the City ordinances and resolutions only for the purpose of noting their existence and adoption.

B. Unconstitutional Taking

a. Ripeness

As described above, Plaintiff's Fifth Amendment Takings claim is based on Board decisions denying it its requested rent increases in Years 1 through Year 5 Applications. *See Compl.* ¶¶ 70-73. Defendants argue that Plaintiff's claim should be dismissed because Colony Cove has "not alleged" that "a final state court judgment has been issued denying compensation" related to the Years 3-5 Applications. *Mot.* 11:24-12:1.

A cause of action "is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). Ripeness is a "question of timing," which prevents the courts from issuing advisory opinions or "entangling themselves in abstract disagreements." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir. 2009) (internal quotation marks and citations omitted). "Constitutional ripeness, in many cases, 'coincides squarely with standing's injury in fact prong' and 'can be characterized as standing on a timeline.' " *Id.* (internal quotation marks and citations omitted).

***6** In the context of a takings claim under the Fifth Amendment, a claim is not ripe for adjudication until a plaintiff satisfies two requirements set out in *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172. *See Colony Cove Properties, LLC v. City of Carson*, 640 F. 3d 948, 958 (9th Cir. 2011). First, a plaintiff must show that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty.*, 473 U.S. at 186. "Second, the plaintiff must have sought, and been denied, 'compensation through the procedures the State has provided for doing so.' " *Colony Cove*, 640 F. 3d at 958 (citing *Williamson Cnty.*, 473 U.S. at 194). The procedure available for a plaintiff pursuing an as-applied takings challenge to a rent control ordinance in the state of California—known as the *Kavanau* adjustment—involves "filing a writ of mandamus in state court and, if the writ is granted, seeking an adjustment of future rents from the local rent control board." *Id.* at 958.

Here, the Court agrees that Plaintiff's as-applied takings claim is not ripe for adjudication to the extent that it is based on the Board's decisions regarding its Year 3-5 Applications. Plaintiffs have satisfied the first requirement under *Williamson* since "there is no dispute that ... the City has reached a final decision on Colony Cove's rent increase applications." *Opp.* 22:10-12; *see Compl.* ¶¶ 29, 36, 41, 45, 46. However, Plaintiff has not met the second *Williamson* requirement. In its Complaint, Plaintiff alleges that "all state court remedies have been exhausted" because "the parties have agreed in principle to stipulate to judgment" in the cases about the Year 3-5 Applications, but to date, no such stipulation has been filed. *Compl.* ¶¶ 66-68. In fact, Plaintiff concedes that "no final state court judgment exists" as to these Applications, but claims that this is due to "the City's gamesmanship."[1] *Opp.* 22:18-23.

According to Plaintiff, the parties had agreed to stipulate to judgment for the City with regards to the writ petitions challenging the Year 3-5 Board decisions, but two days after it filed this lawsuit, the "City reneged on its agreement to stipulate to judgment." *Opp.* 22:18-25. Defendants respond that they "should not be punished for attempting to negotiate a fair settlement." *Reply* 8:20-24. The Court agrees. Plaintiff has not provided the Court with a persuasive argument to find that the claim is ripe based on a stipulation that was never filed.

Plaintiff's argument that "the state procedure is unavailable or inadequate" because Colony Cove "will almost certainly be denied compensation by the state courts" for the Year 3 to 5 Applications based on the Year 1-2 Application decisions is equally unpersuasive. *Opp.* 23:9-23. There is an exception to the second *Williamson* requirement that allows a plaintiff to "bypass state procedures if such procedures are shown to be 'unavailable or inadequate' " making availment of those procedures futile. *Equity Lifestyle Properties, Inc. v. County of San Luis Obispo*, 548 F. 3d 1184, 1191 (9th Cir. 2007). This is a narrow exception, however, and "mere uncertainty does not establish futility." *Id.* Plaintiff claims that it will "almost certainly" be denied compensation, but does not substantiate this assertion. The only argument that Plaintiff offers is that the California courts have denied it relief related to the Year 1 and Year 2 Application decisions. The Court is not convinced. The Years 3 to 5 Applications are based on different rent increase requests and the Board presumably took different expenses into account when issuing its decision. Therefore, it is not almost certain that in reviewing these Board decisions, the California courts will deny Plaintiff's writ petitions. Plaintiff has failed to show that its as-applied takings claim based on the Board's Years 3 to 5 Application decisions is ripe for adjudication under *Williamson*.

***7** Accordingly, Plaintiff's as-applied takings claim is DIMISSED without prejudice to the extent that it relies on the Board's Year 3 to 5 Application decisions.

b. Res Judicata

Defendants also argue that "any taking claim based on the Board's Years 1 and 2 [Application] decisions is barred by *Res Judicata.*" *Mot.* 19:8-9.

"Judicial proceedings of any state 'have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State.' " *Adam Bros. Farming, Inc. v. Cnty. of Santa Barbara*, 604 F. 3d 1142, 1148 (9th Cir. 2010) (citing 28 U.S.C. § 1738). *Res Judicata*—also known as claim preclusion—"precludes litigation of claims that were raised or should have been raised in earlier litigation." *San Remo Hotel, L.P. v. San Francisco City and Cnty.*, 364 F. 3d 1088, 1094 (9th Cir. 2004). When analyzing the *res judicata* effect of a state court proceeding, federal courts apply the *res judicata* doctrine "as adopted by that state." *Adam Bros.*, 604 F. 3d at 1148. In California, *res judicata* "precludes a party from relitigating (1) the same claim, (2) against the same party, (3) when that claim proceeded to a final judgment on the merits in a prior action." *Id.* at 1148-49.

The first prong of this test is met when two different causes of action stem from the same invasion of a primary right. *Id.* at 1149. A primary right is "the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based." *Id.* (quotations and citations omitted). According to Defendants, Plaintiff's state court claims—that the Board decisions did not provide it a fair return—and the as-applied takings claim all "stem from the same injuries." *Mot.* 20:5-26. In response, Plaintiff does not argue that Defendants fail to meet the elements of *res judicata*, but rather, that because it asserted an *England* reservation in state court, it does "not subsequently face claim preclusion in federal district court on the ground that it could have litigated its federal claims in state court." *Opp.* 12:1-8. Under *England v. Louisiana State Bd. Of Med. Examiners*, 375 U.S. 411 (1964) a "party who has been remitted to state court" can "reserve the right to return to federal court for a ruling on the federal claims." *Montes v. City of Bellflower*, 61 Fed. Appx. 385 (9th Cir. 2003) (unpublished). The Court agrees with Plaintiff.

Defendants contend that Plaintiff's "*England* reservations do not prevent the *res judicata* bar" and cite to the U.S. Supreme Court in *San Remo Hotel, L.P. v. City and Cnty. of San Francisco, CA*, 545 U.S. 323 (2005) to support this assertion. *Mot.* 21:8-13. Defendants mischaracterize *San Remo's* holding. In *San Remo*, the Supreme Court was reviewing a decision by the Ninth Circuit finding that issue preclusion—not claim preclusion—"can apply to bar relitigation in federal court of issues necessarily decided in state court, notwithstanding that plaintiffs must litigate in state court pursuant to *Pullman* and/or *Williamson County.*" *San Remo,* 364 F. 3d at 1096; *see San Remo*, 545 U.S. at 327 fn.1, 337 (explaining that the Court's grant of certiorari was limited to the question whether "a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?").

***8** The Ninth Circuit was very clear in *San Remo* that claim preclusion was not at issue and that defendant in that case did "not dispute that the plaintiffs' *England* reservation was sufficient to avoid the doctrine of *claim* preclusion." *San Remo*, 364 F. 3d at 1094. As Plaintiffs point out—a contention that Defendants fail to address in their reply—the present case is more analogous to *Dodd v. Hood River Cnty.*, 59 F. 3d 852 (1995) where the Ninth Circuit "refused to apply *claim* preclusion to dismiss [plaintiffs'] federal takings claim" although plaintiff brought a takings claim in state court, but "reserved their right to have any federal takings claim adjudicated in federal court." *Id.* at 1094-95 (emphasis in original); *see Dodd*, 59 F. 3d 852. Accordingly, the Court is not convinced that *res judicata* bars Plaintiffs' as-applied takings claim.

c. Failure to State Claim

Plaintiff's as-applied takings claim is based on two theories. First, Plaintiff pleads that the Board's decisions constitute a Takings violation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Compl.* ¶ 71. Plaintiff's second theory is that the Board's conduct violated *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Id.* Defendants assert that Plaintiff fails to state a claim under both theories.

i. *Lucas Taking*

To assert a *Lucas* taking, a plaintiff must show that the government's land regulation has caused a deprivation of "all economically productive or beneficial uses." *Lucas*, 505 U.S. at 1030; *see also Lingle v. Chevron U.S.A.*, 544

U.S. 528, 539 (finding that for a *Lucas* claim "the complete elimination of a property's value is the determinative factor").

Plaintiff claims that the government has effected a taking under *Lucas* by prohibiting "all economically beneficial use of the land" because "[u]nder California law, Colony Cove is not permitted to close the Park and use it for another economic purpose, nor is Colony Cove permitted to evict the Park's current tenants, nor is Colony Cove permitted to charge a rent that would result in any profit." *Compl.* ¶ 72.

While Defendants challenge the truthfulness of the first two assertions by citing to California statutes, Plaintiff avers that this Court "must" accept as true its allegation that Defendants' actions have denied it "all economic value." *Mot.* 12:21-13:13; *Opp.* 17:25-18:10. The Court disagrees with Plaintiff. *First English Evangelical Lutheran Church v. Cnty. of Los Angeles,* 482 U.S. 304—a case that Plaintiff quotes to support its point—does not stand for Plaintiff's proposition. Although the Court must accept factual allegations in the complaint as true, it need not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir. 2003); *see Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). Here, the statutes that Defendants cite to show that Plaintiff's contentions are false as a matter of law. The California Government Code expressly provides that mobilehome parks can be closed down and converted to other uses. *See* Cal. Gov. Code §§ 65863.7; 66427.4. The Carson Municipal Code, too, provides the procedures for a closure of a mobilehome park. Carson, Cal. Muni. Code, art. IX, ch. 1, § 9128.21. Furthermore, the California Civil Code expressly provides that a mobilehome owner's tenancy can be terminated if there is a "[c]hange of use of the park or any portion thereof." Cal. Civ. Code § 798.56(g). These allegations can, therefore, not support Plaintiff's claim.

***9** Even if the Court disregarded the statutes described above, Plaintiff's own allegation that in 2012 Defendants "permitted Colony Cove to earn a profit" is fatal to the *Lucas* claim. *Compl.* ¶ 5. Apparently aware of this, Plaintiff argues that it alleges a temporary taking, but admits that temporary takings are evaluated under the *Penn Central* test. Plaintiff's own Complaint undermines its claim that Defendants' Board decisions deprived it of all economically productive or beneficial use of the land. Accordingly, Plaintiff's *Lucas* Takings claim is DISMISSED without leave to amend.

ii. *Penn Central Taking*

Under *Penn Central*, a taking takes place when " 'regulatory actions [occur] that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner' with the inquiry 'focusi[ing] directly upon the severity of the burden that government imposes upon private property rights.' " *MHC Financing Ltd. Partnership v. City of San Rafael,* 714 F. 3d 1118, 1127 (9th Cir. 2013) (modifications in original). Courts look at the following factors when determining whether there has been a *Penn Central* violation: "the regulation's economic impact on the claimant, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action." *Id.*

Here, Plaintiff's Complaint states that the Board's decisions had a significant economic impact because it resulted in "substantial loss of property value and forced operating losses exceeding $4 million." *Compl.* ¶ 72. Plaintiff also alleges that Defendants' regulation interfered with its reasonable expectation that its "debt service would be considered when the City and the Board set rents" which would lead to a profit. *Id.*

Defendants contend that Plaintiff fails to state a Takings violation under *Penn Central* because it does not allege a sufficiently severe economic impact; the Ninth Circuit has already found that the Board's decisions did not interfere with its investment-backed expectations; and the character of the government action described in the Complaint does not support a taking under this theory. *Mot.* 14:12-19:7.

Defendants first attempt to show that Plaintiff has not stated facts of a sufficiently severe economic impact under *Penn Central* by citing to Ninth Circuit cases finding that diminution in value of property ranging from 75% to 92.5% did not support a *Penn Central* taking. *See Mot.* 15:4-14. Plaintiffs, in turn, argue that it is improper for the Court to conclude that "when a property owner is forced to lose money year after year, including over $1 million annually some years with forced operating losses totaling over $4 million, that the loss is insufficiently severe to be contemplated by the Fifth Amendment." *Opp.* 1-12. While the Court agrees with Defendants that Plaintiff's stated diminution in value, on its own, does not support a *Penn Central* finding, Defendants have not

persuasively shown that this factor is dispositive.[2] In their Reply, Defendants cite to *Garneau v. City of Seattle*, 147 F. 3d 802 (9th Cir. 1998), for the proposition that the Ninth Circuit has held that this factor is dispositive, but *Garneau* is distinguishable for at least two reasons. First, *Garneau's* finding dealt with a facial Takings claim, not an as-applied Takings cause of action. *See Garneau*, 147 F. 3d at 807-809. Second, in *Garneau*, Plaintiffs had failed to "produce *any* evidence of economic impact." *Id.* at 808. Here, Plaintiffs have pled that there was at least some negative economic impact from Defendants' actions.

***10** Defendants also argue that Plaintiff cannot plead sufficient facts to support *Penn Central's* second consideration. Specifically, Defendants argue that Plaintiff is "precluded from claiming that the Ordinance has interfered with its distinct investment-backed expectations" as a matter of law. *Mot.* 17:17-18-25.

In *Guggenheim v. City of Goleta*, 638 F. 3d 1111(9th Cir. 2010), the Ninth Circuit held that a mobilehome park owner could not have distinct investment-backed expectations that were disrupted by an ordinance that was adopted before the owner acquired the park. *Guggenheim*, 638 F. 3d at 1120-22. Defendants argue that since the Ninth Circuit also found that the Ordinance at issue in this litigation—which does not guarantee that debt service expenses will be accounted for by the Board in assessing Rent Increase Applications—was in effect before Plaintiff purchased the park, and was not amended in 2006 to prohibit the Board from considering debt service expenses, the Board's decisions "could not have interfered with any of Colony Cove's investment-backed expectations." *Mot.* 18:20-25.

Plaintiff's claim that it had a distinct investment-backed expectation that the Boards would consider debt service expenses, however, is not merely "based on the Ordinance and the Guidelines, but also how the City had set rents historically on other rent applications." *Opp.* 17:3-10. In fact, the Complaint states that Plaintiff's expectations were "based in part on the terms of the Ordinance and Guidelines and also based on how the Board had analyzed and calculated rents previously in the City" since "prior to Colony Cove's acquisition of the Park, the City always (or virtually always) considered a park owner's debt service when disposing of fair return rent applications." *Compl.* ¶¶ 17, 22. The Court accepts the facts pleaded in the Complaint as true, and construes them in the light most favorable to the plaintiff. *See Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009). As such, even accepting that the Ordinance never required that the Board consider a park owner's debt service, Plaintiff has plead sufficient facts to support the allegation that Defendants' actions interfered with its distinct investment-backed expectations.

***11** Plaintiff's complaint fails to plead, however, sufficient facts that the character of the government's action supports a *Penn Central* taking. A government's action is more likely to support a *Penn Central* taking "when the interference with property can be characterized as a physical invasion by government" and not "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *MHC Financing LTD.*, 714 F. 3d at 1128. The Ordinance and the Board's action is more akin go the second scenario than the first. *See id.* (finding that a city Ordinance regulating mobilehome parks did not support that there was a *Penn Central* taking). Plaintiff's assertions that "imposing use restrictions that decide how [the Park] can be used, who can live on the property, and for what price closely resembles ... a physical invasion" by the government are unavailing. *Opp.* 10:13-24. Nevertheless, Defendants have not shown—nor argued—that this factor is dispositive for finding a *Penn Central* Takings violation.

There is no "set formula" for determining when there is a taking under *Penn Central. See Penn Central*, 438 U.S. at 123. Here, Plaintiff has pled that the Board's decision had at least a small economic impact and interfered with its distinct investment-backed expectations. Defendants have failed to show that these combined facts—notwithstanding the fact that the economic impact was small and the government's character does not support a *Penn Central* violation—are insufficient to show that there was a *Penn Central* taking. As such, the Court DENIES Defendants' motion requesting that the Court dismiss Plaintiff's *Penn Central* Takings cause of action.

C. Violation of Due Process Right

Plaintiff's second claim is brought under the Due Process Clause of the Fourteenth Amendment. Plaintiff states in its Complaint that under *Ohio Valley Water* "judicial review of the administrative action by a statute court must be de novo or else the property owner's due process rights are violated." *Compl.* ¶ 76. According to Plaintiff, the California courts reviewed the Board's decisions using a "substantial evidence standard" which did "not permit [the California courts] to exercise [their] independent judgment." *Id.* ¶ 75.

  

Defendants challenge Plaintiff's second claim by arguing both that the Complaint fails to state a claim and that the claim is barred by the doctrine of *Rooker-Feldman.* The Court agrees with Defendants.

Plaintiff's due process claim is based entirely on *Ben Avon*, a Supreme Court case from 1920 holding that if a utility company claims confiscation of property due to an agency's ratesetting "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment." *Ben Avon*, 253 U.S. at 289. As Plaintiff submits, however, the Courts have not developed a mechanism for which to redress this alleged violation. *See Opp.* 20:1-12 ("*Ben Avon* does not address exactly what remedy will serve to compensate for the due process violation"). In fact, Plaintiffs have not shown that this doctrine is still viable. In *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), the U.S. Supreme Court found that in assessing an agency's rate setting decision a Court's judicial inquiry "is at an end" "[i]f the total effect of the rate order cannot be said to be unjust and reasonable." Like the California court's review of the Board's actions, in *Hope Natural*, review of the agency was accomplished using a substantial evidence standard. *Id.* at 602. Plaintiffs have also failed to show that *Ben Avon* applies within the context of a rent control ordinance.

Even if Plaintiff could state a claim under *Ben Avon*, however, the Court would not have subject matter to hear it under the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine provides that federal district courts, as courts of original jurisdiction, lack appellate jurisdiction to review, modify, or nullify final orders of state courts. *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-91 (9th Cir. 1986). As the Supreme Court has clarified, the doctrine applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Furthermore, while federal district courts have jurisdiction over a "general constitutional challenge," *i.e.* one that does not require review of a final state court decision in a particular case, "[w]here the district court must hold that the state court was wrong in order to find in favor of the plaintiff," the court lacks subject matter jurisdiction because the issues presented to both courts are "inextricably intertwined." *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir. 2001).

***12** Here, although Plaintiffs argues otherwise, their second cause of action is, in effect, an appeal of the California Court's decisions denying the writ petitions related to the Year 1 and 2 Applications. Plaintiff goes as far as asking the Court to "engage in independent review of the administrative records for each of the petitions described herein and award damages against the City based on the appropriate, nonconfiscatory rent-levels set by the Court." *Compl.* ¶ 79. The Court is not convinced that this request, as well as the cause of action, is not a review of the California courts' decision. Plaintiff's argument that the situation here is analogous to *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) is not convincing. In *Skinner*, the U.S. Supreme Court found that a convict challenging a court's decision to uphold a statute denying him the right to obtain DNA testing was not barred by *Rooker-Feldman* because the convict was not "challeng[ ]ing] the ... decisions reached by the [state court]" but the "DNA statute 'as construed' by the [state court]." *Skinner*, 562 U.S. at 1291. Here, Plaintiff is challenging the standard of review that the Court utilized when reviewing the Board's decision. Although Colony Cove argues that it could not have litigated its claim in California state courts, it could have argued that the appropriate standard was something more stringent than the substantial evidence standard. *See Termo Co. v. Luther*, 169 Cal. App. 4th 394 (Cal. Ct. App. 2008) (remanding action to trial court to complete "its review under the independent judgment standard").

For the reasons stated above, the Court DISMISSES Plaintiff's second cause of action without leave to amend.

a. Abstention as to Claims Not Dismissed

Defendants request that the Court abstain from hearing any claim not dismissed—in this case Plaintiff's *Penn Central* Takings cause of action—under *Younger* and *Pullman.*

The *Younger* abstention is a jurisprudential doctrine based on principles of comity, equity, and federalism. *San Jose Silicon Valley Chamber of Commerce Political Action Comm. V. City of San Jose*, 546 F. 3d 1087, 1091 (2008). It requires federal courts to abstain from granting relief when such relief would interfere with state judicial proceedings. *Gilbertson v. Albright*, 381 F. 3d 965, 970-95 (9th Cir. 2004) (en banc). In the Ninth Circuit, four requirements must be met for the *Younger* abstention to apply: (1) a state-initiated proceeding is ongoing; (2) the state-initiated proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action wound enjoin the state proceeding or have the practical effect of doing

so. *San Jose Silicon Valley*, 546 F. 3d at 1092. All four factors must be satisfied to warrant abstention. *Logan v. U.S. Bank National Ass'n*, 772 F. 3d 1163, 1167 (9th Cir. 2013) (internal citations omitted).

Defendants fail to show that all four factors have been satisfied warranting a *Younger* abstention. Defendants argue that a "determination by this Court that any of the Board's Years 3-5 Application decisions effected a taking would have the practical effect of a declaration establishing that Colony Cove was denied a fair return by the Board and that the application of the Ordinance effected a confiscatory taking under state law." As expounded above, however, the Court has dismissed Plaintiff's claims to the extent that they rely on the Board's Years 3 to 5 Application decisions. Therefore, Defendants' argument holds no weight. The Court's adjudication of Plaintiff's *Penn Central* claim would not enjoin the pending state court proceedings.

The Court denies Defendants' request for a *Pullman* abstention for the same reason. Under *Pullman*, federal courts refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions." *San Remo*, 145 F. 3d 1095, 1105 (9th Cir. 1998)(citing *Pullman*, 312 U.S. 496 (1941)). Here, Plaintiff's claims are not based on the Year 3 to 5 Application Board decisions and would, therefore, not moot the constitutional issues pending before this Court.

Therefore, neither a *Younger* nor a *Pullman* abstention is warranted.

D. Declaratory and Injunctive Relief

Defendants contend that Plaintiff's request for declaratory and injunctive relief should be dismissed. *Mot.* 25:5-18. These forms of relief, however, are not independent causes of action, but tied to Plaintiff's claims. Apparently recognizing this, Defendants write that Plaintiff's "claim for declaratory relief must be stricken." *Id.* 25:11. Defendants have failed to bring a motion to strike, however, and the Court declines to strike these forms of relief from the Complaint at this juncture.

***13** Defendants' motion to strike Plaintiff's request for declaratory and injunctive relief is DENIED.

E. Leave to Amend[3]

In summary, the Court has dismissed Plaintiff's *Lucas* Taking cause of action, Due Process cause of action, and Takings claim, under *Penn Central*, to the extent that it relies on the Year 3 to 5 Application Board decisions without leave to amend.

In determining whether leave to amend is warranted, the Court considers: (1) a party's bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility; and (5) whether the plaintiff has previously amended his complaint. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F. 3d 351, 355 (9th Cir. 1996). Although the factors should be analyzed with liberality, "leave to amend is not to be granted automatically." *Jackson v. Bank of Hawai'i,* 902 F. 2d 1385, 1387 (9th Cir. 1990).

Here, although the Court finds that most of the factors support granting Plaintiff leave to amend its due process cause of action as well as its *Lucas* Taking cause of action—there is no evidence of bad faith, undue delay, prejudice to Defendants, and Plaintiff has not amended its Complaint—any amendments to the Complaint to attempt to successfully plead these causes of action would be futile. As the Court described above, Plaintiff's second cause of action is barred by the doctrine of *Rooker-Feldman.* As to Plaintiff's *Lucas* Taking claim, Plaintiff conceded in its very Complaint that it earned a profit, defeating this cause of action.

Plaintiff's *Penn Central* Takings claim, on the other hand, is dismissed without leave to amend to the extent that it relies on the Years 3 to 5 Application decisions because its dismissal is based on the fact that the claims are not ripe for adjudication and not due to a deficiency in Plaintiff's pleadings.

V. Conclusion

For the foregoing reasons, Defendants' motion to dismiss is DENIED as to Plaintiff's *Penn Central* Takings claim to the extent that it relies on the Boards Year 1 and 2 Application Decisions.

Defendants' motion is GRANTED as to the remaining claims. Plaintiff's *Penn Central* claim is DISMISSED without prejudice to the extent that it relies on the Years 3 to 5 Applications; Plaintiff's due process claim and *Lucas* Takings claim are dismissed with prejudice.

**IT IS SO ORDERED.**

  

**All Citations**

Footnotes

1 In its Supplemental RJN, Defendants inform the Court that Plaintiff's writ petition challenging the Year 4 Application decision was dismissed by a California state court. *See Supplemental RJN.* Defendants also argue that although the state court dismissed the action, Colony Cove did not pursue "just compensation" because they "essentially abandoned the action." *Id.* The Court need not decide this issue because Plaintiff—who's burden it is to establish federal jurisdiction—has not filed an amended Complaint or convinced the Court that it has met *Williamson's* second requirement based on this dismissal. *See Lujan*, 504 U.S. at 561.

2 Because the economic injury factor is not dispositive, whether this factor is precluded by the doctrine of *Collateral Estoppel*—due to the California state court's finding that Plaintiff did not suffer a significant economic impact from the Board's actions—does not change the Court's analysis. *Mot.* 15:15-17:27. Therefore, the Court need not reach this issue.

3 In its opposition, Plaintiff requests that the Court give it leave amend its Complaint to state a Fifth Amendment Takings claim under *Horne v. United States Dept. of Agriculture*, 750 F. 3d 1128 (9th Cir. 2014). *Opp.* 24:22-25:23. The Court DENIES Plaintiff's request because the request is not properly before the Court. If Plaintiff wishes to add a new claim, it may file a motion to amend its Complaint.

2016 WL 4467889
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

Jack Willis NISSALKE, Petitioner,
v.
Jim BENSON, Warden MCF Rush City, and Lori Swanson, Attorney General for State of Minnesota, Respondents.

Case No. 16cv102 (PAM/TNL)
|
Signed 08/22/2016

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**MEMORANDUM AND ORDER**

Paul A. Magnuson, United States District Court Judge

***1** This matter is before the Court on the Report and Recommendation of Magistrate Judge Tony N. Leung dated July 15, 2016 (Docket No. 15). In the R&R, Magistrate Judge Leung recommends granting Respondents' pending Motions to Dismiss and dismissing the Petition for Writ of Habeas Corpus with prejudice. Petitioner filed timely objections to the R&R.

This Court must review de novo any portion of an R&R to which specific objections are made. 28 U.S.C. § 636(b)(1); D. Minn. L.R. 72.2(b). After conducting the required review and for the reasons that follow, the Court adopts the R&R.

The R&R thoroughly sets forth the factual and procedural background in this matter. Briefly, Petitioner Jack Willis Nissalke is serving a life sentence after a jury in Fillmore County, Minnesota, found him guilty of first-degree premeditated murder, among other charges. Nissalke appealed his conviction, and after the Minnesota Supreme Court affirmed, brought a state motion for postconviction relief. The trial court granted the postconviction motion only with respect to Nissalke's request for jail credit, a claim Nissalke does not repeat here, but otherwise denied relief. The Minnesota Supreme Court again affirmed.

Nissalke filed this Petition on January 19, 2016. He raises seven claims that are substantively identical to the claims raised in his direct appeal and his state postconviction motion. The substance of Nissalke's claims, however, is not relevant to the Court's resolution of the matter because, as the R&R determined, the Petition is untimely under 28 U.S.C. § 2244(d).

Nissalke recognizes that the Petition was filed more than one year from the date his conviction became final. He argues, first, that § 2244(d)'s one-year statute of limitations is unconstitutional because it conflicts with Minnesota's two-year statute of limitations for filing postconviction motions, Minn. Stat. § 590.01, subd. 4. But a different statute of limitations for state and federal remedies does not implicate any constitutional right—if this were true, then states would be obligated to adopt federal statutes of limitations for similar claims. This contention is without merit.

Nissalke also asks the Court to equitably toll the statute of limitations because he is incarcerated and has only limited access to the record and the law library. This contention would essentially render the statute of limitations moot in every habeas case, because habeas petitioners are, almost by definition, incarcerated individuals. But even assuming that a habeas petitioner's incarceration could warrant equitable tolling of the statute of limitations, the claims Nissalke raises in this Petition are substantively identical to those he raised in his state postconviction proceeding. Thus, he has not established that his incarceration seriously affected his ability to formulate his claims in this case.

Finally, Nissalke asks that the Court issue a certificate of appealability, contending that "tens of thousands of followers from around the world who have read every document filed throughout petitioner's appeal processes" agree that there has been a "miscarriage of justice" in his case. (Obj. (Docket No. 18) at 3.) But as the R&R noted, Nissalke does not claim actual innocence and only seeks to be resentenced. Thus, it is not clear what "miscarriage of justice" occurred in his case. And regardless, no

  

reasonable jurist could believe that Nissalke's habeas petition was within the one-year limitations period of § 2244(d), or that Nissalke had established that the one-year period should be tolled. A certificate of appealability will not issue.

***2** Accordingly, **IT IS HEREBY ORDERED that**:

1. The R&R (Docket No. 17) is **ADOPTED**;

2. Respondent Minnesota Attorney General's Motion to Dismiss (Docket No. 8) is **GRANTED**;

3. Respondent Jim Benson's Motion to Dismiss (Docket No. 11) is **GRANTED**;

4. Petitioner's Motion to Dismiss (Docket No. 14) is **DENIED**;

5. The Petition for Writ of Habeas Corpus (Docket No. 1) is **DISMISSED with prejudice**; and

6. No certificate of appealability will issue.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

**All Citations**

Not Reported in Fed. Supp., 2016 WL 4467889

**End of Document**

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United States District Court, N.D. California.

DOORDASH, INC., et al., Plaintiffs,
v.
CITY AND COUNTY OF SAN FRANCISCO, Defendant.

Case No. 21-cv-05502-EMC
|
Signed 03/23/2022

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**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Docket No. 28

EDWARD M. CHEN, United States District Judge

***1** Plaintiffs DoorDash, Inc. ("DoorDash") and Grubhub Inc. ("Grubhub") (collectively, "Plaintiffs") filed this action against Defendant City and County of San Francisco (the "City") alleging that an enacted ordinance—which caps the commissions that third-party platforms, such as Plaintiffs, can charge restaurants to 15%—is unlawful. *See* Docket No. 1 ("Complaint or Compl."). After the City filed its motion to dismiss the Complaint, Plaintiffs filed their First Amended Complaint. *See* Docket No. 25 ("FAC"). Pending before the Court is the City's motion to dismiss Plaintiffs' First Amended Complaint. *See* Docket No. 28 ("Mot."). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the City's motion to dismiss.

## I. BACKGROUND

### A. Factual History

Around February 25, 2020, Mayor London Breed declared a state of emergency in San Francisco due to COVID-19. FAC ¶ 35. In March 2020, the City issued a shelter-in-place order. *Id.* ¶ 36. On April 10, 2020, Mayor Breed promulgated the Ninth Supplement to Mayoral Proclamation Declaring the Existence of a Local Emergency Dated February 25, 2020 ("April 2020 Order"), which temporarily capped the commissions that third-party platforms could charge restaurants to 15%. *Id.* ¶ 39. The intent of the April 2020 Order was to ensure that the City's restaurants were protected during the COVID-19 pandemic. *Id.* ¶ 40.

Beginning in 2019 and throughout 2020, DoorDash and other industry participants publicly supported Proposition 22, a state-wide ballot measure, which would make clear that workers who use platforms such as those of Plaintiffs are independent contractors without certain benefits. *Id.* ¶ 46. Many members of the City's Board of Supervisors (the "Board") publicly opposed Proposition 22. *Id.* ¶¶ 47(a), 50. On November 3, 2020, California voters passed Proposition 22 by a margin of over 17 percentage points. *Id.* ¶¶ 46, 48.

A week later, on November 10, 2020, the Board codified the temporary commission cap from the April 2020 Order and enacted Article 53 to the San Francisco Police Code (the "Ordinance"). *Id.* ¶ 55. On November 20, 2020, Mayor Breed approved the Ordinance. *Id.* The provision at issue here in the Ordinance is the imposition of a 15% cap on the commissions that certain third-party delivery service companies may charge restaurants (the "Commission Cap"). *Id.* ¶ 57. The Ordinance explains that the Commission Cap is an "important step[ ] to ensure that restaurants can thrive in San Francisco and continue to nurture vibrant, distinctive commercial districts." FAC, Ex. D ("S.F. Police Code") § 5300(j).

  

Specifically, the Ordinance's findings state that restaurants "are vital to the character and community fabric of San Francisco" and are "important engines of the local economy, providing jobs and serving as commercial anchors in neighborhoods across the City." *Id.* § 5300(a). The findings note that "in recent years, the City's restaurant industry has been in decline" and "the number of restaurant closures has exceeded the number of new restaurants in the City for at least the past five consecutive years" according to data from the Department of Public Health. *Id.* § 5300(b). According to the City, this decline "coincides with the rapid rise of third-party food delivery services, businesses that process food delivery and pickup orders through mobile apps and websites." *Id.* § 5300(d). One consumer market outlook publication found that "revenue in the U.S. 'platform-to-consumer delivery' market was $8.7 billion in 2019, a nearly 10% increase over the same segment's valuation in 2018" and market research shows that "approximately 15.9% of all U.S. residents utilized third-party food delivery services at least once in the past year, many on a regular basis." *Id.*

***2** The Ordinance states that "This booming market is highly concentrated in just a handful of businesses" and as of "November 2019, just four third-party food delivery services controlled approximately 98% of the entire market." *Id.* "The increasing market dominance of a small number of third-party food delivery services companies has resulted in increasingly difficult economic conditions for City restaurants, which must contract with these companies if they wish to access the growing share of customers who rely on delivery platforms to obtain meals." *Id.* § 5300(e). Because of the platforms' market dominance, the Ordinance explains that they are able to "use this leverage to extract high fees from restaurants—typically totaling 30% of an order total—and thereby diminish restaurants' already-narrow profit margins." *Id.* § 5300(f). For example, "[s]ample contracts used by leading third-party food delivery services companies reflect that these companies commonly charge restaurants a 10% per-order fee for 'delivery services,' the most logistically demanding and resource-intensive service they provide to restaurants" and impose additional fees "totaling as much as 20% of the order cost for what are described as 'marketing' or 'logistics' services." *Id.* § 5300(g).

As a result, the Ordinance explains that "[c]apping the fees third-party food delivery services companies can charge restaurants" would prohibit these companies from "restricting restaurant pricing," among other things, "to ensure that restaurants can thrive in San Francisco and continue to nurture vibrant, distinctive commercial districts." *Id.* § 5300(j). It states that because "leading third-party food delivery services companies currently charge a 10% per-order fee for the most resource-intensive aspect of their business – delivery services – and that these companies report high profit margins from all aspects of their business operations" "a 15% fee cap on per-order fees" is "a reasonable step to protect restaurants from financial collapse without unduly constraining third-party food delivery services' businesses." *Id.*

The Commission Cap applies to "third-party food delivery services," defined as "any website, mobile application or other internet service that offers or arranges for the sale of food and/or beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from, no fewer than 20 separately owned and operated food preparation and service establishments." FAC ¶ 59 (quoting S.F. Police Code § 5301). It does not apply to "any restaurant that meets the definition of a formula retail use under section 303.1 of the Planning Code," *i.e.*, any restaurant that "has eleven or more other retail sales establishments in operation" and that "maintains two or more of the following features: a standardized array of merchandise, a standardized façade, a standardized décor and color scheme, uniform apparel, standardized signage, a trademark or a servicemark." *Id.* ¶ 61.

Originally, the Commission Cap had a sunset date of sixty days after the amendment or termination of the pandemic "Stay Safer At Home" order or any subsequent order allowing restaurants to resume at 100% capacity. *Id.* ¶ 62. But in June 2021, the Board of Supervisors held meetings to discuss removing the Ordinance's sunset provision and making it permanent. *Id.* ¶ 64. Plaintiffs allege that in "voting for the permanent cap," Supervisor Aaron Peskin publicly stated, "DoorDash, Uber Eats, Postmates all contributed to the most expensive ballot measure in history, Prop 22, to gut employee protections." *Id.* ¶ 69. On the same day, he posted the following on Facebook:

> "In another first among major American cities, San Francisco just passed my legislation setting a permanent 15% cap on delivery fees charged by DoorDash, UberEats, Grubhub and Postmates to independent restaurants. Third-party food delivery saw exponential growth during the pandemic, while SF restaurants incurred $400M in rent debt. 70,000 Bay Area hospitality workers lost their jobs, while Big Tech spent $220M to pass Prop 22, the most anti-worker initiative in California history. We will continue to push back against companies who demonstrate blatant disregard for small businesses, workers and neighborhoods. Correcting this imbalance is a long-term project."

  

***3** *Id.* The FAC also alleges that Supervisors Ahsha Safai and Catherine Stefani made statements about third-party platforms at this time but they do not explicitly discuss DoorDash's support of Proposition 22. *See id.* ¶¶ 64(b), 70(a)–(c). On June 10, 2021, the Board voted unanimously to repeal the sunset date. *Id.* ¶ 71. Mayor Breed declined to sign the sunset repeal measure, explaining that she had "concerns about making [the Commission Cap] legislation permanent" and that the Ordinance "is unnecessarily prescriptive in limiting the business models of the third-party organizations, and oversteps what is necessary for the public good." *Id.* ¶ 74. On June 29, 2021, the Ordinance became effective without Mayor Breed's signature. *Id.* ¶ 73.

B. Procedural History

On July 16, 2021, Plaintiffs filed this action against the City and on September 10, 2021, the City filed a motion to dismiss the Complaint. *See* Compl.; Docket No. 20. On October 1, 2021, Plaintiffs filed their First Amended Complaint alleging violations of (1) the Contract Clause of the U.S. Constitution, 42 U.S.C. § 1983, and the California Constitution; (2) the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 19 of the California Constitution; (3) Article IX, Section 7 of the California Constitution; (4) the Due Process Clause of the U.S. Constitution and Article I, Section 7 of the California Constitution; (5) the Equal Protection Clause of the U.S. Constitution and the California Constitution; and (6) the First Amendment of the U.S. Constitution and Article I, Sections 2 and 3 of the California Constitution for DoorDash. Docket. No. 25. Three days later, the City withdrew its original motion to dismiss and on October 15, 2021, the City filed the present motion to dismiss the FAC. The motion hearing took place on December 16, 2021. Docket No. 54 ("Hearing Tr.").

## II. APPLICABLE LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6).

To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff's "factual allegations [in the complaint] must ... suggest that the claim has at least a plausible chance of success." *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (internal quotation marks omitted). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a complaint ... may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Levitt*, 765 F.3d at 1135 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

If the court dismisses pleadings, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

## III. DISCUSSION

A. Judicial Notice

***4** As a preliminary matter, the parties dispute whether the Court should take judicial notice of 28 exhibits. *See* Docket Nos. 29 ("JNR"), 37 ("Opp. JNR"). A court may take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). But a court may not take judicial notice of a fact that is "subject to reasonable dispute." Fed. R. Evid. 201(b); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001) (holding that the district court erred by taking judicial notice of disputed matters in public records, specifically facts in dispute as to an extradition hearing and waiver). Under Federal Rule of Evidence 201, a court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is

  

generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts also do not take judicial notice of facts that are irrelevant. *See Khoja*, 899 F.3d at 1000 n.5.

In addition, a defendant "may seek to incorporate a document into the complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998, 1002 (9th Cir. 2018). "[U]nlike judicial notice, a court may assume [an incorporated document's] contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Khoja*, 899 F.3d at 1003. But "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint. This admonition is, of course, consistent with the prohibition against resolving factual disputes at the pleading stage." *Id.*

The City requests that the Court take judicial notice of 28 exhibits, which fall into the following categories: (1) a resolution adopted by the Board ("Ex. A"); (2) a proposed advisory of the New York State Liquor Authority ("NYSLA") ("Ex. T"); (3) the Plaintiffs' public SEC filings ("Exs. B–D"); (4) news articles ("Exs. E–S, U–Y"); and (5) campaign finance records related to the Proposition 22 campaign maintained by the California Secretary of State ("Exs. Z–BB"). Docket No. 30 ("Goldman Decl.") ¶¶ 2–29. Plaintiffs object to most of the exhibits and argue that the City's requests improperly seek judicial notice of the truth of disputed facts in public records or of facts that are not relevant to the motion to dismiss.[1] Opp. JNR at 1 (objecting to the request for judicial notice of Exs. B–Y and seeking the limited judicial notice of Exs. Z–BB).

One of Plaintiffs' main arguments is that the Court should deny the City's request for judicial notice of any documents related to the foreseeability of regulation impacting Plaintiffs' commissions under the Contract Clause analysis because the question of foreseeability of regulation is a disputed fact. Opp. JNR at 4. The City disagrees and relies on two cases to argue that the question of foreseeability of regulation is a question of law. Reply at 1; *see, e.g., Olson v. California*, 2020 WL 6439166, at *11 (C.D. Cal. Sept. 18, 2020) (holding that the parties should have foreseen the regulation at issue could alter their contract obligations because "courts have opined, as early as 2015, that Uber drivers could plausibly be considered employees despite contractual language."); *All. of Auto. Mfrs., Inc. v. Currey*, 2014 WL 2219219, at *4 (D. Conn. May 28, 2014) (noting that the question of foreseeability under the Contract Clause analysis is a "legal question"). But these cases show that the legal question of foreseeability relies on the determination of certain facts, *e.g.*, existing regulation or laws at the time, court opinions, or the history of regulation in an industry. *See infra* Part III.B.1. In this case, it is undisputed that there is no history of regulating the commissions of third-party delivery apps. Mot. at 6. The City instead argues that because the Plaintiffs were aware that the industry could be regulated, based on articles and their own statements, the regulation was foreseeable. *Id.* Plaintiffs dispute whether these articles and their own statements prove that the regulation was foreseeable. Docket No. 36 ("Opp.") at 7–9. But the question of foreseeability is separate from the question of judicial notice. The Court therefore will take judicial notice of these statements or articles for the reasons explained below.

***5** Turning to the exhibit categories, the Board resolution opposing Proposition 22, referenced in paragraph 47(a) of the FAC, is subject to judicial notice as a matter of public record and is relevant to DoorDash's retaliation claim. JNR at 1 (citing *Cath. League for Religious & C.R. v. City & Cty. of San Francisco*, 464 F. Supp. 2d 938, 941 (N.D. Cal. 2006) (Patel, J.) (taking judicial notice of multiple resolutions by the San Francisco Board of Supervisors)); *see* Goldman Decl., Ex. A. Plaintiffs do not object, but they contend that it cannot be offered for the truth of any statements within it. Opp. JNR at 8; *Lee*, 250 F.3d at 689–90. Because the Board resolution contains some disputed facts, *e.g.*, accusing Plaintiffs of exploiting their employees for profit, the Court **GRANTS** judicial notice of Exhibit A, but not for the truth of any statements within it that are subject to reasonable dispute. *See Khoja*, 899 F.3d at 1003.

In contrast, the proposed Advisory in the Agenda of the NYSLA is not subject to judicial notice. JNR at 1; *see* Goldman Decl., Ex. T. Although it is a matter of public record, it does not appear in the FAC and absent a showing that Plaintiffs were aware of the matter which had nothing to do with San Francisco, it is irrelevant to the resolution of the motion to dismiss. Opp. JNR at 8. The City "fails to explain how a *proposed* action by the *New York* State Liquor Authority is relevant to Plaintiffs' ability to foresee action taken by *the San Francisco* Board of Supervisors," absent Plaintiffs' specific knowledge of the New York matter. *Id.* (emphasis in original). The Court **DENIES** the request for judicial notice of Exhibit T.

Third, the Plaintiffs' SEC filings are subject to judicial notice because they are matters of public record and "are relevant to the foreseeability of regulation that could

  

impact the commissions charged by third-party delivery service companies and to what Plaintiffs communicated about the risks of investment, which bears on their regulatory taking claim." JNR at 2; *see* Goldman Decl., Exs. B–D. The City asserts that judicial notice of Plaintiffs' own statements in their SEC filings is appropriate to establish their awareness and "does not require this Court to assume that any statement is true." Reply at 2. Courts have judicially noticed documents with a party's own statements to establish awareness. *See, e.g., Watkins v. United States*, 854 F.3d 947, 949–50 (7th Cir. 2017) (taking judicial notice of another complaint filed by the plaintiff, which established that the plaintiff was statutorily barred from bringing her medical malpractice suit because there was no plausible dispute that the plaintiff was unaware of the previous filing); *Turner v. Boldt*, No. 97-CV-1616-SI, 1997 WL 564052, at *2 (N.D. Cal. Aug. 26, 1997) (granting judicial notice of plaintiff's own documents which demonstrate that she was aware of a settlement more than one year before she filed the personal injury action).

Plaintiffs contend that courts, including the Ninth Circuit, have refused to take judicial notice of SEC filings, "even if they might otherwise fall within Federal Rule of Evidence 201, when the only purpose for which the filing is offered is to establish a disputed fact." Opp. JNR at 3. They rely on *Khoja*, where the Ninth Circuit denied a request for judicial notice of investor call transcripts submitted to the SEC because "[r]easonable people could debate what exactly this conference call disclosed" about what investors knew. *Khoja*, 899 F.3d at 1003; *see also Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354 (7th Cir. 1995) (upholding district court's refusal to take notice of SEC filing in a discrimination suit because "there was considerable argument over the significance of the 10–K form" and "the fact in question [how many employees the company had for the purposes of establishing punitive damages] was not capable of accurate and ready determination by resort to the 10-K"). But in this case, the statements at issue are the Plaintiffs' own statements about the status of regulation in their industry. *See, e.g.*, Goldman Decl., Ex. B at 22 [26/183] (Grubhub noting that it was subject to "evolving" laws including those that "may cover ... pricing" and other issues); Goldman Decl., Ex. C at 36 [40/266] (DoorDash stating that "[r]egulatory and administrative bodies may enact new laws or promulgate new regulations that are adverse to our business ... including ... by attempting to regulate the commissions businesses like ours agree to with merchants."); Goldman Decl., Ex. D at 59–60 [71–72/371] (DoorDash noting that its "business is subject to a variety of U.S. laws and regulations, including those related to ... pricing and commissions, many of which are unsettled and still developing" and acknowledging that commission caps could be "retained after the COVID-19 pandemic subsides."). There is no dispute that Plaintiffs made these statements, and they are relevant to the question of foreseeability. The Court therefore **GRANTS** the request for judicial notice of the Plaintiffs' SEC filings, not for the truth of the statements therein but to establish their awareness as it relates to the question of foreseeability.

***6** Fourth, newspaper publications and information on publicly accessible websites can be subject to judicial notice to show what information was in the public realm and not for the truth of the statements. JNR at 2; *see Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.' "); *see* Goldman Exs. E–S, U–Y. Plaintiffs concede that judicial notice to establish that these articles were in the public realm is proper. Opp. JNR at 6. These documents are also relevant to question of whether the regulation impacting Plaintiffs' commissions was foreseeable. JNR at 2; *see* FAC ¶ 30. The City also asserts that the documents are relevant to the question of whether the Ordinance is reasonable. JNR at 2. It explains that the Court does not need to assume the truth of the facts in the articles because "a court is required to defer to legislative judgments, [and therefore] it may not engage in judicial factfinding or evaluate the wisdom of policy choices," which is further supported by the fact that "the FAC does not contain plausible allegations to establish that legislators would not believe [the articles] to be true." JNR at 2. The Court **GRANTS** the request for judicial notice of the articles but only for the purpose of establishing that they were in the public realm because they are relevant to the questions of foreseeability and the Ordinance's reasonableness.

Finally, public campaign contributions filed with the California Secretary of State are subject to judicial notice. JNR at 2–3 (citing *Riel v. City of Santa Monica*, 2014 WL 12694159, at *3 (C.D. Cal. Sept. 22, 2014)); Goldman Decl., Exs. Z–BB. These documents are relevant to DoorDash's retaliation claim because they show substantial contributions by Instacart, a grocery delivery service, and rideshare service, Lyft, which are not impacted by the Commission Cap. JNR at 3. The documents may also be relevant because they show that other delivery app services such as Delivery.com, Slice, ChowNow, EatStreet, MealPal, Olo, Relay, or Ritual did not make public campaign contributions to Proposition 22. The Court therefore **GRANTS** the request for judicial notice of public campaign contributions.

  

B. Contract Clause

Plaintiffs allege that the Ordinance violates the Contract Clause of the federal and California constitutions because the Ordinance substantially impairs their existing contracts with restaurants that include commission rates above 15% and the Ordinance does not have a significant or legitimate public purpose. FAC ¶¶ 86, 89.

The Contract Clause of the U.S. Constitution provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts...." U.S. Const., art. I, § 10, cl. 1. It "restricts the power of States to disrupt contractual arrangements." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). The California Constitution also prohibits the Legislature from enacting a "law impairing the obligation of contracts." Cal. Const., art. I, § 9.

To determine when a law violates the Contract Clause, the Supreme Court has "long applied a two-step test" where (1) the threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship" and (2) if such factors show a substantial impairment, whether the law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1821–22. "The California Supreme Court uses the federal Contract Clause analysis for determining whether a statute violates the parallel provision of the California Constitution." *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1097 (9th Cir. 2003).

1. Whether the Ordinance is a Substantial Impairment of a Contractual Relationship

Turning to the threshold issue, the substantial impairment inquiry "has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *In re Seltzer*, 104 F.3d at 236. The City only challenges the third component, whether the impairment is substantial. Mot. at 5.

"In answering that question," the Supreme Court "has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1817. There is no substantial impairment when the contract is in a regulated industry and the challenged law was "foreseeable as the type of law that would alter contract obligations." *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983). Courts consider whether the law "invades an area never before subject to regulation by the State" and hold that the impairment is substantial when laws "work[ ] a severe, permanent, and immediate change" to contractual rights. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, 250 (1978).

***7** The FAC alleges, and the City does not dispute, that the relationship between restaurants and third-party platforms has historically not been subject to government regulation. FAC ¶ 30. But the City asserts that the Plaintiffs knew "that they were operating in a growing industry in which regulation was unsettled and developing, including with respect to laws impacting their commissions." Mot. at 6. For example, in its April 7, 2014, IPO prospectus, Grubhub noted that it was subject to "evolving" laws governing the Internet and e-commerce, including those that "may cover ... pricing" as well as other issues. Goldman Decl., Ex. B at 22 [26/183]. In a draft registration statement to the SEC on February 13, 2020, DoorDash stated that "[r]egulatory and administrative bodies may enact new laws or promulgate new regulations that are adverse to our business ... including ... by attempting to regulate the commissions businesses like ours agree to with merchants." Goldman Decl., Ex. C at 36 [40/266]. Additionally, in its December 2020 IPO prospectus, DoorDash similarly noted that its "business is subject to a variety of U.S. laws and regulations, including those related to ... pricing and commissions, many of which are unsettled and still developing," and acknowledged that "commission caps" could be "retained after the COVID-19 pandemic subsides." Goldman Decl., Ex. D at 59-60 [71-72/371].

The City also points out that there was "robust debate" about the amount of Plaintiffs' commissions, as acknowledged in their FAC and that complaints about the platforms' power to impose excessive commissions circulated in the press long before the pandemic. *See* FAC ¶ 30; Goldman Decl., Exs. E–H. In fact, before the declaration of emergency on February 25, 2020, "the press reported that San Francisco supervisors were considering legislation to address the impact of high commission rates on local restaurants." Mot. at 6 (citing Goldman Decl., Exs. I, J).

But the Court cannot say that these articles or Plaintiffs' disclosures establish as a matter of law that when the Plaintiffs contracted with San Francisco restaurants "it was foreseeable that the City would enact a permanent price-fixing law." Opp. at 8. As Plaintiffs argue, "prior to the outbreak of COVID-19, no government had regulated

  

the commissions that third-party platforms could charge restaurants (or consumers)." FAC ¶ 31. And it appears that "no legislature in California had even formally introduced commission-cap legislation prior to 2020." *Id.* Plaintiffs point out that it "reasonably expected long-term revenue streams from their contracts that included commission rates above 15%" because "[p]rior to the COVID-19 pandemic, many restaurants joined one or both of Plaintiffs' platforms at commission rates greater than 15%" and until "the Ordinance, the vast majority of those restaurants chose to continue their contracts with Plaintiffs at commission rates greater than 15%." FAC ¶ 86. "These reasonably expected revenue streams are [allegedly] important because Plaintiffs make significant up-front investments in their platforms in reliance on long-term recoupment of those investments through commissions." *Id.* ¶ 87.

In support of its position, Plaintiffs cite *Association of Equipment Manufacturers v. Burgum*, 932 F.3d 727 (8th Cir. 2019) ("*AEM*"), where the Eighth Circuit affirmed a district court decision to preliminary enjoin a North Dakota law that prohibited farm equipment manufacturers from imposing certain obligations on dealers notwithstanding that these obligations were set forth in existing contracts. *AEM*, 932 F.3d at 729–30. The Eighth Circuit had "previously held that a similar retroactive law governing agreements between farm equipment dealers and manufacturers in South Dakota violated the Contract Clause" and therefore the law was unforeseeable and the manufacturers had no "appreciable warning of an impending intervention into their agreements." *Id.* The City asserts that *AEM* is distinguishable because there is no prior law that would make the Ordinance unforeseeable and this case involves a new industry with developing regulation, where "it would be patently unreasonable for an e-commerce company to assume that the early status quo would persist indefinitely." Reply at 2.

While there is a logic to the City's argument that there is not a long history within an established industry of freedom from regulation, there is little case law addressing the context of a new industry. Cases cited by the City involved industries that were traditionally regulated. For example, in *Energy Reserves Group*, the Supreme Court found that a law did not substantially impair existing contracts because the natural gas industry is "heavily regulated" and that "[s]tate authority to regulate natural gas prices is well established." *Energy Rsrvs.*, 459 U.S. at 414. Although the state had not "regulat[ed] natural gas prices specifically, its supervision of the industry was extensive and intrusive." *Id.* Similarly, in *California Grocers Ass'n v. City of Long Beach.*, 2021 WL 3500960 (C.D. Cal. Aug. 9, 2021), the court held that the temporary ordinance at issue—which mandated that all grocery workers in the area be paid four dollars more than their hourly wage for a period of at least 120 days—did not substantially impair the existing contracts. *California Grocers Ass'n*, 2021 WL 3500960, at *5. The court held that "[o]ther minimum labor standards impact the grocery industry and the parties could have foreseen additional regulation" and "the 'premium pay' the Ordinance requires is not so dissimilar from other mandated benefits that it necessarily creates a substantial impairment." *Id.* at *11.

***8** To be sure, in *Olson v. California*, 2020 WL 6439166 (C.D. Cal. Sept. 18, 2020), the court held that there was no substantial impairment of independent contractor contracts—contracts between Postmates, a third-party food delivery app and Uber drivers—due to a California law that classified the Uber drivers as employees instead of independent contractors. *Olson*, 2020 WL 6439166, at *1. The court held that "[t]he parties should have foreseen potential enforcement of the [industry-wide test for determining a worker's classification] to Company Plaintiffs' drivers because courts have opined, as early as 2015, that Uber drivers could plausibly be considered employees despite contractual language." *Id.* at *11. *Olson* applies with some, but limited force here because third-party platforms' relationship with merchants have hereto been entirely unregulated without price caps. *See* FAC ¶¶ 28–31.

The City's assertion that the impairment is not substantial "because Plaintiffs' contracts are terminable at will [and therefore] they do not provide them a guaranteed revenue stream or any protection from future regulation" also has logical force but itself is not sufficiently persuasive to establish no substantial impairment as a matter of law. The City's reliance on *Lefrancois v. State of R.I.*, 669 F. Supp. 1204 (D.R.I. 1987) is misplaced. There, the court noted that "there is much force to the defendants' contention" that there was no substantial impairment because the contract between the company and the Rhode Island Solid Waste Management Corporation ("RISWMC") was terminable at will by the RISWMC. *Lefrancois*, 669 F. Supp. at 1215. The court, however, reviewed the Contract Clause question "on the assumption that plaintiff's rights under the contract have in fact, been impaired" "in the interest of the expedient resolution" of the controversy and focused its analysis on whether there was a significant and legitimate public purpose. *Id.* In contrast, in *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618 (5th Cir. 2010), the Fifth Circuit held, "that the contracts were terminable at will ... does not prevent a finding of contract impairment." *United Healthcare*, 602 F.3d at 628. It explained that "neither the district court nor the parties point[ed] to any authority that

  

supports the proposition that the power to terminate a contract enfolds the power to impair it for the purposes of the Contract Clause." *Id.* Likewise, the existence of an at-will contract does not preclude a finding of substantial impairment, although that factor may inform the analysis.

Finally, the City asserts that the Ordinance does not substantially impair the Plaintiffs' contracts because the FAC does not allege facts establishing that the 15% cap is a significant limitation. Mot. at 7. For example, Plaintiffs admit that they can potentially offset lost revenues in other ways. *See* FAC ¶ 80 ("In order to try to offset some of the revenue lost due to lower commissions with restaurants, Plaintiffs could be forced to increase the fees they charge consumers who place delivery orders"). However, the FAC alleges that increasing prices to consumers "would cause fewer orders on Plaintiffs' platform, harming Plaintiffs, restaurants, and couriers who depend on Plaintiffs' platform." FAC ¶ 80. They also contend that the impairment is substantial because "the commission rate is undeniably a core term of Plaintiffs' contracts with restaurants and "[a]rtificially reducing Plaintiffs' compensation fundamentally changes the parties' bargain," which "may result in Plaintiffs being unable to continue offering those services." Opp. at 7 (citing FAC ¶¶ 26–29, 80–82); *Lynch v. United States*, 292 U.S. 571, 580 (1934) (contracts between corporations are impaired when "the right to enforce them ... is taken away or materially lessened").

***9** Accepting Plaintiffs' allegations as true, it is plausible that the Ordinance substantially impaired their existing contracts with restaurants. At the very least, there are factual questions about the substantiality of the impairment that preclude discussion at this stage of the proceedings. Though the City has mounted significant arguments, Plaintiffs have alleged a plausible showing of substantial impairment.

2. Whether the Ordinance is Drawn in an Appropriate and Reasonable Way to Advance a Significant and Legitimate Public Purpose

The next question is whether the Ordinance is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. *Sveen*, 138 S. Ct. at 1821–22. The parties dispute whether this analysis is identical to the one for rational basis review, where the "challenger bears the burden of negating every conceivable basis which might support the legislative classification, whether or not the basis has a foundation in the record." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955 (9th Cir. 2005).

The Supreme Court has acknowledged that it has "never held" that the Due Process analysis is "coextensive" with the more "searching" Contract Clause analysis. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984); *see also AEM*, 932 F.3d at 734 (holding that "[a]ccepting the State's assertion of a sufficient public purpose without a stronger showing would come perilously close to upholding an impairment of contractual obligations based merely on a rational basis."). But *Pension Benefit* was a case where a wholly owned government corporation was a party to the contract. *Pension Benefit*, 467 U.S. at 720.

When the government is not a contracting party, like this case, the Supreme Court has held that "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Rsrvs.*, 459 U.S. at 412–13. The Supreme Court has explained, in a decision after *Pension Benefit*, that courts must "refuse to second-guess" the government's identification of "the most appropriate ways of dealing with the problem" at issue. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987).

At one end of the spectrum, courts and commentators have likened this analysis to rational basis review. *See Melendez v. City of New York*, 16 F.4th 992, 1052 (2d Cir. 2021) (Carney J.) (concurring in part) ("it is telling that the modern standard of review for Contracts Clause challenges when private contracts are at issue is so deferential as to bear a resemblance to rational basis review.") (citing Erwin Chemerinsky, Constitutional Law: Principles & Policies 689 (6th ed. 2019) ("As to the second and third prongs of the [Contracts Clause] test, state and local laws are upheld, even if they interfere with contractual rights, so long as they meet a rational basis test."); Geoffrey R. Stone, et al., Constitutional Law 986 (7th ed. 2013) (explaining that "[m]odern review under the contract clause is substantially identical to modern rationality review under the due process and equal protection clauses" and that, under this standard, "the fit between the legitimate interest and the measure under review need not be close.")).

At the other end of the spectrum, the deference due to legislature "is not so entirely deferential as to constitute rational basis review." *Melendez*, 16 F.4th at 1052 (Carney J.) (concurring in part). "Unlike rational basis review, for a law to survive a Contracts Clause challenge ... the legislature must actually articulate a significant and legitimate public purpose and the public record must support a finding that the legislature's chosen means are reasonable and appropriate." *Id.*

***10** The Ninth Circuit has not expressly discussed the meaning of deference to the legislature under the Contract Clause analysis. However, the Ninth Circuit has recently affirmed a district court decision on a Contract Clause claim where the district court had applied rational basis review, *Apartment Ass'n of Greater Los Angeles v. City of Los Angeles*, 2021 WL 2460634, at *5 (C.D. Cal. June 1, 2021). *See Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 10 F.4th 905, 909 (9th Cir. 2021). Although the Ninth Circuit did not specify whether it too was applying rational basis review, it relied on the Supreme Court cases, *Energy Reserves Group* and *Keystone*, to conclude that modern Contract Clause doctrine under "more contemporary Supreme Court case law has severely limited the Contracts Clause's potency." *Apartment Ass'n of L.A.*, 10 F.4th at 909–10. It explained that the Supreme Court in *Energy Reserves Group*, "clarified the modern approach to the Contracts Clause ... articulating the flexible considerations courts must consider in a Contracts Clause case" and "indicat[ing] a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts." *Id.* at 912, 916.

Accordingly, the Court will analyze the Contract Clause issue under both rational basis review and the highly deferential standard articulated in *Energy Reserves Group* and *Keystone*, when reviewing the Ordinance's fit between its means and goals. Where "the government is not 'the party asserting the benefit of the statute,' " the Plaintiffs bear the burden of showing that the Ordinance does not serve a valid public purpose or that it is unreasonable. *Apartment Ass'n of L.A.*, 10 F.4th at 913.

a. Significant and Legitimate Public Purpose

The first inquiry is whether the Board has a significant and legitimate public purpose behind the regulation, "such as the remedying of a broad and general social or economic problem." *Energy Rsrvs.*, 459 U.S. at 412. "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* In addition, the "public purpose need not be addressed to an emergency or temporary situation." *Id.*

The City asserts that the Ordinance serves a valid purpose to "ensure that restaurants can thrive in San Francisco" and to "continue to nurture vibrant, distinctive commercial districts." *See* S.F. Police Code § 5300(j). The Ordinance's findings recognize that restaurants are important engines of the local economy and that the recent decline of restaurants coincides with the rapid rise of a few third-party food delivery services, which can leverage their market dominance to extract high fees from restaurants. *See id.* § 5300(a)–(b), (e)–(f).

The California Supreme Court has recognized that when a municipality "determines that a particular neighborhood or the community in general is in special need of a specific type of ... business establishment," it may enact legislation "to serve such a need." *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal.4th 435, 461–62 (2015) (upholding a city ordinance that requires affordable housing). *See also Hernandez v. City of Hanford*, 41 Cal.4th 279, 296 (2007) (upholding a city ordinance that allowed large, but not small, retailers to sell furniture in one commercial district because cities may regulate or control competition to preserve the economic viability of business districts and neighborhood shopping areas). Likewise, the Ninth Circuit has acknowledged that a city's attempt to "mitigate the fallout for those most affected by a shift in the market is a permissible state purpose, even if some may question its policy wisdom." *San Francisco Taxi Coal. v. City & Cty. of San Francisco*, 979 F.3d 1220, 1225 (9th Cir. 2020) (affirming the constitutionality against due process and equal protection challenges of a city agency's rules that favored recent owners of taxi medallions over those who had obtained their medallions years ago because of the recent "ridership dry up in the face of disruptive technology").[2]

***11** Plaintiffs contend that the Ordinance does not further a significant and legitimate public purpose because it was enacted to benefit a special-interest group, *i.e.*, local restaurant owners, as opposed to the general public. Opp. at 10; FAC ¶ 89. Specifically, they argue that "the Ordinance's intent is to tilt the competitive landscape between third-party platforms and restaurants in restaurants' favor." Opp. at 11 (citing S.F. Police Code § 5300(d)). As explained below, however, the Ordinance is distinct from the statutes that courts have struck down under the Contract Clause as special interest legislation.

For example, in *Allied Structural Steel Company*, the Supreme Court struck down a statute under the Contract Clause, which required a private employer to pay additional pension benefits if it terminated their pension plans or closed Minnesota offices. *Allied Structural Steel*, 438 U.S. at 247. It noted that "[t]he law was not even purportedly enacted to deal with a broad, generalized economic or social problem" and that the statute's "narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to

establish pension plans for their employees." *Allied Structural Steel*, 438 U.S. at 249. As a result, the Supreme Court concluded that "if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case." *Id.* at 250–51. In the case at bar, the Ordinance does not narrowly single out a particular transactional relationship as in *Allied Structural Steel.*

To be sure, in *AEM*, the Eighth Circuit held that the North Dakota law—that prohibited farm equipment manufacturers from imposing certain obligations on dealers—did not advance a legitimate public purpose in part because it narrowly focused on restricting manufacturers' contract rights to "primarily benefit[ ] ... farm equipment dealers." *AEM*, 932 F.3d at 733. It explained that "[e]ven if the law indirectly might benefit farmers and rural communities, the Contract Clause demands more than incidental public benefits." *Id.* According to the Eighth Circuit, "the State 'bears the burden of proof in showing a significant and legitimate public purpose' " and "[s]pecial-interest groups cannot establish ... a broad societal interest" simply by pointing to "testimony ... about a law's conceivable public benefits." *Id.*

Unlike the Eighth Circuit, however, the Ninth Circuit does not place the burden on the government to show that the legislation's purpose is legitimate, *see Apartment Ass'n of L.A.*, 10 F.4th at 913, and a law appears to target one business group over another is not *a priori* suspect. For example, in *CDK Global*, the Arizona law under challenge "prevent[ed] database providers from limiting access to car dealer data by dealer-authorized third parties" to protect consumer privacy. *See CDK Global LLC v. Brnovich*, 16 F.4th 1266, 1272 (9th Cir. 2021). The Ninth Circuit rejected the database providers' assertion that the Arizona law unfairly targeted its business because "the law applies to all [database] providers that store protected dealer data, regardless of whether they happen[ ] to be parties to ... contracts that contain[ ] a provision affected by the law." *Id.* at 1280–81 (internal quotation marks omitted). The court held that "[a]lthough the statute regulates the dealer data industry rather than some broader segment of the economy, that does not make it suspect" because plaintiffs' own witnesses explained that dealer management systems store highly sensitive data and "[i]t is therefore unsurprising that the Arizona Legislature would be particularly interested in regulating the industry to safeguard Arizonans' privacy." *Id.*

***12** Moreover, "the State could reasonably determine that anticompetitive practices were of particular concern in that industry and decide to focus its efforts at reform there" and "[s]everal other States have enacted similar legislation, further undermining the suggestion that the Arizona Legislature acted with an improper purpose." *Id.* at 1280–81. The Ninth Circuit also held that although the legislature did not make any findings, which specify that its goals were consumer data privacy and competition, it was not required to do so. *Id.* at 1280. The court pointed out that "[t]he purposes are apparent on the face of the law" because the law "contains multiple provisions that further consumer data privacy" and other provisions that "address potential anticompetitive business practices." *Id.*

The Ninth Circuit's decision in *CDK Global* is instructive in this case. The Ordinance applies to all third-party food delivery services as defined under the Ordinance. Plaintiffs are not singled out. *See id.* at 1280–81. Similar to *CDK Global*, the City has articulated a concern about anticompetitive practices in the restaurant industry and the economic health of the industry particularly in commercial districts. *See* S.F. Police Code § 5300(a)–(b), (e)–(f). And Plaintiffs concede that preventing restaurant closures is a "positive development for many local neighborhoods." FAC ¶ 22. The Ordinance thus serves a valid public purpose. The City's articulated purpose addresses a broad economic problem. *Allied Structural Support*, 438 U.S. at 249.

Similarly, in *Melendez*, the Second Circuit reviewed a denial of injunctive relief and concluded that a New York law, which renders permanently unenforceable personal liability guaranties of commercial lease obligations over sixteen months, likely had a legitimate purpose, although the court ultimately affirmed the denial. *Melendez*, 16 F.4th at 1038, 1047. The Second Circuit held that "the City asserts a legitimate public purpose that appears at least plausible on the pleadings record" notwithstanding the plaintiffs' allegation that the City's intent was only to benefit a favored group: commercial-lease guarantors. *Id.* at 1038. It distinguished *Allied Structural Support*, where the Supreme Court had "identified the challenged law to serve no public interest because it was 'not even purportedly enacted to deal with a broad, generalized economic, or social problem,' and the record suggested the target was a single employer." *Id.* at 1037. The Second Circuit concluded that the law's alleged purpose—to mitigate the economic emergency as a result of the COVID-19 pandemic and prevent the possibility of permanently closed businesses, increased unemployment, and reduced services to City residents—found some record support and was therefore plausible for the purposes of a preliminary injunction. *Id.* at 1036 (acknowledging statements by the legislation's sponsor and the text of extending legislation explaining that the law serves to minimize "economic and social damage caused to the city" by the pandemic, which "will be

  

greatly exacerbated ... if these businesses are able to temporarily close and return or, failing that, to close later, gradually, and not all at once.").

Here, the Ordinance's stated purpose—to protect the restaurant industry—is also articulated in the Ordinance's findings. *See* S.F. Police Code § 5300(j). And the City has cited data to supports its purpose. *See* S.F. Police Code § 5300(a)–(f). The City, in articulating a public interest based on evidence and drawn to address a substantial economic problem, asserts a legitimate public purpose. *See CDK Global*, 16 F.4th at 1280–81; *see, e.g., Melendez*, 16 F.4th at 1038. The Court thus considers whether Plaintiffs plausibly plead that the means employed by the City were "not drawn in a reasonable and appropriate way." *CDK Global*, 16 F.4th at 1280.

b. Reasonableness and Necessity of Ordinance

***13** The second inquiry is whether limiting the commissions that platforms may charge covered establishments bears an appropriate and reasonable relationship to the problem identified by the City. Mot. at 9. Even if the Ordinance "is a substantial impairment of contractual relations, if its 'adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption' " the Ordinance must be upheld. *Apartment Ass'n of L.A.*, 10 F.4th at 913 (quoting *Energy Rsrvs.*, 459 U.S. at 412); *see also Keystone*, 480 U.S. at 504 n.31 (holding that although it had "no basis" on which to conclude how substantial the alleged impairment was and although such "dearths in the record might be critical in some cases, they [were] not essential to [the] discussion here because the [federal law] withstands scrutiny even if it is assumed that it constitutes a total impairment"). As explained above, the Court will apply both rational basis review and the highly deferential standard under *Energy Reserves Group* and *Keystone*, where courts "must 'refuse to second-guess' " the "legislature's identification of 'the most appropriate ways of dealing with the problem' " at issue.[3] *Apartment Ass'n of L.A.*, 10 F.4th at 914 (quoting *Keystone*, 480 U.S. at 506); *see supra* Part III.B.2.

Plaintiffs contend that regardless of which standard the Court applies, the Ordinance is unreasonable because there are no extensive legislative findings that support the Commission Cap to which the Court should defer. Hearing Tr. at 16. They contend that because the Ordinance implements a permanent price control, the City needs to "have at least undertaken a study to determine what the profit margin can be to make sure that the companies can operate profitably." Hearing Tr. at 27. The City responds that the Ordinance does not in fact create a price control because Plaintiffs are free to offset any losses to consumers in the form of additional fees. Mot. at 16; *see, e.g., TCF Nat. Bank v. Bernanke*, 643 F.3d 1158, 1164 (8th Cir. 2011) (denying plaintiff's equal protection claim in part because the court was "skeptical that the [challenged law] even created a sufficient price control on TCF's debit-card business" because the law did not prohibit plaintiff from "assess[ing] fees on its customers to offset any losses"). For example, if the platforms experience any loss from the Commission Cap, they can charge a separate fee to the consumer to negate those losses. Therefore, the Ordinance is not a straight cap on price because there are ways the platforms mitigate the impact of the cap, *e.g.*, increasing consumer fees. Instead, the Ordinance functions as a form of price regulation because it effectively restricts the prices a platform can charge a restaurant for its services.

***14** Even assuming the Ordinance effects a form of price control, the only case on which Plaintiffs rely to argue that the Board must undertake such a study, even under the deferential standard of review established by the courts, is a non-binding state court decision from New York, which is distinguishable. In *New York State Land Title Association, Inc. v. New York State Department of Financial Services*, 169 A.D.3d 18 (2019), the New York state appellate court struck down a law that capped insurance fees because the assertion that the cap "allowed insurers to be adequately compensated for the additional costs of conducting such searches while turning a reasonable profit was conclusory." *New York State Land Title Ass'n*, 169 A.D.3d at 20. The court held that without "further empirical documentation, assessment and evaluation to support the regulation," the caps were arbitrary and failed rational basis review. *Id.* The court's imposition of a requirement that the legislature judgment must be supported by a study is not consistent with either rational basis review or the directive that courts not second guess the legislature in its choice of the means of implementing a valid public purpose. *Keystone*, 480 U.S. at 506.

In any event, *New York State Land Title Ass'n* is distinguishable. Here, the Ordinance's rationale is not conclusory; the City relied on market research and sample contracts to justify its 15% commission cap. The Ordinance explains that the 15% cap is "a reasonable step to protect restaurants from financial collapse without unduly constraining third-party food delivery services' businesses" because "leading third-party food delivery services companies currently charge a 10% per-order fee for the most resource-intensive aspect of their

business—delivery services—and [ ] these companies report high profit margins from all aspects of their business operations." S.F. Police Code § 5300(j). For example, the Ordinance finds that these platforms impose additional fees totaling as much as 20% of the order cost for non-delivery services, such as marketing or logistics services, which have higher profit margins than more resource-intensive delivery services. *Id.* § 5300(g). The Ordinance also acknowledges that the typical high fees of 30% of an order diminishes restaurants' already-narrow profit margins. *Id.* § 5300(f). As a result, the Ordinance finds that 15% is a reasonable commission cap. *Id.* § 5300(j). In doing so, it cites data. *Id.* § 5300(g), (j).

Plaintiffs respond that the Commission Cap is "arbitrary and utterly unsupported." Opp. at 19. They assert that "[n]either of the purported 'findings' in support of the 15% cap—that 'leading' third-party platforms charge 10% for 'delivery services' and 'report high profit margins from all aspects of their business operations'—have any evidentiary support." *Id.* Instead, they allege that "they have been operating at a loss in San Francisco, and have not been able to recoup the revenue lost due to the commission cap" since the Ordinance went into effect. FAC ¶ 82(a). According to Plaintiffs, they will not be able to provide various services, such as marketing under the Commission Cap because they "will not even be able to cover their costs." *Id.* ¶ 82(b). And they allegedly will have to "terminate contracts with existing restaurant-partners, and/or decline to enter into new contracts with prospective restaurant-partners" because "most restaurants have opted for plans with commissions of 25% or 30%." *Id.* ¶¶ 64(b), 82(d). Consequently, they assert that there cannot be a "blind deference to the legislature."[4] Hearing Tr. at 27.

***15** But under rational basis review, it is irrelevant "whether or not the basis has a foundation in the record." *Heller v. Doe by Doe*, 509 U.S. 312, 320–21 (1993). Because Plaintiffs fail to negate "every conceivable basis which might support" the Ordinance, *e.g.*, the Ordinance's legitimate purpose in protecting the restaurant industry, Plaintiffs fail to satisfy their burden in showing that the Ordinance is irrational. Under the highly deferential standard established by *Keystone* and *Energy Reserves Group*, Plaintiffs fail to satisfy their burden. The cases that Plaintiffs cite are distinguishable because there, the courts concluded that the means did not further the alleged purpose at all. But here, Plaintiffs do not claim that there is no fit between the Ordinance's means and purpose. They argue that the evidence on which the Board relied is wrong, not that the Board did not rely on any evidence. *See* Opp. at 19. But under binding precedent, the Court cannot "second-guess" the Board's identification of "the most appropriate ways of dealing with the problem" at issue. *Keystone*, 480 U.S. at 506. In fact, none of the courts in the cases that Plaintiffs cite question the legislative record or intent; instead the courts reiterate the deference to a legislature's choice in selecting the means of a law.

For example, Plaintiffs rely on *HRPT Properties Tr. v. Lingle*, 715 F. Supp. 2d 1115 (D. Haw. 2010), where the statute affected the leases of land owned by a single entity, HRPT. *HRPT*, 715 F. Supp. 2d at 1118. Specifically, the law required that any appraiser involved in a rent determination under an HRPT lease to consider factors that were not required by HRPT's leases and that "were clearly designed to favor businesses leasing land from HRPT." *Id.* The court held that although the stated purpose was a legitimate public purpose—to stabilize Hawaii's economy—the statute was not reasonably designed to promote this purpose. *Id.* at 1137-38. The statute explained that it aimed to stabilize the economy by keeping small businesses in urban environments so that consumers have easy access to those businesses. *Id.* at 1138. But the court found that the record did not indicate that the consumers served by HRPT's lessees are primarily in urban areas or that HRPT's lessees are small businesses more than ordinarily likely to move to rural areas. *Id.* Although the court noted that the "[l]egislature need not state any evidentiary findings," because the statute had several paragraphs purporting to state such findings, the court held that none of the findings indicate that it applies to the circumstances of any specific lessee affected by the statute. *Id.*

In contrast, here, the Ordinance's means fit its purpose—the Ordinance seeks to protect the restaurant industry by capping the amount of commissions third-party platforms can charge restaurants for their services. As the *HRPT* court noted, the Board "need not state any evidentiary findings," as Plaintiffs argue the Board must do. *HRPT*, 715 F. Supp. 2d at 1138.

Plaintiffs also cite *Melendez*, where the ordinance at issue allowed individual guarantors of commercial leases to escape personal liability for rent that their shuttered businesses could not pay during sixteen months of the pandemic. *Melendez*, 16 F.4th at 1040. The ordinance's purpose was to help shuttered small businesses reopen after the pandemic, thereby ensuring functioning neighborhoods throughout the city. *Id.* The Second Circuit held that the ordinance's means were likely inappropriate because it did not condition the relief on the guarantors ever reopening their businesses. *Id.* at 1041. The court explained that while it "defer[s] to legislative judgments about the means reasonable and appropriate to address a public emergency, such deference is not warranted in the absence of some record basis to link

  

purpose and means that, otherwise, appears missing." *Id.*

Here, unlike in *Melendez*, the Ordinance's findings "link" its purpose and means. The Ordinance finds that the platforms' leverage on restaurants through their anticompetitive practices allow them to extract high fees from restaurants. S.F. Police Code § 5300(a)–(k). It also finds that the rise of these platforms have coincided with the decline of the City's restaurant industry. *Id.* As a result, these findings appropriately link the Ordinance's goal in protecting the restaurant industry by implementing the Commission Cap.

***16** In *AEM*, the Eighth Circuit reviewed a North Dakota law that primarily benefited farm equipment dealers, although it purported to benefit farmers and rural communities. *AEM*, 932 F.3d at 733–34 (8th Cir. 2019). The Eighth Circuit noted that the law "nowhere mentions benefits for farmers or rural communities." *Id.* at 733. Instead, the law "has a narrow focus: restricting the contractual rights of farm equipment manufacturers" in order to benefit farm equipment dealers. *Id.* The court noted that the North Dakota "state legislature declined to follow the examples of the legislatures in *Blaisdell* and *Keystone Bituminous*, which included well-supported findings or purposes within their duly enacted laws, so any significant and legitimate public purpose must be discerned from the design and operation of the legislation itself." *AEM*, 932 F. 3d at 733. Again, the Ordinance, unlike the North Dakota law, includes well-supported findings that explain its benefits for the City's restaurant industry. S.F. Police Code § 5300(a)–(k). Therefore, the Ordinance reasonably promotes its stated purpose.

The Ordinance is more akin to the legislation in the following cases. In *Apartment Association of Los Angeles County*, the Ninth Circuit held that under "considerable deference to state and local legislatures" the temporary eviction moratorium was "reasonably related to the legitimate public purpose of ensuring health and security during the pandemic" because it was "but one aspect of a broader remedial framework applicable to landlords during the pandemic." *Apartment Ass'n of L.A.*, 10 F.4th at 914, 916. It acknowledged that Los Angeles had created an Emergency Rental Assistance Program, which provided up to $2,000 in rent payments per eligible household, and that the city expected to receive an addition $193 million for rental assistance directly from the federal government, which would be used to pay accumulated rental debt, pursuant to state legislation. *Id.*

Similarly, in *CDK Global*, the Ninth Circuit concluded that the law, which prohibits database providers from monopolizing consumer data collected by car dealers, "advances its purposes [of protecting consumer privacy] in a reasonable way." *CDK Global*, 16 F.14th at 1281. It held that the "record shows that contractual restrictions on third-party access to [database providers] have led many dealers to download their data ... in an unsecured format" and therefore "by ensuring that third-party providers have direct access to dealer data through a secure API, the Dealer Law eliminates the incentive for dealers to resort to unsecured email transfers." *Id.* The Ninth Circuit concluded that the law reasonably furthers its purpose of protecting consumer privacy because it "requires [database] providers to give access only to those authorized integrators that comply with industry security standards" and places "reasonable restrictions on such access." *Id.*

In *Keystone Bituminous Coal*, the Supreme Court affirmed the district court's grant of summary judgment and held that the law, which required coal companies to repair the damage to the surface or give the surface owner funds to repair the damage was valid under the Contract Clause. *Keystone*, 480 U.S. at 506. It acknowledged that the "record indicates that since 1966 petitioners have conducted mining operations under approximately 14,000 structures protected by the" law and that the Commonwealth "has determined that in order to deter mining practices that could have severe effects on the surface, it is not enough to set out guidelines and impose restrictions, but that imposition of liability is necessary." *Id.* at 504–05. The Supreme Court concluded that the law "plainly survives scrutiny." *Id.* at 506.

Likewise, the Ordinance is reasonably drawn to further the City's stated purpose of protecting the restaurant industry. Because the Ordinance has a legitimate public purpose and the Court cannot "second-guess" the City's determination that the Commission Cap constitutes "the most appropriate way" of advancing its purpose, Plaintiffs' Contract Clause claims are implausible and therefore the Court **GRANTS** the City's motion to dismiss these claims under the federal and state constitutions **without leave to amend**. *Apartment Ass'n of L.A.*, 10 F.4th at 914.

C. Takings Clause Under the Fifth Amendment and Inverse Condemnation Under the California Constitution

***17** Plaintiffs allege, to the extent that their contracts with restaurants provide for a commission rate greater than 15%, the Ordinance is an unconstitutional taking of their contractual right to those commissions. *See* FAC ¶¶ 101–14. The "Takings Clause" of the Fifth Amendment provides that private property shall not "be taken for

  

public use, without just compensation." U.S. Const. Amend. V; *see also* Cal. Const. art. I, § 19. The threshold question in any takings case is whether the plaintiff has a protected property interest. *See Turnacliff v. Westly*, 546 F.3d 1113, 1118–19 (9th Cir. 2008) (internal citations omitted). Although the "California Supreme Court has noted that the California constitution protects a 'somewhat broader range of property values' than the corresponding federal provision," "it otherwise generally construes the clauses congruently." *San Remo Hotel L.P. v. City And Cty. of San Francisco*, 364 F.3d 1088, 1093 (9th Cir. 2004).

The parties first dispute whether the Plaintiffs' contracts constitute property for taking under the Fifth Amendment. Mot. at 11; Opp. at 13. The City's reliance on *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), to assert that Plaintiffs' contracts do not give rise to a claim, is misplaced. Mot. at 11. In *Connolly*, Congress passed a law that required any employer withdrawing from a multiemployer pension plan "to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation" in order to "discourage voluntary withdrawals and curtail the current incentives to flee" multiemployer plans in declining industries. *Connolly*, 475 U.S. at 216–17. The law affected an existing trust agreement and pension plan, under which the employer's sole obligation to the trust was to pay the contributions required by the collective bargaining agreement. *Id.* at 218. The Supreme Court held, "that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking" because a regulatory statute's application may not be defeated by private contractual provisions if it is otherwise within the powers of Congress. *Id.* In *Conolly*, the contract rights were not property rights subject to the Takings Clause because "the United States ha[d] taken nothing for its own use, and only ha[d] nullified a contractual provision limiting liability by imposing an additional obligation that [was] otherwise within the power of Congress to impose." *Id.*

In this case, the City argues that it has similarly taken nothing for its own use and has imposed an obligation that is within its powers and therefore the Takings Clause does not protect Plaintiffs' contractual rights. Mot. at 12. The Supreme Court, however, clarified that its decision was "not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation." *Connolly*, 475 U.S. at 224. When the government "imposes regulations that restrict a property owner's ability to use his own property," *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), "a court must evaluate the action under the three-factor test announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, (1978), to determine whether it constitutes a 'regulatory taking.' "[5] *CDK Global*, 16 F.4th at 1281; *see also Connolly*, 475 U.S. at 225 (applying the *Penn Central* factors to "reinforce[ ] [its] belief that the imposition of withdrawal liability does not constitute a compensable taking under the Fifth Amendment").[6]

***18** To establish a regulatory taking, courts evaluate three factors "of particular significance":

- "(1) 'the economic impact of the regulation on the claimant';
- (2) 'the extent to which the regulation has interfered with distinct investment-backed expectation; and
- (3) the character of the governmental action.' "

*Penn Central*, 438 U.S. at 124. These are "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly*, 475 U.S. at 225.

First, there are factual questions about the economic impact of the Ordinance. Plaintiffs allege that the Ordinance "substantially diminishes the economic value" of its contracts and prevents them "from obtaining reasonable returns on their investments" because most of their "original contracts with restaurants included a commission rate greater than 15%." FAC ¶ 104. For example, "the vast majority of San Francisco-based restaurants who opted into" DoorDash's "Partnership Plan selected plans with 25% and 30% commission rates." *Id.* ¶ 6. According to Plaintiffs, the Ordinance does not simply decrease certain commissions by as much as 50% and instead it "diminishes the *value* of Plaintiffs' contracts" by "significantly more than" 50%. *Id.* ¶ 106 (emphasis in original). But it is well-established that the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993). For example, the Ninth Circuit has "observed that diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking." *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). As a result, Plaintiffs' claims—that the Ordinance reduced its commissions by as much as 50%, from 30% to 15%—is not in and of itself sufficient to establish a regulatory taking.

That said, Plaintiffs' other arguments asserting that the Ordinance causes economic harm create factual issues that are sufficient to state a plausible takings claim. They assert that the Ordinance would allegedly force them to

"(i) renegotiate contracts with many restaurants because Plaintiffs cannot cover the cost of providing existing services at a 15% commission rate, (ii) scale back certain marketing and promotional services in the City, thus harming Plaintiffs' reputation and goodwill, (iii) terminate contracts ... and/or decline to enter into new contracts, and (iv) potentially raise consumer prices, further harming their goodwill." *Id.* (internal quotation marks omitted). The City responds that the fact that the Ordinance does not prevent Plaintiffs from adopting a modified business model, *e.g.*, increasing fees to consumers or reducing services, precludes a taking claim. Mot. at 13. But "[r]aising consumer fees or reducing the scope of services would [allegedly] still leave Plaintiffs irreparably harmed" because it would cause fewer orders and therefore Plaintiffs would not fully recoup lost revenue. *Id.* ¶¶ 3, 82. As a result, because there remain factual questions, the Court cannot conclude whether the Ordinance would have a substantial economic impact on Plaintiffs.

***19** Second, it is plausible that the Ordinance interferes with Plaintiffs' investment-backed expectations. Opp. at 16. Plaintiffs allegedly executed their contracts with restaurants before any public debate occurred about commission caps to change those expectations. Opp. at 16. Contrary to the City's contentions, the at-will nature of the contracts and the Plaintiffs' disclosures to investors about the possibility of commission caps do not necessarily undermine Plaintiffs' argument for the same reasons as above. *See supra* Part III.B.1.

The final factor is whether the Ordinance is "more akin to an 'interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good' than 'a physical invasion by government,' " by which a "taking" may more readily be found. *CDK*, 16 F.4th at 1281 (quoting *Penn Central*, 438 U.S. at 124). Plaintiffs contend that the Ordinance "nakedly shifts revenues from one group of private businesses to another." Opp. at 14. But the Supreme Court has held, "[g]iven the propriety of the governmental power to regulate," *e.g.*, the government may "set minimum wages, control prices, or create causes of action that did not previously exist," "it cannot be said that the Takings Clause is violated whenever the legislation requires one person to use his or her assets for the benefit of another." *Connolly*, 475 U.S. at 223. Plaintiffs rely on Mayor Breed's statement to contend that the Ordinance fails to meet the "public use" requirement—that the Ordinance was "unnecessarily prescriptive in limiting the business models of the third-party organizations[ ] and oversteps what is necessary for the public good." FAC ¶¶ 7, 90, 105. The statement, however, concerns the economic impact of the Ordinance, not the nature of the Ordinance. The City did not appropriate anything for its own but merely "adjust[ed] the benefits and burdens of economic life to promote the common good."[7] Mot. at 12 (quoting *Connolly*, 475 U.S. at 225). The third factor thus weighs in the City's favor.

Because there are factual questions about the Ordinance's economic impact and whether the Ordinance interfered with investment-backed expectations, and thus the first two factors could plausibly be resolved in Plaintiffs' favor, the Court **DENIES** the City's motion to dismiss the Takings claims.

D. Police Power under the California Constitution

Plaintiffs assert that the Ordinance exceeds the City's authority under Article XI, Section 7 of the California Constitution because it does not promote the welfare of the general public. FAC ¶¶ 116–17. Article XI, Section 7 provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. When a plaintiff claims "that a statute does not constitute a proper exercise of the police power, the inquiry of court is limited to determining whether the object of the statute is one for which that power may legitimately be invoked and if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained." *Allied Properties v. Dep't of Alcoholic Beverage Control*, 53 Cal. 2d 141, 146 (1959). The California Supreme Court explained that "the presumption is in favor of constitutionality and that the invalidity of an act of the Legislature must be clear before the statute can be declared unconstitutional." *Id.* "It is not the court's "province to weigh the desirability of the social or economic policy underlying the statute or to question its wisdom; they are purely legislative matters." *Id.* Instead, the "means provided in a statute must be accepted as being reasonably designed to accomplish its objective unless it is unquestionable that they are improper." *Rice v. Alcoholic Bev. etc. Appeals Bd.*, 21 Cal. 3d 431, 452 (1978). "The courts will not nullify laws enacted under the police power unless they are manifestly unreasonable, arbitrary or capricious, having no real or substantial relation to the public health, safety, morals or general welfare." *Disney v. City of Concord*, 194 Cal. App. 4th 1410, 1415 (2011), *as modified* (May 2, 2011).

***20** As established above, the Ordinance has a legitimate purpose—to protect the restaurant industry—and its means are reasonable and appropriate. *See supra* Part III.B.2. Plaintiffs' amici, Docket No. 38, argues that the

  

Commission Cap does not promote the general welfare because "economists supposedly agree that all price regulation is counterproductive, pointing to studies of rent control and gas price controls." Reply at 9. But this argument ignores the deferential standard courts must give to legislatures in these areas. *Id.*; *see, e.g., Santa Monica Beach, Ltd. v. Superior Ct.*, 19 Cal.4th 952, 974 (1999) ("with rent control, as with most other such social and economic legislation, we leave to legislative bodies rather than the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment").

The parties also dispute, for the first time, whether the alleged oligopolistic nature of the restaurant delivery service market is relevant to a determination of the Ordinance's reasonableness. According to the City, the "legislators may rationally conclude that public welfare ultimately suffers when oligopolistic platforms can impose harmful commission structures on thousands of restaurants in order to shield consumers from the true costs of convenience" and that "price regulation is an appropriate response, even if the shifting of additional costs to the consumers who use these services results in some reduction in demand for them." *Id.* at 15.; *see* S.F. Police Code § 5300(d) (noting that only four platforms control approximately 98% of the entire market). Plaintiffs respond that the third-party platform industry is not oligopolistic but competitive, with restaurants that can freely enter into contracts with platforms. Opp. at 18; *see* FAC ¶¶ 5, 6, 16–21, 26–30. They assert that because the alleged oligopoly does not exist, this rationale cannot justify the Ordinance. Opp. at 18.

That platforms compete with each other, however, does not indicate that the market is not oligopolistic. Reply at 8. More importantly, whether or not the market is in fact an oligopoly is irrelevant to the question of police power. The City had grounds to believe that the platform industry was so concentrated that platforms could use their market leverage to extract high fees from restaurants. S.F. Police Code § 5300(a)–(b), (e)–(f). As a result, the City found that the Commission Cap would reasonably protect the restaurant industry. *Id.* § 5300(j). The Court cannot "weigh the desirability of the social or economic policy underlying the statute or to question its wisdom." *Allied Properties*, 53 Cal. 2d at 146. The Ordinance's means are proper and therefore the Ordinance is a valid exercise of police power. *Cf. Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 160 (1976) (reviewing a trial court's "findings concerning the existence of facts justifying the rent control provisions" based on the "evidence presented by the parties" to determine whether there is a "complete absence of even a debatable rational basis for the legislative determination" and therefore an invalid exercise of police power). The Ordinance is not "manifestly unreasonable, arbitrary or capricious." *Disney*, 194 Cal. App. 4th at 1415. Because Plaintiffs' allegations that the City exceeded its police power are implausible, the Court **GRANTS** the City's motion to dismiss this claim **without leave to amend**.

E. Due Process

Plaintiffs also allege that the Ordinance violates the Due Process Clause of the federal and California constitutions "because it imposes an irrational and arbitrary direct cap on third-party platforms' ability to generate the revenue needed to cover their expenses, and instead provides preferential economic treatment to certain restaurants at the direct expense of third-party platforms." FAC ¶ 129. Under the Due Process Clause, a law depriving Plaintiffs of property must rationally relate to a legitimate legislative purpose. U.S. Const. amend. XIV; Cal. Const. art. I, § 7. A price control satisfies due process as long as it is not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt...." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988). The *Pennell* court determined the rationality of the rent control statute based on whether the landlords were "guaranteed a fair return on their investment." *Id.* at 13. Similarly, the California Supreme Court has held, "[i]n the context of a due process challenge to a price control ... courts generally find that a regulation bears 'a reasonable relation to a proper legislative purpose' so long as the law does not deprive investors a 'fair return' and thereby become 'confiscatory.' " *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal.4th 761, 771 (1997). "In sum, when considering whether a price regulation violates due process, a court must determine whether the regulation may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection for the relevant public interests, both existing and foreseeable." *Id.* at 772.

***21** For the reasons explained above, the Ordinance articulates a legitimate government purpose—to protect the restaurant industry and nurture vibrant, distinctive commercial districts. *See supra* Part III.B.2.a. Plaintiffs' cases which concern laws that had no legitimate purposes are thus distinguishable. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 992 n.15 (9th Cir. 2008) (concluding that "economic protectionism for the sake of economic protectionism is irrational" but acknowledging that "there might be instances when economic protectionism might be related to a legitimate governmental interest and

survive rational basis review").

Nonetheless, accepting Plaintiffs' allegations as true, there are questions of fact about whether the Ordinance is "confiscatory." Although the City contends that the Commission Cap is not confiscatory because Plaintiffs can receive compensation from other sources, *e.g.*, by raising the price for consumers or reducing services, Plaintiffs assert that they are operating at a loss and will not be able to recoup all of their losses from the Commission Cap because some consumers will not be willing to pay higher fees. FAC ¶¶ 80, 82.

Plaintiffs also assert that increasing consumer fees will harm their reputation and goodwill and therefore the Ordinance is irrational. Opp. at 22 (citing FAC ¶ 82). But such an argument is unpersuasive. Plaintiffs do not cite any case where price regulation may be invalidated because of harm to reputation and goodwill. In fact, the Ninth Circuit has concluded that an injury to business reputation did not "rise to the level of a constitutionally protected property interest." *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 374–76 (9th Cir. 1999) (holding that plaintiff's allegation that a report's conclusion that it was connected to organized crime did not damage its "business goodwill," *i.e.*, its "expectation of continued public patronage"). In contrast, an example of an injury to "business goodwill" that is a constitutionally protected property interest can be found in *Soranno's Gasco v. Morgan*, 874 F.2d 1310 (9th Cir. 1989). There, the Ninth Circuit held that the owner could not be deprived of its conferred property status to business goodwill without due process where county officials had suspended the plaintiff's permits and sent letters to the plaintiff's customers informing them that the permits had been suspended and threatening to revoke their permits if they continued to engage in business with the plaintiff. *Sorranno's Gasco*, 874 F.2d at 1313–16. In other words, although damage to reputation may not be enough, concrete financial injury, threats to customers, and damage business goodwill can be the bases for a due process claim.

In this case, Plaintiffs' allegations of injury to their business goodwill do not rise to the level of a constitutionally protected property interest. Their claims of injury are more akin to allegations of injury to its reputation; there is no, *e.g.*, accusation that they are connected to organized crime, and there is no suspension of their business or threats to their customers. In fact, any allegation of injury to their business goodwill from the Ordinance is unlikely given that the Ordinance does not directly raise fees to consumers and consumers may not be deterred by increased fees.

However, although most of Plaintiffs' due process arguments fail, it is plausible that the Ordinance is confiscatory, and thus the Court **DENIES** the City's motion to dismiss Plaintiffs' due process claims.[8]

F. Equal Protection

***22** Plaintiffs also assert that the Ordinance violates the Equal Protection Clause of the federal and California constitutions. FAC ¶¶ 129, 146. Plaintiffs allege that the Ordinance violates the Equal Protection Clause because (1) it "prohibits the ability of one class (third-party platforms) to freely contract with restaurants" but it "does not fix the price of any other business with whom restaurants transact, such as raw ingredient suppliers, equipment suppliers, or advertisers"; (2) it "caps the fees of third-party platforms that serve at least '20 separately owned and operated food preparation and service establishments,' but not those that serve fewer than 20 such establishments"; and (3) Plaintiffs are members of a politically unpopular group of businesses and therefore the Ordinance was unlawfully enacted with animus. FAC ¶¶ 146, 148–49.

Under the Equal Protection Clause, laws that treat groups differently must rationally relate to a legitimate end. U.S. Const. amend. XIV; Cal. Const. art. I, § 7.[9] When a statute neither impinges upon a fundamental right nor disadvantages a suspect or quasi-suspect class, like the case here, the appropriate legal standard is rational basis, particularly in the field of economic regulation. *See Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 491 (1955). Such statutes must be "wholly irrational" to violate the Equal Protection Clause. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955 (9th Cir. 2005). The "challenger bears the burden of negating every conceivable basis which might support the legislative classification, whether or not the basis has a foundation in the record." *Id.* A law is "constitutionally valid if 'there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.' " *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681 (2012).

First, the application of the Ordinance to third-party platforms but not vendors, such as raw ingredient or equipment suppliers, is rational. Unlike third-party platforms, vendors do not take a fixed-percentage commission out of every sale the restaurant makes. Mot.

at 18. The Board also stated its belief that the "platforms possess power over restaurants that the providers of other goods and service do not," *e.g.*, the power to set prices in an oligopolistic market.[10] *Id.* These stated reasons are a conceivable basis for the Ordinance, and as such are rational and do not "come close" to the "outer bound" of a state's action, which "borders on corruption, pure spite, or naked favoritism lacking any legitimate purpose." *San Francisco Taxi Coal.*, 979 F.3d at 1225. As the Ninth Circuit has acknowledged, "For better or for worse, governmental regulations today typically benefit some groups and burden others. So long as there are other legitimate reasons for the economic distinction, [the court] must uphold the state action." *Id.* at 1225; *see also Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 959 (N.D. Cal. 2017) ("legislators often favor[ ] one industry or segment of commerce over another" and "such economic regulation is historically the kind of legislation that is subject to the most deferential form of traditional rational basis review under the Equal Protection Clause."). Plaintiffs cannot negate "every conceivable basis for the classification." *Fields*, 413 F.3d at 955.

***23** Similarly, the Ordinance's application to only platforms that serve more than 20 restaurants is rational because the Board stated its belief that the largest companies control most of the market. Mot. at 18–19; *see, e.g., Hernandez*, 41 Cal.4th at 302 (upholding differential treatment of large department stores and other retail stores because the distinction was rational—the city desired to protect the economic vitality of the district but did not want to "diminish the financial benefits of the [ ] district for the large department stores that it wanted to attract and maintain"). The Board stated its belief that a platform that serves fewer than 20 restaurants will not be able to exercise the power of a large platform, which can have a "network effect" that increases their market power by drawing more restaurants to its platform and thereby drawing more consumers to join. Mot. at 19.

Plaintiffs challenge these justifications. They allege that third-party platforms are a "politically unpopular group of businesses" and assert that the Ordinance was motivated by animus. Opp. at 21. "When a law exhibits a desire to harm an unpopular group, courts will often apply a more searching application of rational basis review. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1200 (9th Cir. 2018). "[N]either 'a bare ... desire to harm a politically unpopular group" nor "negative attitude[s]" or "fears" about that group constitute a legitimate government interest for the purpose of [rational basis] review." *Id.* "When the politically unpopular group is not a traditionally suspect class, a court may strike down the challenged statute under the Equal Protection Clause if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute's enactment." *Id.* (emphasis in original). Plaintiffs allege that the Board was motivated by animus as evidenced by its members calling Plaintiffs "modern-day robber barons" who tried to "buy democracy," "exploit[ed] their employees for profit," and supported "slave labor." FAC ¶ 47. But they fail to show that they are a "politically unpopular" group subject to the "more searching application of rational basis review." *Animal Legal Def. Fund*, 878 F.3d at 1200. The passage of Proposition 22 by a margin of over 17 percentage points and Mayor Breed's opposition to the removal of the sunset provision indicate otherwise. FAC ¶¶ 48, 73; *see also* S.F. Police Code § 5300(d) (describing increasing usage of third-party food delivery services, especially in urban markets like San Francisco). In contrast, examples of politically unpopular groups include the LGBTQ+ community, *see Lawrence v. Texas*, 539 U.S. 558, 580 (2003), the mentally disabled, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), and animal welfare groups, *Animal Legal Def. Fund*, 878 F.3d at 1200.

Because amendment would be futile—*i.e.*, Plaintiffs cannot allege that Ordinance's classification is irrational—the Court **GRANTS** the City's motion to dismiss Plaintiffs' Equal Protection claims **without leave to amend.**

G. First Amendment Retaliation

Finally, DoorDash alleges that the Ordinance was enacted in retaliation for its support of Proposition 22. FAC ¶¶ 161–63. To state a claim for retaliation under the First Amendment, a plaintiff must plead facts showing: "that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019). "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

***24** At the pleading stage, however, the complaint must simply allege "plausible circumstances connecting the defendant's retaliatory intent to the suppressive

  

conduct[,]" and motive may be shown with direct or circumstantial evidence. *Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 870 (9th Cir. 2016); *see also Capp*, 940 F.3d at 1058 n.6 (noting that its conclusion that plaintiffs have plausibly alleged "but-for" causation "should not be read as disturbing [its] prior cases holding that plaintiffs need only plausibly allege that retaliatory animus was a substantial or motivating factor to state a First Amendment retaliation claim that survives a motion to dismiss."). The Ninth Circuit has emphasized that "motive [is] a necessary element" of a retaliation claim and that "[o]therwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment." *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019) (citing *Arizona Students' Ass'n*, 824 F.3d at 866, 869–70).

In this case, DoorDash claims that as a result of its public support for Proposition 22, the City passed the then-temporary Ordinance a week after Proposition 22 passed in November 2020 ("November 2020 Ordinance") and removed the sunset provision in June 2021 ("June 2021 Ordinance"). FAC ¶¶ 64, 165. There is no dispute that its public support for Proposition 22 was protected by the First Amendment. The City only contends that DoorDash does not plausibly allege the second and third elements. Mot. at 21.

1. Chilling Effect

DoorDash contends that the enactment of the then-temporary Ordinance in November 2020 and the removal of the sunset provision in June 2021—which permanently capped its commissions, allegedly cut its revenue, and rewrote thousands of its contracts—as a result of its public support of Proposition 22 would plausibly chill an ordinary company from engaging in the same protected activity. Opp. at 23. The City responds that its actions did not deter DoorDash because it continued to work to pass Proposition 22 even though there was public information at the time about potential legislation that could cap its commissions. Mot. at 21 (citing FAC ¶¶ 30, 46) (Plaintiffs acknowledging that "for several years, there has been a robust debate about the amount of commissions restaurants pay to third-party platforms" but continuing to publicly support Proposition 22 throughout 2019 and 2020); *see also* Goldman Decl. Exs. I, J (January and February 2020 articles about the Board's hearing to discuss the effects of delivery apps on small businesses). The inquiry, however, is "generic and objective." *O'Brien*, 818 F.3d at 933. The question is not whether the City's actions actually chilled DoorDash, "but rather whether the alleged retaliation would chill a person of ordinary firmness from continuing to engage in the protected activity." *Capp*, 940 F.3d at 1054 (internal quotation marks omitted).

Although it is implausible that the November 2020 Ordinance would chill any conduct, it is plausible that the June 2021 Ordinance would. The November 2020 Ordinance only codified the Mayor's existing temporary commission cap from the April 2020 Order and therefore it had no financial impact and would not plausibly chill any conduct. Reply at 12. DoorDash does not argue that the enactment of the April 2020 Order was in retaliation for its Proposition 22 support, and it does not argue that the temporary commission cap in the November 2020 Ordinance was substantially different from the one in the April 2020 Order. In contrast, the June 2021 Ordinance and its removal of the sunset provision allegedly "permanently shifted revenues from platforms to restaurants." Opp. at 23. Accepting Plaintiffs' allegations as true, it is therefore plausible that the June 2021 Ordinance and its subsequent financial consequences would chill any ordinary company's public advocacy.

2. Substantial or Motivating Factor

***25** DoorDash alleges that the City's retaliatory animus was a substantial or motivating factor for enacting the two versions of the Ordinance because (1) a week after Proposition 22 was passed, the City passed the November 2020 Ordinance; and (2) numerous, contemporaneous statements of Board members show that seven months later, in June 2021, the Board removed the Ordinance's sunset provision in retaliation for its political speech in support of Proposition 22. FAC ¶ 165. Because the Court holds that the enactment of the November 2020 Ordinance would not chill conduct above, it focuses only on the enactment of the June 2021 Ordinance here and concludes that DoorDash does not allege a plausible claim.

First, there is no temporal proximity between the enactment of the June 2021 Ordinance and DoorDash's public support. DoorDash and other industry participants began to support Proposition 22 as early as August 2019, nearly two years before the Board removed the sunset provision in June 2021. *See* FAC ¶ 46. DoorDash contends that the arguable triggering event was the passage of Proposition 22 in November 2020 because if Proposition 22 had not passed, the support for Proposition 22 would have been inconsequential. Hearing Tr. at 35.

  

The Court disagrees. There is no dispute that the protected political activity is DoorDash's support of Proposition 22, not the passage of Proposition 22. As a result, the question is whether DoorDash's support for Proposition 22 was a substantial or motivating factor in the Board's removal of the sunset provision. The fact that removal occurred two years after DoorDash began supporting Proposition 22 weakens an inference of retaliation. *See Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000) (holding that "[t]o conclude that [defendant] was aware of [plaintiff's] statements to [defendant] and that [defendant] retaliated against [plaintiff] because of them would be to engage in the logical fallacy of *post hoc, ergo propter hoc*, literally, 'after this, therefore because of this.' "); *cf., Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 929 (9th Cir. 2004) (holding that actions within the "three-to-eight month time range" " 'easily' supports an inference of retaliation.").

Moreover, even if the triggering event was the passage of Proposition 22 in November 2020, the undisputed fact that the core idea for the Commission Cap originated in the April 2020 Order before the passage of Proposition 22 significantly weakens DoorDash's retaliatory claim. *See, e.g., Inman v. Hatton*, No. 17-CV-06612-SI, 2018 WL 1100959, at *5 (N.D. Cal. Mar. 1, 2018) (holding that plaintiff "does not allege any facts that plausibly suggest that [defendant] engaged in the allegedly retaliatory conduct *because* of [plaintiff's] protected conduct—his allegations only show that the allegedly retaliatory conduct followed several months after [plaintiff] filed a grievance against [defendant]."). Again, DoorDash does not allege that the April 2020 Order was retaliatory. *See Huskey*, 204 F. 3d at 899; *Inman*, 2018 WL 1100959, at *5 (several months delay weakens the inference of retaliation).

Second, the fact that the Ordinance is both overbroad and underinclusive—*i.e.*, it impacts only a partial number of supporters of Proposition 22 and does not impact other major funders of Proposition 22—also weakens DoorDash's retaliation allegations. The principal funders of Proposition 22 such as Lyft, a rideshare service, and Instacart, a grocery delivery service, are not subject to the Ordinance whereas other companies who did not make public campaign donations to Proposition 22, such as Grubhub, are. Mot. at 22. And even though Proposition 22 applies to all app-based drivers and concerns the issues of app-based drivers (*e.g.*, benefits, employee status), the Ordinance only applies to restaurant delivery app-based drivers and concerns issues specific to restaurant delivery platforms (*e.g.*, commission caps, prohibitions on restaurant pricing restrictions).[11] *Id.*

***26** The two Ninth Circuit cases on which DoorDash relies are distinguishable. In *Koala v. Khosla*, the Ninth Circuit denied a motion to dismiss a retaliation claim even though the university acted against all student organizations and not only the plaintiff, a student-run media organization called *The Koala*. *Koala*, 931 F.3d at 906. *The Koala* had published an article satirizing the concept of "safe spaces" at the university and within days, university officials had condemned *The Koala* and called for its defunding. *Id.* at 892–93. A few days later, the university introduced the "Media Act," to discontinue funding for all student-run media organizations. *Id.* The Ninth Circuit concluded that it was plausible that the publication of *The Koala*'s article "was the motivating factor that prompted the" passage of the Media Act and that *The Koala* "was indeed being singled out for special treatment" based on contemporaneous statements by university officials. *Id.* at 905.

Similarly, in *Arizona Students' Association*, an organization representing students at Arizona's three public universities ("ASA") alleged that the Arizona Board of Regents ("ABOR") had withdrawn their student activity fee funding, their only source of income, in retaliation for their support of a controversial statewide ballot measure, Proposition 204. *Ariz. Students' Ass'n*, 824 F.3d at 862–63. The ABOR changed the mandatory student activity fee to an opt-in fee and required the student associations to reimburse the administration for the costs of collection. *Id.* at 863. Although the Ninth Circuit acknowledged that "ABOR had no affirmative obligation to collect or remit the ASA fee," it held that "having done so for fifteen years at no cost, ABOR could not deprive the ASA of the benefit of its fee collection and remittance services in retaliation for the ASA's exercise of its First Amendment rights." *Id.* at 870. The Ninth Circuit held that the plaintiffs "pleaded a plausible claim for First Amendment retaliation" based on several board members' criticism of ASA's support for Proposition 204, the temporal proximity between the alleged retaliatory conduct and the ASA's exercise of its free-speech rights, and several Regents' public acknowledgement that the Board's decision was "political in nature and resulted from ASA's advocacy in support of Proposition 204," all of which "sufficiently identif[ied] [defendant's] retaliatory intent and the nexus between the board's intent and its later [actions]." *Id.* at 871.

In contrast, in this case, the contemporaneous statements made by one Board member, Supervisor Aaron Peskin, at the time of the June 2021 Ordinance, does not support an inference that DoorDash's support of Proposition 22 was a motivating factor for the removal of the sunset provision. When voting for the permanent cap, Supervisor Peskin allegedly noted that "DoorDash, Uber Eats, Postmates all contributed to the most expensive ballot

  

measure in history, Prop 22, to gut employee protections."[12] FAC ¶ 69. That same day, he allegedly posted on Facebook, declaring that:

> "In another first among major American cities, San Francisco just passed my legislation setting a permanent 15% cap on delivery fees charged by DoorDash, UberEats, Grubhub and Postmates to independent restaurants. Third-party food delivery saw exponential growth during the pandemic, while SF restaurants incurred $400M in rent debt. 70,000 Bay Area hospitality workers lost their jobs, while Big Tech spent $220M to pass Prop 22, the most anti-worker initiative in California history. We will continue to push back against companies who demonstrate blatant disregard for small businesses, workers and neighborhoods. Correcting this imbalance is a long-term project."

*Id.* Statements by individual legislators, however, do not establish the motivation of the legislative body as a whole. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 384 (1968) (rejecting argument that requested the Supreme Court to "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it").

***27** Furthermore, *Arizona Students' Association* is distinguishable because in that case there was "no indication that any rationale for the action was provided apart from the express statements by multiple Regents confirming that it was a political decision in response to the ASA's advocacy." Reply at 13. *Koala* is distinguishable for the same reason—there the university introduced the "Media Act" without explanation. *Id.* at 14. In contrast, the Ordinance's findings and the alleged statements by other Board supervisors indicate a motivation that is not retaliatory. *Id.*; *see, e.g.*, FAC ¶¶ 67–70 (Supervisor Safai explaining that "many of the businesses that rely on delivery, would not have been able to survive without that option. And so many of them felt as though they were in a position of negotiating with a gun to their head for lack of better term."); *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1239 (9th Cir. 1994) (holding that "one statement without additional evidence of racial discrimination was insufficient to state a claim" especially "given the many [non-discriminatory] reasons articulated by the City to support its decisions"). Although the Ninth Circuit has held that "the mere existence of a legitimate motive, supported though it might be by the FAC, is insufficient to mandate dismissal," *Capp*, 940 F.3d at 1056, DoorDash's retaliation claim is implausible for several reasons. Any amendment would be futile because DoorDash cannot change the undisputed facts that make its retaliation claim implausible—*i.e.*, that the idea behind the Ordinance originated before the passage of Proposition 22 in the April 2020 Order, that DoorDash does not allege that the April 2020 Order was retaliatory, that the Ordinance is both overbroad and underinclusive regarding Proposition 22 supporters, and that no other Board member but Supervisor Peskin made any contemporaneous statements suggesting that the removal of the sunset provision was due to DoorDash's support of Proposition 22.

Accordingly, the Court **GRANTS** the City's motion to dismiss the Plaintiffs' First Amendment retaliation claim related to the passage of the June 2021 Ordinance **without leave to amend**.

## IV. CONCLUSION

For the reasons explained above, the Court **DENIES** the City's motion to dismiss Plaintiffs' Takings Clause claim and Due Process claim based on its alleged confiscatory effect, as well as their state claim counterparts. The Court **GRANTS** the motion to dismiss their Contract Clause, other aspects of Due Process, Police Power, Equal Protection, and First Amendment retaliation claims as well as their state claim counterparts **without leave to amend.**

This order disposes of Docket No. 28.

**IT IS SO ORDERED.**

### All Citations

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Footnotes

1 The Court rejects the City's assertion that Plaintiffs' opposition to its request for judicial notice should be stricken because they filed a separate 10-page opposition from the 25-page opposition to the City's motion to dismiss, thereby violating Local Rule 7-3(a), which provides that "[a]ny evidentiary and procedural objections to the motion must be contained within the brief or

  

memorandum." Docket No. 49 ("Reply") at 1. The City's request for judicial notice was separately filed from its motion to dismiss and so the Plaintiffs may also separately file its opposition to the request for judicial notice.

2 Contrary to the Plaintiffs' argument, the City's reliance on these cases is proper. *See* Opp. at 11 n.3. Although these cases do not involve Contract Clause claims, they helpfully show that the California Supreme Court and Ninth Circuit have recognized that "the preservation of a municipality's downtown business district for the benefit of the municipality as a whole," *Hernandez*, 41 Cal.4th at 297, and the intent to "mitigate the fallout for those most affected by a shift in the market," *San Francisco Taxi Coal*, 979 F.3d at 1225, are examples of permissible legislative purposes.

Plaintiffs also contend that although the Ninth Circuit in *San Francisco Taxi Collection* held that it is a legitimate government purpose to "mitigate the fallout of those most affected by a shift in the market," the case is distinguishable because there the "economic aid came *from the government*, not forced subsidization by private business." Opp. at 11 n.3 (emphasis in original). This argument, however, relates to the question below—whether the means of achieving the Ordinance's purpose are appropriate and reasonable—and not whether the Ordinance advances a significant and legitimate purpose. And as explained below, such choices are subject to considerable legislative deference. *See Apartment Ass'n of L.A.*, 10 F.4th at 914.

3 The Court rejects Plaintiffs' contention that the Court should follow the analysis in *Melendez. See* Hearing Tr. at 24. There, the Second Circuit applied an exacting analysis under *Allied Structural Steel* that "is difficult to reconcile" with the approach in the subsequent *Keystone Bituminous Coal* case where the Supreme Court "[a]fter providing no more than a short paragraph of analysis, [ ] concluded that the challenged law was reasonable and appropriate." *Melendez*, 16 F.4th at 1054 (Carney, J., concurring in part and dissenting in part). The Court will follow the binding approach by the Ninth Circuit in *Apartment Association.*

Plaintiffs also attempt to distinguish *Apartment Ass'n of L.A.*, by contending that the Ninth Circuit's "absolute deference to the legislature" does not go beyond emergency situations. Hearing Tr. at 21; *see Apartment Ass'n of L.A.*, 10 F.4th at 914 (holding a court's deference to a legislature's determination of the most reasonable means to deal with a problem is "particularly so ... in the face of a public health situation like COVID-19."). But the Supreme Court decision in *Keystone Bituminous Coal*, on which the Ninth Circuit relies, did not involve any emergency situation. *See Keystone*, 480 U.S. at 506 (upholding a federal law that required "coal companies either to repair the damage" to the surface or "to give the surface owner funds to repair the damage" in order to prevent the destruction of various buildings and cemeteries). Hence, *Apartment Ass'n of L.A.*'s deference to a legislature's determinations is not limited to emergency situations.

4 Plaintiffs also argue that the Ordinance is not reasonably designed to revitalize the City's commercial district because it is "not limited to restaurants in any specific district, and it targets *delivery*, which restaurants can do from anywhere, incentivizing them to *leave* the high-rent commercial district." Opp. at 12 (emphases in original). But the Ordinance applies to all of San Francisco's commercial districts and not only one. Reply at 4; *see* S.F. Police Code § 5300(a), (b). Moreover, it stands to reason that restaurants in commercial districts may not enjoy the same local dining support as neighborhood restaurants have.

5 A regulatory taking is different from the other Takings claim that the Supreme Court has recognized—where the government carries out "a physical appropriation of property," which is "a *per se* taking." *Cedar Point*, 141 S. Ct. at 2072.

6 The other cases on which the City relies to assert that their contracts are not "property" under the Takings Clause concern the same statute at issue in *Connolly* and are therefore unpersuasive for the same reason. *See Bd. of Trustees of W. Conf. of Teamsters Pension Tr. Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1406 (9th Cir. 1984); *Peick v. Pension Ben. Guar. Corp.*, 724 F.2d 1247, 1275-76 (7th Cir. 1983); *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund*, 762 F.2d 1124, 1135 (1st Cir. 1984).

7 Plaintiffs contend that the cases on which the City relies consider whether the challenged regulation was within the government's authority and not whether the government itself obtained a benefit. *See Pro-Eco, Inc. v. Bd. of Comm'rs*, 57 F.3d 505, 511 (7th Cir. 1995) (challenged regulations—a county's moratorium on landfills—that impacted real estate option contracts were "within [the

  

government's] substantive powers"); *Connolly*, 475 U.S. at 224 (law was "otherwise within the power of Congress"); *Classic Cab, Inc. v. Dist. of Columbia*, 288 F. Supp. 3d 218, 229 (D.D.C. 2018) (law requiring taxi operators to transition from analog metering systems to newer systems designed to run on mobile devices and calculate fares using Global Positioning System dealt with "a broad, generalized economic or social problem" in a "heavily regulated ... industry"). But the Ordinance is within the Board's substantive powers. Reply at 6; *see supra* Part III.B; *see infra* Part III.D.

8 The City's reliance on *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) is misplaced. There, the Supreme Court held that "the absence of legislative facts explaining the distinction [o]n the record, has no significance in rational-basis analysis" and that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C.*, 597 U.S. at 315 (internal quotation marks omitted). But the Supreme Court was discussing equal protection claims and not due process claims.

9 The same standards apply to equal protection claims under the federal and California constitutions. *Manduley v. Superior Ct.*, 27 Cal. 4th 537, 571 (2002), *as modified* (Apr. 17, 2002).

10 Plaintiffs contend that "no evidence suggests" that third-party platforms charge above-market prices for non-delivery services, and that the City did not "study whether other companies that provide the same services—like Google, which provides marketing services—lack market power and charge lower fees." Opp. at 21. Under traditional rational basis review, however, the City is not required to separately compare each service that platforms provide and establish that platforms effectively charge higher prices for such services. Reply at 11 n.8. It is enough for the City to believe that "platforms impose overall commission rates that restaurants have little choice but to pay to gain access to a large customer base that uses the platform to search restaurants, place orders, and obtain meal delivery" and therefore apply the Ordinance to the platforms only. *Id.*; *see San Francisco Taxi Coal.*, 979 F.3d at 1225 ("That the City would try to mitigate the fallout for those most affected by a shift in the market is a permissible state purpose, even if some may question its policy wisdom.").

11 The issues in the Ordinance other than the Commission Cap are not in dispute here.

12 The FAC also references statements by Supervisors Safai and Stefani at the time, but they do not discuss DoorDash's support of Proposition 22 let alone suggest any evidence of retaliation for support of Proposition 22. Mot. at 23; *see* FAC ¶¶ 64(b), 70(a)–(c).

**End of Document**

2022 WL 1619019
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

ABC SAND AND ROCK COMPANY, INC.; and David Waltemath, Plaintiffs,
v.
COUNTY OF MARICOPA; Flood Control District of Maricopa County; William Wiley and Unknown Wiley; Ed Raleigh and Unknown Raleigh; Anthony Beuche and Unknown Beuche; Michael Fulton and Unknown Fulton; and Scott Vogel and Unknown Vogel, Defendants.

No. CV-21-01875-PHX-DGC
|
Signed 05/23/2022

**Attorneys and Law Firms**

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Stephen William Tully, Law Offices of Tully Bailey LLP, Phoenix, AZ, for Defendants.

**ORDER**

David G. Campbell, Senior United States District Judge

***1** Defendants have filed a motion to dismiss. Doc. 13. The motion is fully briefed (Docs. 13, 16, 17) and oral argument will not aid the Court's decision, *see* LRCiv 7.2. For reasons stated below, the Court will grant the motion as to the individual Defendants and deny it as to the remaining Defendants. Plaintiffs will also be granted leave to amend.

**I. Background.**

This case is the latest in a longstanding dispute between ABC Sand and Rock Company ("ABC") and its owner, David Walmath (collectively, "Plaintiffs"), and the Flood Control District of Maricopa County (the "District"). ABC operates a sand and gravel mine in the floodplain at the confluence of the Agua Fria River and New River in Maricopa County, Arizona. Doc. 1 ¶¶ 25-26. The District regulates and issues five-year permits for mining operations. *Id.* ¶¶ 20, 22-24. ABC mined under permits issued by the District from 1985-2011. *Id.* ¶ 28. In 2011, ABC applied to renew its permit. *Id.* ¶ 29. Disputes over this renewal led to extensive litigation both in this Court and Arizona state courts. *Id.*; *see ABC Sand & Rock Co., Inc. v. Maricopa Cnty.*, No. CV-17-01094-PHX-DGC, 2021 WL 3491947, at *1-4 (D. Ariz. Aug. 9, 2021) (discussing history of litigation between the parties).

As a result of the prior litigation, ABC's permit application process began anew in 2015. Doc. 1 ¶ 31; *ABC Sand & Rock Co.*, 2021 WL 3491947, at *2. The District issued a new permit on August 10, 2017 (the "Permit"). *Id.* ¶ 32. Because of concern that a 100-year flood of the New River could enter ABC's mining pit with a discharge of 39,000 cubic feet per second, the Permit required ABC to take certain actions and build certain structures on its land, and set time limits for ABC to do so. *Id.* ¶¶ 33-35. Plaintiffs allege that complying with the Permit's requirements has cost ABC more than $8 million. *Id.* ¶ 39. Plaintiffs assert that the requirements are based on an outdated 2001 report, rather than a report they received on March 23, 2021, which concluded that any 100-year flow would be only 19,600 cubic feet per second. *Id.* ¶¶ 33-34, 52-59.

Plaintiffs allege that the District chose to rely on the 2001 data – even though the District knew the data to be incorrect – because of expected benefits to its plan for a recreational corridor (the "Watercourse Master Plan") which would pass through ABC's property. *Id.* ¶¶ 50, 60-61. According to Plaintiffs, the Watercourse Master Plan would create a new spring training facility, involve "Main Street" mixed use initiatives and an airport expansion, and create parks and recreation facilities. *Id.* ¶ 49. Plaintiffs allege that the actions required of ABC by the Permit would inure to the District's benefit by allowing it to implement the Watercourse Master Plan at a lower cost. *Id.* ¶ 61.

Plaintiffs bring claims under 42 U.S.C. § 1983 alleging violations of the Takings Clause (Count I) and the Due

  

Process Clause (Count II) of the Fifth Amendment. Plaintiffs seek declaratory and injunctive relief and damages.

**II. Legal Standard.**

***2** When analyzing a complaint for failure to state a claim, the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). A successful motion to dismiss under Rule 12(b)(6) must show either that the complaint lacks a cognizable legal theory or fails to allege facts sufficient to support its theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss as long as it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

**III. Defendants' Motion to Dismiss.**

Defendants argue that Plaintiffs' complaint should be dismissed because it is (A) untimely, (B) precluded by the doctrine of claim preclusion, and (C) fails to state a plausible claim for relief.

**A. Statute of Limitations.**

Defendants argue that the applicable statute of limitations for actions brought under § 1983 in Arizona is two years. Doc. 13 at 4. (citing *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004)). Defendants argue that Plaintiffs' claims accrued on August 10, 2017, the date the Permit was issued, because Plaintiffs knew on that date of the flow rate used by the District and that it would be required to comply with the terms of the Permit in order to extract further material from its mine. *Id.* at 5. Plaintiffs filed this lawsuit on November 4, 2021, more than four years after the Permit was issued. *See id.*

Plaintiffs argue that, under *Ranch 57 v. City of Yuma*, 731 P.2d 113, 117-18 (Ariz. Ct. App. 1986), regulatory takings claims are subject to a four-year statute of limitations, and alternatively that the four-year statute of limitations in 28 U.S.C. § 1658 applies under *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 377-78 (2004). Doc. 16 at 6. Plaintiffs further argue that the date of accrual does not depend on the date the Permit was issued, but on the dates ABC was required to take certain actions on its property pursuant to the Permit. *Id.* at 4. Plaintiffs argue that a takings claim is not ripe until the governmental entity implementing regulations has reached a final decision regarding the application of the regulations to the property at issue, something that did not happen until ABC was required to take action on its land. *Id.* (citing *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019)). Plaintiffs assert that the earliest action required by the Permit was to take place by November 10, 2017. *Id.* at 5. Based on this date, Plaintiffs' action on November 4, 2021, was within the four-year statute of limitations. Plaintiffs finally argue that they did not discover that the District had relied on an incorrect flow rate until March 23, 2021, and the claim did not accrue before then. *Id.* at 6 (citing *Bennett v. City of Kingman*, 543 F. Supp. 3d 794 (D. Ariz. 2021)).

Defendants reply that, to the extent that *Ranch 57* suggests that the statute of limitations for § 1983 actions depends on the character of the constitutional right violated, it conflicts with *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), which rejected such an argument. Doc. 17 at 3. Under *Goodman*, Defendants argue, all suits brought under § 1983 are subject to the statute of limitations for personal injury actions in the state where the suit is brought. *Id.* (citing *Goodman*, 482 U.S. at 661). Defendants also argue that § 1658's four-year statute of limitations does not apply to § 1983 actions because it applies only to federal claims created after 1991 or brought pursuant to a particular section of § 1981. *Id.* at 4. But even if the limitations period is four years, Defendants argue that Plaintiffs' claims are barred because Plaintiffs brought suit more than four years after the Permit was issued. *Id.* at 2. Defendants maintain that Plaintiffs' claims accrued when the Permit was issued, not when ABC took each action required by it. *Id.* Defendants also dispute Plaintiffs' reliance on *Knick*, arguing that it shows that Plaintiffs' claim accrued on issuance of the Permit because the action that allegedly constituted a taking of its property was the requirements imposed by the Permit, which incorporated the flow rate Plaintiffs argue is incorrect. *Id.*

***3** Generally, plaintiffs are not required to plead around affirmative defenses. *U.S. Commodity Futures Trading Comm'n v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019). A statute of limitations defense may be raised by a motion to dismiss if the running of the statute is apparent on the face of the complaint. *Jablon v. Dean Witter &*

  

*Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) ("Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint."). Thus, "[a] motion to dismiss based on the running of the statute of limitations period may be granted only 'if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.' " *Ortega v. Santa Clara Cnty. Jail*, No. 19-17547, 2021 WL 5855066, at *1 (9th Cir. Dec. 9, 2021) (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (9th Cir. 1995); *Jablon*, 614 F.2d at 682).

Section 1983 does not contain its own statute of limitations. Courts must borrow the forum state's statute of limitations for personal injury claims. *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985); *Cholla Ready Mix*, 382 F.3d at 974. "The applicable statute of limitations for personal injury claims in Arizona is two years." A.R.S. § 12-542; *Cholla Ready Mix*, 382 F.3d at 974.

Plaintiffs' arguments that the statute of limitations should be four years are unavailing. Their argument that § 1658's four-year period applies to § 1983 actions has been rejected by the Ninth Circuit. *Cholla Ready Mix*, 382 F.3d at 974 n.5. Indeed, the court in *Cholla Ready Mix* specifically considered *Jones v. R.R. Donnelley & Sons*, the case Plaintiffs cite in support of the applicability of § 1658. And *Jones* itself acknowledges that "§ 1658 applies only to claims arising under statutes enacted after December 1, 1990." 541 U.S. at 380. Claims brought under § 1983 – which is more than 100 years old – "[are] not made possible by a post-1990 statute or amendment and thus are not covered by § 1658's four-year limitations period." *Cholla Ready Mix*, 382 F.3d at 974 n.5.

Plaintiffs also take issue with *Cholla Ready Mix*'s citation to *Wilson v. Garcia*, 471 U.S. 261 (1985), for the applicability of state personal injury periods, arguing that *Jones* overruled *Wilson* on this point. Doc. 16 at 6. Plaintiffs are incorrect that *Jones* overruled *Wilson* on this particular point, however, as shown by the Supreme Court's continued citation to *Wilson*, after *Jones*, for the point that the statute of limitations for § 1983 claims is the state's personal injury limitations period. *See Wallace v. Kato*, 549 U.S. 384, 387 (2007) ("Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts.") (citing *Wilson*).

Plaintiffs' citation to *Ranch 57* is also unavailing. *Ranch 57* did hold that a takings claim was subject to a four-year statute of limitations, 731 P.2d at 118, but it appears to be at odds with *Wilson*, which rejected the argument that the nature of the constitutional right is relevant to identification of the correct limitations period for § 1983 claims. *See Goodman v. Lukens Steel Co.*, 482 U.S. at 660-61 ("In *Wilson*, ... there were three holdings: for the purpose of characterizing a claim asserted under § 1983, federal law, rather than state law, is controlling; a single state statute of limitations should be selected to govern all § 1983 suits; and because claims under § 1983 are in essence claims for personal injury, the state statute applicable to such claims should be borrowed."). Despite being decided after *Wilson*, *Ranch 57* did not acknowledge or discuss *Wilson* at all. *See* 731 P.2d at 118. Moreover, courts in Arizona considering § 1983 claims similar to ABC's routinely apply the limitations period for personal injury actions. *See*, *e.g.*, *Bennett v. City of Kingman*, 543 F. Supp. 3d 794, 805 (D. Ariz. 2021) (applying two-year statute of limitations to § 1983 claims for violations of Takings and Due Process Clauses); *Hasbrouck v. Yavapai Cnty.*, No. CV-20-08112-PCT-DWL, 2021 WL 321894, at *8 (D. Ariz. Feb. 1, 2021) (same); *Kunzelman v. City of Scottsdale*, No. CV-10-0056-PHX-GMS, 2011 WL 3510883, at *2 (D. Ariz. Aug. 10, 2011) (same).

***4** With two years identified as the correct limitations period, the Court must determine when Plaintiffs' § 1983 claims accrued. Under governing federal law, "a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). This discovery rule requires that "[t]he plaintiff ... be diligent in discovering the crucial facts" of its case. *Bibeau v. Pac. Nw. Rsch. Found., Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999).

The Court cannot determine at this point when Plaintiffs' claims accrued. The parties' arguments boil down to factual ones: Defendants argue that Plaintiffs knew or should have known of their injury on issuance of the Permit because the Permit incorporated the flow rate Plaintiffs now claim is outdated and inflated; Plaintiffs counter they did not know that the flow rates were erroneous or that they could challenge the Permit's conditions until they received a more up-to-date study in 2021.[1] The Permit and other factual material are not before the Court at this early stage in the litigation. Because Defendants' statute of limitations defense "raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper." *ASARCO, LLC*, 765 F.3d at 1004.

**B. Claim Preclusion.**

Defendants argue that Plaintiffs' claims are barred by claim preclusion because they are "the latest in a string of suits by ABC claiming fault with the District's and its employees' handling of [its] permitting issues." Doc. 13 at 7. Defendants assert that Plaintiffs' claims could have been brought in their 2017 lawsuit before this Court (the "2017 federal lawsuit"), which complained of the District's handling of ABC's permit application process. *Id.* Defendants argue that because the two lawsuits arise out of the same transactional nucleus of facts and involve the same parties (with the exception of Defendant Fulton, who was not party to the 2017 lawsuit), and the 2017 federal lawsuit ended in a final judgment on the merits, claim preclusion bars Plaintiffs' claims. *Id.*

Plaintiffs respond that their claims are not barred because they filed the 2017 federal lawsuit before the Permit was issued, and the suit focused on the application process, not issuance of the Permit and the conditions it imposed. Doc. 16 at 8.

***5** Defendants reply that the claims Plaintiffs bring in this lawsuit could have been brought in 2017 federal lawsuit because it is the ordinance underlying the Permit's conditions – enacted in 2001 – that effected the taking at issue, not the issuance of the Permit. Doc. 17 at 9 (citing *Fallini v. United States*, 56 F.3d 1378, 1383 (Fed. Cir. 1995); *De Anza Properties X, Ltd. v. Cnty. of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991)).[2] Thus, Defendants argue, Plaintiffs could have brought these claims in the 2017 federal lawsuit and are precluded from bringing them now. *Id.*

Claim preclusion, also called res judicata, "bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits." *United States ex rel. Barajas v. Northrup Corp.*, 147 F.3d 905, 909 (9th Cir. 1998). Claim preclusion applies "whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (citations omitted). Identity of claims exists when two suits "arise from the same transactional nucleus of facts." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (internal quotation marks and citation omitted). "[T]he inquiry about the 'same transactional nucleus of facts' is the same inquiry as whether the claim could have been brought in the previous action" because " '[i]f the harm arose at the same time, then there was no reason why the plaintiff could not have brought the claim in the first action.' " *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir. 2011)).

The Ninth Circuit has held that "for the purposes of federal common law, claim preclusion does not apply to claims that accrue after the filing of the operative complaint." *Id.* at 1040. This is a "bright-line rule which asks only whether a claim could have been brought at the time the operative complaint in the prior suit was filed" and is justified by the "importance of 'certainty and predictability.' " *Id.* "Absent such rule, [courts] would be left with the more difficult question of whether ... plaintiff[s] could have amended [their] complaint in the midst of litigation to add claims which accrued after filing," despite the rule that, apart from one-time amendments early in litigation, plaintiffs can only amend with the consent of opposing parties or by leave of the court. *Id.*[3]

***6** Plaintiffs filed the complaint in the 2017 federal lawsuit on April 7, 2017. *See* Doc. 1-3 at 105; *see also ABC Sand & Rock Co.*, 2021 WL 3491947, at *3. As discussed above, the date on which Plaintiffs' claims accrued is a question of fact not amenable to resolution on this motion. The Court therefore cannot determine at this point whether claim preclusion could apply to bar Plaintiffs' suit. Defendants can raise the issue again on a more factually complete record, either at summary judgment or trial.

The Court is not persuaded by Defendants' argument that the "issuance of the [P]ermit could not trigger a taking of ABC's property" and that the taking was triggered instead by enactment of the underlying ordinance in 2001. Doc. 17 at 9. In support of this argument, Defendants rely on *De Anza Properties X, Ltd. v. Cnty. of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991). In *De Anza*, the plaintiffs brought a facial challenge to a county's mobile home rent control ordinance, alleging that it constituted a taking without just compensation. *Id.* at 1085. The district court dismissed the claims, finding that they had accrued on passage of the ordinance and were thus untimely. *Id.* The plaintiffs argued on appeal that their claims accrued either when the ordinance was amended to eliminate a sunset provision or when each mobile home was sold. *Id.* at 1086. The Ninth Circuit affirmed the district court, holding that the claims were barred by the statute of limitations and that the plaintiff's claims accrued on passage of the original ordinance. *Id. De Anza* thus stands for the proposition that "a facial challenge to a statute as a taking without just compensation under section 1983 accrues upon passage of the ordinance." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993) (discussing and citing *De Anza*). But Plaintiffs do not bring a facial challenge to the ordinance under which the

  

Permit was issued. They bring an as-applied challenge. *See generally id.* at 686 (noting "important distinction" between facial and as-applied takings claims and the accrual issues they raise).

Moreover, in rejecting the plaintiffs' arguments that the amendment of the ordinance re-started the limitations period, *De Anza* observed:

> The flaw in this theory is that the provision of the ordinance which they challenge has remained exactly the same since 1982. The conduct of the county has thus remained exactly the same at all times material to this case, and the effect of the ordinance upon the plaintiffs has not altered. Appellants were experiencing substantially the same injury in 1982 that they experienced in 1987. They were on notice that their property interests would be affected by the ordinance at the time it was enacted.

*De Anza*, 936 F.2d at 1086. The same conditions are not present here. Even assuming the ordinance underlying the Permit was enacted in 2001, it appears from the complaint that the conduct of the District in applying the ordinance to ABC's property was not "exactly the same at all times material to this case." *See id.* Plaintiffs allege that ABC's five-year floodplain use permits were "routinely renewed by the District" from 1985 to 2011. It is not apparent, therefore, that Plaintiffs experienced "substantially the same injury" beginning from 2001 until the issuance of the Permit.

Nor is the Court persuaded by Defendants' reliance on *Fallini v. United States*, 56 F.3d 1378 (Fed. Cir. 1995). In *Fallini*, the plaintiffs grazed cattle on federally owned land abutting their ranch pursuant to a permit, and the plaintiffs had developed water sources on the public land. *Id.* at 1380. Pursuant to a federal statute, the plaintiffs were prohibited from fencing off the water sources to prevent wild horses from accessing it and asserted takings claims against the federal government. *Id.* The district court dismissed the claims, finding that no property right had been taken by government action. *Id.* at 1379. The Federal Circuit affirmed the dismissal of the action, but did so on statute of limitations grounds, finding that the plaintiffs' claims had accrued on passage of the applicable federal statute. *Id.* at 1383. Unlike this case, the injury the *Fallini* plaintiffs complained of came solely from the statute they challenged. Plaintiffs in this case complain of conditions imposed by the Permit which had not previously been imposed by other permits issued pursuant to the underlying ordinance.

**C. Failure to State a Claim.**

***7** Defendants argue that Plaintiffs have not stated plausible claims for relief because the action that allegedly constituted a taking – utilization of an incorrect or out-of-date flow rate – is set by the Federal Emergency Management Agency ("FEMA"), not by the District or its employees. Doc. 13 at 6. Defendants explain that FEMA, as part of its duty to carry out the requirements of the national flood insurance program ("NFIP"), conducts flood hazard studies and determines flow rates. *Id.* at 2. FEMA uses these data to create Flood Insurance Rate Maps ("FIRMs"). *Id.* Defendants assert that Arizona law, as well as federal laws and regulations governing the NFIP, require communities to regulate in accord with FEMA's FIRMs. *Id.* at 3. Thus, Defendants argue, Plaintiffs' claims would be more appropriately brought against the state of Arizona or FEMA because the District could not have approved plans based on a flow rate other than the FEMA rate without breaking the law. *Id.* at 6. Defendants also argue that Plaintiffs' complaint fails to state plausible claims against the individually named defendants because it does not explain the bases on which each is liable. *Id.*

Plaintiffs respond that they do not challenge any federal agency action because, while FEMA does set the applicable flow rate, it does not decide which policies to enforce related to that rate, and the rate is based on data the District is required to provide. Doc. 16 at 7. Plaintiffs argue that the Arizona law that seeks to carry out the requirements of the NFIP also allows the District to grant permit variances, allowing the District to issue permits that vary from the FEMA flow rate and still remain qualified under the NFIP. *Id.* (citing A.R.S. §§ 48-3609(M), 48-3609(B)(7); 42 U.S.C. § 4023). Plaintiffs also assert that they adequately state claims against the individually named Defendants because they are named in the complaint "for their actions in determining and enforcing the regulatory taking that is contained within the Permit." *Id.* at 8. Plaintiffs note that without the benefit of discovery, they are not able to state with more specificity the actions of each individual Defendant. *Id.* If the Court dismisses allegations against the individual Defendants, Plaintiffs request leave to amend their complaint with more precise allegations that they expect will be substantiated through discovery. *Id.*

Defendants raise a host of new arguments in their reply brief. Defendants argue that Plaintiffs have not claimed that ABC's ability to conduct mining activities on its land has been curtailed by the conditions imposed by the Permit, only that it had to expend extra money. Doc. 17 at 4. Defendants also argue that Plaintiffs have not stated a claim for a regulatory taking under the factors set out in *Penn Central Transportation Co. v. City of New York*, 438

  

U.S. 104 (1978). *Id.* at 5-8.

The Court will not consider Defendants' new arguments. *Surowiec v. Cap. Title Agency, Inc.*, 790 F. Supp. 2d 997, 1002 (D. Ariz. 2011). Nor will the Court undertake a *Penn Central* analysis on a motion to dismiss. *See Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 625 (9th Cir. 2020) (observing that the *Penn Central* analysis consists of " 'essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances' ") (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002)); Doc. 17 at 5 (Defendants' acknowledgment that "a *Penn Central* analysis generally requires a factual analysis of a claim and therefore is not subject to a motion to dismiss"); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013) (differentiating between regulatory takings and takings by way of monetary exaction).[4]

***8** The Court is not persuaded at this early stage by Defendants' argument that it had to enforce the FEMA-approved flow rates in the way that it did and thus that Plaintiffs can only make out plausible takings claims against the state of Arizona or FEMA. Plaintiffs allege that the conditions imposed by the Permit constituted takings by way of monetary exaction, and that because the flow rate underlying the conditions was out-of-date and inaccurate, the conditions lacked the requisite nexus and proportionality to mitigation of the impacts of ABC's mining activities. Doc. 1 ¶¶ 79, 81, 82. Defendants cite no authority from which the Court can conclude that the specific conditions it imposed through the Permit were the only way it could abide by state and federal law. Moreover, if the flow rate was established in 2001, as Defendants elsewhere argue, it would appear that prior permits had been issued to ABC utilizing this same flow rate without imposing the Permit's conditions. This supports an inference that the District could have abided its legal obligations without imposing the conditions allegedly giving rise to Plaintiffs' takings claim.

The Court finds, however, that Plaintiffs have failed adequately to allege involvement by the individually named Defendants in the claimed Constitutional violations. Plaintiffs allege only that these individuals are residents of Maricopa County. *See* Doc. 13 at 6; Doc. 1 ¶¶ 5-14. Plaintiffs argue in their response brief that these Defendants "are named in the Complaint for their actions in determining and enforcing the regulatory taking that is contained within the Permit" (Doc. 16 at 8), but no such allegations are found in the complaint. It is unclear from the complaint if the Defendants were employed by the District or if some other relationship gave rise to their involvement in determination and enforcement of the Permit's conditions. The Court is mindful that prior to discovery it may be difficult for Plaintiffs to allege specific actions taken by each named Defendant, but they must provide more than simple allegations of residency in Maricopa County from which the Court can infer involvement in the actions of which Plaintiffs complain. The Court will dismiss Plaintiffs' complaint against the individually named Defendants, but grant Plaintiffs leave to amend their complaint to cure this deficiency.

**IT IS ORDERED**:

1. Defendants' motion (Doc. 13) is **granted** as to Defendants William Wiley, Ed Raleigh, Anthony Beuche, Michael Fulton, Scott Vogel, and their respective "unknown" spouses.

2. Plaintiffs are granted leave to amend their complaint as to the individually named Defendants. They shall file an amended complaint within two weeks of this order.

3. In all other respects, Defendants' motion (Doc. 13) is **denied**.

**All Citations**

Not Reported in Fed. Supp., 2022 WL 1619019

Footnotes

1 Plaintiffs also argue that their claims accrued on the dates ABC was required to take actions on its property pursuant to the Permit, and characterize each of the actions required of it as takings. Doc. 16 at 5-6. The dates Plaintiffs allege the Permit required ABC to act, however, were between November 10, 2017, and August 10, 2019 (*id.* at 6), each more than two years before this lawsuit was filed on November 4, 2021. The only argument Plaintiffs make in their brief that would bring the action within the two-year statute of limitations, then, is that "because [they] did not know the Defendants utilized the incorrect flow rate for determining reasonable protections until March 23, 2021, the claim was not discovered until that date." *Id.* The complaint alleges that on March 23, 2021, Plaintiffs received a report that the flow rate was substantially lower than the rates incorporated into the Permit. Doc. 1 ¶¶ 52, 59. Plaintiffs do not specifically respond to arguments by Defendants that they should have known of their claims earlier, nor can the Court resolve such a fact-dependent inquiry on a motion to dismiss.

  

2 The Court notes that Defendants do not cite any particular ordinance underlying the Permit, stating only that the ordinance was enacted in 2001 and that Plaintiffs admit to that date. *See* Doc. 17 at 9. Because it is not clear what ordinance Defendants refer to, the Court cannot accept that its enactment date was 2001. The only reference to 2001 in materials filed by Plaintiffs that the Court is aware of is the date of the study upon which the allegedly inaccurate flow rate is based. *See* Doc. 1 ¶ 33. For the purposes of this order only, the Court assumes, but does not find, that the flow rate utilized by the District became effective in 2001.

3 The Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits have adopted similar bright-line rules. *See Morgan v. Covington Tp.*, 648 F.3d 172, 177-78 (3d Cir. 2011) (joining the "[f]ive other Courts of Appeals [that] have already adopted a bright-line rule that *res judicata* does not apply to events post-dating the filing of the initial complaint" and collecting cases).

4 The Court is especially hesitant to embark on a *Penn Central* analysis when the complaint does not rely on a regulatory taking theory – and indeed, never even mentions the phrase "regulatory taking." *See generally* Doc. 1. While Plaintiffs do characterize their claim as one for a regulatory taking in their response brief, the complaint uniformly alleges a taking based on monetary exaction and cites the *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and the *Koontz* line of cases to support the claim. Doc. 1 ¶¶ 75, 79, 81, 82, 89. The *Koontz* Court specifically found that it "need not apply *Penn Central*'s essentially ad hoc, factual inquiry at all, much less extend that already difficult and uncertain rule to the vast category of cases in which someone believes that a regulation is too costly," instead applying a *per se* takings approach to such claims. *Koontz*, 570 U.S. at 614 (internal quotations and citations omitted). In cases involving takings by monetary exaction, the Supreme Court applies the standard of *Nollan* and *Dolan*, under which "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 606.

**End of Document**

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United States District Court, E.D. California.

Nicholas HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff,
v.
COUNTY OF STANISLAUS, Defendant.

Case No. 1:21-cv-00801-SKO
|
Signed November 7, 2022

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH LEAVE TO AMEND

Sheila K. Oberto, UNITED STATES MAGISTRATE JUDGE

## I. INTRODUCTION

***1** The matter before the Court is Defendant County of Stanislaus' Motion to Dismiss Plaintiff's Verified Supplemental and Amended Complaint[1] (the "Motion"). (Doc. 15.) On January 14, 2022, Plaintiff Nicholas Honchariw filed his opposition (Doc. 17), and Defendant filed its reply on January 25, 2022 (Doc. 18). Pursuant to General Order No. 617 addressing the public health emergency posed by the COVID-19 pandemic, the Motion was taken under submission on the papers. (Doc. 16.) On September 22, 2022, the parties consented to the jurisdiction of the U.S. Magistrate Judge. (*See* Docs. 26–28.)

Having considered the briefing, and for the reasons set forth below, Defendant's Motion will be granted with leave to amend Plaintiff's Second and Third Causes of Action.

## II. FACTUAL AND PROCEDURAL BACKGROUND[2]

Plaintiff, in his capacity as trustee for the Honchariw Family Trust, sought to divide land in the Knights Ferry area of Stanislaus County into a development of several residential lots and one undeveloped parcel (Supp. Compl. ¶ 1). *See also Honchariw v. Cty. of Stanislaus,* 51 Cal. App. 5th 243, 246–47 (2020).[3] The Board of Supervisors of the County of Stanislaus approved the vesting tentative map application for Plaintiff's development subject to several conditions of approval. *Id.* at 249. One of these conditions of approval was a site improvement request for an extension of fire hydrants to provide a higher level of fire protection for the development. *Id.* at 250.

This current dispute between the parties stems from Plaintiff's submission of a proposed final subdivision map along with plans and specifications in accordance with Defendant's previously requested conditions of approval in April 2016 (Supp. Compl. ¶ 11). *See also Honchariw,* 51 Cal. App. 5th at 250. In November 2016, Stanislaus County's Department of Public Works sent Plaintiff's engineers a letter stating it could not approve the proposed plans for the water system without further information about several items, including fire hydrants. *Id.* at 250–51. At a meeting in March 2017 with the Department, Plaintiff was informed that his proposed plans did not comply with the conditions of approval. *Id.* at 251. The Department interpreted the conditions of approval as requiring a fire suppression system based on functional fire hydrants, which were hydrants that could meet fire flows for volume and pressure required by the California Fire Code. *Id.* at 251–53. In June and July of 2017, Plaintiff and the Department exchanged correspondence in an effort to resolve their dispute. *Id.* at 251–52.

***2** Having reached an impasse, in August 2017, Plaintiff filed a Verified Petition for Writ of Mandate and

  

Complaint for Declaratory Relief and Damages in state court raising three state law claims (*see* Doc. 1 at 8–16). *Honchariw*, 51 Cal. App. 5th at 253. In May 2018, the trial court issued a judgment denying the petition, and Plaintiff appealed. *Id*. In June 2020, the California Court of Appeal reversed, concluding that Defendant had misinterpreted the conditions of approval and remanded the matter to the trial court to determine the terms of the writ of mandate, which, at a minimum, would require Defendant and its officials to interpret the conditions of approval in accordance with its opinion (Supp. Compl. ¶ 1). *Honchariw*, 51 Cal. App. 5th at 246, 256.

Pursuant to a stipulation between the parties, in April 2021, Plaintiff filed a Verified Supplemental and Amended Complaint in state court asserting the three state and federal claims at issue here arising from Defendant's rejection of his April 2016 proposed final subdivision map for failure to comply with the conditions of approval. Plaintiff alleges (1) a violation of California Government Code § 815.6 (Supp. Compl. ¶¶ 10–14); (2) inverse condemnation and temporary taking under the Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 19 of the California Constitution; and 42 U.S.C. § 1983 (Supp. Compl. ¶¶ 15–21); and (3) denial of his substantive due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution; Article 1, Section 7 of the California Constitution; and 42 U.S.C. § 1983 (Supp. Compl. ¶¶ 22–25).

In May 2021, Defendant removed the action to this federal court. (Doc. 1.) On December 3, 2021, Defendant filed the present motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that Plaintiff's claims were procedurally and/or substantively defective. (Doc. 15.)

## III. LEGAL STANDARD

A motion to dismiss brought pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted " 'tests the legal sufficiency of a claim,' " and dismissal is "proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.' " *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011). "To survive a motion to dismiss, the plaintiff's complaint 'must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.' " " *Boquist v. Courtney*, 32 F.4th 764, 773 (9th Cir. 2022) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"At this stage, the Court must take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the non-moving party." *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019). "[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense." *Iqbal*, 556 U.S. at 663–64. " '[I]n practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.' " *Twombly*, 550 U.S. at 562.

In resolving a Rule 12(b)(6) motion, the Court's review is generally limited to the "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008) (internal quotation marks omitted). " '[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.' " *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010).

***3** To the extent the pleadings can be cured by the allegation of additional facts, the plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990); *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013). Federal Rule of Civil Procedure 15(a)(2) advises that "[t]he court should freely give leave when justice so requires." "This policy is 'to be applied with extreme liberality.' " *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). However, "that liberality does not apply when amendment would be futile." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016).

## IV. DISCUSSION

### A. Plaintiff Failed to Comply with the California Government Claims Act

#### 1. Legal Standard

California's Government Claims Act ("the CGCA") "sets out a comprehensive scheme of governmental liability and immunity statutes." *State Dept. of State Hosps. v. Super. Ct.*, 61 Cal. 4th 339, 348 (2015). Under the CGCA,

"the liability of a public entity for an injury is statutory." *Leon v. Cty. of Riverside*, 64 Cal. App. 5th 837, 846 (2021). The "cornerstone" of the CGCA, California Government Code § 815(a), states that "[a] public entity is not liable for an injury" unless "otherwise provided by statute." *Id*.

Government Code § 815.6 provides that, "[w]here a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Thus, a public entity may be liable under § 815.6 when (1) "a mandatory duty is imposed by enactment;" (2) "the duty was designed to protect against the kind of injury allegedly suffered;" and (3) "breach of the duty proximately caused injury." *State Dept. of State Hosps.*, 61 Cal. 4th at 348.

Timely written presentation of the claim to the public entity and its rejection of the claim are prerequisites to maintaining a suit for damages against the entity under the CGCA. *Nguyen v. L.A. Cty. Harbor/UCLA Med. Ctr.*, 8 Cal. App. 4th 729, 732 (1992); *see e.g.,* Cal. Gov. Code § 945.4 ("no suit for money or damages may be brought against a public entity ... until a written claim therefor has been presented to the public entity and has been acted upon by the board"); Cal. Gov. Code § 905 (requires the presentation of "all claims for money or damages against local public entities" subject to exceptions not relevant here). The CGCA's claims presentation mandate is more than simply "procedural;" rather, "it is a condition precedent to plaintiff's maintaining an action against defendant," and is, "in short, an integral part of plaintiff's cause of action." *State of Cal. v. Super. Ct. (Bodde)*, 32 Cal. 4th 1234, 1240 (2004) (internal quotation marks omitted).

"The purpose of the claims statutes is not to prevent surprise, but 'to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation,' " and also to " 'enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future.' " *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 738 (2007). And " '[i]t is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim.' " *Id*.

***4** Thus, "a plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement." *Bodde*, 32 Cal. 4th at 1243; *see also Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1477 (9th Cir. 1995). Otherwise, a plaintiff's complaint "is subject to a general demurrer for failure to state facts sufficient to constitute a cause of action." *Bodde*, 32 Cal. 4th at 1243. Exceptions exist for claims of inverse condemnation brought under the Takings Clause of the California Constitution, Cal. Gov. Code § 905.1, federal causes of action, such as suits brought under 42 U.S.C. § 1983, *Willis v. Reddin*, 418 F.2d 702, 704–705 (9th Cir. 1969), and where money damages are incidental to injunctive or declaratory relief, *Gatto v. Cty. of Sonoma*, 98 Cal. App. 4th 744, 760 (2002).

**2. Analysis**

Defendant contends Plaintiff's First Cause of Action alleging a violation of Government Code § 815.6 should be dismissed because Plaintiff failed to comply with the CGCA's written presentation mandate.[4] (*See* Doc. 15 at 17–19.) Plaintiff asserts that his claim falls within a "well-established" exception to the presentation requirement because his demand for money damages was incidental to dismissal of Defendant's demands. (Doc. 17 at 10–11 (quoting *Eureka Teacher's Ass'n. v. Bd. of Educ.*, 202 Cal. App. 3d 469, 474–75 (1988); *Minsky v. City of L.A.*, 11 Cal. 3d 113, 120–22 (1974)). Plaintiff states that "[his] lengthy discussions with the [County's Department of Public Works] made his claims clear months before any litigation, and [his] petition for writ of mandate expressly reserved a claim for damages incidental to the petition." (Doc. 17 at 11.)

Plaintiff's contention that he spoke with County officials is insufficient to demonstrate compliance with the claim presentation requirement. As previously stated, to " 'provide the public entity sufficient information to enable it to adequately investigate claims and to settle them if appropriate, without the expense of litigation,' " *City of Stockton*, 42 Cal. 4th at 738, Plaintiff was compelled to timely present his claim in writing to Defendant. *See Bodde*, 32 Cal. 4th at 1240; *Nguyen*, 8 Cal. App. 4th at 732; Cal. Gov. Code §§ 905, 945.4. He failed to do so. Plaintiff must therefore allege facts excusing adherence to the CGCA's presentation requirement.

Plaintiff correctly notes that courts have held that non-compliance with the requirement is permissible where the primary relief sought is clearly injunctive or declaratory relief and money damages, if any, are merely incidental. *See, e.g.*, *Gatto*, 98 Cal. App. 4th at 760 (action for a large damage award and no injunctive and declaratory relief was required to comply with the

  

presentation requirement); *Eureka Teacher's Ass'n.*, 202 Cal. App. 3d at 475 (action for mandamus to which damages sought were incidental, and therefore did not have to comply with the presentation requirement). However, Plaintiff's complaint makes clear that his "*chief purpose*" is to recover damages. *Gatto*, 98 Cal. App. 4th at 760. Notably, the prayer for relief contained in the complaint seeks money damages as to all three claims raised against Defendant and simply adds a request for "other and further relief as the court may deem proper" as to each claim. (*See* Doc. 1 at 243–44.) It therefore appears Plaintiff is attempting to bypass the CGCA through creative pleading. *See, e.g., Loehr v. Ventura Cty. Cmty. C. Dist.*, 147 Cal. App. 3d 1071, 1081 (1983) ("self-styled causes of action for mandamus and injunctive relief" added to a complaint alleging three causes of action claiming monetary damages do not change the primary purpose of the action). The Court finds that Plaintiff's prayer for damages is not clearly incidental to his claim for injunctive or declaratory relief.

***5** In sum, Plaintiff is unable to cite an applicable exception "excusing compliance with the claim presentation requirement." *Bodde*, 32 Cal. 4th at 1243; *Mangold*, 67 F.3d at 1477. He was compelled to file a timely written claim as a prerequisite to initiating his lawsuit. Therefore, Plaintiff's failure to comply with the CGCA's mandatory requirements is "fatal" to his claim. *Nguyen*, 8 Cal. App. 4th at 732. The Court finds that amendment of the complaint would be futile. *See Ebner*, 838 F.3d at 968. Plaintiff acknowledges that he did not comply with the CGCA's presentation provision and amending his complaint cannot cure this deficiency. For these reasons, the Court DISMISSES his First Cause of Action without leave to amend.

### B. Plaintiff Fails to State a Cognizable Takings Claim

"The Takings Clause of the Fifth Amendment states that private property [shall not] be taken for public use, without just compensation." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 625 (9th Cir. 2020) (internal quotation marks omitted). "A classic taking occurs when the 'government directly appropriates private property or ousts the owner from his domain.' " *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). Beyond a classic taking, the Supreme Court has recognized that if a regulation goes too far, it will qualify as a taking. *Bridge Aina Le'a, LLC*, 950 F.3d at 625 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Inverse condemnation claims predicated on alleged temporary regulatory takings are governed by the Supreme Court's holding in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) ("*Penn Central*"). "The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). When the government has "restricted a property owner's ability to use his own property," *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), "a court must evaluate the action under the three-factor test announced in [*Penn Central*] to determine whether it constitutes a 'regulatory taking.' " *CDK Global LLC v. Brnovich*, 16 F.4th 1266, 1281 (9th Cir. 2021).

Under *Penn Central*, the Court evaluates the following three factors of "particular significance": (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. " 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' ... and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Id.* (quoting *Pa. Coal Co.*, 260 U.S. at 413).

"The first and second *Penn Central* factors are the primary factors." *Bridge Aina Le'a, LLC*, 950 F.3d at 630 (citing *Lingle*, 544 U.S. at 538–39). However, *Penn Central* sets forth no "set formula" to determine whether a regulatory action is " 'functionally equivalent to the classic taking.' " *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). Instead, the outcome of the inquiry " 'depends largely upon the particular circumstances [in the] case' at hand." *Bridge Aina Le'a, LLC*, 950 F.3d at 630.

With these principles in mind, the Court considers whether Plaintiff states a plausible claim of an impermissible regulatory taking, his Second Cause of Action.

#### 1. Economic Impact and Interference with Investment-Backed Expectations

##### a) Legal Standard

***6** The first consideration is the economic impact of Defendant's action on Plaintiff, the property owner. In analyzing this factor, the Court "compare[s] the value that has been taken from the property with the value that remains in the property." *Bridge Aina Le'a, LLC*, 950 F.3d at 630–31 (internal quotation marks omitted). There is " 'no litmus test' " in undertaking this "value comparison," which, as previously mentioned, "aims 'to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.' " *Id*. at 631 (quoting *Lingle*, 544 U.S. at 539).

With regard to the second factor, the Court uses an objective analysis to evaluate interference with the reasonable investment-backed expectations of the property owner. *Bridge Aina Le'a, LLC*, 950 F.3d at 633. The "focus is on interference with reasonable expectations." *Id*. " 'Distinct investment-backed expectations' implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes." *Guggenheim*, 638 F.3d at 1120. "Thus, 'unilateral expectation[s]' or 'abstract need[s]' cannot form the basis of a claim that the government has interfered with property rights." *Bridge Aina Le'a, LLC*, 950 F.3d at 633–34 (quoting *Ruckelshaus*, 467 U.S. at 1005).

Furthermore, "what is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property." *Bridge Aina Le'a, LLC*, 950 F.3d at 634 (internal quotation marks omitted). For example, " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end[.]' " *Id*. (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993)).

**b) Analysis**

Plaintiff's complaint pleads the following:

> 4. Upon more comprehensive investigation, Plaintiff determined that the costs of a municipal-sized fire suppression system as required by [Defendant] could itself exceed $500,000 over and above the $300,000 which he anticipated for the water line extension and road widening required by his Conditions of Approval. This would render development of the four 1-acre parcels to be served by the water line extension wholly uneconomic and kill it.
>
> 5. The Trust could not fund, or finance, or bond completion, of the improvements being required by [Defendant].
>
> 6. As a direct result, [Plaintiff] was forced to halt the project. He could not finalize the subdivision by recordation of a final map and suspended all related efforts, such as withdrawing his application for a Department of Real Estate subdivision sales report. [Plaintiff] was deprived of meaningful economic use of, and income from, the property in frustration of his distinct investment-backed expectations for the property.
>
> 7. In May 2018, shortly before expiration of the Vesting Tentative Map, [Plaintiff] paid the necessary fees and filed an application for a 1-year extension to keep the Vesting Tentative Map alive. If the extension were denied, the Vesting Tentative Map would expire. [Plaintiff] would have to begin the subdivision process anew, and since [Defendant] had spot re-zoned the portion of the property with the four 1-acre lots in the interim to 5-acre minimum zoning, the same application would no longer comply with local zoning. Development of a single lot would instead not support the cost of the necessary water line extension. The project would die under these limitations.

***7** (Supp. Compl. ¶¶ 4–7.)

Plaintiff also alleges that he obtained and renewed one-year extensions in 2019 and 2020, with the latter extension expiring in May 2021, and that the delay has incurred significant costs, such as carrying costs for the property, maintenance and upkeep, extra engineering, and obtaining extensions. (Supp. Compl. ¶ 8–9.) Plaintiff then alleges the following: he "had expended substantial time, money, and effort since 2002 to subdivide the property;" Defendant "unreasonably and disproportionality burdened" Plaintiff by demanding installation of improvements to the development's fire suppression system; "the extended delay of almost 5 years was not a normal regulatory delay;" and Plaintiff "spot re-zoned" a portion of the property, ultimately "depriving [him] of a critical and anticipated development opportunity." (Supp. Compl. ¶¶ 16–19.)

These conclusory allegations, without more, fall short of setting forth the "value comparison" necessary to indicate any economic impact of Defendant's conduct on Plaintiff's property or demonstrating interference with any reasonable investment-backed expectations that Plaintiff could have formed regarding his property. As the Supreme Court explained in *Penn Central*, " 'taking' " challenges have been "held to be without merit in a wide

variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels have been previously devoted and thus caused substantial individualized harm." *Penn Central*, 438 U.S. at 125. For example, "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Id*. The Court cited zoning laws as classic examples of land-use regulations "which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." *Id*.

Plaintiff makes several barebones allegations regarding expenses he incurred throughout the process of seeking approval for the development of his property. He contends the cost of the fire suppression system as required by Defendant "could ... exceed $500,000 over and above the $300,000 which he anticipated," and because the Trust cannot finance the requisite improvements, his property has been rendered "wholly uneconomic." (Supp. Compl. ¶ 4–5.) In doing so, Plaintiff makes virtually no attempt to specify how much the value of his property has been reduced. Moreover, "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prods. of Cal., Inc.*, 508 U.S. at 645. The Ninth Circuit has observed that "diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking." *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (citing *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127–28 (9th Cir. 2013)). Thus, under *Penn Central*, Plaintiff's sheer allegations Defendant's actions caused him individualized harm in terms of expenses and delay in developing his property are not enough. *Penn Central*, 438 U.S. at 124–25.

***8** Similarly, Plaintiff fails to state a cognizable claim of interference with his investment-backed expectations. This Court's focus is Plaintiff's *reasonable* expectations as to the development of his real property, an endeavor which exists in a field rationally subject to regulation by Defendant. *Bridge Aina Le'a, LLC*, 950 F.3d at 633–34. "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough to materially affect the price." *Guggenheim*, 638 F.3d at 1120–21. Plaintiff's abstract allegations that his "distinct investment-backed expectations" were frustrated (Supp. Compl. ¶ 6) and that he was deprived "of a critical and anticipated development opportunity" (Supp. Compl. ¶ 19) are insufficient.

"Although a plaintiff's allegations are generally taken as true, the court need not accept conclusory allegations of law or unwarranted inferences, and dismissal is required if the facts are insufficient to support a cognizable claim." *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007); *see also Caviness*, 590 F.3d at 812. Accordingly, both the first and second factors weigh against finding that a regulatory taking has occurred.

**2. Character of Governmental Action**

The Court next considers the character of Defendant's action. As the Supreme Court stated in *Lingle*, "the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'—may be relevant in discerning whether a taking has occurred." *Lingle*, 544 U.S. at 539 (citing *Penn Central*, 438 U.S. at 124). "The government generally cannot 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Bridge Aina Le'a, LLC*, 950 F.3d at 636 (citing *Lingle*, 544 U.S. at 537).

With regard to the third factor, Plaintiff makes several allegations that Defendant acted in an "arbitrary" manner throughout the course of its dealings with him. Plaintiff alleges Defendant's demands for a "municipal-sized fire suppression system with its own water supply" "did not have the character of a discretionary public program simply adjusting the benefits and burdens of economic life broadly to promote the public good." (Supp. Compl. ¶¶ 16–17.) Plaintiff also alleges that the "extended" five-year delay "was the direct, foreseeable and possibly purposeful result of [Defendant's] unrelenting pursuit of demands which were arbitrary and capricious [and/or] willful and deliberate efforts to obstruct the project." (Supp. Compl. ¶ 18.) Lastly, referencing some of the earlier denials by Defendant, Plaintiff alleges Defendant "has a history of obstructing the project." (Supp. Compl. ¶ 19.)

Taking these facts as true, the character of Defendant's actions in arbitrarily requiring a more advanced fire suppression system as a part of Plaintiff's development could be construed as " 'physical invasion' " of his property. However, "[e]ven if this factor weighs in favor of finding a taking, this factor is not alone a sufficient basis to find that a taking occurred." *Bridge Aina Le'a,*

*LLC*, 950 F.3d at 636; *see also id.* at 630 (citing *Lingle*, 544 U.S. at 538–39) ("The first and second *Penn Central* factors are the primary factors."). Because both the first and second *Penn Central* factors weigh against finding that a regulatory taking has occurred, the Court finds that Plaintiff fails to state a cognizable claim.

**3. Leave to Amend**

The Court will grant Plaintiff an opportunity to allege conduct on behalf of Defendant amounting to a regulatory taking, as the pleadings can be cured by the allegation of additional facts as for the first two *Penn Central* factors *See* Fed. R. Civ. P. 15(a)(2); *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 247; *Crowley*, 734 F.3d at 977; *see also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) ("when a viable case may be pled, a district court should freely grant leave to amend."). Accordingly, the Court DISMISSES Plaintiff's Second Cause of Action *with* leave to amend.

**C. Plaintiff Fails to State a Cognizable Substantive Due Process Claim**

***9** "To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). However, "[t]he Supreme Court has 'long eschewed ... heightened [means-end] scrutiny when addressing substantive due process challenges to government regulation' that does not impinge on fundamental rights." *Id.* at 1088 (quoting *Lingle*, 544 U.S. at 545). "Accordingly, the 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." *Shanks*, 540 F.3d at 1088 (citing *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008); *see also Matsuda v. City and Cty. of Honolulu*, 512 F.3d 1148, 1156 (9th Cir. 2008) ("state action which 'neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights' will violate substantive due process only if the action is 'not rationally related to a legitimate governmental purpose.' ").

Thus, "[w]hen executive action like a discrete permitting decision is at issue, only egregious official conduct can be said to be arbitrary in the constitutional sense: it must amount to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Shanks*, 540 F.3d at 1088 (internal quotation marks omitted). "Official decisions that rest on an erroneous legal interpretation are not necessarily constitutionally arbitrary." *Id.* at 1089. For example, the Ninth Circuit has recognized that a meritorious due process claim may exist "where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.' " *N. Pacifica LLC*, 526 F.3d at 484 (citing *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007)).

In his Third Cause of Action, Plaintiff alleges that Defendant's demand for improvements to the development's fire suppression system "was arbitrary and capricious," and/or "a willful and deliberate effort to obstruct the project," given that Defendant "had no basis" to make such a demand. (Supp. Compl. ¶ 23.) Plaintiff further alleges that "[Defendant's] refusal did not substantially advance legitimate state interests" because "[Defendant] lacked any authority or responsibility for the design of the water system" and by trying to require improvements that would render development of the lots "uneconomic," "[Defendant] acted to impede the development of housing" protected by law. (Supp. Compl. ¶ 24.) Finally, Plaintiff alleges that upon approval of his Vesting Tentative Map, he "enjoyed a constitutionally protected right to finalize his project in substantial compliance with the terms of approval," and "[Defendant's] demands for a municipal-sized fire suppression system" denied Plaintiff his rights to due process. (Supp. Compl. ¶ 25.)

Based on the facts alleged in the current pleading, Plaintiff fails to meet the " 'exceedingly high burden' " required to show that Defendant or its employees behaved in a constitutionally arbitrary fashion. *See Shanks*, 540 F.3d at 1088. Plaintiff's allegations "do[ ] no more than present the type of 'run of the mill dispute between a developer and a [county] planning agency' that fail[ ] to implicate concerns about due process deprivations." *Teresi Inv. III v. City of Mountain View*, 609 Fed. Appx. 928, 930 (9th Cir. 2015). The conduct with which Plaintiff takes issue — "a routine, even if perhaps unwise or legally erroneous, executive decision" to deny a development application due to fire suppression concerns — falls short of qualifying as constitutionally arbitrary. *Shanks*, 540 F.3d at 1089. "It is 'at least fairly debatable' " that Defendant rationally furthered its legitimate concern for public safety in demanding a more comprehensive fire suppression system as a part of Plaintiff's property development plan. *Id.* "When reviewing a substantive due process challenge, this suffices; our task is not to balance 'the public interest

supporting the government action against the severity of the private deprivation.' " *Id*. (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1238 (9th Cir. 1994)). "[I]n a substantive due process case such as this, our concern is with the rationality of a government action regardless of its impact." *Kawaoka*, 17 F.3d at 1238.

***10** However, because the pleadings can be cured by the allegation of additional facts indicating constitutionally arbitrary conduct by Defendant, the Court affords Plaintiff leave to amend. *See* Fed. R. Civ. P. 15(a)(2); *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 247; *Crowley*, 734 F.3d at 977; *Cafasso, U.S. ex rel.*, 637 F.3d at 1058. Therefore, the Court DISMISSES Plaintiff's Third Cause of Action with leave to amend.

## V. CONCLUSION AND ORDER

F1'or the reasons set forth above, IT IS HEREBY ORDERED that Defendant's motion to dismiss is GRANTED as follows:

1. Plaintiff's First Cause of Action is DISMISSED without leave to amend; and

2. Plaintiff's Second and Third Causes of Action are DISMISSED with leave to amend.

Within twenty-one (21) days, Plaintiff SHALL file: (a) a second amended complaint in accordance with the directives in this order, or (b) a statement that he elects not to proceed with this action. If Plaintiff does not file a second amended complaint within the specified time frame, leave to amend will be withdrawn and the case will be dismissed without further notice.

IT IS SO ORDERED.

### All Citations

Not Reported in Fed. Supp., 2022 WL 16748699

Footnotes

1 The operative pleading, Plaintiff's Verified Supplemental and Amended Complaint ("Supp. Compl."), is attached to Defendant's Notice of Removal (Doc. 1) as Exhibit 36. (*See* Doc. 1 at 237–45.)

2 In considering a motion to dismiss, the Court must accept as true all of the well-pleaded factual allegations contained in the complaint. *See, e.g., Rotkiske v. Klemm*, 140 S. Ct. 355, 359 n.1 (2019) (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002)).

3 The Court takes judicial notice of the facts and proceedings in *Honchariw v. Cty. of Stanislaus*, 51 Cal. App. 5th 243 (2020). *See* Fed. R. Evid. 201(c)(1) (the court may take judicial notice on its own); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.' "). As discussed below, this California Court of Appeal decision is directly related to the instant case.

4 Defendant asks the Court to take judicial notice of the Stanislaus County claim form found on the County's webpage. (Doc. 15 at 19 n.6.) Defendant's request is granted pursuant to Rule 201 of the Federal Rules of Evidence. The Court hereby takes judicial notice of the claim form because it is made "publicly available" by a government entity, and "neither party disputes the authenticity of the [webpage] or the accuracy of the information displayed therein." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010).

  

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United States District Court, E.D. California.

Nicholas HONCHARIW, Trustee, Honchariw Family Trust, Plaintiff,
v.
COUNTY OF STANISLAUS, Defendant.

Case No. 1:21-cv-00801-SKO
|
Signed April 12, 2023
|
Filed April 13, 2023

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND

Sheila K. Oberto, UNITED STATES MAGISTRATE JUDGE

## I. INTRODUCTION

***1** Before the Court is Defendant County of Stanislaus' Motion to Dismiss Plaintiff Nicholas Honchariw's First Amended Complaint[1] (the "Motion"). (Doc. 35.) On January 22, 2023, Plaintiff filed his opposition (Doc. 38), and Defendant filed its reply on February 3, 2023 (Doc. 39).[2] The hearing set for March 8, 2023, on the Motion was vacated by the undersigned and the matter was taken under submission.[3] (Doc. 40.) Having considered the briefing, and for the reasons set forth below, Defendant's Motion will be GRANTED with leave to amend the remaining two causes of action.

## II. FACTUAL AND PROCEDURAL BACKGROUND

In considering Defendant's Motion, the Court accepts as true all of the following factual allegations contained in the FAC. *See, e.g., Rotkiske v. Klemm*, 140 S. Ct. 355, 359 n.1 (2019) (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 n.1 (2002)).

Plaintiff, in his capacity as trustee for the Honchariw Family Trust, sought to divide land in the Knights Ferry area of Stanislaus County into a development of several residential lots and one undeveloped parcel (FAC ¶¶ 1–3). *See also Honchariw v. Cty. of Stanislaus,* 51 Cal. App. 5th 243, 246–47 (2020).[4] The Board of Supervisors of the County of Stanislaus approved the vesting tentative map application for Plaintiff's development subject to several conditions of approval. *Id*. at 249. One of these conditions of approval was a site improvement request for an extension of fire hydrants to provide a higher level of fire protection for the development. *Id*. at 250.

***2** The current dispute between the parties stems from Plaintiff's submission of a proposed final subdivision map in April 2016, along with plans and specifications in accordance with Defendant's previously requested conditions of approval (FAC ¶¶ 49–50). *See also Honchariw*, 51 Cal. App. 5th at 250. In November 2016, Stanislaus County's Department of Public Works ("DPW") sent Plaintiff's engineers a letter stating it could not approve the proposed plans for the water system without further information about several items, including fire hydrants (FAC ¶ 51). *Honchariw,* 51 Cal. App. 5th at 250–51. At a meeting in March 2017 with DPW, Plaintiff was informed that his proposed plans did not comply with the conditions of approval. *Id*. at 251. DPW interpreted the conditions of approval as requiring a fire suppression system based on functional fire hydrants, which were hydrants that could meet fire flows for volume and pressure required by the California Fire Code (FAC ¶ 51). *Honchariw,* 51 Cal. App. 5th at 251–53. In June and July of 2017, Plaintiff and DPW exchanged correspondence in an effort to resolve their dispute. *Id*. at 251–52.

  

Having reached an impasse, in August 2017, Plaintiff filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Relief and Damages in state court raising three state law claims (FAC ¶ 58; *see* Doc. 1 at 8–16). *Honchariw*, 51 Cal. App. 5th at 253. In May 2018, the trial court issued a judgment denying the petition, and Plaintiff appealed. *Id*. In June 2020, the California Court of Appeal reversed, concluding that Defendant had misinterpreted the conditions of approval and remanded the matter to the trial court to determine the terms of the writ of mandate, which, at a minimum, would require Defendant and its officials to interpret the conditions of approval in accordance with its opinion (FAC ¶ 58). *Honchariw*, 51 Cal. App. 5th at 246, 256.

In April 2021, Plaintiff filed a Verified Supplemental and Amended Complaint[5] in state court asserting three state and federal claims arising from Defendant's rejection of his April 2016 proposed final subdivision map for his failure to comply with the conditions of approval. Plaintiff alleged (1) a violation of California Government Code § 815.6 (Supp. Compl. ¶¶ 10–14); (2) inverse condemnation and temporary taking under the Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 19 of the California Constitution; and 42 U.S.C. § 1983 (Supp. Compl. ¶¶ 15–21); and (3) denial of his substantive due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution; Article 1, Section 7 of the California Constitution; and 42 U.S.C. § 1983 (Supp. Compl. ¶¶ 22–25).

In May 2021, Defendant removed the action to this federal court. (Doc. 1.) On December 3, 2021, Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that Plaintiff's claims were procedurally and/or substantively defective. (Doc. 15.) On November 7, 2022, this Court granted Defendant's motion in part, dismissing without leave to amend Plaintiff's claim under California Government Code § 815.6, and dismissing with leave to amend Plaintiff's takings and substantive due process claims. (Doc. 29.)

Plaintiff timely filed his FAC, proceeding with the remaining two claims. (Doc. 32.) On December 22, 2022, Defendant filed the instant Motion pursuant to Rule 12(b)(6), asserting that Plaintiff's complaint, as amended, fails to state plausible claims for relief. (Doc. 35.)

## III. LEGAL STANDARD

A motion to dismiss brought pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted " 'tests the legal sufficiency of a claim,' " and dismissal is "proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.' " *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011). "To survive a motion to dismiss, the plaintiff's complaint 'must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.' " " *Boquist v. Courtney*, 32 F.4th 764, 773 (9th Cir. 2022) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

***3** "At this stage, the Court must take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the non-moving party." *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019). "[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense." *Iqbal*, 556 U.S. at 663–64. " '[I]n practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.' " *Twombly*, 550 U.S. at 562.

In resolving a Rule 12(b)(6) motion, the Court's review is generally limited to the "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008) (internal quotation marks omitted). " '[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.' " *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010).

To the extent the pleadings can be cured by the allegation of additional facts, the plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990); *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013). Federal Rule of Civil Procedure 15(a)(2) advises that "[t]he court should freely give leave when justice so requires." "This policy is 'to be applied with extreme liberality.' " *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). However, "that liberality does not apply when amendment would be futile." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016).

## IV. DISCUSSION

**A. Plaintiff Fails to State a Cognizable Takings Claim**

"The Takings Clause of the Fifth Amendment states that private property [shall not] be taken for public use, without just compensation." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 625 (9th Cir. 2020) (internal quotation marks omitted). "A classic taking occurs when the 'government directly appropriates private property or ousts the owner from his domain.' " *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). The Supreme Court has recognized that if a regulation goes too far, it will qualify as a taking. *Bridge Aina Le'a, LLC*, 950 F.3d at 625 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)); *accord Murr v. Wisconsin*, 137 S. Ct. 1933, 1937 (2017). "This area of the law is characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.' " *Id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) ("*Tahoe-Sierra*")).

The Supreme Court has identified two guidelines that are relevant for determining when a government regulation constitutes a taking. *Murr*, 137 S. Ct. at 1937. "First, 'with certain qualifications ... a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause.' " *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). "Yet even the complete deprivation of use under *Lucas* will not require compensation if the challenged limitations 'inhere ... in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.' " *Murr*, 137 S. Ct. at 1937 (citing *Lucas*, 505 U.S. at 1029).

***4** Second, inverse condemnation claims predicated on alleged temporary regulatory takings are governed by the Supreme Court's holding in *Penn Central Transportation Co. v. City of N.Y.*, 438 U.S. 104 (1978) ("*Penn Central*"). Under *Penn Central*, the Court evaluates the following three factors of "particular significance": (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Id.* at 124. " 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' ... and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Id.* (quoting *Pa. Coal Co.*, 260 U.S. at 413).

"The first and second *Penn Central* factors are the primary factors." *Bridge Aina Le'a, LLC*, 950 F.3d at 630 (citing *Lingle*, 544 U.S. at 538–39). *Penn Central*, however, sets forth no "set formula" to determine whether a regulatory action is " 'functionally equivalent to the classic taking.' " *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). Instead, the outcome of the inquiry " 'depends largely upon the particular circumstances [in the] case' at hand." *Bridge Aina Le'a, LLC*, 950 F.3d at 630.

As a preliminary matter, Plaintiff contends that Defendant's refusal to approve his improvement plans constituted a taking under *Lucas*. (Doc. 38 at 8–9.) But, in the FAC and his opposition to Defendant's Motion, Plaintiff acknowledges that the alleged taking was temporary and he was not deprived of all economically viable use of his property. (*See* FAC at 1, 21–23; Doc. 38 at 9 ("the confiscation was only temporary, so [Plaintiff] did not suffer a complete loss of value.").) "Anything less than a 'complete elimination of value,' or a 'total loss,' ... would require the kind of analysis applied in *Penn Central*." *Tahoe-Sierra*, 535 U.S. at 330 (citing *Lucas*, 505 U.S. at 1019–20 n.8). Accordingly, the Court finds that Plaintiff fails to state a plausible claim of an impermissible taking under *Lucas*. With the above principles in mind, the Court next evaluates whether the FAC states a plausible regulatory takings claim under *Penn Central*.

**1. First Two *Penn Central* Factors: Economic Impact and Interference with Investment-Backed Expectations**

As set forth above, the first two factors to be evaluated under *Penn Central* are the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with distinct investment-backed expectations.

In analyzing the first factor, the Court "compare[s] the value that has been taken from the property with the value that remains in the property." *Bridge Aina Le'a, LLC*, 950 F.3d at 630–31 (internal quotation marks omitted). There is " 'no litmus test' " in undertaking this "value comparison," which, as previously mentioned, "aims 'to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his

domain.' " *Id*. at 631 (quoting *Lingle*, 544 U.S. at 539). The Ninth Circuit has observed that "diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking." *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (citing *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127–28 (9th Cir. 2013)).

With regard to the second factor, the Court uses an objective analysis to evaluate interference with the reasonable investment-backed expectations of the property owner. *Bridge Aina Le'a, LLC*, 950 F.3d at 633. The "focus is on interference with reasonable expectations." *Id*. " 'Distinct investment-backed expectations' implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes." *Guggenheim*, 638 F.3d at 1120. "Thus, 'unilateral expectation[s]' or 'abstract need[s]' cannot form the basis of a claim that the government has interfered with property rights." *Bridge Aina Le'a, LLC*, 950 F.3d at 633–34. Furthermore, "what is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property." *Id*. at 634 (internal quotation marks omitted). For example, " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end[.]' " *Id*. (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993)).

***5** Here, the FAC alleges that in a meeting in March 2017, DPW demanded that Plaintiff design and construct a full fire suppression system with flows based on functional fire hydrants, and that if the Knights Ferry Community Services District ("KFCSD") could not supply municipal flows, then Plaintiff, as the developer, would have to supply them himself. (FAC ¶ 52.) Plaintiff alleges that such requirements were not previously mentioned in the conditions of approval. (FAC ¶ 53.) The FAC elaborates as follows:

> 55. Plaintiff sought to meet with [Defendant] to arrange a mutually agreeable way forward, but [Defendant] refused without presentation of a fire suppression system.
>
> 55. This brought the project to a halt. Costs were unsustainable. Upon detailed investigation, [P]laintiff determined that the costs of a municipal-sized fire suppression system as required by [Defendant] could itself exceed $500,000 over and above the $300,000 anticipated for the water line extension and road widening required by his Conditions of Approval. Since [P]laintiff did not expect the 1-acre lots to sell for more than $250,000 each, this rendered development of the four 1-acre parcels to be served by the water line extension uneconomic unless the costs were recovered from [Defendant].
>
> 56. The Trust could not fund, or finance, or bond completion of the improvements being required by [Defendant].
>
> 57. Plaintiff was deprived of meaningful economic use of, and income from, the property in frustration of his distinct investment-backed expectations for the property.

(FAC ¶¶ 55–57.)[6]

Plaintiff alleges Defendant abandoned its demand for a full fire suppression system in early 2021, but by then, Plaintiff had already incurred "significant costs." (FAC ¶ 60.) The FAC further alleges that in 2014, Defendant "spot down-zoned" Plaintiff's property and, "through a rarely used procedure," required "5-acre minimum zoning upon the substantial remainder in the Historical District owned by [P]laintiff." (FAC ¶ 62.) Plaintiff alleges "[t]he remainder was being stranded and [P]laintiff was blocked from amortizing site improvement costs with fill-in development." (*Id*.) Lastly, the FAC alleges as follows:

> 64. [Defendant's] refusal to approve [Plaintiff's] April 14, 2016 plans without the incorporation of a municipal-sized fire suppression system together with his own water supply for fire suppression deprived him of his investment-backed expectations for development of the property for 4 years. The property containing the four 1-acre parcels was expressly zoned for development under its H-S zoning when acquired by the settlor of the Trust, and [P]laintiff had expended substantial time, money, and effort since 2002 to subdivide the property.

(FAC ¶ 64.)

As with Plaintiff's original complaint, these abstract, conclusory allegations, without more, fall short of setting forth the "value comparison" necessary to indicate any economic impact of Defendant's conduct on Plaintiff's property or demonstrating interference with any reasonable investment-backed expectations that Plaintiff could have formed regarding his property. First, Plaintiff sets forth minimal allegations regarding the economic effect as to a portion of his property due to Defendant's regulatory actions. The FAC alleges that Plaintiff's real property consists of "over 33 acres." (FAC ¶ 1.) Plaintiff pleads that the costs of the fire suppression system required by Defendant would exceed $500,000 in addition

to the $300,000 he expected to incur, and that he did not anticipate that four 1-acre parcels would sell for more than $250,000. (FAC ¶ 55.) Plaintiff alleges that "[t]he Trust could not fund, or finance, or bond completion of the improvements being required by [Defendant]," and he concludes he "was deprived of meaningful economic use of, and income from, the property in frustration of his distinct investment-backed expectations for the property." (FAC ¶¶ 56–57.)

***6** These barebones allegations, again, fail to sufficiently plead the first *Penn Central* factor. As with the original complaint, Plaintiff's sheer allegations that Defendant's actions caused him individualized harm in terms of expenses and delay in developing his property are insufficient. *Penn Central*, 438 U.S. at 124–25. As currently pled, the FAC lacks complete information about the value of the entire property when the 2016 application was submitted, or its value after Defendant denied the application. *See Evans Creek, LLC v. City of Reno*, No. 21-16620, 2022 WL 14955145, at *1 (9th Cir. Oct. 26, 2022); *see, e.g., S. Cal. Rental Hous. Ass'n v. Cty. of San Diego*, 550 F. Supp. 3d 853, 866 (S.D. Cal. 2021) ("It is difficult to calculate the impact that the Ordinance has on the value of Plaintiff's members' property interests, particularly because Plaintiff has not included any facts related to a diminution of the value of their property."). Therefore, even accepting Plaintiff's allegations in the FAC as true, it is not possible for the Court to evaluate the economic impact to Plaintiff's property as a whole. *See Evans Creek, LLC*, 2022 WL 14955145, at *1. *Penn Central* made clear "that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases [the Court] must focus on 'the parcel as a whole.' " *Tahoe-Sierra*, 535 U.S. at 326–27.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather on both the character of the action and on the nature and extent of the inference with rights in the parcel *as a whole*.

*Penn Central*, 438 U.S. at 130–31 (emphasis added); *accord Tahoe-Sierra*, 535 U.S. at 327; *see, e.g.*, *Murr*, 137 S. Ct. at 1944 ("the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation.").

Here, at best, Plaintiff has presented specific allegations that reflect economic loss with respect to four of the over 33 acres he owns, and *no effect* as to the diminution of value of the rest of his property. *See, e.g., Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012). "Although there is no precise minimum threshold," Plaintiff's allegations are "of very little persuasive value in the context of a federal takings challenge," because the Supreme Court has " 'uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a "taking." ' " *Id.*; *see also Concrete Pipe & Prods. of Cal., Inc.*, 508 U.S. at 645 ("our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."); *GHP Mgmt. Corp. v. City of Los Angeles*, Case No. CV 21-06311 DDP (JEMx), 2022 WL 17069822, at *4 (C.D. Cal. Nov. 17, 2022) ("the threshold is high"). To the contrary, the Court "has upheld land-use regulations that destroyed or adversely affected recognized real property interests," and where "the challenged governmental actions prohibited a beneficial use to which individual parcels had been previously devoted and thus caused substantial individualized harm." *Penn Central*, 438 U.S. at 125. Thus, the decrease in value alleged by Plaintiff for merely a small quantity of affected parcels falls within the range of permissible land-use regulations and comes short of pleading the first *Penn Central* factor.

In his opposition, Plaintiff clarifies that his takings claim is not predicated on compensation for the loss of value of the four 1-acre lots or the overall property. (Doc. 38 at 10–11.) Instead, his takings claim seeks compensation for the loss of an income-producing asset during the time in which Defendant denied his vesting tentative map application, caused the project to be temporarily halted, and ultimately prevented Plaintiff from finalizing his subdivision and selling his lots. (*Id.*) "But the mere loss of some income because of regulation does not itself establish a taking. Rather, economic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props., LLC*, 888 F.3d at 451.

***7** The Supreme Court's requirement that " 'the aggregate must be viewed in its entirety' " clarifies why, for example, restrictions on the use of only limited portions of the parcel, such as setback ordinances, or a mandate that coal pillars be left in place to prevent mine subsidence, were not considered regulatory takings. *Tahoe-Sierra*, 535 U.S. at 327. In each of these cases, the Supreme Court "affirmed that 'where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking.' " *Id.* Thus, in *Tahoe-Sierra*, the Court refused to "effectively sever" the 32 months during which the petitioners' property was restricted by temporary moratoria on development and then ask whether that segment had been taken in its entirety, because such an approach would overstate the effect of regulation on property, turning "every delay"

into a "total ban." *Id*. at 331.

Here, the FAC does not allege diminution in value as to the totality of the property, nor does it specify pre- or post-regulation value from which a level of diminution as to the parcel as a whole could be calculated. Accordingly, even if one "strand" of Plaintiff's property rights were affected because Defendant's actions caused him individualized harm in terms of expenses and delay in developing his property and receiving income, the FAC still fails to plead facts sufficient to show economic harm. *See Tahoe-Sierra*, 535 U.S. at 331; *Murr*, 137 S. Ct. at 1944.

Similarly, Plaintiff fails to state a cognizable claim of interference with his investment-backed expectations. The FAC describes expectations dating back to the original trustor's acquisition of the property in 1973 (*see* FAC ¶¶ 2–3) and in his opposition, Plaintiff contends that Defendant's denial of his vesting tentative map application resulted in the bulk of the property being "raw land, earning no rental, licensing or other income" (Doc. 38 at 11). Plaintiff, however, does not establish a "taking" "simply by showing that [he has] been denied the ability to exploit a property interest that [he] heretofore had believed was available for development." *Penn Central*, 438 U.S. at 130. This Court's focus is on Plaintiff's *objectively reasonable* expectations as to the development of his real property, an endeavor which exists in a field rationally subject to regulation by Defendant. *Bridge Aina Le'a, LLC*, 950 F.3d at 633–34; *Colony Cove Props., LLC*, 888 F.3d at 452. In this context, "[t]o 'expect' can mean to anticipate or look forward to, but it can also mean 'to consider probable or certain,' and 'distinct' means capable of being easily perceived, or characterized by individualizing qualities." *Guggenheim*, 638 F.3d at 1120. "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough to materially affect the price." *Id*. at 1120–21.

Plaintiff's " '[u]nilateral expectations' about the mere possibility for future development," as pleaded (*see, e.g.*, FAC ¶¶ 57, 62, 64), "were no more than speculative desires that cannot form the basis of a takings claim." *Evans Creek, LLC*, 2022 WL 14955145, at *1 (citing *Bridge Aina Le'a, LLC*, 950 F.3d at 633–34); *see, e.g., Laurel Park Cmty., LLC*, 698 F.3d at 1190 ("although the ordinances affected one of Plaintiffs' expectations—that at some indefinite time in the future they could convert their properties to some other specific uses—the ordinances did not affect Plaintiffs' 'primary expectation.' "). Thus, even taking Plaintiff's allegations in the FAC as true, the second *Penn Central* factor fails to support a takings claim.

"Although a plaintiff's allegations are generally taken as true, the court need not accept conclusory allegations of law or unwarranted inferences, and dismissal is required if the facts are insufficient to support a cognizable claim." *Perfect 10, Inc. v. Visa Intern. Service Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007); *see also Caviness*, 590 F.3d at 812. Accordingly, the first and second *Penn Central* factors again weigh against finding that a regulatory taking has occurred.

**2. Third *Penn Central* Factor: Character of Governmental Action**

***8** The Court next considers the character of Defendant's action. As the Supreme Court stated in *Lingle*, "the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'—may be relevant in discerning whether a taking has occurred." *Lingle*, 544 U.S. at 539 (citing *Penn Central*, 438 U.S. at 124). "The government generally cannot 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Bridge Aina Le'a, LLC*, 950 F.3d at 636 (citing *Lingle*, 544 U.S. at 537).

Here, Plaintiff contends the "gravamen" of the FAC is that the delay in moving forward with development of his property due to Defendant's demands "was not a normal incident of the regulatory process." (FAC at 3.) He instead alleges that "[Defendant's] demands were arbitrary and capricious [and/or] willful and deliberate obstruction of his constitutionally-protected property rights," and "continuing a long history of obstruction." (*Id.*; *see also* FAC ¶ 66.) Specifically, Plaintiff alleges that Defendant's refusal to approve his 2016 application "without the incorporation of a municipal-sized fire suppression system together with its own water supply" did not have the character "of a public program simply adjusting the benefits and burdens of economic life broadly to promote the public good." (FAC ¶¶ 64–65.) The FAC elaborates that

> [Defendant] directly, unreasonably, and disproportionately burdened [P]laintiff for the installation of municipal-sized primary and back-up pumps over 10 times more powerful than KFCSD's own pumps, back-up power, and a water supply over and above water available from KFCSD. The

> installation of municipal-sized improvements is fairly a responsibility of all KFCSD users, not just [P]laintiff..

(FAC ¶ 65.) Plaintiff contends that any such demands were "beyond" Defendant's authority, given that they were not rooted in "any written or accessible ordinance, policy, or standard applicable" when the application was originally submitted in 2006. (FAC ¶ 65.)

Accepting all of Plaintiff's factual allegations as true, as the Court must at this stage of the proceedings, the character of Defendant's actions in arbitrarily requiring a more advanced fire suppression system as a part of Plaintiff's development could again be construed as " 'physical invasion' " of his property. *See, e.g., Laurel Park Cmty., LLC*, 698 F.3d at 1190–91. However, "[e]ven if this factor weighs in favor of finding a taking, this factor is not alone a sufficient basis to find that a taking occurred." *Bridge Aina Le'a, LLC*, 950 F.3d at 636; *see also id.* at 630 ("The first and second *Penn Central* factors are the primary factors."). Because both the first and second *Penn Central* factors weigh against finding that a regulatory taking has occurred, on balance, the Court finds that Plaintiff fails to state a cognizable claim.

**3. Leave to Amend**

The Court finds it appropriate to grant Plaintiff one last opportunity to allege facts amounting to a regulatory taking, as the pleadings may be cured by the allegation of additional facts with regard to the first two *Penn Central* factors. *See* Fed. R. Civ. P. 15(a)(2); *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 247; *Crowley*, 734 F.3d at 977; *see also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) ("when a viable case may be pled, a district court should freely grant leave to amend."). Accordingly, the Court DISMISSES Plaintiff's takings claim with leave to amend.

**B. Plaintiff Fails to State a Cognizable Substantive Due Process Claim**

***9** "To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). However, "[t]he Supreme Court has 'long eschewed ... heightened [means-end] scrutiny when addressing substantive due process challenges to government regulation' that does not impinge on fundamental rights." *Id.* at 1088 (quoting *Lingle*, 544 U.S. at 545). "Accordingly, the 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." *Shanks*, 540 F.3d at 1088 (citing *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008)); *see also Matsuda v. City and Cty. of Honolulu*, 512 F.3d 1148, 1156 (9th Cir. 2008) ("state action which 'neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights' will violate substantive due process only if the action is 'not rationally related to a legitimate governmental purpose.' ").

Thus, "[w]hen executive action like a discrete permitting decision is at issue, only egregious official conduct can be said to be arbitrary in the constitutional sense: it must amount to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Shanks*, 540 F.3d at 1088 (internal quotation marks omitted). "Official decisions that rest on an erroneous legal interpretation are not necessarily constitutionally arbitrary." *Id.* at 1089. For example, the Ninth Circuit has recognized that a meritorious due process claim may exist "where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.' " *N. Pacifica LLC*, 526 F.3d at 484 (citing *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007)).

As stated above, Plaintiff pleads that Defendant "directly, unreasonably, and disproportionately burdened" him with the installation of a "municipal-sized" fire suppression system, and such improvements were "fairly a responsibility of all KFCSD users, not just [P]laintiff." (FAC ¶ 65.) Plaintiff reiterates his allegations that Defendant "had no basis" to make such a demand because the conditions of approval delegated authority and responsibility of the design of the water line extension to KFCSD. (FAC ¶ 71.) Thus, Plaintiff contends Defendant's demand "was arbitrary and capricious," and/or "a willful and deliberate effort to obstruct the project." (*Id.*) Plaintiff further alleges that "[Defendant's] refusal did not substantially advance legitimate state interests" because "[Defendant] lacked any authority or responsibility for the design of the water system" and by trying to require improvements that would render development of the lots "uneconomic," "[Defendant] acted to impede the development of housing" protected by law. (FAC ¶ 72.) Finally, Plaintiff alleges that upon approval of his vesting tentative map, he "enjoyed a constitutionally protected right to finalize his project in substantial compliance with the terms of approval," and "[Defendant's] demands for a municipal-sized fire suppression system" denied Plaintiff his rights to due

  

process. (FAC ¶ 73.)

Based on the facts alleged in the operative pleading, Plaintiff again fails to meet the " 'exceedingly high burden' " required to show that Defendant or its employees behaved in a constitutionally arbitrary fashion. *See Shanks*, 540 F.3d at 1088. Plaintiff's allegations "do[ ] no more than present the type of 'run of the mill dispute between a developer and a [county] planning agency' that fail[ ] to implicate concerns about due process deprivations." *Teresi Inv. III v. City of Mountain View*, 609 Fed. Appx. 928, 930 (9th Cir. 2015). The conduct with which Plaintiff takes issue, "a routine, even if perhaps unwise or legally erroneous, executive decision" to deny a development application due to fire suppression concerns, falls short of qualifying as constitutionally arbitrary. *Shanks*, 540 F.3d at 1089. "It is 'at least fairly debatable' " that Defendant rationally furthered its legitimate concern for public safety in demanding a more comprehensive fire suppression system as a part of Plaintiff's property development plan. *Id*. "When reviewing a substantive due process challenge, this suffices; our task is not to balance 'the public interest supporting the government action against the severity of the private deprivation.' " *Id*. (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1238 (9th Cir. 1994)). "[I]n a substantive due process case such as this, our concern is with the rationality of a government action regardless of its impact." *Kawaoka*, 17 F.3d at 1238.

***10** In his opposition, Plaintiff cites to several cases preceding the Ninth Circuit's decision in *Shanks* and attempts to distinguish *Shanks* by asserting that Defendant abused its power, "lacking 'any reasonable justification in the service of a legitimate governmental objective.' " (Doc. 38 at 11–18.) In support of these arguments, Plaintiff cites facts surrounding the approval of his application in 2012. (*Id*. at 15–17; *see also* FAC ¶¶ 38, 41, 43, 45.) This Court, however, dismissed Plaintiff's analogous substantive due process arguments in earlier litigation. *See Honchariw v. Cty. of Stanislaus*, 530 F. Supp. 3d 939, 951–52 (E.D. Cal. 2021) (citing *Honchariw v. Cty. of Stanislaus*, Case No. 1:16-cv-01183-LJO-BAM, 2016 WL 6723957, at 6–7 (E.D. Cal. Nov. 14, 2016)[7]). Moreover, the Supreme Court's cases "dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in a constitutional sense.' " *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). As previously noted, the Court finds that Plaintiff fails to plead facts amounting to "the most egregious official conduct." *Id*.

Because the pleadings can be cured by the allegation of additional facts indicating constitutionally arbitrary conduct by Defendant, the Court again affords Plaintiff leave to amend. *See* Fed. R. Civ. P. 15(a)(2); *Cook, Perkiss and Liehe, Inc.*, 911 F.2d at 247; *Crowley*, 734 F.3d at 977; *Cafasso, U.S. ex rel.*, 637 F.3d at 1058. Therefore, the Court DISMISSES Plaintiff's substantive due process claim with leave to amend.

## V. CONCLUSION AND ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that Defendant's Motion is GRANTED with leave to amend. Within twenty-one (21) days, Plaintiff SHALL file: (a) a second amended complaint in accordance with the directives in this order, or (b) a statement that he elects not to proceed with this action. If Plaintiff does not file a second amended complaint in compliance with the directives in this order within the specified time frame, the case will be dismissed without further notice.

IT IS SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2023 WL 2938404

Footnotes

1 The operative pleading, Plaintiff's First Amended Complaint ("FAC"), was filed on November 28, 2022. (Doc. 32.)

2 In its reply brief, Defendant notes that Plaintiff's opposition was filed two days late and urges the Court to disregard the untimely filing. (*See* Doc. 39 at 3.) In the absence of any apparent prejudice, which Defendant has not shown, the Court shall permit the late filing. Plaintiff is cautioned that any future failures to comply with this Court's deadlines will be looked upon with disfavor.

  

3 The parties previously consented to the jurisdiction of the U.S. Magistrate Judge. (*See* Doc. 28.)

4 The Court previously took judicial notice of the facts and proceedings in *Honchariw v. Cty. of Stanislaus*, 51 Cal. App. 5th 243 (2020), given its direct relationship with the present case (Doc. 29 at 2 n.3). *See* Fed. R. Evid. 201(c)(1) (the court may take judicial notice on its own); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("[W]e 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.' "). Furthermore, Defendant requests that the Court take judicial notice of Plaintiff's vesting tentative map, which was made part of Defendant's records as to Plaintiff's subdivision application. (Doc. 36.) Defendant's request is granted pursuant to Rule 201 of the Federal Rules of Evidence. The Court hereby takes judicial notice of the vesting tentative map because "neither party disputes [its] authenticity ... or the accuracy of the information displayed therein," *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010), and courts may take judicial notice of " 'matters of public record,' " *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

5 The original pleading, Plaintiff's Verified Supplemental and Amended Complaint ("Supp. Compl."), is attached to Defendant's Notice of Removal (Doc. 1) as Exhibit 36. (*See* Doc. 1 at 237–45.)

6 The FAC appears to contain two paragraphs labelled paragraph 55. (*See* FAC at 19.) The Court refers to these paragraphs as presented in the FAC.

7 In the present matter, Defendant filed a notice of related case as to *Honchariw v. Cty. of Stanislaus*, No. 1:16-cv-01183-DAD-BAM. (*See* Doc. 3.)

**End of Document**

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
KING MOUNTAIN TOBACCO COMPANY, INC., Defendant-Appellant.

No. 16-35956
|
Argued and Submitted March 15, 2018 San Francisco, California
|
Filed August 13, 2018

**Synopsis**

**Background:** Government brought action against tobacco manufacturer for failing to pay certain fees as required by the Fair and Equitable Tobacco Reform Act (FETRA). The United States District Court for the Eastern District of Washington, No. 1:14-cv-03162-RMP, Rosanna Malouf Peterson, J., 131 F.Supp.3d 1088, granted summary judgment in favor of the government, and ordered manufacturer to pay $6,425,683 in overdue fees. Manufacturer appealed.

**Holdings:** The Court of Appeals held that:

[1] District Court did not abuse its discretion by denying manufacturer's motion for further discovery;

[2] Treaty with Yakama Nation did not entitle manufacturer to exemption from FETRA fees;

[3] manufacturer's obligation to pay fees under FETRA did not amount to regulatory taking under Fifth Amendment; and

[4] assessments under FETRA did not violate due process.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (4)

[1] **Federal Civil Procedure** Actions in which remedy is available

District Court did not abuse its discretion by denying tobacco manufacturer's motion for further discovery, in action brought by government for failing to pay certain fees as required by the Fair and Equitable Tobacco Reform Act (FETRA), where administrative record contained determinations of fees owed by manufacturer, and manufacturer did not contest accuracy of those determinations before the agency. 7 U.S.C.A. §§ 518, 519.

[2] **Agriculture** Tobacco
**Indians** Native village corporations

Treaty with Yakama Nation did not entitle tribal tobacco manufacturer to exemption from fees under the Fair and Equitable Tobacco Reform Act (FETRA). 7 U.S.C.A. §§ 518, 519.

[3] **Eminent Domain** Taxes, licenses, assessments, and users' fees in general

Tobacco manufacturer's obligation to pay fees to government under the Fair and Equitable Tobacco Reform Act (FETRA) did not constitute a "regulatory taking" in violation of the Fifth Amendment; fees assessment did not operate upon or alter identified property interest, but merely imposed obligation to pay a sum of

  

money based on its market share. U.S. Const. Amend. 5; 7 U.S.C.A. §§ 518, 519.

2 Cases that cite this headnote

[4] **Agriculture** Constitutional and statutory provisions
**Constitutional Law** Agriculture and crops

Assessments imposed against tobacco manufacturer under Fair and Equitable Tobacco Reform Act (FETRA) did not violate manufacturer's due process rights; assessments served legitimate legislative purpose of transitioning from quota and price support programs to free market system for tobacco production, and payment obligation was prospective based on manufacturer's current market participation. U.S. Const. Amend. 5; 7 U.S.C.A. §§ 518, 519.

**Attorneys and Law Firms**

***701** Abby Christine Wright, Attorney, DOJ—U.S. Department of Justice, Washington, DC, for Plaintiff-Appellee

Randolph Henry Barnhouse, Attorney, Justin Solimon, Barnhouse Keegan Solimon & West LLP, Los Ranchos de Albuquerque, NM, for Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Washington, Rosanna Malouf Peterson, District Judge, Presiding, D.C. No. 1:14-cv-03162-RMP

Before: FERNANDEZ, McKEOWN, and FUENTES,* Circuit Judges.

MEMORANDUM**

King Mountain Tobacco Company, Inc. ("King Mountain") appeals the district court's order granting summary judgment in favor of the United States in an action to collect $6,425,683 in overdue fees under the Fair and Equitable Tobacco Reform Act ("FETRA"), Pub. L. No. 108-357 §§ 611–612, 118 Stat. 1521, 1522–24 (2004), codified at 7 U.S.C. §§ 518–519. Because the parties are familiar with the facts, we do not repeat them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

**A. The district court did not abuse its discretion by denying King Mountain discovery.**

[1]"Broad discretion is vested in the trial court to permit or deny discovery, and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996). The district court denied discovery after holding that the administrative record demonstrates the accuracy of the agency's determinations of liabilities owed by King Mountain under FETRA. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir. 1986) ("With a few exceptions ... judicial review of agency action is limited to a review of the administrative record."). King Mountain did not contest the accuracy of those determinations before the agency, and indicated that it was "satisfied with the accounting of assessments provided by [the agency] and was not further challenging the accuracy of the FETRA assessments." The agency thus affirmed the amounts owed. The district court did not abuse its discretion when it denied ***702** King Mountain further discovery on judicial review.

**B. The Treaty with the Yakamas does not prohibit the imposition of FETRA assessments.**

[2]Whether FETRA assessments are "taxes" or "fees," the test for King Mountain's exemption is the same. The "express exemptive language" test applies to federal laws generally, not just to federal taxes. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 994 (9th Cir. 2014); *see id.* (describing "the 'express exemptive language' test for determining whether a federal law applies to [Indians]"). As we have explained, *see United States v. King Mountain Tobacco Co., Inc.*, Nos. 14-36055 & 16-35607, 899 F.3d 954, 2018 WL 3826230

  

(9th Cir. 2018), the Treaty with the Yakamas contains no "express exemptive language" that would entitle King Mountain to an exemption from a federal excise tax on tobacco products. For the same reasons, the Treaty does not entitle King Mountain to exemption from FETRA assessments.

### C. The FETRA assessments imposed on King Mountain are constitutional.

#### 1. FETRA assessments do not violate the Takings Clause.

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Because the Constitution "protects rather than creates property interests, the existence of a property interest" is the threshold question of any takings analysis, and it is "determined by reference to 'existing rules or understandings that stem from an independent source such as state law.' " *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) ).

FETRA does not effect a "classical" taking by seizing physical property. Instead, it requires King Mountain to pay quarterly assessments in the form of money. As we have cautioned, "money differs from physical property in respects significant to [a] takings analysis." *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc).

[3]In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) the Court affirmed that confiscations of money, "despite their functional similarity to a tax," 570 U.S. at 615, 133 S.Ct. 2586, are only treated as a taking when the confiscation operates upon or alters an identified property interest. *See, e.g.*, *Phillips*, 524 U.S. at 165, 118 S.Ct. 1925 (recognizing the principal owner's property right to interest earned thereon); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162–64, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (holding that a state statute taking, for the government's own use, the interest accruing on a privately owned interpleader fund deposited in the registry of the county court was unconstitutional under the Takings Clause, and that the state could not avoid the constitutional violation by legislatively or judicially recharacterizing the principal as "public money"). King Mountain fails to identify a property interest that a given FETRA assessment "operate[s] upon or alters." *See Koontz*, 570 U.S. at 623, 133 S.Ct. 2586. At best, King Mountain purports to locate such an interest in the Treaty with the Yakamas, arguing that FETRA interferes with King Mountain's property interest in "the 'exclusive benefit' of ... activities conducted on Yakama reservation" land guaranteed by Article II of the Treaty. As explained ***703** above, however, no provision of the Treaty bars the Government from imposing FETRA assessments on King Mountain.

FETRA simply requires King Mountain to pay a sum of fungible money based on its market share. That requirement, without more, is not a taking.

#### 2. King Mountain's FETRA assessments do not violate the Due Process Clause.

[4]"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). In conducting a review of legislation under the Due Process Clause, "federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1342 (Fed. Cir. 2001). Rather, we "are charged simply with determining whether the congressional action was rational." *Id.* FETRA was a rational response to the unworkability of the Depression-era quota and price-support system governing tobacco production, which by the 1990s had drastically inflated the price of American tobacco past the point of competitiveness. The wisdom of that decision is a policy judgment the Constitution leaves to Congress, not the judiciary.

FETRA was prospective and imposed assessments on King Mountain—and indeed, on all manufacturers of tobacco products—based on current market participation. *See Swisher Intern., Inc. v. Schafer*, 550 F.3d 1046, 1058 (11th Cir. 2008). Therefore, FETRA does not raise retroactivity issues implicating the due process clause. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 534–36, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality opinion).

  

**3. King Mountain's FETRA assessments do not violate any other constitutional provision.**

King Mountain's unconstitutional conditions challenge fails because FETRA assessments do not "deny a benefit to [King Mountain] because [it] exercises a constitutional right." *See Koontz*, 570 U.S. at 604, 133 S.Ct. 2586. King Mountain's equal protection challenge also fails because FETRA, by its express terms, applies to all manufacturers of tobacco products and apportions quarterly assessments according to market share.

**AFFIRMED.**

**All Citations**

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Footnotes

* The Honorable Julio M. Fuentes, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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