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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANIEL LEVIN; MARIA LEVIN; PARK LANE ASSOCIATES, L.P.; THE SAN FRANCISCO APARTMENT ASSOCIATION; and THE COALITION FOR BETTER HOUSING,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

Case No. 14-cv-03352-CRB

DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: August 22, 2014
Time: 10:00 a.m.
Before: The Honorable Charles R. Breyer
Courtroom 6, 17th Floor

Trial Date: None Set

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are landlords who object to San Francisco's new requirement that, as a condition of evicting their rent-controlled tenants, they pay a greater amount in relocation payments to their tenants than was previously due. Although they mostly style their federal lawsuit as a takings action, what they now seek is not just compensation but rather to avoid making a relocation payment altogether.

Their injunctive relief motion suffers many defects. For example, they have made no effort to ripen their claims by seeking compensation in the state courts, yet they offer no reason why this Court should hear their case in the first instance. They have failed to join the tenants in this case, even though the tenants are necessary parties to an action that determines the tenants' rights to payment. And they seek injunctive relief for takings harms that caselaw holds are compensable only with damages. But mostly, Plaintiffs' injunctive relief motion should fail because their claims lack merit. The bottom line is that San Francisco needs only a rational basis to conclude that protecting displaced tenants with relocation payments to help them adjust to a fierce real estate market is a worthy public policy. Although Plaintiffs argue that this kind of transfer effects only a private purpose, cases have held time and time again that price controls in rental markets serve the same lawful public purposes that San Francisco's ordinance serves. Nor is Plaintiffs' claim that San Francisco has taken their property likely to succeed. The torrid San Francisco real estate market pays a premium for Ellis-vacated buildings that far outstrips the relocation benefits the landlords must provide, and the new ordinance diminishes Plaintiffs' property values, if at all, in amounts far smaller than in past cases where takings claims have been rejected. Thus, the Court should deny relief to Plaintiffs.

STATEMENT OF FACTS

I. Rent Control And The Ellis Act

Nearly all housing units in San Francisco constructed before 1979 are subject to rent and eviction controls. S.F. Admin. Code §§ 37.2(r)(5), 37.3(a), 37.9 (Appendix ("App.") 9, 10, 37). San Francisco's rent-control ordinance generally restricts landlords to raising the base rents of current tenants no more than 60% of the published increase in the Department of Labor's Consumer Price Index annually. *Id.* § 37.3(a)(1) (App. 9-10). The ordinance also forbids landlords from evicting their tenants except on specified grounds. *Id.* § 37.9 (App. 37-41.) Evictions are permitted in instances of

tenant fault, like nonpayment of rent, and there are also some no-fault justifications, such as where the owner intends to make major renovations or occupy the unit personally. *Id.*

In short, most landlords in San Francisco face a gap between the regulated rent they can charge and the fair market rent of their unit—a gap that that grows over time since rents are not permitted to go up as much as inflation—and they are mostly forbidden from evicting their tenants. Landlords who wish to stop renting out units in a particular building, however, are afforded the statutory right to do that by the Ellis Act, a state law enacted in 1985. 1985 Cal. Stat., ch. 1509, *codified at* Cal. Gov't Code §§ 7060 *et seq*. The Ellis Act forbids public entities in California from "compel[ling] the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease." Cal. Gov't Code § 7060(a). But the Ellis Act expressly allows public entities to use their existing police powers to "mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations." *Id.* § 7060.1(c). It also allows public entities to require landlords to provide 120 days' notice of their intent to evict most tenants and a full year's notice for seniors and people with disabilities. Cal. Gov't Code § 7060.4(b). San Francisco has adopted these requirements. S.F. Admin. Code § 37.9A(f) (App. 50-52).

To prevent landlords from using the Ellis Act to circumvent local rent controls, such as by evicting all their current tenants but then changing their minds and re-renting to new tenants at market rents, the Ellis Act allows public entities to regulate tenancies in Ellis-vacated units. Cal. Gov't Code § 7060.2. San Francisco has enacted such regulations, which require the landlord to pay damages to the evicted tenant if he re-rents the unit within two years, prevent the landlord from renting the Ellis-vacated unit for more than he could have charged under the last rent-controlled tenancy for five years, and require the landlord to at least try to offer the Ellis-vacated unit to the displaced tenant on the same terms as before the tenant was evicted if the landlord re-rents the unit within 10 years. S.F. Admin. Code § 37.9A(c), (d) (App. 46-47). None of these restrictions is challenged by Plaintiffs in this case.

II. Ellis Act Profits

Not surprisingly in light of the highly regulated nature of the landlord business in San Francisco, San Francisco's real estate market places a very big premium on vacant units. In fact, a recent study by the San Francisco Board of Supervisors Budget and Legislative Analyst determined

that the average profit from selling a random sample of buildings subject to Ellis Act evictions was 116%. Van Aken Dec., Ex. A, at 1. That report did not take into account any improvements or renovation costs, but even after accounting for these costs, the average sales price less cost of improvements was more than twice as much as the average purchase price, for a 102% return on the purchase price. Van Aken Dec. ¶ 5 & Ex. C. In other words, using the Ellis Act to empty a building of tenants roughly doubles its value. Since these units cannot be re-rented in the short term without penalty, they are often sold as tenancies-in-common or TICs, which is a form of fractional joint ownership of a building where all of the owners share title but, by contract, assign exclusive rights to occupy particular units to individual owners.

Plaintiff Park Lane Associates L.P. ("Park Lane") apparently well understands the potential for big profits from selling Ellis-vacated units. Park Lane has invoked the Ellis Act to evict all of the tenants from 1100 Sacramento Street, a high-end residential building on Nob Hill with 33 units. According to a news report, Park Lane's owner thinks that the sales price of all 33 units as tenancies-in-common "could reach $100 million." Van Aken Dec. Ex. E, at 2. The owner expects that he will put $50 million to $60 million into the building, including the purchase price and the costs of renovations and tenant buy outs. *Id.* at 3. In other words, like the owners of the properties studied by the Legislative Analyst's report, Park Lane's owner expects to nearly double his investment by evicting all the tenants. Early signs are that he will reach his estimates: a subsequent news report noted that so far the project is "a cash cow," with penthouse sales at $7 million per unit in all-cash deals. Van Aken Dec. Ex. F, at 2. Sales of smaller units have been in the $3 million to $4 million range. Van Aken Dec. Ex. G, at 4.

III. San Francisco's Efforts To Mitigate Harms For Evicted Tenants

It is well known that San Francisco faces a housing affordability crisis, and that rents here have spiraled. One recent estimate based on internet price data was that, "as of the end of June 2014, the median rental price of a one-bedroom apartment in San Francisco is $3,120. Two-bedroom apartments rent for $4,000, and a three-bedroom apartment rents for $4,795." Van Aken Dec. Ex. H, at 3. Rent-controlled tenants are protected from rising rents in San Francisco, but they are vulnerable to Ellis Act

evictions. When landlords exercise their statutory rights under the Ellis Act, tenants not only face extreme disruption in their daily lives but also a fierce housing market.

San Francisco has a strong public policy that tenants evicted through no fault of their own are in need of and deserve protection. Its regulations of the rental market, including the Mitigation Ordinance, reflect the view that San Francisco should be a place for people of all income levels and that the social fabric of neighborhoods should be preserved where that is reasonably possible. Its policy of mitigating the harms of Ellis evictions is grounded in the Ellis Act itself, which expressly permits such measures. Cal. Gov't Code § 7060.1(c). In keeping with its strong public policy, San Francisco requires landlords to make relocation payments to tenants, with half of the payment due at the time the landlord initially serves notice of the impending eviction, and the other half due at the time the tenant vacates the unit. S.F. Admin. Code § 37.9A(e) (App. 47).

Beginning in February 2005, relocation payments for Ellis evictions were set at $4,500 per tenant for up to three tenants per unit, but no more than $13,500 in total per unit.[1] S.F. Admin. Code § 37.9A(e)(3) (App. 48). In addition, elderly or disabled tenants receive an additional payment of $3,000 per person. *Id.* Those amounts are adjusted annually for inflation, so that the current payment under this provision would be capped at $5,265.10 per person or $15,795.27 per unit, in addition to the inflation-adjusted allowance for elderly or disabled tenants. *Id.*; Van Aken Dec. Ex. I.

In June of this year, the Mitigation Ordinance that Plaintiffs challenge took effect. Under the Mitigation Ordinance, landlords who evict tenants under the Ellis Act must calculate the difference between the tenant's current, regulated rent and the market rent for a comparable unit in San Francisco, using a formula provided by the San Francisco Controller's Office ("Monthly Rent Differential"). S.F. Admin. Code § 37.9A(e)(3)(E) (App. 49). The landlord must pay a relocation payment of two years' worth of Monthly Rent Differential payments per unit, divided equally among all tenants in the unit.[2] A copy of the instruction sheet the San Francisco Rent Board has issued, which describes how to calculate payments, is attached as Exhibit I to the Van Aken Declaration.

[1] For more than three tenants per unit, the tenants divide the $13,500 payment equally.

[2] If that relocation payment is less than the amount required by the February 2005 relocation payment schedule, then the landlord pays the greater amount required under the older provisions.

To ensure that the Mitigation Ordinance is fair to landlords and does not put a prohibitive price on their ability to exercise their Ellis Act rights, the Mitigation Ordinance provides two safeguards. First, the Rent Board may reduce the relocation payment a landlord is required to make where the Controller's formula does not accurately measure the difference between a tenant's current rent and the market rent for a comparable unit. S.F. Admin. Code § 37.9A(e)(3)(H) (App. 50). Second, the Rent Board can reduce the relocation payment a landlord must make where that payment would cause an undue financial hardship to the landlord. *Id.* § 37.9A(e)(3)(G) (App. 49). The Rent Board is directed to consider all relevant factors in determining whether the landlord would suffer a hardship if he had to pay the full amount, such as the landlord's income, assets, debt, age, health, and so on. *Id.* But the Rent Board may not consider the landlord's assets held in retirement accounts or non-liquid personal property. *Id.*

IV. The Levins' And Park Lane's Challenge To The Mitigation Ordinance

The Levins bought their North Beach building, at 471-473 Lombard Street, for $1.88 million in 2008. Van Aken Dec. Ex. J. Zillow estimates it is worth $4.4 million today. *Id.* The Levins' tenant has lived in the lower unit of the building since 1988 and currently pays $2,479.67 per month in rent. Complaint ¶ 41. Although the Levins stated in their complaint that the tenant is "self-sufficient," they have offered no evidence of her means, and they have not challenged her claim that she is disabled. Complaint ¶¶ 41, 44. Pursuant to the Controller's schedule, the fair market value of the unit that the Levins seek to recover is $7,394.62 (or the Monthly Rent Differential of $4,914.95 plus her current rent). Complaint ¶ 47. The Levins admit that that is the fair market rent of the unit. Complaint ¶ 48. The total amount the Levins contend they are required to pay to their tenant under the Mitigation Ordinance is $117,958.89; they have paid $6,079.39 already. Plaintiffs' MPAs ("MPAs") 7.

The Levins have not invoked any administrative remedies under the Mitigation Ordinance, either to contend that the Monthly Rent Differential does not accurately reflect the unit's fair market rent, or to seek a reduction in their requirement payment because of the financial hardship it would cause them. Complaint ¶¶ 48, 53. This is puzzling, since the Levins' TRO moving papers argue that they may have to postpone their retirement to make the required payment, MPAs 7, yet the Mitigation Ordinance forbids the Rent Board from considering their retirement account assets for purposes of the

hardship determination. S.F. Admin. Code § 37.9A(e)(3)(G)(iii) (App. 49).

The facts concerning Park Lane's ownership of 1100 Sacramento Street are discussed above: Park Lane's owner, by his own media statements, stands to make significant profits from evicting his tenants and selling the units as TICs. That is true whether he is required to make relocation payments of $177,171.10 under the 2005 payment schedule, or of $1.1 million under the Mitigation Ordinance, as he alleges in his TRO application. *See* MPAs 8-9. Even with the $1.1 million payment, Park Lane stands to make $38.9 million on its outlay of $61.1 million, by the estimates Park Lane's owner made in one news report. *See* Van Aken Dec. Ex. E. Park Lane has not sought any administrative remedies from the Rent Board.

Park Lane and the Levins have not sought any compensation for their alleged takings in the state courts. Instead, they have brought this federal lawsuit for declaratory and injunctive relief, contending that the Mitigation Ordinance violates the Takings Clause, the Due Process Clause and other constitutional protections, and is preempted by the Ellis Act. They have sued only the City and have not named any of their tenants as defendants. They now seek emergency injunctive relief. Park Lane contends that the tenants in Unit 704 intend to vacate their unit by August 25, 2014 and have demanded a payment of $143,811.84 on that day. MPAs 9-10. Other payments are due from Park Lane by October 2014 or earlier, and the Levins' payment to their tenant is due by December 16, 2014. MPAs 7, 8. They seek to stay the Mitigation Ordinance as applied to them.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008). A plaintiff who shows a likelihood of irreparable injury may also obtain a preliminary injunction upon a showing of "serious questions going to the merits . . . and [that] the balance of hardships tips sharply in plaintiff's favor." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). Plaintiffs do not meet either test here. They are unlikely to succeed on the merits of any of their claims, they have not shown irreparable injury, and the balance of harms tips sharply away from them.

I. PLAINTIFFS' TAKINGS CLAIMS ARE UNRIPE.

Generally a plaintiff is required to ripen his takings claim before bringing the claim to the federal courts. The first ripeness prong requires "obtaini[ing] a final decision regarding how it will be allowed to develop its property." *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985). The second prong requires the plaintiff to seek compensation through available state procedures. *Id.* California has available procedures for seeking takings compensation. *See, e.g.*, *Monks v. City of Rancho Palos Verdes*, 167 Cal. App. 4th 263, 310 (2008).

Ripeness is now a prudential concern of the federal courts rather than a jurisdictional bar. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117-18 (9th Cir. 2010) (en banc). But a plaintiff asserting a takings claim in federal court must still show "that it would be appropriate for this Court to adjudicate the claim at this point in time." *Surf & Sand, LLC v. City of Capitola*, 717 F. Supp. 2d 934, 938 (N.D. Cal. 2010). Plaintiffs offer no reason why a federal forum is the best forum in this case, or any reason why they cannot obtain relief from the state courts for the alleged taking.

Plaintiffs also contend that the prudential ripeness requirement is inapplicable to their per se and regulatory takings challenges. MPAs 12. But they rely only on out-of-circuit authority and a plurality opinion of the Supreme Court, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998), and they ignore the cases of this circuit that are most closely on point and acknowledge the applicability of the *Williamson County* ripeness test to rent-control cases presenting takings claims. *See MHC Financing Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013); *Guggenheim*, 638 F.3d at 1117-18. They also make the argument that it would be pointless for them to ask for money from the City in the state courts after paying money to their tenants—but they offer no reason *why* the state courts could not make them whole with payment of just compensation.[3]

Finally, Petitioners argue that the *Williamson County* rule does not apply to "facial takings claims, which are exempt from *Williamson County* precisely because they do not seek monetary compensation." MPAs 15. This is incorrect. Claims that a taking of private property does not serve a

[3] In fact, Plaintiffs do not seek damages in their complaint—they exclusively seek declaratory and injunctive relief. This is puzzling, because equitable relief is not available for a taking if a damages remedy is available. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985). But Plaintiffs' pleading choices should not alter the ripeness inquiry, which protects federal-state comity concerns.

public purpose—and therefore that the government cannot enforce its law whether or not it pays compensation—are exempt from the *Williamson County* ripeness requirement. *See San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345-46 (2005). Thus, the only one of Plaintiffs' constellation of Takings-Clause challenges that is exempt from the prudential ripeness requirement is its contention that the Mitigation Ordinance serves private rather than public purposes. Because Plaintiffs offer no reasons whatsoever why this Court should exercise its discretion to decide this case rather than letting the state courts provide just compensation if any is due, the Court should hold that Plaintiffs' takings claims, other than their private use claim, are fatally unripe.

II. THE LANDLORDS' TAKINGS CLAIMS LACK MERIT.

A. If Rent Control Is Not A Taking—And It Is Not—Then The Mitigation Ordinance Cannot Be A Taking.

For the same reasons that rent control does not effect a taking for public or private use, neither does the Mitigation Ordinance. Under the combined effect of California law, San Francisco's longstanding rent-control ordinances, and the Mitigation Ordinance, landlords in San Francisco have two choices. Their first choice is to keep the status quo, and refrain from using the Ellis Act to evict all their tenants, but continue to charge their tenants less than fair market rent for their units. Under the status quo, the Landlords must, in effect, subsidize their tenants' rent by the amount of the Monthly Rent Differential each and every month in perpetuity, and they do not have possession of their units. Their second choice is to exercise their Ellis Act rights, pay two years' worth of Monthly Rent Differentials, and recover possession of their units. If they are so inclined, they can reap big profits by selling their units vacant as TICs—as Park Lane is doing. And if they do not sell their units, they are permitted to re-rent their units at market rent in five to 10 years, and use them for any lawful non-rental purpose in the meantime.

It is beyond dispute that the first of these choices, the status quo scenario, is constitutional. Rent control is lawful, serves a public purpose, and does not effect a taking. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992); *MHC Financing*, 714 F.3d at 1126-29.

Because the status quo scenario is constitutional, it also must be beyond dispute that the Mitigation Ordinance is constitutional, because it is less onerous than rent control by every relevant

measure. From a financial perspective, landlords pay less to their tenants under the Mitigation Ordinance than under rent control: they pay only two years' worth of Monthly Rent Differentials rather than facing below-market rents in perpetuity, and if they sell they can capture the substantial Ellis premium for vacant units. And from the perspective of the right of possession, an important lens for takings analysis, the Mitigation Ordinance does not alter landlords' existing right to regain possession of their units after the statutory Ellis notice periods expire. This, too, is less onerous than rent control, which divests the landlord of possession until the tenant dies or chooses to vacate the unit. Thus, the logic of the landlords' takings challenge to the Mitigation Ordinance collapses on even minimal scrutiny. As the City discusses in the succeeding sections, it also fails under established Takings Clause case law.

B. The Mitigation Ordinance Serves A Legitimate Public Purpose.

Plaintiffs contend that the Mitigation Ordinance is a transfer for private purposes because landlords must make payment to tenants, and tenants are free to use the payment for any purposes.[4] MPAs 11. But the public purpose of the Mitigation Ordinance is clear from the Ellis Act: it is intended to "mitigate any adverse impact on persons displaced by reason of" an Ellis Act eviction. Cal. Gov't Code § 7060.1(c). The Mitigation Ordinance must be upheld so long as it is "rationally related to a conceivable public purpose." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *see also Kelo v. City of New London*, 545 U.S. 469, 488 (2005). The City's legislative judgment that payment of two years' Monthly Rent Differential is an appropriate mitigation of the financial burdens displaced tenants face in a boiling real estate market, and will help keep intact the social fabric of existing neighborhoods, is entitled to "extreme deference." *MHC Financing*, 714 F.3d at 1129.

The fact that the Mitigation Ordinance transfers money directly to tenants and that those tenants are occasionally affluent does not mean the ordinance serves private rather than public purposes. The same criticism has repeatedly been leveled at mobile home rent control ordinances, which permit mobile home owners selling their homes to capture the value of the rent subsidies for

[4] It is questionable whether a cause of action challenging a regulatory taking as having a private purpose is cognizable at all. As the Ninth Circuit has noted, "[w]e are aware of no court that has ever recognized a regulatory private taking." *MHC Financing*, 714 F.3d at 1129 n.5.

mobile home pads that their successors will receive, and it has been uniformly rejected by the Supreme Court and Ninth Circuit. *Yee*, 503 U.S. 529; *MHC Financing*, 714 F.3d at 1129. San Francisco's judgment that tenants as a class are likely to need protection, and that tenants who have previously been charged below-market rents may continue to need additional assistance, is not an irrational judgment. *See Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) (rejecting challenge to rent control "because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare"). Nor does it render the legislative scheme as a whole irrational that tenants may sometimes use the payments for purposes other than relocation. A payment to a class of people who are very likely to need to pay relocation expenses, and to be facing very steep rent increases over their current rents, is a rational legislative measure, even if a few tenants use the money for other purposes.

C. The Mitigation Ordinance Is Not A Per Se Taking.

Plaintiffs contend that the Mitigation Ordinance effects a physical taking or its equivalent because, in their view, "a demand for money tied to a particular piece of land is subject to a per se, physical takings analysis." This argument is specious. San Francisco is not occupying their property; it is requiring them to make a payment of money. The Supreme Court recently identified the taxonomy of takings claims in *Lingle v. Chevron*, 544 U.S. 528, 537-38 (2005). There is the paradigmatic ouster from possession of real property, which is a per se taking. *Id.* at 537. There are also "two categories of regulatory action" that are per se takings: when government requires a property owner to suffer a permanent physical invasion of property, however minor, and when government enacts "regulations that completely deprive an owner of '*all* economically beneficial use'" of property. *Id.* at 538 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)) (emphasis in original). "Outside of these two relatively narrow categories . . ., regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 . . . (1978)." *Lingle*, 544 U.S. at 538; *see also id*. at 539 ("The *Penn Central* factors . . . have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."). Plaintiffs' claims do not fall within either of the two narrow categories of regulatory per se takings.

Plaintiffs' vague contention that "a demand for money tied to a particular piece of land" "is a per se taking of their property interest in the money," MPAs 12, is based on a misreading of the Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). In *Koontz*, the Court applied its exactions jurisprudence—which holds that the government may not demand an exaction in exchange for a discretionary permit unless the exaction is roughly proportional to the government's interests with respect to issuing the permit—to a local government's demand for money rather than an interest in real property in exchange for a development permit. *Id.* at 2599. An important part of *Koontz*'s reasoning is that takings jurisprudence applies to takings of money as well as takings of property, so there is little reason to distinguish between an exaction of money from an exaction of land. *Id.* at 2600-02.

But *Koontz* did not purport to rewrite takings law and turn any monetary payment into a per se taking akin to the government's condemnation of land. Indeed, the Ninth Circuit has recently rejected the argument that "*Koontz* somehow substantively altered the doctrinal landscape against which we evaluate takings claims." *Horne v. U.S. Dep't of Agriculture*, 750 F.3d 1128, 1138 n.11. Instead, "*Koontz* simply clarifies the range of takings cases in which *Nollan* and *Dolan* provide the rule of decision." *Id.* Thus, *Koontz* does not mandate a new per se test for compelled payments of money. To the contrary, it was the "direct linkage between the monetary exaction and the piece of land [that] guided the Court [in *Koontz*] to invoke the substantive takings jurisprudence relevant to the *land* for the purpose of determining whether the related *monetary exaction* constituted a taking." *Id.* at 1137.

In this case, San Francisco is conditioning a landlord's ability to evict a tenant on the payment of two years' Monthly Rent Differentials, which reflect the difference between the regulated rent and market rent. As *Horne* clarifies, *Koontz* requires this Court to apply the substantive takings jurisprudence relevant to rent control to a legislative scheme that extends the price-control effect of rent control for two years through the payment of money rather than the occupation of property. But the rent control cases firmly establish that rent control is neither a per se taking nor a regulatory taking. *Yee v. City of Escondido*, 503 U.S. at 532; *MHC Financing*, 714 F.3d at 1126-29. If Plaintiffs were correct that "a demand for money tied to a particular piece of land" "is a per se taking of their property interest in the money," then the paradoxical result would be that the Takings Clause provides *greater*

protection for landlords like Plaintiffs who regain possession of their units but must pay a relocation benefit than it does for landlords who cannot possess their rental units at all because of rent control. In view of the fact that "the Takings Clause affords more protection to real than to personal property," *Horne*, 750 F.3d at 1140, that cannot be correct. *See also Wash. Legal Fdn. v. Legal Fdn. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), *aff'd sub nom., Brown v. Legal Fdn. of Wash.*, 538 U.S. 216 (2003) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.").

Plaintiffs also apparently believe that because they have a property interest in the money the Mitigation Ordinance directs them to pay to their tenants, the City seeks to effect a total taking of that discrete property interest. But plaintiffs are not permitted to slice and dice the property interest at issue in order to rig a total-takings claim. In *Penn Central*, the owner of the property alleged that the City of New York was attempting to take "the airspace above [Grand Central] Terminal" by refusing the owner's plans to build an office tower above it. The Supreme Court found that this violated the parcel-as-a-whole approach to takings:

> "'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 both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . .'" *Penn Cent.*, 438 U.S. at 130-31.

The "character of the action" in this case is not merely a payment to tenants; it is an adjustment of existing rent regulations and relocation requirements that relate to possession of a particular parcel of real property. *Koontz* does not require this Court to divorce the relocation payment from its context.

Nor do the Supreme Court's funds-taking cases require such analysis. In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Supreme Court said that a per se takings approach was appropriate to analyze the alleged taking of interest from an interest-bearing IOLTA account. *Id.* at 235. But in *Koontz*, the Court characterized that as a case concerning "the relinquishment of funds linked to a specific, identifiable . . . bank account." 133 S. Ct. at 2600. That is an exception to the usual rule that because "money is fungible," takings of money are not usually analyzed under the per se approach. *United States v. Sperry*, 493 U.S. 52, 62 n.9 (1989).

Finally, the claim that landlords' payment of money to tenants is a per se taking is foreclosed by *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In that case, Congress retroactively required mining companies pay more money into a benefit fund than they had agreed to pay when they set up the fund. *Id.* at 504-14 (plurality). The judgment of the Court was to strike down the requirement for fractured reasons. *Id.* at 522-23 (plurality) (regulatory takings); *id.* at 543-46 (Kennedy, J., concurring in the judgment) (due process violation). But the Court was unified that it did not constitute a per se taking. *Id.* at 522 (plurality); *id.* at 544 (Kennedy, J.); *id.* at 554 (Breyer, J., dissenting).

D. The Mitigation Ordinance Is Not A Regulatory Taking.

The Mitigation Ordinance is not a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Under that test, this Court conducts an "essentially ad hoc, factual inquir[y]." *Id.* at 124. Relevant factors include "[t]he economic impact of the regulation on the claimant . . ., the extent to which the regulation has interfered with distinct investment-backed expectations," and the extent to which "the interference with property can be characterized as a physical invasion by government . . . [rather] than . . . when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

The Supreme Court has "consistently affirmed that State have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Yee*, 503 U.S. at 528-29. The regulatory burden that San Francisco imposes here—increasing an existing payment obligation by requiring landlords to make Monthly Differential Payments as a condition of the right to avoid rent control entirely, and the opportunity to sell the vacated unit at a steep premium—is not a heavy one. With respect to the first of the *Penn Central* factors, the economic impact on Plaintiffs, courts have previously held diminutions in value of more than 80% not to constitute regulatory takings. *See MHC Financing*, 714 F.3d at 1127-28. Plaintiffs offer no evidence that the value of their properties has been diminished by anything so steep, and the City's evidence in fact shows that vacated units command a premium that far outstrips two years of Monthly Differential Payments. Even analyzing the Mitigation Ordinance without regard to the market rewards for Ellis evictions, there is still no significant diminution of value

here. The payments that Plaintiffs challenge are a small fraction of the purchase prices each willingly paid for the properties a few years ago: about 3% for Park Lane and about 6% for the Levins.

Nor does this regulation meet the remaining two *Penn Central* factors. It does not significantly interfere with Plaintiffs' investment-backed expectations: while they will pay more to exercise their Ellis rights than they may have contemplated, increased regulation is a known risk of being a landlord in a rent-controlled market. "[T]hose who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe & Prods. of Cal., Inc. v. Const. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (internal quotation marks and citation omitted). Finally, *Penn Central* looks to whether the regulation, "can be characterized as a physical invasion by the government." 438 U.S. at 124. Here, it cannot. Under the Mitigation Ordinance, landlords still regain physical possession of their units, but they must merely make a larger payment to their tenants than before. This is "only a slight modification to an already-existing rent control ordinance," *MHC Financing*, 714 F.3d at 1128, and it is far more of an "adjust[ment of] the benefits and burdens of economic life to promote the common good" than it is a physical invasion. *Penn Central*, 438 U.S. at 124. These factors, too, favor the City.

The regulatory takings analysis is intended to identify such burdens so severe that the regulatory action is "functionally equivalent to the classic taking in which government directly appropriates private property." *Lingle*, 544 U.S. at 539. The Mitigation Ordinance falls far short of such severity and is not a regulatory taking.

E. Plaintiffs' Exactions Claims Fail.

As an alternative to their claim that the Mitigation Ordinance works an outright taking, Plaintiffs claim that it is an exaction, an unconstitutional condition imposed on their right to exit the landlord business. "A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz*, 133 S. Ct. at 2598. Plaintiffs' contention fails at that first step. If the condition is not a taking in its own right, there can be no unconstitutional exaction. For the reasons discussed above, the relocation payment is neither a per se nor a regulatory taking.

Nor is the Mitigation Ordinance an exaction or a per se taking because Plaintiffs "would . . . suffer a physical taking from the Ordinance if they *refused* the Payment." MPAs 12. As discussed *passim*, rent control is lawful and requiring Plaintiffs to continue to rent their units is lawful. Plaintiffs contend that they have the constitutional right to leave the landlord business, citing *Yee*, 503 U.S. at 532. But *Yee* does not guarantee Plaintiffs any rights under the Ellis Act to evict their tenants. *Yee*, at page 528 of that case, says that while rent control is not a per se physical taking, a requirement that landlords rent to their tenants "in perpetuity" might present a different case. This dicta has never been used to strike down a rent-control ordinance. And in any event, under the combined effect of the Ellis Act and the Mitigation Ordinance, landlords are not required to rent their units in perpetuity at all, and are required to pay only two years' worth of the Monthly Rent Differential. That is not "perpetuity."

Even if the Mitigation Ordinance were analyzed as an unconstitutional condition, it would survive that review. Where the government imposes a condition on the development of property that it cannot directly compel, that condition is only constitutional if it "serves the same legitimate police-power purpose as a refusal" to allow the development. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987). There must be a "nexus" between the permit condition and the state interest asserted by the government in its decision whether to issue the permit. *Id.* at 837. That nexus need not be exact, but there must be a "rough proportionality" between the government's interest and the exaction. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Furthermore, the government "must make some kind of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

Those criteria are met here. There is an obvious nexus between the rent-control ordinance and eviction controls and the government's interest in protecting displaced tenants, ensuring neighborhood stability, and promoting San Francisco as a city for people at all income levels. Requiring a landlord to make a relocation payment that assists the tenant in paying market rents for two years, to mitigate the adverse effects of eviction, serves the same legitimate government interest. And as for rough proportionality and an individualized determination, the Mitigation Ordinance calculates the required payment based on a formula that is intended to capture exactly the adverse effect of losing rent control for the tenant: it compensates the tenant for the difference between the tenant's current regulated rent

and market rent. If the formula misses the mark in some cases, that can be addressed through the Rent Board's administrative procedures. *See* S.F. Admin. Code § 37.9A(e)(3)(H). Because the Plaintiffs here have made no appeal to the Rent Board, they have failed to exhaust their administrative remedies and thus waived any challenge about the rough proportionality of the formula.

III. THE MITIGATION ORDINANCE DOES NOT VIOLATE DUE PROCESS OR THE FOURTH AMENDMENT.

Economic legislation violates the Due Process Clause only if it is "arbitrary and irrational." *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1994). A plaintiff's burden to make this showing is "extremely high." *Id.* Plaintiffs do not meet that burden. They offer two reasons why the Mitigation Ordinance offends the Due Process Clause: it is retroactive, and Plaintiffs "are being retroactively required to remedy a rental housing problem they did not create." MPAs 16. The second objection is most easily answered: While Plaintiffs are not individually responsible for San Francisco's market conditions, Plaintiffs have in fact created a severe rental housing problem for their tenants by evicting them, and Plaintiffs are being required to mitigate that problem. There is nothing arbitrary and irrational about that. For the same reasons that the Mitigation Ordinance does not violate the Public Use Clause, it comports with the Due Process Clause.

Nor does Plaintiffs' retroactivity objection have force. It is far from clear that the Mitigation Ordinance has a retroactive effect at all. The ordinance applies only to evictions where the tenant vacates a unit after the ordinance's effective date; that is a purely prospective effect. It is common for the government to apply existing rules to granting a government benefit or permit, even if those rules have changed between the time of the application process and the granting of the benefit. *See, e.g.*, *Sierra Club v. U.S. E.P.A.*, -- F.3d --, 2014 WL 3906509 (9th Cir. Aug. 12, 2014). And in any event, retroactivity is constitutional so long as it has a rational basis. As the Supreme Court has explained, "[t]he retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process . . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984). Here, the application of the Mitigation Ordinance to tenants whose eviction was announced but not effected before the effective date of the ordinance serves the

rational legislative purpose of mitigating the adverse effects of eviction for those tenants. That is sufficient.

Plaintiffs also argue their Fourth Amendment rights are at issue. But the City has not seized or threatened to seize Plaintiffs' property; it is instead requiring Plaintiffs to make a payment, using fungible money, to a third party. Plaintiffs' cases relate only to forfeitures or criminal cases where the government took physical possession of chattels or real property. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993); *Soldal v. Cook County*, 506 U.S. 56 (1992); *United States v. Jacobsen*, 466 U.S. 109 (1984). These cases have no application here.

IV. PLAINTIFFS' ELLIS ACT PREEMPTION CLAIM FAILS.

Plaintiffs contend that the Mitigation Ordinance, as applied to them, is preempted by the Ellis Act. Yet the Ellis Act expressly states that nothing in that law "[d]iminishes or enhances any power in any public entity to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations." Gov't Code § 7060.1(c). That language has been interpreted to mean that local governments retain their full police powers to mitigate displacement, and relocation payments are within the scope of that power. *Pieri v. San Francisco*, 137 Cal. App. 4th 886, 893 & n.4 (2006).

There is an Ellis Act limit to the size of the relocation payments the City can require, of course. "[A] public entity may not impose a *prohibitive price* on a landlord's exercise of the right under the Ellis Act to go out of business." *Pieri*, 137 Cal. App. 4th at 893 (emphasis added); *see also id.* at 894 n.6 (denying relief to landlord-plaintiffs claiming Ellis preemption because "there is no evidence that they will, in fact, be unable to withdraw from the rental market" as a result of a relocation ordinance). Another way to put it is that the Mitigation Ordinance or similar regulations would be preempted by the Ellis Act "if those regulations effectively compel residential rental use and prevent the property owner from quitting the rental business." *Reidy v. City & County of San Francisco*, 123 Cal.App.4th 580, 592-93 (2004). *Reidy* and *Pieri* follow from the plain text of the Ellis Act itself, which prohibits local governments from "*compel[ling]*" landlords to continue to rent their buildings. Cal. Gov't Code § 7060(a) (emphasis added). If the relocation payment is not so large as to be coercive, there is no conflict.

Plaintiffs here do not meet the *Pieri* and *Reidy* standard. They have not pleaded or provided evidence to show that the cost of evicting their tenants will prohibit them from proceeding with the evictions—and in fact, they have each admitted that the Mitigation Ordinance does not cause them financial hardship. And if a financial hardship were present, the Rent Board would be empowered to avoid any conflict with the Ellis Act by reducing the required mitigation payment. Because the Mitigation Ordinance does not "compel the owner of any residential real property to . . . continue to offer . . . accommodations in the property for rent," Cal. Gov't Code § 7060(a), it does not conflict with the Ellis Act.[5]

V. THE COURT CANNOT ENTER RELIEF HERE WITHOUT VIOLATING THE DUE PROCESS RIGHTS OF THE TENANTS WHOSE PAYMENTS THE LANDLORDS SEEK TO AVOID.

Plaintiffs have not named as defendants the tenants in their buildings. Yet with this injunction, they seek to avoid making payments to those known, ascertainable tenants. Rule 19(a)(1)(B) of the Federal Rules of Civil Procedure requires the joinder, if feasible, of any person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest." The tenants meet that test: Plaintiffs are seeking to adjudicate the tenants' entitlement to payments, and the tenants' interests may be impaired if they are not joined to protect those interests. This Court should not enter substantive relief that affects the tenants' rights unless they are before the Court. Moreover, entering an order relieving Plaintiffs of their obligations to pay Mitigation Ordinance payments to the tenants would likely violate their due process rights. Because the Mitigation Ordinance makes payment to tenants mandatory upon their eviction, it gives them a property right in the payment. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972). They should receive notice and the opportunity to be heard before their rights are determined.

VI. INJUNCTIVE RELIEF SHOULD BE DENIED.

To obtain injunctive relief, Plaintiffs must show a likelihood that they will be subject to irreparable harm in the absence of court intervention. They cannot. Plaintiffs' per se takings,

[5] There is a pending state-court action challenging the Mitigation Ordinance on Ellis Act preemption grounds. It was filed the same day as Plaintiffs' suit. *See* Van Aken Dec. Ex. L.

regulatory takings, and exactions claims categorically cannot support injunctive relief. *Riverside Bayview Homes, Inc.*, 474 U.S. at 127-28 ("[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.") (internal quotation marks and citation omitted); *Wash. Legal Fdn.*, 271 F.3d at 849.

Nor should injunctive relief be entered on Plaintiffs' other claims, because they have shown no prospect of harms that cannot be remedied by subsequent compensation. What they are seeking to avoid is a payment of money. Money damages can be remedied in an action at law. And while they argue that their claims of constitutional harm create a presumption of irreparable harm, the cases they cite are both First Amendment cases, where intangible interests rather than financial interests are protected. *See Elrod v. Burns*, 427 U.S. 347 (1976) (alleged termination because of political beliefs); *Goldie's Bookstore v. Superior Court*, 739 F.2d 466 (9th Cir. 1984) (*denying* injunctive relief because claim of First Amendment harm was speculative).

Finally, this Court should deny injunctive relief because Plaintiffs have not shown that the balance of harms favors them. *Winter*, 555 U.S. at 20. While Plaintiffs disclaim that the Mitigation Ordinance causes them an undue financial burden, they have produced no evidence, other than their own conclusory statements that their tenants are well off, that the tenants they are seeking to evict in the near term will be able to secure adequate replacement housing if they do not receive payments under the Mitigation Ordinance. On this record, the balance of harms favors the tenants, not Plaintiffs.

CONCLUSION

For the reasons offered above, the City respectfully submits that this Court should deny the motion.

Dated: August 15, 2014

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