NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
Christopher E. Skinnell, Esq. (S.B. No. 227093)
Hilary J. Gibson, Esq. (S.B. No. 287862)
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901
Telephone: (415) 389-6800
Facsimile: (415) 388-6874
Email: cskinnell@nmgovlaw.com
Email: hgibson@nmgovlaw.com

*Attorneys for Plaintiff/Petitioners*
CALIFORNIA APARTMENT ASSOCIATION, STEPHEN LIN, RAKESH and TRIPTI JAIN, ALISON MITCHELL, MICHAEL HAGERTY, & H. ALEX and DANNIE ALVAREZ

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA APARTMENT ASSOCIATION, STEPHEN LIN, RAKESH and TRIPTI JAIN, ALISON MITCHELL, MICHAEL HAGERTY, & H. ALEX and DANNIE ALVAREZ,

*Plaintiffs and Petitioners*,

vs.

COUNTY OF ALAMEDA, BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, and DOES 1-25,

*Defendants and Respondents.*

Case No. 3:22-cv-02705-LB

**PLAINTIFFS' OPPOSITION TO COUNTY OF ALAMEDA'S MOTION FOR JUDGMENT ON THE PLEADINGS**

**[FED. R. CIV. PROC. 56]**

DATE: February 1, 2024
TIME: 9:30 a.m.
DEPT: Courtroom B, 15th Floor
JUDGE: Hon. Laurel Beeler

(Related to Case 3:22-cv-01274-LB, *Williams v. County of Alameda, et al.*)

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Constitutional Authorities**



**Statutes**

**Other Authorities**

## I. INTRODUCTION.

As the Court knows, this case arises out of Alameda County's three-year long imposition—from April of 2020 to April of 2023—of a near-total ban on evictions within the County, for virtually any reason (the "Moratorium"). Originally adopted in response to the COVID-19 pandemic, the County continued to maintain its sweeping, draconian ban even after vaccinations were widely available, "shelter-in-place" was no longer the order of the day, schools and other business had long-since been allowed to operate virtually without restriction, and when the State of California's more tailored tenant protection laws had been fully phased out.

In contrast to applicable state law, the County's Moratorium relieved tenants of eviction for failing to pay rent for those three years, regardless of whether the tenant could afford to make the rent payments; it did not require even partial payment of rent during that period, unlike state law; and, also unlike state law, the Moratorium even prohibited landlords from evicting tenants who breached material terms of their lease, commit nuisance, waste or fraud, or who violated the law. Nor could many landlords regain these rental units for their own use, to stop the bleeding. (Landlords, of course, were not freed of their continuing obligations—financial or otherwise—in connection with these rental units.)

The individual Plaintiffs herein are all Alameda County landlords who, for the duration of the Moratorium, were prevented from evicting tenants who (among other things) failed to pay rent to the tune of tens of thousands of dollars and some of whom damaged Plaintiffs' property. Plaintiffs had no recourse to prevent substantial ongoing, month-by-month financial losses. Plaintiff California Apartment Association represents a host of other landlords in Alameda County in similar circumstances.

For *three years*, the County forced these landlords to dedicate their property to the accomplishment of the County's purposes, largely at the landlords' own expense. Whatever the justification for doing so in the early months of the pandemic, by the time this case was filed it had dissipated. The continued maintenance of the County's

blanket Moratorium, and the cumulative impacts it continued to sanction, despite dramatically improved circumstances, effected a taking of Plaintiffs' property; operated as an unconstitutional impairment of contracts; and violated due process.

## II. LEGAL STANDARD.

Under Federal Rule of Civil Procedure 12(c), "[j]udgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). "Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and . . . 'the same standard of review' applies to motions brought under either rule." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). Thus, in considering such a motion, a court must "accept all material allegations in the complaint as true," and resolve all doubts "in the light most favorable to the plaintiff." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Typically, review is limited to the face of the pleadings, but a court may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

## III. KEY ALLEGATIONS OF THE COMPLAINT, PRESUMED TO BE TRUE, AND PERTINENT JUDICIALLY NOTICEABLE FACTS.

### A. Background.

Since 1872, landlords in California have had a statutory right under the state's unlawful detainer law, Cal. Code Civ. Proc. §§ 1159 *et seq.*, to pursue a summary proceeding to evict tenants who fail to pay their rent or who engage in material breaches of their leases. "The rights and remedies afforded a landlord by the statutory provisions are given in lieu of his common law rights and remedies which included the right to enter and expel the tenant by force." *Childs v. Eltinge*, 29 Cal. App. 3d 843, 853 (1973). And while the courts have held that local governments may place reasonable limits on evictions—limiting the amount of rent that can be charged or imposing "just cause" for eviction laws, *Birkenfeld v. Berkeley*, 17 Cal. 3d 129 (1976)—

both the courts and the Legislature have carefully protected the interests of property owners in collecting lawful rents and in enforcing lawful lease terms, especially by evicting tenants who did not pay their lawful rent or who violated their leases, *see, e.g., id.* (striking down local laws that interfered with unlawful detainer statutes).

In March 2020, however, in response to the COVID-19 pandemic, Governor Newsom declared a State of Emergency in California. On March 16, 2020, Governor Newsom issued an executive order, which, in relevant part, permitted local governments to temporarily limit landlords' ability to evict tenants for nonpayment of rent due to the COVID-19 crisis, though only to the extent the tenants' inability to pay was attributable to negative financial impacts caused by the COVID-19 pandemic itself. In pertinent part, that order provided:

> [T]he statutory cause of action for unlawful detainer, Code of Civil Procedure section 1161 et seq., and any other statutory cause of action that could be used to evict or otherwise eject a residential . . . renter . . . is suspended only as applied to any tenancy . . . to which a local government has imposed a limitation on eviction pursuant to this paragraph 2 [relating to inability to pay rent because of COVID-19 financial distress], and only to the extent of the limitation imposed by the local government. [¶] Nothing in this Order shall relieve a renter of the obligation to pay rent, nor restrict a housing provider's ability to recover rent due.

Cal. Executive Order ("EO") N-28-20 (Mar. 16, 2020), ¶ 2, *see* Plaintiffs' Request for Judicial Notice, filed July 18, 2022 (ECF No. 24) (hereafter "RJN"), pp. 47-48.[1]

On April 21, 2020, acting pursuant to this authority, the Alameda County's Board of Supervisors adopted the ordinance at issue here, Urgency Ordinance No. O-2020-23 (RJN, pp. 181-94), which imposed a moratorium on virtually all evictions in Alameda County, for any reason.[2] The Moratorium prohibited "all evictions from

[1] As noted, the Court can consider judicially noticeable facts in connection with this motion, and the Court has already taken judicial notice of the exhibits attached to this Request. *See* ECF No. 43, pp. 11-12.

[2] The language in the urgency ordinance was made a permanent part of the County's Code of Ordinances on June 23, 2020. Ordinance No. O-2020-32, § II (RJN, pp. 204-12); ACCO, ch. 6.120 (RJN, pp. 173-80).

residential units in the unincorporated and incorporated areas of the county" subject to very few exceptions. Alameda County Code of Ordinances ("ACCO," RJN, pp. 173-80) § 6.120.030. These exceptions were (1) Ellis Act withdrawals; (2) government orders requiring the unit to be vacated; or (3) "the resident poses an imminent threat to health or safety." ACCO § 6.120.030(F). However, even these narrow exceptions did not apply when the tenant claims a financial hardship due to the COVID-19 pandemic. ACCO § 6.120.040. The County's Moratorium provided that it is an "absolute defense" to an unlawful detainer action brought during its term. ACCO §§ 6.120.030(D), 6.120.040(D). By its terms, the Moratorium applied countywide—in incorporated and unincorporated areas alike—except that cities were permitted to provide even more stringent protections for renters. ACCO § 6.120.110. The Moratorium also provides that any rent a tenant fails to pay during the declared state of emergency can *never* be the basis of an eviction, even if the tenant refuses to pay after the state of emergency has ended. ACCO § 6.120.090(B) & (D).

Also, by its terms, the Moratorium expired sixty days "after the expiration of the local health emergency," ACCO § 6.120.030. The emergency was finally lifted on February 28, 2023, and the Moratorium expired on April 29, 2023. ECF No. 58, Ex. A. In other words, landlords in Alameda County were precluded from evicting tenants for nonpayment of rent, or for virtually any reason, for *more than three years*.

Whatever the rationale for imposing the Moratorium in the early months of the pandemic, it cannot be disputed—indeed, the County expressly admits—that by the time this case was filed, "the Bay Area ha[d] seen significant improvement in circumstances relating to the pandemic since March of 2020 and ha[d] a relatively high rate of vaccinations. The County also admits that there [we]re fewer restrictions on business and lower unemployment rates compared to the immediate economic impacts of the pandemic in early 2020." Answer (ECF No. 18), ¶ 74. The California state courts' temporary moratorium on unlawful detainer actions was repealed effective September 1, *2020*, Cal. R. Ct., Appx., Emergency Rule 1(e). That was almost

two years before this case was filed. Governor Newsom's March 2020 executive order permitting local governments to temporarily limit COVID-19-related nonpayment evictions expired a month later, on September 30, 2020. *See* EO N-71-20 (June 30, 2020), ¶ 3 (RJN, p. 52). State and County "stay-at-home" orders, which initially closed nonessential businesses and restricted them on an ongoing basis were repealed *almost a year* before the case was filed, and businesses and schools fully reopened.[3]

Even California's statutory limits on pandemic-related evictions, the "COVID-19 Tenant Relief Act," Cal. Code Civ. Proc. §§ 1179.01–1179.07, and the "COVID-19 Rental Housing Recovery Act," Cal. Code Civ. Proc. §§ 1179.08–1179.15, which were *far* more tailored than Alameda County's Moratorium, had been phased out. Beginning September 1, 2020, and until September 30, 2021, landlords in other counties could evict tenants who failed to pay at least 25 percent of their rent during that period.[4] Beginning October 1, 2021, other counties' landlords regained the ability to evict tenants for *any* nonpayment of rent, provided that the landlord verified that he or she submitted an application for rental assistance through the State or applicable local program on behalf of the tenant and (1) it was denied, or (2) the tenant did not cooperate in completing the application with specified time periods.[5] Beginning April 1, 2022, that restriction was removed—the only tenants who were not subject to eviction for nonpayment under state law were those who had a rent relief

---

[3] *See* Alameda Cnty. Pub. Health Dep't, "Alameda County Is Aligned with the State's Beyond the Blueprint Framework" (June 14, 2021) (RJN, p. 16) ("Alameda County is rescinding its Shelter-in-Place Order…").

[4] *See* Assembly Bill 3088 (2019-2020 Reg. Sess.), 2020 Cal. Stats., ch. 37, § 20 ("AB 3088") (RJN, pp. 59-88) (enacting the "COVID-19 Tenant Relief Act of 2020," including Cal. Code Civ. Proc. § 1179.03); Senate Bill 91 (2021-2022 Reg. Sess.), 2021 Cal. Stats., ch. 2, § 17 ("SB 91") (RJN, pp. 90-120) (amending Cal. Code Civ. Proc. § 1179.03 and related provisions to extend protections through June 30, 2021); Assembly Bill 832 (2021-2022 Reg. Sess.), 2021 Cal. Stats., ch. 27, § 15 ("AB 832") (RJN, pp. 122-60) (further extending protections to Sept. 30, 2021).

[5] AB 832, 2021 Cal. Stats., ch. 27, § 20 (RJN, pp. 144-45) (codifying former Cal. Code Civ. Proc. § 1179.11(a), (c)).

application pending as of March 31, 2022, and even that final, narrow protection expired June 30, 2022.[6]

At all times, these state law protections for nonpayment of rent were afforded only to those who provided a declaration of financial distress caused by COVID-19, and beginning in September 2020 "high-income" tenants were required to provide additional documentation of hardship.[7] Unlike Alameda County's Moratorium, state law did not bar the eviction of tenants who could afford to pay. And, also unlike Alameda County's Moratorium, state law continued to permit evictions for fault (nuisance, waste, material breach violations, etc.), and no-fault "just cause" reasons like an owner move-in. Cal. Code Civ. Proc. § 1179.03.5(a)(3); Cal. Civ. Code § 1946.2.

**B. The Plaintiffs.**

**1. The California Apartment Association.**

CAA is a § 501(c)(6) nonprofit corporation. CAA is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property owners and operators who are responsible for nearly two million rental housing units throughout California. Many of its members are located in the COUNTY and are subject to, and adversely affected by, the Moratorium challenged herein. *See* Complaint, ¶ 7.

**2. The individual plaintiffs.**

The individual Plaintiffs in this case—Rakesh & Tripti Jain, Stephen Lin, Alison Mitchell, Michael Hagerty, and Alex & Dannie Alvarez—are all property owners in Alameda County, who own rental units subject to the Moratorium. *See* Complaint, ¶¶ 8-12, 36, 41, 45 & 47-48.

Each of the individual Plaintiffs has a tenant who has failed to make

---

[6] *See* Assembly Bill 2179 (2021-2022 Reg. Sess.), 2022 Cal. Stats., ch. 13, § 4 (RJN, p. 170) (adding Cal. Code Civ. Proc. § 1179.11(a)(4), (c)(2)).

[7] EO N-28-20, ¶ 2 (RJN, pp. 47-48); AB 3088, § 20 (RJN, pp. 82-86) (enacting Cal. Code Civ. Proc. §§ 1179.02.5, 1179.03).

substantial rent payments during the effective period of the Moratorium. And while some of the Plaintiffs received partial relief payments from federal, state and local funding, *see* Complaint, ¶¶ 36, 41 & 49, others have been unable to do so because their tenants either refused to cooperate, *see* Complaint, ¶ 45,[8] or because the tenant was deemed to be ineligible, *see* Complaint, ¶ 47.[9] In any event, even taking into account the relief payments that were available, as alleged in the Complaint all of these Plaintiffs have tenants who owed *substantial* back rent as of the timing of filing:

- The Jains' tenant paid nothing after January 2020; his security deposit and first month's rent check both bounced. The Jains never collected any money from him. The tenant was behind on his rent in an amount of at least $58,000 for 16 months' worth of unpaid rent that were not covered by the City of Fremont's ERAP program. (Complaint, ¶ 41.)
- Mr. Lin's tenant stopped paying rent in July 2021 and had not paid anything since. He was behind on his rent in an amount of at least $12,000 at the time of filing. (Complaint, ¶ 36.)
- Ms. Mitchell's tenant paid no rent after March 2020, when the pandemic began, and had an outstanding balance of $75,000. (Complaint, ¶ 45.)
- Mr. Hagerty's tenant had not paid any rent for most months during the approximately two years since the pandemic began and was behind on his rent in an amount of at least $47,350. (Complaint, ¶ 47.)
- The Alvarezes' tenant also stopped paying rent in early 2020 and owes more than $24,000 in back rent. (Complaint, ¶ 49.)

The Complaint also alleges that all of these numbers continued to grow with every month that the Moratorium remained in place, and that the State, County and

[8] *See also* Answer (ECF No. 18), ¶ 45 (admitting the allegations of the corresponding paragraph of the complaint).

[9] *See also* Answer (ECF No. 18), ¶ 47 (admitting the allegations of the corresponding paragraph of the complaint).

municipal "rent relief" programs that were supposed to aid landlords ran out of money months earlier. RJN, pp. 19-41. Finally, several of these Plaintiffs purchased the properties in question with the intention of eventually taking possession for their own use or they have proposed to do so as result of the pandemic, but they were precluded by the Moratorium from doing so. Complaint, ¶¶ 43, 45-46 & 50.

## IV. PLAINTIFFS' CLAIMS FOR PROSPECTIVE RELIEF ARE NOT MOOT, BECAUSE THE MORATORIUM HAS A PERMANENT COMPONENT.

Before turning to each of the individual claims for relief in the Complaint, it is important to correct a misstatement of law by the County that relates to all of the claims: it is *not* the case, as the County contends, that the Moratorium has expired and thereby rendered all claims for prospective relief moot. The County conveniently ignores the fact that the Moratorium ordinance contains a permanent component.

It is true, of course, that some aspects of the Moratorium expired on April 29, 2023. Specifically, a tenant who fails to pay rent that comes due *after that date,* or that breaches the lease after that date, may, once more, be evicted.

However, as already noted above, the Moratorium also provides that any rent a tenant fails to pay during the declared state of emergency can *never* be the basis of an eviction, even if the tenant refuses to pay after the state of emergency has ended. ACCO § 6.120.090(B) specifically provides,

> In any action to recover possession of a residential unit from a tenant based on nonpayment of rent, it shall be an affirmative defense that the rent became due [while the broader Moratorium was in effect, *i.e.*, April 21, 2020, to April 29, 2023]. *This defense may be raised at any time, including after the end of the local health emergency and after the expiration of this chapter stated in Section III of the ordinance codified in this chapter*.

(Emphasis added.)

In other words, so long as the tenant begins to pay current installments of rent, he or she can carry a substantial balance of back rent indefinitely that can *never* form the basis of an eviction proceeding. This permanent aspect of the Moratorium means that Plaintiffs' claims for prospective relief remain live.

Additionally, ACCO § 6.120.090(D) limits landlords' ability to pursue contract remedies for overdue back-rent, providing that any rent that came due while the Moratorium was in effect may only be collected as consumer debt, and "[s]uch back rent may not be collected through the unlawful detainer process." Thus, even if a tenant is evicted for post-Moratorium reasons, the landlord still cannot seek back rent through that proceeding; he or she must file an entirely separate lawsuit.

And finally, landlords continue to be prohibited from enforcing provisions of their leases that would entitle them to charge late fees or interest on unpaid rent. *See* ACCO §§ 6.120.030(E) and 6.120.040(E).

## V. THE CALIFORNIA APARTMENT ASSOCIATION SHOULD NOT BE DISMISSED FOR LACK STANDING.

The County rightly does not contest CAA's associational standing to pursue prospective relief as to the claims in the Complaint. *See S. Cal. Rental Hous. Ass'n v. Cty. of San Diego*, 550 F. Supp. 3d 853, 869 (S.D. Cal. 2021) ("*SCRHA*") (rental housing association had standing to raise takings and impairment of contracts claims against San Diego's moratorium). However, the County urges this Court to dismiss CAA as a plaintiff now because, the County maintains, "the Moratorium has expired, any claim for prospective relief is moot[,] … [a]nd CAA lacks associational standing to seek damages against the County under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)." ECF No. 81 at 28. There is no merit to this request.

For one thing, because the County does not dispute the individual Plaintiffs' standing to pursue these claims, this Court need not consider CAA's standing. *Yazzie v. Hobbs*, 977 F.3d 964, 966 n.3 (9th Cir. 2020).

But even on the substance, both aspects of the County's argument are wrong.

First, as discussed above, the Moratorium has an ongoing aspect that continues to affect landlords in the County, so the claims for prospective relief are *not* moot.

Moreover, while *Hunt* noted that associational standing is most typically found with respect to prospective remedies, 432 U.S. at 433-34, it did not hold that a request

for damages categorically forecloses associational standing in every case. (Indeed, the word "damages" appears nowhere in that opinion.) Thus, in *Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Brock*, 477 U.S. 274, 287-88 (1986), the Court held that a labor union could raise claims on behalf of its members that would have established their *entitlement* to damages, where the actual amount of damages would be left to subsequent proceedings.

The aspect of associational standing that typically precludes *compensatory* damages is the requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. But that does not bar an association from seeking *nominal* damages on behalf of its members, because such damages do not require individualized proof. *See, e.g., Fla. Paraplegic Ass'n v. Martinez*, 734 F. Supp. 997, 1001 (S.D. Fla. 1990) (association had standing to seek nominal damages, citing *Brock*, 477 U.S. at 287-88).[10]

## VI. THE COMPLAINT STATES A CLAIM FOR RELIEF.

### A. Plaintiffs Have Adequately Alleged a Takings Claim.

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." Takings come in three basic flavors: (1) physical takings, involving physical invasion of a plaintiff's property; (2) a regulation that deprives an owner of "all economically beneficial use of their property"; and (3) regulatory takings, arising when government regulation "goes too far." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2070-72 (2021). Plaintiffs have adequately alleged claims under the first and third of these "flavors."

---

[10] Although the Complaint does not expressly request nominal damages, it does request special and general damages, which is sufficient to cover nominal damages. *Cardiovascular Sys. v. Cardio Flow, Inc.*, 37 F.4th 1357, 1362 (8th Cir. 2022). Also, the Complaint "did request 'all other relief that the Court deems just and proper under the circumstances.' That is sufficient to permit the plaintiff to pursue nominal damages." *Yniguez v. Ariz.*, 975 F.2d 646, 647 n.1 (9th Cir. 1992); *see also Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1100 n.5 (N.D. Cal. 2007).

**1. Plaintiffs adequately allege a physical takings.**

Relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992), and this Court's prior order denying Plaintiffs summary judgment on their facial physical takings claim (ECF No. 43), the County urges this Court to conclude, as a matter of law, that Plaintiffs have not and cannot state a viable claim for a physical takings. But the County simply ignores the very different procedural posture in which this motion comes before the Court, and the very different standards that apply.

In the earlier motion, the Plaintiffs bore the heavy burden of producing evidence sufficient to establish that there was no triable issue of fact regarding whether the Moratorium was "unconstitutional in all of its applications." ECF No. 43, p. 10:24 (quoting *Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015)). As the County itself argued at the time, "Plaintiffs [had to] show that 'mere enactment' of the Ordinance—without consideration of any events occurring after enactment or the individual circumstances of any affected persons—violated the federal and state constitutions," ECF No. 32, p. 11:13-15, and, further, that the Moratorium caused such a violation "the very day it was enacted, even if it would not outlast that day," *id.* at 12:3; *see also id.* at 28:22-23 ("the only time that matters is the time the ordinance was adopted." (quoting *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010)). Applying that stringent standard, the Court held that the Moratorium did not, on its face, unconstitutionally "take" Plaintiffs' property.

But, as the Court plainly recognized in denying the prior motion,[11] the

[11] *See* ECF No. 43, p. 28:9-17. Consistent with this fact, the Complaint alleges, among other things, that:

- "[E]ven if the[ Moratorium's] impacts were justified in the early going of the pandemic, the circumstances have so dramatically changed that their continued maintenance without an end in sight no longer meets the constitutional standard." (¶ 70.)
- "Defendants' continued imposition of the blanket Moratorium is irrational and lacking in a legitimate government interest because there is no justification for such extreme measures, especially at this point.

extended duration of the County's Moratorium, especially in the face of drastically changing circumstances—the "events occurring after the enactment"—have always been an essential component of the CAA Plaintiffs' case.

And on this motion to dismiss, the burden is on the County as the moving party; it bears the burden of showing that—accepting all of the alleged facts are true and drawing all inferences in Plaintiffs' favor—there is no conceivable set of facts that could establish a violation. In this context, the duration of the Moratorium and the changing circumstances over time are appropriately considered. Thus, in *Cwynar v. City*, 90 Cal. App. 4th 637, 658-59 (2001), the California Court of Appeals expressly overruled the dismissal of an as-applied physical takings claim brought by property owners who were effectively precluded, by amendments to San Francisco's rent control law, from evicting tenants so that they (the landlords) could occupy the property that they owned. *Id*. *See also* *Ross v. City of Berkeley*, 655 F. Supp. 820, 836-42 (N.D. Cal. 1987) (physical taking resulted from regulation that precluded owner from retaking possession of commercial property for owner's own use).

---

> Indeed, California's COVID-19 Tenant Relief Act never imposed such draconian restrictions. Further, the Bay Area has seen significant improvement in circumstances relating to the pandemic since March of 2020, has a high rate of vaccinations, and federal and state officials have recognized that COVID-19 is either in, or moving to, an endemic stage. The COUNTY long ago abandoned the shelter-in-place policies that were the natural justification for the Moratorium. There are few remaining restrictions on businesses, and unemployment rates are very low, as opposed to the immediate economic impacts of the pandemic in early 2020. And the COUNTY has even withdrawn its mask mandate for public spaces. There is, at this point, no plausible justification for continuing the Moratorium indefinitely." (¶ 74.)
>
> - The various rent assistance programs were of limited duration and that the Moratorium had already—by the time of the Complaint's filing—exceeded that period. (¶ 33) Also, the Court can judicially notice the fact that the Moratorium continued for another year thereafter.
> - The individual plaintiffs had already lost substantial unpaid rent, and that the amount of unpaid rent was continuing to grow month by month. (¶¶ 36-51.)

Of particular importance to this case, with respect to that *as-applied* challenge the *Cwynar* court rejected the notion that underlay this Court's prior denial of Plaintiffs' facial claim—that under *Yee*, because the landlord chose to voluntarily rent the property a physical takings claim was foreclosed. Like the County here, San Francisco argued once a tenant is invited to occupy a rental unit, no subsequent change in circumstances can alter the "voluntariness" of the landlord's relationship to the tenant for purposes of a physical takings. *Cwynar*, 90 Cal. App. 4th at 658 ("the *Yee* court *did not* hold or intimate that government coercion is relevant only if it corresponds to the initial physical occupation of the premises." (italics in original)).

In fact, the *Yee* Court itself acknowledged that though a landlord initially chose to rent the property, a statute that, for example, compelled the landlord to refrain from terminating a tenancy might constitute a physical taking. 503 U.S. at 528. *See also FCC v. Fla. Power Corp.*, 480 U.S. 245, 251-53 (1987) (rejecting takings challenge to statute regulating amount a utility could charge a cable company to rent space on utility pole, but noting potential constitutional problem if utility was compelled "to enter into, renew, *or refrain from terminating*" such agreements (emphasis added)).

And while *Yee* and *Cwynar* talked about landlords being obliged to rent the unit "in perpetuity," the Supreme Court has recently clarified that compensation is due regardless of whether the invasion is permanent or temporary. *See Cedar Point Nursery*, 141 S. Ct. at 2074 ("The duration of an appropriation—just like the size of an appropriation [citation]—bears only on the amount of compensation."). The Court in *Cedar Point* acknowledged that "[i]solated physical invasions, not undertaken pursuant to a granted right of access"—equivalent to a trespass—"are properly assessed as individual torts rather than appropriations of a property right." *Id.* at 2078. Thus, applying the facial standard summarized above, in which the Court was required to assume the Moratorium might not "outlast the day" it was enacted, perhaps there is an argument (though Plaintiffs continue to dispute it) that this Court could not assume the line between trespass and taking would necessarily be crossed.

But, "'[w]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence.'" *Id.* (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922)).

In connection with this motion, unlike the prior motion, the Court can consider the judicially noticeable fact that Plaintiffs were prevented, for *three full years*, from exercising any of the three critical property rights—"'sticks in the bundle of rights that are commonly characterized as property'"—that an owner has: "'the rights to possess, use, and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-35 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), & *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). During that period, the Moratorium damaged property owner's "right to possess the occupied space himself, and also [the] power to exclude the occupier from possession and use of the space," 458 U.S. at 435; it denied an owner the "power to control the use of the property" and obtain a profit from it, *id.* at 436; and "[f]inally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id*. *See also Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (cited with approval in *Cedar Point*) ("In this context [of physical takings], 'permanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute.").

The County cites a recent decision of a panel of the Ninth Circuit to the effect that *Yee* continues to prevail over *Cedar Point*, *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 U.S. App. LEXIS 28487 (9th Cir. Oct. 26, 2023), but the panel expressly declined to publish that opinion, and it has no precedential effect, *see* 9th Cir. R. 36-3(a). The *only* published, precedential court of appeal case to consider the

viability of a physical takings challenge to an eviction moratorium continues to be *Heights Apartments, LLC v Walz*, 30 F.4th 720, 729 n.7 (8th Cir. 2022) ("*Walz*"), *reh'g en banc denied at* 39 F.4th 479 (8th Cir. 2022), which held to the contrary.

**2. Plaintiffs adequately allege a regulatory takings.**

Even if the Moratorium did not enact a physical taking, Plaintiffs could still proceed under *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (*Penn Central*). Under this analysis, the Court evaluates the three factors of "particular significance" identified in *Penn Central*: (1) the 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.

In this case, Plaintiffs have pled the loss of substantial rental income from each of their tenants, mounting into the tens and hundreds of thousands of dollars (Complaint, ¶¶ 36-50);[12] they have alleged an inability to occupy their own property (*see, e.g.*, ¶¶ 43, 46, & 48-50) and their inability to sell their property (*see, e.g.*, ¶¶ 46 & 50); they have alleged that the Moratorium enabled physical damage to their rental units (*see, e.g.*, ¶¶ 37-41); and they have alleged that:

> The COUNTY's Moratorium … interferes with Plaintiffs' investment-backed expectations and results in either a substantial or total deprivation of the economic value of Plaintiffs' properties. [Citing *Penn Central*]. The Moratorium is devaluing properties by prohibiting Plaintiffs from recovering possession of their properties—even for their personal use—and even despite renters perpetuating ongoing nuisances and *continued* nonpayment of rents. Plaintiffs have suffered significant financial losses due to the Moratorium, and continue to suffer these losses, notwithstanding the current government "relief" programs in place, which have resulted in little to no relief.

(Complaint, ¶ 55.)

The County nevertheless urges the Court to dismiss Plaintiffs' *Penn Central* claim (with leave to amend), essentially contending that Plaintiffs must lay out in the

[12] Such a claim does not require complete elimination of all economic value or a "total loss." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002).

Complaint, in minute detail, every aspect of their case, including the precise reduction in property valuation attributable to the Moratorium. No need to wait for the disclosure of damage calculations under Rule 26(a)(1)(A)(iii) or the disclosure of expert reports under Rule 26(a)(2)—to survive the pleading stage, Plaintiffs must apparently attach those reports to their Complaint.

But that is not the applicable standard; a claim for relief need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. Proc. 8(a)(2). And while "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" taking into account all reasonable inferences, the Court's judicial experience, and common sense, Rule 8 "does not require 'detailed factual allegations[.]'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)).

None of the cases relied upon by the County warrant dismissal in light of the above-quoted allegations. To begin with, it is worth noting that the majority of the cases that the County cites in connection with this argument addressed a plaintiff's ability or inability to *prove* a regulatory takings at the summary judgment or trial stage, rather than to allege one at the pleading stage.[13] Those cases, accordingly, give little guidance as to the level of specificity required to adequately plead a regulatory takings claim under Federal Rule of Civil Procedure 8.

Indeed, the County cites only three cases that address a *Penn Central* claim in the context of the Rule 8 standard: the District of Colorado's decision in *River N. Props., LLC v. City & Cty. of Denver*, 2014 U.S. Dist. LEXIS 178206 (D. Colo. Dec. 30,

[13] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 535 (2005) (one-day bench trial); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 120-21 (1978) (evidence introduced "at trial" insufficient to carry burden); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (appeal after trial); *Colony Cove Props., Ltd. Liab. Co. v. City of Carson*, 888 F.3d 445 (9th Cir. 2018) (jury trial); *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118 (9th Cir. 2013) (bench trial); *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998) (summary judgment); *Bennett v. City of Kingman*, 543 F. Supp. 3d 794 (D. Ariz. 2021) (summary judgment).

2014), the Seventh Circuit's decision in *Nowlin v. Pritzker*, 34 F.4th 629 (7th Cir. 2022), and the unpublished and non-precedential decision of the Ninth Circuit, *Evans Creek, LLC v. City of Reno*, 2022 U.S. App. LEXIS 29816 (9th Cir. Oct. 26, 2022). None of them support dismissal of this case.

In *River North Properties*, the plaintiff alleged that the City of Denver had improperly "taken" its property by preventing it from leasing the property to a tenant who grows medical marijuana. The district court dismissed the case primarily because it concluded that, since federal law prohibits the sale of medical marijuana, the plaintiff lacked a cognizable property interest that could be "taken." 2014 U.S. Dist. LEXIS 178206, at *4-5. Obviously, in this case, there is no comparable federal prohibition. And while the court also observed that the Complaint contained no allegations "indicating that [the plaintiff] attempted, but was unable, to (1) lease the Property to other tenants for other purposes; (2) apply for other uses of the property; (3) sell the property; or (4) occupy the Property, due to Defendants' regulatory actions or requirements," 2014 U.S. Dist. LEXIS 178206, at *12, the Complaint in this case contains numerous detailed allegations regarding the Plaintiffs' inability to occupy their property (*see, e.g.*, ¶¶ 43, 46, & 48-50) and their inability to sell their property (*see, e.g.*, ¶¶ 46 & 50), and simple common sense dictates that if they cannot evict a non-paying tenant, they cannot lease it to other tenants or use it for other purposes. *River North Properties* did not fault the plaintiff for failing to specify the precise amount by which the property value was diminished.

Likewise, in *Nowlin* the Seventh Circuit faced a challenge to the Illinois governor's executive orders directing "non-essential" businesses temporarily to cease or reduce their operations in response to COVID-19. The Complaint in that action alleged that "Plaintiff Businesses were unable to open for business[]" and "Plaintiffs stand on the precipice of economic collapse," but, as the Court noted, "the Businesses were free to make other uses of their properties consistent with the closure orders," and the Complaint contained no information regarding whether they did so. 34 F.4th

at 634-35. Here, of course, the Plaintiffs were—by necessity—not free to use their rental units for other purposes. Nor did the complaint in *Nowlin* provide any information regarding how long the businesses were actually closed or how much money the business lost. *Id*. Here, the Complaint contains detailed allegations regarding the amounts of rent that the Plaintiffs' tenants had failed to pay and the periods over which they had failed to do so (through the time the Complaint was filed, recognizing that both were ongoing injuries).

And finally, the unpublished decision in *Evans Creek* did affirm the dismissal of a regulatory takings claim in part because the complaint provided no information regarding the value of the "taken" property before and after the challenged governmental action, but (1) it relied upon *Colony Cove*, to support that conclusion and *Colony Cove*, as noted above, was a case decided after a jury trial, not a the pleading stage, and (2) in the circumstances of this case it is a "reasonable inference" that having a hold-over tenant for an indefinite period of time would dramatically reduce the value of the rental unit. *See Loretto*, 458 U.S. at 436 (the forced occupation of a rental unit by a third property "will ordinarily empty the right [to dispose of the property] of any value, since the purchaser will also be unable to make any use of the property"); Complaint, ¶¶ 46 (alleging Alison Mitchell's unsuccessful attempt to sell tenant-occupied condo) & 50 (alleging Alvarezes' difficulty in selling their property).

*DoorDash, Inc. v. City & Cty. of S.F.*, 2022 U.S. Dist. LEXIS 52277 (N.D. Cal. Mar. 23, 2022), is instructive here. In that case, DoorDash challenged an emergency measure adopted by San Francisco's mayor in response to COVID-19 that temporarily capped the commissions that third-party food delivery platforms could charge restaurants to 15%. DoorDash alleged generally that it would lose some revenue—some of its customers had previously agreed to pay 25% or even 30%—but the court found that economic harm insufficient, standing alone, to establish a regulatory taking. *Id.* at *55-56. Nevertheless, because the Complaint alleged that there would be other economic impacts as well, the court concluded that the complaint "create[d]

factual issues that are sufficient to state a plausible takings claim." *Id*. After all, *Penn Central* claims "ad hoc, factual inquiries into the circumstances of each particular case." *Id*. at *55. Here, the Plaintiffs have alleged the lost of rental income plus a host of other economic harms stemming from the County's Moratorium. That is sufficient to state a "plausible" claim for relief, and it is all that Rule 8 requires.

In any event, if the Court were to grant the motion as to this claim, Plaintiffs ask that the Court grant leave to amend, as the County acknowledges is proper.

**B. Plaintiffs' Contracts Clause Claim Is Not Properly Subject to Dismissal on a Rule 12(b)(6) Motion.**

Relying on *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 10 F.4th 905 (9th Cir. 2021) (*AAGLA*), and this Court's prior order denying Plaintiffs summary judgment on their facial impairment of contracts claim (ECF No. 43), the County urges this Court to conclude, as a matter of law, that Plaintiffs have not and cannot state a viable claim for impairment of contracts. But here again, the County simply ignores the very different procedural posture in which this motion comes before the Court, the fact that the burden is on the County as the moving party, and the fact that, in this context, the duration of the Moratorium and the changing circumstances over time are appropriately considered. *See Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 504 (5th Cir. 2001) (in assessing impairment of contracts claim, "The court should also consider what terms of the contract are affected and the duration of the effects." (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-47 (1978)); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 n.19 (1977) (duration is relevant to the impairment inquiry).

For example, in denying summary judgment this Court previously held that, while it was a "close call," ECF No. 43, p. 24:27, the Moratorium did not work a substantial impairment of Plaintiffs' contracts on its face. In engaging in that analysis, the Court was precluded from considering anything but the "mere enactment" of the ordinance. But the duration of the Moratorium is ultimately

relevant to an assessment of whether, and to what extent, it "undermines the contractual bargain"; it is undoubtedly relevant to determining whether the County's actions interfere with a party's reasonable expectations; and it no doubt affects the determination of whether and how much the Moratorium prevents landlords from safeguarding or reinstating their rights. *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). The longer a moratorium is sustained, the more severe the cumulative burdens on landlords get. *Compare* *Home Bldg. & Loan Ass' v. Blaisdell*, 290 U.S. 398 (1934) ("*Blaisdell*") (upholding temporary mortgage moratorium where mortgagors were required to pay a reasonable rent to meet mortgagor's costs) *with* *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935) (finding a similar moratorium to be an unconstitutional impairment when the duration was longer and there was no obligation by the mortgagor to pay a sufficient sum to meet the mortgagee's costs).

The Moratorium's duration, and the broader social circumstances in which it applies, are also relevant to the second and third prongs of the constitutional analysis: whether there is "a significant and legitimate public purpose behind the regulation" and, assuming there is, "whether the 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.'" *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983). Even where an important public purpose is identified, the government "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," *United States Trust Co.*, 431 U.S. at 31, and "[i]t is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Blaisdell*, 290 U.S. at 442. Thus, in *Walz*, 30 F.4th 720, the Eighth Circuit held that though the courts give deference to the government with respect to the impairment analysis, a restriction sustainable in the short-term, in response to a crisis, may become unconstitutional over time. *Id.* at 726-27. As "time is available for more reasoned and less immediate decision-making by public health

officials," a more critical review by the courts is needed. *Id.*

Early on, the State of California and local governments, including Alameda County, imposed stringent "stay-at-home" orders that sought to prevent transmission of the COVID-19 virus. *See* EO N-33-20 (Mar. 19, 2020) (RJN, pp. 43-44); Alameda Cnty. Pub. Health Dep't, "Seven Bay Area Jurisdictions Order Residents to Stay Home" (Mar. 16, 2020) (RJN, pp. 12-14). But those State and county stay-at-home orders were repealed in mid-2021, and businesses and schools were fully reopened almost a year before this case was even filed and nearly two years before the Moratorium expired. *See* Alameda Cnty. Pub. Health Dep't, "Alameda County Is Aligned with the State's Beyond the Blueprint Framework" (June 14, 2021) (RJN, pp. 16-17). The provision of Governor Newsom's March 16, 2020 executive order permitting local governments to temporarily limit COVID-19-related nonpayment evictions expired on September 30, *2020*—almost two full years before the case was filed. *See* EO N-71-20, ¶ 3 (RJN, p. 52). And "the County has admitted in its Answer that the Bay Area ha[d] seen significant improvement in circumstances relating to the pandemic since March of 2020 and had a relatively high rate of vaccinations. The County also admits that by May 2022 there were "fewer restrictions on business and lower unemployment rates compared to the immediate economic impacts of the pandemic in early 2020." Answer (ECF No. 18), ¶ 74. Even California's less-draconian eviction constraints—which at least required tenants to pay *some* rent to avoid eviction, *see* Cal. Code Civ. Proc. § 1179.03(g)(1)(B), and which permitted "for cause" evictions—had expired. By that point, any "emergency" justification for the Moratorium had dissipated, yet the County maintained it for another year.

Nor does the Ninth Circuit's decision in *AAGLA* support a different result. For one thing, the issue in that case "was plaintiff's entitlement to a preliminary injunction on which it bore the burden of demonstrating likely success on its Contracts Clause claim, not simply its plausibility, as necessary here to withstand dismissal." *Melendez v. City of N.Y.*, 16 F.4th 992, 1040 n.70 (2d Cir. 2021)

(distinguishing *AAGLA* on this basis and reversing the district court's dismissal of a Contracts Clause challenge to certain provisions of New York's rent control laws); *Walz*, 30 F.4th at 729 n.8 (distinguishing *AAGLA* on this basis and reversing the district court's dismissal of a Contracts Clause challenge to Minnesota's eviction moratorium); ECF No. 43, p. 28 (declining to follow *Walz*, in part, because that "decision occurred in the context of a motion to dismiss where the court was required to accept factual allegations as true.").

Moreover, "[e]very case must be determined upon its own circumstances," *AAGLA*, 10 F.4th at 916 (quoting *Blaisdell*, 290 U.S. at 430), and *AAGLA* is readily distinguishable. For one thing, the passage of time is a key distinction. AAGLA's contracts clause challenge to Los Angeles's ordinance was filed on June 11, 2020, *id.*—not quite three months into the pandemic, when state and local stay-at-home orders remained in full effect, businesses were closed, and vaccines were still a distant dream. Even when the district court ruled on the preliminary injunction in November 2020, many businesses remained closed, and vaccines were still not available. *See Apartment Ass'n of L.A. Cty., Inc. v. City of L.A.*, 500 F. Supp. 3d 1088, 1091-92 (C.D. Cal. 2020). The Ninth Circuit had determine whether the district court abused its discretion in finding, *in those circumstances*, that the plaintiff failed to demonstrate a substantial likelihood of success on the merits of its claim. 10 F.4th at 911. The court had no occasion to consider whether, and how, the result would change as time passed. *See Walz*, 30 F.4th at 727 (greater scrutiny is appropriate as time passes).

Additionally, Alameda's Moratorium law was *far* broader than Los Angeles's, meaning that the assessment of whether it was appropriately tailored was different. For one thing, the Los Angeles ordinance only prohibited eviction for nonpayment of rent if the tenant had substantial loss of income or increased expenses *attributable to COVID-19 itself*, and landlords could "continue to seek to evict tenants based on their good-faith belief that the tenants are not protected under the eviction moratorium." *AAGLA*, 10 F.4th at 909-10. Wealthy, employed individuals who remained able to pay

their rent were not given a two-year rent holiday, as has happened in Alameda County. Also, Los Angeles did not permanently ban evictions based on failure to pay during the state of emergency, like Alameda County did. And while Los Angeles purported to limit "no-fault" evictions, with two limited exceptions[14] it—unlike Alameda County—continued to permit *for fault* evictions, such as for material breaches of the lease or damage to the property, even for tenants who had suffered a loss of income. *Id.* *See also* L.A.M.C. § 49.99.2. Finally, the Ninth Circuit and district court in *AAGLA* both considered the availability of rental relief funds to be a significant consideration. *See* 10 F.4th at 916; 500 F. Supp. 3d at 1099. But there is no question in Alameda County that (1) many landlords could not qualify for relief, because it was limited to certain thresholds based on the tenant's income and depended on the tenant's cooperation;[15] (2) while the County's Moratorium lasted more than three years, such financial relief as landlords were able to qualify for was limited to no more than 18 months' rent at most;[16] and (3) funds ran out early in any event.[17] In sum, the circumstances in *AAGLA* were materially different than here.

The final, and perhaps the most significant, difference is that "AAGLA d[id] not seriously argue that the City's chosen mechanisms are not reasonably related to the legitimate public purpose of ensuring health and security during the pandemic." *AAGLA*, 10 F.4th at 914. The Complaint in this case, however, alleges exactly that.

As this Court previously held (in denying Plaintiffs' request to certify an interlocutory appeal to the Ninth Circuit on the Contracts Clause claim), "this issue"—the application of the foregoing case law to the specific facts of this case—"is not a 'question of law' … [but] a 'mixed question of law and fact,'" ECF No. 55, p. 8:12-14. And "a mixed question of law and fact … cannot be resolved through a Rule

---

[14] The two exceptions were "'the presence of unauthorized occupants or pets, or for nuisance related to COVID-19.'" *AAGLA*, 10 F.4th at 910.

[15] *See* Cal. Health & Saf. Code § 50897.1(b); Answer (ECF No. 18), ¶¶ 45 & 47.

[16] *See* Cal. Health & Saf. Code § 50897.1(b); 15 U.S.C. § 9058c(d)(1)(A).

[17] *See* RJN, pp. 19-41 (Emergency Rental Assistance Program websites).

12(b)(6) motion." *United States v. San Bernardino Mts. Cmty. Hosp. Dist.*, 2018 U.S. Dist. LEXIS 166889, at *14-15 (C.D. Cal. Sep. 27, 2018); *see also Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 96 (2d Cir. 2016); *In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1163 (C.D. Cal. 1986); *Katzenbach v. Grant*, 2005 U.S. Dist. LEXIS 46756, at *42 (E.D. Cal. June 7, 2005). Thus, the County's motion must be denied.

**C. The Plaintiffs Have Adequately Alleged a Due Process Claim.**

"The state and federal Constitutions prohibit government from depriving a person of property without due process of law. (Cal. Const., art. I, § 7, 15; U.S. Const., 14th Amend., § 1.) These provisions guarantee appropriate procedural protections [citation] and also place some substantive limitations on legislative measures [citations]. The latter guaranty—sometimes described as substantive due process—prevents government from enacting legislation that is 'arbitrary' or 'discriminatory' or lacks 'a reasonable relation to a proper legislative purpose.'" *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 771 (1997) (citing *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). *See also Pennell v. San Jose*, 485 U.S. 1, 12 (1988).

When it comes to restrictions on rental property ownership, a law also violates due process when it deprives owners of a "fair return" on their investment and thereby becomes "confiscatory." *Kavanau*, 16 Cal. 4th at 771; *Pennell*, 485 U.S. at 12.

As to the former test, the Complaint alleges at length that:

> Plaintiffs' have protected property interests in their real properties, and Defendants' continued imposition of the blanket Moratorium is irrational and lacking in a legitimate government interest because there is no justification for such extreme measures, especially at this point. Indeed, California's COVID-19 Tenant Relief Act never imposed such draconian restrictions. Further, the Bay Area has seen significant improvement in circumstances relating to the pandemic since March of 2020, has a high rate of vaccinations, and federal and state officials have recognized that COVID-19 is either in, or moving to, an endemic stage. The COUNTY long ago abandoned the shelter-in-place policies that were the natural justification for the Moratorium. There are few remaining restrictions on businesses, and unemployment rates are very low, as opposed to the immediate economic impacts of the pandemic in early 2020. And

> the COUNTY has even withdrawn its mask mandate for public spaces. There is, at this point, no plausible justification for continuing the Moratorium ….

(Complaint, ¶ 55.) In short, the Complaint alleges that whatever the initial justification for restrictions on evictions, the County's refusal to lift the Moratorium for more than three years was arbitrary and discriminatory.

Additionally, even if the Moratorium didn't rise to the level of a regulatory "taking" of property, its maintenance by the County for three full years—far longer than the length of a typical one-year residential rental agreement—was confiscatory, certainly as to these Plaintiffs, but also as to the many landlords across Alameda County who were deprived of tens and hundreds of thousands of dollars of rental income that they are unlikely to ever recover.

**D. Plaintiffs Agree that the Ellis Act Claim is Moot.**

In its order denying summary judgment, this Court accepted the County's contention that its Moratorium ordinance permitted Ellis Act evictions, even as to tenants affected by lost income due to COVID-19. It therefore found no conflict between state and local law. Though that interpretation was not what the County's online guidance told landlords for the years leading up to this Court's ruling, Plaintiffs acknowledge that since this Court ruled the state courts have once again permitted Ellis Act evictions under those circumstances and that the Alameda County Superior Court amended its rules earlier this year to permit such evictions.

That being the case, Plaintiffs agree that their preemption claim has become moot. Nevertheless, Plaintiffs note that, as a factual matter, landlords were not able to pursue Ellis Act evictions prior to this Court's ruling (*see* Complaint, ¶¶ 43, 46 & n.9), and that inability remains relevant to Plaintiffs' takings and impairment claims.

## VII. CONCLUSION.

For the foregoing reasons, Defendant's motion for judgment on the pleadings (ECF No. 81) should be denied except as to the Ellis Act preemption claim.

///

Respectfully submitted,

Dated: December 28, 2023

NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP

By: 

Christopher E. Skinnell

*Attorneys for Plaintiffs*
CALIFORNIA APARTMENT ASSOCIATION, STEPHEN LIN, RAKESH and TRIPTI JAIN, ALISON MITCHELL, MICHAEL HAGERTY, & H. ALEX and DANNIE ALVAREZ