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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

CITIZENS FOR FREE SPEECH, LLC, and MICHAEL SHAW,

Plaintiffs,

v.

COUNTY OF ALAMEDA; ALAMEDA COUNTY EAST COUNTY BOARD OF ZONING ADJUSTMENTS; FRANK J. IMHOFF, SCOTT BEYER, and MATTHEW B. FORD, in their official capacity as members of the Alameda County East County Board of Zoning Adjustments,

Defendants.

Case No. 4:18-cv-00834-SBA

Defendants' Motion to Dismiss and Notice; Memorandum of Points and Authorities in Support

Date: July 11, 2018
Time: 1:00 p.m.

The Hon. Saundra Brown Armstrong

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NOTICE OF HEARING

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on July 11, 2018, at 1:00 p.m., or as soon thereafter as counsel may be heard by the Court, located at 1300 Clay Street, Oakland, California, in the courtroom of the Honorable Saundra Brown Armstrong, the Court will hold a hearing on this motion, by which Defendants seek an order dismissing each cause of action in Plaintiffs' complaint. This motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the complaint fails to state a claim on which relief can be granted and that the Defendants are entitled to judgment as a matter of law.

This motion is based on this Notice and the Memorandum of Points and Authorities set forth below, the pleadings and papers on file, and upon such other matters as may be presented to the Court at the time of the hearing.

Pursuant to Paragraph 4 of the Court's Standing Order, Defendants certify that the parties have complied with the meet-and-confer requirement in that paragraph.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

For several years, Plaintiffs have maintained three billboards that, by their own admission, violate Alameda County's sign regulations. Plaintiffs have previously sued to challenge those sign regulations, but this Court upheld them as currently constituted.

Despite admittedly maintaining illegal signs, Plaintiffs contend the County can do nothing about it. The Court largely rejected this theory in its recent order denying Plaintiffs' motion for a preliminary injunction, which was predicated on the outlandish theory that their prior—unsuccessful—lawsuit precluded the County from *ever* enforcing its regulations. Dkt. 36 ("PI Order").

The Court should now dismiss Plaintiffs' complaint. Plaintiffs' first, third, and fourth causes of action allege that the County's regulations violate the First Amendment and the Equal Protection Clause. Plaintiffs litigated those claims or could have litigated them in the prior action. They are thus barred by the prior judgment, both as a matter of

claim and issue preclusion. And even if the first cause of action is not precluded, it is meritless. Plaintiffs' second cause of action is based entirely on the preclusion theories that this Court recently rejected in the PI Order.

This Court has already determined that the County's current sign regulations are constitutional. Nothing remains to be litigated now, and the Court should therefore dismiss the complaint with prejudice.

STATEMENT OF FACTS

I. Plaintiffs have maintained illegal billboards on their property for years.

For approximately four years, Plaintiffs have maintained several large, freeway-facing signs on Plaintiff Michael Shaw's property ("Property") in Alameda County. Dkt. 1, ¶ 10. These signs are patently illegal under the County's sign regulations, as Plaintiffs readily admit. Dkt. 1, ¶ 11 (alleging that "[t]he display of Plaintiffs' signs was not allowed under the Code."); *see also* PI Order at 1, 2, 11 (acknowledging Plaintiffs' concession).

II. Plaintiffs fruitlessly sue the County and then concede they have no further challenge to the County's current sign regulations.

In June 2014, the County issued a "Declaration of Public Nuisance—Notice to Abate," informing Shaw that the signs on his Property violated the County Code.[1] The notice instructed Shaw to remove the signs or face abatement proceedings. Prior Dkt. 65-1, ¶¶ 4-6, Ex. C.

On June 1, 2014, Plaintiffs sued the County in this Court, alleging that various provisions of the County Code violated the free speech and equal protection provisions of the federal and California constitutions. *See generally* Prior Dkt. 1. As the case unfolded, it became clear that Plaintiffs asserted both an as-applied challenge—alleging the County could not, consistent with the First Amendment, apply its sign regulations to Plaintiffs'

[1] *Citizens for Free Speech, LLC et al. v. Cty. of Alameda*, Case No. C14-02513, Dkt. 65-1, ¶¶ 4-6, Ex. C. Relevant documents from the prior action are listed in the Request for Judicial Notice ("RJN") filed in support of the County's opposition to Plaintiffs motion for preliminary injunction (Dkt. 29) and will be cited hereinafter as "Prior Dkt. ###."

signs—and a facial challenge—alleging that the County's sign regulations on their face violated the First Amendment and Equal Protection Clause. Prior Dkt. 71 at 4-8.

This Court rejected Plaintiffs' as-applied claim. As the Court noted, Prior Dkt. 71 at 6, County Code section 17.18.120 provides that "[a]ny use of land within the boundaries of a planned development district adopted in accordance with the provisions of this chapter shall conform to the approved land use and development plan." Dkt. 29, Ex. 1.[2] Under Plaintiffs' approved Development Plan, "[t]he signage that could be built on the Parcel was limited to 'one non-electrical unlighted sign with maximum dimensions of two feet by twenty-four feet,' and was required to 'be approved through Zoning approval.'" Prior Dkt. 71 at 5-6 (citations omitted). As the Court recognized, Plaintiffs did not argue that their signs were consistent with these requirements. *Id.* As a result, the Court granted the County's summary judgment motion with respect to Plaintiffs' as-applied claim. *Id.* at 7.

The Court also rejected all but one of Plaintiffs' facial challenges to the County Code, including all facial challenges brought under the First Amendment. Prior Dkt. 71 at 8; Prior Dkt. 105. The only claim on which Plaintiffs prevailed was that County Code section 17.52.520(A) violated the Equal Protection Clause. This section permitted government officials to post notices regardless of size and location but offered no similar authorization for private parties. Prior Dkt. 105 at 25-26. The Court held that section 17.52.520(A) was content-based and could not survive strict scrutiny. *Id.* at 22-26.

On October 4, 2016, before the Court issued final judgment in the case, the County amended section 17.52.520(A) to allow any person, not just government officials, to place one unilluminated temporary sign, up to one square foot in area, on any parcel for up to ninety days. Prior Dkt. 117, Ex. 1. The Court subsequently held that this amendment cured any constitutional deficiency in the County' sign regulations. Prior Dkt. 130 at 9-10. And Plaintiffs themselves then conceded that they had *no further constitutional objections* to the County's sign regulations. Prior Dkt. 123 at 6 ("Citizens does not challenge the cur-

[2] Relevant County Code provisions were attached to the County's RJN in opposition to the motion for preliminary injunction as Exhibits 1 and 2. Dkt. 29, Exs. 1-2.

rent sign code"); *id.* ("the current sign code[is] not challenged in this case"); *see* PI Order at 3-4.

Because the County corrected the sole code provision that the Court found unconstitutional, the Court granted the County's motion to dissolve the preliminary injunction. Prior Dkt. 125; *see also* Prior Dkt. 121 at 3. The Court then awarded Plaintiffs $1 in nominal damages and $38,116 in attorneys' fees—an 80% reduction from Plaintiffs' request, which reflected their minimal success in the suit. Prior Dkt. 130 at 16-18. The Court denied Plaintiffs' repeated requests for a permanent injunction prohibiting the County from ever enforcing its regulations against Plaintiffs' signs. *See* Prior Dkt. 130 at 1, 8 ("The Court has not granted a permanent injunction, despite Citizens' repeated requests."); *id.* at 15 ("Citizens did not receive a permanent injunction allowing it to maintain its signs.").

III. Consistent with the prior judgment, the County now seeks to enforce its constitutional sign regulations against Plaintiffs' illegal signs.

With its sign regulations acknowledged as constitutional by both the Court and Plaintiffs, the County resumed enforcement proceedings against Plaintiffs' illegal signs. On September 28, 2017, the County sent Shaw another "Declaration of Public Nuisance—Notice to Abate." Dkt. 1, ¶ 12. This notice reminded Plaintiffs that their signs violate the County Code. *Id.* The County then provided notice of an administrative hearing on the legality of Plaintiffs' signs. Dkt. 1, ¶ 13.

IV. Plaintiffs sue again, and the Court refuses to enjoin the County's administrative abatement process.

On February 8, 2018, Plaintiffs filed a new complaint asking this Court to enjoin the County proceedings. Dkt. 1. Plaintiffs allege four claims: (1) the County has deprived Plaintiffs of their free speech rights by "[r]equiring Plaintiffs to either acquiesce in the removal of the signs, or engage in an administrative proceeding which can result in the forcible removal of Plaintiff's [*sic*] signs without the approval of a judicial officer"; (2) the County has denied Plaintiffs due process by enforcing its Code against Plaintiffs "in disregard of the preclusive effect of this Court's final order" in the prior action; (3) the County Code deprives Plaintiffs of "free speech rights secured by the First Amendment"; and (4)

the County Code denies Plaintiffs equal protection. Dkt. 1 at 6-7. Plaintiffs' fifth "claim" merely prays for attorneys' fees. *Id.* at 7-8.

On March 7, 2018, Plaintiffs moved to enjoin the County from holding a hearing in the enforcement proceeding until the merits of Plaintiffs' claims are resolved. Dkt. 22. On May 9, the Court entered an order denying the preliminary injunction. PI Order. The Court rejected all of Plaintiffs' theories that the County's enforcement action is barred by the prior judgment. *Id.* at 7-10. It also concluded that Plaintiffs had failed to show irreparable harm from the County moving forward with enforcement, *id.* at 10, and that the balance of equities supported the County because of the County's "strong public interest in enforcing its zoning laws," *id.* at 11.

RULE 12(b)(6) STANDARD

Rule 12(b)(6) requires the court to determine whether the plaintiff has alleged sufficient facts to state a plausible claim on which relief can be granted. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In evaluating a Rule 12(b)(6) motion, the court assumes all material allegations in the complaint are true, but "the court need not accept conclusory allegations of law or unwarranted inferences, and dismissal is required if the facts are insufficient to support a cognizable claim." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007). The court may consider matters subject to judicial notice without converting the motion into one for summary judgment. *See United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003).

ARGUMENT

I. Plaintiffs' first, third, and fourth causes of action are barred by the prior litigation.

A. Claim preclusion bars these causes of action.

Plaintiffs' third and fourth causes of action assert that the County's enforcement of its sign regulations against Plaintiffs' signs violates their First Amendment and equal protection rights, respectively. Dkt. 1 at 7. These claims are *identical* to the claims that Plaintiffs litigated—and for all relevant purposes, lost—in their prior action. *Compare* Dkt. 1 at

6-7 *with* Prior Dkt. 1 at 6-7. Plaintiffs' first cause of action is another First Amendment challenge based on the County's nuisance abatement process, which has not changed since Plaintiffs' first suit was filed. Dkt. 1 at 6. All of these claims are barred by claim preclusion because they either were litigated or could have been litigated in the prior action.

Claim preclusion applies "when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties." PI Order at 7 (citing *Ruiz v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th Cir. 2016)). The doctrine "bars relitigation not only of all grounds of recovery that were actually asserted, but also those that could have been asserted" in the previous action. *Id.* (citing, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077-78 (9th Cir. 2003)). It "is meant to protect parties against being harassed by repetitive actions." *Tahoe-Sierra*, 322 F.3d at 1077.

The final two factors are plainly satisfied here. The prior action was litigated to a final judgment that fully resolved the merits of Plaintiffs' claims. Prior Dkt. 131. And the two proceedings involve identical parties or their privies. *See, e.g., Wheeler v. Mayor of Bakersfield City*, No. 1:11-cv-01832-LJO-JLT, 2011 U.S. Dist. LEXIS 141203, at *11 (E.D. Cal. Dec. 8, 2011) ("City officials, like the Mayor, are in privity with the City . . . .").

As to the first factor, the Ninth Circuit has identified four criteria for determining whether two lawsuits involve identical claims:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Howard v. City of Coos Bay, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012)).

All of these criteria show that Plaintiffs' first, third, and fourth causes of action are identical to those litigated in Plaintiffs' first suit. First, as this Court has recognized, the prior judgment rejected all of Plaintiffs' challenges as to the County's current sign regulations and rejected Plaintiffs' request for an injunction of further enforcement. *See* PI Order

at 3-4, 8. Plaintiffs' claims in this lawsuit would undo that result and thus impair the County's right to proceed with its enforcement action established by the prior judgment.

Second, the evidence in the two actions would be virtually identical—at most, evidence of the existence of Plaintiffs' signs and of the existence and terms of the County's sign regulations. Plaintiffs allege no new facts material to their causes of action.

Third, the actions clearly involve alleged infringement of the same rights: rights of free expression under the First Amendment and the right to equal protection. *Compare* Dkt. 1, ¶¶ 25-27, 31-36 *with* Prior Dkt. 1, ¶¶ 34-39. The First Amendment *theory* asserted in Plaintiffs' first cause of action in this suit was not litigated in the prior action, but both actions allege that the County's enforcement denies Plaintiffs their rights to free expression. Such a minor change in legal theory does not amount to a change in the right asserted. *See McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986) (a plaintiff "cannot avoid the bar of res judicata merely . . . by pleading a new legal theory.").

Finally, "the two suits arise out of the same transactional nucleus of facts." This "is the same inquiry as whether the claim could have been brought in the previous action.'" *Howard*, 871 F.3d at 1039 (quoting *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir. 2011)) (emphasis omitted). Both lawsuits involve (1) Plaintiffs' three signs on the Property, (2) the prohibition of those signs by the County's sign regulations, and (3) the County's continuing effort to enforce those regulations by having Plaintiffs' illegal signs removed. As previously noted, Plaintiffs' third and fourth claims *were* "brought in the previous action." The first cause of action—a facial challenge to the County's code enforcement procedure—could have been brought in the prior action but was not: the County is now implementing the same code enforcement procedure that it was implementing when Plaintiffs filed the prior suit. *See* Dkt. 29, Ex. 2 (County abatement procedures). Indeed, Plaintiffs' first cause of action alleges no facts other than the County's abatement procedures. Dkt. 1 at 6. Plaintiffs do not allege—nor could they—that those procedures have changed since the prior lawsuit, and in fact, they admit that the 2014 abatement notice is "[s]ubstantially identical to the 2017 Notice." Dkt. 1, ¶ 18.

Plaintiffs will contend their claims are not barred because the County did not send its abatement notice until after judgment in the prior action. *See, e.g.,* Dkt. 30 at 10. The new notice changes nothing. The abatement notice—which by Plaintiffs' admission was "[s]ubstantially identical" to the 2014 notice—merely continued the same enforcement action that Plaintiffs unsuccessfully sought to enjoin in the prior action. "There is no new claim; instead there is a new fact supporting an old claim." *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 558 (9th Cir. 2003); *see also In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1464 (9th Cir. 1993) ("Distinct conduct is alleged only in the limited sense that every day is a new day, so doing the same thing today as yesterday is distinct from what was done yesterday.").

Accordingly, a new instance of conduct challenged in a prior completed lawsuit does not give rise to a new claim. *See Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 918-19 (9th Cir. 2012). The recent decision in *Yagman v. Garcetti*, No. LA CV16-05944 JAK (Ex), 2017 U.S. Dist. LEXIS 85264 (C.D. Cal. May 2, 2017), is squarely on point here. There a serial parking offender challenged a city's process for reviewing parking tickets after getting a new ticket, even though he had lost two similar suits based on earlier tickets. *Id.* at *2-5. Although the new parking ticket occurred after judgment in the prior suits, the court held there was an identity of claims because the new ticket did not change the "core facts as to the [challenged] review process." *Id.* at *9-12. "If Plaintiff were permitted to renew the same challenge every time he receives a new parking ticket, it would be in direct conflict with the principles of res judicata." *Id.* at *11. Similarly, the County's resumed enforcement proceeding does nothing to alter any "core facts as to the [challenged enforcement] process."

Because Plaintiffs' current claims are identical to those decided in the prior action, Plaintiffs' lawsuit is barred by claim preclusion and must be dismissed.

B. Plaintiffs' third and fourth causes of action are barred by issue preclusion.

Plaintiffs' third and fourth causes of action are also all barred by issue preclusion.[3] Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). A federal court judgment has issue preclusive effect in a later federal action if "the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated," and, like claim preclusion, there was a prior final judgment on the merits and the two cases involve identical parties or privies. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (quoting *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005)). Issue preclusion bars litigation of an entire claim if the precluded issue is essential to the claim. *See San Remo Hotel L.P. v. S.F. City & Cnty.*, 364 F.3d 1088, 1098-99 (9th Cir. 2004), *aff'd*, 545 U.S. 323 (2005).

The issue preclusive effect of the prior judgment bars Plaintiffs' substantive First Amendment claim and their equal protection claim. The prior action was litigated to a final judgment on the merits and involved the same parties. And this Court "necessarily decided"—and decided adversely to Plaintiffs—the legal issues integral to Plaintiffs' third and fourth causes of action, namely the constitutionality of the County's regulations. *See* PI Order at 3-4 (describing the Court's rulings on the summary judgment motions in the prior action). Reflecting the Court's resolution of the outstanding issues, at the end of the prior action, Plaintiffs "acknowledged that they had no further constitutional objections to the County's sign regulations." *Id.* at 4 (citing Prior Dkt. 123 at 6).

Finally, it is as irrelevant to issue prelusion as to claim preclusion that the County sent Plaintiffs an abatement notice after the prior judgment. "[A] plaintiff cannot avoid

[3] Because Plaintiffs did not assert in the prior lawsuit the First Amendment theory underlying their first cause of action, it is arguably not barred by issue preclusion. However, it is nonetheless precluded as described in sections I.A and I.C and meritless as described in section II.

the bar of collateral estoppel simply by suing a defendant for continuing the same conduct that was found to be lawful in a previous suit brought by the same plaintiff." *Ramallo Bros. Printing, Inc. v. El Dia, Inc.*, 490 F.3d 86, 91 (1st Cir. 2007).

C. Plaintiffs' first, third, and fourth causes of action are barred by judicial estoppel and waiver.

As this Court recognized in the PI Order, in the prior action Plaintiffs expressly "acknowledged that they had no further constitutional objections to the County's sign regulations." PI Order at 4 (citing Prior Dkt. 123 at 6). Plaintiffs should be estopped from changing position now. Moreover, their prior concession qualifies as a waiver of their claims here.

The doctrine of judicial estoppel is intended to "protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions." *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988) (quoting *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984)). In applying the doctrine, courts look to whether: (1) a party's later position is "clearly inconsistent" with its earlier position; (2) the party persuaded a court to accept its earlier position, so acceptance of the later position makes it seem that the court was misled; and (3) the party would derive an unfair advantage if not estopped. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 994 (9th Cir. 2012) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)).

Here, all three factors are satisfied. First, Plaintiffs asserted that they do not challenge the current code, yet now they challenge it. These positions are "clearly inconsistent." Second, Plaintiffs persuaded the Court to accept that Plaintiffs had no further challenge to the County's sign code to end the merits phase of that lawsuit and move on to the remedies phase as quickly as possible. *See* Prior Dkt. 130 at 10. If Plaintiffs were allowed to challenge the same sign code now, after having already recovered nominal damages and attorneys' fees, it would appear that the Court had been misled. Finally, unless estopped from reneging on their assertion that they had no further challenges to the

County's sign code, Plaintiffs would receive an unfair advantage. The County could have appealed the award of nominal damages and attorneys' fees, but did not do so after Plaintiffs' concession that the County's sign regulations were now uncontested.

Plaintiffs' unambiguous assertion also waived any further constitutional challenges to the code. Waiver is the "intentional relinquishment of a known right." *Royal Air Props., Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964). It is determined by the waiving party's express or implied intent. *Fresno Motors, LLC v. Mercedes-Benz United States, LLC*, No. 1:11-cv-2000-CJC, 2015 U.S. Dist. LEXIS 84236, at *9-11 (E.D. Cal. June 26, 2015). Plaintiffs' disclaimer that they "do not challenge the current sign code" was an unequivocal waiver of any further challenge to the County's sign regulations as then—and now—constituted. *See* Prior Dkt. 123 at 6.

II. Plaintiffs' first cause of action is meritless.

Plaintiffs' first cause of action alleges that the County's abatement process violates the First Amendment because the County could remove Plaintiffs' illegal signs "without a court order." Dkt. 1, ¶ 26. Even if it were not precluded by the prior suit, this cause of action lacks any legal basis and thus fails to state a claim.

This cause of action is apparently based on *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999). In *4805 Convoy*, a business challenged the constitutionality of the ordinance under which the city revoked its nude dancing license. *Id.* at 1110-11. The case holds that, where the government requires a license for expressive activity, such a license may not be suspended or revoked without "the possibility of prompt judicial review" prior to the revocation's becoming effective. *Id.* at 1113 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) (plurality opinion)).

4805 Convoy, and Plaintiffs' claim based on it, are out of place here. First, the County has not revoked or suspended any license here. *See* Dkt. 29, Exs. 1-2 (containing the relevant portions of the County Code). Rather, the County seeks to abate signs that were illegally erected and are being illegally maintained, and the signs' illegality does not depend upon their content. *4805 Convoy* and the Supreme Court case it relies on involve pri-

or restraints, *see FW/PBS*, 493 U.S. at 225-26, namely permitting regimes which give officials "the power to deny use of a forum *in advance of actual expression*," *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (emphasis added). Neither the County's regulations nor its enforcement of them impose any prior restraint; the County simply seeks to enforce its regulations against Plaintiffs' signs *after* Plaintiffs illegally erected them.

Second, the rationale of *4805 Convoy* is to ensure judicial review of the license revocation decision to ensure that the decision does not suppress protected speech "erroneously." *4805 Convoy*, 183 F.3d at 1113 (citing *FW/PBS*, 493 U.S. at 228). Here, Plaintiffs have admitted that their signs violate the County's regulations, *see* PI Order at 1, 11, and this Court has previously found those regulations to be constitutional, *see id.* at 3-4, 7-8. Accordingly, there is no risk that the abatement action will lead to removal of their signs based on an error of fact or law.

Applying *4805 Convoy* would therefore produce absurd results in this context. It would require "the preservation of the status quo"—that is, maintaining admittedly *illegal* signs—until judicial review of the County's enforcement action is complete. Under this theory, individuals would gain a presumptive right to continue patently illegal conduct through the lengthy litigation process, simply by dint of beginning it. *4805 Convoy* does not require that result.

III. Plaintiffs' second cause of action fails to state a claim, as this Court recognized in denying the motion for preliminary injunction.

Plaintiffs' second cause of action is based on the supposed preclusive effect of the prior action. Dkt. 1, ¶ 29. It must be dismissed because, as this Court concluded in the PI Order, all of Plaintiffs' preclusion theories are legally meritless. PI Order at 7-10. The Court concluded that "the judgment entered in the Prior Action does not impede Defendants' present right to enforce County ordinances and compel the removal of billboards which Plaintiffs admit are legally improper." *Id.* at 9; *see also id.* ("The judgment rendered in the Prior Action does not preclude the County from seeking to enforce its ordinances as to the signs at issue."). Although the PI Order was necessarily based on Plaintiffs' low like-

lihood of success, the Court's analysis makes clear that Plaintiffs are not merely *unlikely* to succeed on their theories of preclusion—they *cannot* succeed. *See* PI Order at 10 ("Plaintiffs have failed to demonstrate a likelihood of success on the merits . . . ."); *see also Arc of Cal. v. Douglas*, 757 F.3d 975, 993-94 (9th Cir. 2014) ("If there is 'no chance of success' on the merits, then the complaint does not 'state a claim to relief that is plausible on its face,' and must be dismissed.") (citations omitted). Because the Court has rejected Plaintiffs' preclusion theories, it should dismiss the second cause of action, which is based entirely on those theories. *See, e.g., Cty. of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192, 1211 (N.D. Cal. 2003) (granting motion to dismiss after denying preliminary injunction).

IV. Plaintiffs' nominal fifth cause of action is no cause of action at all.

The Court recognized in its PI Order that Plaintiffs' purported fifth cause of action (Dkt. 1 at 7-8) is no such thing; it is simply "a request for attorneys' fees." PI Order at 5. The Court noted that a request for "[a]ttorneys' fees is not a claim for relief; it's a remedy." *Id.* at 5 n.6 (quoting *Williamson v. Gunvalson*, No. 2:13-CV-01019-JAD, 2015 WL 5062384, at *7 (D. Nev. Aug. 25, 2015)). This nominal cause of action therefore must also be dismissed.

V. The Court should deny leave to amend.

Plaintiffs' claims should be dismissed without leave to amend because any "amendments would fail to cure the pleading deficiencies and [thus] amendment would be futile." *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946, 956 (9th Cir. 2013). Because Plaintiffs' entire lawsuit is an improper attempt at a second bite at the apple, they can do nothing to correct the complaint's deficiency. The Court should therefore simply dismiss the complaint.

CONCLUSION

For these reasons, the Court should dismiss the complaint without leave to amend.

DATED: May 24, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: /s/
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