MATTHEW D. ZINN (State Bar No. 214587)
WINTER KING (State Bar No. 237958)
AARON M. STANTON (State Bar No. 312530)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Zinn@smwlaw.com
King@smwlaw.com
Stanton@smwlaw.com

Attorneys for Defendants

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 the First Amended Complaint and Notice; Request for Judicial Notice; Memorandum of Points and Authorities in Support

Date: August 8, 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 August 8, 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' First Amended Complaint. This motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the First Amended 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' First Amended Complaint ("FAC"). 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 FAC 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. 42 ("FAC"), ¶ 10. These signs are patently illegal under the County's sign regulations, as Plaintiffs readily admit. FAC, ¶ 11 ("The 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 are 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." FAC, ¶¶ 21, 22, Ex. 2. 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. FAC, ¶ 23.

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. The County filed a motion to dismiss after complying with this Court's requirement to meet and confer. Dkt. 38. Rather than opposing the motion to dismiss, and without informing the County of their intent to do so during the meet-and-confer, Plaintiffs amended their complaint. *See* Dkt. 43.[3] The FAC, however, alleges the

[3] This is the second time that Plaintiffs have shown a disregard for the Court's Standing Order. *See* PI Order at 6, n.7 ("Without seeking or obtaining prior leave of court, Plaintiffs

(footnote continued on next page)

same four claims that were contained in the initial complaint: (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. FAC at 7-10. Plaintiffs' fifth "claim" merely prays for attorneys' fees. *Id.* at 10.

Meanwhile, 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

(footnote continued from previous page)
filed a twelve page reply brief. Dkt. 30. Plaintiffs are warned that future non-compliant briefs may be stricken and/or result in the imposition of sanctions.").

notice without converting the motion into one for summary judgment. *See United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). The court may also consider documents relied upon by, but not attached to, the complaint when their authenticity is uncontested. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998), *superseded by statute on other grounds as stated in Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006).

REQUEST FOR JUDICIAL NOTICE

In support of its opposition to Plaintiffs' motion for a preliminary injunction, the County filed a request for judicial notice ("RJN"). Dkt. 29. The Court did not rule on that request in denying the preliminary injunction. In addition to the reasons stated in the RJN, a court may take judicial notice of a prior judgment and other court records when evaluating whether to grant a motion to dismiss on res judicata grounds. *Herrera v. Countrywide KB Home Loans*, No. 5:11-cv-03591-LHK, 2012 U.S. Dist. LEXIS 35400, at *7, n.2 (N.D. Cal. Mar. 15, 2012).[4] For all these reasons, the County renews its request that the Court take judicial notice of the documents attached to and cited in its earlier RJN. Dkt. 29.

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. FAC at 8-10. These claims are the same as the claims that Plaintiffs litigated—and for all relevant purposes, lost—in their prior action. *Compare* FAC at 7-10 *with* Prior Dkt. 1 at 6-7; *see also* FAC, ¶ 13 (reciting the claims in the prior

[4] Materials from the prior litigation and the County's regulations are also appropriate for the Court to consider in evaluating this motion, without converting it to one for summary judgment, because the FAC necessarily relies on them and their authenticity is uncontested. *See Parrino*, 146 F.3d at 705-06.

suit). 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. FAC at 7-8. 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* FAC, ¶¶ 44-45, 54-57 *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." In fact, the "new" allegations Plaintiffs introduced in their amended third cause of action only serve to highlight that the new claims are identical to those already litigated in the prior suit. *Compare* FAC, ¶¶ 46-53 (discussing content-based regulations and County Code Section 17.52.520), *with* Prior Dkt. 71 at 6-7, 20-27 (rejecting Plaintiffs' prior as-applied challenge and their content-based regulation challenge to Section 17.52.515), Prior Dkt. 105 at 14-26 (resolving Plaintiffs' prior content-based challenge to

an old version of Section 17.52.520), *and* Prior Dkt. 130 at 9-10 (holding that the current, amended version of Section 17.52.520 is constitutional).

The FAC's 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. FAC at 7-8. Plaintiffs do not allege—nor could they—that those procedures have changed since the prior lawsuit, and in fact, they previously admitted 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 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.[5] 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*

[5] 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.

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 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 incon-

sistent." 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." FAC, ¶ 38. 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 based on *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999); *see* FAC, ¶ 24. 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. Prior Dkt. 71 at 5 (holding that County Code Sections 17.18.120 "do[es] not even implicate Plaintiffs' constitutional rights to free speech"); Prior Dkt. 71 at 27 (holding that Section 17.52.515 is constitutional and content-neutral). *4805 Convoy* and the Supreme Court case it relies on, *FW/PBS*, 493 U.S. at 225-26, involve prior restraints , namely permitting regimes that 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. FAC, ¶ 42. 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 likelihood 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).

Plaintiffs' addition of a reference to California Code of Civil Procedure Sections 426.10-426.70, the state court rule governing compulsory counterclaims, does not save this cause of action. This case is being litigated in federal court on claims arising under federal law, and there is a Federal Rule of Civil Procedure directly on point. To the extent that a compulsory counterclaim rule applies here—and the Court has already decided it does not, *see* PI Order at 8—it is the federal rule, and not the state rule. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102-1103 (9th Cir. 2003); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

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. 42 at 10) 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). Plaintiffs' entire lawsuit is an improper attempt at a second bite at the apple. Moreover, Plaintiffs have already amended their complaint in the present action once after the Court issued its ruling on their motion for preliminary injunction and after the County filed a motion to dismiss. Given that they have had several opportunities to state a viable claim, and have failed each time, it is clear Plaintiffs can do nothing to correct the FAC's deficiency. The Court should therefore simply dismiss the FAC.

CONCLUSION

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

DATED: June 21, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: /s/
WINTER KING

Attorneys for Defendants

MATTHEW D. ZINN (State Bar No. 214587)
WINTER KING (State Bar No. 237958)
AARON M. STANTON (State Bar No. 312530)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Zinn@smwlaw.com
King@smwlaw.com
Stanton@smwlaw.com

Attorneys for Defendants

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

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Date: August 8, 2018
Time: 1:00 p.m.

The Hon. Saundra Brown Armstrong

Defendants' Motion to Dismiss was scheduled for hearing on August 8, 2018. Having considered all of the papers and argument in support of and in opposition to the motion, the Court hereby GRANTS Defendants' Motion to Dismiss as to each of Plaintiffs' causes of action without leave to amend. The Court also GRANTS Defendants' Request for Judicial Notice.

Plaintiffs have maintained several large signs in Alameda County. Dkt. 42, ¶ 10. These signs are illegal under the County's sign regulations, as Plaintiffs admit. Dkt. 42, ¶ 11. In June 2014, the County issued a "Declaration of Public Nuisance—Notice to Abate" instructing Plaintiff Michael Shaw to remove his signs or face abatement proceedings. *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 cited hereinafter as "Prior Dkt. ###."

Plaintiffs sued the County in this Court, alleging that the County Code violated the free speech and equal protection provisions of the federal and California constitutions. *See generally* Prior Dkt. 1. In this prior lawsuit, the Court rejected all but one of Plaintiffs' challenges to the County Code. Prior Dkt. 71; Prior Dkt. 105. Before the Court entered final judgment, the County amended the Code. 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 conceded that they had *no further constitutional objections* to the County's sign regulations. Prior Dkt. 123 at 6. The Court then awarded Plaintiffs nominal damages and greatly reduced attorneys' fees. Prior Dkt. 130. With its sign regulations acknowledged as constitutional by both the Court and Plaintiffs, the County resumed enforcement proceedings against Plaintiffs' illegal signs.

On February 8, 2018, Plaintiffs filed a new complaint asking this Court to enjoin the County proceedings. Dkt. 1. Plaintiffs later filed a First Amended Complaint. Dkt. 42. Plaintiffs allege four claims: for equal protection, due process, and free speech violations. Dkt. 42 at 7-10. Plaintiffs' fifth claim merely prays for attorneys' fees. *Id.* at 10. On March 7, 2018, Plaintiffs moved for a preliminary injunction, which the Court denied. Dkt. 22; Dkt. 36. The Court rejected all of Plaintiffs' theories that the County's enforcement action is barred by the prior judgment. Dkt. 36 at 7-10. Defendants' subsequently moved to dismiss Plaintiffs' First Amended Complaint.

LEGAL 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). A 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).

DISCUSSION

Plaintiffs' first, third, and fourth causes of action are barred by the prior litigation and must be dismissed. 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." Dkt. 36 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)). Each of these factors is satisfied here. The prior action was litigated to a final judgment on the merits; the two proceedings involve identical parties or their privies; and the lawsuits involve identical claims arising out of the same transactional nucleus of facts.

For similar reasons, Plaintiffs' third and fourth causes of action are barred by issue preclusion. This Court "necessarily decided"—adversely to Plaintiffs—the legal issues in these causes of action, which are identical to claims Plaintiffs' submitted in the prior suit. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006).

Plaintiffs' first, third, and fourth causes of action are also barred by judicial estoppel and waiver as a result of Plaintiffs' statement in the prior suit that they no longer

had any constitutional objections to the County's current sign code. In applying judicial estoppel, 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. 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 the prior 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, 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' statement also waived any further constitutional challenges to the code. *Royal Air Props., Inc. v. Smith*, 333 F.2d 568, 571 (9th Cir. 1964) (defining waiver as the "intentional relinquishment of a known right.").

Plaintiffs' first cause of action also fails to state a claim. This cause of action is based on *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999). *4805 Convoy* 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 becoming effective. *Id.* at 1113 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990) (plurality opinion)). This case does not apply where there is no licensing scheme and where Plaintiffs have admitted that their signs violate regulations that this Court has found to be constitutional.

Plaintiffs' second cause of action also fails to state a claim, as this Court recognized in denying the motion for a preliminary injunction. The Court's order determined that Plaintiffs are not merely *unlikely* to succeed on their theories of preclusion—they *cannot* succeed. *See Arc of Cal. v. Douglas*, 757 F.3d 975, 993-94 (9th Cir. 2014).

Finally, the fifth cause of action is not a cause of action at all, but only a request for attorneys' fees.

For the reasons above, the Court GRANTS Defendants' motion to dismiss as to each of Plaintiffs' causes of action. Because amendment would be futile, the Court denies leave to amend.

The Court further GRANTS Defendants' request for judicial notice. Dkt. 29. Excerpts of the Alameda County Code are legislative enactments of the Board of Supervisors of Alameda County and the proper subject of judicial notice under Rule 201 of the Federal Rules of Evidence. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006). The Court further takes judicial notice of the pleadings, orders, and other documents filed in the prior litigation. Judicial notice of a prior judgment and other court records is appropriate when evaluating whether to grant a motion to dismiss on res judicata grounds. *Herrera v. Countrywide KB Home Loans*, No. 5:11-cv-03591-LHK, 2012 U.S. Dist. LEXIS 35400, at *7, n.2 (N.D. Cal. Mar. 15, 2012).

IT IS SO ORDERED.

DATED: August ___, 2018

The Hon. Saundra Brown Armstrong
United States District Court Judge