Docket No. 12-17749

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RANCHO DE CALISTOGA, a
California General Partnership,

Petitioner and Appellant,

v.

CITY OF CALISTOGA; W. SCOTT
SNOWDEN, Hearing Officer, The City
of Calistoga,

Respondents and Appellees.

Appeal from the United States District Court
Northern District of California
The Honorable Jeffrey S. White, District Judge
District Court No. C11-05015 JSW

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Appellant files this corporate disclosure statement pursuant to Federal Rules of Appellate Procedure, Rule 26.1. The Appellant is a California General Partnership. The Appellant is not a corporation. The Appellant does not issue stock and there is no parent corporation or publically held corporation that holds an interest in the Appellant.

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I. STATEMENT OF JURISDICTION

The complaint was filed and these proceedings were instituted against the City of Calistoga and its hearing officer pursuant to 28 U.S.C. §§'s 1331 and 1343(a)(3), for claims arising under the Fifth and Fourteenth Amendments to the Constitution of the United States of America and the Civil Rights Act of 1871 (42 U.S.C. § 1983).

The City of Calistoga is located within the Northern District of California. Venue was proper in the Northern District of California under 28 U.S.C. § 1391(b). The events giving rise to this claim occurred in the County of Napa, where the City of Calistoga is located.

On November 15, 2012, the District Court issued a judgment dismissing the Petitioner's complaint pursuant to Federal Rules of Civil Procedure, Rules 12(b)(1) and (6). (ER 3-9).[1] On December 14, 2012, the Petitioner filed a timely notice of appeal pursuant to Federal Rules of Appellate Procedure, Rule 4(a)(1)(A). (ER 21-24). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

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[1] All references to "ER" are to the excerpts of the record, filed simultaneously herewith. An "addendum" containing pertinent constitutional provisions, statutes and the ordinance is attached hereto.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Can a local rent control ordinance that is valid on its face be applied in a manner that results in a "private taking" of property, if (1) an administrative hearing officer denies a proposed rent increase that is neither excessive, monopolistic, nor in violation of any other legitimate public purpose and (2) there is no means testing under the ordinance, so the landlord is forced to provide each tenant with a significant subsidy each month, without regard to need?

B. Can a local rent control ordinance that is valid on its face be applied in a manner that results in a "regulatory taking" of property, if (1) an administrative hearing officer denies a proposed rent increase that is neither excessive, monopolistic, nor in violation of any other legitimate public purpose, (2) the parkowner acquired the property before the enactment of rent control and had a legitimate investment backed expectation that it would be allowed to charge non-excessive and non-monopolistic rents and (3) the proposed rent increase will not cause the value of the tenants' mobilehomes to be reduced below their depreciated value?

C. If a rent control ordinance that is valid on its face can be

applied in a manner that results in a "regulatory taking" of property, does the California Court of Appeal's decision in *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, 356-361 (2012) excuse the landlord from pursuing a state court inverse condemnation claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186-197 (1985)?

D. Can a local rent control ordinance that is valid on its face be applied in a manner that results in a violation of the due process or the equal protection clause, if (1) an administrative hearing officer denies a proposed rent increase that is neither excessive, monopolistic, nor in violation of any other legitimate public purpose and (2) no other business within the city limits is required to provide subsidies either to consumers in general, or mobilehome park tenants in particular?

III. STATEMENT OF THE CASE

The Parkowner developed Rancho de Calistoga during the early 1970's, long before the City of Calistoga enacted its first rent control ordinance. (ER 278-279, ¶¶'s 11-17). After the City adopted rent control, the Parkowner applied to increase the rent to $625 per month, because the evidence demonstrated such a rent was neither excessive,

monopolistic, nor in violation of any other legitimate public policy. (ER 280-281, ¶¶'s 25-18).

At the evidentiary hearing, the Parkowner contended that the refusal to allow rents to be increased to $625 per month would result in an impermissible private taking of property, because that particular rent was not in violation of any legitimate public policy. In the alternative, the Parkowner argued that preventing rents of $625 per month resulted in a regulatory taking, or a violation of the due process and the equal protection clauses of the federal constitution. (ER 282-283, ¶¶'s 32-38).

The City of Calistoga's hearing officer declined to rule on the Parkowner's constitutional claims, finding that they should be addressed in the first instance by the courts. (ER 284, ¶ 42). Accordingly, on October 10, 2011, the Parkowner initiated these proceedings, alleging that the failure to allow the rent to be increased to $625 per month violated its rights under the takings, due process and equal protection clauses of the federal constitution. (ER 274-292).

Although the District Court granted the City's motion to dismiss the October 10, 2011 petition, it granted leave to amend with respect to the private takings, due process and equal protection claims. (ER 17,

lines 4-6 and ER 19, lines 16-19). However, the District Court found that the Parkowner had failed to exhaust its state court remedies with respect to its regulatory taking claim. As a result of that failure, the District Court found that the regulatory taking claim was not ripe under the Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186-197 (1985). (ER 17, lines 8-27).

On November 15, 2012, the District Court granted the City's motion to dismiss the First Amended Petition, finding that the Parkowner had not properly alleged that the ordinance had been applied in a manner that results in a private taking of property, or a violation of the equal protection or due process clauses. (ER 3-9). On December 14, 2012, the Parkowner filed a timely notice of appeal, pursuant to Federal Rules of Appellate Procedure, Rule 4(a)(1)(A). (ER 21-24).

IV. SUMMARY OF ARGUMENT

Under the Fifth and Fourteenth Amendments to the United States Constitution, a local government is prohibited from taking property for a private purpose. Because no amount of compensation can justify a private taking, a property owner is not required to seek compensation in

the state courts before bringing such a claim. *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005). Moreover, although an ordinance may survive a facial challenge if it is adopted for a public purpose, a property owner may attempt to demonstrate that the ordinance has been applied to effectuate an impermissible private taking. *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996).

The Parkowner has alleged that even if it was enacted for a valid public purpose, the hearing officer has applied the rent control ordinance in a manner that results in a private taking of property, because (1) the proposed rent increase is neither excessive, monopolistic nor in violation of any other public purpose, (2) it is not possible for a mobilehome park owner to exploit a tenant unless the rent is above market and (3) each and every tenant at the park has been awarded a significant discount in their monthly rent, regardless of whether they need it or not. Because the Parkowner alleged that the ordinance has been "applied" in a manner that results in a private taking of property, the District Court's dismissal of that claim at the pleading stage must be reversed.

If this Court determines that it is not possible to allege that a rent

control ordinance has been applied in a manner that results in a private taking, the Parkowner asserts that application of the ordinance nevertheless results in a regulatory taking, because it creates a burden which "in all fairness and justice, should be borne by the public as a whole." *Guggenheim v. City of Goleta,* 638 F. 3d 1111, 1119-1123 (9th Cir. 2010). Although a property owner must normally exhaust any state court remedies that exist before attempting to establish a regulatory taking in federal court, that rule does not apply if it would be futile to proceed in state court. *Manufactured Home Communities, Inc. v. City of San Jose,* 420 F. 3d 1022, 1035-1036 (9th Cir. 2005).

In *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, 356-361 (2012), a California court found that a parkowner could ***not*** establish an "as applied" regulatory taking under the California Constitution, even though the parkowner purchased the property prior to the adoption of rent control. By contrast, in *Guggenheim v. City of Goleta,* 638 F. 3d 1111, 1119-1123 (9th Cir. 2010), the Ninth Circuit left open the possibility of a successful "as applied" challenge, if the park was purchased prior to the adoption of rent control.

Because the *Besaro* Court found that it is not possible to establish a regulatory taking under the California Constitution even if the park was purchased prior to rent control, the Parkowner is not required to seek relief in the state courts before proceeding in federal court. Because the Parkowner purchased the park long before the City adopted rent control, the Parkowner must be allowed to demonstrate that its property has been taken under the standards established by the Ninth Circuit in *Guggenheim*.

Finally, as will be demonstrated below, the only legitimate reason for singling out mobilehome park owners for price controls is that an unscrupulous landlord may lure a prospective tenant into renting a space at a below market rate and raise the rent to an above market rate after the tenant has purchased the mobilehome. However, even if it is assumed that prospective tenants will repeatedly fall for such a ploy, that issue does not exist in this case, because the Parkowner does not seek to invalidate the City of Calistoga's rent control ordinance. To the contrary, the Parkowner readily concedes that once the rent is raised to the non-excessive and non-monopolistic rate of $625 per month, it will not be allowed to increase the rents again, unless authorized by the

ordinance to do so. Because all other businesses in the City of Calistoga are allowed to charge non-excessive and non-monopolistic prices for their good and services, the City's refusal to allow the Parkowner to do the same is arbitrary and results in a violation of the equal protection and due process clauses of the United States Constitution.

V. STATEMENT OF FACTS

Rancho de Calistoga is a 184 space mobilehome park located at 2412 Foothill Boulevard in Calistoga, California ("the park"). The park was originally developed during the early 1970's by Hal C. Aguirre and his former partner, R. C. Roberts. (ER 125, ¶¶'s 11-12).

Sometime during the mid 1970's, the Roberts & Aguirre partnership was dissolved. Mr. Aguirre subsequently formed Rancho de Calistoga, a California General Partnership, with the partnership interests being held primarily for his benefit and the benefit of his children, Mark Aguirre, Jon Aguirre and Christine Gaddini. (ER 125, ¶¶'s 13-14).

Mr. Aguirre and Mr. Roberts have since passed away and the documents regarding the development of the park were apparently destroyed more than thirty years ago. As a result, the dollar amount of

the Parkowner's original investment in Rancho de Calistoga is not known. (ER 125, ¶ 15).

There was no rent control in the City of Calistoga at the time the park was developed. The Parkowner's legitimate investment backed expectation was that it would be entitled to set the rent at the market rate and that it would not be precluded from charging a non-excessive or non-monopolistic rent. The Parkowner did not develop the park as low income housing and the Parkowner has not received any benefit from the City, or any other governmental entity, in exchange for providing low income housing. To the contrary, the park was built as an alternative form of housing for those who desired and could afford that alternative form of housing. (ER 126, ¶¶'s 17-18).

The Regulation of Rents: In April of 1984, the City adopted Ordinance No. 400. Although entitled "Mobile Home Park Rent Stabilization," Ordinance No. 400 did not place any restriction on the amount of rent that could be charged at the park. Instead, if more than fifty percent of the tenants filed a petition challenging a rent increase, the Rent Review Commission would be required to determine whether

it was "so great as to be an unreasonable increase." (ER 126, ¶ 21).

In 1989, the Parkowner initiated a policy of implementing "reasonable rent increases" when new tenants moved into the park, but which were still below market. Based on the then existing turnover rate, the Parkowner estimated it would take 10 to 15 years to increase the rents to "a reasonable figure." There is no evidence that any such rent increase was determined to be "an unreasonable increase" under Ordinance No. 400. (ER 127, ¶ 22).

On June 1, 1993, the City adopted Ordinance No. 493, which amended Ordinance No. 400 "in its entirety" and replaced it with "Mobile Home Rent Stabilization Provisions." Pursuant to Section 9.12.040 of Ordinance No. 493, the Parkowner was entitled to increase the rent once each year by an amount that could not exceed four percent. As a result, the Parkowner was no longer allowed to increase the rent to "a reasonable figure" when new tenants moved into the park. (ER 127, ¶ 23).

On October 2, 2007, the City adopted Ordinance No. 644, once again amending its rent control ordinance. Ordinance No. 644 does not limit rent increases to those that are required to provide a fair return on

the parkowner's investment. Ordinance No. 644 is much broader, stating that the hearing officer "shall determine whether space rent increases proposed or imposed by the parkowner are reasonable based upon the circumstances and all the provisions of this ordinance." (ER 127, ¶ 25).

On October 15, 2009, an appraiser named John Neet concluded that the market rental value for spaces at the park was $625 per month, as of September 29, 2009. At that time, the actual average rent at the park was only $471.39, or $153.61 below market. (ER 127, ¶ 26).

The Parkowner Asks the City to Adopt a Public Subsidy Program: On September 7, 2010, the Parkowner asked the City Council to amend the ordinance, to establish a public subsidy program whereby the City of Calistoga would provide each and every tenant at all four mobilehome parks with a monthly stipend equal to the difference between the market rate and the rent control rate, regardless of need. (ER 135, ¶ 59). The City Council did not act on that request, let alone adopt such a public subsidy program. To the contrary, the administrator of the City's mobilehome rent control ordinance stated the Parkowner's proposed public subsidy program was "unreasonable." (ER

136, ¶ 60).[2]

Request to Increase the Rent to the Non-Excessive, Non-Monopolistic Rate of $625 Per Month: Because the actual rent at the park was significantly below market, the Parkowner decided to notice a rent increase pursuant to the City of Calistoga's rent control ordinance, seeking to increase the rent to $625 per month. (ER 127, ¶ 26). The City appointed W. Scott Snowden as its hearing officer and evidentiary hearings were commenced.

At those hearings, the Parkowner contended that preventing the rent from being increased to $625 per month would result in a private taking, because such a rent was neither excessive, monopolistic, nor in violation of any other legitimate purpose of the ordinance. In the alternative, the Parkowner contended that if requiring rents of less than $625 per month furthered a legitimate purpose, that purpose should be borne by society as a whole, not the Aguirre family. (ER 140, ¶ 73).

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[2] It should be noted that the hearing officer appointed by the City subsequently stated that except where there was means testing, such as under the Section 8 voucher program, he was not aware of any cities that had adopted such an ordinance and that such a proposal would likely be unsuccessful in his hometown of St. Helena. (ER 136, ¶ 60).

The testimony and documentary evidence submitted by the Parkowner during those hearings is summarized below:

John Neet / the Parkowner's Appraiser: John Neet is an MAI certified appraiser who has specialized in appraising mobilehome parks since 1988. Mr. Neet was asked to update his September 2009 "market rent" survey, pursuant to standards approved by the Appraisal Institute. The primary purpose of Mr. Neet's testimony was to establish that the proposed rent of $625 per month was neither excessive nor above market at that particular point in time. (ER 129, ¶ 33).

Mr. Neet began by demonstrating that "market rent" is defined in the appraisal industry as the most probable rent that a property should bring in a competitive and open market, with the lessee and the lessor each acting prudently and knowledgeably. Mr. Neet demonstrated also that market rent is determined based on current rents that are either paid or asked for comparable space as of the date of the appraisal. (ER 130, ¶ 34).

In determining market rent, it is important to ascertain whether the lease represents a freely negotiated arm's length transaction. Rentals that do not reflect freely negotiated arm's length transactions most likely

will have to be eliminated as comparables. Market rent is not based on the average of all rents at a property, nor is market rent based on rents that are mandated by the government. (ER 130, ¶ 35).

In a competitive and open market, rents that new tenants are willing to pay to lease space at a particular property generally provide the best indication of market rent. In a jurisdiction that is subject to rent control, the appraiser first attempts to find examples of recently negotiated rents at the subject property that were exempt from rent control under state or local law. (ER 130, ¶ 36). Where it is not possible to find such examples at the subject property, the appraiser must attempt to find them at comparable properties within the relevant market, or within close enough proximity to the relevant market to shed light on the market rent for the subject. (ER 130, ¶ 37).

Because of various rent control ordinances and other restrictions in place in the Napa Valley, Mr. Neet was not able to find any rental agreements in the relevant market that were the result of an arm's length transaction and a true indication of market rent. However, Mr. Neet was able to identify numerous recent transactions at comparable properties that were subject to rent control. (ER 130, ¶ 38).

Although the parkowners at those other properties were not allowed to "test the market" in those transactions, they nevertheless provided a "lower limit" below which the market rent for the park could not logically be set. Based on those transactions, Mr. Neet was able to determine that the market rent for spaces at the park as of January 12, 2011 was at least $650 per month. (ER 130, ¶ 39). Those transactions are summarized as follows.

Park	**Transfer Rent - Low**	**Transfer Rent - High**
Rancho de Calistoga	$405.49	$572.09
Calistoga Springs	$355.21	$504.00
Chateau Calistoga	$389.00	$535.00
Rancho de Napa	$608.00	$608.00
Napa Valley MHP	$450.00	$689.00
Oaktree Vineyard	$680.00	$680.00
Orchard MHP	$695.00	$695.00
De Anza	$660.00	$1,100.00
Seven Flags	$485.00	$735.00

In short, by using standard appraisal techniques, Mr. Neet was able to demonstrate that the market rent at Rancho de Calistoga was at least $650 per month and that not a single tenant at the park was paying an excessive or above market rate. Because the Parkowner is seeking to

increase the rent to only $625 per month, the proposed rent will still be at least $25 below market, resulting in a windfall to each tenant of at least $300 per year. ($25 per month x 12 months = $300). (ER 131, ¶ 40).

Mr. Neet was also asked to determine the current "market value" of the park with rents at the rent controlled rate, and with rents at $650 per month. (ER 131, ¶ 41). In order to determine the market value of the park, Mr. Neet tracked the overall capitalization rate for approximately 512 mobilehome park sales in the western United States between 2001 and 2009, finding that those rates had decreased from approximately 9% to about 6% during that time frame. (ER 132, ¶ 44). Mr. Neet also examined the overall capitalization rates for six mobilehome parks that sold in California in 2009 and 2010, with an average capitalization rate of 6.35%. Based on all of the data he surveyed, Mr. Neet concluded that 6.25% was the appropriate overall capitalization rate for determining the market value of the park at that point in time. (ER 132, ¶ 45).

Using the actual rental income for the park under rent control, Mr. Neet concluded that the market value of Rancho de Calistoga as of the

date of his report was $11,850,000. However, using the $650 rate derived through his survey of rent controlled parks, Mr. Neet concluded that the market value of the park should be at least $16,580,000. Accordingly, as of the date of the hearing, the rents mandated by the City resulted in a loss in value of at least $4,730,000. ($16,580,000 - $11,850,000 = $4,730,000). (ER 132, ¶ 46).

Richard Fabrikant, PhD / the Parkowner's Economist: Although "market rent" is a defined term in the appraisal industry, some courts have suggested that the market rent may nevertheless be excessive, ***if*** it is the result of monopoly power. *Yee v. City of Escondido,* 224 Cal. App. 3d 1349, 1357 n. 9 (1991). In order to determine whether the proposed rent of $625 was monopolistic in this particular case, the Parkowner retained Dr. Richard Fabrikant. (ER 132, ¶ 47).

Dr. Fabrikant is a Fulbright Scholar with a PhD in economics. Dr. Fabrikant has been studying rents in mobilehome parks since 1991. Dr. Fabrikant was asked to determine if there was any evidence that the Parkowner had monopoly power in the overall housing market. Dr. Fabrikant was asked also to provide an empirical analysis as to whether

the proposed rent of $625 was fair or excessive. (ER 133, ¶ 48).

Dr. Fabrikant began by demonstrating that all forms of housing contain a "shelter" component, based on the price people are willing to pay to live in a particular type of unit. Dr. Fabrikant demonstrated that some forms of housing also contain an "investment" component, based on expectations regarding increases or decreases in the value of the unit purchased. (ER 133, ¶ 49).

An apartment provides the best evidence of the market value of the "shelter" component, because it demonstrates the amount a person is willing to pay for housing services, with no expectation of any return on investment. On the other end of the spectrum are detached single family homes, where the occupant owns both the structure and the land on which it is located. Townhouses, condominiums and mobilehomes are in between the two. (ER 133, ¶ 50).

The uncontradicted evidence demonstrated that the rent or "shelter component" for two and three bedroom apartments within a thirty mile radius of Calistoga ranged from $1,437 to $1,867 per month. Of course, the "shelter component" for residency in a mobilehome park is equal to the rent for the mobilehome space, *plus* the cost of the

mobilehome. In order to be competitive with a two or three bedroom apartment, the “shelter component” for both the mobilehome space and a two or three bedroom mobilehome could not exceed $1,437 to $1,867 per month. (ER 133, ¶ 51).

Assuming mobilehome spaces are rented at the proposed rate of $625, a prospective tenant would need to be able to purchase a two or three bedroom mobilehome at a cost ranging from $812 to $1,242 per month. Otherwise, the “shelter component” of residing at the park would exceed the “shelter component” of residing in a two or three bedroom apartment. (ER 133, ¶ 52). That $812 to $1,242 range is referred to as the “residual” and is derived as follows:

Apartment Size	Apartment Rent	Park Rent	Residual
2 Bedroom 2 Bath	$1,437	($625)	$812
3 Bedroom 2 Bath	$1,867	($625)	$1,242

Depending on the interest rate and the term of the loan, “residuals” ranging from $812 to $1,242 per month would enable a prospective tenant to purchase a two or three bedroom mobilehome ranging in value from $79,716 to $160,196. (ER 134, ¶ 53). As set forth in Dr. Fabrikant’s report, a twenty year loan with interest rates

ranging from 7.00% to 10.80% would enable a prospective tenant to purchase mobilehomes ranging in the following amounts:

	$812 Residual	**$1,242 Residual**
7.00% Interest:	$104,734	$160,196
8.00% Interest:	$97,098	$148,486
9.00% Interest:	$90,250	$138,042
10.80% Interest:	$79,716	$121,931

For the final step of his analysis, Dr. Fabrikant looked to see whether it was possible to actually purchase two and three bedroom mobilehomes in the market place at prices ranging from $79,716 to $160,196, with "residuals" ranging from $812 to $1,242. In response to that inquiry, Dr. Fabrikant found that the average price of the seventeen used mobilehomes sold at Rancho de Calistoga during the preceding two years was $62,029.41, so the "residual" was clearly sufficient to purchase a used mobilehome at the park. (ER 134, ¶ 54).

Dr. Fabrikant found also that brand new two and three bedroom mobilehomes could be purchased at prices ranging from $79,716 to $160,196, with installation costs ranging from $15,000 to $25,000. Assuming an 8.00% interest rate and a twenty year loan, the evidence conclusively established that the "residuals" were sufficient to purchase

such mobilehomes, even with the rent at $625 per month and installation costs at $211 per month. (ER 134, ¶ 55). A summary with respect to four brand new mobilehomes actually listed for sale at the time of the hearing is set forth below:

New Mobilehome	**Cost**	**Mortgage**	**Install**	**Residual**
2 Bedroom 2 Bath	$64,756	$541.65/mo	$211/mo	$812
2 Bedroom 2 Bath	$66,658	$557.55/mo	$211/mo	$812
3 Bedroom 2 Bath	$64,310	$537.91/mo	$211/mo	$1,242
3 Bedroom 2 Bath	$88,398	$739.40/mo	$211/mo	$1,242

If the requested rent of $625 was the result of monopoly power it would not have been possible to find alternative housing at competitive prices. Because it was possible to purchase and install a brand new two or three bedroom mobilehome with the rent at $625 per month for ***less*** than the rent of a two or three bedroom apartment, Dr. Fabrikant concluded that the Parkowner did ***not*** have monopoly power. (ER 135, ¶ 56).

Additional Evidence Submitted by the Parkowner: In addition to demonstrating that there are no excessive or monopolistic rents at Rancho de Calistoga, the Parkowner demonstrated also that there is no shortage of mobilehomes for sale in the relevant market. To the

contrary, a survey of mobilehome sales in Napa County demonstrated that during the preceding 24 months, title to 239 of the mobilehomes at the 3,339 spaces surveyed had changed hands, or 7.16%, while during that same period 17 of the 184 mobilehomes at Rancho de Calistoga had changed hands, or 9.24%. (ER 140, ¶ 75).

The Parkowner demonstrated also that mobilehomes are depreciating assets, meaning that the value of the mobilehomes should decrease over time. However, the average price of the 239 mobilehomes sold in Napa County during the preceding two years actually increased by 33.58%, from $44,166.64 to $58,998.13, while during that same period the average price of the 17 mobilehomes sold at Rancho de Calistoga increased by 156.73%, from $24,161.06 to $62,029.41. (ER 141, ¶ 76).[3]

The Hearing Officer's Decision: The hearing officer issued his decision on July 14, 2011, finding that a $60 rent increase was reasonable under the circumstances. (ER 139, ¶ 71). As a result of the

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[3] The state of California has also recognized that mobilehomes are depreciating assets, providing for an 85% decrease in fair market value over the first eighteen years of ownership of a mobilehome. See Cal. Health and Safety Code Section 18115.5(b).

hearing officer's decision, the average rent at the park remains at least $93.61 below the non-excessive, non-monopolistic and non-exploitive rate of $625 per month. Accordingly, the rents mandated by the hearing officer result in a loss in income of at least $206,690.88 per year and a loss in value of at least $3,307,054.08. ($625 - $531.39 = $93.61 x 184 spaces x 12 months = $206,690.88 ÷ 0.0625 capitalization rate = $3,307,054.08).

The hearing officer did ***not*** issue findings of fact or conclusions of law with respect to many of the issues raised by the Parkowner. Of particular importance in this case, the hearing officer specifically declined to rule on most of the constitutional issues raised by the Parkowner, including whether the ordinance was being applied in accordance with the Parkowner's rights under the takings, due process and equal protection clauses of the federal constitution. In fact, at footnote 6 of his decision the hearing officer found that "it would be premature to consider an 'as applied' constitutional challenge to the ordinance as such an inquiry would be best left to the courts." (ER 140, ¶ 73).

In denying the Parkowner's request to have the rents increased to

$625 per month, the hearing officer relied heavily on the purported purposes of the ordinance. Accordingly, the primary issue in this case in the event of a remand should be whether there is evidence in the record demonstrating that a rent of $625 per month is excessive or monopolistic, or in violation of any other legitimate public purpose. If no such evidence exists, the purported reasons for denying the proposed rent increase are nothing more than pretext, to justify an unconstitutional private taking.

VI. STANDARDS OF REVIEW

A. All Material Facts Must Be Accepted as True and Construed in a Light Most Favorable to the Parkowner.

Dismissal for failure to state a claim is reviewed de novo. *Williamson v. General Dynamics Corp.,* 208 F. 3d 1144, 1149 (9th Cir. 2000). A motion to dismiss may not be granted if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). In making that determination, all material facts must be accepted as true and construed in a light most favorable to the plaintiff. *Western Reserve Oil & Gas Co. v. New,* 765

F. 2d 1428, 1430 (9th Cir. 1985).

B. A Motion to Dismiss Must Be Viewed with Particular Skepticism in Claims Involving the Takings Clause.

The Supreme Court has repeatedly held that there is no "set formula" for determining whether governmental action amounts to a taking. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Rather, courts must engage in "ad hoc" factual inquiries to determine whether a property owner's constitutional rights have been violated. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Because of the "ad hoc" nature of the inquiry, motions to dismiss "must be viewed with particular skepticism" in takings cases. *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 864 F. 2d 1475, 1478 (9th Cir. 1989).[4] Of course, the need for an "ad hoc" factual inquiry is particularly important in the context of a private taking, where the issue is whether reliance on an otherwise valid public purpose is pretext for an impermissible private taking. *Cottonwood Christian Center v.*

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[4] See also *Whitney Benefits Inc. v. United States,* 752 F. 2d 1554, 1560 (F. Cir. 1985), ["[W]hether or not there has been a taking, even if not so intended, is normally a fact issue that cannot be resolved except on a 'complete record' at trial."].

Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002).

In this case, the Parkowner alleges that even if the ordinance is constitutional on its face, the hearing officer has applied the ordinance in a manner that results in a violation of its constitutional rights, because the evidence demonstrated (1) the requested rent is neither excessive, monopolistic, nor in violation of any other legitimate public purpose, (2) it is not possible for a mobilehome park owner to exploit a tenant unless the rent is above market and (3) the Parkowner has been ordered to provide each of its 184 tenants with a significant monthly subsidy, whether they need it or not. As established by the above cited authorities, each of those allegations must be deemed true for purposes of this appeal.

C. An Ordinance May Be Valid on its Face But Invalid as Applied to a Particular Set of Facts.

An ordinance may be challenged either on its face, or as applied. *Guggenheim v. City of Goleta*, 638 F. 3d 1111, 1119 (9th Cir. 2010). "A successful challenge to the facial constitutionality of a law invalidates the law itself." *Foti v. City of Menlo Park,* 146 F. 3d 629, 635 (9th Cir.

1998). "A facial challenge to a legislative Act is, or course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987).

"In addition to a facial challenge, a party may challenge a statute 'as applied.'" *4805 Convoy, Inc. v City of San Diego,* 183 F. 3d 1108, 1111 fn. 3 (9th Cir. 1999). In contrast to a facial challenge, "a successful 'as applied' challenge does not invalidate the law itself, but only the particular application of that law." (Id. at 1111, fn. 3). "It is axiomatic that a 'statute may be invalid as applied to one state of facts and yet valid as applied to another.'" *Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320, 329 (2006).

Based on the above authorities, it is clear that the City's ordinance may not be applied in a manner that deprives the Parkowner of a protected right, even if the ordinance is constitutional on its face. Accordingly, this Court must analyze the facts to determine whether the hearing officer has applied the ordinance in a manner that deprives the Parkowner of its rights under the takings, due process and equal protection clauses, including its right not to have its property taken for

a purely private purpose.

VII. RIPENESS

A. The Parkowner's 'Private Taking' Claim is Ripe Because No Amount of Compensation Can Justify Such Conduct.

The Fifth Amendment to the United States Constitution enables the government to take private property, subject to two conditions. First, the taking must be for a "pubic purpose." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 245 (1984). ("A purely private taking could not withstand the scrutiny of the public use requirement."). Second, the taking must be accompanied by the payment of just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314 (1987). ("[T]he compensation remedy is required by the Constitution.").

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186-197 (1985), the Supreme Court held that where a party alleges governmental action amounts to an otherwise permissible taking, the claim is not ripe for review in federal court, unless the party has first sought and been denied just compensation by the state courts. However, in *Yee v. City of Escondido,*

503 U.S. 519, 534 (1992), the Supreme Court suggested that the "ripeness" requirement does not apply where the party alleges that the governmental action is not for a legitimate public purpose.

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005), a unanimous Supreme Court addressed in unmistakable terms the distinction between permissible takings, which are governed by the 'just compensation' clause of the Fifth Amendment, and impermissible takings, which are governed by either the due process clause of the Fourteenth Amendment, or the 'public use' clause of the Fifth Amendment:

> "[T]he takings clause presupposes that the government has acted in pursuit of a valid public purpose. The clause expressly requires compensation where government takes private property for a 'public use.' . . . . Conversely, if a governmental action is found to be impermissible - - for instance ***because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process - - that is the end of the inquiry. No amount of compensation can authorize such action."*** (Emphasis added).

"Because a 'private taking' cannot be constitutional even if compensated a plaintiff alleging such a taking would not need to seek compensation in state proceedings before filing a federal takings claim

under the rule of *Williamson County*." *Armendariz v. Penman*, 75 F. 3d 1311, 1321, n.5 (9th Cir. 1996). In this case, the Parkowner has alleged that the below market rents mandated by the hearing officer result in an impermissible taking of private property, in violation of the public use clause of the federal constitution. Because the Parkowner's private taking claim does not seek just compensation for an otherwise permissible taking, the Parkowner's private taking claim is ripe.

B. The Parkowner's Due Process Claim is Ripe Because the Arbitrary Action Has Already Occurred.

A substantive due process violation is usually "complete when the wrongful action is taken." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Accordingly, as in the case of a purely private taking, a substantive due process claim is immediately 'ripe' for review in federal court, regardless of any post-deprivation procedures the state courts may provide. As stated in *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 864 F. 2d 1475, 1483 (9th Cir. 1989):

> "Substantive due process is violated at the moment the harm occurs, [and therefore] the existence of a post deprivation state remedy should not have any bearing on whether a cause of action exists under § 1983."

Although a property owner need not pursue state court remedies before bringing a substantive due process claim in federal court, the Ninth Circuit has developed special rules where the violation occurs during the course of an administrative proceeding. In such cases, the substantive due process claim does not become ripe until the administrative proceedings are concluded. *Norco Const. Inc., v. King County,* 801 F. 2d 1143, 1145-1146 (9th Cir. 1986).

In this case, the Parkowner alleges that the hearing officer violated its due process rights by arbitrarily failing to increase the rents to $625 per month, even though the uncontradicted evidence demonstrated (1) the proposed rent was neither excessive nor monopolistic and (2) it is not possible for a parkowner to exploit a tenant unless the rent is above market. The hearing officer issued his decision on July 14, 2011. Accordingly, the Parkowner's substantive due process claim became ripe on that day.

C. The Parkowner's Regulatory Taking Claim is Ripe Because the California Courts Have Rejected Such Claims in a Case With Virtually Identical Facts.

As stated above, a regulatory taking claim is generally not ripe for review in federal court, unless the party has first sought and been denied

just compensation by the state courts. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186-197 (1985). However, an exception exists if a federal court determines it would be futile to proceed in state court. *Manufactured Home Communities, Inc. v. City of San Jose,* 420 F. 3d 1022, 1035-1036 (9th Cir. 2005).

In *Besaro Mobile Home Park, LLC v. City of Fremont,* 204 Cal. App. 4th 345, 356-361 (2012)*,* a California court found that a parkowner could ***not*** establish an "as applied" regulatory taking under the California Constitution, even though the parkowner purchased the property long before the City of Fremont adopted rent control. By contrast, the Ninth Circuit has determined that a parkowner can establish that a rent control ordinance has been applied in a manner that results in a regulatory taking under the federal constitution, provided the parkowner invested in the property prior to the enactment of rent control. *Guggenheim v. City of Goleta,* 638 F. 3d 1111, 1119-1123 (9th Cir. 2010).

Because the California courts have determined that it is not possible to state a regulatory taking claim under the California

Constitution even if the property owner purchased the park before the adoption of rent control, it would be futile for the Parkowner to proceed with its claims under the California Constitution in state court. Accordingly, the Parkowner must be allowed to proceed with its federal regulatory taking claim in the District Court, pursuant to the standards established by the Ninth Circuit in *Guggenheim v. City of Goleta,* 638 F. 3d 1111, 1119-1123 (9th Cir. 2010).

D. The Federal Courts Have Discretion to Hear the Parkowner's Regulatory Taking Claim Because the Determination of Ripeness is Prudential.

The Ninth Circuit has held on several occasions that the *Williamson County* ripeness requirement is "prudential" only, so it may be waived by the federal courts. *Adam Bros. Farming Inc. v. County of Santa Barbara,* 604 F. 3d 1142, 1148 (9th Cir. 2010). In fact, only three years ago the Ninth Circuit exercised its discretion to rule on a challenge to a mobilehome rent control ordinance. *Guggenheim v. City of Goleta,* 638 F. 3d 1111, 1118 (9th Cir. 2010). Accordingly, even if this Court determines that it is not futile for the Parkowner to pursue its state constitutional claims in state court, this Court has discretion to allow the Parkowner's federal regulatory taking claim to proceed at this time.

VIII. SUBSTANTIVE ISSUES

PRIVATE TAKINGS

A. The Ordinance May Not Be Applied in a Manner That Results in an Impermissible Private Taking.

The United States Constitution is the supreme law of the land. *Public Utilities Commission of California v. United States,* 355 U.S. 534, 544-545 (1958). Under the Supremacy Clause, no law may be applied in a manner that is inconsistent with the Constitution. *Buchanan v. Warley,* 245 U.S. 60, 74 (1917).

As stated previously, the Fifth Amendment to the United States Constitution enables the government to take private property, subject to two conditions. First, the taking must be for a "public purpose." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 245 (1984). Second, the taking must be accompanied by the payment of just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314 (1987).

However, the government may never take private property for a private purpose, even if it offers to pay just compensation. The Supreme Court first acknowledged that ancient principle more than two hundred years ago, finding that the Fifth Amendment cannot be used to justify "a

law that takes property from A and gives it to B." *Calder v. Bull,* 3 U.S. 386, 388 (1798). Only eight years ago, the Supreme Court confirmed that fundamental rule of law in *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005):

> "[I]f a governmental action is found to be impermissible - - for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process - - that is the end of the inquiry. ***No amount of compensation can authorize such action."*** [5] (Emphasis added).

As explained above, this Court must engage in an "ad hoc" factual inquiry to determine whether the takings clause has been violated. *Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979). As will be demonstrated below, this rule is particularly important when the issue is whether the enforcement agency's reliance on a purported public purpose is pretext for a private taking, because in many cases it is not possible to determine whether a pretext exists without taking evidence on the subject. *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002).

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[5] Of course, the government is not "permitted to achieve this impermissible result under the guise of an adjunct to rent control." *Gregory v. City of San Juan Capistrano,* 142 Cal. App. 3d 72, 88 (1983).

B. An Enforcement Agency May Not Take Property Under the Pretext of a Public Purpose When its Actual Purpose is to Bestow a Private Benefit.

A local government may not achieve an impermissible private taking simply by asserting an otherwise legitimate public purpose as a pretext for taking the property of A and giving it to B. The Supreme Court recently confirmed that principle in *Kelo v. City of New London,* 545 U.S. 469, 477-478 (2005):

> "Nor would the City be allowed to take property under the ***pretext of a public purpose***, when its actual purpose was to bestow a private benefit." (Id. at 478). (Emphasis added).

Black's Law Dictionary defines pretext as an "[o]stensible reason or motive assigned or assumed as color or cover for the real reason or motive." Black's Law Dictionary, 5th Ed.[6] Accordingly, where it is alleged that a law has been applied in a manner that results in a private taking, a reviewing court may examine the evidence to determine whether the purported public purpose for the decision is pretextual.

In *Armendariz v. Penman*, 75 F. 3d 1311 (9th Cir. 1996), the

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[6] See also *Hurwitz v. City of Orange,* 122 Cal. App. 4th 835, 852 (2004) [pretext is defined as "a cover for the substantive taking of property, or as here, a property right."].

enforcement agency decided to begin "vigorously enforcing" an already existing housing code, closing 95 apartment buildings in a period of six months, evicting the tenants and forcing them to relocate to other areas. (Id. at 1313). One of the property owners sued, claiming that the over-enforcement of the previously adopted law was mere pretext, "to enable a commercial developer to acquire contiguous property . . . on the cheap." (Id. at 1315).

Although the property owner had sued under the due process clause, the Ninth Circuit ultimately found that his claims should be examined under the takings clause, to determine whether the purported "public purpose" behind the enforcement program was a sham:

> "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing a 'conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings." (Id. at 1321).

Similarly, in *99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F. Supp. 2d 1123 (CD Cal. 2001), the enforcement agency

initiated condemnation proceedings against a property owner under a preexisting development plan, claiming that removal of the structure was necessary to prevent blight in the future. The property owner sought an injunction, on the ground that reliance on the purported public purpose was a sham, because the local government simply wanted to make its land available for Costco.

Although legislative determinations are usually entitled to deference in takings cases, the Court began by finding that ***"[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual."*** (Id. at 1129). (Emphasis added). The Court found also that under the federal constitution, the government could not rely on findings of blight made more than 17 years prior to the proposed taking. (Id. at 1130, n. 2). In granting an injunction against the proposed taking the Court wrote as follows:

> "In this case, the evidence is clear beyond dispute that [the government's] condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another . . . In short, the very reason that [the government] decided to condemn 99 Cent's leasehold interest ***was to appease Costco***. Such conduct amounts to an unconstitutional taking for purely private

purposes." (Id. at 1129). (Emphasis added).[7]

As in *Armendariz* and *99 Cents Only Stores*, the Parkowner is not challenging the constitutionality of the previously enacted ordinance that empowered the government to act. Rather, the Parkowner is challenging the over-enforcement of that ordinance, because the hearing officer has refused to allow the rents to be increased to a level that is neither excessive, monopolistic, nor in violation of any other legitimate public interest. Because the Parkowner has alleged that the real reason the hearing officer denied the proposed rent increase is to require the Parkowner to provide the tenants with a significant monthly subsidy, regardless of the facts or circumstances, the District Court erred in dismissing the petition at the pleading stage.

C. The Parkowner Has Raised a 'Fair Question' as to Whether Reliance on the Purported Purposes of the Ordinance is Pretext With Respect to the Denial of this Particular Rent Increase at this Particular Point in Time.

In *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the plaintiff purchased

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[7] It should be noted that the United States Supreme Court cited *99 Cents Only Stores* with approval in *Kelo v. City of New London*, 545 U.S. 469, 487 at n. 17 (2005).

undeveloped land in order to construct religious facilities. The Cypress Redevelopment Agency denied a permit and initiated eminent domain proceedings, so Costco could build a store on the property. The plaintiff alleged that the Redevelopment Agency's plan to turn the property over to Costco resulted in an impermissible private taking. The *Cottonwood* Court allowed the private taking claim to proceed, writing as follows:

> "Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext. . . . Cottonwood has therefore shown at least a fair question on the merits of its takings claim on public use grounds." (Id. at 1229 and 1230).

In the underlying proceedings, the hearing officer determined that the rent could not be increased to $625 per month, in part because such rents would violate one or more purposes of the ordinance. In both its first and second motion to dismiss, the City argued that the hearing officer's decision is correct, also relying on the various purposes set forth in the ordinance at the time it was adopted. (ER 207, lines 5-15 and ER 81, lines 9-21).

Again, however, there is no evidence in the record demonstrating that rental rates of $625 per month are excessive, monopolistic, or in

violation of any other legitimate public purpose. To the contrary, the Parkowner has alleged that the proposed rent is neither excessive nor monopolistic, but is at least $25 below market. Similarly, the Parkowner has alleged that the proposed rent increase would not provide the Parkowner with superior bargaining position, because the tenants will have a "positive leasehold" so long as the rent remains below market. (ER 137, ¶ 63).

In short, the Parkowner has alleged that the real reason the hearing officer denied the requested increase is to insure that the tenants receive a significant subsidy each month, whether it is warranted or not, thereby taking the property of one person and giving it to another. Accordingly, this Court should find that the Parkowner has "shown at least a fair question on the merits of its takings claim on public use grounds." *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002).

D. The Response by City Officials to the Parkowner's Public Subsidy Program Provides Further Evidence that the Ordinance Has Been Applied to Facilitate an Impermissible Private Taking.

On September 7, 2010, the Parkowner asked the City Council to

amend the ordinance, to establish a subsidy program whereby the City of Calistoga would provide each and every tenant at all four mobilehome parks with a monthly subsidy equal to the difference between the market rate and the rent control rate, regardless of need. (ER 135, ¶ 59). The City Council did not act on that request, let alone adopt such a public subsidy program. (ER 136, ¶ 60).

To the contrary, the administrator of the City's mobilehome rent control ordinance stated that the Parkowner's proposed public subsidy program was "unreasonable." Similarly, the hearing officer stated that except where there was means testing, such as under the Section 8 voucher program, he was not aware of any cities that had adopted such a program and that such a proposal would likely be unsuccessful in his hometown of St. Helena. (ER 136, ¶ 60).

It must be stressed that the Parkowner does not allege that the City of Calistoga was legally obligated to adopt or even place its proposed subsidy program on the City Council's agenda for discussion. Rather, the Parkowner alleges that the reaction of those City officials to its proposal provides further evidence that any reason given for requiring the Parkowner to offer virtually identical subsidies to all 184

of its tenants is not a legitimate public purpose, but pretext for a purely private taking. (ER 136, ¶ 61).

E. The Prohibition Against Gifts of Public Funds Under the California Constitution Provides Further Evidence that the Ordinance Has Been Applied to Facilitate an Impermissible Private Taking.

Under the California Constitution a local government is prohibited from making a gift of public money for a private purpose. *Sturgeon v. County of Los Angeles,* 167 Cal. App. 4th 630, 637 (2008). Although a transfer of public funds may be constitutional if provided to a person with a financial hardship, such a transfer to a person with the ability to pay "results in the use of public money for private purposes." *Goodall v. Brite,* 11 Cal. App. 2d 540, 547-548 (1936).

Based on the above authorities, the City of Calistoga would be precluded from paying all or any part of the below market rent for a person who has the financial ability pay, because such a payment would result "in the use of public money for private purposes." Thus, the prohibition against gifts of public money provides further evidence that any purported public purpose for the subsidies mandated by the hearing officer is a sham.

Again, it must be stressed that the Parkowner does not claim that the City has made an illegal gift of public funds to the tenants at Rancho de Calistoga. Rather, by requiring the Parkowner to subsidize the below market rent of 184 people, without regard to their ability to pay, the City is accomplishing indirectly what it is prohibited from doing directly.

In summary, no public purpose is served by requiring the Parkowner to provide more than $206,000 in subsidies each year to the 184 tenants at the park ***if*** (1) the rents are neither excessive nor monopolistic, (2) the proposed rent does not provide the Parkowner with unequal bargaining power and (3) there is no inquiry into the tenants' ability to pay. To the contrary, requiring such subsidies under these circumstances is nothing other than an impermissible transfer of the Parkowner's property for a private purpose, in violation of the takings clause of the federal constitution. Because the Parkowner is entitled to judicial review with respect to the evidence submitted on this issue, the motion to dismiss should have been denied.

F. The Parkowner Must Be Allowed to Prove that the Proposed Rent of $625 Per Month is Neither Excessive Nor Monopolistic.

In *Pennell v. City of San Jose,* 485 U.S. 1, 11 (1988), the Supreme

Court stated that “the government may intervene in the market place to regulate rates or prices that are artificially inflated as a result of the existence of ***a monopoly*** or near monopoly.” (Emphasis added). In *Oceanside Mobilehome Parkowners’ Assn. v. City of Oceanside,* 157 Cal. App. 3d 887, 905 (1984), the court recognized that restoring competitive rents is another proper purpose of rent control:

> “Rent control attempts to ***restore free market conditions*** by limiting rent increases to that level which would occur under general market conditions - a competitive housing market as opposed to a monopolistic or ologopolistic one.” (Id. at 905). (Emphasis added).

Although the primary goal of rent control is to prevent excessive rents, some courts have suggested that it is not sufficient to establish that the proposed rent is “at market,” because the market rate may itself be excessive, ***if*** it is the result of monopoly power. That issue was addressed in *Yee v. City of Escondido,* 224 Cal. App. 3d 1349, 1357 n. 9 (1991):

> “[R]ent controls may be justified ***if quasi-monopolistic conditions have allowed park owners to charge higher rents than would be possible if the market were perfectly competitive***. . . .Hirsch and Hirsch take issue with such a theory, arguing that mobilehome

> rent control ordinances generally penalize landlords ‘irrespective of the rental rates charged tenants, the amount or frequency of rent increases, or the profits reaped by particular landlords. . . . Such an argument is presumably meant to suggest that not all landlords take advantage of the quasi-monopoly power they may possess.
>
> Here, however, Petitioners have limited themselves to a facial attack on the ordinance’s constitutionality, ***refusing to seek individualized upward adjustments in the allowable rents as provided for in the ordinance. . . .*** ‘[W]hether rental regulations are fair or confiscatory depends ultimately on the result reached. . . . That determination, of course can only be made by analyzing a challenge to the regulation as applied.” (Emphasis added).

In this case, the Parkowner has not limited itself to a facial challenge or refused to apply for an upward adjustment of rents. To the contrary, the Parkowner has applied for a rent increase and submitted evidence demonstrating that the proposed rent increase is neither excessive nor the result of monopoly power. The hearing officer has denied that rent increase and the Parkowner has sought judicial review on the ground that the hearing officer’s decision results in an otherwise constitutional ordinance being applied in a manner that results in an impermissible private taking.

Because the purposes of the ordinance can be achieved with rents at $625 per month, there is no legitimate reason for applying the ordinance in a manner that requires the Aguirre family to provide more than two hundred thousand dollars in rent subsidies each year, without regard to the tenants' ability to pay. Again, because the Parkowner is entitled to judicial review of the evidence submitted to the hearing officer, the motion to dismiss should have been denied.

G. The Ninth Circuit's Decision in *Guggenheim v. City of Goleta* Provides Further Support for the Parkowner's Contention that it is Entitled to Prove the Current Rent is Not Fair.

In *Guggenheim v. City of Goleta* (9th Cir. 2010) 638 F. 3d 1111, Mr. and Mrs. Guggenheim challenged a mobilehome rent control ordinance "on its face," claiming that its mere enactment resulted in a regulatory taking of their property. Although the Ninth Circuit found that the Guggenheims' facial challenge was time barred, it found also that the City of Goleta's hearing officer had the authority to grant fair rent increases, consistent with their constitutional rights:

> "[T]he Guggenheims carefully limit their challenge to a facial one, not an as applied challenge. By so doing, they reserve the possibility of an as applied challenge ***if at***

> ***some subsequent time the City of Goleta's arbitrator denied them a fair rent increase.*** If the rent control scheme effects an unconstitutional taking when applied, the challenge will be to that application, not to the ordinance on its face, and the time for the challenge will run from when the administrative action became final as opposed to when the ordinance was enacted." (Id. at 1119). (Emphasis added).

The City of Calistoga's hearing officer had the legal authority to grant a rent increase that was "reasonable under the circumstances," which necessarily included a rent increase that was consistent with the Parkowner's constitutional right to be free from a private taking. Because the Ninth Circuit's decision in *Guggenheim* makes clear that the hearing officer had the legal authority to grant a rent increase consistent with the Parkowner's constitutional rights, the District Court erred in granting the City's motion to dismiss.

H. The California Court of Appeal's Decision in *Yee v. City of Escondido* Provides Further Support for the Parkowner's Contention that it is Entitled to Apply for a Fair Rent.

In *Yee v. City of Escondido,* 224 Cal. App. 3d 1349 (1990), the Fourth District Court of Appeal sustained a demurrer to a facial challenge to the vacancy control aspects of a local rent control

ordinance, in part because no parkowner had actually filed a rent increase application under that ordnance. Nevertheless, the *Yee* Court recognized that a valid as applied challenge could be mounted by showing that the rents allowed by a hearing officer were not "fair" to the parkowner:

> "Here, Petitioners' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, ***the owners have never attempted to obtain Escondido's approval for what they consider to be a 'fair' rent.*** In the absence of such a contention, we assume the rents provided by the ordinance are fair. If they are, there is no taking." (Id. at 1354). (Emphasis added).

Again, unlike the petitioners in *Yee*, the Parkowner has filed an application in this case, seeking to have the rents increased to $625 per month. Not only has the Parkowner submitted evidence demonstrating that the proposed rent was neither excessive nor monopolistic, the tenants offered ***no*** evidence to the contrary. Because the purpose of rent control is to eliminate excessive and unreasonable rents, it is pure pretext to deny a rent increase when there is no evidence the proposed rent is either excessive or monopolistic, or in violation of any other legitimate purpose of rent control.

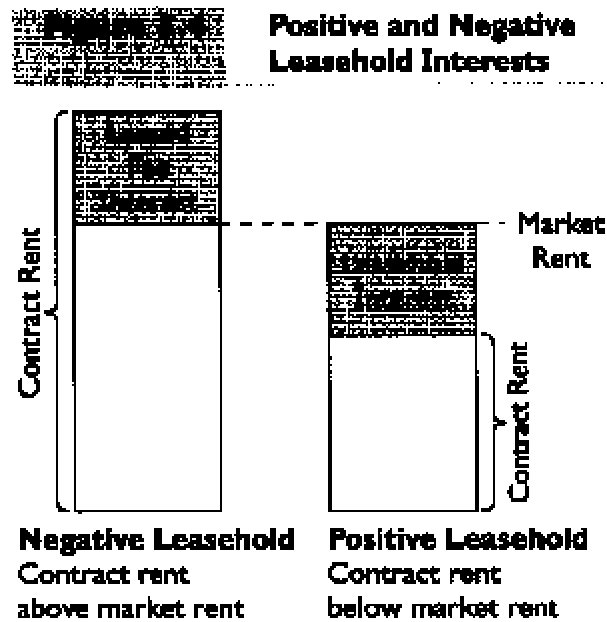
PRETEXTS FOR TAKINGS

A. It is Not Possible to Exploit a Tenant Unless the Rent is Either Above Market or Monopolistic.

The primary justification provided for rent control in mobilehome parks is that unscrupulous landlords will lure unsuspecting tenants onto their properties with fair or below market rents. Once the unsuspecting tenant has taken the bait and invested in a mobilehome, the parkowner can exploit its supposedly superior bargaining position and increase the rent to above market rates. As the theory goes, the now captive tenant will have no meaningful option other than to pay the above market rent, because it is difficult or impossible to move his or her mobilehome to another location.

In the underlying administrative proceedings, the Parkowner conclusively demonstrated that it is not possible to exploit a tenant unless and until the rent is above market. The inability to exploit tenants if the rent is at market is supported not only by the evidence presented at the hearing, the Appraisal Institute has recognized that if the rent is at market, neither the landlord nor the tenant receives a windfall. (ER 137, ¶ 63). That fact is illustrated by Figure 5.4 at page 82 of *The*

Appraisal of Real Estate, 12th Edition, and is reproduced as follows:



Because the Parkowner cannot exploit a tenant unless it is able to charge an above market rent, and because there is no means testing under the ordinance, there is no legitimate reason to require the Parkowner to charge below market rents in perpetuity. Rather, the ordinance is being applied arbitrarily and impermissibly in order to provide each and every one of the 184 tenants with a significant monthly subsidy, whether they need it or not, all at the Parkowner's expense.

B. The Other Alleged Difficulties of Moving or Selling a Mobilehome Would Be The Same Even if the Rent at Rancho de Calistoga Were Free.

Again, although the hearing officer declined to rule on the

constitutional issues raised by the Parkowner, it is anticipated that the City will attempt to convince this Court that there are a number of reasons for finding that there has been no private taking in this case. Based on the statements made by the City earlier in these proceedings, those difficulties could include the high cost of moving a mobilehome, the unavailability of vacant spaces at other parks and the potential for damage to the structure during transit. However, as will be demonstrated below, each of those difficulties would exist even if the rent at Rancho de Calistoga were free.

For example, assume that a tenant who voluntarily purchased a mobilehome at the park ten years ago decides to move to Arizona for a reason unrelated to the rent, such as a new job, warmer weather, or to be closer to his or her family. Even if the rent at Rancho de Calistoga were free, that tenant would be required to either sell the mobilehome in place, or move it to another location.

If that tenant decides to sell the mobilehome in place, he or she would still need to determine an appropriate sales price, find a willing and able buyer who qualified for tenancy at the park, and possibly pay off a loan or retain a real estate agent. Similarly, if that tenant decides

to move the mobilehome to Arizona, he or she would still need to find a place to locate it, plus pay to have it dismantled, transported and reassembled, all the while assuming the risk it will not be damaged or destroyed during transit. Because each of those obstacles must be overcome even if the rent at Rancho de Calistoga were free, any attempt by the City to use those issues to justify the hearing officer's decision is pure pretext for a private taking.

C. The Age, Health and Income of the Tenants are Not Relevant to the Takings Issue Because the Ordinance Has Been Applied Without Regard to Age, Income or Disability.

Again, although the hearing officer declined to rule on the constitutional issues raised by the Parkowner, the City may attempt to justify his decision based on the City's concern for the elderly, the infirm or the poor. Once again, any attempt to rely on such issues is pure pretext, because the hearing officer rejected the proposed rent increase at all 184 spaces at the park, without regard to the age, health or income of the tenants.

In short, a young, healthy and financially secure tenant is just as entitled to a rent subsidy as an elderly and infirm tenant living on a fixed

income. Accordingly, any attempt by the City to rely on such factors to justify the hearing officer's decision is pure pretext. Of course, this is especially true in resort areas such as the Napa Valley, where persons with substantial financial assets sometimes use the parks for a second home, so they may enjoy weekend getaways and extended stays in the wine country.

D. Giving the Parkowner's Money to the Tenants is Not a Legitimate Public Purpose, it is an Impermissible Private Taking.

Once it is determined that the proposed rent of $625 per month is neither excessive, monopolistic, nor coercive, it becomes apparent that the real reason for denying the Parkowner's application is to make certain that the tenants receive a significant monetary subsidy each and every month, whether they need it or not. However, taking the Parkowner's money and giving it to the tenants is not a legitimate public purpose. To the contrary, it a classic private taking, because it blatantly "takes property from A and gives it to B." *Calder v. Bull,* 3 U.S. 386, 388 (1798). Because there is no legitimate reason for preventing the Parkowner from charging the non-excessive, non-monopolistic and non-coercive rate of $625 per month, the Parkowner should be allowed to

prove that such a private taking has occurred.

REGULATORY TAKINGS

A. If the Taking is for a Public Purpose Any Rent Subsidy Should Be Paid by the Public Because the Rents Are Neither Excessive Nor the Result of Monopoly Power.

Although originally applied only to the physical appropriation of property, the takings clause was ultimately expanded to include takings resulting from governmental regulations that go too far. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) ["while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."]. As a result, the takings clause may be employed to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

In *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978), the Supreme Court set forth standards for determining whether a regulation that serves a public purpose goes too far, thereby requiring the payment of just compensation. Like other takings, the *Penn Central* Court stressed that such a determination requires an "ad

hoc" factual inquiry. Although no "set formula" has been developed, the *Penn Central* Court identified "several factors that have particular significance." (Id. at 124). The *Penn Central* Court summarized the most significant of those factors as follows:

> "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations are of course relevant considerations." (Id. at 124).

As stated previously, a different parkowner recently challenged the City of Goleta's mobilehome rent control ordinance on its face, arguing that it resulted in a "regulatory taking" under *Penn Central*. See *Guggenheim v. City of Goleta,* 638 F. 3d 1111 (9th Cir. 2010). The Ninth Circuit rejected the facial claim, in part because the Guggenheims had purchased the park with knowledge that it was subject to rent control and therefore had no legitimate investment backed expectation that rent controls would be abolished. (Id. at 1120-1121). However, the Ninth Circuit left open the possibility that the Guggenheims could prevail on an "as applied" challenge under the takings and the due process clauses, ***if*** the City of Goleta's hearing officer denied them a "fair rent." (Id. at 1119 and 1123).

Unlike the Guggenheims, the Parkowner in this case acquired Rancho de Calistoga long before the enactment of rent control and therefore had a legitimate investment backed expectation that it could charge a fair rent. In addition, the Parkowner has in fact applied to the City in an attempt to charge a fair rent, but has been denied the opportunity to do so.

Moreover, unlike the Guggenheims, the Parkowner in this case does ***not*** seek to abolish rent control or charge an excessive rent that will cause the value of the tenants' mobilehomes to be reduced to zero. (Id. at 1122). The Parkowner seeks only to charge the non-excessive and non-monopolistic rate of $625 per month, which will have no impact on the depreciated value of the tenants' mobilehomes. (ER 139 ¶¶'s 68-69). To the contrary, the tenants will be able to sell their mobilehomes at prices far above their depreciated value, even with rents at $625 per month. (ER 140-141, ¶¶'s 75-76; see also ER 130, ¶ 39).

In short, the hearing officer has required the Parkowner to provide at least $206,690.88 per year in subsidies to the 184 tenants at the park without regard to need, even though (1) the proposed rent is neither excessive nor monopolistic and (2) it is not possible to exploit a tenant

unless and until the rent is above market. Because the hearing officer is forcing the Parkowner to bear a burden that the City itself does not want to bear, without any legitimate reason for doing so, enforcement of the regulation has gone too far. *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

B. The Right to Be Free from Private and Regulatory Takings is Entitled to the Same Respect as the Right to a Fair Return on Investment.

It is beyond dispute that the Parkowner has a constitutional right to a fair return on investment. *Sierra Lake Reserve v. City of Rocklin,* 938 F. 2d 951, 958 (9th Cir. 1991). If the Parkowner submitted evidence at an administrative hearing demonstrating that it required rents of $625 per month in order to receive a fair return, the Parkowner would be entitled to seek judicial review of any order preventing it from obtaining a return "commensurate with returns on investments in other enterprises having corresponding risks." *Power Comm'n v. Hope Gas Co.,* 320 U.S. 591, 603 (1943). Of course, if a reviewing court determined that the right to a fair return had been violated, the remedy would be to order an increase in rents, thereby curing the violation.

It is beyond dispute that the Parkowner has a constitutional right

not to have its property taken for a private purpose. *Kelo v. City of New London,* 545 U.S. 469, 477-478 (2005). It is also beyond dispute that the Parkowner has a constitutional right to be free from a regulatory taking, which requires it to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

If the Parkowner submits evidence demonstrating that rents of less than $625 per month result in either a private or a regulatory taking, a reviewing court must have the authority to determine whether such a taking has occurred, including the authority to determine whether the hearing officer's reliance on the purposes of the ordinance to deny that rent increase is pretext. *Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002). Without such authority, the constitutional protection against takings would be rendered meaningless, so long as the ordinance is constitutional on its face. *Armendariz v. Penman*, 75 F. 3d 1311, 1321 (9th Cir. 1996). Because the Parkowner has alleged both a private taking and a regulatory taking, the District Court erred in dismissing those claims at the pleading stage. Again, this is especially true since the

hearing officer declined to consider the Parkowner's constitutional claims, thereby leaving the Parkowner no remedy at all.

DUE PROCESS

A. The Parkowner Has an Ongoing Right to be Free From Arbitrary Action by the Government.

"The touchstone of due process is the protection of the individual against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974). The Supreme Court set the standard for determining whether price controls violate due process in *Nebbia v. People of State of New York,* 291 U.S. 502, 539 (1934):

> "Price control, like any form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unwarranted interference with individual liberty."

In determining whether the Parkowner's due process rights have been violated, this Court must look to the circumstances at the time of the allegedly discriminatory or arbitrary act. In other words, although enforcement of a regulation may be reasonable for one business at one point in time, it "may be invalid for another sort, or for the same business under different circumstances, because the reasonableness of

each regulation depends on the relevant facts." *Nebbia v. People of the State of New York*, supra, 291 U.S. 502 at 525. In this light, although the facts existing at the time an ordinance is adopted may preclude a facial challenge, a subsequent as applied challenge may succeed "by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.,* 304 U.S. 144, 153 (1938).

For example, in *Lochary v. Kayfetz,* 917 F. 2d 1150, 1155 (9th Cir. 1990), several property owners challenged the rationality of continuing to enforce a previously adopted water moratorium under the due process clause, on the ground that the purported water shortage no longer existed. Although controlling the consumption of water may be a legitimate government purpose where there is in fact a water shortage, the Ninth Circuit allowed the property owners' 'as applied' challenge to proceed because they submitted evidence demonstrating that after more than a decade of regulation the shortage no longer existed:

> "Although a water moratorium may be rationally related to a legitimate state interest in controlling a water shortage, [the Petitioners] have raised triable issues of fact surrounding the very existence of a water shortage." (Id. at 1155).

In this case, the uncontradicted evidence demonstrated that the

proposed rent increase is neither excessive nor the result of monopoly power, and that it is not possible to exploit a tenant unless and until the rent is above market. Because rents of $625 per month are neither excessive nor the result of monopoly power, there is no legitimate reason for prohibiting the rent from being increased to $625 per month at this particular point in time. Accordingly, the Parkowner must be allowed to demonstrate that the hearing officer arbitrarily rejected its application, for political reasons wholly unrelated to prohibiting excessive or monopolistic rents. *Lochary v. Kayfetz,* 917 F. 2d at 1155 ("[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary.").[8]

B. The Parkowner May Simultaneously Pursue a Takings Claim and a Due Process Claim.

In *Armendariz v. Penman,* 75 F. 3d 1311, 1325-1326 (9th Cir. 1996), the Ninth Circuit found that a property owner could not bring a substantive due process claim under 42 U.S.C. § 1983, if the same claim could be brought under one of the specifically enumerated provisions of

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[8] See also *Lucas v Colorado Gen. Assembly,* 377 U.S. 713, 736-737 (1964) ["A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."].

the federal constitution, including the just compensation clause of the Fifth Amendment. As explained above, the Supreme Court has since made it clear that the regulation of property may violate both the takings clause and the due process clause. *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 543 (2005).

In *Crown Point Development Inc. v. City of Sun Valley*, 506 F. 3d 851, 853 (9th Cir. 2007), the Ninth Circuit reconsidered its ruling in *Armendariz*, holding that in view of the Supreme Court's decision in *Lingle*, claims resulting from the arbitrary or unreasonable regulation of property may be brought under the due process clause:

> "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct. As the Court made clear, there is no specific textual source in the Fifth Amendment for protecting a property owner ***from conduct that furthers no legitimate government purpose.*** . . . We now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantive relation to the public health, safety or general welfare." (Id. at 855-856). (Emphasis added).

Based on *Lingle* and *Crown Point Development, Inc.*, it is clear that the Parkowner may challenge the hearing officer's decision to

prevent rents from being increased to $625 per month, because that decision does not further any legitimate government purpose. Because the uncontradicted evidence demonstrated the requested rents were neither excessive nor monopolistic, and because it is not possible for a parkowner to exploit a tenant when rents are below market, the Parkowner must be allowed to proceed with its due process claim, which is both timely and ripe. Should this Court determine that the Parkowner's due process claims are "subsumed" by the takings clause, it should nevertheless apply the above cited due process cases to its takings analysis, including *Lochary v. Kayfetz,* 917 F. 2d 1150, 1155 (9th Cir. 1990).

EQUAL PROTECTION

A. The Current Rent Structure Violates the Parkowner's Right to Equal Protection Under the Law.

"Scrutiny under standard equal protection analysis is essentially equivalent to scrutiny under substantive due process doctrine." *Herrington v. Sonoma County,* 834 F. 2d 1488, 1495 n. 4 (9th Cir. 1987). Accordingly, an arbitrary decision by a government official also results in a violation of the equal protection clause. *Lochary v. Kayfetz,* 917 F.

2d 1150, 1155 (9th Cir. 1990).

In addition to providing protection against an arbitrary decision, the equal protection clause provides that a classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike." *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). Thus, a classification must not only be applied equally within the class established, it must bear "some rationality in the nature of the class singled out." *Rinaldi v. Yeager,* 384 U.S. 305, 308-309 (1966).

If the purpose of the classification is to prevent excessive, monopolistic or coercive rents at mobilehome parks, it is irrational to restrict ***all*** rent increases, without regard to whether the proposed rent increase is in fact excessive, monopolistic or coercive. If the purpose of the classification is to protect seniors, or persons with low income, it is irrational to single out mobilehome park owners, allowing all other businesses in Calistoga to charge unregulated prices to seniors and persons with low income.

IX. CONCLUSION

The Parkowner is not asking this Court to declare the City of

Calistoga's mobilehome rent control ordinance unconstitutional. Nor does the Parkowner seek to debate the wisdom of the City Council's decision to adopt rent control, or to challenge the ordinance on the ground that rent control is not sound social policy. For purposes of these proceedings, the Parkowner concedes that the ordinance is constitutional on its face, and that prohibiting excessive, monopolistic and coercive rents are legitimate goals of government.

Similarly, the Parkowner does not seek the unfettered discretion to set the rent at whatever level it chooses, as if rent control did not exist. The Parkowner seeks only the right to increase the rent to the non-excessive, non-monopolistic and non-coercive rate of $625 per month. The Parkowner readily concedes that once that adjustment is made, the Parkowner may not increase the rents again, unless authorized by law to do so.

Although the Parkowner presented evidence to the hearing officer demonstrating that the current rent structure violated its rights under the takings, due process and equal protection clauses, the hearing officer declined to rule on those constitutional issues. Despite that failure, the hearing officer relied on the purposes of the ordinance to justify his

decision not to increase the rent to $625 per month.

Even an ordinance that is adopted for a valid public purpose must be applied in a manner that is consistent with the United States Constitution. Because the Parkowner has alleged facts demonstrating the hearing officer applied the ordinance in a manner that results in a violation of the takings, due process and equal protection clauses, the District Court erred in dismissing this case at the pleading stage. Accordingly, the decision of the District Court must be reversed with instructions requiring it to review the evidence submitted at the underlying hearings before determining whether the Parkowner's constitutional rights have been violated.

Dated: April 24, 2013

Respectfully submitted,

s/Anthony C. Rodriguez
Anthony C. Rodriguez
Attorney for the Appellant

STATEMENT OF RELATED CASES
PURSUANT TO RULE 28-2.6

The Appellant is not aware of any pending cases in this Court that are related to this case, as that term is defined in Rule 28-2.6.

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because it contains 13,681 words, excluding the parts of the brief the Rule exempts from limitation. This brief complies also with the typeface and type style requirements of Rule 32(a)(5) and (6), because it is in a proportionally spaced typeface with a 14 point Times New Roman font.

Dated: April 24, 2013

Respectfully submitted,

s/Anthony C. Rodriguez
Anthony C. Rodriguez
Attorney for the Appellant

PROOF OF SERVICE BY FEDERAL EXPRESS

I declare I am employed in the County of Alameda, California. I am over the age of 18 years and I am not a party to the within cause. My business address is 1425 Leimert Boulevard, Suite 101, Oakland, California 94602.

On April 24, 2013, I served two copies of the following document(s):

1. APPELLANT'S OPENING BRIEF;

2. EXCERPT'S OF RECORD (TWO VOLUMES)

on the following by placing true copies thereof enclosed in a sealed package with overnight delivery fees provided for and deposited it in a facility regularly maintained by Federal Express, addressed as follows:

Attorney for Respondents
Matthew Visick, Esq.
Burke, Williams & Sorensen, LLP
1901 Harrison Street, Suite 900
Oakland, California 94612

On April 24, 2013, I served four copies of the following document(s):

1. EXCERPT'S OF RECORD (TWO VOLUMES)

on the following by placing true copies thereof enclosed in a sealed package with overnight delivery fees provided for and deposited it in a facility regularly maintained by Federal Express, addressed as follows:

Clerk of the Court
Office of the Clerk
James R. Browning Courthouse

U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

On April 24, 2013, APPELLANT'S OPENING BRIEF will be filed electronically with the Ninth Circuit Court of Appeals.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 2013 at Oakland, California.

s/ Anthony C. Rodriguez
Anthony C. Rodriguez