IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MHC FINANCING LTD PARTNERSHIP, et al,

Plaintiffs,

v

CITY OF SAN RAFAEL,

Defendant.
_____/

CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Defendant-Intervenor.
_____/

No C-00-3785 VRW

ORDER

In their first amended complaint, filed on June 6, 2002, plaintiffs MHC Financing Limited Partnership and Grapeland Vista sued defendant City of San Rafael ("the City") on six claims:

(1) a facial regulatory takings claim alleging that the City's Mobilehome Rent Control Ordinance (San Rafael Municipal Code, Title 20) ("the ordinance") did not "substantially advance" a legitimate state interest and thus violated the Fifth and

Fourteenth Amendments;

(2) a claim seeking a declaration that the ordinance caused an unlawful regulatory taking;

(3) a breach of contract claim relating to a failed settlement agreement between the parties;

(4) a claim for breach of duty of good faith and fair dealing also relating to the failed settlement agreement;

(5) a claim seeking a declaration that if plaintiffs were to initiate a process of changing the use of the Contempo Marin Mobilehome Park ("the Park"), this change would not violate the Mobilehome Residency Law, Cal Civ Code § 798.56(g) and

(6) a claim seeking a declaration that if plaintiffs are not permitted to change the use of the Park, then they have suffered a physical taking.

FAC (Doc #78).

In November 2002, a jury ruled in favor of the City on claims 3 and 4, and the court tried plaintiffs' other claims but delayed its findings of fact and conclusions of law pending the Supreme Court's decision in Lingle v Chevron USA, Inc, 125 S Ct 2074 (2005). Doc ##350, 412. Although the court terminated all pending motions in this case, (Doc #412), the court subsequently revived plaintiffs' earlier-filed motions for judgment as a matter of law notwithstanding the verdict on claim 3 (Doc #351) and for a new trial on claims 3 and 4. Doc #417. After Lingle was decided, defendant-intervenor Contempo Marin Homeowners Association ("the Association") renewed its motion to dismiss claims 1, 2, 5 and 6 (Doc #446), and plaintiffs moved to amend their complaint to add other theories that the ordinance is a taking in violation of the

Fifth Amendment, and to add a Fourteenth Amendment substantive due process claim (Doc #450).

For the reasons that follow, the court: (1) DENIES plaintiffs' motion for judgment as a matter of law notwithstanding the verdict on claim 3; (2) DENIES plaintiffs' motion for a new trial on claims 3 and 4; (3) DENIES the Association's renewed motion to dismiss claims 1 and 2 and GRANTS without prejudice the Association's renewed motion to dismiss claims 5 and 6 (Doc #446) and (4) GRANTS plaintiffs' motion to amend their complaint (Doc #450). This order addresses these motions in turn.

I

Under FRCP 50, a court "may set aside a jury verdict and grant judgment as a matter of law 'only if, under the governing law, there can be but one reasonable conclusion as to the verdict.'" Settlegoode v Portland Public Schools, 371 F3d 503, 510 (9th Cir 2004) (quoting Winarto v Toshiba America Electronics Components, Inc, 274 F3d 1276, 1283 (9th Cir 2001)); FRCP 50(b). "When evaluating such a motion, 'the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.'" Id (quoting Reeves v Sanderson Plumbing Products, Inc, 530 US 133, 150 (2000)).

In this case, plaintiffs' motion for judgment as a matter of law stems from a July 2001 settlement agreement between the parties. Under the agreement, the City would "initiate" amendments to the ordinance that, inter alia, would eliminate vacancy control. Doc #23, Ex 1, § 2. In return, plaintiffs would agree to drop the current suit and not challenge the constitutionality of the amended

ordinance. Id. After encountering strong political opposition, the City declined to eliminate vacancy control. Although the court originally agreed to enforce the agreement against the City (Doc #56), on reconsideration, the court determined that the agreement was ambiguous. Doc #99. Plaintiffs amended their complaint to add claims 3 and 4 (FAC) and argued that the agreement required the City to eliminate vacancy control. The City claimed that the agreement merely obliged the City to attempt such an action. A jury unanimously decided in favor of the City on claims 3 and 4. Doc #350.

Plaintiffs contend that they are entitled to a directed verdict on claim 3 because the plain language of the agreement, canons of contract interpretation and extrinsic evidence demonstrate that the agreement unambiguously supports plaintiffs' interpretation of the settlement agreement. Doc #351 at 7-22. In addition, plaintiffs argue that the City should be judicially estopped from attacking the validity and enforceability of the agreement. Id at 23-24. Plaintiffs also urge the court to exercise its equitable powers to enforce the settlement agreement notwithstanding the jury's verdict. Id at 24-25. Finally, in a supplemental memorandum, plaintiffs assert that "[t]he California Supreme Court's recent opinion in Southern California Edison Co v Peevey, 31 Cal 4th 781 (2003), makes clear that the heart of the City's case was founded on a plain misstatement of the law." Doc #422 at 1. The court considers each of these arguments in turn.

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A

Plaintiffs first contend that the settlement agreement is unambiguous on its face and that no reasonable jury could conclude that the agreement did not obligate the City to enact the ordinance in question. Doc #351 at 7-21. Additionally, plaintiffs argue that the City's proffered interpretation would violate "four fundamental canons of contract interpretation" by "mak[ing] the Agreement illusory," contravening the preference of federal and state law toward enforcing settlement agreements, failing to "construe the [ambiguous] language against the drafter of the contract" and not giving the contract "a natural common sense interpretation." Id at 21-22.

Plaintiffs appear to contest issues already decided by the court in its August 7, 2002, decision. As held by the court and explained in the jury instructions, the meanings of the words "process" and "implement" in paragraph 2.7 and "subject to approval" and "initiate" in paragraph 2.1 are, on their face, ambiguous and require consideration of parol evidence to determine their meanings. Doc #99. Hence, a jury could reasonably have found that the City was not obligated to enact the proposed amendments, and such a finding does not render the contract either illusory or otherwise unenforceable. Because plaintiffs merely seek to rehash issues already decided by this court and did not seek leave to file a motion for reconsideration pursuant to Civ LR 7-9, the court sees no reason to revisit its previous decision.

Additionally, the extrinsic evidence presented at trial also demonstrates that a jury reasonably could have adopted the City's interpretation of the agreement. For example:

* During negotiations, one of plaintiffs' drafts of a proposed stipulation referring to the settlement agreement stated that "the City shall adopt certain amendments to its municipal Code * * *." The City's counsel responded by removing the obligatory language and replacing it with a recital that upon execution of the agreement, the City "will commence the process of adopting an ordinance amending specified sections * * *." Doc #407 at 12; compare Doc #333 at Trial Ex 67 with Doc #333 at Trial Ex 99.

* Plaintiffs' counsel, Robert Coldren, insisted on including a provision that plaintiffs' lawsuit not be dismissed until the amendment was actually enacted. Doc #407 at 10; Doc #343 at 15:20-16:8.

* Recognizing that tenants would very likely oppose the Ordinance at the public hearing, Ragghianti advised Coldren that it was not a good idea for plaintiffs to appear at the upcoming City Council meeting to consider the amendments. Doc #397 at 16; Doc #343 at 16:18-17:20.

* The July 5, 2001, cover letter to a July 11, 2001, stipulation stated that "the City of San Rafael shall immediately commence the processing of certain specified amendments" and the case would be dismissed "provided the City's ordinance amendments are adopted * * *." Doc #11.

* On August 17, 2001, after the agreement had been executed, MHC's President, Thomas Heneghan, wrote in an email to other MHC employees that "[t]he settlement is not yet final and won't be until October at the earliest," which might indicate that he understood that the agreement was conditional pending approval in the public hearing. Doc #397 at 17; Doc #400 at 10.

Viewing this evidence in the light most favorable to the City, a jury could reasonably conclude that the City did not agree to enact the proposed amendments, but instead only agreed to consider and vote on them. Accordingly, the court declines to disturb the jury's unanimous verdict on the basis of extrinsic evidence.

B

Plaintiffs also contend that "[t]he City should be estopped from denying that the Agreement is valid and enforceable and [that the agreement] compelled [the City] to enact the amendments." Doc #351 at 23. Judicial estoppel applies when a

party asserts a position in a legal proceeding that is contrary to a position it previously took in the same proceeding. Cal Coastal Comm'n v Tahmassebi, 81 Cal Rptr 2d 321, 69 Cal App 4th 255, 259-60 (1998). Here, plaintiffs assert that the City represented to the court in a July 5, 2001, letter that the parties "fully settled the case," Doc #11 (internal quotation marks omitted), but now assert "a totally inconsistent position, i e, that the Agreement was not a final agreement." Doc #351 at 23.

Plaintiffs' judicial estoppel argument is procedurally improper because they did not make this argument earlier in their FRCP 50(a) motion before judgment, and thus cannot make it in the present FRCP 50(b) motion. Lifshitz v Walter Drake & Sons, Inc, 806 F2d 1426, 1429 (9th Cir 1986) ("A directed verdict motion can * * * serve as the prerequisite to a jnov only if it includes the specific grounds asserted in the jnov motion."); see also Image Tech Servs v Eastman Kodak Co, 125 F3d 1195, 1212 (9th Cir 1997) ("We strictly adhere to the requirements of Rule 50(b), which prohibit a party from moving for a judgment as a matter of law after the jury's verdict unless that motion was first presented at the close of evidence.").

Nonetheless, plaintiffs contend that "in its Rule 50(a) motion, MHC explicitly raised each of the City's statements upon which MHC supports its judicial estoppel argument" and that "it was also raised in the opposition to the motion to reconsider." Doc #400 at 12-13. But stating facts that form the basis of an argument and making the argument itself are not the same thing. Unlike cases in which a moving party implicitly made an argument in its FRCP 50(a) motion but only failed to label the argument as

such, see, e g, Gilbrook v City of Westminster, 177 F3d 839, 863-64 (9th Cir 1999), in this case, plaintiffs' FRCP 50(a) motion failed even to suggest the present judicial estoppel argument. See Doc #325.

In any event, plaintiffs' judicial estoppel argument is not persuasive, because the City has not made inconsistent representations to this court. The City's July 5, 2001, letter states that this case would be dismissed "provided the City's ordinance amendments are adopted." Doc #11. At no point in the letter does the City represent to the court that the agreement "compelled [the City] to enact the amendments."

Morever, plaintiffs' argument that "[t]he City should be estopped from denying that the Agreement is valid and enforceable" misses the point. The City is not challenging the validity or enforceability of the agreement. Rather, the City merely disagrees with plaintiffs about its obligations under the agreement. Indeed, the City was obligated to "implement" the amendments; the only question was whether this provision required the City merely to consider the amendments or instead to enact the amendments.

C

Plaintiffs further argue that the court should construe the agreement and award damages pursuant to its "inherent equitable authority." Doc #351 at 24-25. Plaintiffs in their reply memorandum request that the court deem their argument as a motion to reconsider the court's previous ruling denying plaintiffs' motion to strike the jury demand on their breach of contract claims. Doc #400 at 13 n3.

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Plaintiffs' request does not conform to the procedural requirements of Civ LR 7-9. In any event, plaintiffs' arguments are not persuasive. Plaintiffs contend that the court may "enforce" the settlement agreement that the court had initially approved. But it is axiomatic that a claim seeking damages is within the proper province of a jury, if a proper jury demand has been made, as the court found in this case. See Dairy Queen, Inc v Wood, 369 US 469, 477-78 (1962). As the Supreme Court explained, "in the federal courts equity has always acted only when legal remedies were inadequate." Beacon Theatres, Inc v Westover, 359 US 500, 509 (1959). Even though plaintiffs have attempted to characterize their prayer for damages under the settlement agreement as equitable in nature, because legal remedies were available to compensate plaintiffs for their alleged injury, their breach of contract claims were properly tried before a jury.

Plaintiffs also urge the court equitably to enforce the contract "by enjoining the City from applying the vacancy control provisions of the Rent Control Ordinance." Doc #351 at 25. The court declines to exercise any equitable power it may have. Up to this point, plaintiffs have sought only damages in the breach of contract action, not injunctive relief to prevent the City from enforcing vacancy control. Additionally, as explained in the court's March 19, 2002, order (Doc #56), even under the construction urged by plaintiffs, the City could have re-enacted vacancy control any time after repeal. The settlement agreement in no way bound the City to relinquish its police power and to keep vacancy control off the books in perpetuity. Accordingly, the court DENIES plaintiffs' request for injunctive relief.

D

Finally, plaintiffs argue for entry of judgment in their favor based on Southern California Edison Co v Peevey, 74 P3d 795, 31 Cal 4th 781 (2003), which according to plaintiffs held that California law does not prohibit a city from agreeing in closed session to enact legislation. Doc #422 at 10. Citing various trial excerpts, plaintiffs contend that the City contradicted Peevey by arguing that state law required a "meaningful public hearing" before the City could adopt the settlement agreement, and hence, that plaintiffs' interpretation of the agreement was contrary to law.

But plaintiffs mischaracterize the City's argument. The excerpts referenced by plaintiffs, placed in context, demonstrate that the City was advocating its proferred interpretation based on the parties' course of conduct. The City elicited testimony that the "processing" of an ordinance, as the parties mutually understood, required a public hearing and that the parties' course of conduct demonstrated that the City had not agreed to bind itself contractually to amend the ordinance before the hearing. In this regard, both plaintiffs and the City elicited testimony from witnesses concerning the custom and usage of certain terms, such as "public hearing", "process" and "initiate." See Doc #343 at 10:13-11:6, 13:25-14:22 (Coldren testimony, plaintiffs' negotiating attorney); Doc #340 at 114:6-115:10 (Taylor testimony, the City's negotiating attorney).

Moreover, the jury instructions further indicate that Peevey has no bearing on this case, because the court instructed the jury that plaintiffs' interpretation of the contract was not

contrary to state law. Specifically, the court instructed that "[t]he City Council may * * * agree in closed session, as part of a settlement of litigation, to make a binding contractual amendment to amend its laws. By giving you this instruction, I do not mean to suggest in any way that the City did or did not agree to amend its ordinance by signing the settlement agreement. That is for you to decide." Doc #331 ("Government processes" instruction).

The court must presume "that jurors follow their instructions." Richardson v Marsh, 481 US 200, 206 (1987). Absent reasonable grounds to believe that juror confusion due to a misleading argument and erroneous instruction "ensured a verdict against the weight of the evidence", Shaw v Lindheim, 809 F Supp 1393, 1401 (CD Cal 1992), there is no basis to disturb the jury's decision.

E

Because plaintiffs have not demonstrated entitlement to judgment as a matter of law, the court DENIES their motion for a directed verdict under FRCP 50.

II

In the alternative, plaintiffs move for a new trial under FRCP 59(a), which provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States * * * .

Plaintiffs present two main arguments why they are entitled to a new trial on their contract claims. First,

plaintiffs argue that the jury's verdict was against the clear weight of the evidence. Second, plaintiffs contend that several prejudicial errors in the admission of evidence and jury instructions led to an erroneous verdict.

A

"A district court may order a new trial based on insufficient evidence only if it finds that the jury's verdict 'is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result.'" Ace v Aetna Life Ins Co, 139 F3d 1241, 1248 (9th Cir 1998) (quoting EEOC v Pape Lift, Inc, 115 F3d 676, 680 (9th Cir 1997)). In determining whether the jury's verdict was contrary to the clear weight of the evidence, "the district judge has the right, and indeed the duty, to weigh the evidence as he saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in his conscientious opinion, the verdict is contrary to the clear weight of the evidence * * *." Murphy v Long Beach, 914 F2d 183, 187 (9th Cir 1990) (emphasis omitted) (quoting Moist Cold Refrigerator Co v Lou Johnson Co, 249 F2d 246, 256 (9th Cir 1957)).

Nevertheless, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tennant v Peoria & Pekin Union Ry Co, 321 US 29, 35 (1944). The court must display "a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system" and "in most cases * * * should accept the findings of the jury, regardless of his own doubts in the matter." Landes Constr Co v Royal Bank of

Canada, 833 F2d 1365, 1371 (9th Cir 1987) (quoting Wright & Miller, 11 Federal Practice and Procedure § 2806 at 48-49 (1973)) (internal quotation marks omitted).

In support of their argument that the jury's verdict was against the clear weight of the evidence, plaintiffs essentially reiterate the same arguments that they made in connection with their FRCP 50 motion. Plaintiffs contend that the contract language reflected a binding agreement, not a unilateral option. But as the court explained on previous occasions and to the jury, there is no question that the settlement agreement was binding; the only issue was whether the City was obligated to amend its ordinance under the agreement.

Plaintiffs also contend that the clear weight of the extrinsic evidence supported their position. As noted earlier, the evidence presented shows that this simply is not true; the City presented significant evidence in its favor. The existence of ample evidence to support the City's position prevents the court from finding that the jury's verdict was against the great weight of the evidence and that plaintiffs are entitled to a new trial on that basis.

B

Plaintiffs also argue that erroneous jury instructions and flawed evidentiary rulings, coupled with the City's "confusing arguments" concerning the propriety of conducting a meaningful public hearing, resulted in prejudicial error sufficient to warrant a new trial.

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While the court declined several requests by plaintiffs for an instruction "to make clear, that * * * the City Council does have the authority * * * to bind itself to take legislative action as part of a settlement agreement entered into in closed session," Mot NT at 17, these rulings do not amount to error, much less prejudicial error, because as discussed earlier in connection with plaintiffs' motion for judgment as a matter of law, the City did not argue that plaintiffs' interpretation of the settlement agreement was contrary to law. Although the City's arguments certainly suggest that it would have been contrary to custom for the City to have contractually bound itself to enact the amendments in question, the City's arguments do not imply that such an obligation would have been legally untenable. In fact, as discussed earlier, the court specifically issued instructions indicating that plaintiffs' interpretation of the contract was legal. Doc #331 ("Government processes" instruction). Because the court must presume that jurors follow their instructions, and there are no grounds to believe that juror confusion led to a verdict against the weight of the evidence, there is no basis to award a new trial.

In addition, the trade custom or usage testimony presented was not "subjective, unexpressed" intent, which is the kind of intent that the court cautioned the jury on numerous occasions to disregard. Instead, testimony concerning the special or technical meanings of certain words such as "initiate" or "process" was admitted for its probative value regarding trade or custom usage as understood by the parties. Even though plaintiffs

might not be "in the trade or business of municipal lawmaking," their negotiating attorney was so engaged. See Doc #333 at 13:25-14:8. Because "[t]he actions and statements of an attorney are considered to be those of the client," the use of specialized terms in a particular setting gives rise to an objective communication of the client's intent. Doc #331 ("Agency of attorney" instruction).

Furthermore, the court instructed the jury that to give "a word a special or technical meaning[, it] must find that each party knew or had reason to know of the special or technical meaning of such word." Doc #331 ("Meaning of words" instruction). Again, the court must presume that the jury followed its instructions to determine whether the parties met their burdens. But "even the improper admission of evidence is not grounds for granting a new trial unless it constitutes prejudicial error." Morgan v Woessner, 997 F2d 1244, 1261 (9th Cir 1993). Here, because the jury was presented with a large amount of non-custom or trade use testimony on which to rest its verdict, plaintiffs cannot demonstrate prejudice.

2

Plaintiffs also argue that the court should have instructed the jury on Cal Civ Code § 1649, which provides in relevant part:

> If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

The court declined plaintiffs' instruction primarily because the instruction would have implicated the parties' unexpressed subjective intent, evidence of which plaintiffs had

vociferously objected to prior to trial. Plaintiffs contend in connection with this motion that the promisee's understanding may entail "objectively reasonable expectations", not "subjective beliefs." Mot NT at 32 (citing Ticor Title Ins Co v Employers Ins of Wausau, 48 Cal Rptr 2d 368, 373 (Cal App 1996)).

But as explained by the court at the pretrial conference and in AIU Ins Co v Superior Court, 799 P2d 1253, 51 Cal 3d 807 (1990), this rule of contract interpretation was meant to protect those in inferior bargaining positions and against contracts of adhesion, such as insurance contracts. Id at 822-23. By contrast, both parties here were well-represented by counsel.

In addition, plaintiffs contend that this instruction was critical to their case because of evidence demonstrating that plaintiffs understood the settlement agreement to obligate the City to amend the ordinance. But, as detailed above, there was ample evidence for the jury to conclude that plaintiffs did not possess such an understanding. Hence, even assuming the court's decision not to instruct the jury on Cal Civ Code § 1649 was erroneous, the error was not prejudicial.

3

Plaintiffs also argue that jurors should have been instructed on Cal Gov Code § 54957.1, which requires that approval of an agreement to end litigation in closed session be reported after the settlement is final upon inquiry of any person. According to plaintiffs, this instruction would have allowed the jury to place in context a letter written by City officials dated July 13, 2001, which stated that "the City Council has unanimously determined to settle this matter * * *." Mot NT at 35.

Plaintiffs contend that "[w]ithout the instruction, the jury had no way of understanding that the City's adherence to the procedures dictated by Section 54957.1 showed that the City knew the Agreement was final rather than merely conditional." Doc #409 at 20. As earlier noted, however, the question presented to the jury was not whether the settlement agreement was final. The court explained on numerous occasions that "the settlement agreement is a valid, binding and enforceable contract and became so when the City of San Rafael City Council approved the settlement agreement during a closed session on July 2, 2001." Doc #331 ("Breach of contract - contract defined" instruction). Instead, the jury's role was to ascertain the City's obligations under the settlement agreement.

4

Similarly, plaintiffs contend that the court's failure to instruct the jury on the "strong public policies in favor of settlement agreements and enforceable contracts" warrants a new trial. Mot NT at 35. But plaintiffs' proposed instruction would have been irrelevant in this case because there was no question that the City was obligated at least to consider the amendments and that the settlement agreement was valid and enforceable. The possibility that the City was not contractually bound to approve the contemplated amendments does not render the settlement agreement illusory or otherwise unenforceable.

5

Plaintiffs also argue that they should have been permitted to introduce testimony concerning statements made at the mediation held before the retired Honorable Eugene Lynch. Plaintiffs contend that any confidentiality attached to statements

made during settlement discussions was waived by the City in a proposed settlement outline attached to a letter dated March 8, 2001, to plaintiffs' counsel. Mot NT at 37-39.

This outline stated: "The parties agree to waive confidentiality to the extent necessary for the City to inform representatives of the homeowners associations about the proposed resolution." Doc #333 at Trial Ex 69. Subsequently, the City explained to residents of Contempo Marin that it decided to enter into the settlement agreement in part based on "[i]nput through mediation conducted by retired Federal Judge Eugene Lynch." See id at Trial Ex 35.

Plaintiffs correctly note that "[o]nce [a] party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." Atari Corp v Sega of America, 161 FRD 417, 420 n4 (ND Cal 1994) (quoting Burlington Industries v Exxon Corp, 65 FRD 26, 46 (D Md 1974)). In Atari, the court determined that voluntary production of a videotape constituted waiver as to the contents of the videotape and matters related to formulation of the tape. But nothing in Atari (or the City's actions or its March 8, 2001, letter) suggests that by revealing the mediator's statements concerning the legal merits of plaintiffs' claims, the City waived its privilege to all other statements made during the mediation, including those made at the commencement of settlement negotiations. Instead, Atari indicates that such waivers, if they occur, are limited to the particular subject matter waived.

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Moreover, plaintiffs have not shown that they suffered any prejudice because the court excluded testimony about statements at the mediation. Ruvalcaba v City of Los Angeles, 64 F3d 1323, 1328 (9th Cir 1995) ("A new trial is only warranted when an erroneous evidentiary ruling 'substantially prejudiced' a party."). Plaintiffs claim that deposition testimony from MHC president Thomas Heneghan demonstrates that "the statements made by the City at the mediation were at odds with the City's theory at trial," and that Heneghan's testimony could have refuted the City's "misleading implication[]" that "there was no final settlement agreement based upon an email that Heneghan sent in August 2001." Mot NT at 39. But plaintiffs do not explain why this particular evidence would have persuaded the jury to reach a different verdict, especially since plaintiffs contend that they already presented significant intrinsic and extrinsic evidence at trial to attack the City's theory. See, e g, id at 2 ("The jury's verdict was stunning and against the clear weight of the evidence."). Moreover, Heneghan already had ample opportunity to testify about what he meant when he wrote the August 2001 email, and plaintiffs fail to explain why his testimony regarding the mediation would have been anything more than cumulative. See, e g, Doc #340 at 83:22-90:17. In addition, the probative value of the mediation testimony seems especially slight given that the settlement agreement was not finalized until months after mediation concluded. Accordingly, the court is not persuaded that plaintiffs suffered the "substantial prejudice" necessary to grant a new trial on this basis.

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Finally, plaintiffs assert that the court prejudicially erred by excluding evidence of unexpressed, subjective intent. In particular, plaintiffs present deposition testimony by Mayor Boro that he understood the word "implement" in the settlement agreement to mean "enact." Mot NT at 39-41.

But the "ruling" that plaintiffs contend constituted error and prevented introduction of the testimony at issue was a ruling in favor of plaintiffs on their motion to exclude evidence of City witnesses' unexpressed subjective intent. Indeed, the court granted plaintiffs' motion directed at specific deposition testimony provided by City officials, including 10 pages of Mayor Boro's deposition. Doc #386 at 9:17-20 (Plaintiffs' attorney states that "[A]ny effort of a witness to get on the stand and simply testify to what they were thinking some time ago should be inadmissible."); id at 14:7-15:4 (sustaining objection as to Boro testimony). Plaintiffs never sought specifically to present the testimony in question.

Plaintiffs argue that evidence of unexpressed subjective intent is generally inadmissible except if it constitutes an opposing party's admission. Plaintiffs, however, provide no legal authority for this creative construction of the parol evidence rule. The opposite would appear to be true: "Ordinarily, absent fraud or mistake of fact, the outward manifestations or expression of consent in [a written integrated] contract is controlling, i e, mutual assent is gathered from the reasonable meaning of words and the acts of the parties, not from their unexpressed intentions or understanding." Merced County Sheriff's Employee's Ass'n v County

of Merced, 188 Cal App 3d 662, 233 Cal Rptr 519, 525-26 (1987) (citing Witkin, 1 Summary of California Law, Contracts § 88 at 92 (1973)). Nor does Barton v Elexsys Int'l, Inc, 73 Cal Rptr 2d 212, 62 Cal App 4th 1182 (1998), support plaintiffs' position. That case did not involve interpretation of ambiguous contract terms, but instead whether a party "had read and understood" an agreement, id at 1188 & n3, and whether the parties had subsequently modified the agreements at issue. Id at 1188-91. Plaintiffs fail to provide, and the court is unaware of, any court that has carved out an "admission by party opponent" exception to the general rule against evidence of unexpressed subjective intent, a prohibition which plaintiffs themselves advocated at trial.

C

Because the court concludes that there is no basis on which to grant a new trial, plaintiffs' motion under FRCP 59 is DENIED.

III

On June 7, 2005, intervenor Contempo Marin Homeowner's Association renewed its motion to dismiss claims 1, 2, 5 and 6, which are plaintiffs' constitutional and declaratory judgment claims. Doc #446. The Association argues that claims 1 and 2 are barred by the statute of limitations, and that claims 5 and 6 seek advisory opinions from this court.

A

The Association contends that even though the court held that the City waived its statute of limitations defense by entering the July 2, 2001, settlement agreement, Doc #56 at 13, the

Association has standing to challenge plaintiffs' claims on limitations grounds because the Association joined this case after the City entered into the settlement agreement. This argument misconceives the nature of a limitations defense. The statute of limitations does not go to the court's jurisdiction; rather, "the privilege conferred by the statute of limitations is * * * a mere personal right for the benefit of the individual which may be waived." Halus v San Diego County Assessment Appeals Bd, 789 F Supp 327, 329 (SD Cal 1992) (quoting Brownrigg v Defrees, 196 Cal 534, 541 (1925)). Even though the Association has an interest in the constitutionality of the ordinance, the City is the only party being sued in claims 1 and 2. Accordingly, the statute of limitations defense belongs to the City, not to the Association.

Moreover, the Association cannot raise the limitations defense on behalf of the City because "[i]t is a well-established general rule that parties may not raise defenses that are not their own." Chailland v Brown & Root, Inc, 45 F3d 947, 951 (5th Cir 1995). In an analogous situation, the Eighth Circuit held that intervenors-defendants could not assert the defense of res judicata, noting, "This defense, if it is available at all, may only be raised by [the original defendant]. [The defendant's] decision not to assert this defense does not give the intervenors standing to raise it, as a party may assert a third party's rights only if, inter alia, the third party is unable to assert its own rights, a condition not present here." United States v Metropolitan St Louis Sewer Dist, 952 F2d 1040, 1043 (8th Cir 1992). Because the City waived its statute of limitations defense and because an intervenor "cannot enlarge the issues tendered by or

arising out of plaintiff's bill," Lake Tahoe Watercraft Rec Ass'n v Tahoe Reg'l Planning Agency, 24 F Supp 2d 1062, 1067 (ED Cal 1998) (citing Chandler & Price Co v Brandtjen & Kluge, Inc, 296 US 53, 58 (1935)), the Association does not have standing to raise the statute of limitations defense. Accordingly, the court DENIES the Association's motion to dismiss claims 1 and 2.

B

The Association also moves to dismiss plaintiffs' declaratory judgment claims 5 and 6 as advisory opinions, or alternatively, as claims that are unripe for adjudication. Plaintiffs counter that claim 5 only seeks a declaration that plaintiffs have the present right to initiate the process for changing the use of the Park, and that claim 6 is asserted in the alternative to claim 5. Doc #452, Ex C at 7.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Nat'l Park Hospitality Ass'n v DOI, 538 US 803, 808 (2003) (internal quotation marks omitted). To satisfy the constitutional requirement, there must exist a case or controversy, with issues that are "definite and concrete, not hypothetical or abstract." Thomas v Anchorage Equal Rights Comm'n, 220 F3d 1134, 1139 (9th Cir 2000) (en banc) (internal quotation marks omitted) (quoting Railway Mail Ass'n v Corsi, 326 US 88, 93 (1945)). Moreover, ripeness "is peculiarly a question of timing. [Its] basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." Thomas v Union Carbide Agric Prods Co, 473 US 568, 580 (1985) (citation omitted) (omission in original).

In this case, the court agrees with the Association that claims 5 and 6 are unripe. With respect to claim 5, plaintiffs implicitly admit in the FAC that they has not yet tried to change the use of the Park. See, e g, FAC, ¶ 93 ("MHC would be acting entirely within its legal rights by commencing the legal process to change the use of the Park, and would seek to do so solely for rational business reasons." (emphasis added)). Hence, plaintiffs are asking this court to validate a potential change in their future park use before plaintiffs have even applied for this change under state law. The court cannot, without speculating as to future events, make such a declaration.

Even if the court could characterize the relief sought in claim 5 as a declaration of a "present right" to initiate a change in the Park's use, this issue is not ripe for adjudication because it depends on "contingent future events that may not occur as anticipated, or indeed not occur at all." 18 Unnamed John Smith Prisoners, 871 F2d 881, 883 (9th Cir 1989) (internal quotation marks omitted) (quoting Union Carbide, 473 US at 580-81). In short, claim 5 rests on hypothetical, not established, facts. See Aetna Life Ins Co v Haworth, 300 US 227, 242 (1937) (requiring "an adjudication of present right upon established facts"). Claim 6 is also unripe because it depends on first determining claim 5. Because both claims 5 and 6 are unripe, the court GRANTS the Association's motion to dismiss these claims. The court dismisses these claims without prejudice to plaintiffs raising these issues in the context of an actual case or controversy involving a change or plan to change use of the Park. Should plaintiffs fail on the claims discussed in the next section, such a change may very well

be sought and this order does not preclude plaintiffs from pursuing a change in use of the Park or seeking relief if that change is not permitted.

IV

Plaintiffs also seek leave to amend their complaint to add new takings theories after the Supreme Court in Lingle held that the "'substantially advances' formula is not a valid takings test." 125 S Ct at 2087. The proposed new theories are that the ordinance is: (i) a physical taking, (ii) an exaction, (iii) a private taking and (iv) a regulatory taking. Plaintiffs also move to add a claim alleging a Fourteenth Amendment substantive due process violation. Doc #450.

The court first finds that amendment under FRCP 15(b) is improper here. Plaintiffs incorrectly assert that their new takings theories and substantive due process claim were "tried by express or implied consent of the parties." Rather, both discovery and trial focused on whether the City's ordinance substantially advances a legitimate state interest. Although elements of plaintiffs' new takings theories and substantive due process claim may overlap in some ways with the "substantially advances" claims that were tried, the only constitutional claims clearly and coherently presented at trial were plaintiffs' claims that the ordinance did not substantially advance a legitimate state interest.

Nonetheless, the court agrees that plaintiffs should be granted leave to amend their complaint under FRCP 15(a), which provides that leave to amend "shall be freely given when justice so

requires." "This policy is 'to be applied with extreme liberality.'" Eminence Capital, LLC v Aspeon, Inc, 316 F3d 1048, 1051 (9th Cir 2003) (quoting Owens v Kaiser Foundation Health Plan, Inc, 244 F3d 708, 712 (9th Cir 2001)). In Foman v Davis, 371 US 178, 182 (1962), the Supreme Court offered several factors for district courts to consider when faced with an FRCP 15(a) motion:

> In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc — the leave sought should, as the rules require, be 'freely given.'

Foman, 371 US at 182; see also Smith v Pacific Properties and Development Co, 358 F3d 1097, 1101 (9th Cir 2004).

"Not all of the [Foman] factors merit equal weight. As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight." Eminence Capital, 316 F3d at 1052. "The party opposing amendment bears the burden of showing prejudice." DCD Programs, Ltd v Leighton, 833 F2d 183, 187 (9th Cir 1987). "Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, 316 F3d at 1052.

The City contends that plaintiffs already received one trial and that allowing the amendment "would require substantial additional expense as fact and expert discovery was conducted concerning these new matters, and then a new trial was conducted." Doc #458 at 12:6-8. The City also argues that allowing amendment would result in undue delay. Both of these arguments lack merit.

The previous trial likely will streamline further discovery and further trial proceedings. While the court recognizes the inconvenience of litigation, these concerns did not prevent the City from scuttling the settlement agreement between the parties four years ago, nor do they outweigh plaintiffs' interest in having their claims adjudicated on the merits.

Nonetheless, the City argues that plaintiffs' "motion to amend should not be analyzed under the liberal standard of Rule 15(a), but instead under Rule 16(b) because it comes three years after" the April 9, 2002, scheduling order. Doc #458 at 10:7-8 (emphasis omitted). FRCP 16(b) requires "a showing of good cause" to amend the scheduling order. "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." Johnson v Mammoth Recreations, 975 F2d 604, 609 (9th Cir 1992).

To be sure, plaintiffs could have included their new takings theories and substantive due process claim in their original complaint, instead of presenting only the strongest theory for their constitutional claims. But plaintiffs can hardly be faulted for choosing to rely on the "substantially advances" test, which was controlling law when plaintiffs filed their FAC. Indeed, plaintiffs' decision to pursue only the "substantially advances" theory very likely would have saved time and effort for the litigants and the court had that theory survived Lingle. Considering the efficiency of strategically limiting claims, the liberal thrust of the federal rules and the desirability of

addressing this case on its merits, in addition to plaintiffs' diligence following Lingle, the court finds that plaintiffs have shown good cause to amend the scheduling order under FRCP 16(b). Plaintiffs very sensibly relied on a state of the law that the Supreme Court avulsively changed with its Lingle decision. Plaintiffs should not now be denied a trial on the merits of other claims that were unnecessary — and, indeed, potentially complex and expensive to pursue — simply because plaintiffs chose the theory that offered the most direct avenue to relief. Accordingly, the court GRANTS plaintiffs' motion to amend their complaint.

V

In sum, the court: (1) DENIES plaintiffs' motion for judgment as a matter of law notwithstanding the verdict on claim 3 (Doc #351); (2) DENIES plaintiffs' motion for a new trial; (3) DENIES the Association's renewed motion to dismiss claims 1 and 2 and GRANTS the Association's renewed motion to dismiss claims 5 and 6 (Doc #446) and (4) GRANTS plaintiffs' motion to amend their complaint (Doc #450). The court DIRECTS plaintiffs to file a second amended complaint consistent with this order no later than February 17, 2006. Defendant shall have 10 days, as specified under FRCP 15(a), in which to file a response after service of the second amended complaint.

Additionally, the court DIRECTS the parties to file a joint statement on or before February 8, 2006, detailing what further discovery, if any, needs to be taken on plaintiffs' new claims, and proposing a tentative trial schedule for those claims. The parties are also instructed to appear for a case management

conference on March 7, 2006, at 9:00 AM, to discuss the issues raised in their joint statement.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge