SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20 (will be heard in Department 6)
Honorable Evette D. Pennypacker, Presiding (for Hon. Socrates Manoukian)

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: May 28, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

THIS CALENDAR WILL BE CALLED IN DEPARTMENT 6. IF YOU PLAN TO ATTEND REMOTELY, PLEASE USE THE DEPT. 6 TEAMS LINK FROM THE COURT WEBSITE.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

LINE #	CASE #	CASE TITLE	RULING
1	2014-1-CV-259575	Unifund CCR, LLC vs Mohammad Ahghari	The Court does not have the complete file for this claim of exemption. Judgment debtor is ordered to appear and provide the Court with a copy of the complete file.
2	22CV404883	Imelda Jimenez vs Robert T Beldsoe, et. al.	Defendant Bledsoe Family Properties, LLC's demur to Plaintiff Imelda Jimenz's Third Amended Complaint is SUSTAINED without leave to amend as to the first, second, third, fifth, eighth causes of action and OVERRULED as to the fourth, sixth, and seventh causes of action. Scroll to line 2 for complete ruling. Court to prepare formal order.
3	23CV415868	Maxie Smith vs. Harry Mehta	Plaintiff's motion to quash deposition subpoena is DENIED. The motion is not timely (it looks like the records may have already been produced), is procedurally defective, and fails to state a legal or factual basis for why the discovery sought is improper. The Court understands Plaintiff intends to appear for this hearing, thus the parties are ordered present at the hearing.
4	23CV426478	Sean Hammond, Jr. vs Nicole D'Arcy	Specially appearing defendant Nicole D'Arcy, M.D.'s motion to quash service of summons is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on April 15, 2024. Plaintiff failed to oppose the motion. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) There is no proof of service of summons in the court file, no declaration from a process server, and no other information from Plaintiff in response to this motion demonstrating service. Accordingly, specially appearing defendant's motion to quash is GRANTED. Moving party to prepare formal order.
5	21CV383740	Eric Figueroa vs. City of Palo Alto	City of Palo Alto's motion for summary judgment is DENIED. Scroll to line 5 for complete ruling. Court to prepare formal order.
6-7	20CV373032	Bonnie Niesen vs Intuitive Surgical, Inc.	Defendant Intuitive Surgical, Inc.'s, Intuitive Surgical Operations, Inc.'s Intuitive Surgical Sarl's and Witnesses' s motion for protective order regarding production of complaint files, adverse event reports, and related documents and Plaintiffs' Bonnie Niesen and Travis Niesen's motion to enforce the March 22, 2024 agreed stipulation regarding Plaintiffs' motion to compel documents both concern the production of complaints. Each motion is GRANTED AND DENIED IN PART. Defendants shall (1) produce the complete complaint reports regarding the products used in Ms. Niesen's surgery and (2) a spreadsheet that contains one column of summary information about the remaining complaints within 60 days of service of the formal order, which order the Court will prepare.
8	22CV403902	Renee Soliman vs City of San Jose	Defendant City of San Jose's motion to continue trial date is GRANTED pursuant to California Rule of Court 3.1332(c)(3). Rule 3.1332(b) directs parties to "make the motion or application [for continuance] as soon as reasonably practical once the necessity for the continuance is discovered." That appears to the Court what the City has done here. The parties are ordered to meet and confer to identify mutually agreeable proposed new trial dates and appear for a trial setting conference on July 23, 2024 at 11:00 in department 20. These orders will be reflected in the minutes.

9	23CV413255	Osceola Lead Generation Holding vs. Hi.Q, Inc.	Amy S. Park, Enoch O. Ajayi, and O'Melveny & Myers LLP's motion to be relieved as counsel is GRANTED. However, a company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Although this case is stayed as to Hi.Q, Inc., Hi.Q, Inc. can only appear in this action through counsel. Thus, Hi.Q, Inc. is ordered to appear on June 20, at 10:00 a.m. in Department 20 and identify counsel who will monitor this case on Hi.Q, Inc.'s behalf for status conferences during the stay then act for Hi.Q, Inc. when the stay is lifted. If Hi.Q, Inc. fails to so identify counsel, its answer may be stricken and default entered against it. Court will modify and use order on file.
10	23C V415886	My Health Angel LLC vs Hi.Q, Inc.	Amy S. Park, Enoch O. Ajayi, and O'Melveny & Myers LLP's motion to be relieved as counsel is GRANTED. However, a company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Although this case is stayed as to Hi.Q, Inc., Hi.Q, Inc. can only appear in this action through counsel. Thus, Hi.Q, Inc. is ordered to appear on June 20, at 10:00 a.m. in Department 20 and identify counsel who will monitor this case on Hi.Q, Inc.'s behalf for status conferences during the stay then act for Hi.Q, Inc. when the stay is lifted. If Hi.Q, Inc. fails to so identify counsel, its answer may be stricken and default entered against it. Court will modify and use order on file.
11	23CV416341	Lisa Huynh vs. Jonathan Lam, et. al.	Plaintiff's motion for leave to file a second amended complaint is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on April 25, 2024. Defendant did not file an opposition. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Moreover, [it] is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). Plaintiff's request is timely and will not prejudice Defendant. Plaintiff is ordered to file the second amended complaint within 10 days of service of this formal order, which the Court will prepare.

12	24CV428722	Maribel Duran Carrillo, et. al. vs. UNIVERSAL PROTECTION SERVICE	The Irvine Company and Tesoro Crescent Village LLC's ("Irvine") motion to compel arbitration is DENIED. Irvine's cited case, *Thomas v. Westlake* (2012) 204 Cal.App. 4th 605 fn.5, does stand for the proposition that a trustee steps into the shoes of the decedent for purposes of contract claims, including for arbitration. However, that footnote does not address wrongful death/survivor claims that belong to surviving family member, but Plaintiffs' cited cases do. (See *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 846; *Goldman v. SunBridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1178; *Fitzhugh v. Granada Healthcare & rehabilitation Center, LLC* (2007) 150 Cal.app.,4th 469; *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.app.4th 674, 680; *Buckner v. tamarin* (2002) 98 Cal.App.4th 140, 142; *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990.) These cases all affirm denials of motions to compel arbitration in circumstances far more analogous to those at bar than those at issue in *Thomas*. Further, to the extent some claims are even arguably subject to arbitration, the Court exercises its discretion under Code of Civil Procedure section 1281.2(c) and orders all claims tried in a single action. Court to prepare formal order.

Calendar Line 2
Case Name: *Imelda Jimenez v. Robert Bledsoe, et al.*
Case No.: 22CV404883

Before the Court is defendant Bledsoe Family Properties, LLC's ("Defendant") demurrer to plaintiff Imelda Jimenez's ("Plaintiff") Third Amended Complaint ("TAC"). Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background

This is a landlord-tenant dispute arising out of alleged uninhabitable conditions in a residential property. Plaintiff resided at 6355 Hopi Circle in San Jose (the "Property"). (TAC, p. 2, ¶ 4.[1]) Plaintiff and her son moved into the Property in December 2019. (TAC, p. 3, ¶ 8.[2]) The monthly rental expense was $3,060. (TAC, p. 3, ¶ 9.)

From the outset, Plaintiff encountered severe issues that disrupted her ability to live and reside there peacefully. (TAC, p. 3, ¶ 10.) The rental unit had unsanitary conditions and an infestation of rodents. (*Ibid.*) The power outlets in the bathroom and living room were dangerously defective. (TAC, p. 3, ¶ 11.)

Defendant had actual knowledge and constructive notice of the numerous issues adversely impacting the habitability of the Property. (TAC, p. 3, ¶ 12.) Despite being informed within a reasonable timeframe of conditions at the Property, Defendant displayed disregard for the welfare of Plaintiff. (*Ibid.*)

Defendant engaged in ongoing construction activities and disregarded the presence of tenants while doing so. (TAC, p. 3, ¶¶ 13-14.) Defendant used Plaintiff's water and utilities for their own projects and charged her for excessive water usage. (TAC, p. 3, ¶ 13.) The Defendant's ongoing construction caused unsightly and unsanitary conditions, including the presence of debris, filth, rubbish, garbage, and rodents. (TAC, p. 3, ¶ 14.) Such conditions subjected Plaintiff to unnecessary distress and undermined her quality of life. (*Ibid.*)

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[1] References to the TAC include both page and paragraph numbers because the paragraph numbering in the TAC restarts at 1 after the general allegations.

[2] The TAC states that the lease agreement is attached as an exhibit, but there are no exhibits attached. Each of Plaintiff's three prior pleadings do have attachments.

Due to Defendant's negligence, the driveway leading to Plaintiff's garage was covered with sand and Plaintiff lost access to it. (TAC, p. 4, ¶ 15.) Plaintiff promptly reported concerns of excessive water consumption and rodent infestation to Defendant. (TAC, p. 4, ¶ 16.) Instead of addressing these issues, Defendant retaliated against Plaintiff and served her a notice of non-renewal of July 6, 2022. (TAC, p. 4, ¶ 17.)

On July 21, 2022, City of San Jose Code Enforcement conducted an inspection of the Property. (TAC, p. 4, ¶ 18.) Multiple violations of the San Jose Municipal Code were identified, including infestations of rodents and cockroaches, garbage and construction materials, a hazardous hole covered by plywood, and a compromised porch floor. (TAC, p. 4, ¶ 18.) Defendant persistently failed to address the hazardous conditions at the Property, and instead asked Plaintiff to vacate the Property. (TAC, p. 4, ¶ 19.) Plaintiff vacated the Property. (TAC, p. 4, ¶ 20.)

On September 29, 2022, Plaintiff initiated this action, asserting: (1) violations of the San Jose Municipal Code; (2) unlawful business practices; (3) breach of warranty of habitability; (4) breach of covenant of quiet enjoyment; (5) breach of covenant of good faith and fair dealing; (6) negligence; and (7) negligent infliction of emotional distress.

On November 30, 2022, Plaintiff filed a First Amended Complaint ("FAC"), asserting the same seven causes of action and adding an eighth cause of action for constructive eviction. On February 14, 2023, Defendant filed a demurrer and motion to strike portions of the FAC. On May 2, 2023, Defendant filed a notice of non-receipt of oppositions to the demurrer and motion to strike regarding the FAC. On May 9, 2023, the court (Hon. Manoukian) – noting Plaintiff had not filed oppositions – sustained the demurrer and granted the motion to strike with 10 days' leave to amend.

On May 17, 2023, Plaintiff filed a Second Amended Complaint ("SAC"), asserting the same eight causes of action set forth in the FAC. On July 21, 2023 (after filing a declaration in support of automatic extension) Defendant filed a demurrer to the SAC. On November 17, 2023, Defendant filed a notice of non-receipt of opposition to the demurrer to the SAC. On November 28, 2023, the court (Hon. Manoukian) sustained Defendant's demurrer to the SAC with 10 days' leave to amend.

On January 23, 2024, Plaintiff filed the operative TAC, again asserting causes of action for: (1) violations of San Jose Municipal Code; (2) unlawful business practices; (3) breach of warranty of

habitability; (4) breach of covenant of quiet enjoyment; (5) breach of covenant of good faith and fair dealing; (6) negligence; (7) negligent infliction of emotional distress; and (8) constructive eviction.

On April 4, 2024 (after filing a declaration in support of automatic extension), Defendant filed the demurrer now before the court, a demurrer to Plaintiff's TAC. On May 14, 2024, Plaintiff filed an opposition to the demurrer, and on May 20, 2024, defendant filed a reply.

II. Demurrer

Defendant demurs to all eight causes of action of the TAC based on failure to allege sufficient facts. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard for a Demurrer

Code of Civil Procedure, section 431.10 states: "The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: [¶] … (e) The pleading does not state facts sufficient to constitute a cause of action." A demurrer may be utilized by the party against whom a complaint has been filed to object to the legal sufficiency of the pleading as a whole, or to any cause of action stated therein, on one more of the grounds enumerated by the statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on a demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

B. Analysis

1. First Cause of Action-Violations of San Jose Municipal Code

Plaintiff alleges Defendants violated San Jose Municipal Code ("SJMC"), section 17.20.900, subdivisions (A), (I), and (J)(2).[3] (TAC, p. 5, ¶¶ 3-5.)

The TAC references SJMC, section 17.20.495 as the basis for Plaintiff's ability to bring a civil action under the city code, however, section 17.20.495 refers to civil actions for violations of the "Fire Detection Systems" part of the code, and the TAC does not allege such a violation. (Defendant's Memorandum of Points and Authorities ("Defendant's Memo"), p. 8, lns. 12-14.) The SJMC does contain a similar civil action provision covering violations of the "Substandard Housing" part of the code. (SJMC, § 17.20.980 ["Any tenant may institute a civil action against the property owner who creates or maintains substandard housing to obtain damages and/or require compliance with the requirements of this chapter" referencing the "housing code," chapter 17.20 of the SJMC.].)

Defendant further argues tenants have an obligation to maintain a dwelling unit in a clean and sanitary condition. ("Defendant's Memo, p. 8, lns. 15-24.) However, this argument does not address the sufficiency of the TAC and goes beyond the scope of the court's inquiry on demurrer. (See *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 [court's role on demurrer is limited to testing the sufficiency of a complaint; a court cannot consider the substance of declarations or matter not subject to judicial notice].)

Defendant also contends the TAC's allegations are too conclusory to state a statutory cause of action. (Defendant's Memo, p. 8, lns. 6-12.) In opposition, Plaintiff acknowledges that statutory causes

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[3] SJMC, section 17.20.900 provides: "Substandard housing – Defined. [¶] … Any housing in which there exists any of the follow listed conditions is hereby deemed and declared to be substandard housing: [¶]
A. Inadequate Sanitation/Ventilation Space Requirements… shall include, but not be limited to, the following as specified in this Code: [¶] 10. Infestation of insects, vermin or rodents. [¶]…
I. Hazardous or Unsanitary Premises. Those premises on which an accumulation of weeds, vegetation, refuse, dead organic matter, debris, garbage, offal, rat harborages, stagnant water, combustible materials, and similar materials or conditions constitute fire, health or safety hazards. [¶]
J. Inadequate Maintenance. [¶] 1. Any building or portion thereof which is determined to be an unsafe building in accordance with the building code. [¶] 2. General dilapidation or maintenance which is inadequate to maintain minimum standards of sanitation, health or safety.

of action must be pleaded with particularity but maintains that the TAC alleges sufficient facts.[4] (Plaintiff's Opposition to Defendant's Demurrer ("Opposition"), pp. 3, ln. 21 – 4, ln. 4.[5])

The general rule is that "statutory causes of action must be pleaded with particularity." (*Covenant Care, Inc. v. Superior Court.* (2004) 32 Cal.4th 771, 790, citation omitted.) "Pleading in the language of the statute is acceptable provided that sufficient facts are pleaded to support the allegations." (*Blegen v. Superior Court* (1981) 1125 Cal.App.3d 959, 963.)

Here, the TAC's allegations are not sufficiently particular to state a violation of the SJMC. The TAC alleges there were violations of the SJMC substandard housing provisions, but the allegations do not include particularized facts to support the pleaded language of the code provisions. (See TAC, p. 5, ¶¶ 3-5.) For example, the TAC's allegations do not describe what (or when or where) Plaintiff observed or experienced to lead to the conclusions that there were unsanitary conditions, pest infestations, or dangerously defective outlets. (TAC, p. 3, ¶¶ 10-11, 14.) Therefore, the TAC does not allege sufficient facts to state a cause of action for violation of the SJMC.

Plaintiff generally requests leave to amend with respect to all causes of action. (Opposition, p. 8, lns. 22-24 ["To the extent the court agrees with Defendant that any of the claims are not adequately pleaded, Plaintiff should be afforded one more opportunity to amend."].) However, Plaintiff fails to meet her burden of explaining how she would amend the pleading. (See *Camsi IV v. Hunter Technology Corp*. (1991) 230 Cal.App.3d 1525, 1542 ["absent an effective request for leave to amend in specified ways," it is an abuse of discretion to deny leave to amend "only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case"]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"], quoting *Cooper v. Leslie Salt Co*. (1969) 70

[4] With respect to the particularity requirement, Plaintiff asserts: "Defendant misconstrues the meaning of the *Lopez* case," presumably referencing *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780 (*Lopez*). However, Defendant's Memo contains no reference to *Lopez*. Moreover, both *Lopez* and the decision cited by Plaintiff explaining *Lopez* (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872) discuss the pleading particularity requirement in the context of a cause of action against a government entity, a situation not present here.

[5] Plaintiff's Opposition does not itself have page numbers indicated.

Cal.2d 627, 636; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 ["the burden is on the plaintiff… to demonstrate the manner in which the complaint might be amended"].)

Because Plaintiff does not explain how she would amend her pleading to address any of the defects identified in the demurrer, and she has already been afforded multiple opportunities to amend (as set forth above), the court will not grant leave to amend.

Accordingly, the demurrer to the first cause of action is SUSTAINED without leave to amend.

2. Third Cause of Action-Breach of Warranty of Habitability

In the third cause of action, Plaintiff alleges Defendant had a duty to keep the Property in a safe and habitable condition and breached that duty by leasing a unit that had cockroach and rodent infestations and other issues affecting the health and safety of inhabitants living in the unit. (TAC, p. 6, ¶¶ 17-18.) The TAC alleges Plaintiff's injury as a proximate result of Defendant's breach. (TAC, p. 7, ¶ 23.)

Defendant contends the TAC lacks any facts supporting this cause of action, emphasizing the absence of facts concerning notice provided to Defendant of the alleged condition and a reasonable time to correct the alleged deficiency. (Defendant's Memo, p. 12, lns. 5-9.) In opposition, Plaintiff contends the TAC alleges the Property had unsanitary conditions and that these issues were confirmed by the City of San Jose. (Opposition, p. 6, lns. 9-12.)

The elements of a cause of action for breach of the implied warranty of habitability "are the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the conditions, the landlord was given a reasonable time to correct the deficiency, and resulting damages. [Citations.]" (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1297 ("*Erlach*").)

Here, the TAC generally alleges "numerous issues adversely impacting the habitability of the Property" including defective power outlets, unsanitary conditions, and an infestation of rodents. (TAC, p. 3, ¶¶ 10-12.) The TAC alleges Plaintiff and her son moved into the unit at Property in December 2019, that Plaintiff promptly reported her concerns to Defendant, and that instead of addressing the issues, Defendants retaliated by serving a notice of non-renewal on July 6, 2022. (TAC, pp. 3-4, ¶¶ 8,

16-17.) The TAC does not allege when, during the roughly two-and-a-half years of her tenancy, Plaintiff reported her concerns to Defendants, nor when she vacated the Property.

The pleading states Defendant had "both actual knowledge and constructive notice" (TAC, p. 3, ¶ 12), but again does not provide supporting facts or an indication of when Defendant acquired this knowledge and notice. The TAC alleges the City of San Jose conducted an inspection of the Property on July 21, 2022, and identified multiple violations. (TAC, p. 4, ¶ 18.)

Here, the TAC does not allege facts showing that Defendant was given notice and a reasonable time to correct the deficiency. (See *Erlach*, *supra*, 226 Cal.App.4th at p. 1297.) Because the TAC does not allege even approximately when Plaintiff provided notice of the habitability issues to the Defendant, this notice cannot be the basis for alleging a reasonable time to correct. Similarly, the TAC does not allege when Plaintiff vacated the Property, or whether it was before or after the City of San Jose alleged identified code violations. Therefore, Plaintiff has not stated sufficient facts to state a cause of action for breach of the warranty of habitability.

Accordingly, the demurrer to the third cause of action is SUSTAINED without leave to amend.

3. Second Cause of Action-Unlawful Business Practices

Plaintiff alleges Defendant's failure to comply with various state and local laws constituted an unfair business practice under Business and Professions Code sections 17200, et seq. and 17500. (TAC, p. 5, ¶ 10.) Defendant argues the pleading lists several statutes without specifying which supports the cause of action, and further that the TAC fails to allege an economic injury. (Defendant's Memo, p. 9, lns. 2-7, 14-15.) Plaintiff contends the TAC sufficiently alleges that she spent money on an uninhabitable unit and that Defendant disregarded her health and safety. (Opposition, p. 5, lns. 19-22.)

Business and Professions Code section 17200 ("Section 17200") prohibits any "unlawful, unfair, or fraudulent business practices." (Bus. & Prof. Code § 17200.) The Unfair Competition Law ("UCL") covers a wide range of conduct. It embraces anything that can be properly called a business practice and that at the same time is forbidden by law. (*Korea Supply Co. v. Lockhead Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Under section 17200, a practice may be deemed unfair or deceptive even if not proscribed by some other law. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 48.) There are three varieties of unfair competition: practices which are unlawful, unfair, or fraudulent. (*Cel-Tech*

Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180.) Pursuant to Section 17200, unfair competition includes, "any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising…" (Bus. & Prof. Code, § 17200.)

"A plaintiff alleging unfair business practices under [the UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) "[Where] recovery is based on a statutory cause of action, the plaintiff must set forth facts in his [or her] complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate. [Citations.]" (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.)

Here, Plaintiff's UCL claim is based upon alleged statutory violations, including violations of the SJMC and breach of the warranty of habitability by renting an untenantable dwelling under Civil Code section 1941.1. (See TAC, pp. 5-6, ¶¶ 10-11.) As explained above, the demurrer has been sustained as to the first cause of action violation of the SJMC cause of action and the third cause of action for breach of the warranty of habitability. Therefore, the alleged violations of the SJMC and the warranty of habitability are likewise not sufficient to state a claim under the UCL.

Accordingly, the demurrer to the second cause of action is SUSTAINED without leave to amend.

4. Fourth Cause of Action-Breach of Covenant of Quiet Enjoyment

Plaintiff alleges that by leasing a dwelling with conditions such as cockroach and rodent infestations, Defendants breached the covenant of quiet enjoyment. (TAC, p. 7, ¶ 27.) Defendant argues the TAC lacks allegations of substantial interference with Plaintiff's right to use and enjoy the premises. (Defendant's Memo, p. 12, 15-25.) In opposition, Plaintiff contends Defendant breached the covenant by beginning construction during Plaintiff's tenancy. (Opposition, p. 6, lns. 23-24; TAC, p. 3, ¶ 13.)

Civil Code section 1927 states, "[a]n agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." (Civ. Code, § 1927.) The implied covenant of quiet enjoyment is the doctrine that a landlord impliedly promises to allow the tenant possession and "quiet enjoyment" of the premises

during the term of the rental agreement and not to, through act or omission, disturb the tenant's possession and beneficial enjoyment of the premises for the purposes contemplated by the rental agreement. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th. 578, 588.) Minor inconveniences and annoyances are not actionable breaches; the landlord's acts or omissions must be substantial- i.e., so serious as to render the premises unfit for the purposes contemplated by the lease or which substantially affect the tenant's enjoyment of a material part of the premises. (See Civ. Code, § 1927; see also *Kulawitz v. Pacific Woodencare & Paper Co.* (1944) 25 Cal.2d 664, 670 (*Kulawitz*).)

Here, the TAC alleges unsafe electrical outlets, ongoing construction during the tenancy, and Defendant's use of Plaintiff's water and utilities for Defendant's construction projects. (TAC, p. 3, ¶¶ 11, 13, 14.) The TAC further alleges unsafe and unsanitary conditions, including pest infestations, posing a threat to the wellbeing of Plaintiff and her son and disturbing their use and enjoyment of the premises. (TAC, p. 3, ¶ 10-11.) Therefore, Plaintiff has alleged facts to support her claim for breach of the covenant of quiet enjoyment. (See Civ. Code, § 1927; see also *Kulawitz, supra*, 25 Cal.2d at 670.)

Accordingly, the demurrer to the fourth cause of action is OVERRULED.

5. Fifth Cause of Action-Breach of Covenant of Good Faith and Fair Dealing

In the fifth cause of action, Plaintiff alleges that her lease agreement with Defendant is subject to an implied covenant of good faith and fair dealing, and that Defendant breached that covenant by interfering with Plaintiff's right to receive the benefits under the lease. (TAC, p. 8, ¶¶ 32-33.) Defendant asserts the TAC lacks allegations of deliberate acts by Defendant intended to frustrate Plaintiff's benefit of the lease agreement. (Defendant's Memo, p. 14, lns. 1-2.) In opposition, Plaintiff contends the allegations that Defendant collected rent on unit with hazardous and unsanitary conditions are sufficient. (Opposition, p. 7, lns. 5-8.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.) "The covenant thus cannot 'be endowed with the existence independent of its contract underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement. (*Id.* at p. 350.) Where a breach of an actual term is alleged, a separate

implied covenant claim, based on the same breach is superfluous. (*Id.* at p. 327.) A breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528 (*Howard*); see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.) To recover in tort for breach of the implied covenant, the defendant must "have acted unreasonably or without proper cause." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 (*Careau*).)

Here, there is no underlying breach of contract claim arising from the lease agreement, but this cause of action is based upon the lease agreement. (See TAC, p. 8, ¶ 33.) Thus, this cause of action is not "independent of its contractual underpinnings." (See *Guz*, *supra*, 24 Cal.4th at pp. 349-350.) Therefore, the TAC, which does not allege any deliberate acts of Defendant designed to frustrate Plaintiff's enjoyment of her rights under the lease agreement, does not allege sufficient facts to state a claim for breach of the covenant of good faith and fair dealing.

Accordingly, the fifth cause of action is SUSTAINED without leave to amend.

6. Sixth Cause of Action-Negligence

In the sixth cause of action, Plaintiff alleges that Defendant owed duties to Plaintiff and breached those duties by disregarding municipal building safety code provisions and renting the unit to Plaintiff. (TAC, p. 8, ¶¶ 37-38.) Defendants contend the sixth cause of action fails because it is duplicative of the first and third causes of action (for SJMC code violations and breach of the warranty of habitability). (Defendant's Memo, p. 14, lns. 8-9.) Plaintiff argues that Defendant owed her a duty arising from the landlord-tenant relationship and breached that duty by not maintaining the property in habitable conditions. (Opposition, p. 7, lns. 17-19.)

As an initial matter, Defendant's argument that each cause of action is duplicative is not a ground on which a demurrer may be sustained. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 (*Blickman*); see *Tracfone Wireless, Inc. v. Los Angeles County* (2008) 163 Cal.App.4th 1359, 1368 [indicating same]; see also Code Civ. Proc., § 430.10 [setting forth the grounds for demurrer].)

While some cases indicate that duplicative causes of action "may be disregarded" or stricken (see e.g. *Ponce-Bran v. Trustees of Cal. State Univ.* (1996) 48 Cal.App.4th 1656, 1658, *Careau*, *supra*, 222 Cal.App.3d at p. 1395, and *Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358, 1370 (*Bionghi*)), the Sixth District Court of Appeal found that duplicativeness "is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment." (*Blickman, supra,* 162 Cal.App.4th at 890.) This Court follows the Sixth District's guidance and declines to sustain the demurrer on this basis. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 (*McCallum*) [as a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district].) Consequently, the demurrer cannot be sustained on the basis of duplicative causes of action.

The elements for a cause of action for negligence are: (1) a legal duty to use reasonable care; (2) a breach of that legal duty; (3) the breach as the proximate or legal cause of; (4) the resulting injury. (*Tribecca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114.)

Here, the TAC alleges facts supporting Plaintiff's position that Defendant owed her a duty to use reasonable care and maintain the Property in habitable condition. It further alleges that Defendant breached that duty, Defendant knew about the condition of the unit, and as a proximate result of their breach of duty, Plaintiff was injured. The TAC also alleges that Plaintiff reported her concerns, but Defendant made no repairs. Therefore, the TAC states a cause of action for negligence.

Accordingly, the demurrer to the sixth cause of action is OVERRULED.

7. Seventh Cause of Action- Negligent Infliction of Emotional Distress

In the seventh cause of action, Plaintiff alleges Defendant knew that she was under extreme stress and negligently preyed on her fear through interactions with her. (TAC, p. 9, ¶ 45.) Plaintiff further alleges that Defendant's conduct was extreme and outrageous. (TAC, p. 9, ¶ 47.) Defendant contends that negligent infliction of emotional distress is not an independent cause of action and is improperly derived from the sixth cause of action for negligence. (Defendant's Memo, p. 15, lns. 2-4, 21-23.) Plaintiff asserts the cause of action is sufficiently pled, regardless of its title. (Opposition, p. 8, lns. 6-7.)

> The law of negligent infliction of emotional distress in California is typically analyzed by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory. We have repeatedly recognized that the negligent causing of emotional distress is not an independent tort, but a tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability.

(*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 490, internal formatting, punctuation, and citations omitted.)

"'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff. '[T]he label "direct victim" arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is "assumed by the relationship between the two." [Citation.] … [W]ell-settled principles of negligence are invoked to determine whether all elements of a cause of action, including duty, are present in a given case.' [Citation.]" (*Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1038 (*"Wooden*").)

Here, it appears that Plaintiff relies upon a direct victim theory as she alleges Defendant knew she was under extreme stress and preyed upon her fears through their interactions with her.

A plaintiff may recover damages as a "direct victim" of negligent infliction of emotional distress in only three types of factual situations: (1) negligent mishandling of corpses (*Christensen v. Super. Ct.* (1991) 54 Cal.3d 868, 879); (2) negligent misdiagnosis of a disease that could potentially harm another (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 923); and (3) the negligent breach of duty arising out of a preexisting relationship (*Burgess v. Super. Ct.* (1992) 2 Cal.4th 1064, 1076 [California Superior Court has allowed plaintiffs to recover damages as "direct victims" in only these types of factual situations; see also CACI 1620.)

There are no facts to support a direct victim emotional distress claim under the first two theories. With regard to the third theory, the duty must be one "assumed by the defendant or imposed on the

defendant as a matter of law, or that arises out of a relationship between the two." (*Wooden, supra,* 61 Cal.App.4th at 1038.)

Here, the TAC alleges Defendant owed her a duty as a result of their relationship. (TAC, p. 3, ¶ 8; p. 6, ¶ 17.) The TAC further alleges Defendants breached the duty through their conduct and as a result, she was damaged. (TAC, pp. 6-7, ¶¶ 18-19; p. 9, ¶¶ 44-45.) Thus, there are facts to support a direct victim emotional distress claim under the third theory. (See *Burgess v. Super. Ct., supra*, 2 Cal.4th at p. 1076.) As a result, Plaintiff has stated sufficient facts for the cause of action for negligent infliction of emotional distress.

Accordingly, the demurrer to the seventh cause of action is OVERRULED.

8. Eighth Cause of Action-Constructive Eviction

In the eighth cause of action, Plaintiff alleges that she was forced to vacate the Property because of hazardous conditions. (TAC, p. 10, ¶ 53.) Defendant contends the cause of action fails because its allegations are conclusory and do not allege that Plaintiff abandoned the Property within a reasonable time after the landlord's allegedly wrongful acts. (Defendant's Memo, p. 16, lns. 11-15.) Plaintiff reiterates allegations that she was forced to vacate the Property due to its conditions. (Opposition, p. 8, lns. 16-20.)

"A constructive eviction occurs when the acts or omissions … of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or substantial portion thereof, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 925-926.) However, a claim for constructive eviction is actionable only if the tenant vacates the premises "within a reasonable amount of time after the wrongful act of the landlord." (*Id*. at p. 926; see also *Clark v. Spiegel* (1971) 22 Cal.App.3d 74, 79.) These cases typically involve material breaches of the lease agreement that render the premises unfit for the purpose for which it was leased. (*Kulawitz v. Pacific Woodenware & Paper Co.* (1944) 25 Cal.2d 664, 670.) When the adverse conduct amounts to a constructive eviction, the tenants are entitled to immediately terminate the tenancy without giving prior notice or opportunity to cure. (*Ibid*.)

Here, the TAC alleges that there were uninhabitable conditions, and that Plaintiff vacated the Property. However, it does not when Plaintiff vacated the Property or when the conditions became uninhabitable. Indeed, the TAC suggests that Plaintiffs concerns with the condition of the property arose almost immediately upon moving in. Further, the TAC alleges that Defendant served Plaintiff with a notice of termination. The allegations do not show that Plaintiff vacated the premises within a reasonable amount of time for purposes of a constructive eviction cause of action.

Accordingly, the demurrer to the eighth cause of action is SUSTAINED without leave to amend.

III. Conclusion

The demurrer to the first, second, third, fifth, eighth causes of action is SUSTAINED without leave to amend.

The demurrer to the fourth, sixth, and seventh causes of action is OVERRULED.

Calendar line 5
Case Name: *Eric Figueroa, et al. v. City of Palo Alto, et al.*
Case No.: 21CV383740

Before the Court is defendant City of Palo Alto's motion for summary judgment against all plaintiffs. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Plaintiffs Eric Figueroa, Michael Foley, Christopher Moore, Robert Parham, Julie Tannock, and David "Heath" Ferreira (collectively, "Plaintiffs") were sworn California police officers employed by defendant Palo Alto Police Department ("PAPD"), assigned to various divisions within PAPD. (Third Amended Complaint ("TAC"), ¶¶1 – 6 and 18.)

Beginning in or around June 2020, defendant City of Palo Alto ("City") officials sought out, encouraged, and paid artists to paint sixteen letters on defendant City property that spelled out "Black Lives Matter" ("Mural"). (TAC, ¶¶19 – 20.) City manager, Ed Shikada, admits "the creation of this temporary mural was directed by the city council." (TAC, ¶20.) In or around mid-June 2020, City approved commission of the Mural, the purpose of which was to advance City's commitment to standing up for African Americans and to oppose systemic violence against African Americans. (TAC, ¶21.) The Mural was explicitly commissioned and created in favor of African Americans at the expense of non-African Americans. (*Id.*)

Defendant City selected sixteen artists from the more than 80 applications and assigned one letter from the phrase, "Black Lives Matter," to each artist. (TAC, ¶22.) City required each artist to submit a sketch for approval prohibiting any branded logos, foul language, or nudity, but not prohibiting the use of racially discriminatory, harassing, or otherwise hateful iconography. (TAC, ¶23.) City reviewed, approved, and endorsed each artist's proposed imagery. (TAC, ¶24.) Upon completion, the Mural was approximately 245 feet long and 17 feet tall, located on Hamilton Avenue in Palo Alto, in front of City Hall and immediately adjacent to defendant PAPD. (TAC, ¶25.)

The Mural featured images inside each letter, including the portrait of and quote by Joanne Chesimard, better known as Assata Shakur, a leader in the Black Liberation Army ("BLA") movement, a hate organization. (TAC, ¶26.) The BLA was a black nationalist militant organization with a stated goal to "take up arms for the liberation and self-determination of black people in the United States," at

the expense of non-African Americans. (*Id.*) The BLA is suspected of involvement in over 70 acts of violence in the 1970s, including the murder of over a dozen non-African American police officers. (*Id.*) The BLA targeted not just whites and law enforcement officers, but also engaged in violence and hatred directed toward all non-African Americans. (TAC, ¶28.)

Shakur was convicted in 1977 for the murder of New Jersey State Trooper Wermer Foerster, a white police officer. (TAC, ¶27.) In 1979, while serving a life sentence for the murder, Shakur escaped from prison and ended up in Cuba where she now has refuge and the Cuban government refuses to extradite her. (*Id.*) The FBI placed Shakur on its top ten list of most wanted domestic terrorists. (*Id.*)

Further, the Mural included a portion of the logo attributed to the New Black Panther Party (figure of a black cat), identified by the Southern Poverty Law Center ("SPLC") as a hate group. (TAC, ¶29.) The SPLC defines the New Black Panther Party as a "virulently racist and anti-Semitic organization whose leaders have encouraged violence against whites, Jews, and law enforcement officers." (*Id.*) The New Black Panther Party targets not just whites, Jews, members of the LGBTQ community, and law enforcement officers, but is an extremist hate group that targets all non-African Americans. (TAC, ¶30.)

Plaintiffs who were in a protected class based on their actual or perceived race, ethnicity, and/or national origin (i.e., non-African American) were forced to physically pass and confront the Mural and its offensive, discriminatory, harassing, and hateful iconography every time they entered the PAPD. (TAC, ¶32.) Plaintiffs reported to defendants City and PAPD and supervisors that the Mural and its accompanying iconography are racially discriminatory, harassing, threatening, and otherwise hateful. (TAC, ¶33.) Additionally, Plaintiffs' complaints were brought to defendants' attention by Plaintiffs' Police Officer's Association in two separate warnings. (*Id.*)

Plaintiffs never requested the Mural be removed from City property nor did they state or suggest that they disagree with or oppose the statement/sentiment that Black Lives Matter or with the overall movement. (TAC, ¶34.) Plaintiffs requested only that the offensive, discriminatory, harassing, and hateful iconography contained in the Mural be replaced with non-discriminatory and non-harassing iconography. (*Id.*)

Plaintiffs' complaints of harassment and discrimination fell on deaf ears. (TAC, ¶35.) In refusing to remove the harassing and discriminatory iconography, City approved the Mural's harassing and discriminatory iconography as a means to appease one racial group (African Americans) at the expense of all others. (TAC, ¶36.) Defendants created and allowed the aforementioned discriminatory and harassing work environment to exist. (TAC, ¶37.) Not only did defendants allow the harassing and discriminatory iconography to exist in the workplace, but defendants also sanctioned, approved, encouraged, and paid for it. (*Id.*) Defendants' failure to abate the harassing and discriminatory conduct is, in and of itself, a form of retaliation for raising such issues. (TAC, ¶38.) The Mural's existence and PAPD's failure to remove the harassing and discriminatory iconography despite Plaintiffs' complaints adversely and materially affected Plaintiffs' job performance. (*Id.*) City was aware that maintaining and failing to remove the Mural would adversely affect and did affect Plaintiffs' ability to perform their duties. (TAC, ¶¶40 – 42.)

On June 4, 2021, Plaintiffs filed a complaint against defendants City and PAPD.

On July 16, 2021, Plaintiffs filed a first amended complaint ("FAC").

Pursuant to a stipulation and order filed 19 October 2021, the court authorized Plaintiffs to file a Second Amended Complaint ("SAC"). Plaintiffs filed a SAC on October 22, 2021 asserting causes of action for:

(1) Discrimination in Violation of FEHA

(2) Harassment in Violation of FEHA

(3) Retaliation in Violation of FEHA

On November 23, 2021, defendant City (also erroneously named as PAPD which is not a separate legal entity) filed the motion now before the court, a demurrer to Plaintiffs' SAC.

On March 10, 2022, the court (Hon. Deen) issued an order sustaining City's demurrer to Plaintiffs' SAC with leave to amend.

On 14 March 2022, Plaintiffs filed the operative TAC which continues to assert the same three causes of action asserted in the SAC.

On April 15, 2022, City filed a demurrer to Plaintiffs' TAC. On 5 July 2022, the court sustained City's demurrer to the first and third causes of action without leave to amend. The court overruled City's demurrer to the second cause of action.

On July 14, 2022, City filed an answer to Plaintiffs' TAC.

On February 28, 2024, City filed the motion now before the court, a motion for summary judgment of the second and only remaining cause of action of Plaintiffs' TAC.

II. City's motion for summary judgment is DENIED.

A. Government Code section 818.2 immunity.

City argues initially that it is entitled to summary judgment of Plaintiffs' TAC pursuant to Government Code section 818.2 which states, "A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." "Courts have thus recognized that '[of] course, it is not a tort for Government to govern. . . .' [Citations omitted.]) (*HFH, Ltd. v. Superior Court of Los Angeles County* (1975) 15 Cal.3d 508, 519 (*HFH*).)

According to City, the Mural is the result of a City Council enactment. Specifically, on June 15, 2020, the Palo Alto City Council held a Special Meeting.[6] During that meeting, the Council unanimously approved a Motion "to provide direction to Staff on a proposed initial framework and workplan to address police use of force and citywide issues related to race and equity to include the following … Direct the Public Art Commission to explore public art honoring diversity, and work with our community to pain "Black Lives Matter" or a similar message near City Hall, as soon as possible…."[7] On June 18, 2020, the Palo Alto Public Art Commission held a meeting during which they unanimously approved a motion regarding how to proceed to commission the mural.[8] Among other things, the Public Art Commission decided that the City would commission artists to create the mural, that each artist would be assigned one letter of the mural for which they would create original artwork.[9] The Public Art Commission also approved funding up to $20,000 for the mural.[10] A Palo Alto City

[6] See Defendant City of Palo Alto's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("City's UMF"), Fact No. 5.
[7] *Id.*
[8] See City's UMF, Fact No. 6.
[9] *Id.*
[10] *Id.*

Council Staff Report for the Palo Alto City Council Meeting on June 23, 2020 recommended that the City Council authorize the City Manager to place the words "Black Lives Matter" on a City street near Palo Alto City Hall as soon as possible.[11] During a Special Meeting on June 23, 2020, the Palo Alto City Council unanimously approved a motion to "Authorize the City Manager to Place 'Black Lives Matter' on a City Street Near Palo Alto City Hall."[12]

Defendant City contends its actions were similar to those taken in *HFH*. However, in *HFH*, *supra*, 15 Cal.3d at p. 519, the court explained, "The zoning ordinance of which plaintiffs complain is, of course, an 'enactment' within the meaning of section 818.2. (Gov. Code, § 810.6.)" Government Code section 810.6 defines "Enactment" to "mean[] a constitutional provision, statute, charter provision, ordinance or regulation."

City's evidence establishes only that various motions brought before the City Council were approved. Plaintiffs persuasively argue in opposition that the approval of motions do not come within the definition of "enactment" as defined by Government Code section 810.6 and, thus, section 818.2 does not apply because an "enactment" is not at issue.

B. Restrictions placed on designated public forum subject to strict scrutiny.

City's next argument is that it would have been unconstitutional for City to have granted Plaintiffs the relief they sought. In designating a public forum, City could not restrict the artists' freedom of speech absent a compelling state interest.

Plaintiffs argue in opposition that City waived any right to assert such an argument since it did not raise this new matter in its answer.[13] "The answer to a complaint shall contain … any new matter constituting a defense." (Code of Civ. Proc. §431.30, subd. (b)(2).) "The failure to assert an affirmative defense by demurrer or answer results in the waiver or, more accurately, forfeiture of the defense unless the defense concerns the lack of subject matter jurisdiction or failure to state facts sufficient to state a cause of action." (*Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, 1314; see also *North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145—First Amendment

[11] See City's UMF, Fact No. 7.
[12] See City's UMF, Fact No. 8.
[13] Defendant City's answer to Plaintiffs' TAC, filed on July 14, 2022, asserts three affirmative defenses: (1) workers' compensation exclusivity; (2) Government Code section 818.2 immunity; and (3) failure to mitigate.

asserted as constitutional affirmative defense; see also *Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 376 ("Justification is an affirmative defense and may not be considered as supporting the trial court's action in sustaining a demurrer unless it appears on the face of the complaint." [Citation.] … The amended complaint does not show on its face that defendants' statement was justified on the ground it was protected by the First Amendment. [Citation].")

The court finds persuasive Plaintiffs' argument that City's failure to raise a constitutional affirmative defense in its answer results in waiver or forfeiture of said affirmative defense.

C. Harassment.

> It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: … For an employer … or any other person, ***because of race*** [or] color [or] national origin … to harass an employee…. Harassment of an employee … shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees … in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(Gov. Code, § 12940, subd. (j)(1); emphasis added.)

"[H]arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 63.) "[H]arassment focuses on situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee."

(*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.) "Harassment includes but is not limited to … Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings ***on a basis enumerated in the Act.***" (Cal. Code Regs., tit. 2, § 11019; emphasis added; see also CACI, No. 2523.)

> To establish a prima facie case of a hostile work environment, [a plaintiff] must show that (1) she is a member of a protected class; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her protected status; (4) the harassment unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment.

(*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581; see also CACI, No. 2521A.)

> To be actionable, "a [racially] objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." (*Faragher v. Boca Raton* (1998) 524 U.S. 775, 787 [141 L. Ed. 2d 662, 118 S. Ct. 2275]; see *Harris*, *supra*, 510 U.S. at pp. 21–22; *Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at pp. 518–519.) That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so.

(*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284.)

City argues the disputed portions of the Mural were not directed at Plaintiffs' race (non-African American). City admits the Mural included a depiction of Assata Shakur who was convicted of killing a Caucasian police officer. City contends, however, that Plaintiffs took offense to the image of Shakur because they are police officers, not because they are non-African American.

City proffers no legal authority or argument to support its assertion that the image of Shakur could only be offensive to police officers or that the image of Shakur is not offensive to anyone non-African American. As this court previously explained:

> The United States Supreme Court has warned that the evidence in a hostile environment [ ] harassment case should not be viewed too narrowly: "[T]he objective severity of

> harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] … . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. … The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing … and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81–82 [140 L. Ed. 2d 201, 118 S. Ct. 998]; see also *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 517–518 [76 Cal. Rptr. 2d 547].)

(*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 462; see also CACI, No. 2524.)

City proffers no argument or evidence which would establish that the image of Shakur is objectively offensive only to police officers. As such, City fails to meet its initial burden, and the Court's analysis need not go further. "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., §437c, subd. (f)(1).)

For all the reasons discussed above, City's motion for summary judgment against all plaintiffs is DENIED.