

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 CHERYL ADAMS, State Bar #164194
Chief Trial Deputy
3 KELLY COLLINS, State Bar #277988
Deputy City Attorney
4 Fox Plaza
1390 Market Street, 6th Floor
5 San Francisco, California 94102-5408
Telephone: (415) 554-3914
6 Facsimile: (415) 554-3837
E-Mail: kelly.collins@sfcityatty.org
7

8 Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO and
9 MAYOR LONDON BREED

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 ALLISON BARTON RICE, AN
INDIVIDUAL,

13 Plaintiff,

14 vs.

15 THE CITY AND COUNTY OF SAN
16 FRANCISCO; LONDON BRED, MAYOR
OF THE CITY OF SAN FRANCISCO; KATE
17 HARTLEY, DIRECTOR OF THE SAN
FRANCISCO MAYOR’S OFFICE OF
18 HOUSING AND COMMUNITY
DEVELOPMENT; MARIA BENJAMIN,
19 DIRECTOR OF HOMEOWNERSHIP &
BELOW MARKET RATE PROGRAMS SAN
20 FRANCISCO MAYOR’S OFFICE OF
HOUSING AND COMMUNITY
21 DEVELOPMENT; CISSY YIN,
HOMEOWNERSHIP & BELOW MARKET
22 RATE PROGRAMS COMPLIANCE
MANAGER SAN FRANCISCO MAYOR’S
23 OFFICE OF HOUSING AND COMMUNITY
DEVELOPMENT; DENNIS HERRERA, SAN
24 FRANCISCO CITY ATTORNEY; KEITH
NAGAYAMA, SAN FRANCISCO CITY
25 DEPUTY ATTORNEY AND DOES 1
THROUGH 50,

26 Defendants.
27
28

Case No. 19-cv-04250 LB

**DEFENDANTS’ NOTICE OF MOTION AND
MOTION TO DISMISS THE COMPLAINT
FOR FAILURE TO STATE A CLAIM
[F.R.C.P, Rule 12(b)(6)]**

Hearing Date: September 19, 2019
Time: 9:30 a.m.
Place: 450 Golden Gate Avenue
Courtroom B – 15th Floor
San Francisco, CA 94102

Trial Date: Not Set

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Allison Rice (“Plaintiff”) brings this action against the City and County of San Francisco (“the City”) and Mayor London Breed, collectively “Defendants,”¹ alleging both federal and state law claims. Defendants move to dismiss the federal claims of alleged violations of the Fair Housing Act and Americans with Disabilities Act on the grounds that Plaintiff fails to state a claim. Defendants move to dismiss the state claims alleging negligence, fraud, and elder abuse on the bases of failure to comply with the statute of limitations, governmental immunities, and failure to state a claim. For the reasons set forth below, the Court should dismiss all of Plaintiff’s claims.

FACTUAL BACKGROUND

Plaintiff acquired title to the Property located at 200 Brannan Street, Unit 316 (hereinafter “the Property”) on October 25, 2004, through the Limited Equity Homeownership Program. ECF No. 1 at ¶ 25. On September 23, 2004, Plaintiff signed the Limited Equity Home Ownership Program Declaration of Resale Restrictions and Option to Purchase Agreement (hereinafter “the Agreement”) ECF No. 1-1 at 4-19. The Agreement set forth the terms of the purchase and restrictions on the Property. *Id.* Specifically, the Agreement stated the requirements that Plaintiff own and occupy the Property as his principal residence for at least ten months each year and that he could not lease the Property or any portion thereof. *Id.* at 8. The Agreement stated that written consent from the Redevelopment Agency of the City and County of San Francisco (hereinafter “the Agency”)² was required for any deviation from these requirements. *Id.* The Agreement explicitly sets forth that all notices, demands, and other communications required or permitted by the Agreement must be in writing at the address listed. *Id.* at 14. It does not list telephonic or electronic mail addresses to obtain this permission. *Id.*

¹ The remaining individuals named as Defendants in the Complaint have not been properly served.

² The San Francisco Redevelopment Agency was dissolved as a matter of state law on February 1, 2012, under California State Assembly Bill No. 1X26, and the City and County of San Francisco is successor in interest to the Agency’s rights and obligations under the Program. The City’s Mayor’s Office of Housing and Community Development (hereinafter “MOHCD”) assumed responsibility and administration of all housing programs formerly administered by the Agency.

1 Plaintiff claims that in the latter part of 2008 he received oral permission to have a rent-paying
2 roommate and to be away from the Property for more than two months per year. ECF No. 1 at ¶ 31.
3 Plaintiff admits that he violated the Agreement by renting a portion of the Property beginning in or
4 around September of 2009 without written permission from the Agency. *Id.* at ¶ 33. He claims he was
5 “not cognizant of the ‘written’ consent requirement within the Agreement until the early part of 2016.”
6 *Id.* at ¶ 41. Once Plaintiff became aware of the written consent requirement, he attempted to obtain
7 permission to have a rent-paying roommate and to be away from the Property for more than two
8 months per year. *Id.* at ¶ 42. Plaintiff did not receive written consent from MOHCD for either
9 request. *Id.* at ¶¶ 43, 45.

10 In September of 2017, Plaintiff began the process of refinancing his mortgage to obtain a lower
11 interest rate. *Id.* at ¶ 50. On October 15, 2017, without obtaining prior written consent from MOHCD,
12 Plaintiff entered into a lease agreement with Ms. Laura Raquel Camacho, whereby she would pay
13 Plaintiff \$800.00 a month to live with Plaintiff in his unit. *Id.* at ¶ 54. Plaintiff was informed of the
14 MOHCD’s concerns about his written consent compliance with regards to a rent-paying roommate on
15 October 19, 2017, when he received an e-mail from Ms. Sean Fitzgerald of First Republic Bank, the
16 institution refinancing his mortgage. *Id.* at ¶ 55. Plaintiff sent communications about the compliance
17 issue to the MOHCD on October 19, 2017, and October 22, 2017. *Id.* at ¶ 56. Plaintiff included a
18 letter from Dr. Alison Ludwig in support of his request for written approval to have a rent-paying
19 roommate and to travel for more than two months per year. ECF No. 1-1 at 25-26. In the letter, Dr.
20 Ludwig explained that Plaintiff is 100% service connected for “Depression, Paranoid Schizophrenia”
21 and stated that having a roommate is significantly helpful and beneficial for Plaintiff’s mental health
22 with respect to isolation and loneliness. *Id.* She also states that Plaintiff’s ability to travel and visit
23 new environments is necessary to maintain his mental health. *Id.* The letter makes no mention of
24 requiring the roommate to be rent-paying or that the travel needed exceed two months out of the year
25 to be beneficial to Plaintiff’s mental health. *Id.*

26 On October 26, 2017, Plaintiff received a letter from Ms. Cissy Yin of the MOHCD. ECF No.
27 1-1 at 33-34. This letter informed Plaintiff that there was no record of approval for him to have a rent-
28 paying roommate and that his conduct was in violation of Section 6.1 of the Agreement. *Id.* The letter

1 acknowledged receipt of the letter from Dr. Ludwig and informed Plaintiff that he was permitted to
2 have a roommate without charging rent and to travel, so long as he reside at the Property for at least
3 ten months out of each calendar year. *Id.* The letter also set forth the circumstances under which a
4 temporary lease would be permitted and informed Plaintiff that he did not appear to qualify. *Id.* The
5 letter directed Plaintiff to terminate the current lease of the Property and not to lease any part of the
6 Property in the future without prior written consent. *Id.* Plaintiff complied and terminated the lease
7 agreement with Ms. Camacho effective October 31, 2017 and submitted a copy of the termination
8 document to the MOHCD. ECF No. 1 at ¶ 59.

9 Despite continued efforts to do so, Plaintiff never received written permission to have a rent-
10 paying roommate and chose not to take in a non-rent-paying roommate. Plaintiff ultimately decided to
11 voluntarily sell his unit in early 2018. *Id.* at ¶ 99. The deed for the Property was granted on March 29,
12 2018. Request for Judicial Notice (hereinafter “RJN”) ¶ 1.

13 Plaintiff filed a government claim on April 25, 2019. Declaration of Matthew Rothschild
14 (hereinafter “Rothschild Dec.”) ¶ 4, filed herewith. Plaintiff filed his Complaint in this matter alleging
15 federal claims for violations of the Fair Housing Act (hereinafter “FHA”), the Americans with
16 Disabilities Act (hereinafter “ADA”), and state claims of negligence, fraud, and elder abuse on July
17 24, 2019. ECF No. 1, ¶¶ 143-184.

18 LEGAL STANDARD FOR MOTION TO DISMISS

19 A complaint may be dismissed for “failure to state a claim upon which relief may be granted.”
20 Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss for failure to state a claim, a plaintiff must
21 allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v.*
22 *Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

25 For purposes of dismissal, the court generally considers only allegations contained in the
26 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice, and
27 construes all well-pleaded material factual allegations in the light most favorable to the nonmoving
28 party. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013); *Akhtar v.*

1 *Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

2 Dismissal under Federal Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal
3 theory, or (2) insufficient facts under a cognizable legal theory. *Chubb Custom Ins. Co.*, *supra* at 956.
4 Dismissal also is appropriate if the complaint alleges a fact that necessarily defeats the claim. *Franklin*
5 *v. Murphy*, 745 F.2d 1221, 1228–1229 (9th Cir. 1984).

6 **ARGUMENT**

7 **I. PLAINTIFF CANNOT STATE FAIR HOUSING ACT OR AMERICANS WITH**
8 **DISABILITY ACT CLAIMS**

9 **A. Plaintiff’s First Cause of Action for Alleged Violations of the Fair Housing Act**
10 **Fails**

11 Plaintiff’s first cause of action is for alleged violations of the Fair Housing Act (“FHA”), 42
12 U.S.C § § 3603, 3604, 3605, 3606, and 3617. The FHA does not apply here because Defendants did
13 not provide housing to Plaintiff during the applicable time period. At all relevant times during the
14 conduct that Plaintiff alleges, Plaintiff owned and occupied the Property.

15 Plaintiff’s allegation is that Defendants’ actions caused his mortgage refinancing to be held
16 “hostage” because Defendants would not provide the necessary approval while he maintained a rent-
17 paying roommate. (ECF No. 1 ¶¶ 57-59). In no way did the alleged conduct prevent Plaintiff from
18 inhabiting his unit. Therefore, this allegation does not give rise to a FHA violation. The FHA states:

19 As made applicable by section 3603 of this title and except as exempted by
20 sections 3603(b) and 3607 of this title, it shall be unlawful--

21 (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to
22 negotiate for the sale or rental of, or otherwise make unavailable or deny, a
23 dwelling to any person because of race, color, religion, sex, familial status, or
24 national origin.

25 (b) To discriminate against any person in the terms, conditions, or privileges of
26 sale or rental of a dwelling, or in the provision of services or facilities in
27 connection therewith, because of race, color, religion, sex, familial status, or
28 national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any
notice, statement, or advertisement, with respect to the sale or rental of a
dwelling that indicates any preference, limitation, or discrimination based on
race, color, religion, sex, handicap, familial status, or national origin, or an
intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap,
familial status, or national origin that any dwelling is not available for
inspection, sale, or rental when such dwelling is in fact so available.

1 (e) For profit, to induce or attempt to induce any person to sell or rent any
2 dwelling by representations regarding the entry or prospective entry into the
neighborhood of a person or persons of a particular race, color, religion, sex,
handicap, familial status, or national origin.

3 42 U.S.C. § 3604.

4 Plaintiff alleges that he was discriminated against because Defendants denied him a reasonable
5 accommodation. Defendants contend that the FHA does not apply because, as stated above, they were
6 not a housing provider to Plaintiff. Plaintiff owned his unit during all relevant times discussed in his
7 Complaint.

8 Even if the Court determines the FHA applies and considers Plaintiff's failure to accommodate
9 argument, it fails on the face of the Complaint. Defendants did not bar Plaintiff from having a
10 roommate or from traveling. Plaintiff was only barred from collecting rent from a roommate or from
11 traveling more than two months out of the year, neither of which he provides evidence to support that
12 it were reasonably necessary to accommodate his disability. His doctor's letter indicates that a
13 roommate is beneficial to Plaintiff's mental health with respect to isolation and loneliness. ECF No.
14 1-1 at 25. It makes no mention of a need for financial gain from that roommate to benefit Plaintiff's
15 mental health. *Id.* There is no dispute of fact that Defendants permitted Plaintiff to have a roommate,
16 so long as rent was not charged. Similarly, Dr. Ludwig's note identifies Plaintiff's ability to travel as
17 necessary to maintain his mental health, but does not state that such travel needs to be more than two
18 months a year. *Id.* There is no allegation that Defendants' conduct precluded Plaintiff from traveling,
19 so long as he was not away more than two months per year. Again, Plaintiff fails to demonstrate why
20 traveling more than two months was a necessary reasonable accommodation.

21 Plaintiff failed to state facts sufficient to support his first cause of action alleging violations of
22 the Fair Housing Act. It should therefore be dismissed.

23 **B. Plaintiff's Second Cause of Action for Alleged Violations of the Americans With**
24 **Disability Acts Fails**

25 Plaintiff's second cause of action is for alleged violations of the Americans With Disabilities
26 Act ("ADA"), 42 U.S.C. Section 12132, the California Civil Code as set forth in Sections 51(c) and
27 54(f), and an unlawful practice pursuant to California Government Code Section 12948. The ADA
28 does not apply here. Therefore, Plaintiff's ADA claim should be dismissed.

1 The ADA states, “[s]ubject to the provisions of this subchapter, no qualified individual with a
2 disability shall, by reason of such disability, be excluded from participation in or be denied the
3 benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by
4 any such entity.” 42 U.S.C. Section 12132, California Civil Code Sections 51(c) and 51(f), and
5 California Government Code Section 12948 all echo the ADA’s ban on discrimination.

6 Here, Defendants neither excluded from participation nor denied benefits to Plaintiff. As
7 stated above, Plaintiff owned his unit at the time of the alleged violations. Defendants were not selling
8 the Property to Plaintiff at the time nor were they renting the Property to Plaintiff.

9 Should the Court find that the ADA applies, Plaintiff’s claim still fails. Defendants informed
10 Plaintiff he was free to take in a roommate, he just could not collect rent. ECF No. 1 at ¶ 68.
11 Additionally, Plaintiff’s financial documents were reviewed and he was informed that he did not
12 appear to qualify for a financial hardship extension. ECF No. 1-1 at 34. Defendants in no way
13 precluded Plaintiff from traveling. Defendants simply declined to alter the requirement that Plaintiff
14 travel no more than two months per year to maintain the Property as his primary residence because
15 nothing was submitted that indicated doing so was necessary to accommodate Plaintiff. Plaintiff still
16 fails to provide evidence that collecting rent and traveling more than two months per year are
17 necessary or beneficial for his disability.

18 Plaintiff failed to state facts sufficient to support his second cause of action alleging violations
19 of the ADA. It should therefore be dismissed.

20 **II. PLAINTIFF’S STATE LAW CLAIMS ARE BARRED BY THE STATUTE OF**
21 **LIMITATIONS**

22 Plaintiff alleges state law claims of negligence, fraud, and elder abuse. All three of these
23 causes of action are barred by the statute of limitations. The California Claims Act (Govt. Code §§
24 810-996.6) sets forth the statute of limitations for time limits for presentation of claims. Claims
25 relating to a cause of action for death or for injury to person or personal Property shall be presented
26 not later than 6 months after the accrual of the cause of action. Cal. Govt. Code §§ 911.2, 911.3. A
27 claim relating to any other cause of action shall be presented not later than one year after the accrual of
28 the cause of action. *Id.* Plaintiff’s state law claims are subject to a 6-month statute of limitations.

1 However, even if the Court finds that a one-year statute of limitations applies, Plaintiff's claims were
2 untimely and are therefore barred.

3 The accrual of the causes of action are not clear from Plaintiff's Complaint. Arguably, the
4 accrual occurred on October 26, 2017, when Plaintiff received the letter from Cissy Yin, Compliance
5 Manager of the Homeownership and BMR Programs, directing Plaintiff to terminate any lease of the
6 Property and not to lease any part of the Property in the future without prior written consent of the
7 MOHCD. ECF No. 1-1 at 33-34. Plaintiff also described the time frame of the discrimination as
8 October 2017 through January 22, 2018 in his housing discrimination inquiry. ECF No. 1-3 at 7.
9 Interpreting the accrual date in the most favorable light to Plaintiff would be the date of the transfer of
10 deed for the Property. The deed for the Property was granted on March 29, 2018. RJN ¶ 1. Plaintiff
11 filed his claim on April 25, 2019, over a year after the most favorable interpretation of the accrual
12 date. Rothschild Dec. ¶ 4.

13 Accordingly, the Court must dismiss the state law based causes of action contained in
14 Plaintiff's Complaint.

15 **III. DEFENDANTS ARE IMMUNE FROM PLAINTIFF'S STATE LAW CLAIMS**

16 Should the Court find that Plaintiff's state law claims are not barred by the statute of
17 limitations, the Court should dismiss the state law causes of action because Defendants are immune.
18 Defendant City enjoys immunity under California Government Code Section 818.4 which states, "[a]
19 public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or
20 by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval,
21 order, or similar authorization where the public entity or an employee of the public entity is authorized
22 by enactment to determine whether or not such authorization should be issued, denied, suspended or
23 revoked." Here, this means that Defendant City is not liable for any injury for the denial of Plaintiff's
24 requests to take in a rent-paying roommate and to travel for more than two months per year.

25 Defendant City is also immune from Plaintiff's state law claims under Cal. Govt. Code Section
26 818.8 which states, "[a] public entity is not liable for an injury caused by misrepresentation by an
27 employee of the public entity, whether or not such misrepresentation be negligent or intentional."
28 Taking Plaintiff's contention as true for purposes of this motion that he received verbal approval for a

1 rent-paying roommate, Defendant City is not liable for any injury caused by any misrepresentation of
2 its employees related to Plaintiff's requests for a rent-paying roommate and to travel for more than two
3 months per year.

4 Plaintiff does not specifically plead the conduct he alleges Defendant Breed partook in.
5 Regardless, Defendant Breed is entitled to immunity under Cal. Govt. Code Section 820.2 which
6 states, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury
7 resulting from his act or omission where the act or omission was the result of the exercise of the
8 discretion vested in him, whether or not such discretion be abused." Additionally, Defendant Breed is
9 also immune under Cal. Govt. Code Section 820.6 which states, "[i]f a public employee acts in good
10 faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid
11 or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have
12 been liable had the enactment been constitutional, valid, and applicable."

13 In light of these statutory immunities that Defendants are entitled to, Plaintiff's state law claims
14 should be dismissed.

15 **IV. PLAINTIFF'S ELDER ABUSE CLAIM FAILS**

16 Plaintiff's fifth cause of action alleges elder abuse under The Elder Abuse and Dependent
17 Adult Civil Protection Act (hereinafter "EADACPA") which is governed by California Welfare and
18 Institution Code Sections 15600-15705.40. Plaintiff specifically alleges violations of Cal. Welf. and
19 Inst. Code Sections 15610.53 and 15610.57. Plaintiff pleads no facts to support these allegations, he
20 simply pleads conclusory statements.

21 Plaintiff first alleges mental suffering under Cal. Welf. and Inst. Code Section 15610.53.
22 "Mental suffering means fear, agitation, confusion, severe depression, or other forms of serious
23 emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by
24 deceptive acts performed or false or misleading statements made with malicious intent to agitate,
25 confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent
26 adult." The Complaint is silent as to any malicious intent by Defendants.

27 Plaintiff's next allegation is neglect under Cal. Welf. and Inst. Code Section 15610.57. Cal.
28 Welf. and Inst. Code Section 15610.57 sets forth the elements of neglect as follows,

(a) "Neglect" means either of the following:

PROOF OF SERVICE

I, ANNAMARIE DAVIS, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney’s Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On August 15, 2019, I served the following document(s):

DEFENDANTS’ NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM [F.R.C.P, Rule 12(b)(6)]

on the following persons at the locations specified:

Allison Barton Rice
700 Lavaca Street, #1400-90978
Austin, TX 78701
allisonbartonrice@mac.com

Plaintiff in Pro Per

(415) 579-8208 (Telephone)

in the manner indicated below:

BY UNITED STATES MAIL: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed August 15, 2019, at San Francisco, California.

/s/ Annamarie Davis
ANNAMARIE DAVIS