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CITY AND COUNTY OF SAN FRANCISCO, LONDON BREED,
9 KATE HARTLEY, MARIA BENJAMIN, CISSY YIN, DENNIS HERRERA,
AND KEITH NAGAYAMA (IN THEIR OFFICIAL CAPACITIES)

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 ALLISON BARTON RICE, AN
13 INDIVIDUAL,

14 Plaintiff,

15 vs.

16 THE CITY AND COUNTY OF SAN
FRANCISCO; LONDON BREED, MAYOR
17 OF THE CITY OF SAN FRANCISCO; KATE
HARTLEY, DIRECTOR OF THE SAN
18 FRANCISCO MAYOR’S OFFICE OF
HOUSING AND COMMUNITY
DEVELOPMENT; MARIA BENJAMIN,
19 DIRECTOR OF HOMEOWNERSHIP &
BELOW MARKET RATE PROGRAMS SAN
20 FRANCISCO MAYOR’S OFFICE OF
HOUSING AND COMMUNITY
DEVELOPMENT; CISSY YIN,
21 HOMEOWNERSHIP & BELOW MARKET
RATE PROGRAMS COMPLIANCE
22 MANAGER SAN FRANCISCO MAYOR’S
OFFICE OF HOUSING AND COMMUNITY
23 DEVELOPMENT; DENNIS HERRERA, SAN
FRANCISCO CITY ATTORNEY; KEITH
24 NAGAYAMA, SAN FRANCISCO CITY
DEPUTY ATTORNEY AND DOES 1
25 THROUGH 50,
26

27 Defendants.
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: January 9, 2020
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 First Amended Complaint against the City and County of San Francisco (“the City”), London Breed, Kate Hartley, Maria Benjamin, Cissy Yin, Dennis Herrera, and Keith Nagayama, collectively “Defendants,” alleging violations of the Fair Housing Act (hereinafter “FHA”), the Americans with Disability Act (hereinafter “ADA), and the §1983 Civil Rights Act (hereinafter “§ 1983”). The individually named Defendants respond in their official capacity only because Plaintiff failed to properly serve them in their individual capacities. Regardless, Plaintiff’s First Amended Complaint identifies no personal conduct by the individual Defendants upon which individual capacity or official capacity liability can be based. For the reasons set forth below, the Court should dismiss all of Plaintiff’s claims against Defendants with prejudice.

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; ECF No. 49 at ¶ 37. 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. ECF No. 1 at ¶ 25; ECF No. 49 at ¶ 38. The Agreement stated that written consent from the Redevelopment Agency of the City and County of San Francisco (hereinafter “the Agency”)¹ was required for any deviation from these requirements. ECF No. 49 at ¶¶ 45, 46.

Plaintiff claims that in the latter part of 2008 he received oral permission to have a rent-paying roommate. ECF No. 49 at ¶ 43. Plaintiff also claims that he was “not cognizant of the ‘written’ consent requirement within the Agreement until the early part of 2016.” *Id.* at ¶ 48. Once Plaintiff

¹ 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 became aware of the written consent requirement, he attempted to obtain permission to have a rent-
2 paying roommate. *Id.* Plaintiff did not receive written consent from MOHCD. *Id.* at ¶ 50.

3 Plaintiff claims that based on the permission he allegedly received orally, he had rent paying
4 roommates. *Id.* at 43. In September of 2017, Plaintiff began the process of refinancing his mortgage
5 to obtain a lower interest rate. *Id.* at ¶ 49. This process caused Plaintiff's violation of the Agreement
6 by way of rent-paying roommates to come to the MOHCD's attention. *Id.* On September 19, 2017,
7 Plaintiff's doctor, Dr. Alison Ludwig, MD, submitted a letter in support of Plaintiff's request for a
8 rent-paying roommate. ECF No. 1-1 at p. 25. The letter stated that Plaintiff found having a roommate
9 helpful and beneficial with respect to isolation and loneliness. *Id.* The letter did not reference the
10 need for the roommate to pay rent to be beneficial for Plaintiff. *Id.*

11 On October 26, 2017, Plaintiff received a letter from Ms. Cissy Yin of the MOHCD. ECF No.
12 1-1 at 33-34. This letter informed Plaintiff that there was no record of approval for him to have a rent-
13 paying roommate and that his conduct was in violation of Section 6.1 of the Agreement. *Id.* The letter
14 acknowledged receipt of the letter from Dr. Ludwig and informed Plaintiff that he could have a
15 roommate without charging rent. *Id.* The letter also set forth the circumstances under which a
16 temporary lease would be permitted and informed Plaintiff that he did not appear to qualify. *Id.* The
17 letter directed Plaintiff to terminate the current lease of the Property and not to lease any part of the
18 Property in the future without prior written consent. *Id.* Plaintiff complied. ECF No. 49 at ¶ 64.

19 Plaintiff never received written permission to have a rent-paying roommate and chose not to
20 take in a non-rent-paying roommate. ECF No. 49 at ¶¶ 50, 64. Plaintiff ultimately voluntarily sold his
21 unit in early 2018. *Id.* at ¶ 64. Escrow closed on the sale of the Property on May 4, 2018. *Id.* at ¶ 67.

22 LEGAL STANDARD FOR MOTION TO DISMISS

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

1 For purposes of dismissal, the court generally considers only allegations contained in the
2 pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice, and
3 construes all well-pleaded material factual allegations in the light most favorable to the nonmoving
4 party. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013); *Akhtar v.*
5 *Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

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

10 ARGUMENT

11 **I. PLAINTIFF FAILED TO COMPLY WITH THE COURT’S ORDER PERMITTING 12 HIM TO AN AMENDED COMPLAINT**

13 The Court granted Defendants’ Motion to Dismiss Plaintiff’s original Complaint in this matter.
14 ECF No. 46. In that order, the Court found that Plaintiff failed to state a FHA claim in his assertion
15 that Defendants discriminated against him by not allowing him to have a roommate. *Id.* The Court
16 also found the same true for Plaintiff’s ADA claim. *Id.* at p. 12. Additionally, the Court dismissed the
17 state law claims for lack of supplemental jurisdiction. *Id.* at p. 13. The Court granted Plaintiff
18 permission to file an amended complaint, “if he can cure the deficiencies in the complaint that the
19 court has identified.” *Id.* at p. 14. Plaintiff’s First Amended Complaint fails to cure the deficiencies.

20 Plaintiff’s First Amended Complaint alleges the same FHA and ADA violations, as well as a §
21 1983 claim based on the claimed FHA and ADA violations. Plaintiff once again alleges that
22 Defendants denying him a rent-paying roommate as the basis of these claims. As such, Plaintiff failed
23 to cure the deficiencies from his first Complaint in his First Amended Complaint. Therefore, the
24 Court should deny Plaintiff’s First Amended Complaint with prejudice as to all Defendants.

1 **II. PLAINTIFF CANNOT STATE FAIR HOUSING ACT OR AMERICANS WITH**
2 **DISABILITY ACT CLAIMS**

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

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

9 In no way did the alleged conduct prevent Plaintiff from inhabiting his unit. Therefore, this
10 allegation does not give rise to a FHA violation. The FHA states:

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

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

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

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

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

(e) For profit, to induce or attempt to induce any person to sell or rent any
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.

42 U.S.C. § 3604.

The FHA goes on to state, “[i]t shall be unlawful to coerce, intimidate, threaten, or interfere
with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or
on account of his having aided or encouraged any other person in the exercise or enjoyment of, any
right granted or protected by section 3603, 3604, 3605, or 3606 of this title.” 42 U.S.C.A. § 3617.

1 Plaintiff purchased the property on October 25, 2004. Plaintiff does not allege that any
2 Defendant either interfered with his purchase of the property or his ability to inhabit his property. At
3 the time of the purchase, Plaintiff signed the Agreement that clearly stated Plaintiff could not lease any
4 portion of his property without written permission. Plaintiff fails to set forth sufficient facts to state a
5 claim under the FHA because he does not and cannot identify conduct by any Defendant that amounts
6 to a violation of the FHA.

7 Defendants do not dispute that in some situations, post-acquisition liability may sometimes
8 exist in FHA claims, as noted in *The Committee Concerning Community Improvement v. City of*
9 *Modesto*, 583 F.3d 690 (9th Circuit 2009) (holding that the FHA applied to post-acquisition
10 discrimination related to municipal services). However, this is not one of those situations. Defendants
11 did not limit Plaintiff's right to exercise or enjoyment of his property. Defendants did not withhold
12 services, privileges or facilities from Plaintiff. Plaintiff maintained control and enjoyment of his unit
13 until he voluntarily sold it.

14 Even if the Court determines the FHA applies and considers Plaintiff's failure to accommodate
15 argument, it fails on the face of the Complaint. Defendants did not bar Plaintiff from having a
16 roommate. Defendants simply barred Plaintiff from collecting rent from a roommate because he failed
17 to make a showing as to why such an exception was necessary. Plaintiff's dissatisfaction with a term
18 of an agreement he entered into at the time he purchased the property does not amount to a FHA
19 violation. Dr. Ludwig's letter indicates that a roommate was beneficial to Plaintiff's mental health
20 with respect to isolation and loneliness. ECF No. 1-1 at p. 25. It makes no mention of a need for
21 financial gain from that roommate to benefit Plaintiff's mental health. *Id.* There is no dispute of fact
22 that Defendants permitted Plaintiff to have a roommate, so long as rent was not charged. ECF No. 1-1
23 at pp. 33-34. Further, Plaintiff did not qualify for a financial hardship exemption. A point that he does
24 not dispute. ECF No. 49 at ¶ 43. Plaintiff simply chose not to take on a non-rent paying roommate.
25 Such a decision by Plaintiff does not give rise to a FHA violation by Defendants.

26 Plaintiff failed to state facts sufficient to support his first cause of action alleging violations of
27 the Fair Housing Act. It should therefore be dismissed as to all Defendants.

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

3 Plaintiff's second cause of action is for alleged violations of the Americans With Disabilities
 4 Act ("ADA"), 42 U.S.C. Section 12132, the California Civil Code as set forth in Sections 51(c) and
 5 54(f), and an unlawful practice pursuant to California Government Code Section 12948. The ADA
 6 does not apply here. Therefore, Plaintiff's ADA claim should be dismissed.

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

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

15 Should the Court find that the ADA applies, Plaintiff's claim still fails. Defendants informed
 16 Plaintiff he was free to take in a roommate, he just could not collect rent. ECF No. 1-1 at pp. 33-34.
 17 Additionally, Plaintiff's financial documents were reviewed and he was informed that he did not
 18 appear to qualify for a financial hardship extension. ECF No. 1-1 at 34. Defendants did not preclude
 19 Plaintiff from having someone live with him to

20 Plaintiff once again failed to state facts sufficient to support his second cause of action alleging
 21 violations of the ADA. Therefore, the Court should dismiss Plaintiff's First Amended Complaint with
 22 prejudice.

23 **III. PLAINTIFF'S § 1983 CLAIM FAILS BECAUSE DEFENDANTS DID NOT VIOLATE**
 24 **PLAINTIFF'S CONSTITUTIONAL RIGHTS**

25 Plaintiff alleges Defendants violated his civil rights under § 1983 based on FHA and ADA
 26 violations. § 1983 states:

27 Every person who, under color of any statute, ordinance, regulation, custom, or
 28 usage, of any State or Territory or the District of Columbia, subjects, or causes
 to be subjected, any citizen of the United States or other person within the
 jurisdiction thereof to the deprivation of any rights, privileges, or immunities
 secured by the Constitution and laws, shall be liable to the party injured in an

1 action at law, suit in equity, or other proper proceeding for redress, except that
2 in any action brought against a judicial officer for an act or omission taken in
3 such officer's judicial capacity, injunctive relief shall not be granted unless a
4 declaratory decree was violated or declaratory relief was unavailable. For the
5 purposes of this section, any Act of Congress applicable exclusively to the
6 District of Columbia shall be considered to be a statute of the District of
7 Columbia.

8 42 U.S.C.A. § 1983.

9 For the reasons set forth above, Plaintiff fails to set forth sufficient facts to support a claim that
10 any Defendant violated his constitutional rights under the FHA or the ADA. Without a constitutional
11 violation, Plaintiff's § 1983 claim cannot survive. The Court should dismiss Plaintiff's § 1983 claim
12 with prejudice as to all Defendants.

13 **CONCLUSION**

14 For all the foregoing reasons, the Court should dismiss Plaintiff's First Amended Complaint
15 with prejudice.

16 Dated: November 25, 2019

17 DENNIS J. HERRERA
18 City Attorney
19 CHERYL ADAMS
20 Chief Trial Deputy
21 KELLY COLLINS
22 Deputy City Attorney

23 By: /s/ Kelly Collins
24 KELLY COLLINS

25 Attorneys for Defendants
26 CITY AND COUNTY OF SAN FRANCISCO and
27 MAYOR LONDON BREED
28