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Plaintiff, in propria persona

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

ALLISON BARTON RICE, an individual,

Plaintiff,

v.

THE CITY AND COUNTY OF SAN FRANCISCO; LONDON BREED, MAYOR OF THE CITY OF SAN FRANCISCO; KATE HARTLEY, DIRECTOR OF THE SAN FRANCISCO MAYOR'S OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT; MARIA BENJAMIN, DIRECTOR OF HOMEOWNERSHIP & BELOW MARKET RATE PROGRAMS SAN FRANCISCO MAYOR'S OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT; CISSY YIN, HOMEOWNERSHIP & BELOW MARKET RATE PROGRAMS COMPLIANCE MANAGER SAN FRANCISCO MAYOR'S OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT; DENNIS HERRERA, SAN FRANCISCO CITY ATTORNEY; KEITH NAGAYAMA, SAN FRANCISCO CITY DEPUTY ATTORNEY and DOES 1 through 50,

Defendants.

CASE NO. 19-cv-04250 LB

OPPOSITION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND PROPOSED ORDER

Hearing Date: January 9, 2020
Time: 9:30 a.m.
Place: 450 Golden Gate Ave. Courtroom B, 15th Fl San Francisco, CA 94102

Trial Date: Not Set

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

1. Allison Barton Rice ("Plaintiff" or "Plaintiff Rice") was (and is) a disabled person and he brought his First Amended Complaint against the City and County of San Francisco, London Breed, Kate Hartley, Maria Benjamin, Cissy Yin, Dennis Herrera, and Keith Nagayama, collectively "Defendants", stating claims of Fair Housing Act violations and Americans with Disabilities Act violations against all Defendants; and causes of action pursuant to § 1983 and § 1985.(2) of the Civil Rights Act against all individually named Defendants in their individual capacity (ECF No. 49). All of Plaintiff's stated claims in his First Amended Complaint are supported by exhibits that clearly show conduct by Defendants was in violation of the Federal laws cited therein, that Plaintiff Rice did suffer damage and injury due to Defendants' unlawful conduct, and that Plaintiff Rice is entitled to relief under Federal law (ECF Nos. 1.1, 1.2, 1.3, and 49).

2. All Defendants were properly served on July 25th 2019, including individually named Defendants in their official and individual capacities (ECF Nos. 6 and 33). Defendants Kate Hartley, Maria Benjamin, Cissy Yin, Dennis Herrera, and Keith Nagayama failed to appear in both their official and individual capacities; London Breed failed to appear in her individual capacity but did appear in her official capacity (ECF No. 15).

3. Defendants moved to dismiss Plaintiff's stated claims in his First Amended Complaint of Fair Housing Act violations, the Americans with Disabilities Act violations, and cause of action pursuant to § 1983 of the Civil Rights Act on grounds Plaintiff failed to cure the deficiencies of his Original Complaint and failed to state a claim.

4. Defendants' Motion to Dismiss Plaintiff's First Amended Complaint lacks a number of pertinent facts; contains partial and/or extraordinarily misleading statements of fact and, in some instances, patently false statements of fact; contains a response to State claims which do not exist; and makes no protest to Plaintiff's claim of a cause of action pursuant to § 1985.(2) of the Civil Rights Act (ECF No. 50).

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5. Five (5) examples of Defendants' partial and/or misleading statements of fact, and patently false statements of fact made to the Court in their Motion to Dismiss Plaintiff's First Amended Complaint are:

1. "In September of 2017, Plaintiff began the process of refinancing his mortgage to obtain a lower interest rate. This process caused Plaintiff's violation of the Agreement by way of rent-paying roommates to come to the MOHCD's attention." (ECF No. 50, page 5, lines 4 thru 6) - these statements of fact made by Defendants are a partial part of the factual background and misleading. Missing from their statements (and their Motion) is the fact that, prior to the refinancing process, Plaintiff Rice had made efforts to rectify his lack of "written consent" but Defendants were mostly unresponsive and took no note of Plaintiff's efforts. Plaintiff Rice contends Defendants seek to insinuate to the Court that Plaintiff Rice was trying to violate the agreement. To the contrary, Plaintiff Rice always strove to be in compliance with the Agreement as well as any and all other rules, regulations, and laws he was subject to,

2. "There is no dispute of fact that Defendants permitted Plaintiff to have a roommate, so long as rent was not charged." (ECF No. 50, page 8, lines 21 thru 22) - this statement of fact made by Defendants lacks a pertinent fact, is misleading (i.e. a red-herring), and it is false. Defendants did not permit Plaintiff Rice anything. Defendants had no authority to permit or not permit Plaintiff Rice from having a "non rent-paying roommate" (i.e. a "guest", in this case, a person that would live for free in Plaintiff's home). Plaintiff Rice contends Defendants seek to convey to the Court that Defendants did make an accommodation available to Plaintiff Rice. The truth and reality is Defendants did not make any accommodation available to Plaintiff Rice, and they made no effort of any kind to accommodate Plaintiff Rice - to the contrary, Defendants denied Plaintiff Rice a reasonable and necessary disability related policy accommodation mandated by the FHA and they made great effort to make it appear otherwise, which they still do. And, Plaintiff Rice has always disputed Defendants suggestion that taking in a "non rent-paying roommate" (i.e. a "guest") was sufficient to alleviate the symptoms of his mental illness,

3. "Defendants did not limit Plaintiff's right to exercise or enjoyment of his property." (ECF No. 50, page 8, lines 10 thru 11) - this statement of fact made by Defendants is outrageously false because, what Defendants deny doing, is exactly what Defendants did, among other misconduct,

4. "Plaintiff maintained control and enjoyment of his unit until he voluntarily sold it." (ECF No. 50, page 8, lines 12 thru 13) - two false statements of fact made by Defendants in one sentence, and a very inappropriate use of the word "unit". The truth and reality is, fact: Plaintiff had limited control of his unit (home), especially of the most critical element with respect to his disability related needs (the ability to share his home with a rent-paying roommate). Fact: Defendants had significant control of the Property (especially "Agency's written consent" to "lease a portion thereof"). Fact: Plaintiff did not voluntarily sell his unit (home). Plaintiff sold his home under great duress placed upon him by the Defendants, which he made abundantly clear in his email to Ms. Borzoni, Ms. Yin, and Ms. Benjamin of the Agency, and Mr. Nagayama of the City Attorney's Office by his express statement: "I am selling my BMR condominium "under protest", primarily because the MOHCD has ignored my disability and denies that the ADA is applicable to this/my situation - which is, and has been, injurious and detrimental to me. If and when I can, I intend to seek recourse through an appropriate legal channel." (ECF No. 1.2, page 36), and

5. "Defendants simply barred Plaintiff from collecting rent from a roommate because he failed to make a showing as to why such an exception was necessary." (ECF No. 50, page 8, lines 16 thru 17) - another false statement of fact. Plaintiff Rice did explain several times that he needed a rent-paying roommate to alleviate the symptoms of his mental illness (most significantly, the isolation and loneliness) because a rent-paying roommate is what worked to reduce the symptoms of his disability, whereas a non rent-paying roommate did not. Exactly how many times were required for Plaintiff Rice to explain the reasons for his reasonable and necessary disability related policy accommodation mandated by the FHA to "… make a showing as to why such an exception was necessary."?

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6. Again, these examples are Defendants' statements of fact to the Court, made in their Motion to Dismiss Plaintiff's First Amended Complaint. And, there are many more, most (if not all) of the crucial statements of fact Defendants have made in their filings to the Court in this case contain partial and/or misleading and/or false statements of fact. Plaintiff Rice is not seeking to be rude or offensive, but what he states in this paragraph has to be said because it is the truth and the reality in this case. And, to be sure, Plaintiff's statements of fact in his filings to the Court in this case are as complete as he is able to make them, straight, truthful, wholly truthful, and nothing but truthful. Any statement (of fact or otherwise) from Plaintiff Rice that is in any way, shape, of form false or in error is purely unintended and likely out of ignorance.

7. Plaintiff Rice desires to make clear, as best he can, that he could afford his Below Market Rate condominium (an affordable housing unit) precisely because it was affordable. Plaintiff Rice never claimed, asserted, or implied that he needed a rent-paying roommate to afford his "affordable" home. To be complete in this statement of fact, Plaintiff Rice did state in his previous filings that the loss of his "affordable" home rendered him unable to afford to live in San Francisco - but while he had his "affordable" home, he had no problem affording life in San Francisco. Plaintiff Rice needed a rent-paying roommate to alleviate the symptoms of his mental illness. It is well founded that there are significant (if not overwhelming) differences in the relationship (and the interpersonal communications, interactions, conditions, etc.) between a rent-paying roommate and a non rent-paying roommate that are far beyond the monetary consideration of rent - as Plaintiff Rice explained in his First Amended Complaint at paragraph 74: "To Plaintiff Rice a roommate who pays his or her own way is like an equal, a companion, someone who shares in the rights and responsibilities of the dwelling. A roommate who lives for free is like a parasite, or a leech getting fat while sucking the blood of it's host; a person who enjoys an exaggerated standard of living, luxuriating in rights to the shared living space while shouldering none of the responsibilities of the dwelling. In the mind of Plaintiff Rice, a paying roommate was a companion while a non-paying roommate was more like invited vermin. Inviting vermin into his home was unlikely to relieve Plaintiff Rice from the symptoms of his mental illness, and, in some ways, it was likely to make them worse."

8. It is noteworthy that Defendants introduced to this case that they provided the same accommodation (that Plaintiff needed and requested) to participants in the 'Limited Equity Home Ownership Program' who had an employment relocation need or a financial hardship need. And, Defendants introduced to this case the idea of financial gain. Again, Plaintiff Rice could afford his home because it was affordable housing. He needed a rent-paying roommate because that was what worked to alleviate the symptoms of his mental illness - not because he couldn't afford his home and not for financial gain. Furthermore, Defendants clearly indicate that the same accommodation, when not required by law, is within the nature of the Program. But, when it is required by law, they claim it's against the nature of the Program (ECF No. 1.2, page 34, forth sentence of first paragraph) - this, of course, completely belies any logic.

9. Plaintiff Rice was a disabled person with a reasonable and necessary disability related policy accommodation need. A fact Defendants have thus far done everything they can to deny, ignore, disregard, obfuscate, obscure, complicate, garble, deflect, redirect, translate into any other meaning - anything whatsoever, except acknowledge.

10. In the interests of justice and to provide Plaintiff Rice fair and equal protection under Federal law and for the reasons and arguments set forth above and below, the Court should deny Defendant's entire Motion to Dismiss Plaintiff's First Amended Complaint and order Defendants to file an Answer to Plaintiff's First Amended Complaint within 21 days of the date of that order.

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FACTUAL BACKGROUND

11. Plaintiff is a totally and permanently disabled veteran (for psychiatric reasons) of the United States Navy (ECF No. 1.1, pages 2 and 25). In 2012, the San Francisco Mayor's Office of Housing and Community Development became the successor in interest to the rights and obligations of a program of the San Francisco Redevelopment Agency (hereinafter collectively known as the "Agency"), (ECF No. 1.1, page 33). In early 2004, by chance, Plaintiff Rice placed high in a lottery created, controlled, and conducted by the Agency that he had entered, such, that the Agency offered to sell Plaintiff Rice a home at a price which was below those otherwise prevailing in the market. That home (hereinafter "the Property") is commonly known as a Below Market Rate condominium (hereinafter "BMR") or "Affordable Housing", and that price is described as "Affordable Purchase Price". And, Plaintiff Rice did purchase the Property from the Agency on October 25th 2004 (close of escrow), (ECF No. 1.1, pages 4 to 19).

12. The Property was part of a program of the Agency entitled the 'Limited Equity Home Ownership Program' (hereinafter "the Program"). Among other terms and conditions, the terms and conditions for purchasing, financing, using, and sale of the Property were defined and enumerated in the 'Declaration of Resale Restrictions and Option to Purchase Agreement' (hereinafter "the Agreement"). Both the Program and the Agreement were created and developed by the Agency. Importantly, the Agency had very significant control over the Property and the use of the Property at all times (ECF No. 1.1, pages 4 to 19).

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13. For several years Plaintiff Rice exercised and enjoyed a reasonable and necessary disability related policy accommodation to combat severe and debilitating isolation and loneliness, a symptom of his mental illness. That policy accommodation was the sharing of the Property (his home) with a roommate in the normal sense (i.e. roommate pays rent and utilizes the space and amenities, and lives at the Property with him), which was verbally granted to him in the latter part of 2008 (possibly the early part of 2009) by Ms. Horner of the Agency. To be clear, this was not for reasons of finance, Plaintiff Rice could afford his home without the need of a rent-paying roommate. Furthermore, while Defendants seem to wish to make a big deal out of Plaintiff's ignorance of the requirement that the accommodation be in writing, it should be noted that Ms. Horner apparently shared that same ignorance when she granted him the accommodation.

14. With respect to the Agreement, such policy accommodation required "Agency's prior written consent" to "lease a portion thereof" pursuant to section 6.1 of the Agreement. The Agency did make that policy accommodation available to participants in the Program who had a financial hardship need or an employment relocation need, not just for a "portion thereof" but for the entire property (ECF No. 1.1, page 8; and ECF 1.2, page 2). Regardless of Plaintiff's lack of written consent from the Agency, the reasonable and necessary disability related policy accommodation that Plaintiff Rice exercised and enjoyed was a right granted and protected by the FHA.

15. Defendants took extreme exception and made an extreme response to Plaintiff's lack of Agency's written consent to lease a portion of his home. And, despite Plaintiff's previous, concurrent, significant, and multiple efforts to rectify that specific issue, and in violation of the FHA, Defendants threatened, intimidated, and coerced Plaintiff Rice and interfered with his exercise and enjoyment of his reasonable and necessary disability related policy accommodation, and they did refuse to grant him that accommodation by denying him "written consent" to "lease a portion thereof".

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ARGUMENT

16. In Defendants' '**Notice of Motion**', Defendants state: "…, Defendants City and County Of San Francisco and London Breed, Mayor of the City of San Francisco ("Defendants") will and hereby do move for an order dismissing all of Plaintiff's causes of action for failure to state a claim, failure to comply with applicable statues[sic] of limitations, and on the basis of immunity." and, in their '**Introduction**', Defendants state: "The individually named Defendants respond in their official capacity only because Plaintiff failed to properly serve them in their individual capacities." They then proceed to offer exactly zero arguments on the issues of statute of limitations, immunity, and proper service of an individual in their individual capacity. Since the rest of Defendants' Motion is addressed to the question of if Plaintiff's complaint states a claim and since Plaintiff Rice will deal with their arguments point by point below, Plaintiff Rice will first take a moment to address the statute of limitations, immunity, and proper service topics, even though Defendants didn't make any arguments.

Statute of Limitations

17. Regarding the statute of limitations for an FHA claim, pursuant to 42 U.S.C. § 3613.(a)(1)(A), the statute of limitations for an FHA claim is 2 years. 42 U.S.C. § 3613.(a)(1)(A) and (B) state:

> 3613. Enforcement by private persons
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> (a) Civil action
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> (1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.
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> (B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

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18. 42 U.S.C. § 3610.(a)(1)(A)(i) states:

3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

Plaintiff Rice followed that procedure in an effort to resolve the issue(s) that bring(s) rise to this case with the Fair Housing and Equal Opportunity Enforcement Division of the Department of Housing and Urban Development (hereinafter "FHEO") and filed a complaint with them on May 8th 2018 (ECF No. 23). Pursuant to 42 U.S.C. § 3613(a)(1)(B), Plaintiff's statute of limitations for his FHA claims was tolled while in administrative proceedings with FHEO. The date on the last letter Plaintiff Rice received from Gordon F. Patterson (Acting Director Enforcement Support Division), marking the end of administrative proceedings with FHEO, is December 20th 2018 (ECF 1.3, page 46) - (including start date and end date) total number of days in administrative proceedings with FHEO is 227 (May 8th 2018 to December 20th 2018). Thus, in this case, the statute of limitations for Plaintiff's FHA claims is 2 years and 227 days.

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19. Regarding the statute of limitations for an ADA claim, drawn form various sources in Plaintiff's research of "statute of limitations for an ADA claim" is the following: The statute of limitations for an ADA claim depends upon the title of the ADA involved and on an interpretation of a Supreme Court opinion. With respect to title II claims, and prior to the ADA Amendments Act of 2008, the applicable statute of limitations was the state's personal injury statute of limitations. California Code of Civil Procedure (hereinafter "CCP"), Chapter 3. The Time of Commencing Actions Other Than for the Recovery of Real Property at § 335.1 and § 338.(a) state, respectively:

335.1. Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

338.(a) Within three years:
(a) An action upon a liability created by statute, other than a penalty or forfeiture.

Thus, the statute of limitations of a pre-amendment ADA claim was 2 years, or, Plaintiff Contends, 3 years, being that the liability alleged in this case was created by federal law. Regardless, in this case, given that Plaintiff's ADA claim is made possible by the ADA Amendments Act of 2008, rather than the pre-amendment ADA, the statute of limitations is the 4 year federal statute of limitations set forth at 28 U.S.C. § 1658.(a). See *Dickinson v. University of North Carolina*, 91 F. Supp. 3d 755, 2015 WL 1185850 (M.D.N.C. 2015). 28 U.S.C. § 1658.(a) states:

1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(The date of the enactment of this section, referred to in subsection (a), is the date of enactment of Pub. L. 101–650, which was approved Dec. 1, 1990.)

Thus, in this case, the the statute of limitations for Plaintiff's ADA claim is 4 years.

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20. Regarding the statute of limitations for Plaintiff's § 1983 and § 1985.(2) claims, Plaintiff Rice asks the Court to find that the 3 year statute of limitations at CCP § 338.(a) be the most appropriate. Should Defendants seek to invoke The California Claims Act (Govt. Code §§ 810-996.6) and seek a 6 month or 1 year statute of limitations, the Court should consider *Burnett v. Grattan*, 468 U.S. 42, 43 (U.S. 1984) "The question presented is whether a state law, establishing a procedure for administrative resolution of employment discrimination complaints, provides an appropriate statute of limitations for actions brought under the Reconstruction-Era Civil Rights Acts, 42 U.S.C. 1981 et seq. We hold that it does not." and, *Doe v. County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wis. 1995) at 1077, noted "… the Supreme Court rejected the use of the Maryland Fair Employment Act statute of limitations for commencing administrative proceedings in a § 1981 and § 1983 employment discrimination action.", citing *Burnett.*

21. Several courts have held that the FHA requires a housing authority and/or a housing provider to engage in an interactive process with a client after that client informs them of his or her disability and seeks an accommodation.[1] What is the value of the rights granted by the FHA if housing authorities and providers, like the Defendants, have no obligation to actively seek a proper accommodation? If housing providers can meet their obligations under the FHA by ignoring a request for accommodation or by offering a non-accommodation or an accommodation that doesn't solve the problem, then the FHA really grants no rights at all. Plaintiff Rice contends, in this case, the Defendants had an obligation to engage in an interactive process with him to find an accommodation. However, Defendants did not. Defendants' discrimination against Plaintiff Rice continued right up until the sale of the property. Thus, the Court should recognize May 4th 2018 (the close of escrow of the Property's sale) as the appropriate accrual date, as that date was "The Point of No Return" and the termination of the alleged discriminatory housing practice.

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[1] See *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996); *Armant v. Chat-Ro Co.*, No. Civ. A. 00-1402, 2000 WL 1092838, at *2 (E.D. La. Aug. 1, 2000); *United States v. Hialeah Hous. Auth.*, 418 F. App'x 872, 877 (11th Cir. 2011); and *Astralis Condo. Assoc. v. HUD*, 620 F.3d 62 (1st Cir. 2010).

22. In the first 'Defendants' Notice of Motion and Motion to Dismiss the Complaint for Failure to State a Claim [F.R.C.P., Rule 12(b)(6)]' dated August 15th 2019, the Defendants stated: "Interpreting the accrual date in the most favorable light to Plaintiff would be the date of the transfer of deed for the Property. The deed for the Property was granted on March 29, 2018." (ECF No. 10, page 12, lines 9 thru 10) However, Plaintiff contests this date and, as stated above in paragraph 21, contends May 4th 2018 as the more appropriate accrual date.

23. In the case of an accrual date of May 4th 2018, Plaintiff filed his Complaint 1 year, 2 months, and 20 days later on July 24th 2019. Plaintiff Rice asks the Court to find Plaintiff's FHA claims, ADA claim, § 1983 claim and § 1985.(2) claim all fall within the applicable statute of limitations.

24. For the reasons stated above, Plaintiff Rice asks the Court to find that all claims in Plaintiff's Complaint were filed within the applicable statute of limitations. And, therefore, the Court should deny the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint based on their assertion of Plaintiff's "failure to comply with applicable statues[sic] of limitations".

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Immunity

25. Regarding Defendants' claim of immunity (while researching the issue of immunity, Plaintiff came across 'Federal Practice Manual for Legal Aid Attorneys', from which much of the following is drawn), besides authorizing official capacity suits against state and local officials for structural injunctive relief, 42 U.S.C. § 1983 authorizes claims against those officials in their individual capacity for compensatory and punitive damages. Although the Eleventh Amendment limits official capacity claims against state officials to prospective injunctive relief, it does not affect damage claims against those officials in their individual capacity.[2]

26. By its terms, § 1983 imposes liability on state and local officials who, acting under color of state law in their individual capacity, deprive plaintiffs of rights created by the Constitution and federal law. Nevertheless, the Supreme Court, drawing on common law, created absolute immunity from liability for some government officials and qualified immunity for others. Absolute and qualified immunity were developed to protect officials from lawsuits for actions relating to their official duties. The Court explained the underlying rationale for immunity: "[T]he public interest requires decisions and actions to enforce laws for the protection of the public … Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity - absolute or qualified - for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."[3]

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[2] *Hafer v. Melo,* 502 U.S. 21, 29-30 (1991); *Scheuer v. Rhodes,* 416 U.S. 232, 237 (1974), *overruled on other grounds, Davis v. Scherer,* 468 U.S. 183 (1984)..

[3] *Scheuer,* 416 U.S. at 241-42.

27. Qualified Immunity: Executive Officials - The U.S. president enjoys absolute immunity from suits for damages arising from his conduct as president.[4] But every other executive official, from cabinet officials and governors, legislators, and judges performing administrative functions, to the tens of thousands of public employees exercising state and local authority such as law enforcement officers and schoolteachers, enjoy only qualified immunity from suit.[5] A private individual temporarily retained by the government to carry out its work is also entitled to seek qualified immunity from suit under § 1983.[6]

28. Drawn from analogous common-law defenses available to public officials, qualified immunity protects public officials from personal liability unless their conduct violates then clearly established rights, privileges, or immunities secured by the Constitution and laws of the United States.

29. Qualified immunity is an affirmative defense. Early cases required a public employee to establish both that he did not violate clearly established law and that he acted without malicious intent.[7] Because proof of subjective good faith was incompatible with summary judgment, the Supreme Court modified the defense to shield public employees performing discretionary government functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[8] And so, conduct that does violate clearly established statutory or constitutional rights of which a reasonable person would have known does not enjoy qualified immunity.

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[4] *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Immunity is limited to claims arising from conduct within the "outer perimeter" of presidential responsibility and does not extend to conduct before the President takes office. *Clinton v. Jones*, 520 U.S. 681, 693-96 (1997).

[5] *Mitchell v. Forsyth,* 472 U.S. 511, 520-24 (1985) (rejecting absolute immunity for cabinet officers and individuals performing national security investigations); *Harlow v. Fitzgerald,* 457 U.S. 800, 808-13 (1982) (high- ranking presidential aides); *Wood v. Strickland*, 420 U.S. at 322 (1975) (school officials); *Scheuer v. Rhodes*, 416 U.S. 232, 247- 49 (1974) (governors, state adjunct generals, national guard officers, enlisted members, and presidents of state universities)

[6] *Filarsky v. Delia*, 132 S. Ct. 1657 (U.S. 2012).

[7] *E.g., Wood*, 420 U.S. at 322.

[8] *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). See also *Scott v. Harris*, 550 U.S. 372, 382-83 (2007).

30. Because public employees almost always perform discretionary functions[9], qualified immunity really turns on two issues: (1) whether the action in question violated a constitutional right and (2) whether that action violated clearly established law.[10] Although the former question may involve disputed facts, the latter is a question of law subject to early resolution. This involves a historical inquiry into whether the law was clearly established when the defendant acted.

31. *Saucier v. Katz* held that lower courts must decide qualified immunity defenses using that two step analysis in that sequence.[11] In *Pearson v. Callahan* the Court subsequently relaxed the analysis, holding that the *Saucier* procedure was not mandatory and that courts should have the flexibility to decide the question in either order.[12]

32. Identifying a case in which "the very action in question has previously been held unlawful" is not necessary, it is essential that "in the light of pre-existing law, the unlawfulness must be apparent."[13] Thus, to be "clearly established a right must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that right.'"[14]

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[9] For a rare example of a public official held not to be performing a discretionary function, see *Holloman v. Harland*, 370 F.3d 1252, 1282-84 (11th Cir. 2004) (public school teacher not performing discretionary function when leading class in moment of silent prayer, and therefore not entitled to raise qualified immunity as defense to suit). The court in *Holloman* observed: "Employment by a local, county, state, or federal government is not a *carte blanche* invitation to push the envelope and tackle matters far beyond one's job description or achieve one's official goals through unauthorized means. Pursuing a job-related goal through means that fall outside the range of discretion that comes with an employee's job is not protected by qualified immunity." *Id*. at 1267.

[10] *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

[11] *Saucier v. Katz*, 533 U.S. 194 (2001).

[12] *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

[13] *Anderson v. Creighton*, 483 U.S. 635 (1987).

[14] *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)) (whether there is right to be free from retaliatory arrest, otherwise supported by probable cause, after making statements to public figure was unclear). See also *Stanton v. Sims,* 134 S. Ct. 3 (2013) (per curiam) (police officer with probable cause to arrest suspect for misdemeanor who enters home without warrant while in hot pursuit of that suspect and who injures homeowner is entitled to qualified immunity because federal and state courts are sharply divided on legality of officer's actions).

33. Thus, in this case, regarding immunity for the individually named Defendants in their individual capacity, there are four (4) questions:

1. Was the FHA and/or the ADA clearly established federal law?

2. Did the FHA and/or the ADA apply to any or some of all of the following: Plaintiff Rice; the Property; the Agency, the City and County of San Francisco (hereinafter "CCSF"), the City Attorney's Office; the services, programs, activities or behavior of the Agency, CCSF, or the City Attorney's Office; the individually named Defendants; and/or the relationship(s) between any or some or all of the aforementioned?

3. Did any or some or all the individually named Defendants violate the FHA and/or the ADA, under color of state law with respect to Plaintiff Rice; the Property; the services, programs, activities of the Agency, CCSF, the City Attorney's Office; and/or the relationship(s) between any or some or all of the aforementioned?

4. Would a reasonable official in like position(s) of the individually named Defendants understood or have known that the alleged conduct of the individually named Defendants was in violation of the FHA and/or the ADA?

34. In this case, "reasonable" is not limited to what would be reasonable for an ordinary person, it is what would be reasonable for an official (a professional) in like position(s) of the individually named Defendants.

35. Regarding question 1 - Plaintiff contends that it was clearly established federal law that the FHA required Defendants to offer a reasonable accommodation to a person with a disability. And that under the ADA, the Defendants could not exclude a client or potential client from their services or deny their services to a client or potential client on the grounds that the nature of the client's disability and/or his needed accommodation would require them to make changes in their housing program that they wished to avoid making because it did not fit their established procedures or processes or the nature of that program as they saw it.

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36. Regarding question 2 - Plaintiff contends that the FHA and the ADA did apply to Plaintiff Rice and the Defendants. It is unclear why the Defendants think the ADA doesn't apply, since they seem to have misunderstood that Plaintiff's ADA claim was not about having a roommate, but rather about excluding Plaintiff from and/or denying him their legal and other services because of Plaintiff's disability. However, it is clear from their Motion, that Defendants think the FHA did not apply because they think that the FHA doesn't reach post-acquisition discrimination. However, *Committee Concerning Community Improvement v. Modesto*, 583 F. 3d 690 (9th Circuit 2009) (hereinafter "*CCCI*"), makes it abundantly clear that, in the 9th Circuit at least, it is settled law that the FHA does reach post-acquisition discrimination.

37. Regarding question 3 - Plaintiff contends that at least Ms. Yin, Ms. Benjamin, and Mr. Nagayama, if not all, of the individually named Defendants violated the FHA and/or the ADA with respect to Plaintiff Rice; the Property; the Agency's services, programs, activities, or behavior; and the relationships between any or some or all of the aforementioned - as he makes clear in the factual background and in his FHA, ADA, and § 1983 and § 1985.(2) claims in the Plaintiff's First Amended Complaint.

38. Regarding question 4 - Plaintiff contends that reasonable officials and legal professionals in like position(s) as that of the individually named Defendants would have understood or would have known that the alleged conduct of the Defendants was in violation of the FHA and/or the ADA. Especially given the rather extended time period of that alleged conduct and Plaintiff's multiple communications of his disabled status, disability, disability related needs; and his assertions and questions of the ADA and disability rights and disability accommodations - not once, twice, or thrice, but many times during the alleged conduct - as shown by the record of communications between Plaintiff Rice and the Defendants.

39. Furthermore, Plaintiff contends that reasonable housing officials and legal professionals would have known that the FHA requires them to make reasonable accommodations to allow a disabled person equal opportunity to use and enjoy their dwelling. And, reasonable housing officials and legal professionals would have known that in the 9th Circuit under *CCCI*, the FHA applied even in post-acquisition circumstances.

40. Similarly, reasonable housing officials and legal professionals would have known that the ADA would not permit them to exclude from or deny legal and housing counseling services to a disabled person simply because his disability and the accommodation necessary to relieve his symptoms would have required them to offer an accommodation that they considered against the nature of their housing program. And, reasonable housing officials and legal professions would have known of their obligation to engage in an interactive process in accommodations under both the FHA and the ADA.

41. For the reasons stated above, Plaintiff Rice asks the Court to find that the individually named Defendants do not enjoy immunity. And, therefore, the Court should deny the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint based on their assertion of "… on the basis of immunity."

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Proper Service and Failure to Appear

42. Regarding proper service and individually named Defendants' failure to appear, in Defendants' Motion, Defendants state: "The individually named Defendants respond in their official capacity only because Plaintiff failed to properly serve them in their individual capacities." (ECF No. 50, page 4, lines 7 thru 8)

43. Pursuant to Federal Rules of Civil Procedures (hereinafter "F.R.C.P.") Rule 4(a)(1)(E), individually named Defendants were notified in the summons: "If you fail to respond, judgement by default will be entered against you for the relief demanded in the complaint." (ECF No. 6). Furthermore, Plaintiff's Complaint clearly, unequivocally, and expressly stated for each of the individually named Defendants: "Individually and in her [or his] Capacity as …" (ECF No. 1.0)

44. Per directive of the San Francisco City Attorney or the San Francisco City Attorney's Office, Plaintiff served the Summons and Complaint on individually named Defendants Authorized Person in charge to accept Service of Process. That service was completed on July 25th 2019 at 3:45 PM at Mayor's Office, 1 Dr. Carlton B. Goodlett Place, Rm. 200, San Francisco, CA 94102 by Andy Esquer (Registered Process Server, S&R Services, 903 Sneath Lane, STE. 227, San Bruno, CA 94066 - S&R is now in STE. 115), (ECF Nos. 6 and 33).

45. Only the City and County of San Francisco and Ms. Breed (in her official capacity only) made a timely appearance. Plaintiff Rice contends "The other defendants have not appeared.", which is exactly what the Court said on August 21st 2019 in an Order signed by Honorable Judge Laurel Beeler (ECF No. 15). And, to date, <u>all individually named Defendants in their individual capacity have not appeared</u>. The "… other defendants …", after being informed of "… have not appeared." by the Court, joined themselves to Defendant City and County of San Francisco and Defendant London Breed's 'Motion to Dismiss' on August 26th 2019 (ECF No. 17). But, only in their official capacity, which was far from timely and, Plaintiff contends, does not change the fact that <u>the other defendants have not appeared</u>.

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46. Individually named Defendants acknowledged service and were fully aware of being served. Yet, (except for Ms. Breed in her official capacity) they consciously and willfully refused to timely appear by their stated reason of "… have not been properly served." via a footnote (without explanation) in the first 'Defendants' Notice of Motion and Motion to Dismiss the Complaint for Failure to State a Claim [F.R.C.P., Rule 12(b)(6)]' dated August 15th 2019 (ECF No. 10, page 6).

47. In the Order signed by Honorable Judge Laurel Beeler on August 21st 2019, the Court took note of individually named Defendants not appearing and stated: "The other defendants have not appeared." And, of their assertion of not being properly served, the Court stated: "The Court asks the counsel for CCSF to file a statement by August 26, 2019 explaining what the proper process is for serving CCSF officials with legal process." (ECF No. 15).

48. Counsel for CCSF, Kelly Collins, responded via a letter to Honorable Judge Laurel Beeler dated August 26th 2019 (ECF No. 16), in which she stated, in part, the following:

a. "Plaintiff failed to personally serve the individual Defendants in compliance with Federal Rule of Civil Procedure ("FRCP") Rule 4. Compliance with FRCP Rule 4 is necessary for the Defendants sued in their individual capacity.",

b. "Counsel for Defendants requested that Plaintiff dismiss Defendants in their individual capacities and proceed only in their official capacities. Plaintiff declined to do so.", and

c. "As such, Defendants contend that the Defendants have not been properly served in their individual capacities in compliance with FRCP Rule 4. Defendants will respond in their official capacity in a joinder pleading filed herewith.".

49. In that same letter, as shown above in paragraph 48, Counsel Kelly Collins stated: "Defendants will respond to the Complaint in their official capacity in a joinder pleading filed herewith." Counsel Kelly Collins and the Defendants apparently believed the Court's request for "… the counsel for CCSF to file a statement by August 26, 2019 explaining what the proper process is for serving CCSF officials with legal process." was an invitation to join themselves to Defendant City and County of San Francisco and Defendant London Breed's first 'Motion to Dismiss'. The Court's Order makes no such invitation. Plaintiff Rice, again, contends <u>all individually named Defendants, except Ms. Breed in her official capacity, have not appeared</u>.

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50. Plaintiff Rice took exception to Counsel Kelly Collins' assertions in her letter, and in his letter to the Honorable Judge Beeler dated August 27th 2019 (ECF No. 21), he stated, in part and referring to the individually named Defendants, the following:

> "1. I do not know their home addresses, nor of any other place to find them.
> 2. An internet search of their names does not provide a reliable address that I can tell.
> 3. Serving an individual - F.R.C.P. Rule 4(e)(C)[sic] "delivering a copy of each to an agent authorized by appointment or by law to receive service of process."[s/h/b 4(e)(2)(C)]
> 4. For an individual that is a CCSF employee, that agent is located at the Mayor's Office, City Hall, room 200 - per directive of the City Attorney or his office.
> 5. They were served by a professional registered process server.,
> 6. I searched for, but could not find, any requirement that "individual capacity" must be served separately from "official capacity" and, thus, require two summons, which appears to be what Ms. Collins is suggesting.
> 7. I believe serving in either capacity serves both."

51. Plaintiff Rice contends individually named Defendants were duly and properly served pursuant to F.R.C.P. Rule 4(e)(1) and 4(e)(2)(C), which states:

> (e) SERVING AN INDIVIDUAL WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
> (A) …;
> (B) …; or
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Furthermore, F.R.C.P. Rule 4, or elsewhere, does not express or imply or otherwise indicate any distinction for such "agent" to an agent at one's place of employment or home or elsewhere; or to be one that receives service of process for an individual in their official capacity and another that receives service of process in their individual capacity. Additionally, F.R.C.P. Rule 4(d)(1) Waving Service, states: (1) *Requesting a Waiver.* An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons …

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52. Plaintiff Rice contends individually named Defendants were duly and properly served pursuant to F.R.C.P. Rule 5(b)(2)(B)(i), which states:

> (b) SERVICE: HOW MADE.
> (1) …
> (2) Service in General. A paper is served under this rule by:
> (A) …;
> (B) leaving it:
> (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
> (ii) …

53. Individually named Defendants' home addresses are unknown to Plaintiff Rice. Plaintiff's exhaustive internet search for individual Defendants' home addresses did not reveal any addresses, if at all, that could reasonably (or otherwise) be relied upon. CCSF employees home addresses are restricted information and not publicly available from CCSF. Thus, the only reasonable place for Service of Process for individually named Defendants was their "usual place of business".

54. Plaintiff Rice contends individually named Defendants were duly and properly served pursuant to California Code of Civil Procedure (hereinafter "CCP"), § 415.20.(b) and § 416.90, which state:

> 415.20.(b) If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

> 416.90. A summons may be served on a person not otherwise specified in this article by delivering a copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process.

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55. Plaintiff Rice contends individually named Defendants were duly and properly served pursuant to San Francisco Municipal Code, ARTICLE III: EXECUTIVE BRANCH - OFFICE OF MAYOR, Section 3.100. POWERS AND RESPONSIBILITIES. 3., which states:

> The Mayor shall be the chief executive officer and the official representative of the City and County, and shall serve full time in that capacity. The Mayor shall devote his or her entire time and attention to the duties of the office, and shall not devote time or attention to any other occupation or business activity. The Mayor shall enforce all laws relating to the City and County, and accept service of process on its behalf.
>
> The Mayor shall have responsibility for:
>
> 1. …;
> 2. …;
> 3. Receipt and examination of complaints relating to the administration of the affairs of the City and County, and timely delivery of notice to the complainant of findings and actions taken;
> 4. …; thru 20. ….

56. On April 25th 2019 at the clerk's desk of the CCSF's Controller's Office, Claims Division, located at 1390 Market Street, 7th Floor, San Francisco, CA 94102 (and subsequent to Plaintiff filing his "CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO"), Plaintiff inquired (not once, but twice for absolute clarity) from the two (2) clerks on duty at that time the exact place for Service of Process for an individual employed by the CCSF, both clerk's were adamant that the place for Service of Process for any and all individuals employed by the CCSF (regardless of where they worked and per a directive of the City Attorney and/or the City Attorney's Office) was the Mayor's Office, City Hall, Rm. 200 located at 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102. Furthermore, for even more clarity, Plaintiff made further inquiry of the clerks if that was true for a complaint filed against the City Attorney. Again, the clerks were adamant that the Mayor's Office, City Hall, Rm. 200 was the place for Service of Process for any and all individuals employed by the CCSF regardless of where they worked, including the City Attorney.

57. On July 25th 2019 at 3:45 PM at the Mayor's Office, City Hall, Rm. 200, a copy of the Summons and of the Complaint for each individually named Defendant was left with Abigal Fay, Front Desk Coordinator who is the Authorized Person in charge to accept Service of Process (ECF No. 6 and 33).

58. Stated in the 'Declaration of Andy Esquer in Support of Plaintiff's Motion for Default Judgement', signed and dated 9/25/2019 (ECF No. 33) is:

"I, Andy Esquer, declare as follows:

1. I am a Registered Process Server in the employ of S&R Services, 903 Sneath Lane, STE. 227, San Bruno, CA 94066.

2. I served the Summons at the following individuals place of employment: London Breed, Kate Hartley, Maria Benjamin, Cissy Yin, Dennis Herrera, and Keith Nagayama; as well as the City and County of San Francisco. I left the documents with ABIGAIL FAY, FRONT DESK COORDINATOR who is the Authorized Person in charge to accept Service of Process at 3:45pm on July 25, 2019 at MAYOR'S OFFICE, 1 DR. CARLTON B. GOODLETT PLACE, RM. 200, SAN FRANCISCO, CA 94102.

3. Abigail Fay looked through everything before accepting service.

4. Abigail Fay accepted service for all 7 (1. London Breed, 2. Kate Hartley, 3. Maria Benjamin, 4. Cissy Yin, 5. Dennis Herrera, 6. Keith Nagayama, and 7. City and County of San Francisco).

5. For each of the 7 Summons I served, I produced and signed a PROOF OF SERVICE on July 26, 2019.

6. I declare under penalty of perjury that the foregoing is true and correct."

59. Plaintiff's exhaustive internet search for any instruction or directive that required the individually named defendants in their individual capacity (or any capacity) in this case to be served the Summons and Complaint in some other manner found none.

60. For the reasons stated above, Plaintiff Rice asks the Court to find that on July 25th 2019 at 3:45 PM individually named Defendants in their official capacity and individual capacity were each duly and properly served a copy of the Summons and of the Complaint, and that all individually named Defendants, except Ms. Breed in her official capacity, have not appeared and, thus, failed to appear.

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I. Defendants' Argument I. PLAINTIFF FAILED TO COMPLY WITH THE COURT'S ORDER PERMITTING HIM TO AN AMENDED COMPLAINT

61. In Defendants' Argument I, they argue, in conclusory fashion, that Plaintiff Rice failed to comply with the Court's order, because the Court granted him permission to file an amended complaint "if he can cure the deficiencies in the complaint that the court has identified." Plaintiff certainly tried to cure the deficiencies that the Court identified. The gist of the deficiencies that the Court identified in Plaintiff's original Complaint was that the Defendants didn't deny Plaintiff Rice a roommate, they simply denied him a rent-paying roommate. Plaintiff Rice explained in his First Amended Complaint why a non rent-paying roommate was not a solution to his problem. Every disability is different, perhaps even more so mental disabilities, the simple fact is: A non rent-paying roommate was not a solution to Plaintiff's problem. Plaintiff Rice expressed this to the Defendants on many occasions. The Defendants, however, simply continued to offer the non-accommodation solution of a non rent-paying roommate, never even engaging with Plaintiff Rice to understand why that was not a solution. It was as if Plaintiff, lacking arms, requested an auto-opening door and was offered a ramp, a solution to a problem completely different than the problem that Plaintiff had.

62. Plaintiff Rice states, as clearly as he possibly can, Defendants did not accommodate, permit, or provide anything whatsoever to Plaintiff Rice with respect to his disability related need(s). Defendants had no authority to permit or not permit Plaintiff Rice from having a "non rent-paying roommate". Plaintiff Rice contends Defendants' use of the term "non rent-paying roommate" or their statement "… Defendants permitted Plaintiff to have a roommate, so long as rent was not charged." (ECF No. 50, page 8, line 22) , or anything in a similar vein, is nothing more than a red-herring used in an effort to convince the Court that Defendants did make an accommodation available to Plaintiff Rice, but they did not. The truth and reality is Defendants did not make any accommodation available to Plaintiff Rice, and they made no effort of any kind to accommodate Plaintiff Rice. To the contrary, Defendants denied Plaintiff Rice a reasonable and necessary disability related policy accommodation mandated by the FHA and they made great effort to make it appear otherwise, which they still do.

63. As this Court noted in its opinion (ECF No. 46, page 12, lines 12 thru 19):

"To prevail on an FHA discrimination claim for failure to reasonably accommodate under 42 U.S.C. § 3604(f)(3), a plaintiff must prove all of the following elements: (1) the plaintiff is handicapped within the meaning of 42 U.S.C. § 3602(h); (2) the defendant knew or should reasonably be expected to know of the handicap; (3) accommodation of the handicap may be necessary to afford the handicapped person an equal opportunity to use and enjoy the dwelling; (4) the accommodation is reasonable; and (5) the defendant refused to make the requested accommodation. *Id.* at *4 (citing *Dubois*, 453 F.3d at 1179).".

Plaintiff Rice (1) certainly is handicapped within the meaning of 42 U.S.C. § 3602.(h). The Defendants (2) certainly knew of Plaintiff's handicap. The accommodation (3) was necessary to afford Plaintiff an equal opportunity to use and enjoy the dwelling, as may be seen by the fact that Plaintiff Rice, being repeatedly denied the accommodation he needed, was ultimately forced to sell his home and seek remedy for the symptoms of his mental illness elsewhere. The accommodation Plaintiff requested (4) was certainly reasonable, since the Defendants' own rules allowed just such an accommodation for mere reasons of financial difficulty or employment relocation requirements. And, Defendants (5) refused to make the accommodation.

64. This Court made clear that the standard is not - was the accommodation that Plaintiff sought the only solution or even the best solution, nor was it only the ability to use the dwelling - the standard is simply an accommodation that may be necessary to afford Plaintiff an equal opportunity to use and enjoy the dwelling; and that it is reasonable (ECF No. 46, page 12, lines 7 thru 10). Once the first four elements of the above test are met (as they were by Plaintiff Rice), the Defendants don't get to substitute their judgment as to whether or not the accommodation sought was the only or best way to meet the disability related needs of Plaintiff Rice - as made clear in Plaintiff's First Amended Complaint at paragraph 53:

"The last paragraph of item 7 in a document provided by the U.S. Department of Housing and Urban Development, Office of Fair Housing and Equal Opportunity entitled 'Joint Statement of the Department of Housing and Urban Development and the Department of Justice *Reasonable Accommodations Under the Fair Housing Act*', states: "There may be instances where a provider believes that, while the accommodation requested by an individual is reasonable, there is an alternative accommodation that would be equally effective in meeting the individual's disability-related needs. In such a circumstance, the provider should discuss with the individual if she is willing to accept the alternative accommodation. **However, providers should be aware that persons with disabilities typically have the most accurate knowledge about the functional limitations posed by their disability, and an individual is not obligated to accept an alternative accommodation suggested by the provider if she believes it will not meet her needs and her preferred accommodation is reasonable**."" (ECF 1.2, quote is on page 21)." (emphasis mine)

65. In the end, this case comes down to the Defendants insisting that they knew better than Plaintiff Rice what the needs of his disability were. They offered a solution that was a non-accommodation that did not work and, despite Plaintiff's protestations that their solution was no solution at all (nor an accommodation), they refused to engage with him to find and provide a real solution.

66. Plaintiff Rice asks the Court to find that he did cure the deficiencies of his Original Complaint in his First Amended Complaint. And, therefore, the Court should deny the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint based on their argument I.

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II. Defendants' Argument II. PLAINTIFF CANNOT STATE FAIR HOUSING ACT OR AMERICANS WITH DISABILITY ACT CLAIMS

Defendants' Argument II A. Plaintiff's First Cause of Action for Alleged Violations of the Fair Housing Act Fails

67. In Argument II A of Defendants' Motion, Defendants repeat their argument from their Motion to dismiss Plaintiff's Original Complaint: "The FHA does not apply here because Defendants did not provide housing to Plaintiff during the applicable time period. At all relevant times during the conduct that Plaintiff alleges, Plaintiff owned and occupied the Property". The Defendants state that they did not "prevent Plaintiff from inhabiting his unit". Defendants then go on to cite a section from the FHA, seemingly without noticing that the section that they cite goes directly against the argument that the FHA only applies in cases where a resident is prevented "from inhabiting his unit". Defendants cite 42 U.S.C. § 3604:

> "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful-
> …
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
> …"

(absent from their cite of § 3604): (f)(2) "… because of a handicap of …" and (f)(3)(B) "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or"

68. And, of course, exactly what Defendants did was to discriminate against Plaintiff, in this case, the service of their necessary consent to the presence of a rent-paying roommate. It bears noting that Defendants' claim Plaintiff Rice owned the Property, while true, obfuscates the real relationship between Plaintiff and Defendants. This was not a situation where the Seller-Defendants, having sold the Property, transferred all interest and control to Buyer-Plaintiff, as is the usual transaction. Rather, Defendants retained considerable control over the usage of the Property. Among other things, Defendants retained the right to control who could live at the Property and under what circumstances. In many ways, the relationship between Defendants and Plaintiff was less like that of Former Owner-Current Owner and more like that of Landlord-Tennant.

69. Defendants go on to acknowledge that under *CCCI* the FHA does reach some post-acquisition circumstances. Although they attempt to dismiss its reach by mentioning that the *CCCI* case was related to municipal services. While Plaintiff is not certain that the situation in this case is not also related to municipal services, he thinks that Defendants are engaged in a deliberate misreading of *CCCI* and its broad embrace of the FHA in post-acquisition circumstances.

70. First, the 9th Circuit Court of Appeals notes that *CCCI* is in line with other cases that they have decided[15]: *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir.2009), dealing with homeowner's insurance, and *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir.1999), noting "Again, we did not make any distinction based on the fact that the plaintiff's claim (which was related to her eviction) had necessarily arisen after she acquired the housing." *CCCI*, at 712.

71. Additionally, Defendants take no notice of the unmodified holding in *CCCI* regarding the FHA and post-acquisition discrimination:

> **For the reasons that follow, we conclude that the FHA reaches post-acquisition discrimination** (emphasis mine):
>
> First, the statutory language does not preclude all post-acquisition claims. The statute prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in provision of services or facilities in connection therewith." 42 U.S.C. § 3604(b). The inclusion of the word "privileges" implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling. While defendants argue that "the provision of services or facilities in connection therewith" refers only to services or facilities provided at the moment of acquisition in connection with the sale or the rental, this is hardly a necessary reading. There are few "services or facilities" provided at the moment of sale, but there are many "services or facilities" provided to the dwelling associated with the occupancy of the dwelling. Under this natural reading, the reach of the statute encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling.
>
> Second, the regulations implementing the FHA, promulgated by the Department of Housing and Urban Development, also support permitting post-acquisition claims. 24 C.F.R. § 100.65, entitled "Discrimination in terms, conditions and privileges and in services and facilities," provides, in pertinent part:
>
> (a) It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.

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[15] See also *Reed v. Peñasquitos Casablanca Owner's Ass'n*, 381 F. App'x 674, 677 (9th. Cir. 2010);

> (b) Prohibited actions under this section include, but are not limited to: …
>
> (2) Failing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin...
>
> (4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant or a person associated with him or her.

The sections prohibiting "[f]ailing or delaying maintenance or repairs of sale or rental dwellings" and "[l]imiting the use of privileges, services or facilities associated with a dwelling" appear to embrace claims about problems arising after the tenant or owner has acquired the property. In common parlance, issues relating to "maintenance or repairs" or "services or facilities associated with a dwelling" tend to be issues arising after the tenant or owner has come into possession of the dwelling and sought out maintenance, repair, or services. See, e.g., *Landesman*, 2004 WL 2370638, *2 (discussing regulation in the context of challenge to condominium association rules placing restrictions on use of the swimming pool by children).

Additionally, limiting the FHA to claims brought at the point of acquisition would limit the act from reaching a whole host of situations that, while perhaps not amounting to constructive eviction, would constitute discrimination in the enjoyment of residence in a dwelling or in the provision of services associated with that dwelling. Under so limited a reading of the statute:

> ... it would not violate § 3604(b) for a condominium owners' association to prevent a disabled person from using the laundry facilities or for a landlord to refuse to provide maintenance to his Hispanic tenants. Similarly, it would not violate § 3604(b) for a landlord to sexually harass a tenant or to raise the rent of only Jewish tenants. It would not violate § 3604(c) for a landlord to use racial slurs to or about existing tenants or to spray-paint such a slur on an occupant's door. Nor would it violate § 3604(c) for a homeowners association to print up flyers denigrating a particular resident due to her religious faith and post them throughout the neighborhood. All of these behaviors would be beyond the law's purview solely because of when they occurred.

Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L.Rev. 1, 32-33 (2008) (asserting that pre-Halprin case law found post-acquisition claims under § 3604 permissible, criticizing the Halprin decision, and proposing a framework that "focuses less on the point of acquisition and more on the identity of the defendant and the relationship between the parties"). See also *Bloch*, 533 F.3d at 571 (7th Cir.2008) (Wood, J., dissenting) (noting that permitting post-acquisition claims "will ensure that member of protected groups do not win the battle (to purchase or rent housing) but lose the war (to live in their new home free from invidious discrimination)").

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> In our view, the FHA does apply to post-acquisition discrimination, and the District Court erred in deciding otherwise. However, we will not reinstate plaintiffs' FHA claims in this case in their entirety. Plaintiffs' factual averments supporting the alleged violations of the FHA are largely the same as the allegations supporting plaintiffs' claims that their rights to equal protection were violated by defendants' actions with regard to municipal *715 services. To the extent the complaint alleged additional violations related to other municipal services, plaintiffs are bound by the 2005 agreement limiting their claims regarding services to the areas of sewer access, police services, and bilingual assistance. We have already concluded that plaintiffs have not put forth evidence of disparate impact with regard to the provision of sewer services or infrastructure. As a result, remanding those claims would be futile because the evidence of the FHA violations would be the same statistical evidence rejected in the course of resolving the equal protection claims. We therefore limit reinstatement of plaintiffs' FHA claims to those regarding the timely provision of law-enforcement personnel.

72. It is clear that the 9th Circuit Court of Appeals has held that the FHA reaches post-acquisition discrimination - not in some limited number of situations - but in the general course of all post-acquisition behaviors where the FHA would apply if the same behavior were to occur in a pre-acquisition circumstance.

73. Taken in this light, it seems even clearer that if Plaintiff Rice had arrived in the pre-acquisition period with his disability and his special needs and his reasonable accommodation, Defendants would have been obligated under the FHA to offer that accommodation. Just like an apartment complex with a “no pets” rule, must accommodate a tenant who requires a Seeing Eye dog, and cannot deny him (under the FHA) that accommodation, nor suggest that a fish would serve just as well.

74. As noted in Plaintiff’s First Amended Complaint at paragraph 56: “The Agency’s own rules allowed such accommodation to persons in the Program with a work relocation requirement or a financial hardship.” and, as noted above in paragraph 14: “The Agency did make that policy accommodation available to participants in the Program who had a financial hardship need or an employment relocation need, not just for a “portion thereof” but for the entire property (ECF No. 1.1, page 8; and ECF 1.2, page 2).”. In those cases, the accommodation is not for the purpose to allow “roommates” to live at such property for free, because, clearly, that would not solve the problem.

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75. Likewise, Defendants insistence that a non rent-paying roommate would be sufficient to satisfy Plaintiff's disability related need(s), clearly, was an erroneous attempt by Defendants to substitute their judgment for that of Plaintiff Rice, and would likely create more problems for him, as he made clear to the Defendants. And, as he wrote in his First Amended Complaint at paragraph 60: "Plaintiff Rice protested that solution and explained that a non rent paying roommate situation did not work in alleviating him of his mental illness symptoms and it very likely would create more problems (i.e. it would not provide him an equal opportunity to use and enjoy the dwelling)."

76. Further in their second argument, Defendants say that the letter they received from Doctor Ludwig (Plaintiff's primary care physician), only mentions that a roommate would be helpful and says nothing about a rent-paying roommate. However, when Plaintiff Rice explained that only a rent-paying roommate would aid his disability; that, perhaps, he was the best judge of his own needs (**better than even his doctor**), Defendants refused to even consider an accommodation. If any one of the Defendants had lived up to their obligation under the FHA to try to reach an accommodation with Plaintiff; if someone had just informed him that his doctor's recommendation letter needed to include the specific words "rent-paying" roommate, everything would have been different. Is this whole case, all the pain, suffering, and disruption Plaintiff Rice has had to bear, just because a doctor left a two word phrase out of a letter, and the Defendants were unwilling to try to resolve that problem? (As noted in paragraph 21, "Several courts have held that the FHA requires a housing authority and/or a housing provider to engage in an interactive process with a client after that client informs them of his or her disability and seeks an accommodation."[16])

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[16] See *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996); *Armant v. Chat-Ro Co.*, No. Civ. A. 00-1402, 2000 WL 1092838, at *2 (E.D. La. Aug. 1, 2000); *United States v. Hialeah Hous. Auth.*, 418 F. App'x 872, 877 (11th Cir. 2011); *Astralis Condo. Assoc. v. HUD*, 620 F.3d 62 (1st Cir. 2010); and *United States v. District of Columbia*, 538 F. Supp. 2d 211, 219 (D.D.C. 2008).

77. Plaintiff Rice asks the Court to find that the FHA did apply to the housing relationship between Plaintiff Rice and Defendants, and to the Property. And, therefore, the Court should deny the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint based on their argument II A.

Defendants' Argument II B. Plaintiff's Second Cause of Action for Alleged Violations of the Americans With Disability Acts Fails

78. Argument II B of Defendants' Motion indicates that Defendants did not understand Plaintiff's ADA claim. Defendants repeat that: "Defendants informed Plaintiff he was free to take in a roommate, he just could not collect rent." (ECF No. 50, page 9, lines 14 thru 15).

79. However, Plaintiff's ADA claim is not about the issue of a roommate. Rather Plaintiff's ADA claim is about how Defendants, despite their advertising that they provided legal advice and housing related counseling, refused and/or completely failed to offer such services to Plaintiff and did not engage in an interactive process to discuss options with him, because to do so, given his disability and needed accommodation, would have required them to reevaluate their program and allow rent-paying roommates in certain circumstances to aide a person with a disability, which they saw as a violation of the nature of the Program; and, simply, Defendants subjected Plaintiff Rice to discrimination.

80. Plaintiff Rice asks the Court to find that the ADA did apply to Defendants refusal and/or failure to provide (i.e. exclude Plaintiff from) legal and counseling services to Plaintiff because of his disability; and/or Defendants subjected Plaintiff to discrimination. And, therefore, the Court should deny the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint based on their argument II B.

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III. Defendants' Argument III. PLAINTIFF'S § 1983 CLAIM FAILS BECAUSE DEFENDANTS DID NOT VIOLATE PLAINTIFF'S CONSITUTIONAL[sic] RIGHTS

81. Argument III of Defendants' Motion also raises the possibility that Defendants did not fully understand the § 1983 claim portion of Plaintiff's First Amended Complaint, because Plaintiff did not claim that a Constitutional right was violated, rather that he was deprived of rights secured by laws of the United States (specifically the FHA and the ADA) by the individually named Defendants acting under color of state law (i.e. any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia).

82. Defendants state in the LEGAL STANDARD FOR MOTION TO DISMISS section of their Motion: "A complaint may be dismissed for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556)." (ECF No. 50, page 5, lines 23 thru 28)

83. Plaintiff Rice quotes Martin A. Schwartz *Touro College, Jacob D. Fuchsberg law Center* and Kathryn R. Urbonya *The College of William and Mary School of Law* from their book entitled 'Section 1983 Litigation' *Second Edition* the following (found at page 12):

> Although *Bell Atlantic* could be read as imposing some form of "heightened" pleading requirement, the Supreme Court disavowed any intent to do so. The Court acknowledged that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations" and that it was not requiring "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[46]

45. *Bell Atlantic*, 127 S. Ct. at 1968-69.
46. *Id.* at 1974.

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84. Plaintiff Rice asks the Court to find that he sufficiently and clearly set forth enough facts to state a claim to relief that is plausible on its face in his First Amended Complaint in that the individually named Defendants did act under color of state law to deprive him of his rights, privileges, or immunities under the FHA and/or the ADA; which did injure him and his property and did deprive him of his rights or privileges as a citizen of the United States and, thus, constituted a cause of action pursuant to § 1983 of the Civil Rights Act. And, therefore, the Court should deny the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint based on their argument III.

IV. PLAINTIFF'S § 1985.(2) OF THE CIVIL RIGHTS ACT CLAIM

85. Defendants did not protest Plaintiff's § 1985.(2) of the Civil Rights Act claim in their 'Motion to Dismiss Plaintiff's First Amended Complaint'.

86. Plaintiff Rice notes here, to the Court, that in his First Amended Complaint he err'd in identifying § 1985 part (2) as the applicable part of § 1985 when, in fact, he intended to indicate part (3). He now identifies § 1985 part (3) as the applicable part of his § 1985 claim, and he shall later request from the Court a 'Leave to Amend' to correct this error.

87. Still, Plaintiff Rice asks the Court to find that he clearly and sufficiently set forth enough facts to state a claim to relief that is plausible on its face in his First Amended Complaint in that the individually named Defendants did conspire for the purpose of depriving, either directly or indirectly, Plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of the City and County of San Francisco and the State of California from giving or securing to him the equal protection of the laws under the FHA and the ADA; which did injure him and his property and did deprive him of his rights or privileges as a citizen of the United States and, thus, constituted a cause of action pursuant to § 1985.(3) of the Civil Rights Act.

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CONCLUSION

88. In the interests of justice and in order to provide Plaintiff Rice fair and equal protection under federal law and for all the foregoing reasons and arguments, the Court should deny the Defendants' entire Motion to Dismiss Plaintiff's First Amended Complaint.

PROPOSED ORDER

89. Plaintiff Rice respectfully requests the Court to deny the Defendants' entire Motion to Dismiss Plaintiff's First Amended Complaint and order the Defendants to prepare and file an Answer to Plaintiff's First Amended Complaint within 21 days of the date of such order. And, to find that on July 25th 2019 at 3:45 PM, individually named Defendants in their official capacity and individual capacity were each duly and properly served a copy of the Summons and of the Complaint, and declare that all individually named Defendants, except Ms. Breed in her official capacity, did not appear and, thus, failed to appear.

Dated: December 8th 2019

Respectfully Submitted,

By: */s/ Allison Barton Rice*

Allison Barton Rice, Plaintiff in pro per

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