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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 ALLISON BARTON RICE,

14 Plaintiff,

15 v.

16 THE CITY AND COUNTY OF SAN
FRANCISCO, et al.,

17 Defendants.

Case No. 3:19-cv-04250-LB

JOINT PROPOSED JURY INSTRUCTIONS

Date: June 20, 2023
Time: 9:30 a.m.
Place: Via Zoom
Judge: Honorable Laurel Beeler

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I. FORM INSTRUCTIONS

Per Section VI(C)(4) of the Court’s Case-Management and Pretrial Order, the parties agree to the following form preliminary, general, and concluding instructions from the *Ninth Circuit Manual of Model Civil Jury Instructions*.

1.3 Duty of Jury (Court Reads Instructions Only)

1.4 Duty of Jury (Court Reads and Provides Written Instructions at End of Case)

1.6 Burden of Proof—Preponderance of the Evidence

1.9 What Is Evidence

1.10 What Is Not Evidence

1.11 Evidence for Limited Purpose

1.12 Direct and Circumstantial Evidence

1.13 Ruling on Objections

1.14 Credibility of Witnesses

1.15 Conduct of the Jury

1.16 Publicity During Trial

1.17 No Transcript Available to Jury

1.18 Taking Notes

1.20 Bench Conferences and Recesses

1.21 Outline of Trial

2.0 Cautionary Instructions

2.2 Stipulations of Fact

2.3 Judicial Notice

2.9 Impeachment Evidence—Witness

2.11 Use of Interrogatories

2.12 Use of Requests for Admission

2.13 Expert Opinion

2.14 Charts and Summaries Not Received in Evidence

1 2.15 Charts and Summaries in Evidence

2 2.16 Evidence in Electronic Format

3 3.1 Duty To Deliberate

4 3.2 Consideration of Evidence—Conduct of the Jury

5 3.3 Communication With Court

6 3.5 Return of Verdict

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II. JOINT SHORT STATEMENT OF THE CASE

Plaintiff Allison Rice is a navy veteran diagnosed with a 100% disability rating for his service-connected depression and paranoid schizophrenia. He owned a Below Market Rate condominium in San Francisco, California. The Below Market Rate program is currently managed by the Defendant City and County of San Francisco through the Mayor's Office of Housing and Community Development (MOHCD).

Plaintiff Allison Rice brings this lawsuit against the Defendant City and County of San Francisco. Plaintiff brings two claims against the City under the Fair Housing Act. First, Plaintiff Allison Rice alleges that the City discriminated against him on the basis of his disability when it denied his request for a rent-paying roommate. Second, Plaintiff Allison Rice claims that the City unlawfully interfered with his rights under the Fair Housing Act by requiring him to terminate his lease with his then rent-paying roommate and by holding up his efforts to refinance until he complied with the terms of his affordable housing agreement. Plaintiff Allison Rice has the burden of proving these claims by a preponderance of the evidence.

Defendant City and County of San Francisco denies those claims. The City asserts that it reasonably accommodated Plaintiff's request by allowing him a non-rent paying roommate. The City also asserts that Plaintiff did not have a medical need to charge rent and his request to charge rent was not reasonable. The City also contends that Plaintiff's request to charge rent in his Below Market Rate condominium would fundamentally change the nature of the City's affordable housing program and create undue administrative and financial burdens for the City. Finally, the City denies retaliating against Plaintiff, and asserts that it had legitimate, non-discriminatory reasons for its actions.

III. INSTRUCTION NO. 1 - 1.5 CLAIMS AND DEFENSES (STIPULATED)

To help you follow the evidence, I will give you a brief summary of the positions of the parties.

Plaintiff Allison Rice brings this lawsuit against the Defendant City and County of San Francisco. Mr. Rice brings two claims against the City under the Fair Housing Act. First, he contends that he had a disability-related need for a rent-paying roommate and that the City discriminated against him on the basis of his disability by denying that request. He alleges his request was reasonable because it would not fundamentally change the nature of the City's affordable housing program or cause undue administrative and financial burdens. Second, Plaintiff Allison Rice claims that the City unlawfully interfered with his rights under the Fair Housing Act by requiring him to terminate his lease with his then rent-paying roommate and by holding up his efforts to refinance until he complied with the terms of his affordable housing agreement.

Defendant City and County of San Francisco denies those claims. The City asserts that it reasonably accommodated Plaintiff's request by allowing him a non-rent-paying roommate. The City also asserts that Plaintiff did not have a medical need to charge rent and his request to charge rent was not reasonable. The City also contends that Plaintiff's request to charge rent in his Below Market Rate condominium would fundamentally change the nature of the City's affordable housing program and create undue administrative and financial burdens for the City. Finally, the City denies retaliating against Plaintiff, and asserts that it had legitimate, non-discriminatory reasons for its actions.

Authority: 9th Cir. Civ. Jury Instr. 1.5 (2017 ed., updated Dec. 2022)

IV. INSTRUCTION NO. 2 – FAIR HOUSING ACT INTRO (STIPULATED)

Plaintiff Allison Rice brings his claims under the federal statute, 42 U.S.C. §§ 3604, 3617, which is known as the Fair Housing Act. The Fair Housing Act prohibits housing discrimination against disabled persons based upon their disability.

Authority: 42 U.S.C. §§ 3604, 3617.

V. DISPUTED INSTRUCTION NO. 3 – FAIR HOUSING ACT, 42 U.S.C. § 3604 (PLAINTIFF)

To prevail on his claim that the City discriminated against him by failing to make a reasonable accommodation, Plaintiff Allison Rice must prove by a preponderance of the evidence that:

1. He is a person with a disability, as defined by the Fair Housing Act;
2. That the City knew or should reasonably be expected to know that Mr. Rice had a disability;
3. That the particular accommodation Mr. Rice requested may be necessary to afford the him an equal opportunity to use and enjoy his condominium;
4. That the accommodation is reasonable; and
5. That the City refused to make the requested accommodation.

The parties agree that element 1 has been satisfied.

Mr. Rice does not need to prove that having a rent-paying roommate was actually necessary for him to equally use and enjoy the property as other residents—just that, at the time, it was an accommodation that “may be necessary.” Additionally, an accommodation is unreasonable if the accommodation would fundamentally alter the nature of the program; or the accommodation imposes an undue financial and administrative burden.

If you find Plaintiff Allison Rice has proved each of these elements by a preponderance of the evidence, your verdict should be for the Plaintiff on this Claim. If, on the other hand, you find that the Plaintiff has failed to prove any or all of these elements, your verdict should be for the City on this Claim.

You may have heard the terms “handicap” and “disability” used throughout this trial. For the purposes of this case, the parties agree that the terms “handicap” and “disability” can be used interchangeably.

Authority:

42 U.S.C. § 3604; *Budnick v. Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008); *Dubois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006); *Wolf v. City of Millbrae*, No. 21-CV-00967-PJH, 2021 WL 3727072 at *4 (N.D. Cal. Aug. 23, 2021).

**DEFENDANT’S OBJECTION TO PLAINTIFF’S INSTRUCTION NO. 3
REGARDING SECTION 3604**

Defendant objects to Plaintiff’s jury instruction.

First, Defendant objects to Plaintiff’s proposed instruction, because it requires Plaintiff to prove only that the accommodation “may be necessary,” as opposed to actually necessary. Specifically, Defendant objects to Lines 6-7, where it states plaintiff must prove the accommodation “may be necessary,” and Lines 11-14, which state that “Mr. Rice does not need to prove that having a rent-paying roommate was actually necessary for him to equally use and enjoy the property as other residents – just that, at the time, it was an accommodation that ‘may be necessary.’” This instruction misstates the law and is confusing and misleading.

The law requires Plaintiff to prove a causal connection between his disability and the requested accommodation. Although the statute says “may be necessary,” the Ninth Circuit requires Plaintiff to prove that “but for the accommodation, [the disabled] will likely be denied an equal opportunity to enjoy the housing of their choice.” *Budnick v. Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008) (citation omitted). In other words, contrary to Plaintiff’s position and proposed jury instruction, Plaintiff must prove that the requested accommodation was “actually necessary,” not just potentially necessary. In *Budnick*, the Ninth Circuit recited the statutory language, but then applied the “but for” causation requirement and found the plaintiff failed to demonstrate the requested accommodation was necessary. *Id.* at 1119-20. The Court explained:

[The plaintiff] has not set forth sufficient evidence to establish that the RAC’s amenities were necessary to house disabled seniors; in other words, that “but for the accommodation, [the disabled] will likely be denied an equal opportunity to enjoy the housing of their choice.” [citation omitted]. To the extent Budnick suggests that the amenities requiring accommodation are “necessary to house the physically disabled,” this suggestion is primarily based on Budnick’s view that all of the RAC’s residents may one day be disabled and, therefore, the amenities must have the capacity to serve all of the RAC’s potential residents. Not only have we rejected this initial premise, but Budnick has also only summarily concluded that the RAC’s amenities are necessary for the disabled and has not delineated for the court why each of the RAC’s amenities are necessary in the first place. As a result, we need not discuss the reasonableness of the accommodations Carefree offered to Budnick after it denied Budnick’s application for the SUP.

Id. at 1119-20 (citation omitted). The Court explicitly rejected the plaintiff’s speculative claim.

1 More recently, in *Howard v. HMK Holdings, LLC*, the Ninth Circuit held that “[n]ecessary
2 suggests something that cannot be done without.” 988 F.3d 1185, 1190–91 (9th Cir. 2021) (citing
3 *Vorchheimer v. Philadelphian Owners Ass’n*, 903 F.3d 100, 105–07 (3d Cir. 2018) (defining “necessary”
4 to mean “required, indispensable, essential”)). The Court explained:

5 The plaintiff’s disability must cause the need for an accommodation in the
6 “rules, policies, practices, or services.” In other words, absent an
7 accommodation, the plaintiff’s disability must cause the plaintiffs to lose an
8 equal opportunity to use and enjoy a dwelling. Thus, there must be a
9 “causal link” between the requested accommodation and the plaintiff’s
10 disability.

11 *Id.* (citations and quotations omitted). Here, as in *Budnick* and *Howard*, the Court should require
12 Plaintiff to prove that “but for” a rent-paying roommate, he would have been denied an equal opportunity
13 to use and enjoy his home. In other words, the jury must decide whether a rent-paying roommate was
14 “necessary” to accommodate his mental disability; that is, “something that cannot be done without” not
15 merely a theoretical, possible need. *Howard*, 988 F.3d at 1190–91. The court in *The Ohio House LLC, v.*
16 *City Of Costa Mesa*, Case 8:19-cv-01710-JVS-GJS at 41-45, 2022 WL 1285965 (C.D. Cal. 2022)
17 adopted and instructed the jury on exactly the same elements of section 3604 that Defendant includes in
18 its proposed instruction. For that jury trial, the Court’s Instruction No. 34 stated, in part:

19 In order to prevail on this claim, Ohio House must prove each of the
20 following elements by the preponderance of the evidence:

- 21 (1) That the City knew or reasonably should be expected to know of the
- 22 disabilities of Ohio House’s residents;
- 23 (2) That Ohio House requested an accommodation;
- 24 (3) That granting Ohio House’s requested accommodation was
- 25 necessary to afford its residents an equal opportunity to use and enjoy
- 26 the housing of their choice in the community.
- 27 (4) That Ohio House’s request was reasonable; and,
- 28 (5) That the City refused to make the requested accommodation.

The court in *Ohio House* provided a separate instruction, Court’s Instruction No. 35, to
define “may necessary.” It instructed:

An accommodation “may be necessary” –

- If it enables disabled persons to use and enjoy housing to the same extent as a nondisabled person; or,
- If it would enhance the disabled persons’ quality of life by ameliorating the effect of their disability; or,

- If without the accommodation, the City’s rules, policies or practices interfere with a disabled person’s right to use and enjoy their dwelling.

The *Ohio House* court notably did not fold in the “may be necessary” language in the jury instruction, as Plaintiff attempts to do. *Ohio House* is instructive.

To the contrary, none of Plaintiff’s cases stand for the proposition that a plaintiff need only prove a possible need for the requested accommodation. Anything is *possible*; that is not the standard. Further, none of Plaintiff’s cited cases address *instructions to a jury*. Rather, the cases are all decided on motions to dismiss or summary judgment, or in one case, review of a bench trial. That the courts recited the statutory language before moving on to apply the requisite causation analysis in deciding a summary judgment motion does not support Plaintiff’s position of instructing the jury on the “may be necessary” language. Given the causation requirement, instructing a jury on the statutory language is confusing and misleading. The Court should provide the jury with plain language that correctly states Plaintiff’s burden.

Second, Defendant objects to Plaintiff’s instruction on reasonableness, at Lines 13-16. An accommodation is certainly unreasonable if it would require a fundamental alternation in the nature of the program, or create an undue financial or administrative burden. However, these are not the *only* ways an accommodation can be unreasonable, and Plaintiff’s effort to limit the definition of reasonableness in this way is improper. *See, e.g., Giebler v. M & B Assocs.*, 343 F.3d 1143, 1147, 1155 (9th Cir. 2003) (“*Ordinarily*, an accommodation is reasonable under the FHA[] when it imposes no fundamental alteration in the nature of the program or undue financial or administrative burdens.”) (citations and quotations omitted) (emphasis added); *Skochko v. Mercy Hous., Inc.*, No. 20-CV-08659-JSC, 2022 WL 3357836, at *10 (N.D. Cal. Aug. 15, 2022) (trier of fact must determine whether requested accommodation posed an undue burden or was otherwise unreasonable under the circumstances); *Wolf v. City of Millbrae*, 2021 WL 3727072, at *5 (N.D. Cal. Aug. 23, 2021), *aff’d*, 2023 WL 2134403 (9th Cir. Feb. 21, 2023) (holding plaintiff failed to state an FHA claim where “[g]ranting plaintiff’s accommodation request would require the City to regulate RF emissions in violation of the TCA and its implementing regulations” and was thus not reasonable because it “would require the City to face

1 liability for violating federal law”). For example, in *Ohio House*, the court provided the following
2 instructions on reasonableness:

3 Court’s Instruction No. 36:

4 An accommodation is reasonable if it seems reasonable on its face or reasonable given
5 the specific circumstances related to the plaintiff’s request.

6 Court’s Instruction No. 37:

7 Even if Ohio House proved initially that its requested accommodation was reasonable,
8 if the City then proves that the requested accommodation would have required a
9 fundamental alteration in the nature of City’s zoning scheme, including its land use
10 regulations, then Ohio House’s claim for reasonable accommodation fails.

11 *Ohio House*, 2022 WL 1285965. Defendant’s instruction incorporates the *Ohio House* instructions 36
12 and 37 and provides the jury with the necessary guidance.
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VI. DISPUTED INSTRUCTION NO. 3 – FAIR HOUSING ACT, 42 U.S.C. § 3604 (DEFENDANT)

To prevail on his claim that the City discriminated against him by failing to make a reasonable accommodation, Plaintiff Allison Rice must prove by a preponderance of the evidence that:

1. He is a person with a disability, as defined by the Fair Housing Act;
2. The City knew or reasonably should have known that Plaintiff was a person with a disability;
3. The particular accommodation Plaintiff requested was necessary to provide him an equal opportunity to use and enjoy his condominium;
4. Plaintiff's requested accommodation was reasonable; and
5. The City refused to make the requested accommodation.

The parties stipulate that Plaintiff Allison Rice is a person with a disability, as defined by the Fair Housing Act.

To prove that an accommodation is necessary, Plaintiff Allison Rice must prove that, without the requested accommodation, he will be denied the opportunity to use and enjoy his home to the same extent as a nondisabled person. The plaintiff's disability must cause the need for the requested accommodation. The accommodation must be essential, not just preferable. Only if plaintiff proves the requested accommodation was necessary for his disability, is there any obligation for the City to provide a reasonable accommodation.

If you decide that the requested accommodation was necessary, you must determine whether it was reasonable. Only reasonable accommodations are required. An accommodation is reasonable if it seems reasonable on its face or reasonable given the specific circumstances related to Plaintiff's request. Additionally, an accommodation is unreasonable if the accommodation would fundamentally alter the nature of the program; or the accommodation imposes an undue financial and administrative burden.

If you find Plaintiff Allison Rice has proved each of these elements by a preponderance of the evidence, your verdict should be for the Plaintiff on this Claim. If, on the other hand, you find that the Plaintiff has failed to prove any or all of these elements, your verdict should be for the City on this Claim.

1 Authority: 42 U.S.C. § 3604(f)(3)(B); *Howard v. HMK Holdings, LLC*, 988 F.3d 1185, 1190–91
 2 (9th Cir. 2021) (“Necessary suggests something that cannot be done without.” (citing *Vorchheimer v.*
 3 *Philadelphian Owners Ass’n*, 903 F.3d 100, 105–07 (3d Cir. 2018) (defining “necessary” to mean
 4 “required, indispensable, essential”)) (“The plaintiff’s disability must cause the need for an
 5 accommodation in the ‘rules, policies, practices, or services.’ In other words, absent an accommodation,
 6 the plaintiff’s disability must cause the plaintiffs to lose an equal opportunity to use and enjoy a dwelling.
 7 Thus, there must be a ‘causal link’ between the requested accommodation and the plaintiff’s disability.”
 8 (citations and quotations omitted)); *Snapp v. United Transportation Union*, 889 F.3d 1088, 1101 (9th Cir.
 9 2018); *Budnick v. Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008) (elements); *Dubois v. Ass’n of*
 10 *Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006); *Giebel v. M & B Assocs.*,
 11 343 F.3d 1143, 1147, 1155 (9th Cir. 2003) (“To prove that an accommodation is necessary, plaintiffs
 12 must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the
 13 housing of their choice. Put another way, without a causal link between defendants’ policy and the
 14 plaintiff’s injury, there can be no obligation on the part of defendants to make a reasonable
 15 accommodation.”) (“Ordinarily, an accommodation is reasonable under the FHAA when it imposes no
 16 fundamental alteration in the nature of the program or undue financial or administrative burdens.”)
 17 (citations and quotations omitted) (emphasis added)); *United States v. Cal. Mobile Home Park Mgmt.*
 18 *Co.*, 107 F.3d 1374, 1380 (9th Cir.1997) (“Without a causal link between defendants’ policy and
 19 plaintiff’s injury, there can be no obligation on the part of defendants to make a reasonable
 20 accommodation.”); *Skochko v. Mercy Hous., Inc.*, No. 20-CV-08659-JSC, 2022 WL 3357836, at *10
 21 (N.D. Cal. Aug. 15, 2022) (trier of fact must determine whether requested accommodation posed an
 22 undue burden or was otherwise unreasonable under the circumstances); *Wolf v. City of Millbrae*, 2021
 23 WL 3727072, at *5 (N.D. Cal. Aug. 23, 2021), *aff’d*, 2023 WL 2134403 (9th Cir. Feb. 21, 2023) (holding
 24 plaintiff failed to state a FHA claim where “[g]ranting plaintiff’s accommodation request would require
 25 the City to regulate RF emissions in violation of the TCA and its implementing regulations” and was thus
 26 not reasonable because it “would require the City to face liability for violating federal law”); *The Ohio*
 27 *House LLC v. City of Costa Mesa*, Case 8:19-cv-01710-JVS-GJS at 41-45, 2022 WL 1285965.
 28

1 **PLAINTIFF’S OBJECTION TO DEFENDANT’S INSTRUCTION NO. 3**

2 Section 3604 is clear that, in determining whether a defendant discriminated against a plaintiff
3 because of his handicap, discrimination includes “a refusal to make reasonable accommodations in rules,
4 policies, practices, or services, when such accommodations **may be necessary** to afford such person equal
5 opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(3)(B) (emphasis added). No case stands for
6 the proposition that the plain text of § 3604’s “may be necessary” should instead be read to mean “is
7 necessary,” as suggested by the City’s proposed instruction. In fact, every FHA case that the City cites
8 as authority uses the phrase “may be necessary” to recite the standard. *See, e.g., Howard v. HMK*
9 *Holdings, LLC*, 988 F.3d 1185, 1189 (“The Howards base their FHAA discrimination claim on 42 U.S.C.
10 § 3604(f)(3)(B), which prohibits discrimination in the form of “a refusal to make reasonable
11 accommodations in rules, policies, practices, or services, when such accommodations **may be necessary**
12 to afford such person equal opportunity to use and enjoy a dwelling.” (emphasis added)); *Budnick v.*
13 *Town of Carefree*, 518 F.3d 1109, 1119 (9th Cir. 2008) (“To establish a claim of discrimination on a
14 theory of failure to reasonably accommodate, ‘a plaintiff must demonstrate that . . . (3) accommodation
15 of the handicap ‘**may be necessary**’ to afford plaintiff an equal opportunity to use and enjoy the dwelling
16”); *Dubois v. Ass’n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir. 2006)
17 (same); *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (“We conclude that Giebeler’s
18 request that he be permitted to reside in an apartment rented by his financially qualified mother is a
19 request for an accommodation that, under the FHAA, he was entitled to receive **if** the adjustment both
20 ‘**may be necessary** to afford [him] equal opportunity to use and enjoy a dwelling’ and was ‘reasonable’
21 within the meaning of that statute.” (emphasis added)); *United States v. Cal. Mobile Home Park Mgmt.*
22 *Co.*, , 1380 (9th Cir.1997) (“At trial, Cohen-Strong failed to show that the waiver of the fees ‘**may be**
23 **necessary**’ to afford her an equal opportunity to use and enjoy her dwelling.” (emphasis added)).¹

24 Plaintiff agrees that to succeed on a § 3604 claim, he must demonstrate “a causal link between
25 defendants’ policy and plaintiff’s injury,” *United States v. Cal. Mobile Home*, 107 F.3d 1374, 1381 (9th
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27
28 ¹ Plaintiff notes that *Snapp v. United Transportation Union*, 889 F.3d 1088, 1102 (9th Cir. 2018) is an
ADA case.

Cir. 1997). But this “causal link” between the plaintiff’s disability and the requested accommodation to the defendant’s “rules, policies, practices, or services” does not warrant changing the language of the standard. A plaintiff can establish both that an alteration to the defendant’s policy “may be necessary” to her use and enjoyment of the property, *and* that there is a nexus between the requested accommodation and her disability. *See, e.g., Hernandez v. Golf Course Ests. Home Owners Ass’n.*, 454 F. Supp. 3d 1029, 1037 (D. Or. 2020) (“There is a clear nexus between the requested transportation accommodation and A.R.’s disability in that the symptoms of A.R.’s disability require specialized transportation and make A.R.’s use of the regular public school bus stop unsafe. Plaintiffs “need not prove that the requested accommodation is the best or only way to solve a disability-related problem; the plain text of the statute requires a housing provider to make a reasonable accommodation that ‘*may be necessary*’ to permit use and enjoyment of the home.” (emphasis added) (quoting *Kuhn by & through Kuhn v. McNary Ests. Homeowners Ass’n, Inc.*, 228 F. Supp. 3d 1142, 1149 (D. Or. 2017))); *Giebeler*, 343 F.3d at 1155 (“While in some cases the plaintiff will not be able to show that the alteration of a particular policy ‘may be necessary’ to her use and enjoyment of the property, the causation requirement poses little hurdle in a case such as this one, where a landlord’s policy entirely prevents a tenant from living in a dwelling.”).

The City relies on a jury instruction in *The Ohio House LLC, v. City Of Costa Mesa*, Case 8:19-cv-01710-JVS-GJS at 41-45, 2022 WL 1285965 (C.D. Cal. 2022), where one of the instructions describing the factors for § 3604 used the words “was necessary.” But that instruction was immediately followed by an instruction on what “may be necessary” means, which suggests that the *Ohio House* court understood that “may be necessary” was part of the legal standard. Indeed, district courts within the Ninth Circuit regularly include “may be necessary” as the legal standard in their final jury instructions for FHA cases. *See, e.g., Sw. Fair Hous. Council v. WG Scottsdale LLC*, No. CV-19-00180-TUC-RM, D.I. 117 (Amended Final Jury Instructions), at 16 (D. Ariz. May 16, 2022) (“To succeed on their fair housing act claims, Plaintiff must prove each of the following elements by a preponderance of the evidence: (1) that Plaintiff’s tester’s fictitious deaf relative is a qualified individual with a handicap; (2) that the Defendant knew or should reasonably be expected to know of the handicap; (3) that accommodation of the handicap may be necessary to afford the handicapped person an equal opportunity to use and enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that the Defendant

1 refused to make the reasonable accommodation.”); *Community House, Inc., et al. v. City of Boise, et al.*,
2 Case No. 05-cv-283-CWD, D.I. 374 (Jury Instructions), at 26 (D. Idaho Sept. 12, 2012) (“To prove their
3 claim that the defendants failed to make a reasonable accommodation in violation of the Fair Housing
4 Act, an individual plaintiff must prove by a preponderance of the evidence each of the following
5 elements: (1) That he or she suffers from a disability as defined by the Fair Housing Act. This element is
6 not disputed; (2) That the City of Boise knew or reasonably should be expected to know that the
7 individual was disabled; (3) That an accommodation may be necessary to afford the individual an equal
8 opportunity to use and enjoy the dwelling; (4) That the individual requested an accommodation; (5) That
9 the requested accommodation was reasonable; and (6) That the City of Boise refused to make the
10 requested accommodation”). Finally, the City’s proposed instruction regarding whether a requested
11 accommodation is “reasonable” misrepresents the legal standard for this inquiry. As courts have
12 repeatedly held, “[a]n accommodation is ‘reasonable’ when it imposes no ‘fundamental alteration in the
13 nature of the program’ or ‘undue financial or administrative burdens.’” *Howard v. City of Beavercreek*,
14 276 F.3d 802, 806 (9th Cir. 2002) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397,
15 410, 412 (1979)). The City’s attempt to propose to a jury that *other*, unstated factors are relevant to the
16 question of reasonableness is improper.

VII. DISPUTED INSTRUCTION NO. 4 – “INTERACTIVE PROCESS” (PLAINTIFF)

You have heard evidence relating to whether the City engaged in an interactive process with Mr. Rice regarding his reasonable accommodation request. A defendant is not liable under § 3604 solely because it failed to engage in an interactive process with an individual requesting a reasonable accommodation, but the interactions are still relevant to the question of whether the defendant reasonably accommodated the plaintiff.

Authority: *Howard v. HMK Holdings, LLC*, 988 F.3d 1185, 1192-94 (9th Cir. 2021) (“[W]e hold that there is no ‘standalone’ liability under the FHAA for a landlord’s failure to engage in an ‘interactive process’ with a tenant . . . The interactions between the tenant and landlord are, of course, relevant—reasonableness and ‘accommodation’ cannot be determined in a vacuum.”); *Wilkerson v. Fujinaka Properties, LP*, No. 219CV02381WBSCKD, 2020 WL 1547445, at *2 (E.D. Cal. Apr. 1, 2020) (“[T]he court agrees with other district courts in the Ninth Circuit and finds that defendants’ failure to engage can be relevant to whether they failed to reasonably accommodate plaintiff.”); *Rodriguez v. Morgan*, No. CV 09-8939-GW CWX, 2012 WL 253867, at *8 (C.D. Cal. Jan. 26, 2012) (“[T]his Court would not find that the interactive process is a separate requirement under the FHAA....However, a landlord’s nonfeasance in that regard can be considered in determining whether he or she failed to reasonably accommodate the tenant’s disability/handicap.”); *Elliott v. QF Circa 37, LLC*, No. 16-CV-0288-BAS-AGS, 2018 WL 2933467, at *12 (S.D. Cal. June 12, 2018) (“The Court believes that even if the FHA imposes no affirmative obligation, evidence of a housing provider engaging in an interactive process with a tenant is relevant to the refusal inquiry.”).

1 **DEFENDANT’S OBJECTION TO PLAINTIFF’S INTERACTIVE PROCESS INSTRUCTION**

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3 Defendant objects to Plaintiff’s proposed instruction. First, Defendant objects to the last phrase,
4 “but the interactions are still relevant to the question of whether the defendant reasonably accommodated
5 the plaintiff.” The parties agree that Defendant cannot be held liable under the Fair Housing Act for a
6 failure to engage Plaintiff in an interactive process. The parties also agree that the interactions between
7 Plaintiff and the City are relevant to the reasonableness analysis. However, Plaintiff’s phrasing shifts the
8 burden to Defendant; the question is whether Plaintiff has proven his requested accommodation was
9 reasonable. Defendant objects to including this proposed phrase. The Court will instruct the jury that it
10 should consider all of the testimony and evidence introduced at trial. And, the interactions between
11 Plaintiff and the City regarding his requested accommodation will come into evidence. The Court does
12 not need to repeat or reemphasize that this evidence is relevant. Plaintiff can argue its relevance during
13 closing.

14 Second, Defendant objects to the word “solely,” because it implies there can be liability based *in*
15 *part* on a failure to engage with Plaintiff – and this is incorrect. The Fair Housing Act does not create
16 liability for failing to engage in an interactive process. As the Ninth Circuit unequivocally held in
17 *Howard v. HMK Holdings, LLC*, “the FHA[] does not refer to an interactive process or base liability on a
18 landlord’s failure to interact, so there is no such liability under the FHA[.]” *Howard*, 988 F.3d 1185,
19 1194 (9th Cir. 2021). “[T]he statute prohibits failing to ‘make reasonable accommodations,’ not failing
20 to ‘interactively engage.’” *Id.* at 1192. *See also, Johnson v. Guardian Mgmt.*, 2022 WL 981324, at *3
21 (D. Or. Mar. 15, 2022), *report and recommendation adopted*, 2022 WL 980745 (D. Or. Mar. 31, 2022)
22 (“To the extent plaintiffs assert defendants must engage in some sort of interactive process when
23 plaintiffs make accommodation requests, that assertion is also mistaken.”).

VIII. DISPUTED INSTRUCTION NO. 4 – “INTERACTIVE PROCESS” (DEFENDANT)

The City was not required to engage in an “interactive process” with Plaintiff Allison Rice regarding his disability or requested accommodation. The City cannot be liable under the Fair Housing Act for failing to engage with Mr. Rice about his disability or his request.

Authority: 42 U.S.C. § 3604(f)(3)(B); *Howard v. HMK Holdings, LLC*, 988 F.3d 1185, 1192-94 (9th Cir. 2021) (“This is an issue of first impression in this court, and we hold that there is no ‘standalone’ liability under the FHAA for a landlord's failure to engage in an ‘interactive process’ with a tenant. . . . [T]he interactive process simply does not apply to the FHAA.”); *Salisbury v. City of Santa Monica*, 998 F.3d 852, 861–62 (9th Cir. 2021) (“[Our] court has definitively rejected the ‘interactive process’ theory as a separate, ‘standalone’ font of FHA[] liability.”); *Johnson v. Guardian Mgmt.*, 2022 WL 981324, at *3 (D. Or. Mar. 15, 2022), *report and recommendation adopted*, 2022 WL 980745 (D. Or. Mar. 31, 2022) (“To the extent plaintiffs assert defendants must engage in some sort of interactive process when plaintiffs make accommodation requests, that assertion is also mistaken.”).

PLAINTIFF’S OBJECTION TO DEFENDANT’S INSTRUCTION NO. 4

The City’s proposed instruction will provide an incomplete understanding of the law to the jury. It is well-established that the “interactive process” is still relevant to the question of whether the defendant reasonably accommodated the plaintiff. *See, e.g., Howard v. HMK Holdings, LLC*, 988 F.3d 1185, 1192–94 (9th Cir. 2021) (“[W]e hold that there is no ‘standalone’ liability under the FHAA for a landlord’s failure to engage in an ‘interactive process’ with a tenant . . . The interactions between the tenant and landlord are, of course, relevant—reasonableness and ‘accommodation’ cannot be determined in a vacuum.”); *Wilkerson v. Fujinaka Properties, LP*, No. 219CV02381WBSCKD, 2020 WL 1547445, at *2 (E.D. Cal. Apr. 1, 2020) (“[T]he court agrees with other district courts in the Ninth Circuit and finds that defendants’ failure to engage can be relevant to whether they failed to reasonably accommodate plaintiff.”); *Rodriguez v. Morgan*, No. CV 09-8939-GW CWX, 2012 WL 253867, at *8 (C.D. Cal. Jan. 26, 2012) (“[T]his Court would not find that the interactive process is a separate requirement under the FHAA....However, a landlord's nonfeasance in that regard can be considered in determining whether he or she failed to reasonably accommodate the tenant's disability/handicap.”); *Elliott v. QF Circa 37, LLC*, No. 16-CV- 0288-BAS-AGS, 2018 WL 2933467, at *12 (S.D. Cal. June 12, 2018) (“The Court believes that even if the FHA imposes no affirmative obligation, evidence of a housing provider engaging in an interactive process with a tenant is relevant to the refusal inquiry.”). But the City’s instruction omits this critical information. Without that context, a jury may read the City’s instruction and simply disregard any evidence presented at trial regarding the “interactive process” because they may believe it to be irrelevant. Accordingly, the Court should reject the City’s proposed instruction because it would be misleading to the jury.

IX. INSTRUCTION NO. 5 – FAIR HOUSING ACT, 42 U.S.C. § 3617 (STIPULATED)

To prove that the City violated Section 3617 of the Fair Housing Act, Plaintiff Allison Rice must prove by a preponderance of the evidence that:

1. He engaged in a protected activity;
2. The City took an adverse action against Plaintiff;
3. The adverse action was because of Plaintiff's protected activity, rather than a legitimate, nondiscriminatory reason; and
4. Plaintiff suffered injury as a result.

If you find Plaintiff Allison Rice has proved each of these elements by a preponderance of the evidence, your verdict should be for the Plaintiff on this Claim. For the purposes of this case, the parties agree that Mr. Rice's request for a reasonable accommodation was a protected activity. If, on the other hand, you find that the Plaintiff has failed to prove any or all of these elements, your verdict should be for the City on this Claim.

Authority: 42 U.S.C. § 3617; *Walker v. City of Lakewood*, 272 F.3d 1114, 1129 (9th Cir. 2001); *Galia v. Wasatch Advantage Grp. LLC*, No. 19-cv-08156-JCS, 2021 WL 1516372, at *5 (N.D. Cal. Apr. 16, 2021); *Hamilton v. Lincoln Mariners Assocs. Ltd*, 2014 WL 5180885, at *6 (S.D. Cal. Oct. 14, 2014); *Arceneaux v. Marin Hous. Auth.*, 2015 WL 1263891, at *4 (N.D. Cal. Mar. 19, 2015). *See also, Sanghvi v. City of Claremont*, 328 F.3d 532, 540–41 (9th Cir. 2003) (on a disparate treatment discrimination claim under FHA, it was error to instruct jury on technical elements of *McDonnell Douglas* burden-shifting framework, because “[t]he technical elements of the presumptions and shifting burdens have significant potential to confuse juries”); *Lord v. Hy-Vee Food Stores*, 720 N.W.2d 443, 453 (S.D. 2006) (“[W]e conclude that the trial court was correct in instructing the jury (Jury Instruction No. 30) that Lord had the burden of proving ‘that Hy–Vee terminated his employment because he complained about sexual harassment.’ The presumption of retaliation had disappeared following the submission of conflicting evidence on this point, and therefore, this instruction correctly required Lord to prove a retaliatory motive for the termination. The trial court correctly rejected requested Jury Instruction No. 23 because it was an

1 incorrect statement of the law and because a jury should not be instructed to conduct a burden shifting
2 analysis in reaching its verdict.”); *Jun Yu v. Idaho State Univ.*, 2019 WL 501457, at *2 (D. Idaho Feb. 8,
3 2019) (“Plaintiff’s burden at trial is not merely to establish such a prima facie case, but to persuade the jury
4 on the ultimate issue of discrimination.”).

X. INSTRUCTION NO. 6 – EVIDENCE REGARDING THE ADA (STIPULATED)

You have seen and heard evidence that mentions the American Disabilities Act, or the ADA. To be clear, you are not being asked to determine any claims under the ADA. But that evidence was presented to you because it may also be relevant to Mr. Rice’s Fair Housing Act claim—for instance, because both the ADA and FHA provide for reasonable accommodations. Thus, do not disregard evidence simply because it mentions the ADA.

[NOTE: The parties agree this instruction may be excluded if no evidence mentioning the ADA is introduced or if a limiting instruction is given and there is no need to repeat it]

XI. DISPUTED INSTRUCTION NO. 7 – VIOLATION OF ADMINISTRATIVE POLICY (PLAINTIFF)

No instruction is needed. As discussed in his opposition to the City’s motion *in limine* no. 4, Plaintiff has no intention of arguing or suggesting that a violation of a City or agency policy constitutes a violation of the Fair Housing Act. If such evidence or argument is presented, a limiting instruction may be appropriate at the time, but Defendant’s proposal is premature and prejudicial.

1 **XII. DISPUTED INSTRUCTION NO. 7 – VIOLATION OF ADMINISTRATIVE POLICY**
2 **(DEFENDANT)**

3 The standards for determining whether Plaintiff has proved the Defendant violated the Fair
4 Housing Act were explained in the prior instructions. A City employee's violation of a City policy or a
5 policy of the Department of Housing and Urban Development (HUD) does not necessarily establish a
6 violation of the Fair Housing Act. Likewise, an employee's actions consistent with a policy of the City
7 or of HUD does not necessarily establish that those actions are proper under the Fair Housing Act.

8 [NOTE: Defendant notes this instruction may not be necessary or may need to be revised,
9 depending on Plaintiff's case and the evidence presented.]
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11 Authority: *Davis v. Scherer*, 468 U.S. 183, 194 & n.12 (1984); *see also*, *Case v. Kitsap County*
12 *Sheriff's Department*, 249 F.3d 921, 929-30 (9th Cir. 2001); *Devereaux v. Perez*, 218 F.3d 1045, 1056
13 (9th Cir. 2000), *on reh'g en banc sub nom. Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001).
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XIII. DISPUTED INSTRUCTION NO. 8 – 5.1, 5.2 DAMAGES (PLAINTIFF)

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the Plaintiff Mr. Rice on his Fair Housing Act claims, then you must determine his damages against the City and County of San Francisco.

Mr. Rice has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate Mr. Rice for any injury you find was caused by the City. In determining the measure of damages, you should consider the:

1. The nature and extent of his injuries, including any denial of and harm to Plaintiff's statutory rights;
2. The loss of enjoyment of life experienced and that with reasonable probability will be experienced in the future; and
3. The mental, physical, and emotional pain and suffering experienced and that with reasonable probability will be experienced in the future.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Authority: 9th Cir. Civ. Jury Instr. 5.1, 5.2 (2017 ed., updated Dec. 2022), as modified.

DEFENDANT’S OBJECTION TO PLAINTIFF’S DAMAGES INSTRUCTION

Defendant objects to Plaintiff’s instruction regarding “[t]he loss of enjoyment of life experienced and that with reasonable probability will be experienced in the future.” Plaintiff essentially seeks hedonic damages. *Mark H. v. Lemahieu*, 513 F.3d 922, 930 n. 6 (9th Cir. 2008) (quoting Black’s Law Dictionary 417 (8th ed. 2004) (“hedonic damages are based on ‘the loss of the pleasure of being alive’”). Yet, Plaintiff cites no Ninth Circuit authority to support an award of hedonic damages in a Fair Housing Act case. Hedonic damages are typically reserved for cases involving loss of limbs or 42 U.S.C. Section 1983 cases, none of which are at issue here. *See generally, Caldwell v. City of San Francisco*, No. 12-CV-01892-DMR, 2021 WL 1391464, at *5 (N.D. Cal. Apr. 13, 2021); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000); *Davis v. ROCOR Int’l*, 226 F. Supp. 2d 839, 842 (S.D. Miss. 2002); *Sherrod v. Berry*, 827 F.2d 195, 207 (7th Cir. 1987), reh’g granted and opinion vacated, 835 F.2d 1222 (7th Cir. 1988), on reh’g en banc, 856 F.2d 802 (7th Cir. 1988). Further, Defendant objects to instructing the jury that it may award damages for “any denial of and harm to Plaintiff’s statutory rights.” Plaintiff cites jury instructions from one district court case, which included both an ADA and FHA claim. But, Plaintiff cites no case discussing or holding that a jury may award compensatory damages for a loss of statutory rights in a Fair Housing Act case, as opposed to nominal damages. The Fair Housing Act states simply that the court may award “actual” damages. 42 U.S.C. § 3613(c).

XIV. DISPUTED INSTRUCTION NO. 8 – 5.1, 5.2 DAMAGES (DEFENDANT)

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff, you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant.

In determining the measure of damages, you should consider:

- The nature and extent of the injuries, including any mental or emotional pain and suffering experienced.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Source: Ninth Circuit Model Instructions 5.1 and 5.2

1 **PLAINTIFF’S OBJECTION TO DEFENDANT’S DAMAGES INSTRUCTION**

2 Defendant’s instruction does not include damages for harm to Plaintiff’s statutory rights or loss of
3 enjoyment of life. Both types of damages are directly compensable for Plaintiff’s claims under 42 U.S.C.
4 § 3617, which makes unlawful interference “with any person in the exercise or enjoyment of . . . any
5 right granted or protected by section 3603, 3604, 3605, or 3606 of this title.” Damages for harm to
6 statutory rights have also been given to compensate a plaintiff under 42 U.S.C. § 3604. *See Southwest*
7 *Fair Housing Council v. WG Scottsdale LLC*, No. CV-19-00180 (D. Ariz. May 16, 2022) at 17 (“The
8 nature, extent and value of any denial of and harm to the statutory rights and civil rights of the plaintiff”).
9 *See also Sachs v. Nunziante*, No. CV 15-1825, 2016 WL 4506731, at *4 (E.D.N.Y. July 21, 2016)
10 (“Non-monetary harms include damages resulting from emotional distress and loss of enjoyment of
11 life.”); *Rivera v. Inc. Vill. of Farmingdale*, 29 F. Supp. 3d 121, 134 (E.D.N.Y. 2013)
12 (“Non-monetary harms, ‘compensable in the common law of tort,’ include (i) ‘emotional distress’ and
13 (ii) the ‘loss of enjoyment of life.’”) (citing *U.S. v. Vulcan Soc’y, Inc.*, 897 F.Supp.2d 30, 42-43); *U.S. v.*
14 *Hylton*, 944 F.Supp.2d 176, 195-97 (D. Conn. 2013) (holding, in a Fair Housing Act case, that the
15 plaintiffs were also entitled to compensatory damages for “emotional distress,” defined as “severe mental
16 trauma associated with unlawful discrimination,” and for “fewer life chances,” such as a lower “quality
17 of life”) (quotations omitted); Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing*
18 *Cases*, 16 Harv. C.R.-C.L. L.Rev. 83,90 (1981) (stating that “economic loss,” “emotional distress,” and
19 “loss of rights” are all “judicially recognized as an appropriate basis for an award of compensatory
20 damages to a victim of housing discrimination”).
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1 **XV. DISPUTED INSTRUCTION NO. 9 – FHA DAMAGES (PLAINTIFF)**

2 No instruction is necessary. Neither intentional discrimination nor “deliberate indifference” are
 3 required for an award of compensatory damages under the FHA. Instead, intentional discrimination is a
 4 separate theory of discrimination Plaintiff does not assert here. *See Gieeler v. M&B Associates*, 343 F.3d
 5 1143 (9th Cir. 2003) (recognizing under the FHA “three theories of discrimination: disparate impact,
 6 intentional discrimination, and failure to reasonably accommodate.”).

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 8 Defendant’s citations are misplaced. The vast majority apply the standard for the ADA, not the
 9 FHA. *See, Behav. Health Servs., Inc. v. City of Gardena*, 2003 WL 21750852, at *12 (C.D. Cal. Feb. 26,
 10 2003) (“Compensatory damages are available under the ADA and Rehabilitation Act only if plaintiffs
 11 prove discriminatory intent amounting to ‘deliberate indifference.’ . . . Compensatory damages are
 12 **allowable** under the Fair Housing Act for intentional discrimination”) (emphasis added); *Ferguson v.*
 13 *City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998), as amended (Oct. 8, 1998) (“The principal question
 14 remaining in this appeal is whether a showing of intentional discrimination is a prerequisite to the
 15 recovery of damages by plaintiffs when violations of the ADA and Rehabilitation Act have occurred.”);
 16 *Kuzmicki v. Hanrahan*, 2018 WL 2088745, at *7-8 (D. Nev. May 4, 2018) (citing *Duvall v. Cnty. Of*
 17 *Kitsap*, 260 F.3d 1124, 1138-39 (2001) (providing that “[t]o recover monetary damages under Title II of
 18 the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the
 19 defendant.”)); *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (holding the deliberate
 20 indifference standard requires a showing of intentional discrimination to recover monetary damages
 21 under ADA's public services and programs provisions and Rehabilitation Act); *Wilkins-Jones*, No. C-08-
 22 1485-MHP, 2010 WL 4780291 (ADA); *Jamison v. Baillie*, No. 2:10-cv-124, 2016 WL 775746 (E.D.
 23 Cal. Feb. 29, 2016) (ADA).

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 26 *Tsombanidis* did find no compensatory damages against the Fire District because of a lack of
 27 “intentional discrimination” under plaintiff’s disparate impact claim, but that holding does not apply here
 28

1 because the court found no violation under plaintiff's reasonable accommodation claim. *Tsombanidis v.*
2 *City of W. Haven*, 180 F. Supp. 2d 262, 299 (D. Conn. 2001), aff'd in part, rev'd in part sub nom.,
3 *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565 (2d Cir. 2003) (reversing finding of disparate impact,
4 affirming finding of no violation of reasonable accommodation provision).
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XVI. DISPUTED INSTRUCTION NO. 9 – FHA DAMAGES (DEFENDANT)

The plaintiff seeks monetary relief under the Fair Housing Act. To be entitled to monetary relief under the Fair Housing Act, the plaintiff must additionally prove, by a preponderance of the evidence, that the City and County of San Francisco intentionally discriminated against him. In other words, Plaintiff must prove the City acted with “deliberate indifference.”

“Deliberate indifference” is the conscious choice to disregard the consequences of one’s acts or omissions. To prove deliberate indifference, Plaintiff Allison Rice must prove that the City and County of San Francisco (1) had “knowledge” that harm to Plaintiff’s FHA rights was “substantially likely” and (2) deliberately failed to act upon that likelihood. The failure to act must be a result of conduct that is more than negligent, and involve an element of deliberateness.

Authority: *Behav. Health Servs., Inc. v. City of Gardena*, 2003 WL 21750852, at *12 (C.D. Cal. Feb. 26, 2003) (“Compensatory damages are allowable under the Fair Housing Act for intentional discrimination.” (citation omitted)); *Kuzmicki v. Hanrahan*, 2018 WL 2088745, at *8 (D. Nev. May 4, 2018), report and recommendation adopted, 2018 WL 3577246 (D. Nev. July 25, 2018) (“[T]o recover monetary damages, a plaintiff must prove intentional discrimination by the defendant. The standard for intentional discrimination is deliberate indifference, requiring the plaintiff to show that the defendant knew ‘harm to a federally protected right [wa]s substantially likely’ and failed to act upon that likelihood.” (citations omitted)); *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 299 (D. Conn. 2001), *aff’d in part, rev’d in part sub nom., Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565 (2d Cir. 2003) (where plaintiffs brought disparate impact and reasonable accommodation claims against the Fire District, holding plaintiffs were not entitled to an award of compensatory damages against the Fire District, because plaintiffs did not prove intentional discrimination); *see also, Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998), as amended (Oct. 8, 1998); *Duvall*, 260 F.3d at 1135; *Updike*, 870 F.3d at 950–51; *Wilkins-Jones*, 2010 WL 4780291, at *4; *Jamison*, 2016 WL 775746, at *6 (“‘A plaintiff asserting a private cause of action for violations of the ADA...may only recover compensatory damages upon a showing of intentional discrimination,’ and cannot assert a claim based on an isolated act of negligence” (citations omitted)).

XVII. INSTRUCTION NO. 10 – NOMINAL DAMAGES (STIPULATED)

The law that applies to this case authorizes an award of nominal damages. If you find for Mr. Rice but you find that he has failed to prove damages as defined in these instructions, then you must award nominal damages. Nominal damages may not exceed one dollar.

Authority: 9th Cir. Civ. Jury Instr. 5.6 (2017 ed., updated Dec. 2022); *Sw. Fair Hous. Council v. WG Scottsdale LLC*, No. CV-19-00180-TUC-RM, 2022 WL 3923526, at *1 (D. Ariz. Aug. 31, 2022) (nominal damages awarded under the FHA); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 818 (9th Cir. 2001) (same); *Roman v. MSL Cap., LLC*, No. EDCV172066JGBSPX, 2019 WL 3017765, at *1 (C.D. Cal. July 9, 2019), *aff'd*, 820 F. App'x 592 (9th Cir. 2020) (same).

XVIII. DISPUTED INSTRUCTION NO. 11 – PUNITIVE DAMAGES (PLAINTIFF)

If you find for Mr. Rice, then you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

Mr. Rice has the burden of proving by a preponderance of the evidence that punitive damages should be awarded and, if so, the amount of any such damages. You may award punitive damages only if you find that the City's conduct that harmed Mr. Rice was malicious, oppressive or in reckless disregard of Mr. Rice's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring Mr. Rice. Conduct is in reckless disregard of Mr. Rice's rights if, under the circumstances, it reflects complete indifference to his safety or rights, or if the City acts in the face of a perceived risk that its actions will violate Mr. Rice's rights under federal law. An act or omission is oppressive if the City injures or damages or otherwise violates the rights of Mr. Rice with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of Mr. Rice.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the City's conduct.

Punitive damages may be awarded even if you award Mr. Rice only nominal, and not compensatory, damages.

Authority: 9th Cir. Civ. Jury Instr. 5.5 (2017 ed., updated Dec. 2022); 42 U.S.C. § 3613(c); *Gilead Cnty. Servs., Inc. v. Town of Cromwell*, 604 F.Supp.3d 1 (D. Conn. 2022); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003).

DEFENDANT’S OBJECTION TO PLAINTIFF’S PROPOSED PUNITIVE DAMAGES INSTRUCTION

Defendant objects to giving any instruction on punitive damages. As briefed in Defendant’s motion *in limine* number 6, punitive damages are not available against the City.

Punitive damages are unavailable against the City under California law. Cal. Gov. Code § 818. And, “punitive damages are presumptively unavailable from municipalities for violations of federal law absent congressional authorization or compelling public policy reasons.” *Jennings v. Hous. Auth. of Baltimore City*, 2014 WL 346641, at *9 (D. Md. Jan. 29, 2014) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)). “[W]here a statute does not specifically address the recovery of punitive damages, they are not ordinarily recoverable against a municipality.” *L & F Homes & Dev. v. City of Gulfport, Miss.*, 2011 WL 5563205, at *2–3 (S.D. Miss. Nov. 15, 2011) (collecting cases).

Municipalities are immune from punitive damages under 42 U.S.C. § 1983. *City of Newport*, 453 U.S. at 267, 271 (holding that “a municipality is immune from punitive damages under 42 U.S.C. § 1983,” in part because “an award of punitive damages against a municipality ‘punishes’ only the taxpayers, who took no part in the commission of the tort”). Additionally, the Supreme Court has held that punitive damages are not available under Section 202 of the ADA or Section 504 of the Rehabilitation Act. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002). Consistent with *City of Newport* and *Barnes*, numerous courts have held that like the ADA and RA, the Fair Housing Act does not explicitly authorize punitive damages against local governments – consequently, municipalities are immune from punitive damages under the FHA. 42 U.S.C. § 3613(c); *see, e.g., Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1158 (C.D. Cal. 2001) (finding that the FHA’s general provision regarding the availability of punitive damages was not sufficient under *City of Newport* to impart municipal liability for punitive damages); *Phifer v. Sacramento Hous. & Redevelopment Agency*, 2009 WL 2914336, at *12 (E.D. Cal. Sept. 9, 2009); *Jennings*, 2014 WL 346641, at *9 (noting that “punitive damages are presumptively unavailable from municipalities for violations of federal law absent congressional authorization or compelling public policy reasons” and finding that the FHA does not explicitly authorize punitive damage awards against local governments); *Brooks v. Seattle Hous. Auth.*, 2013 WL 5493049, at *2 (W.D. Wash. Oct. 1, 2013); *Samaritan Inns v. D.C.*, 1995 WL 405710, at *31

(D.D.C. June 30, 1995), *aff'd in part, rev'd in part on other grounds*, 114 F.3d 1227 (D.C. Cir. 1997) (holding that “the common law and the legislative history of the FHA as related to the imposition of punitive damages on a municipality provide no basis for the exaction of such a penalty”); *Brooker v. Altoona Hous. Auth.*, 2013 WL 2896814, at *27 (W.D. Pa. June 12, 2013) (noting that, while punitive damages are generally available in actions arising under the FHA, “the relevant statutory provision contains no language suggesting that Congress intended to disturb the ‘settled common-law immunity’ from such damages enjoyed by governmental entities”); *Lundregan v. Hous. Opportunities Comm’n*, 2020 WL 2218928, at *4 (D. Md. May 7, 2020) (“the FHA does not explicitly authorize punitive damage awards against local governments”); *Hous. Invs., Inc. v. City of Clanton, Ala.*, 68 F. Supp. 2d 1287, 1296 (M.D. Ala. 1999) (citing *City of Newport* and finding that the city was immune from claims for punitive damages). *But see, Gilead Cmty. Servs., Inc. v. Town of Cromwell*, 604 F. Supp. 3d 1 (D. Conn. 2022) (where the district court permitted the jury to award punitive damages against Town pursuant to the FHA).

Although Defendant has not found any Ninth Circuit case specifically addressing whether punitive damages are available against municipalities under the Fair Housing Act, the decisions cited above, including two undisturbed California (Central District and Eastern District) opinions, counsel against municipal liability for punitive damages under the Fair Housing Act. There is no reason to depart from this general rule. *See City of Newport*, 453 U.S. at 260-67; *Jennings*, 2014 WL 346641, at *9; *L & F Homes & Dev.*, 2011 WL 5563205, at *2–3; *see also Onita Tuggles V. City Of Antioch, et. al.*, 2010 WL 11187667 (N.D. Cal. 2010) (a case involving claims brought under the FHA and other federal statutes, where the court’s final jury instruction on punitive damages stated “Punitive damages may not be awarded against the City of Antioch.”)

The Court should not give a punitive damage instruction. Alternatively, if the Court holds punitive damages are available against the City, the City requests bifurcation of the punitive damages phases; the City requests the Court not instruct the jury regarding the amount of punitive damage until, and only if, the jury returns a verdict for Plaintiff and on punitive damages.

XIX. INSTRUCTION NO. 12 – 5.3 MITIGATION OF DAMAGES (STIPULATED)

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. that the plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

Source: Ninth Circuit Model Instruction 5.3

[NOTE: The parties agree this instruction may be excluded if there is no evidence of damages that implicates a duty to mitigate.]

Dated: May 26, 2023

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ALLISON BARTON RICE

FILER'S ATTESTATION

Pursuant to Local Rule 5-1(h)(3) of the Northern District of California, regarding signatures, I, Ramsey W. Fisher, attest that concurrence in the filing of this document has been obtained.

Dated: May 26, 2023

/s/ Ramsey W. Fisher

RAMSEY W. FISHER