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xx

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

COURT OF LIMITED JURISDICTION

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| CCC,<br>Plaintiff,<br>v.<br><br>XX, and Does 1 to 5,<br>Defendants. | No. CUD-<br><br>**NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE AMENDED ANSWER**<br><br>Date:<br>Time: 9:30 AM<br>Dept: 501 |

**TO PLAINTIFF CARITAS MANAGEMENT CORPORATION AND PLAINTIFF'S ATTORNEY OF RECORD:**

PLEASE TAKE NOTICE that on _____ at 9:30 a.m. or as soon thereafter as the matter may be heard in the Law and Motion Department of the above-entitled Court, Room 501, 400 McAllister Street, San Francisco, California, Defendant xx will move this Court for an order permitting Defendants to file an amended answer which is attached hereto as Exhibit A and a copy of which is served herewith. This motion will be made upon the ground that it is in furtherance of justice to allow the filing of such amended answer, and will be based upon this notice, the attached memorandum of points and authorities, all papers and records on

file herein, the declaration of Erin Katayama, and evidence both oral and documentary, as it may be presented at the hearing of this motion.

Dated: January 30, 2014

Erin Katayama
ATTORNEY FOR DEFENDANT

**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Through this motion, Defendant seeks to file his proposed amended answer pursuant to California Code of Civil Procedure, Section 473, which authorizes the trial court to allow substantive amendments at its discretion. The proposed Amended Answer, attached hereto as Exhibit A, clarifies and expands upon defenses.

Defendants make this motion in order to add defenses based on information gleaned from examination of the factual record produced during discovery, continued investigations and discussions with the client, her doctors, social workers, household members and neighbors, and receipt of Defendant's medical records.

## II. STATEMENT OF FACTS

The Plaintiff filed the summons & complaint on August 16, 2013 for an action based on nuisance. The allegations in the notice attached to the complaint took place in February 2013. (Declaration of Erin Katayama, Exhibit B, paragraphs 4-6). Upon receipt of the summons & complaint defendants XX and XX went to the EDC and filed an answer as pro per defendants on August 21, 2013. (Exhibit B, paragraph 5).

Defendants XX and XX came to the Homeless Advocacy Project on the 23rd of September to look for assistance. Attorney Erin Katayama signed on to represent the three defendants on September 27, 2013. (Exhibit B, paragraphs 6-7). Ms. XX failed to mention her disability until

approximately the fourth meeting with her attorney. Once she opened up about it, it became clear that Ms. XX has a long history of mental illness that affect her day-to-day functioning. (Exhibit B, paragraph 8).

Ms. XX had no idea that a defense of reasonable accommodation was available to her and did not know anything about Department of Housing and Urban Development ("HUD") policies. (Exhibit B, paragraph 9).

On or about October 30th, 2013, and November 7, 2013 the Homeless Advocacy Project (HAP) office sent a reasonable accommodation request to Plaintiff's attorney. (see Exhibit B, paragraph 10; Exhibit C, Reasonable Accommodation Request). On or about December 30, 2013, Plaintiff sent to Ms. XX a denial of her request for a reasonable accommodation. (Exhibit B, paragraph 11; Exhibit D, Plaintiff's denial letter. Ms. XX informed HAP about the letter and brought it to our office on or about _____. (Exhibit E, paragraph _____).

From October 30, 2013 to current, attorneys Erin Katayama and Michael Spalding have been doing research into HUD policies, on-site investigations at the subject premises, interviews with household members, doctors, and social workers, and requesting and reviewing Ms. XX's medical records. (Exhibit B, paragraph 12; Exhibit E, paragraph ___).

No trial date has been set in this action. Plaintiff has filed a Motion for Summary Judgment that is set to be heard in Department 501 on February 6, 2014.

## III. ARGUMENT

### a. LEAVE TO AMEND SHOULD BE LIBERALLY GRANTED TO CORRECT A MISTAKE IN THE INITIAL ANSWER

California Civil Code, Section 473 authorizes the court, if in furtherance of justice, to allow amendments to any pleadings to correct a mistake. (See, Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 115 (6th Dist.) The purpose of this law is to allow the correction of errors or omissions. Webster v. Freeman (1938) 27 Cal.App.2d 5. Errors or omissions for the purpose of this law can be "ambiguities, [amend] insufficiencies, eliminate surplusage (sic), or explain mistaken statements, particularly with respect to statements shown to be the result of excusable inadvertence . . . . " Bank of America National Trust & Savings Association v. Lamb Finance Co. (1956) 145 Cal.App.2d 702 (2d

Dist.) (ruling that because the court's purpose is to ascertain the truth and facts and make a determination accordingly, it is proper to allow leave to amend when there are clear insufficiencies in the initial pleading).

On the attachment to Defendant's original answer, they inadvertently omitted several key defenses on the "Attachment 3k" including: (the additions are noted in bold; See Exhibit A for amended answer in its entirety).

- 3E – retaliation because Defendant "**requested an application to add grandson to the lease**"
- EF – Plaintiff is arbitrarily discriminating against Defendant because of **disability**.
- 3J – **(2) Plaintiff has failed to provide Defendant with a reasonable accommodation.**
- 3K – **(3) Plaintiff has failed to exercise its discretion in evicting Defendant as required by HUD policy.**

California Code of Civil Procedure, Section 576 provides that, "Any Judge, at any time before or after commencement of trial, in the furtherance of justice . . . may allow the amendment of any pleading . . . " Courts should "exercise liberality" in permitting amendments at any stage of the proceeding. (See, e.g., Hulsey v. Koehler (1990) 218 Cal.App.3d 1150; Klopstock v. Superior Court (1941) 17Cal.2d 13, 19.) This discretion should particularly be exercised when allowing amendments to answers if a defendant denied leave to amend is significantly deprived of a defense. Dunzweiler v. Superior Court (1968) 267 Cal.App.2d 569, 576. Here, Ms. XX's and her daughters have a clear defense of failure to provide a reasonable accommodation and disability discrimination. The reasonable accommodation request was made and denied well after Defendants filed their pro per answer, and after Ms. XX and her daughters obtained an attorney. Also, at the time of filing their original answer, Ms. XX and her daughters were not aware that the housing provider has a duty to exercise discretion when it comes to evicting or denying /granting reasonable accommodations to tenants in HUD subsidized housing. Finally, through no fault of Defendants, much of the evidence to support these defenses did not come to light and did not become available until well after the Defendants filed their original

answer. Therefore, the Court should allow Ms. XX and her daughters to amend their answer to include the above-mentioned defenses.

### b. PLAINTIFF HAS FAILED TO PROVIDE MS. xx WITH A REASONABLE ACCOMMODAITON FOR HER DISABILITIES

Under Federal and State fair housing laws, landlords must make reasonable accommodations of tenant's disabilities in their policies, rules and practices. 42 U.S.C. Section 3604(f)(3)(B). In order to assert the defense to eviction that plaintiff has failed to provide a reasonable accommodation, defendant must show that: (1) she is a disabled person under the law, (2) that defendant requested that plaintiff accommodate her disability and that (5) plaintiff refused to accommodate her. See e.g., United States v. California Mobile Home Park Mgmt. Co. 107 D.3d 1374, 1380 (9th Cir.1997).

#### 1. Fair Housing Law applies to both parties

The Fair Housing Amendment's Act of 1988 (FHA) is the primary federal statute that protects people with disabilities on housing issues. If the housing receives any type of government funding, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act also apply.

The subject premises (Betel Apartments) is managed by the Plaintiff. The Department of Housing and Urban Development ("HUD") subsidizes the rent paid by the Defendants for rental of the premises. Therefore, as government funded housing Plaintiff is subject to Fair Housing laws. 42 U.S.C. Section 3603 (a).

#### 2. Ms. XX is disabled and her disabilities contributed to the incidents alleged in the notice to quit.

Ms. **XX** mental disability is well documented. Her psychiatric social worker described Ms. **XX** as having Major Depression, Post Traumatic Stress Disorder, and Attention Deficit Hyperactive Disorder since at least 2006 **(See Exhibit I).** Currently, Ms. xx a variety of medications for treating these conditions. (See Exhibit G).

Ms. xx medical condition has a history of impacting her parenting and ability to control her son. **(Exhibit A & D).** At times, she left most of the parenting responsibility, including bathing and diapering to her husband or mother because she was in such severe depression she

could not get out of bed or bathe herself. **(Exhibit A & D).** OO describes her mother's disability as "making it hard for her to communicate things and focus on issues" and says "her thoughts are scattered", and explains that she has seen "her brother take advantage of her on several occasions". **(Exhibit B, paragraphs 38-40).**

Ms. xx mental health background combined with her son's severe behavioral issues, contributed to the state of affairs that resulted in the alleged criminal activity at issue here. Specifically, Ms. xx was not capable of being a source of stability and support for her son **(Exhibit D, declaration of social worker, paragraph 5),** and his disability exacerbated his own and her mental health issues. As her son's disabilities and misbehavior disrupted the family unit, Ms. xx psychological state deteriorated. RR, a Mental Health Specialist has worked with at-risk Latino population for 15 years. Ms. RR believes that "given the stigma associated with acknowledging mental health issues in the Latino community, one could argue that this made Ms. xx a likelier target for abuse." **(See Exhibit E, Letter from Lupe Rodriguez).** Ms. RR further hypothesized that Ms. xx inability to remain firm on keeping her son out of her home and stand up to her son more likely comes from a place of a "male-aggression" dominated household where the women in the household felt powerless, and that the women "acted out of fear for their own personal safety and out of fear of being ostracized by their own community"...a fear that was made more complicated by Ms. xx history of sexual trauma and abuse. **(Exhibit E, Letter from RR)**.

**3. Ms. xx requested a reasonable accommodation from the Plaintiff and the request was denied.**

By offering to permanently ban her son from the premises, Ms. xx has proposed a reasonable accommodation to the Plaintiff. The proposed reasonable accommodation would (1) allow Ms. xx, her daughters, and grandson to remain in possession of the premises, and (2) would require (and allow) Ms. xx to continue working on her own mental health conditions now that her son is out of the picture. **(See Exhibits H and I, Ms. xx request for reasonable accommodation, and supplement).** In addition, this accommodation is an opportunity for Ms. xx and her daughters to finally experience a form of stability that she has never experienced, and an opportunity to control her own household without being under the constant control and fear of Christopher. Most importantly, Ms. xx and her daughters will not be victims of the consequences that her son's behavior might cause. To demonstrate her commitment to this plan,

Ms. xx even proposed to permanently ban her son's baby's mother from visiting the premises so that he will not have any incentive to come to the premises once he is eventually released from prison. Ms. xx is willing to visit with that particular grandson away from the premises for this purpose.

Despite a solid plan and reasonable proposal, the Plaintiff denied Ms. xx request. On December 30, 2013, the Plaintiff issued a formal denial of Ms. xx request. **(See Exhibit J, Plaintiff's denial of Ms. xx reasonable accommodation).**

**4. Ms. xx request was reasonable and necessary because of her disability.**

With her son incarcerated, Ms. xx has gained the opportunity to focus on her own mental health without the frequent setbacks caused by her son's conduct. This period of uninterrupted recovery will improve her capacity to keep her son from the premises after his release from State prison. It is perfectly reasonable for the Plaintiff to provide Ms. xx with this time to heal while her son is incapable of coming onto the premises. It is a solution that will prevent an innocent mother, two daughters, and grandson from becoming homeless – all because one son with behavioral disabilities was able to take advantage of his mentally disabled mother. Defendants will present testimony from Ms. xx doctor indicating his believe that her son took advantage of Ms. xx disability, and that she has made significant progress since her son has been away. Even Ms. xx daughters have noticed a marked improvement in their mother since her son has been away. **(See Exhibit B, paragraph 41).**

A housing provider has a duty to make reasonable efforts to accommodate a tenant's mental disability before the provider evicts the tenant. Roe v. Housing Authority of the City of Boulder, 909 F.Supp. 814 (D. Colo. 1995); Roe v. Sugar River Mills Assoc., 820 F.Supp. 6363 (D.N.H. 1993). In Roe v. Sugar River, the tenant had used obscene and offensive language and threatened physical violence. Yet, the court held that the landlord must first made reasonable accommodations to minimize or eliminate the impact of the tenant's disability before evicting the tenant. Here, Ms. xx is not requesting to keep her son on the premises so that he can work on his mental health. Rather, her request accepts responsibility for the fact that her own mental health deficiencies have contributed to her son's behavior and prays for an opportunity to both work on her deficiencies and move forward without her son.

The requested accommodation is not only reasonable but it has already shown to be effective. Due to the fact that her son has been gone since he was arrested in February 2013, Ms.

xx (and her daughters) have been able to live in peace, free of incidents in the building, and has been able to make progress in her mental health treatment. Allowing Ms. xx and her daughters to stay in their housing is a reasonable accommodation with little to no cost to the Plaintiff, nor is it unduly burdensome. Defendants have not and do not jeopardize the safety of the community, nor are they a direct threat to the community.

Plaintiff has failed to demonstrate that accepting Ms.xx's request for a reasonable accommodation proposes an undue hardship.

### 5. Fair Housing Act Does Not Require That a Request be Made in a Particular Manner or at Particular Time

The Department of Justice ("JOD") and the Department of Housing and Urban Development ("HUD") are jointly responsible for enforcing the federal Fair Housing Act. Contrary to plaintiff's assertion that Ms. xx submitted " … the request a reasonable accommodation more than 60 days after filing an answer to the complaint." **(See Exhibit J, Denial of Reasonable Accommodation)**, DOJ and HUD in their "Joint Statement of the Department of Housing and Urban Development and the Department of Justice – Reasonable Accommodations under the Fair Housing Act", made it abundantly clear that the ***Fair Housing Act does not require that a request be made in a particular manner or at a particular time*** (see Exhibit P, page __. The complete 15-page document can be found at http://www.hud.gov/offices/fheo/library/huddojstatement.pdf). Therefore, under the Fair Housing Act standards, Ms. xx request for a reasonable accommodation is timely.

### 6. Case Law is Clear that Landlord's Duty of Reasonable Accommodations Exists Through Time of Recovery of Possession

In the eviction context, a tenant may request a reasonable accommodation before trial, at trial, or up until he or she is actually evicted. In Boston Housing Authority v. Bridgewaters, 452 Mass. 833 (2009), the Court held that the tenant meets his obligation to request an accommodation by making such request to the judge at eviction trial. At his trial, Bridgewaters made the judge aware of his disability, testifying about his mental disability, and his subsequent treatment program. The Court held that the tenant fulfilled the notice requirement of a reasonable

accommodation request by apprising the judge of his need for an accommodation. Combined with tenant's assertions at trial that he was mentally disabled and had been successfully treated subsequently, the Court found that this amounted to a timely request for an accommodation.

The Court in Housing Authority of Bangor v. Maheux, 748 A.2d 474, 476 (Me. 2000), ruled that "the landlord is under a duty to accommodate until eviction writ is issued." In Housing Authority of Bangor, a mother was being evicted because her son seriously disrupted the right of other tenant's right of quiet enjoyment. A judgment was issued against the tenant, and the tenant filed a motion for relief from judgment and for a stay of issuance of writ. On appeal, the Court ruled in favor of the tenant and held that ***the landlord is under duty to accommodate until eviction writ is issued***. [emphasis added].

Guidance from case law is abundantly clear: the reasonable accommodation request can be made any time before the actual execution of the writ and that the jury's job is to determine whether the landlord discriminated against the tenant when the request was made, even if made after the expiration of the notice.

At the close of trial, defendant will ask the Court for Jury instructions on Fair Housing Act, disabilities, and reasonable accommodation. "[T]he question of what constitutes a reasonable accommodation … 'requires a fact-specific, individualized analysis of the disabled individual's circumstances and the [possible reasonable] accommodations.'" McGary v. City of Portland, at 1270.

### c. THE COURT CAN GRANT LEAVE TO AMEND A PLEADING ABSENT A SHOWING OF PRJUDICE TO THE ADVERSE PARTY

Absent a showing of prejudice to the adverse party, the court may grant to leave to amend a pleading. Price v. Maason-McDuffee Co. (1942) 50 Cal.App.2d 320 (1st Dist.).

In Price the court analyzed whether, in granting defendants' motion for leave to amend their answer, the plaintiffs suffered prejudice. Defendants in Price requested leave to amend their answer to due to the defective form of their initial denials from "mistake, inadvertence, and excusable neglect". The mistake, inadvertence and excusable neglect was due to their initial answer being imperfect in form as to the allegations of fraud due to the previous understanding that the allegations of fraud had been sufficiently denied. Id. at 325.

The Court found that the plaintiff produced the same evidence they would have had the denials been legally sufficient. The leave to amend was granted and affirmed by the appellate court because the plaintiffs were unable to show that they suffered any prejudice as the result of the amended answer. (See also, Atkinson v. Elk Corp. (2003) 109.App.4th, 739, 760, (1st Dist.) (court denied Defendant's argument that Plaintiff should not be allowed to amend the complaint on the ground that Plaintiff was simply trying to "circumvent" the trial court ruling, because Defendant did not show prejudice by the amendment). In the present case, the Plaintiff will not be prejudiced if Defendants are permitted to amend their answer to include the above-mentioned defenses. Plaintiff has not yet set the trial date and the discovery cut-off has not expired.

**CONCLUSION**

In the instant case, no trial date has been set. Furthermore, Defendant will suffer significant prejudice to their case if not permitted to amend their answer. For the reasons discussed above, Defendants respectfully seek leave of this Court to file the proposed Amended Answer.

Dated: January 30, 2014

_____
ERIN KATAYAMA
Attorney for Defendant