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Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA - COUNTY OF SAN FRANCISCO

	)	CASE NO.
Plaintiff,	)	
v.	)	<b>DEFENDANT’S SECOND MOTION IN</b>
	)	<b>LIMINE TO INCLUDE EVIDENCE</b>
	)	<b>RELATED TO AN ADDITIONAL</b>
	)	<b>AFFIRMATIVE DEFENSE;</b>
Defendants.	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES</b>
	)	Date: April 13, 2009
	)	Time:
	)	Dept.:
	)	

To Plaintiff and its Counsel:

Defendant respectfully moves this Court to allow the trier of fact to hear all of the following matters ["And," in a series, includes "and/or."]:

Mention, discussion, testimony and any and all direct and indirect references to evidence of and any conduct or actions evidencing defendant’s disability, his request for a reasonable accommodation and plaintiff’s response to that request, as well as, evidence that supports defendant’s affirmative defense of disability discrimination and plaintiff’s failure to provide a reasonable accommodation of that disability.

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2 **POINTS AND AUTHORITIES**

3 **I. PROCEDURAL HISTORY**

4 Defendant filed his answer to plaintiff's complaint on February 23, 2009. At the time he  
5 responded he was not represented by counsel. The initial trial date in this action was Monday  
6 March 16, 2009. On Thursday March 12, 2009, defendant was diagnosed with a mental health  
7 disability by a licensed medical care provider. On Friday March 13, 2009, Defendant made a  
8 request for a reasonable accommodation based on a treatment plan developed by his medical  
9 provider that in her professional opinion would allow the defendant to remain in his housing and  
10 address the concerns of his landlord. On Friday March 13, 2009, the time period allowed for  
11 amending an answer by right had run. On March 18, 2009 defendant requested that plaintiff  
12 stipulate to allowing Defendant to amend his answer. Plaintiff denied this request. On March  
13 19, 2009 and April 2, 2009 Defendant appeared on the law and motion ex parte calendar for an  
14 order shortening time on a motion for leave to amend defendant's answer to include defendant's  
15 affirmative defense of disability discrimination and plaintiff's failure to provide a reasonable  
16 accommodation of that disability. Specifically X sought the following affirmative defense be  
17 added to the Answer:

18 3f. Plaintiff is arbitrarily discriminating against Defendant  
19 because of disability.

20 3i(2). Defendant informed Plaintiff of his disability on March 13,  
21 2009 and requested a reasonable accommodation. Plaintiff failed to  
22 reasonably accommodate defendant's disability. In so doing,  
23 Plaintiff has violated federal, state, and local law pertaining to  
24 disability discrimination.<sup>1</sup>

25 On both occasions the order shorting time were denied because there was not time to set the  
26 hearing before the trial date. On April 3, 2009, Plaintiff's counsel was personally served  
27 defendant's motion for leave to amend defendant's answer to include defendant's affirmative  
28 defense of disability discrimination and plaintiff's failure to provide a reasonable  
accommodation of that disability. On April 6, 2009 Defendant requested a reasonable

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<sup>1</sup> In addition, and consistent with this X First Amended Answer would check box 3f.

1 accommodation from Department 206 of the Superior Court of a trial protective date in two  
2 weeks to allow time for defendant’s motion for leave to amend answer be heard. This request  
3 was denied. Defendant intends to request that the answer be amended as to conform to proof  
4 upon concluding the presentation of his case.  
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## 6 **II. LEGAL ARGUMENT**

7 California has a liberal public policy favoring the broad exercise of a court’s discretion to  
8 permit amendment of pleadings. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4<sup>th</sup> 739, 760; *Mabie*  
9 *v. Hyatt* (1998) 61 Cal.App.4<sup>th</sup> 581, 596.) Code of Civil Procedure Section 473 provides in  
10 pertinent part that this Court has the authority to allow a party, “upon any terms as may be just,  
11 an amendment to any pleading or proceeding.” (Cal. Code Civ.Proc § 473(a)(1).) Further, Code  
12 of Civil Procedure Section 470 states “where the variance is not material, as provided in Section  
13 469, the court may direct the fact to be found according to the evidence, or may order an  
14 immediate amendment, without costs.” (Cal. Code Civ.Proc § 470.) Under Code of Civil  
15 Procedure Section 469, “[n]o variance between the allegation in a pleading and the proof is to be  
16 deemed material, unless it has actually misled the adverse party to his prejudice in maintaining  
17 his action or defense upon the merits.” (Cal. Code Civ.Proc § 469.)

18 Defendant’s Narcissistic Personality Disorder is a disability/handicap that substantially  
19 limits at least one of his major life activities and which qualifies his for protection within the  
20 meaning of the California Fair Employment and Housing Act (“FEHA”) and the Federal Fair  
21 Housing Act (“FHA”). (California Government Code § 12926.1(c); 42 U.S.C. § 3601 et seq; *In*  
22 *re Marriage of James and Christine C.* (2008) 158 Cal.App.4<sup>th</sup> 1261, 1273; *Auburn Woods I*  
23 *Homeowners Association v. Fair Employment and Housing Commission* (2004) 121 Cal.App.4<sup>th</sup>  
24 1578, 1592.) Therefore, the defendant is deemed a “protected tenant” under both California and  
25 Federal law.

26 When a disabled tenant requests a reasonable accommodation, a landlord is legally  
27 required to actually respond thereto. As the Court explained in *Auburn Woods I, supra*, 121  
28 Cal.App.4<sup>th</sup> at 1598, “[t]his obligation to ‘open a dialogue’ with a party requesting a reasonable

1 accommodation is part of the interactive process in which each party seeks and shares  
2 information.” Moreover, “if a landlord is skeptical of a tenant’s alleged disability or the  
3 landlord’s ability to provide an accommodation, it is incumbent upon the landlord to request  
4 documentation or open a dialogue.” (*Ibid.*) The Court concluded that a landlord “could not  
5 simply sit back and deny a request for reasonable accommodation because it did not think  
6 sufficient information had been presented or because it did not think the [tenant] had spoken the  
7 ‘magic words’ required to claim the protections of FEHA.”<sup>2</sup> (*Ibid.*) In this case, Plaintiff  
8 violated the rule articulated in *Auburn Woods I* when it failed to open a dialogue regarding  
9 Defendant’s request for a reasonable accommodation.

10           FHA imposes the same obligation on a landlord. A violation of the FHA occurs when a  
11 disabled resident is denied a reasonable accommodation. (*Dubois v. Association of Apartment*  
12 *Owners of 2987 Kalakaua* (9<sup>th</sup> Cir. 2006) 453 F. 3d 1175, 1179.) The Ninth Circuit recently  
13 reiterated its position that “[w]e have repeatedly interpreted this language [FHA] as imposing an  
14 affirmative duty on landlords and public agencies to reasonably accommodate the needs of  
15 disabled individuals.” (*McGary v. City of Portland (2004)* 386 F.3d 1259, 1261) (citations  
16 omitted)

17           Further, defendant’s request for Reasonable Accommodation was timely and Plaintiff’s  
18 duty to make a reasonable accommodation continues to exist. In *Radeki v. Joura*, 114 F.3d 115  
19 (8th Cir. 1997), the tenant told the landlords that he was “ill” and needed more time to prepare  
20 for repairs and pest extermination in his apartment. The tenant had not cooperated with the  
21 landlords in allowing them access to his unit for repairs and for the elimination of cockroaches  
22 and mice. It was not until months later that the landlords were put on notice that the tenant  
23 suffered from severe depression. The court held that even though the landlords were not aware  
24 of the nature and extent of the tenant's disability when they served the notice, at the time they  
25 were made aware of the disability, they should have made a reasonable accommodation for the  
26 tenant's disabilities. *Id.* at 117. In this case, Defendant made a request for Reasonable  
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1 Accommodation on March 13, 2009 the same day he received written confirmation of his  
2 disability from a licensed health care professional and the day after he was diagnosed. Thus,  
3 when plaintiff became aware of defendant's disability and of his request for a reasonable  
4 accommodation, the duty to comply with the FHA still existed. This duty continues to exist and  
5 the plaintiff here has a present obligation to the tenant. Therefore, defendant's request is timely.  
6

7 **III. EVIDENCE OF DISABILITY AND DEFENDANT'S REQUEST FOR A**  
8 **REASONABLE ACCOMMODATION SHOULD BE ALLOWED**

9 The Evidence Code of California defines admissible evidence as that which is relevant.  
10 Cal. Ev. Code §350. According to the Code, "Relevant evidence means evidence, including  
11 evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in  
12 reason to prove or disprove any disputed fact that is of consequence to the determination of the  
13 action." Cal. Ev. Code §210. In this case, the Court should exercise its discretion to allow  
14 evidence regarding defendant's disability, his request for a reasonable accommodation and  
15 plaintiff's response to this request as it is relevant to both the incident alleged in the three day  
16 notice to quit and defendant's ability to raise a disability defense under both Federal and State  
17 law. First, Defendant's medical provider developed a reasonable accommodation and treatment  
18 plan that in her professional opinion would allow the defendant to remain in his housing and  
19 address the concerns of his landlord. Thus, there is a relationship between defendant's disability  
20 and plaintiff's allegations. Second, while defendant's request for a reasonable accommodation  
21 was timely under Federal law, its timing also precluded it from being included in defendant's in  
22 pro per answer. Finally, excluding this evidence will deny this disabled defendant the  
23 opportunity to exercise his Federally and State protected rights.

24 Therefore, evidence of defendant's disability, his request for a reasonable  
25 accommodation and plaintiff's response to this request defendant's disability, as well as any  
26 evidence which supports defendant's affirmative defense of disability discrimination and  
27 plaintiff's failure to provide a reasonable accommodation of that disability should be allowed as  
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1 it is directly related to allegations raised in plaintiff's pleadings and essential to protect this  
2 disabled defendant's Federally and State guaranteed rights.  
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4 Dated: April 20, 2009

Respectfully submitted,

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8 Attorney for Defendant  
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