

HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD
REGULAR BOARD MEETING

May 23, 2019

7:00 P.M.

CITY HALL, HEARING ROOM #1
ONE FRANK H. OGAWA PLAZA
OAKLAND, CA

AGENDA

1. CALL TO ORDER
2. ROLL CALL
3. CONSENT ITEMS
4. OPEN FORUM
5. OLD BUSINESS
 - a. Policy Committee
6. NEW BUSINESS
 - a. Appeal Hearings in:
 - i. T16-0258, Sherman v. Michelsen
7. SCHEDULING AND REPORTS
8. ADJOURNMENT

Accessibility. This meeting location is wheelchair accessible. To request disability-related accommodations or to request an ASL, Cantonese, Mandarin or Spanish interpreter, please email sshannon@oaklandnet.com or call (510) 238-3715 or California relay service at 711 at least five working days before the meeting. Please refrain from wearing scented products to this meeting as a courtesy to attendees with chemical sensitivities.

Esta reunión es accesible para sillas de ruedas. Si desea solicitar adaptaciones relacionadas con discapacidades, o para pedir un intérprete de en español, Cantones, Mandarín o de lenguaje de señas (ASL) por favor envíe un correo

electrónico a sshannon@oaklandnet.com o llame al (510) 238-3715 o 711 por lo menos cinco días hábiles antes de la reunión. Se le pide de favor que no use perfumes a esta reunión como cortesía para los que tienen sensibilidad a los productos químicos. Gracias.

會場有適合輪椅出入設施。需要殘障輔助設施, 手語, 西班牙語, 粵語或國語翻譯服務, 請在會議前五個工作天電郵 sshannon@oaklandnet.com 或致電 (510) 238-3715 或 711 California relay service。請避免塗搽香氛產品, 參加者可能對化學成分敏感。

Service Animals/Emotional Support Animals: The City of Oakland Rent Adjustment Program is committed to providing full access to qualified persons with disabilities who use service animals or emotional support animals.

If your service animal lacks visual evidence that it is a service animal (presence of an apparel item, apparatus, etc.), then please be prepared to reasonably establish that the animal does, in fact, perform a function or task that you cannot otherwise perform.

If you will be accompanied by an emotional support animal, then you must provide documentation on letterhead from a licensed mental health professional, not more than one year old, stating that you have a mental health-related disability, that having the animal accompany you is necessary to your mental health or treatment, and that you are under his or her professional care.

Service animals and emotional support animals must be trained to behave properly in public. An animal that behaves in an unreasonably disruptive or aggressive manner (barks, growls, bites, jumps, urinates or defecates, etc.) will be removed.

CHRONOLOGICAL CASE REPORT

Case No.: T16-0258
Case Name: Sherman v. Michelsen
Property Address: 5823-5825 Occidental Street, Oakland, CA
Parties: Mark Sherman (Tenant)
Harold & Diane Michelsen (Owners)
Leah Hess (Tenant Attorney)

OWNERS & TENANT APPEAL:

<u>Activity</u>	<u>Date</u>
Tenant Petition filed	May 20, 2016
Owner Response filed	July 21, 2016
Hearing Decision mailed	December 4, 2018
Owner Appeal filed	December 19, 2018
Tenant Appeal filed	December 24, 2018
Legal Brief & Evidence submitted by Tenant Attorney	February 16, 2018
Closing Brief Re: Fraud and Mistake submitted by Owners	July 13, 2018
Tenant's Remand Hearing Brief Submitted by Tenant's Attorney	July 13, 2018
Additional Hearing Brief submitted by Tenant Attorney with attached Request for Judicial Notice	July 16, 2018

000003

OWNER & TENANT APPEAL: (continued)

Activity

Date

Petitioner Mark Sherman's Opposition
to Owners' Appeal submitted by
Tenant Attorney

January 18, 2019

Opposition to Tenant's Appeal
submitted by Owners

January 28, 2019

T16-0258 Re/WM

CITY OF OAKLAND
RENT ADJUSTMENT PROGRAM

CITY OF OAKLAND RENT ADJUSTMENT PROGRAM Mail To: P. O. Box 70243 Oakland, California 94612-0243 (510) 238-3721	For date stamp. 2016 MAY 20 PM 12:33
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Please Fill Out This Form As Completely As You Can. Failure to provide needed information may result in your petition being rejected or delayed.

TENANT PETITION

Please print legibly

Your Name Mark L. Sherman	Rental Address (with zip code) 5825 Occidental Street Oakland, CA 94608	Telephone (510) 547-1109
Your Representative's Name Leah Hess, Esq.	Mailing Address (with zip code) 1814 Franklin St, Suite 506 Oakland, CA 94612	Telephone (510) 451-3103
Property Owner(s) name(s) Diane and Rus Michelsen	Mailing Address (with zip code) c/o LODM, 3109 Old Tunnel Rd. Lafayette, CA 94549	Telephone (925) 945-1880

Number of units on the property: 4

Type of unit you rent (circle one)	House	Condominium	<input checked="" type="radio"/> Apartment, Room, or Live-Work
Are you current on your rent? (circle one)	<input checked="" type="radio"/> Yes	No	Legally Withholding Rent. You must attach an explanation and citation of code violation.

I. GROUNDS FOR PETITION: Check all that apply. You must check at least one box. For all of the grounds for a petition see OMC 8.22.070 and OMC 8.22.090. I (We) contest one or more rent increases on one or more of the following grounds:

<input checked="" type="checkbox"/>	(a) The increase(s) exceed(s) the CPI Adjustment and is (are) unjustified or is (are) greater than 10%.
<input type="checkbox"/>	(b) The owner did not give me a summary of the justification(s) for the increase despite my written request.
<input type="checkbox"/>	(c) The rent was raised <u>illegally</u> after the unit was vacated (Costa-Hawkins violation).
<input checked="" type="checkbox"/>	(d) No written notice of Rent Program was given to me together with the notice of increase(s) I am contesting. (Only for increases noticed after July 26, 2000.)
<input type="checkbox"/>	(e) A City of Oakland form notice of the existence of the Rent Program was not given to me at least six months before the effective date of the rent increase(s) I am contesting.
<input checked="" type="checkbox"/>	(f1) The housing services I am being provided have decreased. (Complete Section III on following page)
<input checked="" type="checkbox"/>	(f2) At present, there exists a health, safety, fire, or building code violation in the unit. <u>If the owner has been cited in an inspection report, please attach a copy of the citation or report.</u>
<input type="checkbox"/>	(g) The contested increase is the second rent increase in a 12-month period.
<input type="checkbox"/>	(h) The notice of rent increase based upon capital improvement costs does not contain the "enhanced notice" requirements of the Rent Adjustment Ordinance or the enhanced notice was not filed with the RAP.
<input type="checkbox"/>	(i) My rent was not reduced after the expiration period of the rent increase based on capital improvements.
<input checked="" type="checkbox"/>	(j) The proposed rent increase would exceed an overall increase of 30% in 5 years. (The 5-year period begins with rent increases noticed on or after August 1, 2014).
<input checked="" type="checkbox"/>	(k) I wish to contest an exemption from the Rent Adjustment Ordinance (OMC 8.22, Article I)

II. RENTAL HISTORY: (You must complete this section)

Date you moved into the Unit: 9/1/1985 Initial Rent: \$ 1,225 /month

When did the owner first provide you with a written NOTICE TO TENANTS of the existence of the Rent Adjustment Program (RAP NOTICE)? Date: More than 6 mo. ago. If never provided, enter "Never."

- Is your rent subsidized or controlled by any government agency, including HUD (Section 8)? Yes No

List all rent increases that you want to challenge. Begin with the most recent and work backwards. If you need additional space, please attach another sheet. You must check "Yes" next to each increase that you are challenging.

Date Notice Served (mo/day/year)	Date Increase Effective (mo/day/year)	Amount Rent Increased		Are you Contesting this Increase in this Petition?*	Did You Receive a Rent Program Notice With the Notice Of Increase?
		From	To		
3/21/2016	6/1/2016	\$ 1,817.80	\$ 4,000	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
** See below		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

* You have 60 days from the date of notice of increase or from the first date you received written notice of the existence of the Rent Adjustment program (whichever is later) to contest a rent increase. (O.M.C. 8.22.090 A 2) If you never got the RAP Notice you can contest all past increases.

List case number(s) of all Petition(s) you have ever filed for this rental unit: T-12-0332

III. DESCRIPTION OF DECREASED OR INADEQUATE HOUSING SERVICES:

Decreased or inadequate housing services are considered an increase in rent. If you claim an unlawful rent increase for service problems, you must complete this section.

- Are you being charged for services originally paid by the owner? Yes No
- Have you lost services originally provided by the owner or have the conditions changed? Yes No
- Are you claiming any serious problem(s) with the condition of your rental unit? Yes No

If you answered "Yes" to any of the above, please attach a separate sheet listing a description of the reduced service(s) and problem(s). Be sure to include at least the following: 1) a list of the lost housing service(s) or serious problem(s); 2) the date the loss(es) began or the date you began paying for the service(s); and 3) how you calculate the dollar value of lost problem(s) or service(s). Please attach documentary evidence if available.

To have a unit inspected and code violations cited, contact the City of Oakland, Code Compliance Unit, 250 Frank H. Ogawa Plaza, 2nd Floor, Oakland, CA 94612. Phone: (510) 238-3381

**See Attachment A re: Prior rent/petition hearing

IV. VERIFICATION: The tenant must sign:

I declare under penalty of perjury pursuant to the laws of the State of California that everything I said in this petition is true and that all of the documents attached to the petition are true copies of the originals.

Mark Sherman

Tenant's Signature

5/18/2016

Date

V. MEDIATION AVAILABLE: Mediation is an entirely voluntary process to assist you in reaching an agreement with the owner. If both parties agree, you have the option to mediate your complaints before a hearing is held. If the parties do not reach an agreement in mediation, your case will go to a formal hearing before a Rent Adjustment Program Hearing Officer the same day.

You may choose to have the mediation conducted by a Rent Adjustment Program Hearing Officer or select an outside mediator. Rent Adjustment Program Hearing Officers conduct mediation sessions free of charge. If you and the owner agree to an outside mediator, please call (510) 238-3721 to make arrangements. Any fees charged by an outside mediator for mediation of rent disputes will be the responsibility of the parties requesting the use of their services.

Mediation will be scheduled only if both parties agree (after both your petition and the owner's response have been filed with the Rent Adjustment Program). **The Rent Adjustment Program will not schedule a mediation session if the owner does not file a response to the petition.** Rent Board Regulation 8.22.100.A.

If you want to schedule your case for mediation, sign below.

I agree to have my case mediated by a Rent Adjustment Program Staff Hearing Officer (no charge).

Tenant's Signature

Date

VI. IMPORTANT INFORMATION:

Time to File This form must be received at the offices of the City of Oakland, Rent Adjustment Program, Dalziel Building, 250 Frank H. Ogawa Plaza Suite 5313, Oakland, CA 94612 within the time limit for filing a petition set out in the Rent Adjustment Ordinance, Oakland Municipal Code, Chapter 8.22. Board Staff cannot grant an extension of time to file your petition by phone. For more information, please call: (510) 238-3721.

File Review

The owner is required to file a Response to this petition within 35 days of notification by the Rent Adjustment Program. You will be mailed a copy of the Landlord's Response form. Copies of documents attached to the Response form will not be sent to you. However, you may review these in the Rent Program office by appointment. For an appointment to review a file call (510) 238-3721; please allow six weeks from the date of filing before scheduling a file review.

VII. HOW DID YOU LEARN ABOUT THE RENT ADJUSTMENT PROGRAM?

- Printed form provided by the owner
- Pamphlet distributed by the Rent Adjustment Program
- Legal services or community organization
- Sign on bus or bus shelter
- Other (describe): ATTORNEY REFERENCE

ATTACHMENT A

THE PRIMARY CLAIM IN THIS PETITION IS THAT THE CERTIFICATE OF EXEMPTION FOR THE TENANT'S RENTAL UNIT WAS ISSUED AS A RESULT OF FRAUD OR MISTAKE. PLAINTIFF WILL PRESENT EVIDENCE PROVING THAT FRAUD AND MISTAKE. HE WILL PROVE THAT HIS RENTAL UNIT WAS USED RESIDENTIALLY PRIOR TO THE ENACTMENT OF THE RENT ORDINANCE AND PRIOR TO THE ISSUANCE OF THE CERTIFICATE OF OCCUPANCY. THE ISSUE IN THIS PETITION DIFFERS FROM THE LANDLORD'S EXEMPTION PETITION. OMC 8.22..030.A.5

THIS PETITION IS BASED UPON 8.22.030.B.1.b. and 8.22.030.B.1.c., WHICH PROVIDE AS FOLLOWS:

b. For purposes of obtaining a certificate of exemption or responding to a tenant petition by claiming an exemption from Chapter 8.22, Article I, the burden of proving and producing evidence for the exemption is on the owner. A certificate of exemption is a final determination of exemption *absent fraud or mistake*.

c. Timely submission of a certificate of exemption previously granted in response to a petition shall result in dismissal of the petition absent proof of fraud or mistake regarding the granting of the certificate. The burden of proving such fraud or mistake is on the tenant.

MR. SHERMAN'S PETITION SHOULD NOT BE DISMISSED, AS HE IS PREPARED TO PROVE THAT THE CERTIFICATE WAS ISSUED AS A RESULT OF FRAUD AND MISTAKE.

Background:

Tenant filed a petition in 2012 challenging every rent increase ever impose as the required notices informing him of his rights under the Ordinance were never given. (Case No. T-12-0332). He was successful. The increases were disallowed, rent withholding was authorized, and ongoing rent was set at \$1,225 month. Landlords did not raise exemption during that case.

The landlords unsuccessfully appealed the decision to the Board. When they lost they filed a writ of mandate in the Superior Court. (Alameda County Superior Court No. RG14711450) That case is still pending as of the date of filing of this petition.

The landlords also filed a petition for exemption. They asserted that the certificate of occupancy in the case was issued in 1985 and that the property was not previously used for residential purposes. That petition was successful and they obtained a certificate of exemption. (Case No. L13-0054)

1. This Tenant appealed to the Board, without success. He then filed a writ of mandate in the Superior Court. (Alameda County Superior Court No. RG15785257). The Superior

Court upheld the decision and the tenant appealed to the First District Court of Appeals, where it is currently pending. (First District Court of Appeals Case No. A147789)

On March 21, 2016 the Landlords raised the tenant's rent to \$4,000 a month.

Mr. Sherman's challenge to the rent raise in this proceeding is based upon different grounds and different evidence than his opposition to the granting of the Landlord's exemption petition. He will prove that the Certificate of Exemption was issued as a result of fraud and mistake. The landlord's assertions that the subject rental unit was never rented for residential use prior to Mr. Sherman's tenancy will be disproved at the hearing in this petition.

DECREASE IN SERVICES: Multiple problems exist. At the subject unit affecting major systems: Plumbing defects, yearly leaking through roof, electrical system deficient, windows which do not open and close, lack of security bars on windows and a multitude of other issues.

Tenant attaches hereto a Citation by a City of Oakland Code Compliance Officer for many issues and a citation from the Oakland Fire Department. Most of the issues identified have not been repaired, or were repaired and the repairs failed.

Attached is a report of a recent inspection by Austral Housing Inspections detailing problems presently in existence at the rental unit.

ATTACHMENT B—LOST SERVICES/SERIOUS CONDITIONS AT THE PROPERTY

Lost or Reduced Services:

1. Unit was originally provided with a dishwashing machine. In (year) the landlords disconnected the dishwasher, rather than provide proper venting, as required by City Inspector.
2. Unit was originally rented as live-work space. In (date) tenant was instructed to cease his manufacturing activity on the premises.
3. In (date) landlord replaced original (number) gallon trash containers with (number) gallon trash containers.

CITY OF OAKLAND RENT ADJUSTMENT PROGRAM P.O. Box 70243 250 Frank H. Ogawa Plaza, Suite 5313 Oakland, CA 94612 (510) 238-3721	For filing stamp. <div style="text-align: center; font-size: small;"> JUL 21 PM 1:5 </div>
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Please Fill Out This Form As Completely As You Can. Failure to provide needed information may result in your response being rejected or delayed.

CASE NUMBER T16- 0258

OWNER RESPONSE

Please print legibly.

Your Name Diane & Harold Rus Michelsen	Complete Address (with zip code) PO Box 6363 Moraga 94570 Ca	Phone: <u>925 683 3693</u> Email: <u>Diane@LODM.com</u>
Your Representative's Name (if any) <div style="text-align: center; font-size: x-large;">N/A</div>	Complete Address (with zip code)	Phone: _____ Fax: _____ Email: _____
Tenant(s) name(s) Mark Sherman	Complete Address (with zip code) 5823 - 5825 Occidental Oakland, Ca 94608	

Have you paid for your Oakland Business License? Yes No Number 20518448
 (Provide proof of payment.)

Have you paid the Rent Adjustment Program Service Fee? (\$30 per unit) Yes No
 (Provide proof of payment.)

There are 4 residential units in the subject building. I acquired the building on 1/1/1974

Is there more than one street address on the parcel? Yes No .

I. RENTAL HISTORY

The tenant moved into the rental unit on 9/1/1985

The tenant's initial rent including all services provided was \$ 1225⁰⁰ / month.

Have you (or a previous Owner) given the City of Oakland's form entitled **NOTICE TO TENANTS OF RESIDENTIAL RENT ADJUSTMENT PROGRAM ("RAP Notice")** to all of the petitioning tenants?
 Yes No I don't know If yes, on what date was the Notice first given? Approx 8mo ago

Is the tenant current on the rent? Yes No

If you believe your unit is exempt from Rent Adjustment you may skip to **Section IV. EXEMPTION**.

If a contested increase was based on **Capital Improvements**, did you provide an **Enhanced Notice to Tenants for Capital Improvements** to the petitioning tenant(s)? Yes ____ No ____ . If yes, on what date was the Enhanced Notice given? _____. Did you submit a copy of the Enhanced Notice to the RAP office within 10 days of serving the tenant? Yes ____ No ____ . Not applicable: there was no capital improvements increase. _____

Begin with the most recent rent increase and work backwards. Attach another sheet if needed.

Date Notice Given (mo/day/year)	Date Increase Effective (mo/day/year)	Amount Rent Increased		Did you provide NOTICE TO TENANTS with the notice of rent increase? <input type="checkbox"/> Yes <input type="checkbox"/> No
		From	To	
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No
		\$	\$	<input type="checkbox"/> Yes <input type="checkbox"/> No

II. JUSTIFICATION FOR RENT INCREASE

You must prove that each contested rent increase greater than the Annual CPI Adjustment is justified and was correctly served. Use the following table and check the applicable justification(s) box for each increase contested by the tenant(s) petition. For a summary of these justifications, please refer to the "Justifications for Increases Greater than the Annual CPI Rate" section in the attached Owner's Guide to Rent Adjustment.

<u>Date of Increase</u>	Banking (deferred annual increases)	Increased Housing Service Costs	Capital Improvements	Uninsured Repair Costs	Fair Return	Debt Service (if purchased before 4/1/14)
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

For each justification checked, you must submit organized documents demonstrating your entitlement to the increase. Please see the "Justifications" section in the attached Owner's Guide for details on the type of documentation required. In the case of Capital Improvement increases, you must include a copy of the "Enhanced Notice to Tenants for Capital Improvements" that was given to tenants. Your supporting documents do not need to be attached here, but are due in the RAP office no later than seven (7) days before the first scheduled Hearing date.

III. DECREASED HOUSING SERVICES

If the petition filed by your tenant claims **Decreased Housing Services**, state your position regarding the tenant's claim(s) of decreased housing services on a separate sheet. Submit any documents, photographs or other tangible evidence that supports your position.

IV. EXEMPTION

If you claim that your property is exempt from Rent Adjustment (Oakland Municipal Code Chapter 8.22), please check one or more of the grounds:

The unit is a single family residence or condominium exempted by the **Costa Hawkins Rental Housing Act** (California Civil Code 1954.50, et seq.). **If claiming exemption under Costa-Hawkins, please answer the following questions on a separate sheet:**

1. Did the prior tenant leave after being given a notice to quit (Civil Code Section 1946)?
2. Did the prior tenant leave after being given a notice of rent increase (Civil Code Section 827)?
3. Was the prior tenant evicted for cause?
4. Are there any outstanding violations of building housing, fire or safety codes in the unit or building?
5. Is the unit a single family dwelling or condominium that can be sold separately?
6. Did the petitioning tenant have roommates when he/she moved in?
7. If the unit is a condominium, did you purchase it? If so: 1) from whom? 2) Did you purchase the entire building?

The rent for the unit is **controlled, regulated or subsidized** by a governmental unit, agency or authority other than the City of Oakland Rent Adjustment Ordinance.

The unit was **newly constructed** and a certificate of occupancy was issued for it on or after January 1, 1983.

On the day the petition was filed, the tenant petitioner was a resident of a **motel, hotel, or boarding house** for less than 30 days.

The subject unit is in a building that was **rehabilitated** at a cost of 50% or more of the average basic cost of new construction.

The unit is an accommodation in a **hospital, convent, monastery, extended care facility, convalescent home, non-profit home for aged, or dormitory** owned and operated by an educational institution.

The unit is located in a building with three or fewer units. The owner occupies one of the units continuously as his or her principal residence and has done so for at least one year.

V. IMPORTANT INFORMATION

Time to File. This form **must be received** by the Rent Adjustment Program, P.O. Box 70243, Oakland, CA 94612-0243, within 35 days of the date that a copy of the Tenant Petition was mailed to you. (The date of mailing is shown on the Proof of Service attached to the Tenant Petition and other response documents mailed to you.) A postmark does not suffice. If the RAP office is closed on the last day to file, the time to file is extended to the next day the office is open. If you wish to deliver your completed Owner Response to the Rent Adjustment Program office in person, go to the City of Oakland Housing Assistance Center, 250 Frank H. Ogawa Plaza, 6th Floor, Oakland, where you can date-stamp and drop your Response in the Rent Adjustment drop box. The Housing Assistance Center is open Monday through Friday, except holidays, from 9:00 a.m. to 5:00 p.m. **You cannot get an extension of time to file your Response by telephone.**

NOTE: If you do not file a timely Response, you will not be able to produce evidence at the Hearing, unless you can show good cause for the late filing.

File Review. You should have received a copy of the petition (and claim of decreased services) filed by your tenant with this packet. Other documents provided by the tenant will not be mailed to you. You may review additional documents in the RAP office by appointment. For an appointment to review a file or to request a copy of documents in the file call (510) 238-3721.

VI. VERIFICATION

Owner must sign here:

I declare under penalty of perjury pursuant to the laws of the State of California that all statements made in this Response are true and that all of the documents attached hereto are true copies of the originals.

Diane M. Chilvers
Owner's Signature

7/21/2016
Date

VII. MEDIATION AVAILABLE

Your tenant may have signed the mediation section in the Tenant Petition to request mediation of the disputed issues. Mediation is an entirely voluntary process to assist the parties to reach an agreement on the disputed issues in lieu of a Rent Adjustment hearing.

If the parties reach an agreement during the mediation, a written Agreement will be prepared immediately by the mediator and signed by the parties at that time. If the parties fail to settle the dispute, the case will go to a formal Rent Adjustment Program Hearing, usually the same day. A Rent Adjustment Program staff Hearing Officer serves as mediator unless the parties choose to have the mediation conducted by an outside mediator. If you and the tenant(s) agree to use an outside mediator, please notify the RAP office at (510) 238-3721. Any fees charged by an outside mediator for mediation of rent disputes will be the responsibility of the parties requesting the use of their services. (There is no charge for a RAP Hearing Officer to mediate a RAP case.)

Mediation will be scheduled only if both parties request it – after both the Tenant Petition and the Owner Response have been filed with the Rent Adjustment Program. **The Rent Adjustment Program will not schedule a mediation session if the owner does not file a response to the petition.** (Rent Board Regulation 8.22.100.A.)

If you want to schedule your case for mediation, sign below.

I agree to have my case mediated by a Rent Adjustment Program Staff Hearing Officer (no charge).

Owner's Signature

Date

ATTACHMENT 1, T16-0258, (Sherman v. Michelsen)

Landlord respectfully moves to Dismiss or Deny This Petition Without Hearing.

I. A MOTION TO DISMISS OR DENY WITHOUT HEARING IS ALLOWED AND APPROPRIATE.

A. *Chapter 8.22.110 Describes When A Hearing Is Not Appropriate.*

Chapter 8.22.110 directs that a hearing may not be scheduled and a Hearing Officer may issue a decision without a hearing when: "(c) The required prerequisites to file a petition or response have not been met; or (d) conclusive proof of exemption has been provided and is not challenged by the tenant."

The prerequisites for a Tenant Petition cannot be met, because the property at issue has been held to be exempt, and thus not a "Covered Unit", so Mr. Sherman is not a "tenant" and the Michelsens are not an "Owner" as defined in the Chapter and in the implementing Regulations.

Conclusive proof of an exemption exists: a Certificate of Exemption approved after a full hearing, upheld on Board Appeal, and affirmed by the Superior Court in denying Mr. Sherman's Petition for Writ of Mandate. (See: Exhibit A: Certificate of Exemption).

B. *A Second Hearing Would Defeat The Goal of Finality.*

Mr. Sherman has had his full and fair hearing on the exemption issue, and several reviews. It is improper for Mr. Sherman to continue to contest the exemption by asking for a second hearing, seeking a more sympathetic hearing officer.

In Rent Board case #L13-0054, the Hearing Officer, after a full hearing, determined that the live-work space rented by Mr. Sherman is exempt from the Rent

Control Ordinance; the unit is not a Covered Unit (see: Exhibit B: Decision of Hearing Officer). Mr. Sherman appealed that decision; the decision and the Hearing Officer's evidentiary rulings were upheld on Board Appeal, with Mr. Sherman represented by counsel (see: Exhibit C: Decision of Board on Appeal). These hearings were full and extensive (see: Exhibit D: Administrative Record). He challenged the ruling of the Appellate Panel by filing in the Superior Court for a Writ of Mandate to overturn it; after briefing and hearing (Sherman's hearing brief is Exhibit E), it was upheld by Superior Court Judge Grillo (see: Exhibit F: Order Denying Writ of Mandate). Mr. Sherman has appealed that adverse ruling; it is pending in the First District Court of Appeal.

Mr. Sherman is candid that the purpose of the current petition is to seek a second hearing on the exemption issue. This must occur before his appeal of the adverse decision on his Petition for Writ of Mandate is decided and the issue becomes legally *res judicata* (legal terminology for the claim can't be raised again). Exhibit A to Mr. Sherman's Petition notes that his "primary claim" is that the finding of exemption should be reversed. His Exhibit A even quotes Regulations 8.22.030B.1.b. and 8.22.030.B.1.c.

Mr. Sherman seeks a new hearing now to avoid the issue and claim preclusion which will exist when the Court of Appeal upholds the Superior Court judgment affirming the Board decision on appeal which upheld the Hearing Officer Decision.

At this juncture, the goal of finality of decisions is preserved by concepts such as "law of the case" and *stare decisis*, which basically say that a party is due only one full and fair hearing on the same claim. Although a the party may appeal and seek correction of errors, the result of the one full hearing should not be overturned and a

second hearing allowed except in extraordinary circumstances. A party does not have a right, after an adverse result, to successive hearings until he prevails.

Here, Mr. Sherman had his full and fair hearing, as recognized by the Board Decision on Appeal, and the Superior Court Judgment denying his petition for writ of mandate. His many objections to rulings on evidentiary points, claimed procedural unfairness, weight to be given to evidence, etc., were rejected by the Hearing Officer, the Board on Appeal, and the Superior Court judge.

It is not clear that the Rent Board Rules allows the *same* tenant (overlooking that "tenant" in the Ordinance and Regulations requires a Covered Unit) to seek a second hearing on a claim of exemption for the same unit. The rule makes more sense when interpreted as providing for finality, but also making sure that a collusive result (for example, a landlord's exemption petition with a collaborative tenant) can be challenged by another, independent tenant; here, the initial hearing was undoubtedly not collusive. Without conceding the issue, this motion will assume, for purposes of competing the analysis, that the very same tenant can ask for another hearing on the very same claim, despite losing in the hearing, on appeal, and in the Superior Court.

[Parenthetically, notwithstanding losing on his Petition for Writ of Mandate, Mr. Sherman retained virtually all the benefits gained by his Rent Board petition; the Superior Court ruling on the Michelsens' petition for writ of mandate found the exemption decision was not retroactive, so left in place the rent refund and lowered rent until June 15, 2015; see Exhibit G.]

II. A BARE STATEMENT THAT THE SECOND HEARING WILL BE BASED UPON NEW EVIDENCE, NEW GROUNDS, AND WILL SHOW FRAUD IS INSUFFICIENT.

ATTACHMENT 1, T16-0258, (Sherman v. Michelsen)

A. Finality Requires That The Purported New Evidence And Fraud Be Stated With Particularity.

The Ordinance is specific about the finality of an exemption decision: it is "final absent fraud or mistake". Paying lip service to that requirement, Mr. Sherman states his Petition is based upon "different grounds and different evidence than his opposition to the granting of the Landlord's exemption petition", but makes no attempt either to describe the purported "different evidence" or to explain why that evidence, or the supposed "new grounds" were not presented as part of his vigorous opposition to the Michelsens' exemption petition.

Mr. Sherman's approach – to simply declare that the new hearing on the same issue will be based on "new evidence" and that the several prior rulings were based on "fraud" – would negate the finality goal of the Ordinance.

At the very least *before a hearing* Mr. Sherman must set forth in detail the purported "new evidence" and "fraud".

This is necessary so that the Board can analyze whether the situation is appropriate for an exception to the finality rule. It can determine whether indeed new evidence will be presented, or the "new evidence" is basically evidence which was excluded at the first hearing or was available but not presented, and whether the "fraud" is something different than a pejorative label on "the landlord's witnesses disagreed with mine, and mine of course told the truth, so it must be that the landlord defrauded the hearing officer".

Most of Mr. Sherman's objections to the first hearing and his claims of unfairness were disagreements with the Hearing Officer's decisions on what evidence to admit and

what evidence was persuasive. Should Mr. Sherman's "new evidence" simply be the evidence previously excluded, or given little weight, then the current petition is exposed as essentially a request for a different hearing officer; it is forum or judge shopping, and not within the limited exception to the finality of exemption decisions.

Similarly, any "new grounds" need an explanation why the contentions were not raised at the first hearing by Mr. Sherman. Otherwise, a strategy election at the time of the first hearing on what to focus upon would be transformed after the adverse decision into a reason for a second hearing.

While Mr. Sherman's Petition mentions "mistake", there is no attempt to describe or explain what mistake was made. "Mistake" apparently is shorthand for Mr. Sherman's disagreement with the first decision.

Under California general law, fraud must be specifically pleaded. General and conclusionary allegations are not sufficient. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 74; *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268). Fraud requires particularity, that is, "pleading facts which show how, when, where, to whom, and by what means" the fraud was accomplished. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) *Hall v. Department of Adoptions* (1975) 47 Cal.App.3d 898, 904; *Cooper v. Equity General Insurance* (1990) 219 Cal.App.3d 1252, 1262.

B. "New and Different Facts" Mean Facts Which Could Not In The Exercise of Reasonable Discretion Have Been Presented At the Initial Hearing.

Established general law for courts, on which the Rent Board finality approach seems patterned, furthers the finality of decisions, as does the Ordinance, by limiting rehearings or overturning decided matters to situations of new evidence and fraud.

However, there are specific legal interpretations of what those terms mean for this purpose.

Mr. Sherman, in Exhibit A to his Petition, properly recognizes that he must present new evidence in support of his demand for a second hearing. This reflects the usual rules.

California Code of Civil Procedure subsections 1008 (a) and (b), in substantially similar language, allow a party to ask for a rehearing after an adverse decision "based upon new or different facts, circumstances, or law, The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." An application to reconsider or for rehearing which does not allege the new or different facts can be treated as a contempt. CCP Section 1008(d).

Even beyond the explicit requirement to detail the new and different facts, CCP §1008 is uniformly interpreted, in conformance with the general rule that a party is entitled to only one full and fair hearing, to define "new or different facts" as evidence that was *unavailable* at the time of the first hearing. *Shiffer v. CBS Corp.* (2015) 240 Cal. App. 4th 246:

"Code of Civil Procedure section 1008, subdivision (a) provides that a party affected by a prior court order may, 'based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order.' (Code Civ. Proc., § 1008, subd. (a).) Similarly, Code of Civil Procedure section 657, subdivision 4 provides that a party may move for a new trial on a showing that there is '[n]ewly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.'" (*In re H.S.* (2010) 188 Cal.App.4th 103, 108.) Under both sections, the moving party must provide a "satisfactory explanation for the failure to produce that evidence at an earlier time.'" (*In re H.S.*, *supra*, 188 Cal.App.4th at p. 108, italics omitted; see *Even Zohar Construction &*

Remodeling, Inc. v. Bellaire Townhouses, LLC (2015) 61 Cal.4th 830, 833; *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212 (*New York Times*).)”).

The California Supreme Court explained the purpose of these requirements in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, Ltd.*, 61 Cal. 4th 830 (2015):

Courts have construed section 1008 to require a party filing an application for reconsideration or a renewed application to show diligence with a satisfactory explanation for not having presented the new or different information earlier. (*California Correctional Peace Officers Assn. v. Virga, supra*, 181 Cal.App.4th at pp. 46–47 & fns. 14–15; see *Garcia v. Hejmadi, supra*, 58 Cal.App.4th at pp. 688–690.)

Section 1008's purpose is “to conserve judicial resources by constraining litigants who would endlessly bring the same motions over and over, or move for reconsideration of every adverse order and then appeal the denial of the motion to reconsider.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1067 (2011–2012 Reg. Sess.) as amended Apr. 25, 2011, p. 4.)

The Board must determine, before a second hearing is allowed, that the “new facts” are facts or evidence which could not have been produced, in the exercise of reasonable diligence, at the first hearing.

C. Extrinsic Fraud is Necessary To Overturn A Decision.

Under California and common law, only “extrinsic fraud”, as distinguished from “intrinsic fraud” may be the basis to overturn a judgment.

As explained in *In re Marriage of Stevenot* (1984) 154 Cal. App. 3d 1051, quoting one of California's “judicial superstars”, Justice Roger Traynor:

Over 40 years ago, Justice Traynor wrote, “The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic [citations]. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court [citations]. If an unsuccessful party to an action has been kept in ignorance thereof [citations] or has been prevented from fully participating therein [citation], there has been no true adversary proceeding, and the judgment is

open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. [Citations.] Fraud perpetrated under such circumstances is intrinsic, . . ." (*Westphal v. Westphal* (1942) 20 Cal.2d 393, 397 [126 P.2d 105], citing in part to *United States v. Throckmorton* (1878) 98 U.S. 61, and *Caldwell v. Taylor* (1933) 218 Cal. 471.)

This restriction – that the fraud not be simply presenting evidence which could have been countered, impeached, or refuted at the first hearing, but must be something that is equivalent to having been kept "ignorant" of the proceeding – serves "the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." *Id.*

Later in *Stevenot*, the opinion quotes Justice Traynor in another case: Justice Traynor went on to point out, "Relief is denied, however, if a party has been given notice of an action and has not been prevented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary. [Citations.] Moreover, a mutual mistake that might be sufficient to set aside a contract is not sufficient to set aside a final judgment. The principles of res judicata demand that the parties present their entire case in one proceeding [Citation.] Courts deny relief, therefore, when the fraud or mistake is 'intrinsic'; that is, when it 'goes to the merits of the prior proceedings, which should have been guarded against by the plaintiff at that time.' [Citations.] [para.] Relief is also denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained [citation] 'If the complainant was guilty of negligence in permitting the fraud to be practiced or the mistake to occur equity will deny relief.' [Citation.]" (*Id.*, at pp. 472-473.) Thus, in *Kulchar*, the court refused to set aside a stipulated judgment where a potential tax obligation had been overlooked, since any fraud or mistake was intrinsic because of a failure to fully investigate.

Thus, to satisfy the "fraud" ground to challenge the exemption, Mr. Sherman must show the fraud was extrinsic fraud; a review of the first hearing shows this is impossible.

III. CONCLUSION

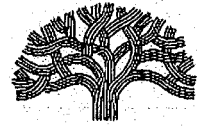
The Regulations should not be interpreted to allow the same tenant to contest the finality of an exemption decision after a fair and full hearing, appeal, and writ of mandate all upheld the exemption.

If a tenant is allowed to request a second hearing on the basis of new facts or fraud, those new facts and the purported fraud must be stated in the Petition with particularity. Only facts and evidence which in the exercise of reasonable diligence could not have been presented at the initial hearing in opposition to the claim of exemption should be considered. Only extrinsic fraud preventing Mr. Sherman from participating in the first hearing should be considered.

In summary, the current Petition should be dismissed outright, because the rented property is exempt, and Mr. Sherman is not a "tenant". Additionally, because Mr. Sherman's Petition does not set forth facts which were not available at the time of the first hearing, nor does he show that extrinsic fraud prevented him from fully participating at the first hearing, no hearing should be set.

CITY OF OAKLAND

250 FRANK OGAWA PLAZA, SUITE 5313, OAKLAND, CA 94612



Housing and Community Development Department
Rent Adjustment Program

TEL (510) 238-3721
FAX (510) 238-6181
TDD (510) 238-3254

HEARING DECISION

CASE NUMBER: T16-0258, Sherman v. Michelsen

PROPERTY ADDRESSES: 5823-5825 Occidental Street, Oakland, CA

DATES OF HEARING: February 23, 2018; June 22, 2018

DATE OF PRETRIAL CONFERENCE: October 17, 2017

DATE OF DECISION: November 30, 2018

APPEARANCES: Mark Sherman, Tenant (all dates)
Leah Hess, Attorney for Tenant (all dates)
Charles Abraham, Witness (Feb. 23, 2018, only)
Sue Doyle, Witness (Feb. 23, 2018, only)
Daniel Wiener, Witness (by phone, Feb. 23, 2018, only)
Michael Joffe, Witness (Feb. 23, 2018, only)

Harold Rus Michelsen (by phone, Feb. 23, 2018, only), Owner
Diane Michelsen, Owner (all dates)

SUMMARY OF DECISION

The tenant's petition is granted. The legal rent for the unit is set forth in the Order below.

CONTENTIONS OF THE PARTIES

The tenant filed a petition on May 20, 2016, alleging that a rent increase from \$1,817.80 to \$4,000 a month, effective June 1, 2016, violated the Rent Adjustment Ordinance (Ordinance) on the following grounds: the increase exceeds the CPI Adjustment and is unjustified or is greater than 10%; no written notice of the Rent Program (RAP Notice) was given together with the notice of increase; the proposed increase would exceed an overall

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increase of 30% in 5 years; and, that he wishes to contest an exemption from the Rent Adjustment Ordinance.

The tenant filed an Attachment to the Petition in which he claimed that “the primary claim in this petition is that the Certificate of Exemption for the tenant’s rental unit was issued as a result of fraud or mistake.”

Additionally, the tenant claimed decreased housing services and that there is a current health, safety, fire or building code violation in the unit. The tenant dismissed his claims regarding decreased services without prejudice on February 27, 2017.

The owners filed a timely response to the tenant petition on July 21, 2016, claiming that the unit was exempt as new construction. The owners filed an Attachment to their Response in which they claimed that a Certificate of Exemption had already been granted in a prior case L13-0054, and that the tenant’s petition should therefore be dismissed.

PROCEDURAL HISTORY

On November 30, 2012, Mark Sherman, tenant at 5825 Occidental Street in Oakland, filed a petition contesting a series of rent increases in case T12-0332 (the rent increase Hearing). The owner did not claim a new construction exemption at that time. The tenant prevailed in his claim, which was upheld on appeal to the Rent Board.

On December 13, 2013, the owner filed a petition in case L13-0054, *Michelsen et al v. Sherman*, seeking an exemption for the unit located at 5825 Occidental Street in Oakland based on new construction. While the original *Landlord Petition for Certificate of Exemption* identified the building as a 4 unit building, the attachment to the petition stated that the only tenant was Mark Sherman at 5825 Occidental Street, Oakland, CA and that the:

- “Owners will prove the following building history.”
- “Chronology of Building Use”
- “1975 Michelsen purchases commercial building”
- “1976 to 1983, 5823 Occidental rented as commercial space for custom woodworking.”
- “1983 to early summer 1984, 5823 Occidental rented as commercial art studio.”
- “Appx. June 1984 to October 1984, Michelsen converts 5825 Occidental to live-work space.”
- “October, 1984, Building inspected by Housing Authority for Certificate of Occupancy.”
- “November, 1984 Building Permit issued.”
- “February, 1985 Certificate of Occupancy issued.”

The *Landlord Petition for Certificate of Exemption* in that case was mailed only to Sherman, as he was the only tenant listed on the required attachment to the petition. Sherman filed a *Tenant Response* to the petition stating that he contested the exemption.

A Hearing (the exemption Hearing) was held on February 24, 2014, with the limited question as to whether or not the unit on Occidental was new construction under the Rent Adjustment Ordinance. The testimony at the exemption Hearing was primarily about the Occidental Street unit.

At the exemption Hearing, a Declaration, sworn under penalty of perjury, written by Harold Rus Michelsen, was admitted into evidence. This declaration stated in pertinent part that: He was the owner of the commercial building located at 5825 Occidental Street in Oakland and that he purchased it in 1974, at which time it was vacant. It remained vacant until he rented it in 1976. The building had previously been used as a print shop. It was one large building with no bath facilities, nor kitchen facilities. It had two toilets for employees and a breakroom.

The Declaration further states that from 1976 to 1982, the unit was rented as a custom woodworking studio and then from early 1983 to the summer of 1984 as a custom art studio. In 1984, a conversion of 5825 Occidental to live work space began. The premises were rented to Mark Sherman in September of 1985, which was the first time the premises "were ever rented as a residence...". At no point in the Declaration does Mr. Michelsen identify the addresses of the other units on the premises, nor does he say that he lived on the property at any time.

At the exemption Hearing, Diane Michelsen, Mr. Michelsen's wife, testified. In pertinent part her testimony was that she first became familiar with the property in 1982 and (referring to the Occidental Street portion of the property) at the time there were no kitchen facilities, there was no shower or bathing facilities and it did not appear that it could have been utilized as residential property. It was rented as commercial space in 1983 to an artist from Boston. In 1983 it was not used for residential purposes. After this artist moved out, Rus (her husband) converted the property to residential use. He divided the space into three units on Grace Street and converted Occidental Street into a residence by putting in a kitchen, raising the floor, putting in a heating system and a tub.

She further testified that she lived at 927 Grace (the other side of the property) beginning in 1983. Her husband, Rus Michelsen, lived there from the late 1970s. Diane Michelsen testified that her husband's legal name is Harold, but that he goes by Rus, his middle name.

At the exemption Hearing the owners produced an email from Rachel Flynn to Greg McConnell, who was representing the owners at the Hearing. The email stated in pertinent part that according to City records the Olympic Press Publishing Company occupied 5825 Occidental starting in 1967. By the mid-80's, housing went into the structure.¹

At the exemption Hearing the owners also produced a *Certificate of Occupancy* for the building dated February 20, 1985.² The *Certificate of Occupancy* relates to all four units; the unit on Occidental Street and the three units on Grace Avenue.

¹ This email was admitted into evidence in this Hearing as Exhibit 1, page 1.

² This Exhibit was admitted into evidence in the Hearing of L13-0054 as Exhibit C.

Further, at the exemption Hearing, the owner produced a letter dated November 25, 1974, from the *City of Oakland Planning Department*, which states that “5825 Occidental Street is located in the R-50 Medium Density Residential Zone and a residence at that location is permitted activity. One parking space off street must be provided for the residential portion of the building.”^{3, 4}

At the exemption Hearing, the tenant produced a letter from Charles Abraham, which was not sworn under penalty of perjury, which stated that he lived at 5823 Occidental during the years 1976, 1977 and 1978.⁵ Additionally, he produced copies of Oakland phone book pages preceding 1983 showing listings for a Chuck Abraham at that address.

After the exemption Hearing, a Hearing Decision was issued which found in favor of the owner and stated under the Summary of Decision that the “subject unit is exempt from the Rent Adjustment Program” and in the Order that the “subject property is exempt from the Rent Adjustment Ordinance.”

The tenant appealed to the Rent Board arguing that there was prior residential use of his unit and that the entire property should not be deemed exempt because the other tenants were not notified about the case.⁶ The Board affirmed the Hearing Decision but remanded the case back to the Hearing Officer to determine whether there were other tenants at the property at the time the Landlord’s Petition for Exemption was filed, and whether these tenants received notice and opportunity to participate in the hearing. The other tenants were then notified of the proceeding and a new Hearing, (the Remand Hearing) was scheduled.

Prior to the Remand Hearing, tenant Sherman filed a *Request for Rent Adjustment Staff Intervention* on November 25, 2014. In that document the tenant requested for staff to intervene “for the purpose of better ensuring that all facts relating to the exemption are presented to the Hearing Officer.” The document also states that “Landlord Diane Michelsen has given sworn testimony at a prior hearing in this matter that, in the late 1970s, unit 927 Grace Street was formerly a residential space in which Landlord Rus Michelsen resided.”⁷

At the Remand Hearing, the owner’s then representative, Gregory McConnell, addressing the question of the process of the remand, stated:

“With regard to this Rent Adjustment Program staff intervention, in addition to it not being a part of the record, or a part of the Remand, just so that the record is clear, the Board always has a right, at a future point in time, if a tenant files a Tenant Petition challenging an exemption, to determine whether or not that exemption was made based upon fraud or mistake etc. So that if at some point in the future, someone

³ This letter is marked as page S3 in the evidence section of the original file, immediately behind Exhibit A and before Exhibit B.

⁴ In the instant Hearing, Ms. Michelsen testified that this letter was obtained by her husband soon after he purchased the building, to establish that he was permitted to live in the building.

⁵ This Exhibit was admitted into evidence in this Hearing as Exhibit 3.

⁶ At that point the tenant attempted to produce sworn declarations from both Charles Abraham and Daniel Wiener.

⁷ See *Request for Rent Adjustment Program Staff Intervention*, filed in L13-0054 on November 25, 2014.

wanted to do that, they could do that. So this is not a denial of process to any of the existing tenants.”⁸

McConnell also stated that the original petition, filed by the owner, was only seeking a *Certificate of Exemption* for the unit at Occidental, and not the other units on Grace Avenue. However, McConnell noted that since the Board requested that the Hearing be reopened to consider the other units in the building, the Owner sought an exemption as to all units. At the Remand Hearing, the owners did not address the issue of their prior residential use of 927 Grace Avenue.

No other tenants (other than Sherman, who was not allowed to participate) appeared at the Remand Hearing, and the tenants from the Grace Avenue side of the building filed documents saying they did not contest the exemption.

On December 5, 2014, a *Remand Hearing Decision* was issued as to the property located at 5825 Occidental Street. The *Remand Hearing Decision* states that the:

“Owner’s Petition is granted.”

“The subject property is exempt from the Rent Ordinance.”

The tenant then appealed the *Remand Hearing Decision* to the HRRRB. An *Appeal Decision* was issued on June 15, 2015, which determined that the *Remand Hearing Decision* applied only to the subject unit on Occidental (and not the units on Grace Avenue) and that the unit on Occidental was exempt.

After the *Remand Hearing Decision*, the tenant filed a writ in Superior Court (Alameda county Case Number RG15-785257), which was denied. The Court of Appeal affirmed the Superior Court decision (Case No. A147769).

A *Certificate of Exemption* was issued for the residential unit located at 5825 Occidental Street on June 21, 2016.⁹

In March of 2016, the owner served a rent increase notice on the tenant, purporting to increase the rent from \$1,817.80 a month to \$4,000 a month, effective June 1, 2016. The tenant filed the instant petition in response to the rent increase.

After the petition was filed in the instant case, an *Administrative Decision* was issued on July 26, 2016, dismissing the tenant’s claim on the grounds of the prior *Certificate of Exemption*. The tenant appealed to the HRRRB and an *Administrative Appeal Decision* was issued denying the tenant’s claim. The tenant then filed a second writ to the Superior Court.

⁸ Rent Adjustment Remand Hearing, L13-0054, 12/1/14 at 3:14-3:54

⁹ While there was argument at the Remand Hearing that the owner sought a *Certificate of Exemption* for the entire property, the language of the *Certificate of Exemption* combined with the Appeal Decision, makes clear that the *Certificate of Exemption* is limited to the “unit” located at 5823-5825 Occidental Street. There was never a *Certificate of Exemption* as to the units on Grace Avenue and the owner has never filed a petition seeking such.

During the procedure on the second writ, the City of Oakland argued to the Court that the City had erred in not providing a Hearing on the merits of the tenant's claim that the prior exemption had been granted based on fraud or mistake. The Superior Court granted the City's motion and remanded the matter to the HRRRB for further proceedings, and entered judgment for Mr. Sherman. On remand, the HRRRB vacated the *Administrative Decision* and the *Administrative Appeal Decision* and ordered the instant Hearing. The owner then sought a writ to prevent this Hearing from the Court of Appeal, which was denied.

PRETRIAL CONFERENCE

On October 17, 2017, a pretrial conference was held in this case. The *Pretrial Conference Statement* states: "The Administrative Decision and the Administrative Appeal Decisions issued in this case are vacated. A Hearing is being held to determine whether or not there was fraud committed in the prior determination (in case L13-0054), that there was no prior residential use of the premises in this unit and that the unit qualified for a 'new construction' exemption." The purpose of the pretrial conference was to determine whether or not the tenant's request for findings of good cause with respect to the issuance of subpoenas would be granted.

At the pretrial conference the owners argued that the case should be dismissed because the RAP lacked subject matter jurisdiction because the tenant's claims were barred by collateral estoppel and res judicata and that the tenant did not allege fraud or mistake with any specificity. The owners' request to dismiss the case at the pretrial conference was denied because the pretrial conference was not the forum to argue whether or not the RAP lacked subject matter jurisdiction, and that the tenant had alleged fraud or mistake with as much particularity as is required by this jurisdiction.

After the pretrial conference a *Pre-Hearing Conference Order and Amended Notice of Hearing* was issued.

At the pretrial conference, Sherman requested a finding of good cause for a subpoena to be issued for Mr. Abraham, the person who had issued the initial letter in the exemption case stating that he had resided on the premises beginning in 1976. The owner objected to the issuance of the finding of good cause for the subpoena because in the exemption case, and in the proceedings in Superior Court and the Court of Appeal regarding that case, the HRRRB and the Courts had refused to allow further evidence from Mr. Abraham. Since the underlying questions in this case were (1) whether or not fraud was committed by the owners by denying in the previous case that there was residential use of the premises before 1985, and (2) whether or not a mistake was made in the granting of the exemption, Mr. Abraham's testimony was necessary to determine whether or not fraud was committed or a mistake was made. Therefore, a finding of good cause was issued as to the issuance of a subpoena for Abraham.

Sherman further requested a finding of good cause for a subpoena to issue for Rachel Flynn, along with a request for production of documents. Flynn was a prior City of Oakland employee. At the pretrial conference, the tenant stated that no subpoena was necessary if the

parties could stipulate that certain communications from Flynn were true and correct. At the pretrial conference and at the Hearing a stipulation was reached. See stipulation, below.

Sherman further requested a finding of good cause for a subpoena for the production of certain documents from both the Alameda County Registrar of Voters and the State Department of Motor Vehicles. The owner objected to these requests on the grounds that the issue of prior residential use had already been litigated. A finding of good cause was issued for both these agencies. See discussion below regarding the Voter Registration Records.

The State Department of Motor Vehicles issued an objection to the subpoena, which was received by the RAP on February 7, 2018, and refused to comply because the requester was required to first serve a notice to the consumer whose records were being sought when a subpoena for a consumer's personal records is requested.¹⁰

At the pretrial conference the tenant also requested certain documents from Mr. Michelsen and requested that a subpoena be issued for his appearance or that he be requested to appear. This request was granted. (See Document Request below.)

JUDICIAL NOTICE

The tenant requested that judicial notice be taken of the following:

1. *Declaration of Harold Rus Michelsen*, dated February 11, 2014, submitted in case L13-0054. The request to take judicial notice is granted.
2. *Transcript of Exemption Hearing on February 24, 2014*, from case L13-0054. The request to take judicial notice is granted.
3. *Transcript of Pre-Trial Hearing on October 17, 2017*, from the instant case. The request to take judicial notice is not granted as the pre-trial hearing is a part of the procedure of this case and any relevant testimony will be listed herein.
4. *Alameda County Voter Registration Application* from County of Alameda Registrar of Voters. Judicial Notice is taken of this document.

THE ISSUES

1. Does the tenant have a right to contest the exemption on the grounds that the exemption was issued as a result of fraud or mistake?
2. Is the tenant's claim limited to a claim that the fraud committed by the owner was extrinsic fraud?
3. Was the prior exemption as to 5823-5825 Occidental granted as a result of fraud?
4. If the prior exemption was granted as a result of fraud, how does the agency correct the *Certificate of Exemption*?
5. If the prior exemption was granted as a result of fraud, what is the allowable rent?

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¹⁰ The State also objected because the department could not provide records without two points of identification and because the department does not retain records for the time period specified in the subpoena.

EVIDENCE

Testimony of Mark Sherman: (all dates)

Tenant Mark Sherman testified that he lives at 5823-5825 Occidental Street in Oakland. He moved into the rental unit in 1985 at an initial rent of \$1,225 a month. His lease was admitted into evidence as Exhibit 5.¹¹ The lease specifies that it was "for a residential and studio space located at 5825 Occidental, in Oakland."

The tenant testified that his unit is in a large building which contains units on the front and back side of the building. There are two addresses on his unit, 5823 and 5825 Occidental.¹² He has two front doors to his property which are depicted in Exhibit 4, page 1 and Exhibit 4, page 2. Exhibit 4, page 3, depicts a wooden loft in his unit. Michelsen informed him that the woodworker who lived in the unit before him built this loft.

Sherman further testified that Exhibit 4, page 5, is a picture of the back of the property, which is currently divided into three units. This part of the property borders Grace Avenue and the units are addressed on Grace Avenue. The center unit is 927 Grace, the unit on the left is 921 Grace, and the unit on the right is 929 Grace.

Sherman further testified that, based on his research into the building, in the past the building was one large building with an address only of 5823-5825 Occidental Street. The front of the building is on Occidental and the back of the building is on Grace Avenue. At some point additional addresses were added to the back of the building.

Sherman further testified that when he rented the unit it was equipped half as a residential unit and half as studio space. The bathroom has a mahogany wood panel (described by Abraham below).

Sherman further testified that when he talked to Michelsen about moving in, Michelsen did not tell him he was the first residential tenant. Nor was he ever told that he was the first residential tenant. In fact, Michelsen told Sherman that he was not the first tenant and that a woodworker had resided in the unit and had built a loft that is in the unit.

Sherman further testified that when he moved in, Mr. Michelsen was living in Orinda. Sherman first met Diane Michelsen in approximately 2007, maybe earlier. At the time Sherman moved into the building, there were other rental units on the property with addresses on Grace Avenue.

Sherman further testified that many years earlier, he filed a petition with the RAP contesting a series of rent increases based on the failure of the owner to serve him with the form *Notice to Tenants of the Rent Adjustment Program (RAP Notice)*.¹³ The owner responded to the

¹¹ All Exhibits referred to in this Hearing Decision were admitted into evidence without objection, except Exhibit 6.

¹² This explains why in the historical record sometimes the unit is referred to as 5823 Occidental and sometimes as 5825 Occidental.

¹³ This case was T12-0332, mentioned above.

petition and did not claim that the unit was exempt from the RAP. The tenant was awarded a substantial rent reduction and an award of restitution in that case.

Sherman further testified that in early January of 2014, he was served with a notice from the RAP that the owner had filed a petition claiming an exemption for new construction (the "exemption case".) Because Michelsen had told him that a woodworker had lived in the unit before him, Sherman believed that the unit was not qualified for the exemption. Since he did not know the name of the woodworker he began to do some research using Criss-cross directories (Criss-cross directories are phone books that list addresses first, and then state the name of the person who resides in that unit.) These directories gave him information that three people had resided at the addresses listed as 5823 and 5825 Occidental; Mr. Michelsen, a Mr. Abraham and a Daniel Wiener. He tried to locate the two previously unknown individuals and was able to find a telephone number for Mr. Abraham.

Sherman further testified that he contacted Mr. Abraham who informed him that he had lived in the subject rental unit. Sherman drafted the letter that Abraham signed which was later submitted to the RAP in the exemption case. While Abraham informed Sherman that he lived in the rental unit from 1976-1983, Sherman believed that since he only needed to prove that Abraham lived there at all he didn't focus on listing all the years he resided there, but just listed some of the years of his residence.

Sherman testified that before the Hearing in the exemption case, he also tried to find Daniel Wiener, but he was not able to find the correct Wiener as there are many people named Daniel Wiener. He tried to find the correct Daniel Wiener in the phone books; by checking the library; by researching on Ancestry.com; by using Google; by calling a variety of Daniel Wieners he was able to find; by contacting the Registrar of Voters; by contacting PG&E (who informed him that the unit had residential service in the 1970s); and by calling EBMUD. He was unable to find the correct Daniel Wiener before the Hearing in the exemption case. While there was a website for a Daniel Wiener that came up first on his Google search, this person was an artist on the other side of the country (in New York) and there was no reason to connect him to the property in question so Sherman did not look further at the website.

After the Hearing in the exemption case, he used Google to again try to find Daniel Wiener and found the same website related to a Daniel Wiener who lived in New York. At this point he looked further at the website and found a resume for Mr. Wiener which stated that this Daniel Wiener went to school in Berkeley in the 1970s. Because of that connection Sherman emailed Wiener who confirmed that he had lived in the subject unit. This was after the Hearing in the exemption case had occurred but before the case was heard at the HRRRB for the appeal Hearing. Wiener was contacted and provided a sworn declaration. Additionally, Abraham provided a sworn declaration which was also presented to the HRRRB.

On cross-examination, Sherman testified that the subject unit is 2300-2500 square feet. When he started researching who lived in the building, he learned that historically the entire building was addressed as 5823-5825 Occidental Avenue. He learned that Rus Michelsen listed himself in the phone book with an address of 5823-5825 Occidental and does not know if Michelsen ever lived in the same area of the building in which Sherman currently lives. At some point along the way, individual gas meters were installed in the building, and

as far as he knows, *PG&E* started having records for all the units separately. Additionally, at some point, addresses appeared for the units on Grace Avenue. And in 1985, a *Certificate of Occupancy* was issued dividing the building into 4 units with addresses on Occidental Street and on Grace Avenue.

Stipulation: The tenant submitted a set of documents that evidence a conversation between the tenant's attorney, Leah Hess, and Rachel Flynn, the former Director of the Department of Planning and Building for the City of Oakland, regarding the subject property that occurred starting on May 5, 2016.¹⁴ The parties stipulated that the contents of the subsequent conversation between Ms. Flynn and Ms. Hess, beginning with the May 5, 2016 email, as evidenced by the emails between them, are true and correct.¹⁵

These documents reflect the following information. In May of 2016, Leah Hess, attorney for the tenant, wrote an email to Ms. Flynn asking her to find and review the documents that were referred to in the earlier email she had written to Greg McConnell that stated that housing had gone into the structure in the mid-1980s.¹⁶ In response, Ms. Flynn provided the *Certificate of Occupancy (C/O)* and asked if the *C/O* was sufficient information.¹⁷ Hess responded that the *C/O* did not suffice and asked the following questions:

"What records did you rely on for the information that Olympic Press occupied the property starting in 1967?" and

"Was the Certificate of Occupancy the sole source of your statement that 'by the mid-80's housing went into the structure'?"¹⁸

Ms. Flynn responded on May 6, 2016:

"Leah, I don't recall what I referenced when I wrote the email. I most likely called someone on staff. Here are additional documents."¹⁹

The additional documents included a building permit from 1928 for alterations to the building, showing that the building was owned by East Bay Print Company (Exhibit 1, page 8); a similar document from 1929 (Exhibit 1, page 9); a similar document from 1937 (Exhibit 1, page 10); an undated application for a building permit to build an addition to the existing building (Exhibit 1, page 11); and an application from Olympic Press (then current owner), dated July 30, 1964, for a permit to raise the roof (Exhibit 1, page 12).

Within these documents was also a communication between Rachel Flynn and Aubrey Rose, another City of Oakland employee. Ms. Flynn was asking Ms. Rose: "Do we have

¹⁴ Exhibit 1

¹⁵ February 23, 2018, Recording at 11:30-15:14 and Pretrial Conference Hearing Recording, October 17, 2017, 19:19:-23:16.

¹⁶ Exhibit 1, p 1 a.

¹⁷ Exhibit 1, p. 2-3

¹⁸ Exhibit 1, p. 5

¹⁹ Exhibit 1, page 6

documentation confirming the original use in 1967?"²⁰ Ms. Rose replied that the proof of the prior print shop were the building permits discussed above.²¹

Document Request:

Prior to the Hearing in this case, a pretrial conference was held. After the pretrial conference an order was issued that Mr. Michelsen was to produce the following documents to the RAP and the tenant, 7 days prior to the scheduled Hearing. Additionally, as to each category of documents, Michelsen was to state whether or not such documents exist.

1. All lease or rental agreements to rent space, for any purpose, in any part of the subject property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA from the date of purchase through 1985.²²
2. All documents which identify the name, last known address and last known telephone number of each person who rented space, for any purpose, in any part of the subject property now bearing the addresses 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA from the date of purchase through 1985.
3. All documents (including but not limited to estimates, bids, billing statements, letters, receipts, or correspondence) which concern the division of the subject property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA into separate rental units.
4. All documents (including but not limited to the City of Oakland permit history records, applications for permits, the actual permits, inspection records and reports and final sign-offs for permits) which concern permits of any kind for the subject property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA from the date of purchase through 1986.
5. All documents which concern repairs or improvement performed on the subject property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA from the date of purchase through 1986.
6. All advertisements to rent any portion of the subject property (including but not limited to written ads and newspaper ads), for any purpose, in any part of the property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA from the date of purchase through 1986.
7. All documents (including but not limited to letters, reports, applications or correspondence) between Rus Michelsen or Diane Michelsen and the City of Oakland which concern any Certificate of Occupancy for the subject property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA.
8. All documents concerning and Conditional Use Permits issued for the subject property now bearing the addresses of 5823/5825 Occidental Street and 921-929 Grace Avenue, Oakland, CA from the date of purchase through 1986.

²⁰ See Exhibit 1, page 6

²¹ Id.

²² It is understood that Ms. Michelsen testified that she believes that none of the requested documents exist. However, this document production request is being issued to Mr. Michelsen, who might have access to these documents.

9. All documents which concern the official designation by any governmental agency of 921, 927 and 929 Grace Avenue, Oakland, CA, as the addresses at the subject property for the rental units fronting on Grace Avenue. Such documents should include, but not be limited to, correspondence between either real party in interest and any government agency, maps, applications or permits.”

On February 2, 2018, the RAP received a letter from Mr. Michelsen, in which he asserted in response to requests numbered 1, 2, 3, 5, 6 and 8, that no such documents exist. As to requests numbered 4, 7 and 9, the owner responded that all such documents have already been filed with the Rent Board in the underlying exemption hearing. A similar letter was provided by Ms. Michelsen.

Testimony of Diane Michelsen: (all dates) Diane Michelsen testified that the subject building formerly was addressed only as 5823-5825 Occidental Street, which was the master address for the building. She first learned of the building in 1982, when she first starting dating Mr. Michelsen. She married him that same year. Prior to 1982, she had not seen the building, and had no personal knowledge of what happened there. At the time she started dating Mr. Michelsen, he was living at the property. She moved to the property in 1983, and lived in the part of the building known as 927 Grace Avenue, in which Rus Michelsen was previously residing. This unit had a work space fronting Grace Avenue, which Rus used as an art studio, and there was a kitchen, a bathroom, two bedrooms and a living room. She believes that the unit in which she lived on Grace Avenue shared a wall with the unit on Occidental Street (the subject unit). When she moved in, there were also two other units on Grace Avenue that were rented as commercial units.

Ms. Michelsen testified that years prior to her moving into the Grace Avenue side of the property, the post office only had one address for the entire building. Over the years that Mr. Michelsen lived in the building, he did work on the different units and over time different addresses were assigned to the different units.

Ms. Michelsen further testified that when she first viewed the unit on Occidental in 1982, it was filthy, there was no stove, no refrigerator, and the only thing in the kitchen area was a luncheonette counter and a sink with a faucet and running water. The bathroom had an old funky toilet, and she remembers nothing other than that. It was almost decrepit. The bathroom was approximately 8x10 feet. She first saw the property because she and her husband were talking about converting them into live/work spaces. When she moved into Grace Avenue, there was no one living in the Occidental side of the property.

Ms. Michelsen further testified that when she moved into the building mail was delivered to her unit and there were door slots for the mail delivery in all the units on Grace. After they moved, she or Rus rented the unit at 927 Grace Avenue either as a live work space or a residential unit. She believes he “freshened up” the unit prior to renting it. She does not know how long it was before the unit was rented.

With respect to the units addressed as 921 Grace Avenue and 929 Grace Avenue, sometime in 1983 or 1984, Rus did work on these units to rent them as live/work spaces. In 929, he built a second story where he installed a kitchen and a half bath, and put in bedrooms. In

921, he added a loft, and installed a kitchen under the loft, put in wood floors and heat, water heaters and skylights. As far as she knows, the work was done by her husband. She does not know if he hired any professionals.

Ms. Michelsen further testified that for the 5823 Occidental street unit, Mr. Michelsen worked on the kitchen and baths, wood floors, and a heater. As far as she knows, on at least some on the units, Mr. Michelsen did not take out building permits on the work he did until after the work was done. After the work was done, her husband did the paperwork necessary to get the *Certificate of Occupancy* for the building.

Ms. Michelsen further testified that from 1982 through the receipt of the *Certificate of Occupancy*, which was obtained in 1985, neither 921 or 929 Grace Avenue or the unit at 5823 Occidental were rented as residential units. Additionally, during the time she lived there no written agreements were made for any of the commercial tenants who used the property.

Ms. Michelsen was asked to review an *Unlawful Detainer Complaint* filed in Superior Court on September 24, 1984, regarding a lease agreement made for 929 Grace Avenue in Oakland, between Rus Michelsen and Eric McDougall, Robert Howe and Michael Gray.²³ The *Complaint* lists Diane Michelsen as the attorney for the plaintiff, Rus Michelsen. Attached to the *Complaint* is a lease for the premises at 929 Grace, showing that the tenants were leased a dwelling unit at that address on July 4, 1984, with a lease term from July 15, 1984 to July 31, 1985. The lease lists those persons that are authorized to "live in this dwelling." Upon review, Ms. Michelsen stated that she did not remember any information about this rental agreement. She acknowledged that it was her signature of the *Complaint* and Rus Michelsen's signature on the lease.

Testimony of Rus Michelsen (by phone): Rus Michelsen testified that he purchased the entire building in December of 1974. Prior to purchase, the building had been used as a printing operation with no addresses on Grace Avenue. (The entire building had a single address on Occidental). At the time he purchased it, he intended to live in part of the building and use it for making metal sculpture. He moved into the building in 1976. During the year between purchase and move in he was working on the building on the weekends, putting in dividing walls and installing a foundry. Sometime after he subdivided the building, in approximately 1976, he put up addresses on the Grace Avenue side of the building.

During the early years he lived on the premises, from 1976 through the early 1980s, he had two large dogs in his unit.

Mr. Michelsen further testified that at the time of purchase the inside of the building was totally open space other than a small part of the unit that is currently addressed as 5823/5825 Occidental. The open space was approximately 4,000 square feet. A part of the unit that is currently addressed as 5823/5825 Occidental was part of the open space included in this 4,000 square feet. The construction he did before moving into the building

²³ Exhibit 10. This Exhibit was admitted into evidence without objection.

included adding the back wall between Grace Avenue and the Occidental side of the building as well as adding the walls that separated 927 Grace from 921 and 929 Grace. He then built the interior of his living space. He did all of this work without permits.

Mr. Michelsen further testified that after he moved into the unit at 927 Grace, he rented out the units at 921 and 929 Grace to artists as studio space. There was no running water and no toilets in these units. One of the units was rented by a printmaker who used the unit for many years. The other unit was rented to multiple different artists who used various parts of the unit for their art work.

Mr. Michelsen testified that in 1979-1980, he started doing the work to convert 921 and 929 Grace to living space. This work was also done without permits.

Michelsen further testified that he never used 5823/5825 Occidental as his address. He did have a telephone number at the time, and the telephone records showed his address on Occidental. He was registered to vote and his assumption is that he used the Grace Avenue address for his voting records.

Michelsen further testified that he rented the unit on Occidental to Charles Abraham in approximately 1976. He knew Abraham from graduate school but does not remember how they reconnected or how Abraham found out that he had a unit to rent. He did not have a written lease with Abraham. At the time Abraham moved in there was a bathroom with two toilets and a sink and a lunch room area. There was a sink and a counter top in this lunch room area. There was no stove or refrigerator. The bathroom did not have a bathtub.

Michelsen further testified that he did not know Abraham was living in the building and did not know if his child ever visited or stayed there. Abraham left the building in December of 1982 after Michelsen gave him a *30 Day Notice to Quit*. The reasons Michelsen gave Abraham the notice to quit was that there was a dispute about Michelsen's desire to raise the rent and because Michelsen believed that Abraham was dealing cocaine out of the unit. Abraham's rent was originally \$300 a month. He had not had a rent increase and Michelsen wanted to raise the rent to \$500 a month. With respect to the cocaine, Michelsen further testified that he had no definitive evidence that there was drug activity from Abraham but he suspected there was cocaine dealing because of the activity on the street and because he saw bullet holes on or around the property.

Michelsen further testified that he originally rented the Occidental unit to Abraham as a woodworking studio. He never met Daniel Wiener.

Michelsen further testified that after he had a discussion with Abraham about the possible rent increase Abraham threatened to report him to the City of Oakland and Abraham said he couldn't raise the rent. In return, Michelsen informed Abraham that "it is my space, I paid for it, and I get to do what I want.....".²⁴ A few days later he gave him a *30 Day Notice*. He didn't give him a *3 Day Notice*.

²⁴ Tape recording, February 23, 2018, Hearing, 3:03 to 3:03:32.

After Abraham left the Occidental Street unit Michelsen rented the unit to an artist from the east coast who “stayed there” about a year.²⁵ It wasn’t a living space, it was just a painting studio. After he moved out, at the end of 1983, Mr. Michelsen started to renovate the Occidental Street unit.

Mr. Michelsen testified that he did not rent the Occidental unit to a band nor does he remember a person named Clint MacKay.²⁶

Mr. Michelsen further testified that the footprint of the unit on Occidental remained almost the same between Abraham’s tenancy and renting to Sherman. When Abraham rented there were two bathrooms (toilets and sinks only), back to back, which shared a wall. Before renting to Sherman he removed the wall and one of the toilets and added a tub to the space. This is the only wall that was changed between the rental of the space to Abraham and the rental to Sherman.

Mr. Michelsen further testified that he does not remember if there was garbage service to the Occidental side of the property at the time that Abraham was renting the property. In the beginning of 1983, he started to renovate the Occidental Street unit into a living unit. This work was also done without permits.

Mr. Michelsen further testified that after finishing the work on Occidental, he “turned himself” in to the Housing Authority for doing the work on all the units without permits.²⁷ Inspections were done and the City informed him of deficiencies in the units. He then corrected those deficiencies, with permits, and received a *Certificates of Occupancy* for all of the units.

Michelsen further testified that he filled out the *Building Permit Application* shown in Exhibit 11.²⁸ (Since Mr. Michelsen was appearing by phone, Ms. Michelsen testified that the left hand side of the form contained Mr. Michelsen’s handwriting and signature.) The permit was to “sheetrock one room” and “repair windows.” This permit was for work done at 5823 Occidental. While Michelsen had already installed sheetrock in the unit, the City wanted there to be a 1 hour firewall, so Michelsen was required to pull down the prior 1/2” sheetrock and replace it with a thicker material.

On the *Application* the present use of the building was listed as “apt.” Michelsen testified that it was listed that way because the intended use was as an apartment and he did not think the form was asking him for the prior use of the building. During the Hearing, Mr. Michelsen refused to answer any questions as to whether or not the units on Grace Avenue were rented to anyone for residential purposes prior to the issuance

²⁵ Tape recording, February 23, 2018, Hearing, 3:16-3:16:13.

²⁶ This testimony conflicts with a declaration produced by the owners, from Clint MacKay, which was admitted into evidence. See below.

²⁷ It is assumed that Mr. Michelsen is referring to the City of Oakland’s Department of Building and Planning.

²⁸ This document was admitted into Evidence without objection.

of the *Certificates of Occupancy*.²⁹ Michelsen later answered some questions about this side of the property. At first, he did not recall having a written rental agreement with any tenants living on Grace in 1984. After having his recollection refreshed by the *Complaint* and the *Three Day Notice to Quit*, Michelsen remembered that he did rent the unit at 929 Grace Avenue to tenants McDougall, Howe and Grey, and they were asked to move out because they were growing marijuana.

Michelsen further testified that this rental to these tenants occurred after January 1, 1983; this was relevant to him because he knows that this is the "new construction" date under the RAP Ordinance.

Mr. Michelsen further testified that the door between his unit at 927 Grace Avenue and the Occidental Street unit had a lock on it, and he kept it locked. It was not utilized without his permission. Additionally, he testified that when one entered the Occidental Street unit from 927 Grace, the area you walked into was a part of the large studio space and not a part of the living area. From that part of the unit, you couldn't tell if someone was using the space as living space.

Michelsen further testified that when Abraham moved into Occidental, he was looking for a woodworking studio. He did not meet anyone that Abraham may have sublet to and would not have allowed him to sublet.

Michelsen further testified that he never told Mark Sherman that a prior tenant had lived in the unit. He does not recall telling Sherman that a prior tenant had built a sleeping loft. Further, the loft in question is not something that Michelsen considers to be a sleeping loft, but rather a place for storage, since there is only about a 3 foot clearance from the top of the loft to the ceiling.

Michelsen further testified that he "might have" told Sherman that he wouldn't raise the rent if he didn't ask for repairs but if this conversation occurred it was near the beginning of the tenancy.

Testimony of Witnesses:

Charles Abraham: Mr. Abraham testified that he resided at 5823-5825 Occidental in approximately 1976 or 1977 and moved out in approximately 1983. He had known Rus Michelsen from graduate school and ran into him in Berkeley before moving into the unit. He told Michelsen he was splitting up with his wife and was looking for a place to live, and Michelsen informed him that he owned a unit that his sister and brother-in-law were moving out of. Abraham made an appointment with Michelsen, went to see the Occidental Street property, and rented it from him. Abraham was looking for a place to live (for him and his daughter) as well as a place to do his woodworking. Michelsen knew that Abraham wanted to rent the property as a live/ work space and that he lived there.

²⁹ Michelsen was informed that a negative inference would be drawn by his refusal to answer the questions about the prior residential use of the Grace side of the property.

Abraham testified that he was clear in his communication with Michelsen that he intended to live in the unit. The unit had a bathroom and a kitchen. The bathroom had a claw foot tub with a mahogany surround. At some point after Abraham moved into the unit, he rented a room in the unit to a man named Daniel.

Abraham further testified that Rus Michelsen also lived in a different unit on the premises at the time that Abraham moved in. Michelsen lived in a unit on the back side of the structure. There was a door separating Abraham's unit from Michelsen's unit. Abraham visited Michelsen's unit on several occasions, which was a large open space, approximately two stories high, with a walled off bedroom space. Michelsen was a sculptor.

Abraham further testified that Michelsen also entered Abraham's living area on multiple occasions. One time he was there to help Abraham install the front doors to his unit to accommodate his large saw. At the time this occurred, Abraham was already living in the unit, and his furniture and other accoutrements of living were in the unit, visible to Michelsen. Michelsen also visited on multiple other occasions.

Abraham was shown a phone listing from an Oakland telephone book showing a listing for "Chuck Abraham at 5823 Occidental."³⁰ He testified that this listing belonged to him, and that this was a residential listing because he never had a business license for his woodworking operation and did not believe he had a business phone.

On cross-examination, Abraham testified that Daniel was a student at Cal. Berkeley who he, Abraham, rented a room to. As far as Abraham knew, Daniel did not have any direct dealings with Mr. Michelsen with respect to the rental.

Abraham further testified that he never applied for a business phone or a business license.

As to his previously filed letters and declarations in support of Mr. Sherman, Abraham testified that he did not remember why in his initial letter (written on February 1, 2014) he listed that he lived at 5823 Occidental during the years 1976-1978.³¹ He does not remember why he did not state the full amount of time he lived there, but while he does not know the exact dates of move in or departure, he knows that he lived in the unit for approximately 7 years.

Abraham further testified that he shared custody of his daughter with his wife during the times he was living on Occidental, and Michelsen knew his daughter was living with him episodically. He built a loft bed for his daughter in the unit, which Michelsen had seen.

Abraham further testified that as you face the property from Occidental, the two bedrooms were on the right hand side of the property. Abraham did not remember if Michelsen went into the bedrooms during his visits to the property. The kitchen area and dining area were right outside of the main open space where he had his woodworking material.

³⁰ Exhibit 2

³¹ See Exhibit 3

Testimony of Sue Doyle: Sue Doyle testified that she is a paralegal in the Law Offices of Leah Hess. As part of her job she searched for records for the building located at 5823-5825 Occidental Avenue. She regularly uses the Haines Criss Cross Directories (both as part of her job and in her personal genealogy research) to find residential information for people for whom she is searching and these directories are considered reliable.

She further testified that she looked in the Haines Criss Cross Directories for residents living at that address and found that in 1976-1985 (not including 1980), Rus Michelsen was listed with the address 5823 Occidental Avenue, in 1978-1981 (not including 1980), Charles Abraham was listed with the address 5823 Occidental Street, and in 1978-1979, Daniel Wiener was listed with the address 5823 Occidental Street. At the time she searched she did not have access to the 1980 directory so she could not say whether or not these individuals were listed for that year. Ms. Doyle further testified that an asterisk in the directory stands for a business listing. None of these listings have an asterisk present.

The tenant provided a summary of this information produced by Doyle as page 1 of Exhibit 7, along with the actual Haines Directories attached as Exhibit 7, pages 2-21.³² The Haines Directories has a "Key to symbols" page which explains that an * (asterisk) is used to denote a business, or non-residential telephone number. (See Exhibit 7, page 4.)

Doyle also testified that she checked the Oakland Telephone Directories for the years 1977-1984. She created a summary of what she found, which the tenant produced as page 1 of Exhibit 8, along with the relevant copies of the telephone directory pages which were attached as Exhibit 8, pages 2-30.³³ In the Oakland telephone directories, Rus Michelsen was listed at 5823 Occidental Street for the years 1977-1984; Charles Abraham was listed for the years 1977-1980; and Daniel Wiener was listed for the years 1977-1978.

Doyle further testified about records she received from *Ancestry.com* for the same address regarding people residing at this address in 1918-1928.³⁴ This testimony is not described here as it is not relevant to the Decision reached.³⁵

Testimony of Michael Joffe: Joffe testified that he is a licensed private investigator. He was first contacted by Leah Hess in June of 2017 to determine whether anyone had lived at the subject property prior to 1985.

In the course of his investigation he spoke with Ted Germann who informed Joffe that he lived at the property before February of 1985 with members of his band. The band members included Clint MacKay, who was the manager of the band; Ted's brother, Tim Germann, who was the guitar tech for the band; Chris Schroeder, who was the drummer; and Keith Hinyard, another band member. Germann told him that at the same time that he lived on

³² Exhibit 7 was admitted into evidence without objection.

³³ Exhibit 8 was admitted into evidence without objection.

³⁴ Exhibit 9. This Exhibit was admitted into evidence without objection.

³⁵ The prior residential use of the property before it was a printing press is not relevant to whether or not the building is "new construction" under the Ordinance.

Occidental he also stayed with his girlfriend who also had a rental unit on Occidental. He stated that mostly he lived at 5823-5825 Occidental.

Joffe also exchanged emails with Clint MacKay requesting information about his living at the property. MacKay replied with a terse email saying that he was not renting the unit as a residential space but as a recording space and studio. McKay did not respond to Joffe's request for an answer to the question about whether or not he lived in the unit. Joffe testified that it is hard to find information about people who lived in rental units back in the 1970's and 1980's. The current databases that he has access to do not go back that far and the databases he has access to are not available to the general public but are limited access to people who have certain licenses.

On cross-examination Joffe testified that Germann informed him he lived in the unit for two years and that he left the property in either 1984 or 1985. Joffe was unable to reach any other members of the band.

Testimony of Daniel Wiener: Wiener testified that he moved into the rental unit at 5823 Occidental Street in 1976. He remembers it was in 1976 when he moved in because he graduated from UC Berkeley in 1977 and he moved into this live work space the year before he graduated. He rented his space from a man whose name he does not remember but who lived and worked on the property. They each had a bedroom and they each had a workspace to do their art. There was a kitchen (with a sink, stove, oven and refrigerator) and a bathroom which they shared.

The person he lived with had a child who came by about once a week because he shared custody of the child with his wife.

Behind his apartment there was another unit in which the owner lived. The entrance to the owner's unit was entered from the back side of the building. There was a door from Wiener's unit that went directly into the owner's unit which he walked through from time to time to throw his garbage away. The owner had two large dogs that Wiener remembers. The owner was an artist working with bronze.

Wiener understood that the owner knew that he was living on the premises because it was completely and totally obvious that Wiener and his roommate were living there. There were beds in the unit and a kitchen and nothing was hidden from the owner. He was introduced to the owner when he moved in and the owner entered the space in which Wiener and his roommate lived.

Wiener further testified he would not have rented the space if he could not have lived and worked on the property as he was looking for a live/work unit.

On cross-examination Wiener testified that he paid rent to his roommate, not the owner of the building. He was introduced to the owner as a subtenant. Wiener did not remember whether the owner of the property ever entered his bedroom area. Wiener also testified that he does not have a clear memory of whether or not his roommate's child lived with them.

Declaration of Ted Germann:

The tenant produced a declaration from Ted Germann.³⁶

Germann's declaration, which is sworn under penalty of perjury, states in relevant part that in the early 1980's he played in a band and from 1984-1985, he and his other band members, resided at 5823-5825 Occidental Street in Oakland. The unit was fully equipped for them to live in. There was a kitchen, running water, a bathroom, and regular trash collection. At the same time he lived at this address, he also concurrently lived down the street with his wife. The other people who resided at the property were Keith Hinyard, Clinton MacKay, Chris Schroeder and Tim Germann (Ted's brother.)

Declaration of Clint MacKay:

In response to the declaration of Ted Germann, the owners submitted a declaration of Clint MacKay at the Hearing. This document was not produced prior to the Hearing. Since the owner did not have knowledge of Ted Germann's declaration until the day before the Hearing, it was determined that there was good cause for the admission of the declaration into evidence.³⁷

MacKay's declaration, which is sworn under penalty of perjury, states that he rented a large commercial space from Rus Michelsen for music recording and band rehearsal space circa 1984. The space had one bathroom and a lunchroom kitchen area. No other facilities were provided. MacKay further stated that Ted Germann never lived in the unit, that he lived down the street with his wife.

Voter Registration Records: In response to a subpoena, the County of Alameda submitted a compilation of the voter registration records it has for the units at 921 Grace Avenue, 927 Grace Avenue, 929 Grace Avenue, 5823 Occidental Street and 5825 Occidental street from 1978 through 1985. These records were submitted under seal, in order to protect the privacy rights of individuals named, and the information provided was restricted. A stipulation was reached between County Counsel and the Oakland City Attorney's office that the parties could view the voter registration list at the Hearing but that the parties would not be given a physical copy of the list and that only if the individuals testified that they were registered to vote at the addresses in the document, could they be named. Otherwise, the decision would indicate that there were voters at the various addresses during the applicable time periods, without naming them.³⁸

³⁶ The declaration was admitted into evidence as Exhibit 6. The owner objected to the admission of this Declaration because it was not filed with the RAP 7 days prior to the Hearing, but instead was produced on the day prior to the Hearing. The tenant's attorney explained that she had been in contact with Mr. Germann who had agreed to sign the declaration but then did not send it back. She had to keep contacting him. She was not able to produce the document to the RAP earlier because she had just received it the day before the Hearing (which is validated by the fax stamp on the top left of the page showing a February 22, 2018, fax date, and a signature date of February 20, 2018.) The document was admitted into evidence based on a finding of good cause for the failure to produce the document any sooner.

³⁷ The declaration was admitted into evidence as Exhibit 12.

³⁸ Exhibit 13, the voter registration list, and emailed stipulation agreement are in the file in a manila envelope which states "Confidential Documents Do Not View or Release Without Approval of City Attorney's Office."

The records show:

- **Voter 1: was registered to vote from September 1, 1976, through 1985 at 5823 Occidental Street.**
- **Voter 2: was registered to vote from April 12, 1976 through 1980, at 5823 Occidental Street.**
- Voter 3: identified as Harold R. Michelsen, was registered to vote on March 11, 1975, at 5823 Occidental Street and remained registered at this address through 1979. He then registered at 927 Grace Avenue on April 14, 1980, and remained registered at 927 Grace from 1980 through 1985.
- **Voter 4: was registered to vote from April 5, 1982 through 1983 at 5823 Occidental Street.**
- **Voter 5: was registered to vote from June 22, 1982 through October 26, 1984, at 5823 Occidental Street.**
- **Voter 6: was registered to vote from June 11, 1982 through 1985, at 5823 Occidental Street.**
- **Voter 7: was registered to vote from September 22, 1982, through 1985, at 5823 Occidental Street.**
- **Voter 8: was registered to vote from March 9, 1984 through 1985, at 5823 Occidental Street.**
- **Voter 9: was registered to vote from August 31, 1984 through 1985, at 929 Grace Avenue.**
- **Voter 10: was registered to vote from August 6, 1984 through 1985, at 929 Grace Avenue.**
- **Voter 11: was registered to vote on September 7, 1984 through 1985, at 929 Grace Avenue.**
- **Voter 12: was registered to vote on September 29, 1980 through 1985, at 921 Grace Avenue.**
- **Voter 13: was registered to vote on August 22, 1984 through 1985 at 921 Grace Avenue.**
- Voter 14: was registered to vote on April 14, 1980 through 1982, at 927 Grace Avenue.
- Voter 15: identified as Diane Michelsen, was registered to vote on August 31, 1984 and remained registered through 1985, at 927 Grace Avenue.

The bolded information represents individuals other than Harold Rus Michelsen or Diane Michelsen who were registered to vote at any unit other than 927 Grace Avenue on the property prior to the *Certificate of Occupancy* being issued. Those voters identified as 1, 2, 4, 5, 6, 7 and 12 were all originally registered prior to the new construction date of January 1, 1983.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Does the tenant have a right to contest the exemption on the grounds that the exemption was issued as a result of fraud or mistake?

The Ordinance states that "A Certificate of Exemption is a final determination of exemption absent fraud or mistake" and "(t)imely submission of a certificate of exemption previously granted in response to a petition shall result in dismissal of the petition absent proof of fraud or mistake regarding the granting of the certificate. The burden of proving such fraud or mistake is on the tenant." O.M.C. 8.22.030(B)(1)(b) and (c). There is no definition of fraud or mistake given in either the Ordinance or the accompanying regulations. This subsection of the Ordinance has been in the Ordinance continuously since 2002.

The *Tenant Petition* form contains a "ground for petition" that states "I wish to contest an exemption from the Rent Adjustment Ordinance." This box was checked on Mark Sherman's petition in the instant case. Attached to his petition was an Attachment stating that his primary claim is that the certificate of exemption in case L13-0054 (the exemption case) was issued as a result of fraud or mistake.

The owners argue that because the tenant has not alleged fraud with specificity, that he cannot prevail in his claim and it must be dismissed. The law does not require specificity.

Since 2002, the Rent Adjustment Ordinance has provided a remedy to any tenant to establish that a prior exemption was granted based on fraud or mistake. This remedy applies to both the tenant who is residing in the unit at the time the exemption is sought and to all future tenants of the unit or building in question. The pleading and proof requirements are those set by the Rent Adjustment Ordinance, the Regulations, and the Board and are not those set forth in the California Civil Code or those cases that interpret Code of Civil Procedure § 473 (allowing for relief from "a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.").

The RAP does not have pleadings beyond that which is provided by the *Tenant Petition* forms. The form, as noted above, has a box to check if one wishes to contest a prior exemption. There is no ability to do anything more than that, and nothing more than that is required. Nonetheless, the tenant attached a statement to his petition stating that he was claiming that the prior certificate of exemption was issued as a result of fraud or mistake. The tenant has plead fraud or mistake with as much specificity as the Ordinance requires.

Additionally, the owners argue that the case must be dismissed because of the doctrines of *res judicata* and *collateral estoppel*. These arguments also fail. Because the RAP is an administrative agency, where no discovery exists prior to Hearing, the Ordinance provides a remedy for the tenant involved in the initial Hearing and all future tenants to challenge a previously issued Certificate of Exemption.³⁹ Unlike the original petition, where the owner

³⁹ There are no interrogatories or depositions permitted in the RAP process. There are no requirements that parties exchange documents. Parties are required to send all documents to the RAP 7 days prior to Hearing, allowing the

had the burden of proof to establish a new construction exemption, in this case, the tenant has the burden of proof. This is a completely different hearing, with a different burden of proof, than the initial exemption Hearing and is not a collateral attack on the exemption case.

Furthermore, *res judicata* bars claims that were, or should have been, made in a prior suit involving the same parties. See *DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824. However, since claims attacking a prior exemption can be made by either the tenant involved in the first case or by the universe of future tenants, a claim attacking an exemption is not a claim that should or could have been made in the prior suit. This is a completely different claim and is not barred by either *collateral estoppel* or *res judicata*.

The owners also argue that the great interest in finality of judgment prevents a Hearing on this matter and should result in a denial of the tenant's petition. The City of Oakland, on the other hand, has authored an Ordinance which allows current and future tenants to contest exemptions granted because of fraud or mistake. While there is always a legitimate interest in the finality of judgments, that interest does not supersede the interest that all judgments, especially those that exclude housing from rent control in perpetuity, should not be based on fraud or mistake.

Furthermore, the owners' purported concern as to judgment finality is really only their own self-interest at stake. There is simply no evidence to suggest that allowing a tenant to contest an exemption in this instance will cause a massive number of cases to be filed repeatedly contesting previously granted exemptions. In fact, as far as this Hearing Officer knows, there is only one other case in which this matter has been litigated in the history of the Rent Program.^{40, 41}

Finally, if the Rent Adjustment Program was limiting petitions based on judgment finality, the owners would not have been allowed to claim in the exemption case that the unit was exempt, because they did not make that claim in the original rent increase petition (T12-0332). That rent increase petition was fully litigated and the owner never raised the claim that the unit was exempt from the RAP program. Yet the owner was allowed to file the exemption case. The reason they were allowed to file the exemption case is that the RAP does not have rules requiring that all claims be decided in one Hearing. The ability of the owner to file the exemption case after the complete litigation of the tenant's original petition is a clear demonstration that the interest of judgment finality does not supersede all other interests, including the interest of introducing new evidence and of adjudicating the decision fairly and correctly. It was not possible for the tenant to allege that there was fraud in the

opposing party to review those documents at a file review. Additionally, while a party can request a good cause finding for the issuance of a subpoena, this procedure is not known by many, is not written in any of the RAP handouts and is not described in the Ordinance or the Regulations.

⁴⁰ While other tenants do sometimes check the box on the petition form that they wish to contest an exemption, this box is often checked before a prior exemption has been granted. See, for example, *Peters v. Sullivan*, T17-0274 and *Cordes v. Park*, T17-0376, for cases where the tenants checked the box that they wished to contest an exemption, when no exemption had previously been granted.

⁴¹ See *Scott v. Suh*, T18-0150, which is currently pending.

underlying exemption case until the owners testified that the unit had no prior residential use.⁴²

The City of Oakland Rent Adjustment Ordinance states in its “findings and purpose” section, that:

“The City Council finds that a shortage of decent, safe, affordable and sanitary residential housing continues to exist in Oakland. This shortage is evidence by a low vacancy rate amount such units through the city and continually increasing demand for such housing. Many residents of Oakland pay a substantial amount of their monthly income for rent. The present shortage of rental housing units and the prevailing rent levels have a detrimental effect on the health, safety, and welfare of a substantial number of Oakland residents, particularly senior citizens, persons in low and moderate income households, and persons on fixed incomes.....” O.M.C. § 8.22.010(A).

This language, combined with the language allowing any tenant to contest an exemption based on fraud or mistake, makes it clear that the City gives great weight to returning a wrongly exempted dwelling unit to Oakland’s stock of affordable housing.

Is the tenant’s claim limited to a claim that the fraud committed by the owner was extrinsic fraud?

The owners argue that the tenant can only prevail in his claim if he proves extrinsic fraud, rather than intrinsic fraud. (Extrinsic fraud is fraud that relates to the underlying litigation, such as being told that a Hearing is continued, when in fact it was not. Intrinsic fraud is fraud that relates to the testimony given in the underlying matter.) It is not the law in this jurisdiction that the only kind of fraud that can be claimed in a case seeking to nullify a previously granted *Certificate of Exemption* is extrinsic fraud.

The ability to challenge a fraudulently granted exemption affects the rights of current and future tenants to rent regulation as well as the interests of the City of Oakland to protect its tenants from unscrupulous landlords. Since any tenant who resides in a unit after a *Certificate of Exemption* has been granted can raise a claim that the exemption was granted based on fraud or mistake it is not possible to limit these cases to those of extrinsic fraud as that kind of fraud only occurs between the parties in the underlying proceeding.

Additionally, the cases cited by the owners in this argument are all cases that interpret Code of Civil Procedure § 473, which procedurally allows for relief from judgment (by the underlying parties to a proceeding) based on mistake, inadvertence and excusable neglect. It is in this context that it has been held that fraud in an underlying proceeding can only be claimed if it is “extrinsic.” See for example, *In re Marriage of Stevenot* (1984) 154 Cal. App. 3d 1051. The claims that arise in the instant case are not claims that are limited to the parties in a proceeding, as are those claims that interpret CCP § 473. Therefore, it would

⁴² As noted below, the RAP does not have discovery, which would have allowed the tenant to learn about the owners’ claims in great detail prior to the Hearing.

severely hamper the investigation of fraudulent misrepresentations by owners who seek to defraud the City of Oakland, if these claims were limited to only those cases where extrinsic fraud was at stake.

Still further, even in those cases that interpret CCP § 473, the courts have held that the rules about extrinsic and intrinsic fraud are not hard and fast. In cases where discovery is limited (as in proceedings before the Rent Board, where there is no discovery available between the parties), courts have held that claims of fraud cannot be limited to only extrinsic fraud.

The case of *Pour le Bebe v. Guess?, Inc.* 112 Cal. App.4th 810, is instructive. That case arose out of an arbitration, where discovery is limited. When the plaintiff claimed that fraud had been committed in the underlying action the Court held:

“Because parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigants, lacking for example the right to an appeal or to extensive discovery, courts generally take a more lenient approach when examining intrinsic fraud in the context of a motion to vacate an arbitration award.” *Id.* at 829.

For all of these reasons, the tenant’s claim that there was fraud committed by the owner is not limited to a claim of extrinsic fraud.

Was the prior exemption granted as a result of fraud?

The elements of fraud are “(a) a misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Lazar v. Superior Court* (1996) 12. Cal. 4th 631, 638.

The first questions then, are these: was Mr. Michelsen’s testimony in the exemption case that there was no prior residential use of Sherman’s unit prior to 1984 false testimony and did he know that the testimony was false?

The evidence in this case establishes that the declaration provided by Mr. Michelsen, (and supported by Ms. Michelsen’s live testimony at the exemption Hearing) that when he rented the premises to Mark Sherman in September of 1985, it was the first time the premises were rented as a residence, was false testimony. Both Michelsens’ further testified that there were no bath or kitchen facilities in the unit prior to the Sherman rental, and this too was false.

There is ample evidence of prior residential use. First, there is clear and convincing evidence that Charles Abraham and Daniel Wiener resided in the unit at 5823 Occidental. In Abraham’s case the evidence establishes that he lived there for many years beginning in 1976 or 1977. The fact that Abraham’s move in date is more likely than not to be 1976 is corroborated by Wiener’s testimony that he moved into the unit in 1976 because, since Wiener was a subtenant of Abraham’s, he could not have moved in in 1976 unless Abraham was already residing there.

The Michelsens did acknowledge in the exemption Hearing that the unit in question had previously been a "custom woodworking studio." The evidence in this case establishes that the woodworker in question was Charles Abraham.

The testimony from both Abraham and Wiener establishes that they lived in the unit with Mr. Michelsen's knowledge and consent. Abraham knew Michelsen from school and, when he ran into him at the unemployment office, he told Michelsen he needed a place to live and work. Michelsen volunteered that he had a unit he could rent to him for both live and work purposes. That they knew each other from before the rental was corroborated by Mr. Michelsen.

Furthermore, it is highly improbable that under the circumstances Mr. Michelsen could not have known that Abraham and Wiener were living on the premises. Mr. Michelsen lived in the same building in a unit that shared a wall and a door with the Abraham/Wiener unit. Based on Ms. Michelsen's testimony that she (and presumably Mr. Michelsen as well) moved to Orinda in 1984, it appears that during the entirety of Abraham's and Wiener's residency in the unit, Michelsen was living in the same building and shared a wall with these tenants. Both Abraham and Wiener testified that Mr. Michelsen was in their unit and that they were in Mr. Michelsen's unit on multiple occasions.⁴³ Wiener remembered two large dogs, and Mr. Michelsen acknowledged he had two large dogs. Furthermore, while Mr. Michelsen denies knowing that Abraham "lived" in the unit, he testified that he helped Abraham install a large door to accommodate his woodworking equipment and testified he was inside the unit.

There is further evidence to support a finding that both Abraham and Wiener lived in the unit prior to January of 1983 (the new construction cut-off date) and, obviously, before the *Certificate of Occupancy* was issued in 1985. The tenant produced telephone directory pages for Oakland from 1977 and 1978, each of which show a listing for Chuck (a common nickname for Charles) Abraham at 5823 Occidental and Danl (shortening for Daniel) Wiener.^{44, 45} The telephone directory also had a listing for Chuck Abraham at the same address in 1979 and 1980.⁴⁶ Additionally, the tenant produced a Haines Criss Cross directory from 1978 showing that both Chuck Abraham and Daniel Wiener (along with Rus Michelsen) are listed at 5823 Occidental. Abraham and Wiener remain listed in 1979 and Abraham alone remains listed in 1981.⁴⁷ None of these listings have an asterisk next to them, meaning that they were not business listings but instead were residential listings.

While it is unclear as to exactly how long Abraham resided in the unit past 1981, since he was no longer listed in the Criss Cross directory after 1981, the fact that his testimony as to

⁴³ In fact, Mr. Michelsen testified that no one could have been in his unit without his permission. Since Wiener and Abraham both credibly testified that they were in Mr. Michelsen's unit, and provided enough detail to corroborate their testimony, it is likely true that at the time these visits occurred, Michelsen knew that they were in his unit.

⁴⁴ Additionally, Abraham testified this was his listing.

⁴⁵ Exhibit 2, pages 4 and 6 for 1977 and pages 8 and 10a for 1978.

⁴⁶ Exhibit 2, pages 13 and 17. Although it is difficult to read the name "Abraham" on the Exhibit copy provided by the tenant from the 1979 and 1980 directories, the name "Chuck" and the address is visible. Additionally, the same telephone number listed is the same as the two preceding years.

⁴⁷ See Criss-Cross Directory listings at Exhibit 7.

the dates of his residency might not have been entirely accurate, is not relevant to these facts and circumstances. Abraham was testifying in 2018 about the circumstances of where he lived from 1976 through 1984. That he might have moved out earlier than what he testified to is not of consequence. There is sufficient corroborating evidence from the telephone book, from the Criss Cross directory, and from Daniel Wiener, to establish that during the key years of 1976 through at least 1981 Abraham was a resident of 5823 Occidental with Mr. Michelsen's knowledge and consent.⁴⁸

Additionally, Mr. Michelsen's testimony in the exemption Hearing, and in this case, that the unit was not fit as a residence when it was in use as a woodworking studio was also false. Both Abraham and Wiener testified that the unit had a working bathroom and a usable kitchen during their residency in the unit. Abraham's testimony about a "mahogany surround" around the bathtub was corroborated by Sherman's testimony that the wood around the bathtub area is still there. This is something a woodworker would notice.

It is important to note that neither Abraham and Wiener have any axe to grind in this case and no reason to provide false testimony. They are not interested parties. The Michelsens, on the other hand, have every reason to have provided false testimony (in the past and in the instant Hearing) that there was no prior residential use of the property as this was the only way for them to receive the *Certificate of Exemption* and the only way for them to maintain it.⁴⁹

There is additional evidence of residential use of the premises after Abraham and Wiener moved out that disputes Mr. Michelsen's testimony that Sherman was the first residential tenant in the unit. The tenant produced a sworn declaration from Ted Germann who testified that in 1984-1985 he, along with other band members, resided in the unit located at 5823-5825 Occidental.⁵⁰ Germann acknowledged that while living there he also lived with his wife down the street. While this residency is after the Ordinance new construction date of February of 1983, it nonetheless is indicative that Mr. Michelsen's testimony in the underlying case was fraudulent.

While Ted Germann's declaration of residency was disputed by Clint McKay's declaration that Germann never lived on the premises because he lived "down the street with his wife", McKay's declaration is more interesting for what it does not say than what it does say. McKay says he rented a commercial space for a recording studio and that it had a bathroom and a lunchroom and kitchen area. He never says he did not live on the premises. The problem with McKay's declaration is further evidenced by the fact that when Joffe, the tenant's private investigator, asked McKay whether he resided in the unit, McKay refused to answer. Additionally, Germann did not just say he lived on the premises, he said his other

⁴⁸ The likelihood that Abraham moved out in 1981 or 1982, would line up with Diane Michelsen's testimony that at the time she moved into the building in 1983, the unit on Occidental was empty.

⁴⁹ Note that Mr. Michelsen has a history of not following the City's rules. Based on his own testimony he did the work on all these units without permits, and then sought the *Certificate of Occupancy*. Because of this history there is absolutely no documentary proof to show when the work was done on any of these units. And we know that at least some of the work was done before Mr. Michelsen moved into the building, as he completed the work on his unit before he moved into 927 Grace in 1976. This work was done long before the new construction cutoff date.

⁵⁰ Exhibit 6

band members did as well. Based on these facts it is found that Germann's declaration that he and others lived in the unit is more convincing than McKay's declaration that Germann did not reside there.

Additionally, McKay's declaration establishes that there was a kitchen on the premises while the Michelsens claimed there was not. The conflict between the owners' claim in this regard and McKay's declaration, which was produced by the owners, is further indication that the owners' claim is fraudulent.

Finally, the voter registration records are of significant importance as it relates to a finding that there was prior residential use of the property. Official Notice is taken that to register to vote, one must claim residency at the address where you are registering to vote. Current California Election Code § 349 requires that residence for voting purposes is a person's domicile. This law (§ 349) was preceded by Election Code § 200, which was in effect in 1976, and required the same rules regarding residency.

Registering to vote in a location is evidence of residence in that location at least at the time of initial registration. See *Assembly of State of Cal. V. Deukmejian*, 30 Cal. 3rd 638, 646, where the court stated that "with minor exceptions, an individual must continue to reside at the address stated in his or her affidavit of registration in order to be qualified to vote." While discussing a different subject, the court in *Perham v. City of Los Altos*, 190 Cal.App.2d 808 at 811, stated that "(t)he object of the registration law is to prevent illegal voting, by providing, in advance of election, an authentic list of qualified electors" citing *Welch v. Williams*, 96 Cal. 365.

In this case, the voter registration records show that prior to the *Certificate of Occupancy*, other than Harold R. Michelsen, Voters 1, 2, 4, 5, 6, 7, and 8 were each registered to vote at 5823 Occidental Street in Oakland; that Voters 9, 10 and 11 were each registered to vote at 929 Grace; and that Voters 12 and Voter 13 were each registered to vote at 921 Grace.⁵¹

While the Michelsens argue that the voter registration records are not relevant, because it is not possible that so many people were registered to vote at 5823 Occidental, this argument fails based on their own testimony that the building in question only had one residential address for many years, and that address was on Occidental. So these other people who were registered to vote may have lived in any of the units on Grace (just like Mr. Michelsen did).

Furthermore, it is important to note that the Michelsens continued to provide false testimony about residential use in the building in the instant Hearing. Prior to being shown an *Unlawful Detainer* and a lease for tenants who rented 929 Grace Avenue, Diane Michelsen testified that neither 921 or 929 Grace Avenue was rented as residential units between 1982 and 1985 (when the *Certificate of Occupancy* was obtained.) This was obviously not true, as was shown by the lease attached to the *Unlawful Detainer* entered into evidence for that unit, dated July 15, 1984.⁵² The *Unlawful Detainer* action was signed

⁵¹ Many of these voters (1, 2, 4, 5, 6 and 7 and 12), were all initially registered before the new construction date as well as prior to the *Certificate of Occupancy*.

⁵² Exhibit 10

by Diane Michelsen. This is also not true based on the voter registration records showing registrations at both 921 and 929 Grace prior to the *Certificate of Occupancy*.

Taking all these facts together it is determined that there was prior residential use of 5823-5825 Occidental Street prior to both the new construction date and the issuance of the *Certificate of Occupancy* and that at least Mr. Michelsen knew of this prior residential use at the time he testified in the exemption case.^{53, 54}

There is no reason to discuss with any specificity the other elements of a claim of fraud. It is clear that Mr. Michelsen's testimony at the exemption hearing was with an "intent to defraud" as he was seeking a *Certificate of Exemption* that he could not receive without such false testimony. It is further clear that the Hearing Officer in the exemption case relied on his testimony and that a *Certificate of Exemption* was issued as to 5823-5825 Occidental Street, resulting in damage both to Mr. Sherman and to the City of Oakland, based on the removal of a covered unit from the Ordinance.

Based on the fraud by Mr. Michelsen in his testimony regarding this matter, coupled with the testimony by Ms. Michelsen which supported that fraudulent testimony, there is sufficient reason to find that the prior exemption cannot stand.

If the prior exemption was granted as a result of fraud, how does the agency correct the *Certificate of Exemption*?

The Rent Adjustment Regulations state:

"In the event that a previously issued Certificate of Exemption is found to have been issued based on fraud or mistake and thereby rescinded, the Staff shall record a rescission of the Certificate of Exemption against the affected real property with the County Recorder." Regulations 8.22.030(C)(2).

The *Certificate of Exemption* was received by the owners based on the testimony in the exemption Hearing that the unit at 5823-5825 Occidental had no prior residential use before the *Certificate of Occupancy* was provided. Therefore, the *Certificate of Exemption* must be rescinded.

After the appeal period in this matter is over, in order to effectuate the rescission, the Staff shall record a rescission with the County Recorder.

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⁵³ Since most of these facts preceded Ms. Michelen's knowledge of the building, it is not possible to say whether she knew that all of the facts were false, or was simply relying on the information provided to her by her husband. It is determined that at the time Ms. Michelsen first saw the building there was a kitchen and a bathroom, including a bathtub, in the unit and that her testimony that these things did not exist was false. What is not known is whether or not she knew of the prior residential use.

⁵⁴ The facts also show that there was prior residential use of 921 and 929 Grace Avenue before the *Certificate of Occupancy* was granted, contrary to the owners' testimony in this case.

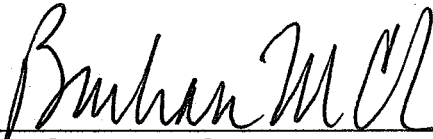
If the prior exemption was granted as a result of fraud, what is the allowable rent as to Tenant Sherman?

Since the prior exemption as to Sherman's unit was based on fraud, the unit is a covered unit and the rent increase is invalid. The tenant's rent remains \$1,817.80.

ORDER

1. Petition T16-0258 is granted.
2. The *Certificate of Exemption* was granted based on fraud.
3. The unit is a covered unit under the Ordinance.
4. The tenant's rent is \$1,817.80 per month.
5. A rescission of the *Certificate of Exemption* shall be recorded after the appeal period.
6. **Right to Appeal:** **This decision is the final decision of the Rent Adjustment Program Staff.** Either party may appeal this decision by filing a properly completed appeal using the form provided by the Rent Adjustment Program. The appeal must be received within twenty (20) calendar days after service of the decision. The date of service is shown on the attached Proof of Service. If the Rent Adjustment Office is closed on the last day to file, the appeal may be filed on the next business day.

Dated: November 30, 2018


Barbara M. Cohen
Hearing Officer
Rent Adjustment Program

PROOF OF SERVICE
Case Number T16-0258

I am a resident of the State of California at least eighteen years of age. I am not a party to the Residential Rent Adjustment Program case listed above. I am employed in Alameda County, California. My business address is 250 Frank H. Ogawa Plaza, Suite 5313, 5th Floor, Oakland, California 94612.

Today, I served the attached documents listed below by placing a true copy of it in a sealed envelope in a City of Oakland mail collection receptacle for mailing on the below date at 250 Frank H. Ogawa Plaza, Suite 5313, 5th Floor, Oakland, California, addressed to:

Documents Included

Hearing Decision

Owner

Diane & Rus Michelsen
PO Box 6363
Moraga, CA 94570

Tenant

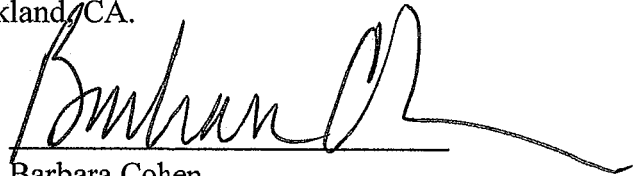
Mark L. Sherman
5825 Occidental St
Oakland, CA 94608

Tenant Representative

Leah Hess, Leah Hess, Esq.
610 16th Street Suite M-8
Oakland, CA 94612

I am readily familiar with the City of Oakland's practice of collection and processing correspondence for mailing. Under that practice an envelope placed in the mail collection receptacle described above would be deposited in the United States mail with the U.S. Postal Service on that same day with first class postage thereon fully prepaid in the ordinary course of business.

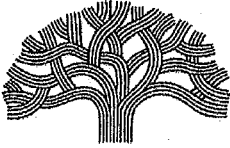
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 04, 2018 in Oakland, CA.



Barbara Cohen
Oakland Rent Adjustment Program

000054

2018 DEC 19 PM 12:56
For date stamp.

 CITY OF OAKLAND	CITY OF OAKLAND RENT ADJUSTMENT PROGRAM 250 Frank Ogawa Plaza, Suite 5313 Oakland, CA 94612 (510) 238-3721	<u>APPEAL</u>

Appellant's Name <i>Diane and Harold Michelsen</i>		<input checked="" type="checkbox"/> Owner <input type="checkbox"/> Tenant	
Property Address (Include Unit Number) <i>5823-5825 Occidental St., Oakland, CA</i>			
Appellant's Mailing Address (For receipt of notices) <i>P.O. Box 6363</i> <i>Moraga, CA 94570</i>		Case Number <i>T16-0258</i>	
		Date of Decision appealed <i>Nov. 30, 2018</i>	
Name of Representative (if any) <i>Francis McKeown</i>		Representative's Mailing Address (For notices) <i>2550, Ninth St., Suite 202</i> <i>Berkeley, CA 94710</i>	

Please select your ground(s) for appeal from the list below. As part of the appeal, an explanation must be provided responding to each ground for which you are appealing. Each ground for appeal listed below includes directions as to what should be included in the explanation.

1) There are math/clerical errors that require the Hearing Decision to be updated. *(Please clearly explain the math/clerical errors.)*

2) Appealing the decision for one of the grounds below (required):

- a) The decision is inconsistent with OMC Chapter 8.22, Rent Board Regulations or prior decisions of the Board. *(In your explanation, you must identify the Ordinance section, regulation or prior Board decision(s) and describe how the description is inconsistent.)*
- b) The decision is inconsistent with decisions issued by other Hearing Officers. *(In your explanation, you must identify the prior inconsistent decision and explain how the decision is inconsistent.)*
- c) The decision raises a new policy issue that has not been decided by the Board. *(In your explanation, you must provide a detailed statement of the issue and why the issue should be decided in your favor.)*
- d) The decision violates federal, state or local law. *(In your explanation, you must provide a detailed statement as to what law is violated.)*
- e) The decision is not supported by substantial evidence. *(In your explanation, you must explain why the decision is not supported by substantial evidence found in the case record.)*


For more information phone (510) 238-3721.

- f) I was denied a sufficient opportunity to present my claim or respond to the petitioner's claim. (In your explanation, you must describe how you were denied the chance to defend your claims and what evidence you would have presented. Note that a hearing is not required in every case. Staff may issue a decision without a hearing if sufficient facts to make the decision are not in dispute.)
- g) The decision denies the Owner a fair return on my investment. (You may appeal on this ground only when your underlying petition was based on a fair return claim. You must specifically state why you have been denied a fair return and attach the calculations supporting your claim.)
- h) Other. (In your explanation, you must attach a detailed explanation of your grounds for appeal.)

Submissions to the Board must *not* exceed 25 pages from each party, and they must be received by the Rent Adjustment Program with a proof of service on opposing party within 15 days of filing the appeal. Only the first 25 pages of submissions from each party will be considered by the Board, subject to Regulations 8.22.010(A)(5). Please number attached pages consecutively. Number of pages attached: 1.

- You must serve a copy of your appeal on the opposing parties or your appeal may be dismissed. •
 I declare under penalty of perjury under the laws of the State of California that on 12-19, 2018. I placed a copy of this form, and all attached pages, in the United States mail or deposited it with a commercial carrier, using a service at least as expeditious as first class mail, with all postage or charges fully prepaid, addressed to each opposing party as follows:

Name	Leah Hess, Esq.
Address	1814 Franklin St. #506
City, State Zip	Oakland, CA 94612
Name	Mark Sherman
Address	50 25 Occidental St.
City, State Zip	Oakland, CA 94608

	12-19-18
---	----------

SIGNATURE of APPELLANT or DESIGNATED REPRESENTATIVE

DATE

Francis McKeown

For more information phone (510) 238-3721.

IMPORTANT INFORMATION:

This appeal must be received by the Rent Adjustment Program, 250 Frank Ogawa Plaza, Suite 5313, Oakland, California 94612, not later than 5:00 P.M. on the 20th calendar day after the date the decision was mailed to you as shown on the proof of service attached to the decision. If the last day to file is a weekend or holiday, the time to file the document is extended to the next business day.

- Appeals filed late without good cause will be dismissed.
- You must provide all the information required, or your appeal cannot be processed and may be dismissed.
- Any response to the appeal by the other party must be received by the Rent Adjustment Program with a proof of service on opposing party within 35 days of filing the appeal.
- The Board will not consider new claims. All claims, except jurisdiction issues, must have been made in the petition, response, or at the hearing.
- The Board will not consider new evidence at the appeal hearing without specific approval.
- You must sign and date this form or your appeal will not be processed.
- The entire case record is available to the Board, but sections of audio recordings must be pre-designated to Rent Adjustment Staff.

For more information phone (510) 238-3721.

ATTACHMENT TO CITY OF OAKLAND RENT ADJUSTMENT PROGRAM APPEAL OF NOV. 30, 2018
DECISION, T16-0258

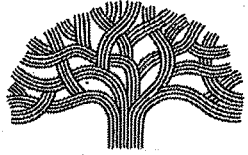
The decision is in contradiction, is contravened and is in contempt of the California Court of Appeal Decision styled Sherman v. City of Oakland, Case Number A147769 from Superior Court Case No. RG15785257.

The decision appealed from ignores principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion).

These matters are the subject of the current appeal before the First District Court of Appeal, Action Number A152429.

RECEIVED
CITY OF OAKLAND
RENT ARBITRATION PROGRAM

For date stamp
2018 DEC 24 PM 12:38



CITY OF OAKLAND

CITY OF OAKLAND
RENT ADJUSTMENT PROGRAM
250 Frank Ogawa Plaza, Suite 5313
Oakland, CA 94612
(510) 238-3721

APPEAL

Appellant's Name Mark Sherman		<input type="checkbox"/> Owner <input checked="" type="checkbox"/> Tenant	
Property Address (Include Unit Number) 5823-5825 Occidental Street, Oakland, CA 94608			
Appellant's Mailing Address (For receipt of notices) 5823-5825 Occidental Street, Oakland, CA 94680		Case Number T16-0258	
		Date of Decision appealed November 30, 2018	
Name of Representative (if any) Leah Hess		Representative's Mailing Address (For notices) Law Office of Leah Hess, 610 16th Street, M-8 Oakland, CA 94612	

Please select your ground(s) for appeal from the list below. As part of the appeal, an explanation must be provided responding to each ground for which you are appealing. Each ground for appeal listed below includes directions as to what should be included in the explanation.

1) There are math/clerical errors that require the Hearing Decision to be updated. *(Please clearly explain the math/clerical errors.)*

2) Appealing the decision for one of the grounds below (required):

- a) The decision is inconsistent with OMC Chapter 8.22, Rent Board Regulations or prior decisions of the Board. *(In your explanation, you must identify the Ordinance section, regulation or prior Board decision(s) and describe how the description is inconsistent.)*
- b) The decision is inconsistent with decisions issued by other Hearing Officers. *(In your explanation, you must identify the prior inconsistent decision and explain how the decision is inconsistent.)* See Attachment.
- c) The decision raises a new policy issue that has not been decided by the Board. *(In your explanation, you must provide a detailed statement of the issue and why the issue should be decided in your favor.)*
- d) The decision violates federal, state or local law. *(In your explanation, you must provide a detailed statement as to what law is violated.)*
- e) The decision is not supported by substantial evidence. *(In your explanation, you must explain why the decision is not supported by substantial evidence found in the case record.)*

For more information phone (510) 238-3721.

- f) I was denied a sufficient opportunity to present my claim or respond to the petitioner's claim. (In your explanation, you must describe how you were denied the chance to defend your claims and what evidence you would have presented. Note that a hearing is not required in every case. Staff may issue a decision without a hearing if sufficient facts to make the decision are not in dispute.)
- g) The decision denies the Owner a fair return on my investment. (You may appeal on this ground only when your underlying petition was based on a fair return claim. You must specifically state why you have been denied a fair return and attach the calculations supporting your claim.)
- h) Other. (In your explanation, you must attach a detailed explanation of your grounds for appeal.)

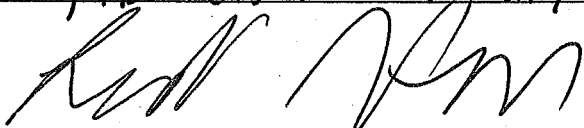
See Attachment.

Submissions to the Board must *not* exceed 25 pages from each party, and they must be received by the Rent Adjustment Program with a proof of service on opposing party within 15 days of filing the appeal. Only the first 25 pages of submissions from each party will be considered by the Board, subject to Regulations 8.22.010(A)(5). Please number attached pages consecutively. Number of pages attached: _____.

- You must serve a copy of your appeal on the opposing parties or your appeal may be dismissed. •
- I declare under penalty of perjury under the laws of the State of California that on December 24, 2018, I placed a copy of this form, and all attached pages, in the United States mail or deposited it with a commercial carrier, using a service at least as expeditious as first class mail, with all postage or charges fully prepaid, addressed to each opposing party as follows:

Name	Diane Michelsen
Address	Post Office Box 6363
City, State Zip	Moraga, CA 94570
Name	Harold Rus Michelsen
Address	Post Office Box 6363
City, State Zip	Moraga, CA 94570

Jamilah Jefferson, City of Oakland, Office of the City Attorney, One Frank Ogawa Plaza, Oakland CA 94612; FRANCIS F. MCKEOWN, 2550 9th St, Suite 202, Berkeley, CA 94710

	12/24/2018
---	------------

SIGNATURE of APPELLANT or DESIGNATED REPRESENTATIVE

DATE

For more information phone (510) 238-3721.

ATTACHMENT T16-0258: PETITIONER MARK SHERMAN'S APPEAL OF THE HEARING DECISION

Introduction

This appeal seeks to correct only the amount of monthly rent the Hearing Officer determined that Mr. Sherman must pay. He does not challenge any other determination made in the Hearing Decision.

The Hearing Officer has found that Landlords Diane and Rus Michelsen obtained a Certificate of Exemption for Mark Sherman's rental unit by means of fraud. They gave false testimony during the hearing on their petition for exemption. (L13-054). They continued to make false statements in these proceedings, at the remand hearing of Sherman's petition to rescind the Certificate of Exemption.

In this case, after a full hearing on the merits, the Hearing Officer determined that the exemption was obtained through fraud. Contrary to the Owners' testimony, there had been extensive residential use of the property prior to Mr. Sherman's occupancy. Two witnesses testified credibly that they resided in the property in the 1970's. Another former tenant presented a declaration stating that he, and several other roommates had lived there before Mr. Sherman's occupancy. Copious corroborating evidence of prior residential use of the premises was admitted. The Hearing Decision concluded that fraud was clear:

It is clear that Mr. Michelsen's testimony at the exemption hearing was with an "intent to defraud" as he was seeking a Certificate of Exemption that he could not receive without such false testimony. It is further clear that the Hearing Officer in the exemption case relied on his testimony and that a Certificate of Exemption was issued as to 5823-5825 Occidental Street, resulting in damage both to Mr. Sherman and to the City of Oakland, based on the removal of a covered unit from the Ordinance.

Based on the fraud by Mr. Michelsen in his testimony regarding this matter, coupled with the testimony by Ms. Michelsen which supported that fraudulent testimony, there is sufficient reason to find that the prior exemption cannot stand. Page 29. Remand Hearing Decision T16-0258, Page 29.

The Appeal decision declared that the Certificate of Exemption had been obtained by means of fraud, declared the unit to be covered by the Ordinance, ordered that the Certificate of Exemption be rescinded after the appeal period, and set Mr. Sherman's rent at \$1,817.80 per month. L13-0054 Remand Hearing Decision, Page 30.

Mr. Sherman appeals that portion of the Hearing Decision which sets his rent at \$1,817.80 per month. That amount of rent was one of a series of unlawful rent increase which were stricken in an earlier RAP case, *Sherman v. Michelsen* T12-0332. Sherman requests that the Board correct the lawful amount of rent owed each month to no more than \$1,225, the

amount which was set as the lawful rent in Rent Petition. Because the Order in this case invalidates the Certificate of Occupancy, Mr. Sherman is entitled to have his rent rolled back to the last *lawful* rent, the rent specified in the *Sherman v. Michelsen* Hearing Decision. He also seeks a rebate, of all rent overpayments made during the time that he was required to pay \$1,817.80 per month.

If the portion of the Order setting rent at \$1,817.80 is permitted to stand, Mr. Sherman will lose the benefit of the Decision in this case. The Michelsens will be unjustly enriched, retaining money they obtained through fraud.

STATEMENT OF FACTS/PROCEDURAL BACKGROUND

Sherman's First Petition

Mr. Sherman began his tenancy in 1985 at a rental rate of \$1,225. In 2007, the Michelsens began a series of substantial rent increases, none of which was accompanied by the required RAP Notice. Sherman paid all of these increases until 2012 when the Owners attempted to raise the rent from \$1,687 to \$1,817.28. He did not pay that increase, but instead, filed a petition to the RAP seeking to invalidate the rent raises. *Sherman v. Michelsen* T12-0332. ("Rent Petition").

At the hearing, Owner Diane Michelsen acknowledged that they had not served a RAP Notice with any of the notices of rent raises.¹ The Hearing Officer ruled in Sherman's favor, ordering the rent rolled back to \$1,225 per month, and ordering a rebate of rent overpaid in the form of reduced rent. (Exh. A: Rent Petition, Corrected Hearing Decision, issued 4/17/2013.)

The landlords appealed to the Rent Board. The Board affirmed the Hearing Officer's Decision. (Exh. B: Rent Petition, Appeal Decision Issued 10/28/2013)

The Michelsens then filed a petition for writ of mandamus to the Superior Court, which was ultimately denied. (*Michelsen v. Oakland Rent Program* Alameda County Superior Court RG14-771450, "Owners' Writ")

Michelsens' Exemption Petition

After the Board's Decision in the Rent Petition, but before filing the Owners' Writ, the Michelsens filed a new RAP petition, seeking issuance of a Certificate of Exemption for Sherman's rental unit as "new construction" under the Ordinance. *Michelsen v. Sherman* L13-054 ("Exemption Petition".) They claimed that the unit met the requirements: 1) that the property had been issued a Certificate of Occupancy after to January 1, 1983 and 2) that there

¹The Michelsens did finally send a RAP notice in March 2013, but did not serve a notice with their subsequent attempt to raise the rent.

had been no prior residential use of the rental unit. (Oakland Municipal Code §8.22.020.A.5).

Sherman knew that the claim of no prior residential use was false. Rus Michelsen had once told him that a woodworker had lived in the unit in the 1970s. Sherman located the woodworker and, at the hearing of the Exemption Petition, submitted an unsworn, one-line letter from him stating he had lived there in the 1970s.

At the hearing Rus Michelsen submitted a sworn declaration that, when Sherman rented the unit, it was the first time it had ever been rented as a residence. Ms. Michelsen testified at the hearing that when she first viewed it in 1982, it had no kitchen or bathroom, and that it was dirty and full of cobwebs. She testified that it appeared that it never had been, and never could have been occupied residentially.

Unfortunately, Sherman did not understand evidentiary rules. The Michelsens' sworn falsehoods about the lack of prior residential use outweighed Sherman's deficient presentation of an unsworn letter from a prior tenant. The Michelsens' petition was granted and the property was declared exempt.

Mr. Sherman appealed to the Board. By the time of the appeal hearing, he had obtained detailed declarations from *two* prior residents of his rental unit. He requested a remand to present the declarations as "new evidence". The request was denied. The Board determined that Sherman had not been diligent in searching for the evidence prior to the initial exemption hearing. The Hearing Officer's decision was affirmed.

The Exemption petition was delayed in Rent Board proceedings for many months, as the Board struggled to deal with due process rights of other residents of the building. Numerous continuances at the Board held up a final Board Appeal Decision, until June 15, 2015. The final decision affirmed the Hearing Decision.

Superior Court Disposition of Rent Writ and Exemption Writ

When the Board decision in the Michelsen's Exemption Petition became final, Sherman filed a petition for writ of mandamus. *Sherman v. City of Oakland*, RG15-785257 ("Exemption Writ") At this point, there were now two writs pending before the Court: the Landlords' Rent Writ and the Tenant's Exemption Writ.

In September 2014, the Judge required Sherman to put up \$1,817 rent each month while the two cases were pending. Part of the payment was to be paid directly to the Michelsens and the remainder was to be paid into the Court. The Court stated that this was "the most reasonable status quo [as it] .is the tenant's most recent rent."² (Exh. C, Owners' Writ, Order,

²The judge's assumption was incorrect. \$1,817.28 was the most recent rent *raise*. Sherman had never paid the most recent raise after filing his Rent Petition with the RAP. He paid \$1,687.35 in rent prior to his Rent Petition. (See Exh. A, Rent Petition, Corrected Hearing

Motion Granted, 9/18/2014)

On February 23, 2016, Sherman's Exemption Writ was denied. (Exh. D, Pages from Exemption Writ RG15-785257.

After further proceedings, the Court also denied the Michelsens' Rent Writ. (Exh. E, pages from, pages from Final Statement of Decision (1) Denying Petition and (2) Accounting for Rents Due and Paid Michelsen v. Oakland Rent Adjustment Board, Alameda County Superior Court RG14-711450.

During the proceedings, the judge requested that the Board inform the Court of when the Exemption Petition Decision became effective. The Board determined that it became effective on the date that the Final Appeal Decision had been issued on June 15, 2015. The exemption was not retroactive. Thus, the Rent Petition Decision ordering repayment and rent roll back for Sherman was in effect up to June 15, 2015. The property became exempt only after that date.

Sherman's Appeal to the Court of Appeals

Sherman filed an appeal to the Court of Appeals in March 2016. He met with no success. The Court affirmed the decision of the Superior Court. (*Sherman v. City of Oakland*, First District Court of Appeals, 4/26/2017, unpublished No. A147769.

Sherman's Petition to the Board for Rescission of Certificate of Exemption.

Mr. Sherman continued to pay rent at the rate \$1,817.28 per month. However, on March 21, 2016, the Michelsens served a rent increase notice, demanding that he begin paying \$4,000 per month on June 1, 2016. (Exh. F)

On May 20, 2016, Sherman filed the instant petition asserting that the Michelsens had obtained the certificate of exemption by means of fraud. When the Hearing Officer issued an Administrative Decision denying him a hearing, he appealed to the Board. The petition, however, never reached the Board. The Program Administrator issued an Administrative Appeal Decision, denying him a hearing before the Board. Mr. Sherman, again, filed an petition for writ of Administrative Mandamus alleging the decisions denied him his due process right to the hearings.

Subsequent to the filing, the Board held a closed meeting in which it determined to move the Superior Court to grant the petition, and remand the matter back to the Rent Program for hearing on the merits. In its motion for dismissal/remand, the Board agreed with Sherman's contention that he was denied due process, and requested that the Court remand the matter back to the Board for hearings and dismiss the petition. The Court granted the motion and

Decision)

remanded the case back to the Rent Board. The Board remanded to matter to a Hearing Officer for hearing on the merits.

The Hearing/Decision in Sherman's Favor

After four years, Mr. Sherman finally obtained what he had sought: An evidentiary hearing on the merits of his case. He presented clear proof that at least two, and very possibly more, persons resided in his rental unit prior to 1983. Rus Michelsen knew they lived there because he rented the property to them. He lived on the property in a unit that shared a wall with them. He was present in their rental unit at time. Both Owners proved themselves to be untruthful in their testimony. Their statements were intended to deceive, to obtain an exemption to which they were not entitled.

Mr. Sherman was harmed by their deception. He has paid, and continues to pay, rent to which his landlords are not entitled. Unsatisfied with the \$1,817 which they receive each month, they served him with a rent increase to \$4,000. In 2016, they served a three day notice to quit for non-payment of the \$4,000 rent.

Sherman won a roll back of rent to \$1,225 per month in his Rent Petition. He has paid \$1,817.28, dating from June 15, 2015, the date that the Exemption Petition went into effect, to the present.³ Now the Exemption has been proven fraudulent. Mr. Sherman has thus been overpaying by \$592 each month for the past 42 months.

This Board cannot reimburse Mr. Sherman for the anxiety and distress that he has endured during since this grueling quest for justice began. But the Board can order that he be repaid (in the form of rent reduction) the amount that he has overpaid. And the Board can also order that his base rent be set to the amount he obtained in his Rent Petition—\$1,225.

Alternatively, the Board could remand to the Hearing Officer for the sole purpose of determining the amount of overpayments made, ordering reimbursement via rent reduction, and setting the rent at \$1,225.

Respectfully submitted,



Leah Hess

Attorney for Mark Sherman

³Payments of \$1,817 prior to June 15, 2015 were adjusted in the Statement of Accounting in the Trial Court's Final Statement of Decision in the Rent Writ, bringing the parties even up to that date.



CITY OF OAKLAND
250 FRANK H. OGAWA PLAZA, SUITE 5313, OAKLAND, CALIFORNIA
94612-2034
Housing and Community Development Agency
Rent Adjustment Program

(510) 238-3721
FAX (510) 238-3691
TDD (510) 238-3254

CORRECTED HEARING DECISION

CASE NUMBER: T012-0332, Sherman v. Michelsen
PROPERTY ADDRESS: 5825 Occidental Street, Oakland, CA
APPEARANCES: Mark Sherman Tenant
Diane Michelsen Owner
DATE OF HEARING: March 4, 2013
DATE OF DECISION: April 17, 2013
DATE OF CORRECTED DECISION: May 13, 2013

BACKGROUND

The undersigned Hearing Officer issued a Decision on April 17, 2013, which granted the tenant restitution for rent overpayments in the amount of \$16,080.56. However, the amount granted for restitution was for forty months, which is in excess of the three year period allowed by Board decision.¹ The correct amount of the restitution is \$15,035.64. This Decision is an entirely new decision and sets out a new appeal period.

INTRODUCTION

Mark Sherman filed a petition on November 30, 2012, which contests several rent increases, and alleges that he has never received notice of the existence of the Rent Adjustment Program (RAP) or a RAP notice with the notice of the rent increases.

The owner filed a timely response to the petition, and acknowledges that she has not provided the tenant with the RAP notice.

¹ Barajas/Avalos v. Chu, T06-0051 (2006)

EVIDENCE

Tenant Sherman testified that he has never received the RAP notice. He moved into his unit in 1985 at a monthly rent of \$1,225.00. Both parties agree that he received the following rent increases:

- 9/1/86 from \$1,225 to \$1,264
- 12/1/07 to 1,399.56
- 12/1/08 to \$1,486.23
- 12/1/09 to \$1,574.02
- 12/1/10 to \$1,687.35
- 12/1/12 to \$1,817.28

The owner testified that she has not provided the tenant with the RAP notice but the tenant is very aware of the Rent Ordinance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The tenant's petition, the owner's response and the parties' testimony establishes that the tenant has resided in his unit since 1985 at an initial rent of \$1,225.00. In 1986 the tenant's rent was increased to \$1,264.00 monthly. He has paid the past rent increases from 1986 and 2007 through 2010 and is currently paying \$1,687.35 monthly.

NOTICE AND FILING REQUIREMENTS

The Rent Ordinance requires an owner to serve notice of the existence and scope of the Rent Adjustment Program (RAP) at the start of a tenancy² and together with any notice of rent increase³.

The Notice requirement of the Rent Ordinance was passed in November 1983⁴ and requires the following:

"Landlords are hereby required to notify tenants in writing of the existence of the Residential Rent Arbitration board. Said notice shall be in the form of an addendum to any lease in effect at the time of the effective date of this ordinance or any lease entered into after the effective date of this ordinance".

The purpose of the RAP is to inform a tenant of his or her rights under the RAP so that he may exercise his rights under the ordinance in a timely manner.

² O.M.C. Section 8.22.060(A)

³ O.M.C. §8.222.070(H)(1)(A)

⁴ Ordinance No. 10402 C.M.S.

No evidence was presented that the tenant received written notice of the RAP. The owner acknowledged that she has not provided the tenant with the RAP notice. Therefore, the rent increases for 1986 and 2007 through December 2012 are invalid.

However, a tenant's claim for rent overpayments is limited, by Board decision, to three years prior to the filing of the tenant petition.⁵ See also Cal. Code of Civil Procedure, Section 338. Therefore, the rent overpayments are computed for the period November 31, 2009 through December 2012, as follows:

11/31/09-11/31/2010-	\$1,225-\$1,486.23 = \$261.23 x 8=	\$2089.84
12/1/10- 11/31/2012-	1687.35-\$1,225= \$462.35 x 24=	\$11,096.40
12/1/2012-4/1/13=	\$1,687.35-\$1,225=\$462.35 x 4=	\$1,849.40

TOTAL RENT OVERPAYMENT \$15,035.64

Rent overpayments are usually amortized over twelve months. However, the large amount of rent overpayment constitutes an amount far in excess of the tenant's monthly rent, which is an extraordinary circumstance, and is amortized over a period of 18 months or \$835.31 monthly.⁶ Under the current ordinance, the owner is not permitted to raise the rent until six months after she has provided the "Notice to Tenants" required by the RAP.

Furthermore, the tenant's rent is rolled back to \$ 1,225.00, the beginning of the tenancy. There is no limitation for a rent roll-back due to the owner's failure to provide the RAP notice.⁷

The tenant's rent payment for May 2013 should have been \$389.69. In the prior Hearing Decision the temporary monthly rental amount was set at \$331.64. Therefore, the tenant has underpaid rent in the amount of \$58.05. The rent payment for June 2013 is \$447.74

For the reasons stated above, the tenant's petition is granted.

ORDER

1. Petition T12-0332 is granted for the reasons stated above.
2. The rent overpayment due to lack of the RAP notice is \$15,035.64.

⁵ Barajas/Avalos v. Chu, T06-0051 (2006); 12 Mitchell v. Leslie, et al (1995) 46 Cal. Rptr. 423-Court held that restitution of excess rent is not a penalty and claim for actual damages is subject to 3 yr. statute of limitations per Code of Civil Procedure, Section 338, subdivision (A)

¹³ Ordinance 11758, Section 6 (12/1994)

⁶ 8.22.110 (F)(4)(d)

⁷ Barajas/Avalos v. Chu, T06-0051 (2006).

Base rent	\$ 1,225.00
Plus rent underpayments \$15,035.64/18=\$835.31	\$ -\$835.31
Rent payment for June 2013 due to underpayment of \$58.05 for May 2013	\$ 447.74
Rent payment commencing July 1, 2013 and ending October 1, 2014	\$ 389.69

3. The owner may also impose rent increases to which she is otherwise entitled under the Rent Adjustment Ordinance beginning six months after first serving the tenant with a copy of the Rent Adjustment Program Notice to Tenants and in accordance with the Rent Ordinance and California Civil Code Section 827.
4. **Right to Appeal: This decision is the Final Decision of the Rent Adjustment Program Staff.** Either party may appeal this Decision by filing a properly completed appeal using the form provided by the Rent Adjustment program. The appeal must be received within twenty (20) days after service of this decision. The date of service is shown on the attached Proof of Service. If the last day to file is a weekend or holiday, the appeal may be filed on the next business day.

Date: May 13, 2013



BARBARA KONG-BROWN, ESQ.
Hearing Officer
Rent Adjustment Program



P.O. BOX 70243, OAKLAND, CA 94612-2043

Housing and Community Development Agency
Rent Adjustment Program

(510) 238-3721
FAX (510) 238-6181
TDD (510) 238-3254

October 28, 2013

**Housing, Residential Rent
and Relocation Board (HRRRB)**

APPEAL DECISION

CASE NUMBER: T12-0332, Sherman v. Michelson
PROPERTY ADDRESS: 5825 Occidental Street, Oakland, CA
APPEAL HEARING: October 10, 2013
APPEARANCES: Mark Sherman Tenant
Diane Michelsen Owner

Procedural Background

The tenant filed a petition on November 30, 2012, contesting several rent increases on the ground that he has never received the Notice of the existence of the Rent Adjustment Program (RAP). The Hearing Officer issued a Hearing Decision on May 13, 2013, which granted restitution in the amount of \$15,035.64, for a period of three years prior to the filing of the petition, and set the base rent at \$1,225, the amount the tenant paid upon move-in in 1985.

Grounds for Appeal

The owner filed an appeal on June 3, 2013, and contends that to roll back the rent 28 years to the amount the tenant paid in 1985 for 2,550 square feet, does not consider increased cost of housing services, insurance, garbage, or water. The tenant has not had a rent increase until after twenty years. The tenant is very aware of the rent control ordinance and the owner has discussed the rent control program with him. The owner does not live in Oakland and was not aware that the RAP notice was required as the Rent Adjustment Program web site did not provide specific information about the RAP notice form. This decision penalizes the owner who substantially complied with all procedures with only one rent increase in the past 28 years and this was a harmless error. This decision is inconsistent with Rent Board Regulations or prior decisions of the

EXH. B

AR 001

000070¹²

Board, and deprives the owner of a fair return on her property.

Appeal Decision

After the parties' arguments, questions for both parties and Board discussion, E. Lai moved to remand the Hearing Decision for recalculation. After further discussion, E. Lai withdrew his motion. T. Singleton moved to affirm the Hearing Decision because no RAP notice was given to the tenant. B. Williams seconded.

The Board voted as follows:

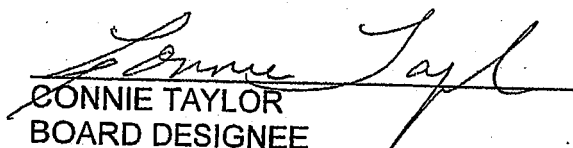
Aye: N. Frigault, T. Singleton, B. Williams, B. Scott,
Nay: E. Lai, L. Lonay
Abstain: M. Bowie

The Motion carried.

NOTICE TO PARTIES

Pursuant to Ordinance No(s). 9510 C.M.S. of 1977 and 10449 C.M.S. of 1984, modified in Article 5 of Chapter 1 of the Municipal Code, the City of Oakland has adopted the ninety (90) day statute of limitations period of Code of Civil Procedure, Section 1094.6.

YOU ARE HEREBY NOTIFIED THAT YOU HAVE NINETY (90) DAYS FROM THE DATE OF MAILING OF THIS DECISION WITHIN WHICH TO SEEK JUDICIAL REVIEW OF THE DECISION OF THIS BOARD IN YOUR CASE.



CONNIE TAYLOR
BOARD DESIGNEE
CITY OF OAKLAND
HOUSING, RESIDENTIAL RENT AND
RELOCATION BOARD

DATE

10/28/13

Harold Michelsen
1033 Bollinger Canyon Rd
Moraga, CA 94556

Oakland Rent Adjustment Board

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Michelsen Plaintiff/Petitioner(s)	No. <u>RG14711450</u>
VS.	Order
Oakland Rent Adjustment Board Defendant/Respondent(s) (Abbreviated Title)	Motion Granted

The Motion was set for hearing on 09/18/2014 at 01:30 PM in Department 31 before the Honorable Evelio Grillo.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The motion of petitioner Harold and Diane Michelson to stay the 5/13/13 Decision of the Oakland Rent Adjustment Board is **GRANTED IN PART**.

In the 5/13/13 Board Decision (Decision I), the Oakland Rent Adjustment Board applied OMC 8.22.070(H)(3) and held that because the Michelsons had not provided tenant Mark Sherman with the required Rent Adjustment Program notices that all the rent increases since 1985 were invalid and the Michelsons were required to pay tenant the overcharges for the past three years (approximately \$15,000).

In the 2/26/14 Hearing Officer Decision (Decision II), the Hearing Officer held that the property is exempt from the Rent Adjustment Program. This matter is on appeal to the Board. On 9/11/14, the Board continued the matter to 9/25/14 to allow tenants to brief the issue of whether the matter should be remanded to permit additional tenants to brief the merits of the matter. (Jefferson Dec. filed 9/12/14.)

Tenant's initial rent in 1985 was \$1225, tenant's rent during a 21-year period of no rent increases was \$1264, tenant's rent just prior to the petition was \$1817.28, and tenant's rent through April 2015 under Decision I will be \$389.69.

The Rent Adjustment Board cannot authorize tenants to withhold their rents as means of recovering alleged overpayments before landlords have an opportunity to obtain judicial review by petition for writ of mandate. (McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal.3d 348, 376-378.) Therefore, the court may restore the status quo. The court holds that the most reasonable status quo regarding monthly rent payments is the tenant's most recent rent, which was \$1817.28 per month.

Therefore, until further order of the court in this matter, tenant Mark Sherman must pay \$389.69/month rent directly to the Harold and Diane Michelson as required under Decision I and pay the balance of \$1,427.59/month into court. Tenant will, therefore, be paying \$1817.28 per month. The first payments are due on October 1, 2014, and subsequent payments are due on the 1st of every subsequent month.

Based on the ultimate resolution of the Rent Adjustment Board proceedings and any challenges to those proceedings in court, the court will direct that tenant's funds deposited into court will either be returned


Order

EXH. C

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to tenant or will be paid to Harold and Diane Michelson.

Dated: 09/18/2014



Fecstine

Judge Evelio Grillo

Order

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FILED
ALAMEDA COUNTY

FEB 23 2016

By *[Signature]*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

MARK SHERMAN,
Petitioner
v.
OAKLAND RENT ADJUSTMENT BOARD,
Respondent.

Case No. RG15-785257
JUDGMENT

The two petitions in the related cases of *Michelsen v. Oakland Rent Adjustment Board*, RG14-711450 (the "Rent Case"), and *Sherman v. Oakland Rent Adjustment Board*, RG15-785257 (the "Exemption Case") came on for hearing on December 9, 2015, in Department 14 of this Court, the Honorable Evelio Grillo presiding. On December 30, 2015, the court issued an order in *Sherman*, the Exemption Case. The court has not yet entered a judgment in this case.

Pursuant to the order of December 30, 2015, JUDGMENT is entered as follows:

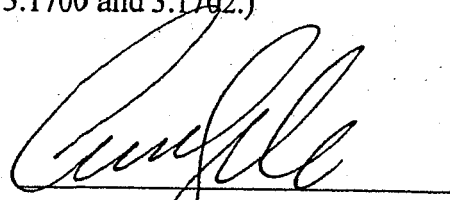
1. The petition of Mark Sherman ("Tenant") to direct the Oakland Rent Adjustment Board (the "Rent Board") to void the Appeal Decision in Case # L13-0054 in the Exemption Case is DENIED as stated in the Order of December 30, 2015.
2. Judgment is hereby entered in favor of the Rent Board.

EXH D 16
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3. Any party may file a memorandum of costs or make a motion for an award of attorney's fees. (CCP 1032 and 1033.5; CRC 3.1700 and 3.1702.)

Dated: February __, 2016



Evelio Grillo
Judge of the Superior Court



FILED
ALAMEDA COUNTY

JUN 16 2016

CLERK OF THE SUPERIOR COURT
By [Signature]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

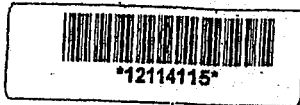
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<p>HAROLD AND DIANE MICHELSON, Petitioners v. OAKLAND RENT ADJUSTMENT BOARD, Respondent.</p>	<p>Case No. RG14-711450 FINAL STATEMENT OF DECISION (1) DENYING PETITION AND (2) ACCOUNTING FOR RENTS DUE AND PAID.</p>
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The two petitions in the related cases of *Michelsen v. Oakland Rent Adjustment Board*, RG14-711450 (the "Rent Case"), and *Sherman v. Oakland Rent Adjustment Board*, RG15-785257 (the "Exemption Case") came on for hearing on December 9, 2015, in Department 14 of this Court, the Honorable Evelio Grillo presiding. Judgment has been entered in *Sherman*, the Exemption Case. This order concerns only *Michelson*, the Rent Case.

After consideration of the briefing and the argument, IT IS ORDERED: The petition of Harold and Diane Michelson ("Owners") to direct the Oakland Rent Adjustment Board (the "Rent Board") to void the Appeal Decision in Case # T12-0332 in the Rent Case is DENIED.

EXIT E



FILED
ALAMEDA COUNTY

JUN 16 2016

CLERK OF THE SUPERIOR COURT
By [Signature]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

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HAROLD AND DIANE MICHELSON,

Petitioners

v.

OAKLAND RENT ADJUSTMENT BOARD,

Respondent.

Case No. RG14-711450

FINAL STATEMENT OF DECISION (1)
DENYING PETITION AND (2)
ACCOUNTING FOR RENTS DUE AND
PAID.

The two petitions in the related cases of *Michelsen v. Oakland Rent Adjustment Board*, RG14-711450 (the "Rent Case"), and *Sherman v. Oakland Rent Adjustment Board*, RG15-785257 (the "Exemption Case") came on for hearing on December 9, 2015, in Department 14 of this Court, the Honorable Evelio Grillo presiding. Judgment has been entered in *Sherman*, the Exemption Case. This order concerns only *Michelson*, the Rent Case.

After consideration of the briefing and the argument, IT IS ORDERED: The petition of Harold and Diane Michelson ("Owners") to direct the Oakland Rent Adjustment Board (the "Rent Board") to void the Appeal Decision in Case # T12-0332 in the Rent Case is DENIED.

1 the Rent Control Ordinance. (O.M.C. section 8.22.070(D)(6) and final decision of HRRRB re
2 effective date of rent increase.)

3 The Unit was exempt from the Ordinance as of June 15, 2015. On and after June 15,
4 2015, the rent for 5825 Occidental Street was the \$1,837.50. The court reasons that Michelson
5 gave Tenant notice that Tenant's monthly rent would be increased to \$1,817.28 effective
6 December 1, 2012. (AR 57.) Although that monthly rent increase was not lawful at the time it
7 was announced, the rent increase became lawful when the Unit became exempt from the
8 Ordinance on June 15, 2015.

9
10 In summary (1) as of December 1, 2012, Michaelsen was obligated to repay Sherman the
11 sum of \$15,035.64, the amount of the overpayments as determined by the hearing officer and
12 affirmed by the HRRRB's October 28, 2013 decision; (2) for the 30.5 months from December 1,
13 2012 through June 15, 2015, Sherman was obligated to pay monthly rent to Michelsen in the
14 amount of \$1,225, or \$37,362.50; and (3) between December 1, 2012 and June 15, 2015,
15 Sherman paid rent directly to Michelsen in the sum of \$20,248.20, (representing twelve monthly
16 in the amount of \$1687.35 for December 2012 to October 31, 2013) plus \$7,014.42
17 (representing eighteen payments of \$389.69 (November 1, 2013 to June 1, 2015), or \$27,262.62.
18

19 Therefore, as of the date 5825 Occidental Street was determined to be exempt from the
20 Ordinance, exclusive of any payments made into escrow as ordered by the court, a credit was
21 due from Michelsen to Sherman in the amount of \$4,935.76, calculated as follows:

22 Sherman's Rent Obligation to Michelsen (30.5 months x \$1,225)	\$37,362.50
23 Less Refund Order By HRRRB (Covers 3 years preceeding 11/30/12 petition)	(\$15,035.64)
24 Less Direct Payments By Sherman to Michelsen	(\$27,262.62)
25 Balance Owing to Sherman from Michelsen (As of 6/1/2015)	\$4,935.76

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3 ACCOUNTING – AFTER 6/15/15, WHEN THE PROPERTY WAS EXEMPT FROM THE
4 RENT CONTROL ORDINANCE.

5 Going forward from June 15, 2015, the date the property was declared exempt, through
6 June 15, 2016, the effective date of this order, Sherman's rent obligation to Michelsen was
7 \$1,817 per month. Sherman is entitled to a credit of \$194.85 during this period for one-half of
8 the rental payment of \$389.69 made on June 1, 2015. Sherman's rental obligation to Michelsen
9 during this period is therefore \$21,414.30, representing twelve months rent at \$1,817 per month
10 ((\$21,804) less the credit of \$194.85.
11

12 From July 1, 2015 through June 1, 2016, Sherman has paid directly to Michelsen the rent
13 payments in the amount of \$10,969.07, representing rent payments in the amount of \$389.69
14 per month for the three months of July, August and September 2015 (\$1,169.07), and \$1,225
15 per month for the eight months of November and December 2015, and January, February,
16 March, April May and June 2016 (\$9,800).
17

18 Therefore, exclusive of any payments made into escrow as ordered by the court, for the
19 period from June 15, 2015 through June 16, 2016, a credit was due from Sherman to Michelsen
20 in the amount of \$\$10,445.23, calculated as follows:

21 Sherman's Rent Obligation to Michelsen (3 months x \$389.69 + 8months x 1225)	\$21,414.30
22 Less Direct Payments By Sherman to Michelsen	(\$10,969.07)
23 Balance Owing to Michelsen from Sherman 24 (As of 6/15/2016)	\$10,445.23

25 ///
26

1 ACCOUNTING – CONCLUSION.

2 Based on the court's calculation of the pre-exemption payments and credits and the post-
3 exemption payments and credits, the court has determined that a credit is owing from Sherman to
4 Michelsen in the amount of 5,509.47 calculated as follows:

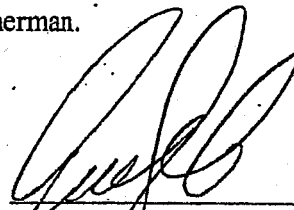
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6 Balance Owing to Michelsen from Sherman (Period from 12/1/2012 to 6/15/2015)	\$10,445.23
7 Balance Owing to Sherman from Michelsen (Period from 6/15/2015 to 6/15/2016)	\$4,935.76
8 Payment due to Michelsen from Escrow	\$5,509.47

9 The court ORDERS that the sum of \$5,509.47 shall be released from the escrow to Michelsen.

10 The Balance of the escrowed funds are to be released to Sherman.

11
12
13 Dated: June 17, 2016

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Evelio Grillo
Judge of the Superior Court

NOTICE TO INCREASE RENT

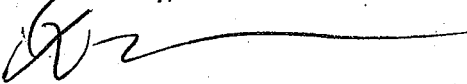
NOTICE to Mark Sherman, and any and all others in possession of the premises at 5825 Occidental, Oakland, CA.

Pursuant to the lease signed August 14, 1985, you are in possession of the premises at 5823 Occidental, Oakland, CA. Your rental agreement is now a monthly periodic tenancy and continues from month to month.

In accordance with your lease and the statutes and laws of California and Oakland, I am hereby giving you (more than) 60 days notice of a change in your rent.

Your rent will be increasing to \$4,000.00 (four thousand) per month. This increase will take effect June 1, 2016.

Yours truly,

A handwritten signature in black ink, appearing to be 'G. Sherman', followed by a long horizontal line extending to the right.

3/21/2016

EXH F

23

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2018 FEB 16 PM 4:56

LEAH HESS
Attorney at Law
1736 Franklin Street, 10th Floor
Oakland, California 94612
Telephone: (510) 451-3103
Facsimile: (510) 444-1704

February 16, 2018

BY PERSONAL DELIVERY

Barbara Cohen, Hearing Officer
c/o Roberto F. Costa, Program Analyst
City Of Oakland-Rent Adjustment Program
250 Frank H. Ogawa Plaza, 5th Floor
Oakland, CA 94612

Re: Legal Brief and Evidence for Remand Hearing
Sherman vs. Michelsen, Case No: T16-0258

Dear Ms. Cohen,

Enclosed please find the following documents filed for the Remand Hearing scheduled for February 23, 2018 in the above case:

1. Petitioner's Remand Hearing Brief
2. Photographs of the subject property
3. Haines Criss-Cross Directory Listings (re: subject property)
4. Oakland Residential Telephone Directory Listings
5. Occupancy Records (re: subject property) (1918-1928)
6. City of Oakland Building Department records
7. Mark Sherman's Lease for subject property
8. Statements and Declarations from previous residents at subject property
9. Notice of Rent Increase to Mark Sherman

Please call us if you have any questions.

Thank you,

Sincerely



Leah Hess

RECEIVED
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RENT ARBITRATION PROGRAM

2018 FEB 16 PM 4:57

STATEMENTS/DECLARATIONS
FROM PREVIOUS RESIDENTS
OF SUBJECT PROPERTY

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2014 FEB 14 PM 2:38

February 1, 2014

To whom it may concern,

I Charles Abraham lived at 5823 Occidental St. Oakland Ca. 94608 during the years 1976, 1977, 1978.

Charles Abraham

Charles R. Abraham

813 56th ST.
OAKLAND CA.

TENANT EVIDENCE FOR CASE # L13-0054

AR 423

000084

Declaration of Charles Abraham

1. I have personal knowledge of the facts stated in this declaration and, if called to testify, could and would testify thereto.
2. My name is Charles Abraham. I currently reside at 813 56th Street, Oakland, CA 94608.
3. My daughter and I resided at 5825 Occidental Street, Oakland, California 94608 from about 1976 until about 1983.
4. I found this rental unit through Harold Rus Michelssen, whom I knew as Rusty. Rusty was a friend of mine from graduate school, who owned the building and lived in an adjacent unit in the building.
5. I rented the unit from Rusty as a live/work space. Rusty was well aware that I lived in the space with my daughter during those years. He himself lived in the same warehouse, and an interior door connected our two living spaces.
6. My daughter and I each had a bedroom in the unit. Next to our bedrooms was a large open room in which I did fine woodwork. Adjacent to that open room was another large room which served as our living room, dining room, and kitchen. This room had a sink, a refrigerator, an oven, and a stove. I distinctly remember that the bathroom in the unit had a claw foot tub and a mahogany surround.
7. When Mark Sherman recently contacted me by phone about the current dispute with his landlord, I was reluctant to get involved because of my past friendship with Rusty. But I was willing to provide Mark with a letter stating that I lived at the property in question for some years in the late 1970s. I gave that letter to Mark when he dropped by my place to pick it up in February 2014.
8. When Mark told me that the hearing officer had disregarded my letter in her decision, I immediately agreed to prepare a second declaration for Mark in support of his appeal. I hope this written declaration is sufficient, but if necessary, I am willing to offer my testimony at a hearing to help clear up any confusion in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on MAY 15/2014 in OAKLAND, California.

Signed:



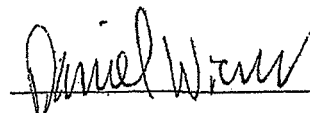
Charles Abraham

Declaration of Daniel Wiener

1. I have personal knowledge of the facts stated in this declaration and, if called to testify, could and would testify thereto.
2. My name is Daniel Wiener. My address is 156 Hoyt Street, Brooklyn, New York 11217.
3. To the best of my recollection, I moved into the unit at 5823 Occidental Street, Oakland, CA 94608 in 1976 and resided there until about 1978. I distinctly remember that I moved into the unit shortly before I graduated from college (I graduated in 1977) and lived in the unit for about one or two years.
4. I lived at 5823 Occidental Street with one other tenant, who had a large room in the unit.
5. We each rented and used the unit as a live/work space.
6. Because I lived at this unit for a short period about 36 years ago, I cannot recall the name of the other tenant who lived in my unit.
7. I had a small bedroom and a small studio space in the unit.
8. The unit had a large kitchen with the basic amenities, including a stove, a refrigerator, and a sink.
9. The unit had one bathroom, which I shared with the other tenant.
10. There were other people residing in the building at the time that I lived there.
11. The attached copy from the residential phone book listings includes my listing for the time period during which I lived at the property. My name was listed as Danl Wiener.
12. Mark Sherman first reached out to me regarding this dispute through my website, <http://danielwiener.com>, in March 2014.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on June 8, 2014 in Brooklyn, New York.

Signed:


Daniel Wiener

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CITY OF OAKLAND
RENT ARBITRATION PROGRAM

NOTICE TO INCREASE RENT

2018 FEB 16 PM 4: 57

NOTICE to Mark Sherman, and any and all others in possession of the premises at 5825 Occidental, Oakland, CA.

Pursuant to the lease signed August 14, 1985, you are in possession of the premises at 5823 Occidental, Oakland, CA. Your rental agreement is now a monthly periodic tenancy and continues from month to month.

In accordance with your lease and the statutes and laws of California and Oakland, I am hereby giving you (more than) 60 days notice of a change in your rent.

Your rent will be increasing to \$4,000.00 (four thousand) per month. This increase will take effect June 1, 2016.

Yours truly,




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DECLARATION OF TED GERMANN

I, Ted Germann, declare:

- 1. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I could competently testify thereto.
- 2. My current address is 12505 SE River Road, Portland, Oregon.
- 3. In the early 1980s, I played in a band that performed at various venues in the San Francisco Bay Area. Around 1984-1985 I resided, with other band members, at 5823-5825 Occidental Street, Oakland, California. I definitely lived there prior to February 1985.
- 4. The promises of 5823-5825 were fully equipt to live in. There was a kitchen, running water, bathroom and regular trash collection.
- 5. Other band members who lived at the Occidental Street property with me included Koith Hinyard, Clinton MacKay, Chris Schroeder and my brother, Tim Germann. Mr. MacKay located and rented the place and handled issues with the landlord such as rent payment.
- 6. During the time I lived at the Occidental Street property, I also rented a place with my wife up the street. However, I did reside at both addressos.

I declare under penalty of perjury of the laws of California that the forgoing facts are known to me personally, that they are true and correct, and that this declaration was executed in Port land, Oregon on February 20, 2018.



TED GERMANN

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RENT ARBITRATION PROGRAM
2018 FEB 22 PM 5:40

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CITY OF OAKLAND
RENT ARBITRATION PROGRAM

2018 FEB 16 PM 4:57

LEASE

Agreement between Rus Michelsen, Owner and Mark Sherman, Tenant, for a residential and studio space located at 5825 OCCIDENTAL, in Oakland, California 94608.

The TERM of the lease is one year, beginning September 1, 1985 and ending August 31, 1985. This lease is renewable for one year at a monthly rental of \$1225 plus or minus ^{Adjustment of Rent} 5%, consistent with the cost of living index based on the index changes from July 1, 1985 to July 1, 1986. RENT for September 1, 1985 to August 31, 1985 is \$1225.00 per month, payable in advance. Rent is payable on the first day of every calendar month to Owner at 80 La Espiral, Orinda, California 94563, telephone 415 254-1907.

The SECURITY/CLEANING DEPOSIT on this property is \$1225.00. It is refundable, with bank passbook interest if Tenant leaves the property reasonably clean and undamaged. *normal wear & tear excepted, interest on security deposit to be paid yearly*

If Tenant intends to renew this lease at the end of the term, or if Tenant intends to move, he agrees to give Owner at least 30 days written notice before the lease runs out. Otherwise, he will be regarded as automatically switching over to a month-to-month tenancy. Unless and until Tenant receives a 30 day advance notice of rent change, rent will be deemed at \$1225.00 per month during this period.

Owner agrees to refund all deposits due within 3 days after Tenant has moved out completely and have returned *keys*

Only Mark Sherman and one roommate of his choice are to live in this space at 5825 Occidental. No other persons ~~occupies~~ may live there without Owner's written permission. These premises may NOT BE SUBLET, without Owner's written permission. Owner agrees not to withhold permission unreasonably.

Use of the washer and dryer are included in the rent. ~~Tenant~~

2018 JUL 13 AM 10:14

Diane and Harold Rus Michelsen
P.O.Box 6363
Moraga, CA 94570
925 683 3693
Diane@lodm.com

Property Address: 5823 Occidental, Oakland, CA
Hearing Date: Friday 6/22/18, 10 a.m
250 Frank Ogawa Plaza Ste 5313, Oakland, CA

Sherman v. Michelsen # T160258

CLOSING BRIEF RE FRAUD AND MISTAKE

I.
GENERAL DISCUSSION

The City of Oakland's body of law must comply with CA law. The City has no special dispensation to create a new nonconforming body of law. Although the City's regulations allow a fraud action, this in and of itself does not preclude the specific tenets which must be pleaded in a fraud action under CA law and does not nullify due process requirements such as collateral estoppel and res judicata.

The judicial analysis of what facts and circumstances may allow a challenge to a final judgment for fraud are briefed in Owners Reply Attachment 1, filed July 2016, and more specifically in Memo filed 2/2/2018. (Both are incorporated by reference.)

A. NEWLY DISCOVERABLE EVIDENCE IS REQUIRED.

The facts alleged must be newly discoverable; i.e. not available previously even with diligent effort. It is not enough for facts to be newly discovered. If any other interpretation was allowed, certificate of exemption hearings would be just practice for tenants -- opportunities to refine one's case until one wins. Without the new evidence requirement, upon a loss, a petition claiming fraud can always be filed.

Although in his initial Fraud Petition, Tenant posits "new evidence", he reveals no "new evidence" at the time of filing this Petition or indeed even by the conclusion of this matter. Tenant made no attempt to demonstrate that the further evidence introduced here was "new evidence" or to show why, had Sherman prepared diligently for the first exemption, he could not have produced the evidence at the first hearing. That Sherman did not

endeavor to hunt for further facts before the first hearing does not make his counsel's later discoveries relevant.

Sherman makes no showing that *upon filing* this fraud petition, he had sufficient facts *previously undiscoverable* that the first hearing was fatally corrupt. In fact, there is no showing he had *any* more evidence upon filing the Fraud petition than when he first appealed the Hearing Officer's issuance of the Certificate of Exemption. The allegations and submissions in the record when Sherman filed this Petition are virtually identical to when that Appellate Panel ruled. The Appellate Panel refused to remand the matter, or reverse, and instead affirmed the issuance; as did the Superior Court and the Court of Appeal. The outcome here must be the same; fraud petitions must be something more than eternal evidentiary fishing (and harassing) actions.

Demanding "new evidence" was the express and correct legal analysis followed by the Superior Court and the Court of Appeal. Under that analysis, the more formal Abraham submission, and the Weiner submission were repeatedly determined not to be "new evidence". By extension, other evidence which Sherman produced for the fraud hearing would also be determined to be not new evidence; all of it was discoverable prior to the first exemption hearing.

A correct legal analysis confirms the initial dismissal of this Petition by the Rent Board. No more encompassing review of the record is needed.

B. CALIFORNIA STATUTES AND JUDICAIRY REQUIRE CLAIMS OF FRAUD TO BE PLED WITH SPECIFICITY.

Under the approach taken by California statutes and judiciary, this *requires* that a tenant claiming fraud or mistake in the issuance of a Certificate of Exemption allege with particularity the specific facts *then* known to the tenant which make that claim plausible. Owner believes this is the approach properly taken by the initial Hearing Officer on this Petition in dismissing the Petition.

C. THE HEARING OFFICER RULED THAT THE CASE DOES NOT FAIL BASED ON FAILURE OF THE TENANT TO ALLEGE FRAUD AND MISTAKE WITH ANY MORE SPECIFICITY THAN HE ALREADY HAS BECAUSE THE FORM ONLY DEMANDS A BOX BE CHECKED.

Owner contends that the form does not comply with the requirements of CA law and that this "loophole" ostensibly interpreted here as allowing tenant to redo the entire rent exemption action should not be allowed. At the very least, Tenant, at the onset of the fraud hearing or shortly after

filing his action, should have been required to detail with particularity what facts constitute his allegations of fraud or mistake.

Before the issues of fraud and mistake (as properly defined for purposes of a collateral challenge to a final decision) are entitled to disrupt that respite and subject the formerly victorious party to discovery, hearings, evidentiary hearings, the law imposes requirements that the challenging party demonstrate a likelihood of prevailing by pleading the fraud and mistake with particularity. (Please see page 6 of 1/14/17 Memo.) The law typically does not allow the respite from further litigation on the same issue of the exemption earned by the Owners through prevailing at the original hearing on their Petition for Exemption, then before the Appeals panel, a lengthy and hard fought appeal, then in the Superior Court and then in the Court of Appeal to be so easily lost.

Unless the pleading requirements imposed by CA law are respected, whenever a Tenant loses, an immediate new petition could be filed, based on the continued disagreement, implying to the losing party that the decision was reached by fraud or mistake. Tenant could relitigate forever the issue of the Certificate of Exemption without alleging any new facts to support his allegations and use the new action as a fishing expedition to find facts to buffet his claim. There would be no end. ("To withstand a demurrer, the facts constituting every element of the fraud must be alleged with particularity, and the claim cannot be salvaged by reference to the general policy favoring the liberal construction of pleadings." *Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal App4th 772, 782 (1994))

The necessity of specific pleading is also consistent with traditional legal principles that frown upon the use of fraud claims as a post-hoc insurance policy. As in this case, without the initial inquiry of what facts the petitioner had at the time of filing his petition of fraud or mistake, the administrative proceeding would become a hunting expedition to seek facts supporting the allegation.

D. INTRINSIC FRAUD SHOULD NOT BE ALLOWED TO BE THE BASIS OF A FRAUD HEARING.

Under CA law, fraud must be extrinsic, such as misleading a litigant about the time, place, or purpose of a hearing. Intrinsic fraud, a witness telling falsehoods or making a mistake is not enough. (Please see previous submissions for case law.) Extrinsic fraud did not exist here: Sherman participated knowingly and energetically at the first hearing.

Sherman alleges that the rent board hearing is equivalent to an arbitration hearing and therefore intrinsic fraud should be allowable grounds for a

fraud hearing. However, this is not true. Typically arbitrations do not have the right to appeal, and may have crippling time constraints and arbitrators who may not be independent. Rent Board hearings are mini trials, with the right of discovery, and appeal. Should litigants need further time for discovery, they may make motions to reschedule or continue the case for cause.

Additionally, the nature of the Rent Board proceedings are such that a party could anticipate and effectively counter fraud arising in the hearing. For example, in the exemption hearing the issue was whether there was residential use prior to the issuance of the Certificate of Occupancy. Sherman presented his evidence and by his choice, did not have his witness appear. Landlord, as anticipated, denied such use and presented affidavits and testimony. Sherman used his right to appeal in the Rent Board Appeal Panel, the Superior Court and the Court of Appeals and then filed this fraud action when he didn't prevail.

There are already hundreds of millions of United States administrative hearings. If an exception were recognized for such hearings from the need for intrinsic fraud, Sherman would have dozens of cites for the propositions from all jurisdictions and in federal law. He has none.

II. EVIDENCE PROFERRED.

Typically in an administrative hearing all evidence is admitted and it is up to the hearing officer to decide how much weight to give each item. Owners' contention is that none of this evidence is new; all could have been presented in the first hearing had the tenant been diligent; therefore *all* of this further evidence should be excluded. For illustrative purposes, some of the evidence/testimony is itemized below.

A. RUS MICHELSEN'S TESTIMONY. Michelsen testified when he purchased the building, it had been zoned commercial and was newly zoned residential. He sought and received a letter from the City of Oakland giving him permission to live in it and do art. At that time, the building did not lend itself to being residential due to its configuration. All rentals prior to Certificate of Occupancy issuance at 5823-25 Occidental were for commercial use. He had no knowledge of any abrogation of the contracts.

B. SHERMANS TESTIMONY. In the exemption hearing, Sherman testified about his unit, gave hearsay and described his efforts at locating

information. None of this is new information. Only his original testimony should be given weight.

C. OCCUPANCY RECORDS PRE 1974 WHEN MICHELSEN PURCHASED THE BUILDING SHOULD BE GIVEN NO WEIGHT AS TO WHETHER THE PROPERTY WAS USED FOR RESIDENTIAL PURPOSES. From records Sherman introduced, it appeared the building in the early 1900s was used/zoned for residential purposes. However, the configuration of the building, (if it was the same building and not just on the same land), was totally different. According to 8/30/1924 and 1/25/1925 newspaper ads, the building was composed of one nine room house for two families. That the building had been used for/zoned commercial prior to his purchase was confirmed by Rachel Flynn's original email and in her email of May 06, 2016 wherein she referred to the buildings' permits in 1931 and 1964 as proposed use of building as "painting company" and "printing plant".

Michelsen testified that when he bought the building it was a large open space with a lunch room and toilet facilities and it had been used as a print shop.

Certainly these early instances of residential use were before the building's usages, zoning and configuration changed, much before any consideration of the rent control ordinances and exemptions. This clearly is not what the regulation refers when speaking of the building not being used for residential purposes prior to the certificate of occupancy being issued.

The documents Sherman introduced from the early 1900s, including but not limited to the newspaper ads advertising the property for sale, the early census records, the occupancy records from 1918-1928, city directories, and voter registration records should be given no weight as to whether the property was used for residential purposes prior to the certificate of occupancy. Additionally, these records are and have been available and cannot be considered as "new" or previously unavailable evidence.

D. & E. DECLARATIONS AND (FURTHER) TESTIMONY OF ABRAHAM AND WEINER WERE PREVIOUSLY CONSIDERED AS "NOT NEW EVIDENCE" AND WERE EXCLUDED. THEY SHOULD CONTINUE TO BE EXCLUDED. The revised declarations and further testimony from Abraham and Weiner were excluded previously. They should not be able to be kited back into court under a fraud allegation. Further testimony and

declarations should be given no weight. Please see Brief Attachment 1, Owners Response 7/21/16 page 5 et al.

It is undisputed that Abraham leased space; it was Michelsen's testimony that he leased it for commercial purposes. Abraham's declarations and testimony are at odds with themselves as to time frames, and who lived there and also at odds with Weiner's as to time frames and who occupied the space. Further, accepting Abraham's testimony/declarations requires the hearing officer to believe he would have exposed his child to a toxic atmosphere of sawdust, glue, varnish and other contaminants of artistic and woodworking use and raucous band practice.

Weiner testimony: The Weiner declaration was not accepted as new evidence in any of the former appeals. Weiner, who claimed he moved in sometime in 1976, rented from a roommate. He indicated he met with Michelsen from time to time, but Michelsen rebutted this and denied any knowledge of him. That Weiner indicated Michelsen had dogs does not indicate he lived there or that Michelsen knew of him as a resident; it is not a stretch to believe, if anything, that he rented studio space only. Weiner also said the child came by every once in a while, but never mentioned living with a child which was in conflict with Abrahams earlier declarations. Weiner's testimony is not proof that Michelsen knew of him or that he resided in the unit.

F. TESTIMONY OF TED GERMANN WAS REBUTTED BY MICHELSEN AND BY CLINT MACKAY. Germann's testified the band lived at the premises; that the premises were fully equipped with a kitchen, full bathroom and regular trash collection and that he also lived with his wife up the street.

This testimony was rebutted by Michelsen who testified that the premises were composed of a commercial lunchroom, including a sink, not a stove, and a bathroom toilet and sink, not a shower. The premises were rented for commercial purposes. Trash pick up was provided for the commercial space.

Declaration of Clint Mackay, further rebutted Ted Germann's statement. Mackay stated that he located and rented the space for commercial purposes, for a music recording and band rehearsal business and had limited contact with Michelsen. His declaration stated the premises had limited lunchroom and bathroom facilities. He stated that Ted Germann never lived there, noting the other declarant had a separate residence with his wife.

Former tenants were available at the time of the original exemption hearing. While the evidence may be newly discovered, this is not newly discoverable evidence. Given that Germann's testimony is rebutted by Michelsen's and Mackay's testimony, Germann's testimony should be accorded little or no weight.

G. THE UNLAWFUL DETAINER COMPLAINT IS NOT FOR THIS ADDRESS AND SHOULD BE GIVEN NO WEIGHT. The Unlawful Detainer Complaint was for 929 Grace Street, a completely autonomous unit. The Superior Court Eviction Complaint has been part of the court records, easily searchable, since at least 1985, and thus cannot be considered new evidence.

H. THE HAINES CRISSCROSS DIRECTORY AND OAKLAND RESIDENTIAL PHONE BOOK LISTINGS WERE ENTERED AS EVIDENCE AND CONSIDERED BY THE FIRST HEARING OFFICER. It is unclear where Crisscross got its information from as to residential/commercial usage, although it appears it came from the phone books. Businesses and residence listings are both on same page in the books, therefore are not proof of residence. This is not new evidence.

I. CITY OF OAKLAND BUILDING DEPARTMENT RECORDS AND RACHEL FLYNN'S EMAIL. All of these items were previously submitted and accepted as evidence during the original exemption hearing and considered by the hearing officer. There is no showing that these documents were fraudulent. Further examination and amplification of this should not be allowed.

J. THE VOTER REGISTRATION RECORDS ARE INCORRECT AND CONFUSING. Tenant did not have this information in his possession at the time of filing the fraud complaint and had no idea what it would show. This is a fishing expedition at its best and the time for such would have been at the initial hearing discovery, not in the fraud action.

According to Chuck Abraham's first declaration, he was in residence from 1976 to 1978. Later his declarations changed the dates and that he lived there with his daughter. He made no mention of other renters. According to the voter registration forms, he was registered there from 1978-1985. His alleged roommate, DW, was not registered.

According to voter registration records in
 1978, there were 3 registered voters showing this address;
 1979, there were 3 registered voters showing this address;
 1980, there were 2 registered voters showing this address;

1981, there was 1 registered voter showing this address;
 1982, there were 4 registered voters showing this address;
 1983, there were 2 registered voters showing this address;
 1984, there were 5 registered voters showing this address;
 1985, there were 4 registered voters showing this address.

Who were these people who registered to vote showing this address?
 How could there have been 5 people in the space and Abraham doesn't
 mention them? Either the voter registration information is not accurate or
 Abraham's declarations are not accurate.

Further, the evidence produced nothing that could not have been
 discovered previously. The history was always there. The information
 was findable with reasonable diligence; if more time was needed, a
 continuance could have been sought.

Owners believe that the so called fraud is just a continuation of Sherman's
 attempts to present the "newly discovered" evidence he attempted to
 introduce on the appeal of the Decision finding the unit was exempt. The
 Appeal Board, the Superior Court and the Court of Appeals all determined
 that such "new evidence" did not constitute new evidence, but was
 evidence which Sherman should have introduced at the first hearing: *that
 evidence legally cannot be the basis of a fraud claim.*

In reviewing the record, we must keep in mind that the evidence first must
 be sufficient to show fraud invalidating the first hearing before any
 evidence relevant to the underlying issue – the Certificate of Exemption –
 is considered. What do we mean by "fraud" at the first hearing (if not
 what the law defines as fraud permitting a collateral challenge)? To
 respect the dignity of hearings, it would have to be some showing that
 wholly or in good conscience invalidates the first hearing. Simply rebutting
 some evidence is not sufficient. That criterion cannot be met here.

III.

TENANT HAS MADE NO SHOWING OF FRAUD IN THE LEGAL SENSE.

Who committed the alleged fraud or what the alleged fraud was that was
 committed has been articulated by Sherman only in his Remand Brief. He
 accused his landlords of giving "false testimony." This leads to the
 argument that this would be intrinsic fraud and not the type of fraud to be
 included in a fraud complaint.

This is not a case where a finding of fraud sufficient to invalidate the prior
 Decision is possible. Even assuming that Mr. Michelsen falsely stated he

was unaware of any prior residence use, if the uncontested evidence remains sufficient to support the Decision, questionable statements cannot be sufficient to invalidate the decision. A litigant's statement on the ultimate issue is rarely given much weight by itself in an administrative hearing. The officer looks at the totality of the evidence to make the ultimate decision. How can there be fraud if the hearing officer could have rationally decided the same way completely ignoring the challenged testimony? How could one find fraud in this case without simply saying that any prior hearing officer's decision is subject to eternal review upon disagreement with what evidence was given what weight?

Tenant has made no showing of actual fraud/perjury. Mr. Michelsen may not have been aware of his tenants' purported unpermitted use of the space on the opposite side of the building, or considered such use as random or sporadic, rather than actually residential. The newly offered evidence here simply does not include any inconsistent prior statement, whether oral or written, in which Mr. Michelsen is quoted as admitting residential use, nor any inconsistent document with his signature. Any additional evidence offered which, by making a finding of residential use earlier more likely than not, *still* does not prove Harold Michelsen's contrary testimony was knowingly false. No showing of fraud, even in the common sense, is made.

Additionally, there is insufficient evidence to establish perjury by Mr. Michelsen even when we range far afield from the legal view of how a fraud collateral challenge to a final judgment should be handled or even if we consider all the evidence, irrespective of whether it is "new evidence" or was known when the fraud petition was filed. The burden, by a preponderance of the evidence, is on Sherman, to make the fraud showing. He has not met the burden.

IV.

RES JUDICATA AND COLLATERAL ESTOPPEL SHOULD APPLY TO THIS FRAUD PROCEEDING.

A. THIS ACTION IS A COLLATERAL ATTACK ON THE EXEMPTION JUDGMENT.

The definition of collateral attack is a legal action to challenge the ruling in another case. Sherman writes he is not attempting to vacate the judgment in the exemption case, and is alleging a new cause of action, therefore there should not be any res judicata or collateral estoppel. However, the distinction of vacating a ruling as opposed to getting relief notwithstanding a final judgment is not supported by authority nor logic. This is as circular as a distinction without a difference. If every fraud case was considered a

wholly new action, no fraud case would ever be precluded under res judicata or collateral estoppel and that entire body of law wouldn't exist.

B. PRIMARY RIGHTS THEORY BARS AND DEFEATS THE FRAUD PETITION UNDER RES JUDICATA.

The "primary right theory" which determines whether res judicata bars a second action, is discussed in Memo to Rent Board, Feb 2, 2018 Page 4A2. It states "...the invasion of a primary right gives rise to a single cause of action, even though that cause of action may find expression under the law in a number of different counts or legal theories." *Fujifilm Corp. v. Yang*, 223 Cal.App.4th 326 (2d Dist. 2014). "For the purposes of res judicata, causes of action are considered the same if based on the same primary right." *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296,325. "The primary right is simply the plaintiff's right to be free from the particular injury suffered," (*Mycogen*, supra 28 Cal.4th at p904.) as opposed to the particular theory asserted by the litigant or legal theory advanced. (emphasis added) *Boeken v. Phillip Morris USA* (2010) 48 Cal.4th 788, 798.

The primary right here is Tenant's right to be free from the exemption of his unit from rent control. Tenant claimed (Attachment A of his initial fraud petition) that "he will prove that his rental unit was used residentially prior to the enactment of the rent ordinance and prior to the issuance of the certificate of occupancy." This is the very same claim that was at issue in all the exemption proceedings and that claim was given a full and fair hearing and three appeals!

The concepts of finality—one hearing and one final decision on an issue—sometimes called issue preclusion (Collateral estoppel) and claim preclusion (res judicata) cannot be immediately evaded by a rote saying of fraud or mistake. If it were that easy, the respite from litigation which those doctrines are supposed to provide would be nugatory.

C. THAT THE STATUTES AND REGS ALLOW FOR A SEPARATE FRAUD ACTION DOES NOT PRECLUDE RES JUDICATA OR COLLATERAL ESTOPPEL.

Sherman has argued that res judicata and collateral estoppel do not apply to the Rent Board hearings because fraud contests are authorized by regulations. The fact that the ordinance explicitly provides that a certificate of exemption may be challenged in a separate subsequent proceeding does not demonstrate an intent that res judicata and collateral estoppel not be applied. There may well be instances where collateral challenges are appropriate, (e.g. extrinsic fraud,) just not in this case. The very fact that the regulation allows for a second action demonstrates an

intent to recognize doctrines of issue and claim preclusion by citing the very principles which allow a challenge.

Tenant's position is indistinguishable in practice from having Certificates of Exemption being forever temporary. As soon as one is issued, a tenant can freely allege fraud, begin a fishing expedition through administrative discovery devices, cease paying the increased rent since a rent board action is "pending", and obtain another full hearing. Like shampoo instructions, ...wash, rinse, repeat..., it could be endless. This is not a procedure properly within a set of administrative regulations governing important business. It is a recipe for harassment. Yet, this result is unavoidable *unless* the considerable body of law protecting the finality of judicial decisions is respected.

D. FORUM DOES NOT CONTROL CALIFORNIA LAW.

The City of Oakland demonstrated no particular right to invent a one sided approach giving tenant numerous opportunities to litigate an exemption case and ignore established California law. If the Oakland Rent Ordinance throws out doctrines of issue and claim preclusion for exemption hearings, and the need to plead fraud with particularity, then where did it get the power to override generally applicable CA law in this matter? How can it preclude issue and claim preclusion which are part of due process in American law? How can it give new definitions to legal fraud and mistake? Why didn't it make its position clear rather than choose language which seems to identify recognized exceptions to the doctrines of collateral estoppel and res judicata?

V.

GENERAL DISCUSSION OF MISTAKE.

Under California law, no "mistake" of the type recognized as allowing a challenge to a prior final decision (a "collateral challenge") is possible here. California case law holds that "mistake" allowing collateral challenge can only be of essential facts, not actually litigated, where the mistake was mutual between the parties and shared by the hearing officer or judge. (please see: Owners' Reply to the Petition)

Even if the legal approach to analyzing mistake/collateral challenges is abandoned, a mistake case should not be allowed here. A tenant is not entitled, by claiming "mistake", to countless further hearings until the Hearing Officer, in the tenant's opinion, "gets it right".

Sherman's "mistake" claim is apparently simple disagreement with the prior outcome. Allowing such collateral challenges would deprive Rent

Board exemption decisions of finality or respect. Sherman's "mistake" claim must be denied.

VI.

WHOSE MISTAKE IS BEING EVALUATED? DOES IT DIFFER FROM THE APPEAL PROCESS ALREADY LITIGATED?

Sherman has never explained what "mistake" underlies his current challenge to the exemption decision, which was upheld by the Superior Court and by the Court of Appeal in denying his appeal from that decision. No evidence submitted in the current proceeding supports a claim of mistake.

If the purported mistake was by the Hearing Officer, it should have been corrected by the Appellate Panel of the Rent Board. Additionally, it is impossible to distinguish that situation from what was asserted and argued during the writ of mandate proceeding and appeal. Sherman raised literally dozens of issues in his writ of mandate and appeal, alleging *inter alia* that he had "new evidence", that the Hearing Officer improperly rejected or discounted his evidence, was biased in favor of landlords, denied Sherman due process, etc.; each complaint was analyzed and dismissed by the Superior Court and by the Court of Appeal.

Sherman fares no better if the purported mistake was by Sherman himself, in believing that the short Abraham letter necessarily determined the matter, so that he then abandoned any further investigation or preparation for the initial exemption hearing. Accepting that interpretation—that this qualifies as a mistake to set aside a verdict—means that all exemption hearings would basically be practice sessions for the tenant. Whenever a tenant loses, a new hearing will be provided automatically on a claim of "mistake", until that tenant exhausts the research which should have been done for the initial hearing, or the tenant prevails.

However, Rent Board hearings should have import and be respected; California Maxims of Jurisprudence (Civil Code Sections 3517 and §3527 apply here fully: "No one can take advantage of his own wrong." "The law helps the vigilant, before those who sleep on their rights." If it was Sherman's mistake, there was no showing he wasn't fully aware of issues and what evidence was relevant.

VII. CONCLUSION.

The outcome of this case is entirely dependent on whether the City of Oakland follows CA law or creates its own body of law and ignores due process. This brief speaks to the specific requirements of fraud actions: a) that it be extrinsic fraud, rather than intrinsic, b) that the allegations be pleaded with specificity and c) that the evidence be newly discoverable. It also speaks of res judicata and collateral estoppel, even though the Hearing Officer ruled it had no application to this case.

Sherman states, "the purpose of the rescission hearings in which tenants may challenge previously granted Certificates of Exemption is to correct erroneously granted permanent exemptions." However, whether this granting is erroneous depends on whether there was external fraud, precluding a full and fair hearing on the issues, not whether claimant continues to believe the case had the wrong outcome. A fraud petition must be something more than disagreement with the hearing officer's weighing of the evidence.

Sherman ignores this; he writes that the methodology of this hearing should be to completely ignore *all* previous hearings and appeals (which decided that Sherman could have in the exercise of reasonable diligence have presented the declarations and witnesses at the initial hearing and that therefore none of this is "newly discovered evidence.") He writes in order to discover fraud which he equates with "wrong outcome", *all* the evidence which is relevant to that question, new and old, must be considered including testimony from previous witnesses. He states (page 14 remand brief), "this includes witnesses who *might have been discovered prior to the initial exemption hearing.*" Sherman's position is that *all* the evidence now presented should be reviewed to determine whether the first decision was correct, irrespective of whether it is "new"--virtually eliminating any need to show fraud or mistake independently and ignoring some five plus years of litigation! This is not what Fraud or Mistake in the legal sense means and flies in the face of legal principles of finality.

But even *arguendo* accepting a novel view that "fraud" in the popular sense is relevant, Tenant must show the *previously unavailable* evidence which *demonstrates* – not just that on further submissions a hearing officer could have decided the prior petition in Tenant's favor –that the evidence presented by Owner at the prior hearing was so infected with conscious falsehood or absolute invention (*e.g.*, a fabricated document) that even assuming the prior Hearing Officer gave little weight to Owner's testimony (since it was contested), the prior decision cannot stand.

The evidence presented is not newly "discoverable" evidence and goes to intrinsic rather than extrinsic fraud. No extrinsic fraud is shown. The declarants were available; all could have been located much earlier so as to be presented at the initial hearing. The evidence is insufficient to overturn the original decision and should be deemed not persuasive in a fraud hearing because of this.

If the first evidence submitted by Sherman was the only evidence to consider, then it is not difficult to understand that the first hearing officer could have easily decided in favor of Michelsen. It was a judgment call made by the hearing officer. Michelsen, aged 76, is suffering from debilitating disease. Even if parts of his testimony are challenged by others, there is no inconsistency in writings from one hearing to next. Even without considering the portions of Michelsens testimony which are contested, there was sufficient evidence for the first hearing officer to find in favor of the certificate of exemption. The building permits, Certificate of Occupancy, email from Rachel Finn, testimony of Diane Michelsen all supported the exemption finding.

There is no newly discoverable evidence to prove Michelsen's testimony was false or fraudulent. Had the tenant provided all his newly discovered evidence at the first hearing, he may have prevailed, but in this fraud hearing, new evidence which was not newly discoverable should be excluded. With these exclusions, by law, the tenant did not meet his burden of proof.

Respectfully submitted,


Diane Michelsen

In Pro Per for Diane and Rus Michelsen.

July 13, 2018

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**Housing and Community Development Department
Rent Adjustment Program**

CASE NUMBER: T16-0258, Sherman v. Michelsen
PROPERTY ADDRESS: 5823/5825 Occidental Street, Oakland, CA
PARTIES: Mark Sherman, Tenant
Diane and Rus Michelsen, Owners

PETITIONER MARK SHERMAN'S REMAND HEARING BRIEF

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PETITIONER MARK SHERMAN'S REMAND HEARING BRIEF

I. INTRODUCTION

Petitioner is not pursuing his initial claim of fraud *and* mistake and proceeds on his fraud allegations only. After review of the entire record to date, including the hearing tapes, it is difficult to conclude that the certificate of exemption was the result of anything but fraud. Harold Rus Michelsen and Diane Michelsen obtained the certificate of exemption through their false and misleading statements to the RAP in the initial exemption case. The falsehoods were made for the purpose of inducing the RAP to issue a certificate of exemption for the rental unit inhabited by their tenant, Mark Sherman. They succeeded in obtaining the certificate, to the detriment of Mr. Sherman and the City of Oakland.¹

¹Of course, it is possible that the Hearing Officer may take a less harsh view of the Michelsen's representations about their property, finding that they resulted from the remoteness of the events and the vicissitudes of memory. Petitioner however regards this as the less likely explanation for the award of a certificate of exemption.

II. BRIEF HISTORY OF PRIOR PETITIONS

A. Sherman's Petition (Failure to Serve RAP Notices)

In 2012, Mark Sherman filed a tenant petition protesting rent increases that his landlords, Diane and Harold Rus Michelsen, had imposed over the years. (Sherman v. Michelsen, T12-0332). He prevailed in his claim, receiving an order for overpaid rent and his rent was set back to the initial 1985 level. The Michelsens appealed to the Rent Board, which sustained the Hearing Decision. During the course of the petition, the landlords did not raise permanent exemption as a defense. The Michelsens petitioned the Superior Court for a Writ of Mandate to remand the case back to the Board. (Michelsen v. Oakland Rent Adjustment Board, Alameda County Superior Court No. RG14-711405)

B. Michelsen's Petition for Certificate of Exemption

In December 2013, the Michelsens filed their petition for a certificate of exemption. (Michelsen v. Sherman , L13-0054). Sherman responded, challenging their claim that 5825/5823 Occidental Street, Oakland had never been used residentially.

He located a former tenant, woodworker Charles Abraham, and obtained a one-sentence unsworn letter from him, stating he had lived at 5823 Occidental in 1976, 1977 and 1978.(Exh. 2) Sherman submitted the letter and a copy of Abraham's 1977 and 1978 residential telephone directory listings. (Exh. 3)

The Michelsens submitted Rus Michelsen's sworn declaration stating that Sherman's unit had never been "rented as" residential property prior to the 1985 certificate of occupancy. Diane Michelsen testified that the rental unit was not habitable in 1982, and described the conversion of the property into residential rental units in 1984. A certificate of occupancy was issued in 1985. The owners submitted an email from a city official to their representative, Greg McConnell,

which stated that housing “went into” the property “by the mid-80’s”. (Exh 1)²

The Michelsens prevailed. The Hearing Officer found that Mr. Sherman’s showing was outweighed by the owners’ evidence. Her order granted the landlords’ petition, declared the property exempt, and ordered issuance of a certificate of exemption. (Hearing Decision, L13-0054)

Sherman appealed to the Board. By that time, he had obtained a sworn declaration from Mr. Abraham, describing his tenancy and offering to testify in person. He located a second former tenant, Daniel Wiener, who also lived in Sherman’s unit prior to 1985. Wiener provided a sworn declaration detailing his residence at Occidental Street. The Board upheld the Hearing Decision and rejected Sherman’s assertion that the matter should be remanded for consideration of the declarations as “new evidence.” (Appeal Decision, L13-0054)

C. The Superior Court Judgments in the Rent and Exemption Petitions

Sherman challenged the Board’s exemption determination in a petition for writ of mandate in the Superior Court, seeking a remand back to the Rent Board. (*Sherman v. Oakland Rent Board* Alameda County Superior Court No. RG15-785257) The Superior Court deemed Sherman’s writ petition and the Michelsen’s previously filed writ petition to be related matters. The two proceeded together.

The Michelsens prevailed in the exemption petition. The trial court found that the Rent Board did not err in failing to remand for consideration of new evidence. Rather, it found that Sherman did not employ reasonable diligence in locating and presenting the evidence at the hearing level. The Trial Court also found that the Hearing Decision was supported by substantial

²The evidence submitted by the owners in the initial exemption petition hearing will be examined in greater detail *infra*. Mr. Sherman’s claim is based upon the knowingly false statements made by the landlords in the exemption proceedings.

evidence. (Judgment–Writ Denied, Case No: RG15-785257, dated 2/23/2016).

Mr. Sherman prevailed in his writ petition for lack of RAP notices, meaning that the rent abatement was not invalidated, and the rent remained rolled back for the months prior to the final Rent Board order exempting the property. (Judgment–Writ Denied Rent Petition **date**)

D. Court of Appeals Opinion on Exemption Petition

In an unpublished decision, issued April 26, 2017, the Court of Appeals upheld the Superior Court’s judgement, finding that Mr. Sherman was not denied due process when the Rent Board refused to remand. The Court found that Sherman had not shown sufficient diligence when he failed to locate Mr. Wiener in time for the RAP hearing. The Court also found that the Hearing Decision was supported by substantial evidence. (*Sherman v. City of Oakland (Rent Board)* Case No. A147769, Opinion 4/26/17.

E. Sherman’s Petition for Rescission of the Certificate of Exemption

On March 21, 2016, the Michelsens served Sherman with a rent increase notice which more than doubled his rent, to \$4,000. He timely filed a RAP petition, challenging the increase. His primary claim was that the certificate of exemption had been obtained through fraud and mistake. (Tenant Petition, Record on file herein)

Unfortunately, instead of providing a hearing, the Hearing Officer and later the RAP Administrator issued summary administrative decisions dismissing his petition.

Mr. Sherman sought a writ of mandate from the Superior Court, asserting denial of due process. (*Sherman v. City of Oakland Rent Adjustment Program, Alameda County Superior Court*, Case No. RG16-843773) After consideration by the Board in a closed meeting, the City of Oakland agreed that the RAP had denied his due process rights. The City moved the Superior Court to remand the matter back to the Rent Board and dismiss the writ petition. The motion was

granted and this remand is the result. (Alameda County Superior Court, Case No: RG16-843773 Order Granting Motion to Remand and Dismiss, dated 7/12/2017).

III. LEGAL ISSUES

The Hearing Officer ordered the parties to address certain issues presented by this case. They are directed to address whether any of the facts upon which the tenant relies were known or should have been known prior to the underlying RAP case and whether that impacts his claim; whether he had a different duty to establish what could have been determined in the prior decision; and whether Sherman's position is different from other tenants alleging fraud in a challenge to a previously issued exemption, because he was the tenant in the underlying case. Finally she directed the parties to brief, in detail, the legal and factual standards applicable to claims of fraud and to specify the factual basis of the claim – who committed the fraud, the nature of the fraud, and what was done that constitutes fraud.

A. The Rent Ordinance Provides Safeguards Against Fraud in the Granting of Certificates of Exemption; It Should Be Liberally Interpreted to Promote the Beneficial Purposes for Which Those Safeguards Were Enacted

This action examines whether the certificate of exemption resulted from fraud. The Ordinance provides the statutory authority for rescission based upon fraud.

Certificates of exemption are permanent. They remove rental units from Oakland's stock of affordable housing. Thus, a wrongfully issued certificate of exemption robs both the City and resident tenants of the protections afforded by the Rent Ordinance.

The Regulations provide for certain safeguards against wrongful issuance:

Whenever an Owner seeks a Certificate of Exemption the following procedures apply:

- a. The petition cannot be decided on a summary basis and may only be decided after a hearing on the merits;

- b. Staff may intervene in the matter for the purpose of better ensuring that all facts relating to the exemption are presented to the Hearing Officer;
- c. In addition to a party's right to appeal, Staff or the Hearing Officer may appeal the decision to the Rent Board...

Regs., 8.22.030.C.1.(a) - ©

These Regulations ensure that a certificate cannot be granted by default. If no tenant appears at the hearing, the hearing must nonetheless go forward and the owner must present evidence to prove each element of the claim. However, despite their "permanent" nature, certificates *can* be rescinded if they were issued as a result of fraud or mistake. (OMC 8.22.030.B.1.b; 822.030.B1.c) These provisions demonstrate a policy of caution in granting permanent exemptions, and a policy of permitting rescission of wrongfully granted certificates of exemption. They promote the goal of protecting affordable housing in Oakland. The necessity for this "safety valve" of rescission is clear. There are many potential avenues for owner fraud.³ Given their importance they have in preventing fraud and protecting affordable housing, these provisions of the Ordinance should be liberally interpreted in a manner so as to promote their beneficial purposes.

Although the provisions of the Ordinance are clearly intended to prevent wrongful

³ A Landlord could, for example, wait until a unit was empty before applying for a certificate, in order to guarantee no opposition. Or a landlord might, as the owners have done here, delay seeking a certificate of exemption until long after the certificate of occupancy has been issued. That way, proof of former residential occupancy would be extremely difficult. If the landlord applies for an exemption (rather than raising exemption as a defense to a tenant petition) the landlord gains the advantage of time. The landlord may take as much time as he or she wishes to put together his or her exemption case. The tenant is then required to gather evidence from decades past to prove the property was residential prior to issuance of the certificate of occupancy.

issuance of certificates of occupancy, they provide little in the way of actual guidelines for how fraud or mistake cases should proceed. No doubt, this is because there has been little opportunity to 'flesh out' those provisions. According to the City, the RAP has not previously held "fraud or mistake" hearings. "This is somewhat uncharted territory....Given the Appellate Court ruling,...Mr. Sherman is precluded from using prior evidence and arguments to challenge whether his unit is exempt. Although it is a fine and somewhat blurred line, Mr. Sherman is, however, able to use (new or prior) evidence and/or testimony to prove whether there was "fraud or mistake" when the hearing officer determined the unit was exempt." (City of Oakland, Reply to Opposition to Motion for Remand and Dismissal Alameda County Superior Court, Case No. RG16-843773).

In this case, Mr. Sherman now presents both new *and* prior evidence to demonstrate fraud. He should not be penalized for his unsuccessful efforts in prior proceedings. The rescission provisions of the Ordinance allow for this new and different claim. Unlike the landlords, who took eleven months after Mr. Sherman's initial rent petition to claim exemption, they had plenty of time to prepare. Mr. Sherman received notice of their exemption petition less than a month and a half prior the hearing. He should not be prevented from making a full presentation of his case by prohibiting him from using "prior" evidence. Full presentation of the facts promotes the beneficial purposes of the ordinance provisions permitting rescission. The rescission provisions of the Ordinance him to make this new and different claim and do not prohibit him from presenting previously raised evidence.

- B. Mr. Sherman Has a Different Duty in This Petition than His Duty in the Exemption Petition**
 - 1. The Board has Taken the Position that Mr. Sherman's Present Claim Is Different from his Claim in the Exemption Petition**

In its motion for remand to the Superior Court, the Rent Board took the position that Mr. Sherman is *not* attempting to set aside the final judgment of the Court of Appeal. This is not a re-litigation of the original exemption hearing. A challenge to a previously issued certificate of exemption based upon fraud or mistake is not the same claim as opposing a landlord's petition for a certificate of exemption even though it may involve overlapping evidence.

As stated by the City in its motion:

Although Ms. Michelsen argues that the California Court of Appeal decision finally decided the exemption finding was proper, Mr. Sherman's tenant petition argues something different – there was “fraud or mistake” in the facts leading to the underlying finding. The evidence and declarations that Mr. Sherman initially presented to the hearing officer in 2014 and 2015 were designed to refute Ms. Michelsen's claim that the property was exempt. The California Court of Appeal decision reviewed Mr. Sherman's evidence on this ground only. *Even if Mr. Sherman offers similar evidence in the instant tenant's petition, he now does so in an attempt to prove a different theory, with a different legal standard, and having the burden of proof.* [Emphasis added]

(Alameda County Superior Court RG16-843773, *Michelsen v. City of Oakland, et al.* City's Reply Brief in Support of Motion to Remand and Dismiss, at p. 5:22-24)

The Ordinance and Regulations provide that a claim of fraud or mistake will arise *after* issuance of the certificate of exemption. They speak of tenant challenges to “previously granted” (OMC 8.22.030.B.1.c) and “previously issued” certificates of exemption. (Regulation 8.22.030.C.2) Under the Ordinance, no cause of action for fraud *could* arise until a certificate has been granted. Once it is issued, the tenant has a different duty from opposition to a petition for exemption in which the landlord bears the burden of proof.

Sherman's burden in this action is heavier than at the exemption hearing. In the exemption hearing, Sherman only had to disprove a single element of the owners' claim in order to prevail. He had to prove that the property had not been used residentially prior to issuance of the certificate of occupancy. Now, he must prove every element of fraud. He must show, not only

actual residential use prior to the issuance of the Certificate of Occupancy, but that the Michelsens knew of that use and lied when they repeatedly represented that there had been no such prior use.

2. Participation in the Exemption Hearings Should Not Impinge on Sherman's Fraud Claim; His Position Is the Same as Any Other Tenant Seeking Rescission Based on Fraud

Nothing in the Rent Ordinance bars a tenant who unsuccessfully opposed a landlord's exemption petition from filing a petition challenging the resulting certificate of exemption on the basis of fraud. Nor should such a tenant be held to a different standard than a tenant opposing a landlord's exemption petition.

The Court of Appeal has determined that there *are* facts that were, or should have been known by Mr. Sherman prior to the hearing in the landlord's exemption petition.⁴ However, his failure to have presented those facts at the earlier should not preclude him from introducing evidence of those facts into these proceedings. He should not be penalized in the present case, which is a separate and new

The only way that Mr. Sherman's position now has changed from the position he was in at the hearing on the landlords' exemption hearing is that, in this petition, he has had more time to gather evidence. The results are obvious.

Sherman should not be barred from presenting the live testimony of witness he located prior to the initial exemption hearing (Mr. Abraham), or the witness he found prior to the Board Hearing (Mr. Wiener). Nor should he be prevented from presenting other evidence he "could have" or "should have" located earlier. That evidence has been presented here to prove the elements of fraud. He must show that the Michelsens' representations that there was no prior

⁴A conclusion with which we vigorously disagree.

residential use were false, and knowingly so.

Fraud is difficult to prove where, as here, the underlying facts go back 42 years. At the remand hearing, Mr. Sherman testified about his attempts to locate prior tenants in the brief time between notice of the landlords' petition and the exemption hearing. Private Investigator Michael Joffe also testified about the difficulty of locating and obtaining information from the 1970s and 1980s, even with his more sophisticated resources. It stands to reason that Mr. Sherman's petition claiming fraud in the issuance of a certificate of occupancy must, of necessity, have included evidence from the initial hearing and elsewhere. Sherman has put considerable effort and resources into gathering this evidence.

The Michelsens have argued that permitting Sherman to proceed with his petition gives him a "second bite of the apple." But he has a different task now. He must prove fraud, a different theory, with a different legal standard. Moreover, he now bears the burden of proof.

In all likelihood, the Michelsens prevailed at the Hearing level in their exemption petition because Mark Sherman, who was unrepresented, did not know how to effectively gather and present his evidence. Since that time, he has obtained and presented the testimony of Mr. Abraham and Mr. Wiener, and other, compelling evidence of prior residential use of the property and of deception on the part of the Michelsens.

In order to deprive Sherman of the benefit of the evidence he discovered at the prior hearing, it would be necessary to infer a clause into the Ordinance, limiting the evidence which a party that participated in the initial exemption hearing may proffer to prove fraud or mistake. There is no rule and no reason that the prior exemption case should impinge on his right to present *all* of the evidence of fraud that he has gathered. Moreover, doing so would impose a form of collateral estoppel, which has been ruled out in these proceedings.

Finally, treating Mr. Sherman differently from tenants who were not parties to a landlord exemption petition could lead to inconsistent results. If Sherman were restricted in his presentation of evidence, a future tenant petitioner, being unrestricted might prevail using evidence which Mr. Sherman was prevented from using.

According to the City, this case is the first RAP case determining the issue of fraud in issuance of an exemption certificate. (Alameda County Superior Court RG16843773, *Michelsen v. City of Oakland, et al. Motion to Remand and Dismiss*, at p. 5:28) The Ordinance and Regulations provide few, if any, guidelines for these proceedings. All Mr. Sherman wishes for is to finally have the evidence he has obtained given full consideration. He should not be hindered by restrictions which are not included in the Ordinance or regulations

IV. THE CERTIFICATE OF EXEMPTION WAS OBTAINED AS A RESULT OF FRAUD ON THE PART OF DIANE AND HAROLD RUS MICHELSEN

A. Basic Nature of the Fraud

To obtain a certificate of exemption as "new construction" the Michelsens needed to prove: 1) That the rental unit received a certificate of occupancy on or after January 1, 1983; and 2) that the rental unit was either entirely newly constructed or created from space that was formerly entirely non-residential. (OMC 8.22.350.I.2) They easily met the first element, as they received a certificate of occupancy for the unit (and all other units in the building) in February 1985. But they knew that Mark Sherman's unit at 5823/5825 Occidental had been occupied as a live work space continuously from at least 1976. They obtained the exemption certificate for 5823/5825 Occidental by knowingly presenting false testimony at the exemption hearing.

The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.

Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal.4th 979, 990.

The evidence presented by the Michelsens fulfills the elements of fraud. Their claim of lack of prior residential use was comprised of “deliberate, intentional misrepresentations, untruths, half truths and deceitfully misleading declarations...” *Beresh v. Sovereign Life Ins. Co.* 92 Cal.App.3d 547 (1979). They made these representations in order to induce the RAP to issue a certificate of exemption. The certificate was issued, to the detriment of Mr. Sherman and the City. The details of how they effected this fraud will be set forth below after a brief discussion of intrinsic and extrinsic fraud.

B. Petitioner Need Not Show Extrinsic Fraud; He May Challenge the Certificate of Exemption Based on Intrinsic Fraud

The Michelsens obtained their certificate of exemption for the rental unit through direct intentional misrepresentations made to the Hearing Officer. Now they claim that the type of fraud they engaged in – intrinsic fraud – cannot be used to demonstrate fraud under OMC 8.22.030.B.8.b.

It is well settled in California law that a final judgment may be set aside if it is the result of extrinsic fraud, but not if it is the result of intrinsic fraud.⁵ Fraud is extrinsic if it prevents a party from having a fair hearing, such as a false promise of settlement, or purposely keeping the party in ignorance of the suit. Intrinsic fraud, on the other hand, is fraud committed at the trial, such as perjury or submitting forged documents. (*Pico v. Cohn* 91 Cal. 129, 133-134 (1891) ; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 225, p. 832). Intrinsic

⁵We emphasize again, that Mr. Sherman is *not* attempting to vacate the judgment in the exemption case. We are alleging a new claim, authorized by the Ordinance. Most of the case law cited in this section involves requests that a judgment be set aside based on equitable principles. The Ordinance provisions permitting rescission provides a legal, rather than an equitable foundation for the remedy.

fraud consists of matters such as “deliberate, intentional misrepresentations, untruths, half truths and deceitfully misleading declarations...” *Beresh v. Sovereign Life Ins. Co.* 92 Cal.App.3d 547 (1979).

If the aggrieved party had a reasonable opportunity to appear and litigate his claim or defense, fraud occurring in the course of the proceeding is not a ground for equitable relief. The theory is that these matters will ordinarily be exposed during the trial by diligence of the party and his or her counsel, and that the occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability of final judgments.

(8 Witkin, Cal. Procedure (3d ed. 1985) Attack on Judgment in the Trial Court, § 221, p. 625.)

Despite this harsh and oft-repeated view, it is nonetheless recognized that the terms “extrinsic” and “intrinsic” do not constitute an infallible formula for discerning whether relief from judgment may be ordered in a particular case.⁶ The policy of finality of judgments must be balanced against the policy of relief from judgment when a party was prevented a fair opportunity to present his case. In this case, the policy of preventing wrongfully-obtained certificates of exemption must also be given great weight.

The Ordinance specifically sets out a separate basis for challenging a previously issued certificate, indicating that the City of Oakland gives greater weight to returning a wrongfully exempted dwelling to the City’s stock of affordable housing than it does to ensuring finality to a decision awarding a permanent exemption. That policy is further demonstrated in the Board’s stated position in its motion for remand that this case involves a different claim and different

⁶There are certain types of cases in which the principle of stability of judgments often does *not* win out. They occur when the nature of the proceedings is such that a party could not anticipate, or effectively counter, fraud arising in the hearing. See, e.g. cases cited in *Pour le Bebe v. Guess?, Inc.* 112 Cal.App.4th at 829-830. And, while a motion to vacate for intrinsic fraud will not lie, the same result may be achieved through a timely C.C.P. § 473 motion. *Beresh, supra*, at p. 552

issues than were determined in the landlord's exemption petition.

A further reason for permitting Mr. Sherman to rescind the certificate based on intrinsic fraud is that the Ordinance does not provide the tools necessary for uncovering fraud prior to the hearing.

Because parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigants, lacking for example the right to an appeal or to extensive discovery, courts generally take a more lenient approach when examining intrinsic fraud in the context of a motion to vacate an arbitration award.

Pour le Bebe v. Guess?, Inc. 112 Cal.App.4th 810, 829 (2003).

Oakland's Ordinance does not provide for "the full panoply of procedural rights available to civil litigants." There are no provisions in the Ordinance or in the Regulations for discovery. The parties submit documents seven days prior to the hearing. As a practical matter, the documents become available to opposing parties a little later. There is little that can be done in the nature of investigation or impeachment in a few days time. Here, Sherman was permitted to view records compiled pursuant to a subpoena to the Registrar of Voters only on the day of the hearing. Because the Ordinance does not provide for full discovery, which is crucial in civil proceedings, evidence of intrinsic fraud should be permitted.

In this case, the City's policy of remedying the effects of wrongfully-obtained certificates of exemption must also be accorded respect. Nothing in the Ordinance hints that its drafters intended fraud to be limited to extrinsic fraud only. The fact that the Ordinance specifically provides for rescission of fraudulently or mistakenly issued certificates, indicates the importance the City gives to returning wrongfully-exempted dwellings to the City's stock of affordable housing. That policy is further demonstrated by the Board's stated position that Sherman is entitled to a new hearing to prove his claim. The City does not regard this challenge as an attempt

to re-litigate.

**V. THE EXEMPTION HEARING: HOW THE MICHELSENS
FRAUDULENTLY OBTAINED THE CERTIFICATE OF EXEMPTION**

A. Evidence submitted at the Exemption Petition Hearing

In their exemption petition to the RAP the Michelsens claimed their property was “New Construction” and attached the following history:

Section 3: Landlords Claim of Exemption—owners will prove the following building history.

Chronology of Building Use:

1975 Michelsen Purchases commercial building

1976 to 1983, 5823 Occidental rented as commercial space for custom woodworking.

1983 to early summer 1984, 5823 Occidental rented as commercial art studio.

Approx. June 1984 to October 1984, Michelsen converts 5825 Occidental to live-work space.

October, 1984 Building inspected by Housing Authority for Certificate of Occupancy

November 1984 Building Permit Issued

February, 1985 Certificate of Occupancy issued.

Both owners signed the document under penalty of perjury.

At the hearing on February 24, 2014, Mr. Michelsen submitted his notarized declaration, sworn under penalty of perjury. He stated that “the property” remained vacant after his 1974 purchase until 1976. He described “the property” as running from Occidental Street on the east to Grace Avenue on the west. He described it as “one large building with no bath facilities, nor kitchen facilities. It had two toilets for employees and a break room.” He stated 5825 Occidental Street “was rented” as a custom woodworking studio from 1976 to 1982 and “was rented” as a custom art studio from 1983 to early summer 1984. In 1984 he began the conversion of 5825 Occidental to live/work space and obtained a Certificate of Occupancy in February 1985. When Mark Sherman rented the unit in September 1985, it was the first time “the premises were ever

rented as a residence..."

(Declaration of Harold Rus Michelsen, Judicial Notice Requested)

The declaration fails to state that, to the best of his knowledge, the Occidental unit had never been *used* residentially. Nor does he mention that he had resided in the property from 1976 until the early to mid-1980s.

Diane Michelsen also testified at the exemption hearing. She described her first view of 5825 Occidental in early summer 1982. She testified that it was dirty, with cobwebs hanging. It had a toilet and two sinks. It had no kitchen facilities and no shower. It was comprised of several open contiguous spaces. Transcript of Exemption Hearing. ("Transc. 1"), p 5:7-18, Judicial Notice Requested..

Greg McConnell: So, when you visited the property in 1982, summer of 1982, is it your belief that it had been or it could be rented as residential property?

Dianne Michelsen: There was no kitchen facilities, there was no shower. It certainly did not appear that it could have been utilized as residential property.

Transc. 1, p. 6:8-11

Asked whether she spoke to her husband about whether the property had ever been used for residential purposes, she replied: "His answer was that the property had been rented as commercial property. It was not residential property." Transc.1, p. 6:12-17 She testified that it was not used for residential purposes. Transc. 7:7-9. "on occasion to collect rent". Transc. 1, p. 7:4-6. She stated that that she began living in the building with Rus, at 927 Grace Avenue, in 1983. Transc. 1, p. 11:3-5.

Ms. Michelsen further testified that in 1984, "Rus divided the living space into three units on Grace Avenue and he converted Occidental Street into a residence. He hung doors, he put in a

kitchen, he raised the floor, he put in a heating system, he put in a tub. He made it so that it had bedrooms, a kitchen, a living room, bathroom, cabinets, and studio spaces". The work was done "right prior to the certificate of occupancy". Transc. 1, p.7:14-8:1. She testified that he did not obtain permits for the work. He obtained permits—electrical, plumbing and general building permits—in 1984 and 1985, after the work was performed. Transc. 1, p.8:2-21. The certificate of occupancy was issued in February 1985. Transc. 1. p. 9:9-11.

The Michelsens submitted two applications for permits—A November 1984 permit to sheet rock a room and repair a window at 5825 Occidental Street, and a February 1985 electrical permit for work being done at 921 Grace Avenue. On examination, these applications do not reflect the extent of the work described in Ms. Michelsen's testimony. The building permit application described the "present use" of the unit as "Apt." (Exh. 11).

The owners submitted an email from Rachel Flynn, Director of Planning and Building which stated:

Greg, According to our records, the Olympic Publishing Company Occupied 5825 Occidental Street starting in 1967.

We don't know how long they remained open, but by the mid-80's, housing went into the structure. Hope this helps. Rachel

No testimony was given about the circumstances surrounding the obtaining of this email.

The email does not include or describe the documents Ms. Flynn relied upon to make the determination that housing "went into" 5825 Occidental in the mid-1980s. From the documents Ms. Flynn later provided to petitioner's counsel, it appears that the only document which *could* have suggested that the property was first used residentially in the mid-1980s was the certificate of occupancy. (Exh. 1). Of course, the existence of a certificate of occupancy demonstrates nothing about when the property was *actually* first occupied as a residence.

At the hearing, Sherman attempted to disprove the owners' evidence by presenting Charles Abraham's unsworn on-line letter which stated:

To whom it may concern,

I, Charles Abraham lived at 5813 Occidental St. Oakland Ca. 94608 during the years 1976, 1977, 1978.

The letter was signed and it provided Mr. Abraham's current residence address. (Exh. 3). Sherman testified that Rus had told him that a woodworker had lived in his rental unit in the late 1970s. Mr. Sherman also submitted pages from the 1977 and 1978 Pacific Telephone Company residential telephone directory listings for "Chuck Abraham" at 5823 Occidental Street. (Exh. 2). This was the extent of his evidentiary showing.

VI. THE REMAND HEARING

A. Remand Pre-Trial Hearing

After the instant case was remanded back to the Board a Pretrial Hearing was held on October 17, 2017 for the purpose of determining whether good cause existed for issuance of subpoenas for witnesses and documents.

At that hearing Mr. Sherman and Ms. Michelsen were sworn in as witnesses. (Pretrial Hearing Transcript, p 6:3-9)

Petitioner requested that Rus Michelsen be required to appear and produce documents at the remand hearing. One of the document demands was for all lease or rental agreements to rent space in any part of the property at Occidental Street and Grace Avenue, from the time of Rus Michelsen's purchased the property through 1985. In discussing the demand, Ms. Michelsen testified:

Ms. Michelsen: I know on number 1, there are no – there was nothing in writing in terms of leases or rental agreements for any space.

Ms. Hess: For any space in the property?

Ms. Michelsen: For any space.

Ms Hess: Prior to when?

Ms. Michelsen: Prior to '85

Ms. Hess: Prior to '85 there were no written agreements?

Ms. Michelsen: And I think, actually it was much later than that because there are certainly nothing now. When I asked Rus about this, he said it was after (unintelligible)

Ms. Hess: And you resided in the property from -- in '83'?

Ms. Michelsen: Yes.

Ms. Hess: And when did you reside there?
....

Ms. Michelsen: -- to be specific. It was '83, '84. That's what I remember. I don't remember anything else.

Ms. Hess: Okay. But before the issuance of the certificate of occupancy, there were no written leases?

Ms. Michelsen: Oh, no. Because it was commercial space; not residential space.

Hearing Officer: I understand that but I don't -- I know there might not have been residential leases, but, generally speaking commercial leases...

Ms. Michelsen: This was very informal. There was somebody that had a band at one point, somebody that did woodworking, somebody who was an artist, somebody who use to come into the space that Rus built and fixed bicycles. It was really a dog-patchy kind of thing.

(Pretrial Hearing Transcript, p 28-30)

B. The Remand Hearing

The Michelsens consistently represented in their petition, in Mr. Michelsen's declaration and in Diane Michelsen's testimony, that 5823/5825 Occidental Street had only been rented commercially prior to 1985, when Mr. Sherman took up residence. They continued to make these

assertions at the remand hearing. However, their statements were contradicted by the testimony of two witnesses who lived in the rental unit prior to 1985. The witnesses testimony at the Remand Hearing describing their residential use of the property was detailed and convincing:

Charles Abraham testified that he lived and worked at 5823/5825 Occidental Street from 1976 to 1983, approximately. He and Rus Michelsen knew each other from graduate school. One day they encountered each other by chance and had a conversation. Mr. Michelsen mentioned that he owned a rental property. His sister and brother-in-law were living there, but they were moving out. Mr. Abraham told Mr. Michelsen that he and his wife were splitting up and he needed a place to live for himself and his minor daughter. After viewing the property, Abraham moved in. He rented it as a live work space.

Rus Michelsen lived in the adjacent unit on Grace Avenue. He knew that Abraham lived there. Some time after he moved in, Rus helped him install double doors to accommodate his woodworking equipment. There was furniture and personal belongings there indicating Rus knew he was living there at the time.

When Abraham moved in, the space had a full kitchen, bathroom, bedrooms and studio space. The bathroom had an old claw foot tub with a mahogany surround. He built a loft for his daughter in one of the bedrooms when they were living there.

Diane Michelsen: As far as you know was Rus ever aware that there was a child living in the place?"

Charles Abraham: Oh yes, Yes.

Diane Michelsen: And how do you know that?

Charles Abraham Because he saw her. She was there.

There was a door between his rental unit and Rus Michelsen's space, which fronted on Grace Avenue. Abraham would call ahead if he had any reason to go into Rus's space. Rus had a

large studio with a walled in bedroom. He made metal sculptures in his studio space. Rus occasionally came into Abraham's space. Mr. Abraham identified a 1977 Oakland Telephone Directory Listing for Chuck Abraham as a residential phone listing for him. He didn't have a business listing.

Sometime after he moved in, Daniel, a student at Cal Berkeley moved in and rented a room from him.

Daniel Wiener testified that he had lived at 5823/5825 Occidental Street for approximately one year. He was an artist attending school. He moved before his graduation in 1977. He was anxious to make sure he had a place to live and to do his artwork after graduating. He knew that Mr. Abraham had shared custody of his daughter and was aware of Mr. Abraham's daughter visiting, about once a week.

He, too, remembered the door between the Occidental Street unit and the landlord's unit on the other side of the building. He had to carry his trash through the landlord's studio space to use trash bins on Grace Avenue. side. He remembered that the owner had a large studio where he made metal sculpture. The landlord had two large black dogs that Wiener was afraid of. The landlord would "corral" them so he could go through to dump the trash.

Wiener stated that his understanding was that the landlord knew he lived at 5823/5825 Occidental Street. When asked how he knew that the owner knew he lived there, he testified "Because it was completely and totally obvious." There were beds, rooms, a kitchen. He remembers the landlord coming into the rental unit "very casually." "Nothing was hidden." He was "pretty sure" that the other tenant introduced him to the owner as a subtenant living at the property.

He would not have rented at Occidental if he had not been able to live and work there. He

identified his residential listing in the phone book.

Ted Germann Declaration

Petitioner also submitted a sworn declaration from Ted Germann, another former resident of 5823/5825 Occidental Street, (Exh. 6). Mr. Germann's declaration stated that in the early 1980s he played in a band that played in the Bay area. Around 1984-1985, he resided with other band members at the 5823/5825 Occidental Street unit. He "definitely" lived there prior to 1985. The premises were fully equipt to live in with a kitchen, bathroom and regular trash collection. He named four other band members who lived there with him, including Tim Germann, Keith Hinyard, Clinton MacKay and Chris Schroeder. He also rented a place with his wife up the street. However, he resided at both addresses.

Private detective Michael Joffe, testified about his attempts to locate persons who lived at the Occidental Street property prior to 1985. He located and spoke to Ted Germann. German said he definitely lived at the property before 1985. He lived there for a couple of years. He was a member of a band that played around the Bay Area. They practiced a lot and had parties at the Occidental property. He identified other members who lived at the property: Band manager Clint Mackay, his brother Tim Germann, Keith Hinyard and Chris Schroeder. Ted Germann said he had another place on Occidental where he lived with his girlfriend. Mostly he lived at 5823/5825 Occidental Street.

Joffe also communicated with Clint MacKay, who sent him a "terse" email saying he was not renting Occidental as a residential space, but a commercial space for a recording studio and discussing the zoning of the property. MacKay did not address the question "Did you live there and did the band members live there."

Joffe testified that Germann told him that he left the building in 1984 or 1985 and that he

had resided there for about 2 years. He definitely lived in the building before February 1985.

Joffe also testified about the difficulty of locating people from the 1980s as digitalized records were spotty in that time period. The data bases he subscribes to are not available to the general public.

Paralegal Sue Doyle described her search for prior residential records for Occidental Street. Using the Haines Criss-Cross directory, she found Rus Michelson, Chuck Abraham, and Daniel Wiener listed as residents in the late 1970s and early to mid-1980s (Exh 7) She found Mr. Michelsen and Mr. Abraham listed around the same dates in the Oakland Residential Telephone Directories. She also found Daniel Wiener listed in the 1977 and 1978 Oakland Residential Telephone Directories. (Exh. 8)⁷

Mark Sherman Testimony

Mr. Sherman testified he moved into 5825/5823 Occidental Street in September 1985. He identified photographs of the property, including a photo of a loft that Rus Michelsen told him that the woodworker who had lived there before him had built. (Exh. 4) He identified the lease which he negotiated with Rus Michelsen (Exh 5) The unit was rented as a live work space. The had studio space, where he manufactured perfumes and incense for his retail store. He is now retired. The other half of the unit was living space, with carpeted rooms, a kitchen, a dishwasher and a refrigerator and a stove. It had a bathroom. The bathtub still has a mahogany surround.

Rus Michelsen never told Sherman that he was the first tenant to live in the unit. Nor did he recall Rus telling him that he once lived in the building. Initial rent was \$1,225.

⁷Ms. Doyle also found documents from 1919 through 1928, demonstrating an early history of residential use: Military Draft Registration cards, census records, and voter registration records.. However fascinating as these original source documents are, they are far too remote in time to have any bearing on fraud.

Sherman testified that began imposing a series of rent after she took over managing the property in about 2007. This lead to his petition based upon lack of notice of the RAP program. back to \$1,225. The Michelsens then filed the exemption petition.

Mr. Sherman provided extensive testimony about his search for former tenants at the property to prepare for the hearing. Using the Haines Criss-Cross Directory he found three names of people living at 5825/5823—Rus Michelsen, Charles Abraham and Daniel Wiener. He began looking, checking sources at the library, ancestry.com and other listing. He got a current phone number and found Abraham who verified that he had lived at the property and agreed to sign a letter. Mr. Sherman wrote the letter, listing only three years of Abraham's tenancy.

He also attempted to locate Wiener. He found some 20 to 50 listings for "Daniel Wiener". He also attempted to contact persons named Daniel Wieners listed in the Bay Area, without luck. He attempted to get records for the property from PG&E. EBMUD, fictitious business record and other sources, all before the exemption hearing. He googled and found many listings for Daniel Wiener, but was unable to locate the Wiener who had lived on Occidental prior to the exemption hearing. After the hearing, he finally located Wiener, an artist in New York. He sent an email and Wiener responded. He was able to submit detailed declarations by Wiener and Abraham for the Appeal Hearing, but the Board rejected his plea for a remand.

Diane Michelsen was called by petitioner to testify. Her testimony followed the script she had set out in the exemption hearing: When she first saw the building in 1982, the Occidental unit was uninhabitable: Filthy, no kitchen, no stove or refrigerator, just counter with a sink, an old dirty toilet. Rus lived at 927 Grace Avenue and she moved in "probably" in early 1983. She did not remember there being any door between 927 Grace and Occidental.

She testified that she and Mr. Michelsen moved to Orinda in late 1983 or early 1984.

Rus converted all of the units at the property to residential use. He did the work himself. He did not obtain permits. He obtained them later, prior to the certificate of occupancy.

There was a hot tub on the roof, when she moved in. They removed it when they moved out.

She testified that during the time she lived at the property, there were no written rental agreements with any residential tenants. She was then shown Exhibit 10, an unlawful detainer complaint filed September 24th, 1984. The attorney was Diane Michelsen, Rus Michelsen was the plaintiff, and the defendants were three tenants of 929 Grace Avenue.

Leah Hess: Do you recognize this document?

Diane Michelsen: I recognize my signature, but I don't recognize the document... It just was too long ago, I guess.

Leah Hess: Ok. Did you file this document?

Diane Michelsen: It says I did. So I must have.

Ms. Hess directed her to the third page, which showed that Rus Michelsen agreed to lease "This dwelling" to the tenants for one year. Ms. Michelsen recognized the signature on the document is Mr. Michelsen's signature. The attached lease agreement said that a hot tub was include in the rent. It also referenced a third bedroom which was to be built.

Ms. Michelsen testified that she did not remember whether she lived at the property when the lease was negotiated, did not remember whether Rus told her he had entered into a lease with three people for 929 Grace, did not remember whether he told her he rented any place residentially prior to February 20, 1985.

Ms. Hess: Was 929 rented residentially prior to –

Diane Michelsen: I think I already told you I didn't remember. I don't even remember exactly when we moved out.

Harold Rus Michelsen testified immediately after Diane Michelsen.

He testified that he purchased the property in 1974 with the intent of living in it and as a metal working studio. The entire building, except for Occidental was all one large open continuous space. He constructed a foundry and a living space for himself on Grace Avenue. Part of what is now Occidental was part of the open 4,000 square footage of the building. In 1976, he put in the wall that separates 921 and 927 Grace from Occidental. He put numbers on the Grace Avenue unit, but many records still show 5825/5823 Occidental as the only address. He said he never used the 5823 unit for any purpose. He said his residential telephone listing was at Occidental Street, but he didn't live there. He registered to vote. "I assume I used Grace Avenue."

He said he and Ms. Michelsen moved out in 1985.

He rented the Occidental unit to Charles Abraham in 1976. Abraham left at the end of 1982, when over a dispute about a rent raise. Mr. Michelsen said it was about a rent raise and also said that Abraham was engaging in criminal activity. He acknowledged that he had "no evidence". It became apparent that the dispute was about raising the rent. When Abraham told him he couldn't raise the rent and threatened to bring in the City, he responded "...this was my space. I paid for it. I get to do what I want...within a day or so. He served the 30-day notice soon after.

Rus Michelsen also testified that he didn't know there was rent control in the City until Sherman filed his petition.

Michelsen testified that at the time Abraham moved in to Occidental, there was a "lunch room" with a counter and sink but no refrigerator or stove. There were two toilets and a sink, but no bathtub He knew Abraham had a child but was unaware of a child being in the rental unit. He denied that the structure depicted in Exh. 4 was a loft, because it was built so close to the ceiling and had no ladder.

He began converting 921 and 929 Grace to live work space in 1979 or 1980. Prior to that they had been artists' studios. The conversion took about two years. He started converting Occidental into a living unit around early 1983, when Abraham moved out.

None of the work was done with permits. He testified that he went to the "Housing Authority and turned myself in...for doing this work without permit." The Housing Authority told him what deficiencies to remedy, "which I did. Permits signed off. Then I got my certificate of occupancy." Among the deficiencies, was the need for a one-hour firewall at Occidental. When questioned about that permit, which said the present use of the building was "APT", he said that was the intended use, "not what it currently is." (Exh. 11)

When asked if, to the best of his knowledge, nobody lived at either Grace or Occidental until after February 20, 1985, he answered that to the best of his knowledge, nobody lived at Occidental. When asked if anyone had lived on the Grace Avenue side, Diane Michelsen stated: "I fail to see the relevance of this."

The Hearing Officer explained that the question goes to the issue of fraud. "Are you saying that no one lived on the Grace side other than you?"

Rus Michelsen: I'm not saying that.

Leah Hess: When did someone else live on the Grace side?

Rus Michelsen: I'm not saying that either. I don't think it's relevant.

Hearing Officer: I believe it is relevant Mr. Michelsen. And so I need you to answer the question to the degree you can.

Rus Michelsen: I think it's time for me to talk to my attorney.

Hearing Officer: You don't get to do that. You have to answer the question first.

Rus Michelsen. Well no, I'm not going to answer the question.

...

Hearing Officer: I mean I will draw a negative inference from your failure to answer the question. So you've got one more chance to answer the question.

Rus Michelsen: Nope.

Mr. Michelsen testified that he had two dogs from 1976 until the early eighties. They were great Danes, one "darkish" and the other brindle. He never met Daniel Wiener. No band ever rented Occidental and he did not know a person named Clinton MacKay. He again refused to answer questions about prior residential use of the Grace Avenue units. When asked if he ever field a complaint for unlawful detainer, he responded, "Seem so. You have a copy".

On cross examination, he acknowledged that there was a door between 927 Grace and Occidental. He said he kept it locked and would not have gone into "their" space. He did not know if "they" had a lock on "their" side. He never told Mark Sherman that someone had lived in the rental unit before him. He could not recall the arrangements for trash or garbage service.

The Michelsens submitted a sworn declaration from Clinton MacKay, which basically said the same information he had told the private investigator. He said he rented the apartment for a sound studio. It did not say whether he had resided in the space. (Exh. 13)

Voter Registration Records

A subpoena to the Registrar of Voters sought registration information for all units at 5823/5825 Occidental and 921, 297, and 929 Grace Avenue from 1977 through 1985. The Registrar's office provided a summary of the information sought: It stated voter names, address where registered, date first registered, and years subsequently listed on the rolls. The Hearing Officer assigned numbers to each registrant, to avoid disclosure of names (other than Rus Michelsen), in order to comply with an agreement between counsel for the City and for the counsel.

The Hearing Officer is asked to take Judicial Notice of the fact that voters must provide residence addresses, residence information is necessary to ascertain that voters are voting in the proper geographical area (Precinct, city, county) Petitioner submits for informational purposes a blank current Registration Form obtained from the Registrar's office.

It is likely the date first registered is a highly accurate record of residence on that date. The Registration list may be less so, as we do not know how the Registration list is updated.

The summary provided corresponds closely with the other evidence of residential use provided at the hearing.

Voters are shown to be registered at Occidental during the entire time period from 1975 through 1984. The long-term tenancy shown for Voter 1, corresponds with evidence presented at the hearing. Of the five band members about whom there was testimony three were registered to vote in the early 1980s. The Grace Avenue property also shows registered voters prior to issuance of the certificate of occupancy.

VI THE EVIDENCE PROVES THE ELEMENTS OF FRAUD

A. False Statement

In his initial declaration in the exemption hearing, Harold Rus Michelsen stated that, prior to Mark Sherman's occupancy, 5823/5825 Occidental had never been "rented as" residential property. It had been rented as commercial space to a woodworker and an artist. Diane Michelsen testified that, when she first viewed it in 1982, it lacked kitchen and bath and did not look habitable. At one point in her she testified that "It was not residential property." (Trans. 1, p 7:7-9.) At that point, neither said that no one had resided in the unit prior to the certificate of occupancy, that was the message they conveyed at the hearing.

The statement was false. Mr. Abraham and Mr. Wiener provided testimony that they

resided in the property. Ted Germann provided a declaration to that effect. The voter registration records evidence eight persons registering to vote at the address between 1976 and 1984.

B. Scienter

The statement was knowingly false. Both Abraham and Wiener described the apartment as a completely liveable space with full kitchen and bath, bedrooms and work space. Abraham describes renting the unit from Rus, who rented it to him as a live-work space. Wiener, who rented as a subtenant from Abraham, also described it as live-work space. Both testified that Mr. Michelsen knew they lived in the space. Both testified that there was a door between the units. Both testified that Rus came into their unit through the door. "Very casually" according to Wiener, "Nothing was hidden." Mr. Michelsen confirmed there was a door, but denied he entered. He denied that Wiener came through the door, but acknowledged he had large dark dogs at the time.

It is difficult to prove another's state of mind. And that is what we must do now, in order to prove an element of fraud. But given the number of persons who resided in the unit over time, and their proximity to the Michelsen's unit, it is hard to imagine the Michelsen *didn't* know they lived at Occidental.

There is no reason to disbelieve petitioner's witnesses. They were straightforward and they have nothing to gain by testifying. Nor is Mr. Germain's declaration to be disbelieved. Whether or not one resided at a particular place for years is hardly something one would be mistaken about. But to believe the Michelsens, one has to disbelieve these three witnesses.

The owners testimony was often in contradiction with each other and sometimes they contradicted themselves. For example, at the remand hearing, Mr. Michelsen denied that a band rented at the property. Diane Michelsen volunteered, at the pretrial hearing that there was a band

that rented at the property.

Diane Michelsen was revealed speaking a major untruth. She testified that neither the Occidental unit nor Grace Street had written leases. Then she was shown the unlawful detainer case that she, herself had filed. Subsequently Mr. Michelsen, refused repeatedly to answer questions about Grace Street. He continued testifying that, to his knowledge, there had been no residential tenants at Occidental during his ownership. At this point,

The Michelsens' testimony was characterized by their consciousness of guilt.

C. Intent to Induce Reliance/Justifiable Reliance

The goal of the Michelsens in making these knowing falsehoods was to induce the RAP to issue a certificate of exemption. In addition to their own statements, they submitted an email from a city official, Rachel Flynn, which they knew to be untrue. As a result, the Hearing Officer found in their favor and they obtained the certificate granting them permanent exemption from the Rent Ordinance.

D. Damage to Sherman

In this case, the falsehoods presented to the RAP were aimed at causing damage to Mr. Sherman. Once they obtained a permanent exemption, they could raise his rent. They have attempted to do so. The false testimony was made to a third party, but they were intended to impact Mr. Sherman. The Rent Ordinance provides tenants with the right to file a petition to stop the fraud.

In addition to losing the ongoing benefit of his award in the petition for failure to serve RAP notices, Mr. Sherman has been paying rent at the level of the Michelsen's last rent raise prior to his filing petition for failure to serve RAP notices This was the amount set by the Trial Court in

his writ petition in *Sherman v. Oakland Rent Board* Alameda County Superior Court No. RG15-785257.

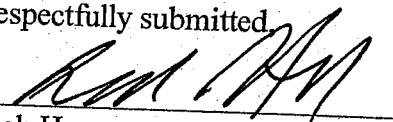
VI. REMEDY SOUGHT

Mr. Michelsen Respectfully requests:

- 1) An order rescinding the Certificate of Exemption for 5825/5823 Occidental Street, Oakland, California;
- 2) An order setting his rent back to \$1,225 with reimbursement of amounts paid in excess of that amount during the past three years.

July 13, 2018

Respectfully submitted,



Leah Hess
Attorney for Petitioner
Mark Sherman

PROOF OF SERVICE BY MAIL

I am over the age of eighteen (18) and not a party to the within case. My business address is 610 16th Street, Suite M-8, Oakland, CA 94612

On July 13, 2018, I served a copy of the following document:

MARK SHERMAN'S REMAND HEARING BRIEF

By First Class Mail to the following addresses:

Barbara Cohen, Hearing Officer
Oakland Rent Adjustment Program
250 Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612

Diane Michelsen & Harold Rus Michelsen
PO Box 6363
Moraga, CA 94570

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Oakland, California on July 13, 2018.



SUSAN DOYLE

PETITIONER MARK SHERMAN'S REMAND HEARING BRIEF

RECEIVED
CITY OF OAKLAND
RENT ARBITRATION PROGRAM
2018 JUL 16 PM 12:43

ERRATA

Petitioner's counsel inadvertently omitted the following section (Conclusion) from the Remand Hearing Brief. Petitioner requests its inclusion in the brief. It should be labeled section **VI**.

The section following it ("REMEDY SOUGHT") should be re-labeled section **VII**.

VI. CONCLUSION

Throughout his ownership of the property, Harold Rus Michelsen has behaved as though no laws applied to his use of it. As he testified, he informed Charles Abraham when Abraham objected to a rent raise, "this was my space. I get to do what I want" and he promptly served a notice terminating Abraham's tenancy.

In his testimony, Michelsen described extensive work performed at the property as early as 1974, including building a foundry with a crucible, and creating his own living space. (927 Grace Street) Part of his construction work included building a wall separating Grace from Occidental, apparently apportioning some of the Occidental space to Grace Street in the process.

At some point – Rus and Diane Michelsen claim it was in 1983 and 1984 (the dates vary) – he converted 5823/5825 Occidental and 921 and 929 Grace Street into livable rental units.

Residential use of the Occidental unit, however, began at least eight years earlier. Although Michelsen denies it, it seems obvious from Mr. Abraham's testimony that Michelsen had created a residential unit with a fully functioning kitchen and bathroom at Occidental Street by 1976.

All this work was done without permits.

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According to Mr. Michelsen, he didn't begin the conversion of Occidental and 921 and 927 Grace Street into residential units until about 1980. Then, in approximately 1984, he "turned himself in" to the "Housing Authority" for building without permits. Despite the improbability that the scrutiny of the City was self-initiated, the Michelsen's history of the property submitted with their exemption petition states that the property was inspected by the "Housing Authority for Certificate of Occupancy" in October 1984. (Approximately one month after the Michelsens sued to evict tenants at 929 Grace Avenue.)

Rus Michelsen testified that, after inspection, the Housing Authority informed him of deficiencies at the property which needed remedy. He remedied them and obtained a certificate of occupancy for all units in the building on February 20, 1985.

Both of the Michelsens lived at the property—Rus from 1976, Diane from 1982 or 1983. Diane collected rent from the tenants. They moved out, according to Rus, in 1985, when they purchased a home in Orinda. From 1976 until Sherman filed his petition challenging illegal rent increases in December 2013, the Michelsens did not bother learning their responsibilities under the rent ordinance. (According to Rus Michelsen, he was not aware of rent control until Sherman filed his petition.)

The Michelsens have steadfastly maintained that the property was not used residentially before issuance of the Certificate of Occupancy. Their statements – from the filing of their petition for exemption through all of the proceedings that followed – continued
To deny prior residential use.

The evidence presented at the remand hearing, however, demonstrates how unlikely it is that Occidental's residential use could have been unnoticed by the Michelsens. Solely from the length of Abraham's eight-year tenancy, this assertion is suspect. Abraham's and Wiener's

testimony that Rus was well aware that they resided in the unit is far more credible than his claim that the property was "rented as" commercial space. Their testimony about a door between the units (not to mention Mr. Michelsen's "darkish" dogs), the presence of the loft, and other details add to the veracity of their testimony.

The Michelsens' reaction to being confronted with direct evidence of prior residential use reflects a very telling. Diane Michelsen testified clearly and repeatedly that there had been no prior residential use of the property and no written leases. Confronted with the unlawful detainer she had filed against the residents of 929 Grace months before issuance of the certificate of occupancy she testified that she "must have" filed the pleading, because her signature was on it. She also acknowledged Mr. Michelsen's signature on the complaint and the attached residential lease. Asked further questions about the lease, she answered with a sudden inability to remember things, including whether Rus Michelsen had told her he rented any place residentially prior to February 20, 1985.

Rus Michelsen responded to this development by refusing to answer any questions about whether anyone had resided in the Grace Avenue side of the building prior to February 20, 1985. He stated he would answer only with respect to the Occidental side. He maintained that the Grace Avenue questions were irrelevant. He continued to refuse to answer even after the Hearing Office informed him she would draw a negative inference from his silence.

The Michelsen's responses after being confronted with the unlawful detainer reveal their willingness to make deliberately false statements about "the property" in order to obtain a certificate of exemption. Since Mr. Michelsen rented 929 Grace to residents prior to issuance of the certificate of occupancy, what reason is there to believe that he did not do the same with other units, including Occidental Street?

Diane Michelsen lived at the property and collected rent from tenants from 1982 or 1983 onward. She filed an eviction action against the tenants of one rental unit. How likely is it that she could have been ignorant of residential tenants in the Occidental unit?

Rus Michelsen is hardly the first landlord to believe that designating a space as commercial would immunize him from laws protecting tenants, such as the right to habitable premises and to rent control. Nor do his evasive statements that the premises were "rented as" commercial space render this misrepresentation less fraudulent. The statements were intended to mislead. They did mislead. And they wrongfully removed a property from Oakland's stock of affordable housing.

For these reasons, Mark Sherman requests that the Hearing Office find that the certificate of exemption for 5825/5823 Occidental Street, Oakland, California 94608, was issued as a result of fraud.

PROOF OF SERVICE BY MAIL

I am over the age of eighteen (18) and not a party to the within case. My business address is 610 16th Street, Suite M-8, Oakland, CA 94612.

On July 16, 2018, I served a copy of the following documents:

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REMAND HEARING BRIEF

ERRATA TO PETITIONER'S REMAND HEARING BRIEF

By First Class Mail to the following addresses:

Diane Michelsen & Harold Rus Michelsen
PO Box 6363
Moraga, CA 94570

Jamilla Jefferson
City Attorneys Office
One Frank H Ogawa Plaza, 6th Floor
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Oakland, California on July 16, 2018.



SUSAN DOYLE

RECEIVED
CITY OF OAKLAND
RENT ARBITRATION
2018 JUL 16 PM 12:30

Leah Hess, SB No. 126800
Attorney at Law
610 16th Street, M-8
Oakland, CA 94612
Tel. 510.451.3103
leahhess2@sbcglobal.net

Attorney for Petitioner

**Housing and Community Development Department
Rent Adjustment Program**

CASE NUMBER: T16-0258, Sherman v. Michelsen
PROPERTY ADDRESS: 5823/5825 Occidental Street, Oakland, CA
PARTIES: Mark Sherman, Tenant
Diane and Rus Michelsen, Owners

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER
MARK SHERMAN'S REMAND HEARING BRIEF**

TO RESPONDENTS DIANE MICHELSEN AND HAROLD RUS MICHELSEN AND
THEIR ATTORNEYS OF RECORD:

This Request is submitted in support of Petitioner Mark Sherman's Remand Hearing
Brief, filed herewith.

Petitioner Mark Sherman hereby requests that the City of Oakland Rent Adjustment
Program take judicial notice of the following documents:

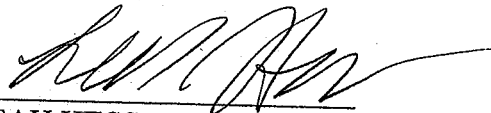
1. Declaration of Harold Rus Michelsen, dated February 11, 2014, submitted in support of
landlords' Petition in the case of *Michelsen vs. Sherman*, Case No: L13-0054. A true and correct
copy is attached hereto as **EXHIBIT A**.
2. Transcript of Exemption Hearing on February 24, 2014 in the case of *Michelsen vs.*
Sherman, Case No: L13-0054. A true and correct copy is attached hereto as **EXHIBIT B**.
3. Transcript of Pre-Trial Hearing on October 17, 2017 in the above-entitled case. A true

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and correct copy is attached hereto as **EXHIBIT C**.

4. Alameda County Voter Registration Application from County of Alameda Registrar of Voters. A true and correct copy is attached hereto as **EXHIBIT D**.

Dated: July 13, 2018



LEAH HESS
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am over the age of eighteen (18) and not a party to the within case. My business address is 610 16th Street, Suite M-8, Oakland, CA 94612.

On July 16, 2018, I served a copy of the following documents:

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONER'S REMAND HEARING BRIEF

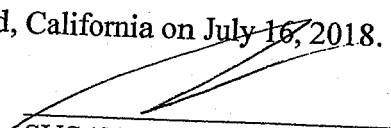
ERRATA TO PETITIONER'S REMAND HEARING BRIEF

By First Class Mail to the following addresses:

Diane Michelsen & Harold Rus Michelsen
PO Box 6363
Moraga, CA 94570

Jamilla Jefferson
City Attorneys Office
One Frank H Ogawa Plaza, 6th Floor
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Oakland, California on July 16, 2018.


SUSAN DOYLE

Declaration of Harold Rus Michelsen

1. I am 72 years old and unable to travel for this hearing due to health issues which have caused my hospitalization over the past year. My home is in Kauai, Hawaii. The following is my testimony.
2. I purchased the commercial building at 5825 Occidental Street, Oakland CA 94608 in December, 1974. At the time the property was vacant and remained that way until rented in 1976.
3. This property had previously been used as a print shop. It ran from Occidental to the East to Grace to the West. It was one large building with no bath facilities, nor kitchen facilities. It had two toilets for employees and a breakroom.
4. From 1976 to 1982, 5825 Occidental was rented as a custom woodworking studio.
5. From 1983 to early summer 1984, 5825 Occidental was rented as a custom art studio.
6. In 1984, I began the conversion of 5825 Occidental to live/work space. In February, 1985, the Certificate of Occupancy was issued. The premises were rented to Mark Sherman in September of 1985. That was the first time the premises were ever rented as a residence and he has continued as a tenant ever since.

I declare this to be true and correct, to the best of belief and recollection, under penalty of perjury under the laws of the State of California.

Dated: 2/11/14

Signed: Harold Rus Michelsen

Harold Rus Michelsen

See attached
90

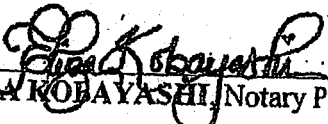
AR 429₁

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INDIVIDUAL ACKNOWLEDGMENT

STATE OF HAWAII)
COUNTY OF KAUAI)

On this 11th day of February, 2014, before me personally appeared
Harold Rus Michelsen
to me known to be the person(s) described in and who executed the
foregoing instrument, and acknowledged that he executed the same as
his free act and deed.

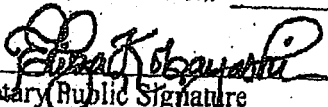

ELIZA KOBAYASHI, Notary Public

LS

My Commission Expires: July 21, 2017

STATE OF HAWAII NOTARY CERTIFICATION

Doc. Description: Declaration of Harold Michelsen
Date of Document: 02/11/2014 # Pages: 2
Date of Notarization: FEB 11 2014


Notary Public Signature
ELIZA KOBAYASHI
Fifth Judicial Circuit
Notary Commission No. 13-254

LS

EXHIBIT B

Accent on Languages

TECHNICAL & BUSINESS TRANSLATORS AND INTERPRETERS

Transcription Sheet

Case Number:	N/A
Reference:	DISC I
Date of recorded event:	2/24/2014
Duration:	38 minutes 17 seconds TRANSCRIBE ENTIRE FILE
Description:	Hearing 2/24/2014
Participants:	Linda Moroz - Hearing Officer Diane Michelson - Owner Gregory McConnell - Owner Representative Mark Sherman - Tenant
Transcribed by (Initials):	JBS
Date of transcription:	8/7/2015

Legend:

- [] Brackets are used to separate the transcriber's remarks from the original source words spoken.
- [II] or [U] Unidentified, unintelligible diction.
- [PH] Phonetic transcription.
- [sic] The preceding is written intentionally or is copied verbatim from its original source, even if it appears to be a mistake.

Words pronounced in Spanish have been translated into English as indicated by *italics*.

1 Linda Moroz: So good morning. We are on the record, in the case number
2 L130054, Michelson v. Sherman. And today's date is Monday, February 24 and it's
3 about 10:07 a.m. and we are beginning this hearing today. My name is Linda Moroz
4 and I am a hearing officer with the City of Oakland Rent Adjustment Program, and I will
5 be conducting this hearing today. It is an administrative hearing, not a courtroom. So it
6 is less formal than the courtroom, but we will follow all the laws of the state of California
7 and the City of Oakland rent ordinance. Also the rules of evidence are more liberal here
8 than in the courtroom, but I will consider all relevant evidence as I see—and weigh it as
9 I see fit. I have reviewed the file and might have questions to ask both parties as we
10 proceed. But at this week hearing, one party will go first and the other party will have an
11 opportunity to cross-examine, and then we'll switch. Finally at the end, each of you will
12 have a chance to sum up and present your view of what the evidence showed, and why
13 I should rule in a particular way. As you see, this hearing is being recorded on a digital
14 voice recorder, so I ask that all testimony be said out loud so everything is captured. I
15 will not be making a decision today, but will be sending a written decision to all parties
16 within 30 days of this hearing. Hopefully sooner, but within 30 days. At this hearing, I
17 would like to check—yeah, at this point I would like to check the statement of
18 appearances. So we have Ms. Diane Michelson as the owner.

19 Diane Michelson: Michelson.

20 Linda Moroz: I'm sorry, Michelson. Okay. And then we have Mr. Gregory
21 McConnell.

22 Gregory McConnell: Correct.

1 Linda Moroz: As the owner representative. And then we have Mr. Mark
2 Sherman, the tenant. Okay. Thank you. And finally all testimony is required to be
3 under oath, so please raise your right hand. Do you swear or affirm under penalty of
4 perjury that all testimony you give will be the truth?

5 Mark Sherman: Yes.

6 Diane Michelson: Yes.

7 Linda Moroz: Okay, thank you. And now we can begin. I of course reviewed the
8 file prior to this hearing. And I know that-that this is the owner's petition for exemption
9 to have the property exempt from the rent adjustment ordinance based on the new
10 construction, or based on the fact that the certificate of occupancy was issued after
11 1983, instead. The gist of it—

12 Gregory McConnell: Well it's twofold.

13 Linda Moroz: Okay.

14 Gregory McConnell: That was—that was converted from property. That was
15 commercial to residential, and—

16 Linda Moroz: Right. So the exemption is essentially the new construction.

17 Gregory McConnell: Correct.

18 Linda Moroz: Okay. So—and like I said, I've reviewed the file. I've received a
19 declaration under penalty of perjury I believe, that- by Mr. Harold Russ Michelson.

20 Diane Michelson: Yes.

21 Linda Moroz: And that would be—

22 Diane Michelson: My husband.

23 Linda Moroz: Your husband, okay.

1 Gregory McConnell: And how did that happen?

2 Diane Michelson: Russ and I were going out. We were fiancée'd [sic]. We were
3 looking at our assets at that time. The property was vacant and we talked about renting
4 it again. And—.

5 Gregory McConnell: And could you describe the appearance—this was in 19—
6 approximately when in 1982 was this?

7 Diane Michelson: It was probably early summer, 1982.

8 Gregory McConnell: And would you describe the appearance of the unit at that
9 time?

10 Diane Michelson: Yeah. It was dirty. It had cobwebs—.

11 Gregory McConnell: Could you speak up a bit?

12 Diane Michelson: Yeah, thank you. It was dirty. It had cobwebs hanging, it had
13 sawdust. It had a toilet and a sink, and another sink as well. It did not have kitchen
14 facilities, it did not have a shower.

15 Linda Moroz: And it was like a one open space, or what?

16 Diane Michelson: No, it was several open spaces. And then there were some
17 partitions where the property had been formerly used as a print shop. And those were
18 like semi-business offices, but they were all contiguous.

19 Gregory McConnell: And did we learn the name—the name of the print shop that
20 you just mentioned in doing your investigations of the property—.

21 Diane Michelson: Yes we did, in doing the investigation with the city.

22 Gregory McConnell: And who was that?

23 Diane Michelson: We submitted an email.

1 Linda Moroz: I saw that, yeah.

2 Gregory McConnell: There was an email from the director of the building
3 department.

4 Linda Moroz: Building department, I saw that.

5 Gregory McConnell: Would—if I say [UI] Press Publishing Company would that
6 refresh your recollection?

7 Diane Michelson: Yes.

8 Gregory McConnell: So when you visited the property in 1982, summer of 1982,
9 is it your belief that it had been or it could be rented as residential property?

10 Diane Michelson: There was no kitchen facilities, there was no shower. It
11 certainly did not appear that it could have been utilized as residential property.

12 Gregory McConnell: Alright. And did you speak to your husband about whether
13 or not this property had ever been utilized as residential property?

14 Diane Michelson: I did.

15 Gregory McConnell: And his answer? What did he say to you?

16 Diane Michelson: His answer was that the property had been rented as
17 commercial property. It was not residential property.

18 Gregory McConnell: Alright. And so that was in 1982. And was the property
19 rented in 1983?

20 Diane Michelson: The property was rented in 1983.

21 Gregory McConnell: And to whom was it rented?

22 Diane Michelson: It was rented to an artist. I believe he was from Boston, and
23 he did large paintings.

1 Gregory McConnell: Were you involved at all in the management of the property
2 in 1983?

3 Diane Michelson: Yes, I was.

4 Gregory McConnell: Alright. Did you visit the property to collect rent or take—or
5 review the property, what have you—.

6 Diane Michelson: I did visit the property on occasion to collect rent.

7 Gregory McConnell: So in '83 when it was rented, was it used at all for
8 residential purposes?

9 Diane Michelson: It was not.

10 Gregory McConnell: And that continued until 1984?

11 Diane Michelson: Yes. The artist moved out. I think he went back to Boston.
12 And around that time, Russ and I had talked about converting the property to
13 residential. And that's basically what happened at that point.

14 Gregory McConnell: What happened in 84? Tell us what you did, or what Russ
15 did?

16 Diane Michelson: Okay, Russ—.

17 Gregory McConnell: Well maybe what you did, that could be misconstrued.

18 Diane Michelson: Yeah, but-but really Russ did it. Russ divided the living space
19 into three units on Grace Street and he converted Occidental Street into a residence.
20 He hung doors, he put in a kitchen, he raised the floor, he put in a heating system, he
21 put in a tub. He made it so it had bedrooms, a kitchen, a living room, bathroom,
22 cabinets, and studio spaces.

23 Linda Moroz: Okay, and this was in 1984?

1 Diane Michelson: It was, it was right prior to the certificate of occupancy.

2 Gregory McConnell: Did he ask for—when he started the work, did he do the
3 work with permits?

4 Diane Michelson: He did not do the work with permits.

5 Gregory McConnell: And did he subsequently ask for and receive permits?

6 Diane Michelson: He did.

7 Gregory McConnell: For electrical and plumbing?

8 Diane Michelson: Yes, yes.

9 Gregory McConnell: And did you at my request, review the building files at the
10 City of Oakland to attempt reclaim all of the permits?

11 Diane Michelson: Yes.

12 Gregory McConnell: And were you able to find any permits?

13 Diane Michelson: Yes. There was an electrical permit.

14 Gregory McConnell: Okay, and the electrical—let's see. So there was a—was
15 there an electrical permit? Is that the one that is attached, that's identified as D35039?

16 Diane Michelson: Yes.

17 Gregory McConnell: And that was dated in 85?

18 Diane Michelson: Yes.

19 Gregory McConnell: Right. And there was a general building permit that was
20 requested in '84. Is that correct?

21 Diane Michelson: Yes. That is correct.

1 Gregory McConnell: Okay. And that permit indicates that in '84—the present
2 use of the building was apartment. Now was it actually being used as an apartment
3 before this work was done?

4 Diane Michelson: No.

5 Gregory McConnell: So that was the way it had been designed.

6 Diane Michelson: That's correct.

7 Gregory McConnell: In the layout.

8 Diane Michelson: Yes.

9 Gregory McConnell: So did you request and receive in February of 1985, a
10 certificate of occupancy?

11 Diane Michelson: Yes.

12 Gregory McConnell: Alright. Now you also provided to me, and we submitted to
13 the rent board did we not, a grant deed showing that in fact you did become the owner
14 on May 20th, 1985?

15 Diane Michelson: Yes.

16 Gregory McConnell: Now in 1974, did your husband inquire about the ability to
17 rent this property as a sculpture facility, as a place where custom manufacturing
18 sculptures would be permitted?

19 Diane Michelson: He inquired zoning, because he was wanting—he was a
20 sculptor himself. And he wanted to be able to do his work in the building.

21 Gregory McConnell: So at that time, he was told that the property, that the zone,
22 was R50 medium density residential zone, is that correct?

1 Linda Moroz: Evidence, yes. And they will be entered into evidence. So do you
2 have any questions?

3 Mark Sherman: Yeah. Diane, when did you live in the—in the building? What
4 year?

5 Diane Michelson: '83.

6 Mark Sherman: And not before?

7 Diane Michelson: Not before. No, I had a house in the city.

8 Mark Sherman: In Oakland?

9 Diane Michelson: No, in the city.

10 Mark Sherman: Oh. And where did Russ live?

11 Diane Michelson: Russ lived on 929 Grace.

12 Mark Sherman: 929?

13 Diane Michelson: 927, excuse me, sorry.

14 Mark Sherman: And he lived there from the time he bought the building to—.

15 Diane Michelson: I'm not positive as to whether he would live there from the time
16 he bought the building, but he lived there probably in the late 70s at least, yeah.

17 Mark Sherman: Late 70s, okay.

18 Diane Michelson: But that was only on 927 Grace.

19 Linda Moroz: So one building was livable, but the others were not?

20 Mark Sherman: Sections.

21 Linda Moroz: Sections of the property.

22 Diane Michelson: Yes, it had different addresses.

23 Linda Moroz: Oh, okay. Right, I noticed that, okay.

1 Customer Name: Accent on Languages

2 Case Name and Number: Hearing 2/24/2014 [6057 Disc]

3

4

CERTIFICATION OF TRANSCRIPT

5

6 I, Jenna B. Sol do hereby certify:

7

8 That I frequently transcribe audio and video recordings and have worked in the field for
9 5 years, and I am qualified to transcribe said recordings.

9

10 That Accent on Languages provided the attached recordings pertaining to the above-
11 referenced case. This transcript is from one of those recordings.

11

12 That per the request of the above mentioned firm, I listened to and transcribed the contents
13 of the recording to the best of my ability, and to the best of my knowledge and skill, this
14 transcript constitutes a full, true, and correct report of the recording.

14

15 That I am a disinterested person to the said action.

16

17 I declare under penalty of perjury under the laws of the United States that the foregoing is
18 true and correct and that this declaration was executed in Eugene, Oregon, by:

18

19 Jenna B. Sol on 8/23/2015
20 Signature Date

20

21

22

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EXHIBIT C

ORIGINAL

CITY OF OAKLAND
HOUSING & COMMUNITY DEVELOPMENT DEPARTMENT
RENT ADJUSTMENT PROGRAM

MARK SHERMAN,

Petitioner,

vs.

NO. T16-0258

RUSSEL MICHELSEN & DIANE
MICHELSEN,

Defendants.

REPORTER'S TRANSCRIPT OF CD OF PROCEEDINGS OF
RENT ADJUSTMENT PRETRIAL HEARING

OCTOBER 17, 2017

Produced by: GEORGIA A. WRIGHT, CSR #1542
Certified Shorthand Reporter

GEORGIA A. WRIGHT, CSR #1542
748 Pinedale Court, Hayward, CA. 94544
(510) 886-3352

000162

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 APPEARANCES:

2 BEFORE:

3 Barbara Cohen
4 Hearing Officer
5 Housing & Community Development Dept.
6 Oakland, California 94612

7 FOR THE PETITIONER MARK SHERMAN, TENANT:

8 Leah Hess
9 Attorney at Law
10 1736 Franklin Street, 10th Floor
11 Oakland, California 94612

12 FOR THE DEFENDANTS RUSSELL & DIANE MICHELSEN, OWNERS:

13 Diane Michelsen
14
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25

---oo---

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 that there's going to be -- yeah, there will be testimony.
2 So testimony is given under oath.

3 So, Mr. Sherman and Ms. Michelsen, raise your
4 right hand.

5
6 MARK SHERMAN and DIANE MICHELSEN,
7 being first duly sworn by the Hearing Officer to tell the
8 truth, the whole truth, and nothing but the truth,
9 testifies as follows:

10
11 HEARING OFFICER: Okay. Thank you.

12 Starting from my right, please state your name
13 for the record.

14 MS. MICHELSEN: Yes. My name is Diane Michelsen.

15 MR. SHERMAN: Mark Sherman.

16 MS. HESS: Leah Hess.

17 HEARING OFFICER: All right.

18 MS. MICHELSEN: How would you like to be
19 addressed?

20 HEARING OFFICER: Ms. Cohen is fine.

21 MS. MICHELSEN: Ms. Cohen, I have a statement I
22 would like to read. Also, my understanding was that the
23 purpose of this hearing was not to determine just about
24 subpoenas, but was to determine what procedures total we
25 were going to use and that was that. So if I may read my

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 declaration from Susan Grull, and I do not know why on
2 number 3 she's attached copies of the records from the
3 city of Berkeley because it is not in the city of
4 Berkeley, it is in the city of Oakland. And I don't
5 understand what 2240 Virginia Street, Berkeley, refers to
6 in this issue.

7 HEARING OFFICER: What I understand they're doing
8 is they're referring to a procedure in a different
9 jurisdiction as to the issue of whether voter registration
10 of records are relevant to a proceeding. It has nothing
11 to do with Virginia Street, it has nothing to do with
12 that. It is simply a legal argument that, "Look, they do
13 this in Berkeley so we should do it, too."

14 MS. MICHELSEN: I see.

15 HEARING OFFICER: Which is neither here or there
16 for me. The issue is -- the only question is: Is it
17 relevant that anybody was registered to vote at these
18 addresses?

19 And I would have to agree that that is a relevant
20 question. So ignore the whole thing about Berkeley. It
21 has nothing to do with anything that's going on here.

22 Am I right, that that was the whole purpose of
23 that?

24 MS. HESS: Yes. Yes.

25 HEARING OFFICER: So it doesn't have anything to

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 do with that. It has something to do with whether -- is
2 it relevant if somebody claimed that as their voting -- as
3 their place to vote because, as I understand the argument
4 would be, a voting -- when you register to vote, you say
5 what your residence address is. I would have to see a
6 voting registration card for that to be sure that that's
7 true. But I'm pretty sure that that's true, that you're
8 asked for your residence. So they're looking for was
9 anybody registered to vote at this address. That's the
10 subpoena they're seeking.

11 MS. MICHELSEN: I would object.

12 HEARING OFFICER: On what grounds?

13 MS. MICHELSEN: On the grounds it has already
14 been adjudicated when the premises and what the premises
15 had been utilized for.

16 HEARING OFFICER: Okay. The next one, Rus
17 Michelsen. Is this a declaration -- oh, it's a subpoena
18 and a subpoena duces tecum for documents and --

19 MS. HESS: Basically, what I was hoping to ask
20 for whether he could be served as we do in a court of law
21 with a demand that he appear instead of a subpoena because
22 he's a party.

23 HEARING OFFICER: We do not have that. You do
24 not have to -- we do not have that procedure. You do not
25 have to appear here as a party. You can send somebody to

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 MS. MICHELSEN: As compared to the ones that sag,
2 those land lines that work (unintelligible).

3 HEARING OFFICER: Exactly. Exactly.

4 MS. MICHELSEN: Yeah. Yeah.

5 HEARING OFFICER: So if there is a subpoena
6 issued for him, hopefully, if he cannot appear in person,
7 he will appear by phone, whether by video or phone.
8 Between the two of you, you can discuss whether that needs
9 to be video or whether it can just be by phone.

10 But the documents, the first in the list is lease
11 agreements for the space.

12 Ms. Michelsen, when did you and Mr. Michelsen get
13 married?

14 MS. MICHELSEN: In '82.

15 HEARING OFFICER: '82. So do you know whether
16 these documents are in existence, number 1?

17 MS. MICHELSEN: I know on number 1, there are no
18 -- there was nothing in writing in terms of leases or
19 rental agreements for any space.

20 MS. HESS: For any space in the property?

21 MS. MICHELSEN: For any space.

22 MS. HESS: Prior to when?

23 MS. MICHELSEN: Prior to '85.

24 MS. HESS: Prior to '85 there were no written
25 agreements?

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 MS. MICHELSEN: And I think, actually, it was
2 much later than that because there are certainly nothing
3 now. When I asked Rus about this, he said it was after
4 (unintelligible).

5 MS. HESS: And you resided at the property
6 from -- in '83?

7 MS. MICHELSEN: Yes.

8 MS. HESS: And when did you reside there?

9 MS. MICHELSEN: '83 -- well, the property being
10 927 Grace --

11 MS. HESS: Okay.

12 MS. MICHELSEN: -- to be specific. It was '83,
13 '84. That's what I remember. I don't remember anything
14 else.

15 MS. HESS: Okay. But before the issuance of the
16 certificate of occupancy, there were no written leases?

17 MS. MICHELSEN: Oh, no. Because it was
18 commercial space; not residential space.

19 HEARING OFFICER: I understand that, but I don't
20 -- I know there might not have been residential leases,
21 but, generally speaking, commercial leases ...

22 MS. MICHELSEN: This was very informal. There
23 was somebody that had a band at one point, somebody that
24 did woodworking, somebody who was an artist, somebody who
25 use to come into the space that Rus built and fixed

1 bicycles. It was really a dog-patchy kind of space. So
2 it was very informal. It was a handshake kind of thing.

3 HEARING OFFICER: All right. But whether or
4 not -- I mean, I can still -- I may make a finding of good
5 cause for those documents, and then you can indicate that
6 there were none.

7 MS. MICHELSEN: None. Yeah.

8 HEARING OFFICER: And then --

9 MS. HESS: For those documents, is there a
10 possibility -- it will save a great deal of time in the
11 pending hearing -- is there a possibility that those
12 documents could be produced ten days before the hearing?

13 HEARING OFFICER: The documents that
14 Ms. Michelsen just determined don't exist?

15 MS. HESS: Yes. If any do exist.

16 HEARING OFFICER: Yes. When you get the good
17 cause finding, you will then issue a subpoena and your
18 subpoena will -- it looks like all subpoenas, they will
19 say the time for production. And that does not have to
20 be at the hearing. In fact, you have to set it before the
21 hearing because any documents you want to produce at the
22 hearing has to be produced to us seven days before the
23 hearing.

24 MS. HESS: Okay. Great.

25 HEARING OFFICER: So. But this is all causing me

RENT ADJUSTMENT PRETRIAL HEARING 10/17/17

1 STATE OF CALIFORNIA)
2 COUNTY OF ALAMEDA)

3
4 I, GEORGIA A. WRIGHT, do hereby certify:

5 That I am a Certified Shorthand Reporter, duly
6 qualified, licensed and acting in the State of California;

7 That the foregoing pages numbered 1 through 55
8 constitute a true and complete transcription of the CD
9 recorded of the Rent Adjustment Pretrial Hearing set forth
10 on the date of October 17, 2017.

11
12 DATED: February 14, 2018.

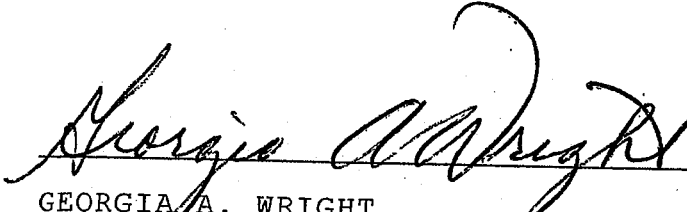
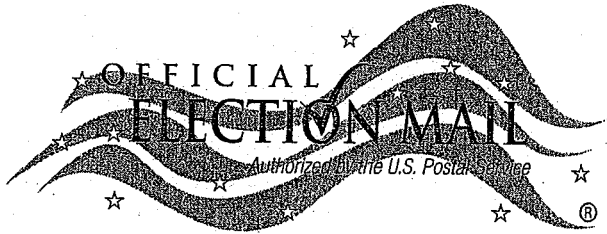
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16 
17 GEORGIA A. WRIGHT
18 Certified Shorthand Reporter No. 1542
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EXHIBIT D

ALAMEDA COUNTY
REGISTRAR OF VOTERS
1225 FALLON STREET, ROOM G-1
OAKLAND CA 94612-4283

(Rev. 01/18) ALAVES 18 143375_01



California Voter Registration/Pre-Registration Application
Solicitud de Inscripción/Preinscripción de Votante de California



California Voter Registration/Pre-Registration Application

Solicitud de Inscripción/Preinscripción de Votante de California

ALAMEDA COUNTY

Print clearly using blue or black ink. Use this form if you: (1) are a new voter, (2) are pre-registering to vote, (3) have changed your name, (4) have moved and need to update your voter registration address, or (5) want to change your political party preference. You can also register to vote online at RegisterToVote.ca.gov. — Escribe en letra de molde usando tinta azul o negra. Use este formulario si: (1) es votante nuevo; (2) se está preinscribiendo para votar; (3) cambió de nombre; (4) se mudó y tiene que actualizar el domicilio en su inscripción de votante; o (5) quiere cambiar su preferencia de partido político. También puede inscribirse en línea en RegisterToVote.ca.gov.

Qualifications Requisitos

- 1 I am a U.S. citizen and resident of California Yes-Sí No
 Soy ciudadano de EE.UU. y residente de California
 I am 18 or older — Tengo al menos 18 años de edad Yes-Sí No
 I am 16 or 17 and want to pre-register Yes-Sí No
 Tengo 16 o 17 años de edad y quiero preinscribirme

If "No," you CANNOT register. — Si "No", NO PUEDE inscribirse para votar.

Only choose one. — Elija solo una.

Your legal name Su nombre legal

Mr. — Sr. Ms. — Sra. Mrs. — Sra. Miss — Srta. (optional) — (optativo)

2 First — Primer nombre Middle — Segundo nombre

Last (including suffix, such as Jr., Sr., III) — Apellido (con sufijo, como Jr., Sr., III)

Identification Identificación

3 If you do not have a CA driver license or CA ID card, list the last 4 numbers of your Social Security Number (SSN), if you have one. — Si no tiene una licencia de manejar de CA o tarjeta de identidad de CA, ponga las últimas 4 cifras de su número del Seguro Social (SSN), si tiene uno.

Date of birth — Fecha de nacimiento (mes/día/año) M M D D Y Y Y Y

California driver license or ID card # — Núm. de licencia de manejar o tarjeta de identidad de California SSN (last 4 numbers) SSN (las últimas 4 cifras) XXX-XX-

U.S. state or foreign country of birth
Estado de EE.UU. o país extranjero donde nació

The address where you live La dirección donde vive

4 Home address — Domicilio Apt or Unit # — N° de depto. o Unidad
 City Ciudad State Estado CA Zip Cód. postal California county Condado de California
 Do not use a P.O. Box # No ponga apartado postal
 If you do not have a street address, describe where you live including cross streets, Route, N, S, E, W, etc. — Si no tiene una dirección con calle y número, describa dónde vive (cruce de calles, ruta, N, S, E, O, etc.)

The address where you receive mail — La dirección donde recibe su correo

5 Mailing address — if different from above or a P.O. Box #
 Dirección postal, si no es la misma que puso más arriba o es apartado postal
 Skip if same as address above. No llene si es la misma que puso más arriba.
 City Ciudad State Estado Zip Cód. postal Foreign country País extranjero

Registration history Historial de inscripción

6 If you were previously registered or pre-registered to vote, fill out this section. Si se inscribió o preinscribió para votar anteriormente, llene esta sección.

First name — Primer nombre Middle initial — Inicial del segundo nombre Last name — Apellido
 Previous address — Dirección anterior City — Ciudad
 State Estado Zip Cód. postal Previous county Condado anterior Previous political party preference (if any) Preferencia de partido político anterior (si corresponde)

Vote-by-mail Votación por correo

7 I want to get my ballot by mail before each election. Quiero recibir mi boleta por correo antes de cada elección.
 Yes-Sí* No
 *If "Yes," you will get your ballot by mail before each election but, if you want to vote in person, you must turn in your ballot or vote a provisional ballot. — Si "Sí", recibirá su boleta por correo antes de cada elección; sin embargo, si quiere votar en persona tiene que entregar su boleta o votar con una boleta provisional.

Political party preference Preferencia de partido político

8 If you choose "No Party/None," you may not be able to vote for some parties' candidates at a primary election for U.S. President, or for a party's central committee. Si selecciona "Ningún partido/Ninguno", es posible que no pueda votar por algunos de los candidatos partidarios en una elección primaria para presidente de EE.UU. o comité central partidario.

- I want to choose a political party preference — Deseo indicar una preferencia de partido político
- American Independent Party Partido Americano Independiente
 - Democratic Party — Partido Demócrata
 - Green Party — Partido Verde
 - Libertarian Party — Partido Libertario
 - Peace and Freedom Party Partido Paz y Libertad
 - Republican Party — Partido Republicano
 - Other (specify): — Otro (especificar):

I do not want to choose a political party preference — No deseo indicar una preferencia de partido político.

No Party / None — Ningún partido / Ninguno

Optional voter information — Datos optativos del votante

9 Email (optional) — Email (optativo)
 Phone number (optional) — Número de teléfono (optativo)
 I would like to receive election information by text message. Quiero recibir información electoral por mensaje de texto.
 My language preference for receiving election materials is. — Mi preferencia de idioma para recibir materiales electorales es:
 English Spanish Español Chinese 中文 Hindi हिन्दी Khmer ខ្មែរ
 Korean 한국어 Japanese 日本語 Tagalog Thai ไทย Vietnamese Việt ngữ
 I want voting materials in an accessible format. — Quiero recibir materiales electorales en un formato accesible.
 My ethnicity/race is: — Mi origen étnico/raza es:

Affidavit
Declaración jurada
 You must sign in the red box for your registration to be complete. — Para completar su inscripción, tiene que firmar en la casilla roja.

I swear or affirm that: — Juro o afirmo que:
 I am a U.S. citizen and a resident of California and at least 16 years old. I am not currently in state or federal prison or on parole for the conviction of a felony. I am not currently found mentally incompetent to vote by a court. I understand that it is a crime to intentionally provide incorrect information on this form. I declare under penalty of perjury under the laws of the State of California that the information on this form is true and correct. — Soy ciudadano de EE.UU. y soy residente de California y tengo al menos 16 años de edad. No estoy actualmente en una prisión estatal o federal o en libertad condicional por haber sido condenado de un delito mayor. No he sido declarado mentalmente incompetente para votar actualmente por una corte judicial. Entiendo que brindar información incorrecta de manera intencional en este formulario es un delito. Declaro bajo pena de perjurio conforme a las leyes del estado de California que la información en este formulario es verdadera y correcta.

X
 Signature — Firma _____ Date Signed — Fecha de la firma _____
 Month — Mes _____ Day — Día _____ Year — Año _____

01 SO 495533 200002

For Elections Information Contact:
Para información electoral,
comuníquese con:
 Alameda County
 Registrar of Voters
 1225 Fallon Street, Room G-1
 Oakland CA 94612-4283
 (510) 272-6973

The law protects your voter registration information against commercial use. Report any problems to the Secretary of State's Voter Hotline: (800) 345-8683. La ley prohíbe el uso comercial de su información de inscripción como votante. Reporte cualquier problema a la Línea de asistencia del Secretario de Estado: (800) 232-8682.

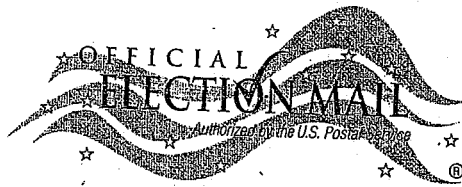
Did someone help you fill out or deliver this form? — ¿Alguien le ayudó a llenar o entregar este formulario?
 If "yes", the person who helped you must fill out and sign both parts of this blue box. Si "sí", la persona que lo ayudó tiene que llenar y firmar ambas partes de esta casilla azul.

Signature — Firma _____ Date — Fecha _____
 Name, address, and phone #: — Nombre, dirección y núm. de teléfono: _____
 Org. name and phone #: — Nombre y núm. de teléfono de la organización: _____
 Signature — Firma _____ Date — Fecha _____
 Name, address, and phone #: — Nombre, dirección y núm. de teléfono: _____
 Org. name and phone #: — Nombre y núm. de teléfono de la organización: _____

Tear here and fold to seal. Do not staple. The bottom part is your receipt. Separa aquí y doblar. Sella con cinta. No use grapas. La parte inferior es su recibo. Keep it until you receive a notice from your county elections official. Guardalo hasta que reciba un aviso del funcionario electoral de su condado.

01 SO 495533

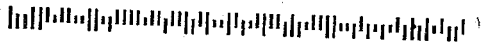
(This part is the voter's receipt.)
 (Esta parte es el recibo para el votante.)



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ALAMEDA COUNTY
REGISTRAR OF VOTERS
PO BOX 24224
OAKLAND CA 94623-9910

ALAMEDA COUNTY

Important Registration Information

- To vote in the next election, you must be at least 18 years old on Election Day and mail or deliver this card at least 15 days before the next election.
- If you miss the 15-day deadline, you can still register and vote. Contact your county elections official.
- 16- and 17-year-olds that pre-register to vote will automatically be registered voters when they turn 18.
- New voters that register by mail may have to show a form of identification the first time they vote, if they didn't provide a driver license or SSN when registering.
- Once registered, you may vote for any candidate for state or congressional office, regardless of the candidate's or your party preference or lack of party preference.

Can I vote by mail in the next election?

- Mark "Yes" in box 7 to always receive your ballot by mail, or
- Once registered, to receive your ballot by mail for the next election, send a written request to your county elections official at least 7 days before the election.

Questions, problems, or to report fraud?

Contact the Secretary of State's office:
 • (800) 345-VOTE (8683) • www.sos.ca.gov
 • elections@sos.ca.gov • RegisterToVote.ca.gov
 Or contact your local elections office.

For election information in other languages, please visit: www.sos.ca.gov
 Para obtener información electoral en otros idiomas visite: www.sos.ca.gov

Español: (800) 232-8682
 中文: (800) 339-2857
 Việt ngữ: (800) 339-8163

Can I check my voter registration status?

Yes! Check online at:
<https://voterstatus.sos.ca.gov>

Safe at Home

If sharing your address could put you in life threatening danger, you may be eligible to register to vote confidentially.

For more information, contact the Safe at Home program.

Safe at Home: (877) 322-5227
 Online: SafeAtHome.sos.ca.gov

¿Cómo puedo verificar si ya estoy inscrito o no?

Puede consultarlo en línea en:
<https://voterstatus.sos.ca.gov>

Safe at Home (Seguro en su casa)

Si el poner su dirección puede poner en peligro su vida, puede ser elegible para inscribirse para votar en forma confidencial.

Para obtener más información, comuníquese con el programa Safe at Home (Seguro en su casa).

Safe at Home: (877) 322-5227
 En línea: SafeAtHome.sos.ca.gov

¿Puedo verificar si ya estoy inscrito o no?

Para votar en la próxima elección, tiene que tener al menos 18 años de edad para el día de la elección y enviar por correo o entregar esta tarjeta por lo menos 15 días antes de la próxima elección.

Si se pasa de la fecha límite de 15 días, igual se puede inscribir y votar. Comuníquese con el funcionario electoral de su condado.

Las personas de 16 y 17 años que se preinscriban para votar serán automáticamente votantes inscritos cuando cumplan 18 años de edad.

Los votantes nuevos que se inscribieron por correo y no indicaron su número de licencia de manejar ni del Seguro Social, pueden tener que mostrar un documento de identidad la primera vez que voten.

Una vez inscrito, puede votar por cualquier candidato a un cargo estatal o del Congreso, sin importar la preferencia partidaria de usted o del candidato, o incluso si no tienen preferencia partidaria.

¿Puedo votar por correo en la próxima elección?

Marque "Sí" en la casilla 7 para recibir siempre su boleta por correo.

Una vez inscrito, si quiere recibir su boleta por correo para la próxima elección, envíe una solicitud por escrito al funcionario electoral de su condado por lo menos 7 días antes de la elección.

Preguntas, problemas o para denunciar fraude?

Póngase en contacto con la Secretaría de Estado al:

• (800) 232-8682 • www.sos.ca.gov
 • elections@sos.ca.gov • RegisterToVote.ca.gov
 O comuníquese con la oficina electoral de su condado.

한국어: (866) 575-1558
 Tagalog: (800) 339-2957
 日本語: (800) 339-2865
 हिन्दी: (888) 345-2692
 ខ្មែរ: (888) 345-4917
 ไทย: (855) 345-3933

Leah Hess, SB No. 126800
Attorney at Law
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RENT ARBITRATION PROGRAM
2019 JAN 18 PM 3:18

Attorney for Petitioner

**Housing and Community Development Department
Rent Adjustment Program**

CASE NUMBER: T16-0258, Sherman v. Michelsen
PROPERTY ADDRESS: 5823/5825 Occidental Street, Oakland, CA
PARTIES: Mark Sherman, Tenant
Diane and Harold Rus Michelsen, Owners

**PETITIONER MARK SHERMAN'S OPPOSITION TO OWNERS'
APPEAL OF REMAND HEARING DECISION**

On remand, after a full hearing on the merits, the Hearing Officer has determined that the Owners, Harold Rus Michelsen and Diane Michelsen obtained a Certificate of Exemption for Mark Sherman's rental unit by means of fraud. The remand Hearing Decision concluded that they had made false statements in the initial exemption hearing. Their testimony in that hearing was intended to deceive and to enable them to obtain a certificate to which they were not entitled. They repeated their false testimony in the remand hearing. Sherman proved their claim was fraudulent.

The Michelsens do not claim in this Rent Board Appeal that the findings of fact enumerated in the remand Hearing Decision are inaccurate or untrue. How could they? The evidence overwhelmingly points to fraud. Instead, the Owners raise entirely procedural issues.

The Owners assert that the Hearing Decision "contradicts...and is in contempt" of an earlier Appellate Court decision affirming the initial grant of exemption. They also assert that the prior litigation concerning the initial grant of the exemption bars this further petition on *res judicata* and collateral estoppel grounds. Finally, they assert that their own currently pending appeal of *this* case to the Court of Appeals bars this petition to the Rent Program.

**The Appellate Court Decision Affirming The Granting Of The Initial
Certificate Of Exemption Does Not Bar This Petition From Proceeding**

In this petition, Mr. Sherman challenged the validity of the original Certificate of Exemption. This petition was summarily dismissed by the RAP and the Program Administrator. Sherman

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filed a writ to the Superior Court alleging that the summary dismissal violated due process.

The Rent Board met to discuss the case with counsel in closed session and decided that it was indeed error to have denied Sherman the mandated hearings. Therefore, to remedy the error, the Rent Board filed a motion in Superior Court, requesting that the matter be remanded back to the Board. Alameda County Superior Court Case, No. RG16843, Rent Board Motion to Remand and Dismiss.

In their opposition to the Rent Board's motion for remand, the Michelsens raised claim and issue preclusion and lack of jurisdiction as reasons not to remand. The Superior Court rejected those arguments and remanded the case to the Board for further action.

In its motion for remand to the Superior Court, the Rent Board made it clear that Mr. Sherman's petition does not "contradict" the Superior Court judgment and Appellate Court's Decision affirming the initial grant of exemption. Rather, this petition is a new and different type of claim. As the Board stated in its motion for remand, a landlord's petition claiming exemption from the Ordinance differs from a subsequent challenge to the exemption based upon fraud or mistake:

Although the dispute between the parties had been pending for many years and appeared to have been finally decided by the [Superior] Court's 2015 order and judgment and the 2017 Court of Appeal decision, the 2016 tenants' petition actually presented a new issue.

Alameda County Superior Court Case No. RG16843, Rent Board's Motion to Remand and Dismiss p. 3:19-22

A hearing on the 2016 tenant's petition *will not* re-litigate whether the property is exempt....Instead, the hearing will examine whether there was "fraud or mistake" in the underlying facts that led to the Hearing Officer's or the Rent Board's ultimate finding that the property was exempt. Mr. Sherman has the burden of proof on the latter issue. The parties have never litigated the latter issue involving "fraud or mistake."

Rent Board's Reply to Owner's Opposition to Motion to Remand, p. 2:5-10

The Rent Board pointed out that the Ordinance clearly contemplates challenges, based on fraud or mistake, to previously issued Certificates of Exemption. If tenants are precluded from such subsequent challenges, the following Ordinance provisions below would be rendered meaningless.

A Certificate of Exemption is a final determination of exemption *absent fraud or mistake*. [Emphasis added].

OMC 8.22.030.B. (1)(b)

Timely submission of a Certificate of Exemption previously granted in response to a petition will result in dismissal of the petition *absent proof of fraud and mistake regarding the granting of the certificate*. [Emphasis added]
OMC 8.22.030.B. (1)(c)

In the event that a *previously issued Certificate of Exemption* is found to have been issued *based on fraud or mistake and thereby rescinded*, the Staff will record a rescission of the Certificate of Exemption against the affected real property with the County Recorder. [Emphasis added]
Regulation 8.22.130C.2.

The Superior Court rejected the Michelsens' arguments of lack of jurisdiction and granted the Board's motion. The Court remanded the matter back to the Board, reserving issues of *res judicata* /collateral estoppel for determination in the remand proceedings. (See, Exhibit 1, Alameda County Superior Court. R. RG16843, Order/Motion to Remand and Dismiss Granted, attached hereto)

In the remand proceedings, the remand Hearing Decision rejected the Owners' *res judicata/collateral* estoppel arguments. The Hearing Officer also rejected the argument that only extrinsic fraud could be alleged in the hearing. See, Exhibit 2: RAP. Hearing Decision, pp. 22-25, attached hereto.

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The Court Of Appeal Has Permitted Sherman's Remand Hearing To Proceed While The Appellate Case Is Pending

The owners appealed the Superior Court's judgment to the First District Court of Appeal, alleging that the Superior Court erred in remanding the case. In their Appeal, they again alleged that the RAP lacked jurisdiction. They asserted, again that the action was barred by *res judicata* and collateral estoppel and claimed that only extrinsic fraud could be alleged in the proceedings. They asserted that the Superior Court erred in granting the Rent Board's motion for remand.

The Michelsens filed three separate motions to stay the remand hearing pending the outcome of their appeal to the First District Court of Appeal. In each, they repeated the arguments they had raised before. The first motion to stay, to the First District Court of Appeal, was rejected for procedural errors.

The Owners next filed a motion to stay the Rent Board proceedings in the Superior Court. The Superior Court also rejected the motion. The Superior Court clearly stated that the Ordinance permits a tenant to file a case to rescind an earlier case because it was based on fraud or mistake. The Court also referred to the policy of hearing of matters on their merits, and noted the age of the parties: "Postponing resolution on the merits could result in loss of evidence or memory and prejudice the parties." The Court did not address the issue of issue and claim preclusion, saying that the parties could raise it in the remand proceedings. See, Exhibit 3, Alameda County Superior Court, Order/Motion to Stay Proceedings Denied, attached hereto.

The Michelsens again applied to the First District Court of Appeal for a stay of the RAP remand hearing (deemed, by the Appellate Court a writ of supersedeas). The request was again denied. This time, the Appellate Court emphasized that the stay was denied "on the merits," rather than on procedural grounds, stating that the owners had not shown "probable error." Nor had they shown that any "substantial question" would be raised in the appeal. (See, Exhibit 4, Denial of Writ of Supersedeas.)

The Remand Hearing Decision Should Be Affirmed

Mr. Sherman finally obtained a hearing on the merits of his claim of fraud. The Hearing Officer, in a well-reasoned 31-page Remand Decision, detailed the voluminous facts upon which her finding of fraud rested. She also set forth sound reasoning for her rejection of the Michelsen's defenses of lack of jurisdiction, res judicata/collateral estoppel, and extrinsic v. intrinsic fraud.

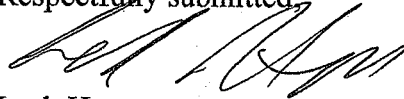
Conclusion

The Owners' appeal of the remand Hearing Decision is without basis. When summarily denied the hearing to which he was entitled, Sherman petitioned the Superior Court seeking remand. The Rent Board wisely acknowledged that Mr. Sherman had been denied due process and moved the Court requesting remand so that the error could be corrected. When the Michelsens appealed, both the Superior Court and the First District Court of Appeal denied their requests for a stay of the RAP hearing pending the outcome of the appeal. At the RAP Hearing, the Hearing Officer rejected the Owner's legal arguments and, upon reviewing the voluminous evidence,¹ she determined that they had fraudulently obtained the initial Certificate of Exemption to the detriment of both Mr. Sherman and the City of Oakland.

Mr. Sherman requests that the Board affirm the remand Hearing Decision, and that the Board correct the decision's Order with respect to rent overpayment and base rent issues only. (As requested in Mr. Sherman's appeal). Alternatively, Mr. Sherman requests that the Board affirm the entire decision, except for rent overpayment and base rent determinations, and remand for the sole purpose of making such corrections.

January 17, 2019

Respectfully submitted,



Leah Hess
Attorney for Mark Sherman

¹The evidence included live testimony from two prior tenants and a declaration, under penalty of perjury from another, voter registration records showing numerous prior tenants at the property, telephone directory records, reverse directories, and other documents. Both owners were shown to have intentionally made false statements about the residential history of the building and the construction of rental units at the property.

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Attn: Hess, Leah
1736 Franklin Street
10th Floor
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City of Oakland

**Superior Court of California, County of Alameda
Hayward Hall of Justice**

Sherman Plaintiff/Petitioner(s) VS. City of Oakland Defendant/Respondent(s) (Abbreviated Title)	No. <u>RG16843773</u> Order Motion To Remand and Dismiss Granted
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The Motion To Remand and Dismiss was set for hearing on 07/12/2017 at 09:00 AM in Department 511 before the Honorable Kimberly E. Colwell. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The motion of the City of Oakland to remand and dismiss the case is **GRANTED**.

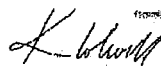
Petitioner Sherman asserts that on 7/25/16 the Hearing Officer issued an administrative decision without providing a hearing and that on 9/28/16 the Rent Board issued a final decision again without providing a hearing. The City's motion asserts that it was an error to dismiss petitioner's claim without a hearing and seeks a court order remanding the matter so that the Rent Board can revisit the matter. Petitioner does not oppose the motion.

It is **ORDERED** that that 7/25/16 decision of the Hearing Officer and the 9/28/16 decision of the Rent Board are **VACATED**. The court remands the matter to the Rent Board. The court does not direct or constrain the Rent Board's discretion regarding the conduct of further proceedings. (CCP 1094.5(f).)

If after further administrative proceedings the Rent Board issues another decision, then a challenge to any such administrative decision should be made in a new case before this court.

The court enters **JUDGMENT** in favor of Petitioner Sherman. The case is **DISMISSED**.

Dated: 07/12/2017



Judge Kimberly E. Colwell

Order

EXHIBIT 1

000185

CITY OF OAKLAND

250 FRANK OGAWA PLAZA, SUITE 5313, OAKLAND, CA 94612



Housing and Community Development Department
Rent Adjustment Program

TEL (510) 238-3721
FAX (510) 238-6181
TDD (510) 238-3254

HEARING DECISION

CASE NUMBER: T16-0258, Sherman v. Michelsen

PROPERTY ADDRESSES: 5823-5825 Occidental Street, Oakland, CA

DATES OF HEARING: February 23, 2018; June 22, 2018

DATE OF PRETRIAL CONFERENCE: October 17, 2017

DATE OF DECISION: November 30, 2018

APPEARANCES: Mark Sherman, Tenant (all dates)
Leah Hess, Attorney for Tenant (all dates)
Charles Abraham, Witness (Feb. 23, 2018, only)
Sue Doyle, Witness (Feb. 23, 2018, only)
Daniel Wiener, Witness (by phone, Feb. 23, 2018, only)
Michael Joffe, Witness (Feb. 23, 2018, only)

Harold Rus Michelsen (by phone, Feb. 23, 2018, only), Owner
Diane Michelsen, Owner (all dates)

SUMMARY OF DECISION

The tenant's petition is granted. The legal rent for the unit is set forth in the Order below.

CONTENTIONS OF THE PARTIES

The tenant filed a petition on May 20, 2016, alleging that a rent increase from \$1,817.80 to \$4,000 a month, effective June 1, 2016, violated the Rent Adjustment Ordinance (Ordinance) on the following grounds: the increase exceeds the CPI Adjustment and is unjustified or is greater than 10%; no written notice of the Rent Program (RAP Notice) was given together with the notice of increase; the proposed increase would exceed an overall

EXHIBIT 2

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Does the tenant have a right to contest the exemption on the grounds that the exemption was issued as a result of fraud or mistake?

The Ordinance states that "A Certificate of Exemption is a final determination of exemption absent fraud or mistake" and "(t)imely submission of a certificate of exemption previously granted in response to a petition shall result in dismissal of the petition absent proof of fraud or mistake regarding the granting of the certificate. The burden of proving such fraud or mistake is on the tenant." O.M.C. 8.22.030(B)(1)(b) and (c). There is no definition of fraud or mistake given in either the Ordinance or the accompanying regulations. This subsection of the Ordinance has been in the Ordinance continuously since 2002.

The *Tenant Petition* form contains a "ground for petition" that states "I wish to contest an exemption from the Rent Adjustment Ordinance." This box was checked on Mark Sherman's petition in the instant case. Attached to his petition was an Attachment stating that his primary claim is that the certificate of exemption in case L13-0054 (the exemption case) was issued as a result of fraud or mistake.

The owners argue that because the tenant has not alleged fraud with specificity, that he cannot prevail in his claim and it must be dismissed. The law does not require specificity.

Since 2002, the Rent Adjustment Ordinance has provided a remedy to any tenant to establish that a prior exemption was granted based on fraud or mistake. This remedy applies to both the tenant who is residing in the unit at the time the exemption is sought and to all future tenants of the unit or building in question. The pleading and proof requirements are those set by the Rent Adjustment Ordinance, the Regulations, and the Board and are not those set forth in the California Civil Code or those cases that interpret Code of Civil Procedure § 473 (allowing for relief from "a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.").

The RAP does not have pleadings beyond that which is provided by the *Tenant Petition* forms. The form, as noted above, has a box to check if one wishes to contest a prior exemption. There is no ability to do anything more than that, and nothing more than that is required. Nonetheless, the tenant attached a statement to his petition stating that he was claiming that the prior certificate of exemption was issued as a result of fraud or mistake. The tenant has plead fraud or mistake with as much specificity as the Ordinance requires.

Additionally, the owners argue that the case must be dismissed because of the doctrines of *res judicata* and *collateral estoppel*. These arguments also fail. Because the RAP is an administrative agency, where no discovery exists prior to Hearing, the Ordinance provides a remedy for the tenant involved in the initial Hearing and all future tenants to challenge a previously issued Certificate of Exemption.³⁹ Unlike the original petition, where the owner

³⁹ There are no interrogatories or depositions permitted in the RAP process. There are no requirements that parties exchange documents. Parties are required to send all documents to the RAP 7 days prior to Hearing, allowing the

had the burden of proof to establish a new construction exemption, in this case, the tenant has the burden of proof. This is a completely different hearing, with a different burden of proof, than the initial exemption Hearing and is not a collateral attack on the exemption case.

Furthermore, *res judicata* bars claims that were, or should have been, made in a prior suit involving the same parties. See *DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824. However, since claims attacking a prior exemption can be made by either the tenant involved in the first case or by the universe of future tenants, a claim attacking an exemption is not a claim that should or could have been made in the prior suit. This is a completely different claim and is not barred by either *collateral estoppel* or *res judicata*.

The owners also argue that the great interest in finality of judgment prevents a Hearing on this matter and should result in a denial of the tenant's petition. The City of Oakland, on the other hand, has authored an Ordinance which allows current and future tenants to contest exemptions granted because of fraud or mistake. While there is always a legitimate interest in the finality of judgments, that interest does not supersede the interest that all judgments, especially those that exclude housing from rent control in perpetuity, should not be based on fraud or mistake.

Furthermore, the owners' purported concern as to judgment finality is really only their own self-interest at stake. There is simply no evidence to suggest that allowing a tenant to contest an exemption in this instance will cause a massive number of cases to be filed repeatedly contesting previously granted exemptions. In fact, as far as this Hearing Officer knows, there is only one other case in which this matter has been litigated in the history of the Rent Program.^{40, 41}

Finally, if the Rent Adjustment Program was limiting petitions based on judgment finality, the owners would not have been allowed to claim in the exemption case that the unit was exempt, because they did not make that claim in the original rent increase petition (T12-0332). That rent increase petition was fully litigated and the owner never raised the claim that the unit was exempt from the RAP program. Yet the owner was allowed to file the exemption case. The reason they were allowed to file the exemption case is that the RAP does not have rules requiring that all claims be decided in one Hearing. The ability of the owner to file the exemption case after the complete litigation of the tenant's original petition is a clear demonstration that the interest of judgment finality does not supersede all other interests, including the interest of introducing new evidence and of adjudicating the decision fairly and correctly. It was not possible for the tenant to allege that there was fraud in the

opposing party to review those documents at a file review. Additionally, while a party can request a good cause finding for the issuance of a subpoena, this procedure is not known by many, is not written in any of the RAP handouts and is not described in the Ordinance or the Regulations.

⁴⁰ While other tenants do sometimes check the box on the petition form that they wish to contest an exemption, this box is often checked before a prior exemption has been granted. See, for example, *Peters v. Sullivan*, T17-0274 and *Cordes v. Park*, T17-0376, for cases where the tenants checked the box that they wished to contest an exemption, when no exemption had previously been granted.

⁴¹ See *Scott v. Suh*, T18-0150, which is currently pending.

underlying exemption case until the owners testified that the unit had no prior residential use.⁴²

The City of Oakland Rent Adjustment Ordinance states in its "findings and purpose" section, that:

"The City Council finds that a shortage of decent, safe, affordable and sanitary residential housing continues to exist in Oakland. This shortage is evidence by a low vacancy rate amount such units through the city and continually increasing demand for such housing. Many residents of Oakland pay a substantial amount of their monthly income for rent. The present shortage of rental housing units and the prevailing rent levels have a detrimental effect on the health, safety, and welfare of a substantial number of Oakland residents, particularly senior citizens, persons in low and moderate income households, and persons on fixed incomes....." O.M.C. § 8.22.010(A).

This language, combined with the language allowing any tenant to contest an exemption based on fraud or mistake, makes it clear that the City gives great weight to returning a wrongly exempted dwelling unit to Oakland's stock of affordable housing.

Is the tenant's claim limited to a claim that the fraud committed by the owner was extrinsic fraud?

The owners argue that the tenant can only prevail in his claim if he proves extrinsic fraud, rather than intrinsic fraud. (Extrinsic fraud is fraud that relates to the underlying litigation, such as being told that a Hearing is continued, when in fact it was not. Intrinsic fraud is fraud that relates to the testimony given in the underlying matter.) It is not the law in this jurisdiction that the only kind of fraud that can be claimed in a case seeking to nullify a previously granted *Certificate of Exemption* is extrinsic fraud.

The ability to challenge a fraudulently granted exemption affects the rights of current and future tenants to rent regulation as well as the interests of the City of Oakland to protect its tenants from unscrupulous landlords. Since any tenant who resides in a unit after a *Certificate of Exemption* has been granted can raise a claim that the exemption was granted based on fraud or mistake it is not possible to limit these cases to those of extrinsic fraud as that kind of fraud only occurs between the parties in the underlying proceeding.

Additionally, the cases cited by the owners in this argument are all cases that interpret Code of Civil Procedure § 473, which procedurally allows for relief from judgment (by the underlying parties to a proceeding) based on mistake, inadvertence and excusable neglect. It is in this context that it has been held that fraud in an underlying proceeding can only be claimed if it is "extrinsic." See for example, *In re Marriage of Stevenot* (1984) 154 Cal. App. 3d 151. The claims that arise in the instant case are not claims that are limited to the parties in a proceeding, as are those claims that interpret CCP § 473. Therefore, it would

⁴² As noted below, the RAP does not have discovery, which would have allowed the tenant to learn about the owners' claim in great detail prior to the Hearing.

severely hamper the investigation of fraudulent misrepresentations by owners who seek to defraud the City of Oakland, if these claims were limited to only those cases where extrinsic fraud was at stake.

Still further, even in those cases that interpret CCP § 473, the courts have held that the rules about extrinsic and intrinsic fraud are not hard and fast. In cases where discovery is limited (as in proceedings before the Rent Board, where there is no discovery available between the parties), courts have held that claims of fraud cannot be limited to only extrinsic fraud.

The case of *Pour le Bebe v. Guess?, Inc.* 112 Cal. App.4th 810, is instructive. That case arose out of an arbitration, where discovery is limited. When the plaintiff claimed that fraud had been committed in the underlying action the Court held:

“Because parties to an arbitration are not afforded the full panoply of procedural rights available to civil litigants, lacking for example the right to an appeal or to extensive discovery, courts generally take a more lenient approach when examining intrinsic fraud in the context of a motion to vacate an arbitration award.” *Id.* at 829.

For all of these reasons, the tenant’s claim that there was fraud committed by the owner is not limited to a claim of extrinsic fraud.

Was the prior exemption granted as a result of fraud?

The elements of fraud are “(a) a misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Lazar v. Superior Court* (1996) 12. Cal. 4th 631, 638.

The first questions then, are these: was Mr. Michelsen’s testimony in the exemption case that there was no prior residential use of Sherman’s unit prior to 1984 false testimony and did he know that the testimony was false?

The evidence in this case establishes that the declaration provided by Mr. Michelsen, (and supported by Ms. Michelsen’s live testimony at the exemption Hearing) that when he rented the premises to Mark Sherman in September of 1985, it was the first time the premises were rented as a residence, was false testimony. Both Michelsens’ further testified that there were no bath or kitchen facilities in the unit prior to the Sherman rental, and this too was false.

There is ample evidence of prior residential use. First, there is clear and convincing evidence that Charles Abraham and Daniel Wiener resided in the unit at 5823 Occidental. In Abraham’s case the evidence establishes that he lived there for many years beginning in 1976 or 1977. The fact that Abraham’s move in date is more likely than not to be 1976 is corroborated by Wiener’s testimony that he moved into the unit in 1976 because, since Wiener was a subtenant of Abraham’s, he could not have moved in in 1976 unless Abraham was already residing there.

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City of Oakland

**Superior Court of California, County of Alameda
Hayward Hall of Justice**

Sherman Plaintiff/Petitioner(s) VS. City of Oakland Defendant/Respondent(s) (Abbreviated Title)	No. <u>RG16843773</u> Order Motion to Stay Proceedings Denied
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The Motion to Stay Proceedings was set for hearing on 11/08/2017 at 09:00 AM in Department 507 before the Honorable Jennifer Madden. The Tentative Ruling was published and was contested.

Third Party Diane Michelsen appearing, Third Party Rus Michelsen not appearing, Respondent City of Oakland appearing represented by Jamilah Jefferson.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Motion of Diane and Harold Rus Michelsen to stay the case is DENIED.

Following two earlier Rent Board cases, Sherman filed a third case asserting that there was fraud or mistake in the second Rent Board case finding that the property was exempt. A person can file a Rent Board case asserting that an earlier Rent Board decision should be rescinded because it was based on fraud or mistake. (OMC 8.22.030B.1.b, OMC 8.22.030B.1.c, and OMC 8.22.030.C.2.) The Hearing Officer dismissed the third Rent Board case without a hearing.

On 12/28/16 Petitioner Sherman filed this action seeking a writ that would direct the City of Oakland to set aside the decision dismissing the third Rent Board case.

The City filed a motion stating that the City erred in dismissing petitioner's claim without a hearing and sought dismissal of the case. On 7/12/17, the court dismissed the case, stating, "It is ORDERED that that 7/25/16 decision of the Hearing Officer and the 9/28/16 decision of the Rent Board are VACATED. The court remands the matter to the Rent Board."

On 9/13/17, Real parties in interest Diane and Harold Rus Michelsen filed an appeal and sought to stay the trial court proceedings. (Sherman v. Oakland, Court of Appeal case No. A152429.) On 10/4/17, the Court of Appeal denied the request for a stay of (petition for writ of supersedeas) on procedural grounds.

On 10/11/14, petitioner filed a motion in this court seeking to stay the Rent Board proceedings. The Court may stay its own cases in the interest of justice. (C.C.P. 187; Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 758.) The court can also stay an administrative proceeding if the administrative proceeding is the subject of a pending case.

Order

P 11 *EXHIBIT 3*

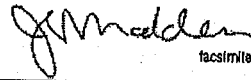
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The court will not stay the administrative proceeding. The court generally favors the resolution of matters on the merits, so the court will err in favor of permitting the Rent Board to address the merits. The facts in the third Rent Board case date back many years and the parties in the third Rent Board case are over the age of 70, so postponing resolution on the merits could result in loss of evidence or memory and prejudice the parties.

The court does not address whether the second Rent Board case has claim or issue preclusion effect on the third Rent Board case. The parties can raise that issue in the third Rent Board case.

The court's order does not preclude any party from seeking a stay of the third Rent Board case in the third Rent Board case.

Dated: 11/08/2017


facsimile

Judge Jennifer Madden

Law Office of Leah Hess
Attn: Hess, Leah
1736 Franklin Street
10th Floor
Oakland, CA 94612

City of Oakland

**Superior Court of California, County of Alameda
Hayward Hall of Justice**

Sherman <p style="text-align: center;">Plaintiff/Petitioner(s)</p> VS. City of Oakland <p style="text-align: center;">Defendant/Respondent(s) (Abbreviated Title)</p>	No. <u>RG16843773</u> Order Motion to Stay Proceedings Denied
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The matter was argued and submitted, and good cause appearing therefore,

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On 12/28/16 Petitioner Sherman filed this action seeking a writ that would direct the City of Oakland to set aside the decision dismissing the third Rent Board case.

The City filed a motion stating that the City erred in dismissing petitioner's claim without a hearing and sought dismissal of the case. On 7/12/17, the court dismissed the case, stating, "It is ORDERED that that 7/25/16 decision of the Hearing Officer and the 9/28/16 decision of the Rent Board are VACATED. The court remands the matter to the Rent Board."

On 9/13/17, Real parties in interest Diane and Harold Rus Michelsen filed an appeal and sought to stay the trial court proceedings. (Sherman v. Oakland, Court of Appeal case No. A152429.) On 10/4/17, the Court of Appeal denied the request for a stay of (petition for writ of supersedeas) on procedural grounds.

On 10/11/14, petitioner filed a motion in this court seeking to stay the Rent Board proceedings. The Court may stay its own cases in the interest of justice. (C.C.P. 187; Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal.4th 739, 758.) The court can also stay an administrative proceeding if the administrative proceeding is the subject of a pending case.

Order

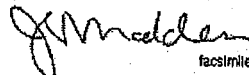
EXHIBIT 4
000188
P12

The court will not stay the administrative proceeding. The court generally favors the resolution of matters on the merits, so the court will err in favor of permitting the Rent Board to address the merits. The facts in the third Rent Board case date back many years and the parties in the third Rent Board case are over the age of 70, so postponing resolution on the merits could result in loss of evidence or memory and prejudice the parties.

The court does not address whether the second Rent Board case has claim or issue preclusion effect on the third Rent Board case. The parties can raise that issue in the third Rent Board case.

The court's order does not preclude any party from seeking a stay of the third Rent Board case in the third Rent Board case.

Dated: 11/08/2017



facsimile

Judge Jennifer Madden

PROOF OF SERVICE BY MAIL

I am over the age of eighteen (18) and not a party to the within case. I am employed in the County of Alameda, State of California. My business address is 610 16th Street, Suite M-8, Oakland, CA 94612.

On January 18, 2019, I served true copies of the following document:

PETITIONER MARK SHERMAN'S OPPOSITION TO OWNER'S APPEAL OF REMAND HEARING DECISION

By First Class Mail to the following addresses:

Francis McKeown
2550 Ninth Street, Suite 202
Berkeley, CA 94710

Diane Michelsen
PO Box 6363
Moraga, CA 94570

Harold Michelsen
PO Box 6363
Moraga, CA 94570

Jamilah A. Jefferson
City Attorney's Office
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Oakland, California on January 18, 2019.


SUSAN DOYLE

2019 JAN 28 PM 12:32

1 FRANCIS M. MCKEOWN (BAR NO. 122796)
2 MCKEOWN & ASSOCIATES
3 2550 9TH STREET, SUITE 202
4 BERKELEY, CA 94710
5 TELEPHONE 510-647-0600
6 FACSIMILE 510-644-1905

7 Attorney for Real Party In Interest HAROLD RUS
8 MICHELSEN AND DIANE MICHELSE

9 **CITY OF OAKLAND RENT ADJUSTMENT PROGRAM**

10 MARK SHERMAN,

CASE NO. T16-0258

11 Petitioner and Appellant,

12 vs.

OPPOSITION TO APPEAL

13 CITY OF OAKLAND (RENT BOARD,

14 Respondent.

15 HAROLD RUS MICHELSEN AND DIANE
16 MICHELSEN,

17 Real Parties in Interest.

18 Real Party In Interest Diane Michelsen and Harold Rus Michelsen file this opposition to
19 the appeal of the rent board decision of November 30, 2018 in order to preserve their rights in
20 this process.

21 The thrust of the position of the real parties in interest was set forth in the court of appeal
22 reply brief filed in this matter. The rent board has taken the position that res judicata does not
23 apply to their decisions, which may be inconsistent and petitioners may apparently file multiple
24 petitions on the same matters and obtain new and different decisions.

25 While this may well be within the powers of the City of Oakland Rent Adjustment
26 Program to decline to give respect to its previous decisions, it may not do so with respect to the
27 decisions of the California Superior Court, or the California Court of Appeal for the First
28 District.

1 Sherman's Respondent's brief on appeal set out the law succinctly:

2 The California Supreme Court has stated: "'Res judicata' describes the
3 preclusive effect of a final judgment on the merits." (*Mycogen Corp. v.*
4 *Monsanto Co.*, (2002) 28 Cal. 4th 888, 896) It "prevents relitigation of the
5 same cause of action in a second suit between the same parties. (*Id.* at p. 897.)
6 Under the doctrine, "all claims based on the same cause of action must be
7 decided in a single suit; if not brought initially, they may not be raised at a
8 later date." (*Ibid.*)

9 Collateral estoppel precludes relitigation of issues. (*Lucido v. Superior Court*
10 (1990) 51 Cal.3d 335, 341. The doctrine applies only if 1) the issue sought to
11 be precluded is identical to that decided in a prior proceeding; 2) the issue
12 must have been actually litigated in the prior proceeding; 3) it must have been
13 necessarily decided in that proceeding; 4) the party against whom collateral
14 estoppel is asserted, must be the same as the party in the prior proceeding; and,
15 5) the decision in the former proceeding must be final and on the merits.
16 (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal. 4th
17 921, 943-944. (Respondent's Brief, pages 29-30.) (Sherman Respondent's
18 Brief, pages 33-34.)

19 Sherman went on to quite accurately state the law with respect to attacks on the
20 underlying decision based upon extrinsic versus intrinsic fraud:

21 It is well settled in California law that a final judgment may be set aside if it is
22 the result of extrinsic fraud, but not if it is the result of intrinsic fraud. Fraud is
23 extrinsic if it prevents a party from having a fair hearing, such as a false
24 promise of settlement, or purposely keeping the party in ignorance of the suit.
25 Intrinsic fraud, on the other hand, is fraud committed at the trial, such as
26 perjury or submitting forged documents. *Pico v. Cohn* 91 Cal. 129, 133-134
(1891) ; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial
Court, § 225, p. 832. Intrinsic fraud consists of matters such as "deliberate,
intentional misrepresentations, untruths, half truths and deceitfully misleading
declarations..." *Beresh v. Sovereign Life Ins. Co.* 92 Cal.App.3d 547 (1979).

If the aggrieved party had a reasonable opportunity to appear and litigate his
claim or defense, fraud occurring in the course of the proceeding is not a
ground for equitable relief. The theory is that these matters will ordinarily be
exposed during the trial by diligence of the party and his or her counsel, and
that the occasional unfortunate results of undiscovered perjury or other
intrinsic fraud must be endured in the interest of stability of final judgments. 8
Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, §
225, p. 832. (Sherman Respondent's Brief, pages 33-34.)

1 **SHERMAN V CITY OF OAKLAND**
2 **Court Of Appeal Case A157249,**
3 **(Superior Court Case #RG16843773)**

4 **PROOF OF SERVICE**

[C.C.P. §2009]

5 I, the undersigned, state:

6 I am a citizen of the United States. My business address is 2550 Ninth Street, Suite 202,
7 Berkeley, California 94710. I am over the age of eighteen years and not a party to this action. On the date
8 set forth below, I served the foregoing documents described as follows:

8 **OPPOSITION TO APPEAL**

9 On the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope
10 addressed as follows:

11 Leah Hess
12 610 16th Street, M-8
Oakland, CA 94612

13 Jamilah Jefferson
14 1 Frank H. Ogawa Plaza, 6th Floor
Oakland CA 94612

15 [x] BY FIRST CLASS MAIL - I am readily familiar with my firm's practice for collection and
16 processing of correspondence for mailing with the United States Postal Service, to-wit, that
17 correspondence will be deposited with the United States Postal Service this same day in the
ordinary course of business. I sealed said envelope and placed it for collection and mailing this
date, following ordinary business practices.

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct and that this declaration was executed this date in Berkeley, California.

20 Dated: January 28, 2019

21 _____
Annie Taylor

22
23
24
25
26

PROOF OF SERVICE