HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD
REGULAR MEETING
October 24, 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

a) Approval of Board Minutes from September 26, 2019 Regular Meeting
b) Approval of Board Minutes from October 3, 2019 Panel Meeting
c) Approval of Board Minutes from October 10, 2019 Regular Meeting

4. OPEN FORUM

5. APPEALS*

a) T18-0226, Baragano v. Discovery Investments
b) L17-0062, Kahan v. Tenants
c) T17-0371, Arnold v. Farley Levine Properties

6. ACTION ITEMS

a) Formation of additional ad hoc committees, membership and review of issues identified in May 9, 2019, Board meeting (see attached list on page 3)

7. INFORMATION AND ANNOUNCEMENTS

a) Updates on the Efficiency Ordinance (City Attorney's Office)
b) Discussion of changes to HUD Requirements and Fair Housing Act (J. Warner)

8. COMMITTEE REPORTS AND SCHEDULING

a) Report from Ad Hoc Committee – Deferred Maintenance v. Capital Improvement of Dry Rot

9. ADJOURNMENT

* Staff recommendation memos for the appeals will be available at the Rent Program and the Clerk's office at least 72 hours prior to the meeting pursuant to O.M.C. 2.20.080.C and 2.20.090.

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@oaklandca.gov 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 envié un correo electrónico a sshannon@oaklandca.gov 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@oaklandca.gov
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.

Formation of additional ad hoc committees, membership and review of issues identified in May 9, 2019, Board meeting:

- Information about the Building Code and intersection with the Regulations; (e.g. window bars-there is a code that applies to this.)
- Should dry rot be treated differently from other deferred maintenance items?
- Clarification of deferred maintenance v. items that benefit tenants?
- Ambiguous terms in the regulations and in the Ordinance;
- How is the value of the Decreased Housing Services determined?
- What constitutes a burden of proof regarding expenses for capital improvements?
- Effects of AB 1482 on Rent Adjustment Program Ordinance

HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD
REGULAR MEETING
September 26, 2019
7:00 P.M.
CITY HALL, HEARING ROOM #1
ONE FRANK H. OGAWA PLAZA
OAKLAND, CA

MINUTES

1. CALL TO ORDER

The HRRRB meeting was called to order at 7:08 p.m. by Chair, J. Warner.

2. ROLL CALL

MEMBER	STATUS	PRESENT	ABSENT	EXCUSED
T. HALL	Tenant			X
R. AUGUSTE	Tenant	X		
H. FLANERY	Tenant Alt.	X		
C. TODD	Tenant Alt.			X
R. STONE	Homeowner	X		
J. WARNER	Homeowner	X		
A. GRAHAM	Homeowner	X		
E. LAI	Homeowner Alt.			X
J. MA POWERS	Homeowner Alt.			X
K. FRIEDMAN	Landlord	X		
T. WILLIAMS	Landlord	X		
B. SCOTT	Landlord Alt.			X
K. SIMS	Landlord Alt.			X

Staff Present

Kent Qian	Deputy City Attorney
Oliver Luby	Deputy City Attorney
Chanee Franklin Minor	Rent Adjustment Program Manager
Kelly Rush	Program Analyst 1

3. CONSENT ITEMS

a. Approval of Board Minutes from September 12, 2019

R. August requested under #7(a)(II) to change the word "allowed" to "needed."

J. Warner and K. Friedman discussed that it would be "allowed" but could add "needed."

R. Stone moved to appeal the minutes with the addition of the word "needed". T. Williams seconded the motion.
The Board voted as follows:
Aye: H. Flannery, R. Auguste, A. Graham, R. Stone, J. Warner, T. Williams
Nay:
Abstain: K. Friedman

The motion carried.

4. OPEN FORUM

a. Arlinda Befort

5. APPEALS

a. L18-0034 Beacon Properties v. Tenants

Appearances:	Simon Angelo	Tenant Appellant
	JR McConnell	Attorney for the Appellee

The tenant appealed the hearing decision which granted the owner capital improvement rent increases due to work on the property. The tenant contended that he saw the work being done and does not feel as though it is a capital improvement. Tenant states that the mailboxes were broken into many times and therefore new mailboxes in a different location were needed. The tenant also discussed the fact that there was no structural work done to his balcony (only inspections and painting were done).

The owner representative appeared and responded to the claims presented by the tenant. The owner representative contends that there was substantial evidence of work completed in the record and that all capital improvements were done according to the ordinance and regulations.

After arguments made by both parties, Board questions to the parties and Board discussion, K. Friedman moved to affirm the Hearing Decision based on substantial evidence. R. Stone seconded the motion.

The Board voted as follows:

Aye: R. Auguste, A. Graham, R. Stone, J. Warner, T. Williams, K. Friedman
Nay:
Abstain: H. Flannery

The motion carried.

6. ACTION ITEMS

a. Formation of additional ad hoc committees, membership and review of issues identified in May 9, 2019, Board meeting (see attached list on page 3)

Speaker: James Vann

Would like to suggest that the Board look at the issue of seniors on a fixed income and ways to address eviction/displacement of these individuals. Informed the Board that Santa Monica has a pilot program regarding this issue.

R. Auguste suggests that the Board wait until next year to form new committees.

7. INFORMATION AND ANNOUNCEMENTS

a. Discussion on AB 1482 (J. Warner)
   i. In major victory for tenants, California lawmakers pass sweeping rent cap bill (East Bay Times) (see attachment page 4 & 5)

Speakers: James Vann

1. Bill has not been signed yet, but the Governor has until 10/13 to sign
2. Additional protections for tenants who were not previously protected

3. Request information on how tenants would get notice of these protections and if the Rent Adjustment Program plans to expand.

J. Warner requests that item regarding AB1482 be added to a future agenda

K. Qian informed the Board that it would not expand Rent Control jurisdictions.

C. Franklin Minor stated that tenants that are newly protected could not file a petition with the Rent Adjustment Program under current Ordinance but would need to bring the defense for illegal rent increases and evictions. She states that the Board could discuss and make recommendations to expand the Ordinance or possibly formulate a committee around this issue.

b. Presentation of program outreach materials (C. Cooper)
   i. Rent Adjustment Program Guide and Information Sheets https://www.oaklandca.gov/resources/rent-adjustment-program-guide-and-information-sheets

      C. Cooper presented material to the Board that has recently been posted on the website and provided in the community at outreach events/workshops. Folders with materials were provided to all Board members which included
      1. Guide to Oakland Rental Housing laws
      2. Property Owner Packet of information sheets (available in English, Spanish and Chinese)
      3. Tenant Packet of information sheets (available in English, Spanish and Chinese)
      4. Flyer regarding duplex/triplex law changes (mailed to 7616 units)
      5. Flyer for mediation program (non-petition mediation)
      6. Information sheet on rent control and eviction protections
      7. Flyer for property owner workshop from earlier this week (9/24)
      8. Flyer for tenant workshop in Spanish (10/8)

      C. Cooper also presented some general statistics to the Board members.
      1. Phone calls (June through August): 1,301

2. Drop in services (June through August): 972
3. Outreach Events: 7
4. Workshops: 4

The Board would like to thank staff for all efforts and information.

Speaker: James Vann

1. Thank you from Oakland Tenants Union for work and outreach programs
2. There is a gap in tenant information
3. Increase in tenants under the program
4. Possibly consider target mailings

C. Franklin Minor would like to provide post cards and is aiming to do two in the next year. She states she would like to do more outreach on social media.

c. Report on Efficiency Ordinance (K. Qian, City Attorney's Office)

K. Qian gave information on major changes from feedback that was provided.

1. Change in term limits (less than ½ term does not count for a whole term)
2. Change in terms allowed to serve
3. Further language to decide what appeals could be heard by full board, panel and appeal officer
4. Parties required to serve other parties

Speaker: James Vann

1. Change in terms limits is better but still not the correct fix; expanding the pool of members is better
2. Not happy that a staff person can now serve as an appeal officer – needs to be experienced and have qualifications

Further discussion by Board on items that should be added or removed to the Efficiency Ordinance prior to presentation to City Council.

J. Warner requests report on Efficiency Ordinance again later in October for further discussion.

J. Warner makes motion to extend the meeting pass 10 p.m.

The Board voted as follows:

Aye: H. Flannery, R. Auguste, R. Stone, J. Warner, T. Williams,
Nay:
Abstain: K. Friedman

The motion carried.

8. COMMITTEE REPORTS AND SCHEDULING

a. Ad Hoc Committee Report: Dry rot v. Deferred Maintenance (T. Williams)

T. Williams provided update that there was no meeting in the past weeks. Committee needs to map out what they want to do and are in limbo state without tenant representative.

Speaker: James Vann
Would ask that the ad hoc committee meetings be delayed until there is a tenant replacement for T. Hall.

J. Warner moves to disband ad hoc committee on Capital Improvement v. Deferred Maintenance – Dry rot and allow for reformation. R. Auguste seconded the motion.

The Board voted as follows:

Aye: H. Flannery, R. Auguste, R. Stone, J. Warner, T. Williams,
Nay:
Abstain:

The motion passed by consensus.

H. Flannery was asked if she would be interested in the committee on Capital Improvement v. Deferred Maintenance – Dry rot when the committee is reformed. H. Flannery accepted and granted permission to add her to the committee at the next meeting when it is reformed.

9. ADJOURNMENT

HRRRB Meeting was adjourned at 10:23 p.m. by Chair J. Warner.

CITY OF OAKLAND
HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD

PANEL MEETING
October 3, 2019
7:00 p.m.
City Hall, Hearing Room #1
One Frank H. Ogawa Plaza, Oakland, CA

MINUTES

1. CALL TO ORDER

The HRRRB Panel was called to order at 7:00 p.m. by Panel Chair, Ed Lai

2. ROLL CALL

MEMBER	STATUS	PRESENT	ABSENT	EXCUSED
Ed Lai	Homeowner	X		
Kathleen Sims	Landlord Alt.	X		
Hannah Flanery	Tenant Alt.	X		

Staff Present

Kent Qian	Deputy City Attorney, Office of the City Attorney
Barbara Kong-Brown	Senior Hearing Officer, Rent Adjustment Program

3. OPEN FORUM

No Speakers

4. NEW BUSINESS

i. Appeal Hearing in cases:

a. T18-0409, Luther v. CCC Property Management
b. T18-0488, Pastore v. Breitkopf

a. T18-0409, Luther v. CCC Property Management

Appearances	John Tse	Owner Appellant
	Connie Louie	Owner Appellant
	Adrian Gebhart	Tenant Appellee

On July 31, 2018, tenant Briah Luther filed a petition contesting a rent increase from $1,259.00 to $1,330.00, and claiming several decreased housing services. At the hearing the tenant withdrew her claim regarding the rent increase. The hearing officer granted restitution of $2,806.09 for past decreased housing services, including rodents, cockroaches and plumbing issues.

The hearing officer also granted a 17% rent decrease for ongoing conditions, set the monthly base rent at $1,330.00, and reduced it to $1,103.00, effective May 1, 2019, before considering restitution for past decreased housing services.

Grounds for Appeal

The owner appealed the hearing decision on the following grounds:

- The decision is inconsistent with OMC Chapter 8.22, Rent Board Regulations or prior decisions of the Board

- The decision is inconsistent with decisions issued by other Hearing Officers.

Appeal Decision

After questions to the parties and Board discussion, E. Lai moved to affirm the hearing decision. H. Flanery seconded.

The Board panel voted as follows:

Aye: H. Flanery, E. Lai
Nay: K. Sims
Abstain: 0

The motion carried.

b. T18-0488, Pastore v. Breitkopf

The owner withdrew his appeal on October 3, 2019.

5. ADJOURNMENT

The meeting was adjourned at 8:00 pm.

HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD
REGULAR MEETING
October 10, 2019
7:00 P.M.
CITY HALL, HEARING ROOM #1
ONE FRANK H. OGAWA PLAZA
OAKLAND, CA

MINUTES

1. CALL TO ORDER

The HRRRB meeting was called to order at 7:04 p.m. by chair, J. Warner.

2. ROLL CALL

MEMBER	STATUS	PRESENT	ABSENT	EXCUSED
T. HALL	Tenant	X		
R. AUGUSTE	Tenant	X		
H. FLANERY	Tenant Alt.			X
C. TODD	Tenant Alt.			X
R. STONE	Homeowner	X		
J. WARNER	Homeowner	X		
A. GRAHAM	Homeowner	X		
E. LAI	Homeowner Alt.			X
J. MA POWERS	Homeowner Alt.			X
K. FRIEDMAN	Landlord	X		
T. WILLIAMS	Landlord	X		
B. SCOTT	Landlord Alt.			X
K. SIMS	Landlord Alt.			X

Staff Present

Kent Qian	Deputy City Attorney
Oliver Luby	Deputy City Attorney
Chanee Franklin Minor	Rent Adjustment Program Manager
Kelly Rush	Program Analyst 1

3. CONSENT ITEMS

a) Approval of Board Panel Minutes from September 19, 2019

Minutes were reviewed. No action taken.

4. OPEN FORUM

Speaker: James Vann

- Presented East Bay Times Article regarding passage of AB 1482
- Oakland Tenant's Union recommends staff report on the options available to Rent Board on extending information or coverage to newly protected tenants.

5. APPEALS*

a) L18-0086, Kingston Ave Partners LLC v. Tenants

Appearances:	David Simmons	Appellant
	John Rogers	Appellant
	Fraya Garfinkle	Appellant
	Kimberly Roehn	Attorney for Appellee

The appellants contended that the windows that were previously installed were better than the replacement windows and that the improvements made were cosmetic changes rather than capital improvements.

The attorney or the appellee contended that there were proper records and permits provided that were done according to the code and that all arguments made by the tenant were fully heard during the underlying hearing. The attorney appellee did acknowledge that there was an amendment made to the petition after initial filing but before the hearing, which corrected a typo in the description of work that incorrectly listed carpet as a capital improvement. The attorney for the appellee stated that these were bad faith claims by the tenants.

After arguments made by both parties, Board questions to the parties and Board discussion, T. Williams moved to affirm the Hearing Decision based on substantial evidence. K. Friedman seconded the motion. The Board would like to point out that the decision did not address the issue of gold plating that was brought forth by the tenants within their appeals.

* Staff recommendation memos for the appeals will be available at the Rent Program and the Clerk's office at least 72 hours prior to the meeting pursuant to O.M.C. 2.20.080.C and 2.20.090.

The Board voted as follows:

Aye: T. Hall, A. Graham, R. Stone, J. Warner, T. Williams, K. Friedman
Nay:
Abstain: R. Auguste

The motion carried.

b) L18-0035, Lew v. Tenants

Appearances:	James Vann	Appellant Representative
	Debra Lew	Appellee

The appellant did not appear but contacted her representative from the underlying hearing (Mr. James Vann) to appear and ask that her arguments attached to the appeal to be submitted into the record as her statement. The tenant contends that the work that was completed was deferred maintenance rather than a capital improvement. The tenant also cites a prior case (T14-0380) in which the Hearing Decision disallowed the cost of the sink and faucet due to an ongoing leak in the kitchen sink.

The appellee appeared and contended that there was no proper service of the appeal since the proof of service was dated on January 12th but the envelope stamped by the post office was dated on January 23rd. The owner cites the requirements of service provided under CCP § 1013(a) and claims that all work completed were capital improvements rather than deferred maintenance.

After arguments made by both parties, Board questions to the parties and Board discussion, R. Stone moved to affirm the Hearing Decision based on substantial evidence. T. Hall seconded the motion.

The Board voted as follows:

Aye: T. Hall, R. Auguste, A. Graham, R. Stone, J. Warner, T. Williams, K. Friedman
Nay:
Abstain:

The motion approved by consensus.

6. ACTION ITEMS

a) Reformation of ad hoc committee
(Dry Rot – Capital Improvements vs. Deferred Maintenance)

T. Williams motioned to re-create the committee with the following members.

H. Flanery (Tenant Rep)
E. Lai (Homeowner Rep)
T. Williams (Landlord Rep)

The committee will be set for a 6-month timeframe and will meet weekly. The committee will be reporting back bi-weekly at the regular Rent Board meetings.

R. Stone seconded the motion.

The Board voted as follows:

Aye: T. Hall, R. Auguste, A. Graham, R. Stone, J. Warner, T. Williams, K. Friedman
Nay:
Abstain:

The motion approved by consensus.

b) Formation of additional ad hoc committees, membership and review of issues identified in May 9, 2019, Board meeting (see attached list on page 3)

There was no expression of interest in further creation of ad hoc committees by the Board members.

T. Williams motions to add AB 1482 as option on the list of possible issues for creation of future ad hoc committees. A. Graham seconded the motion.

The Board voted as follows:

Aye: T. Hall, R. Auguste, A. Graham, R. Stone, J. Warner, T. Williams, K. Friedman
Nay:
Abstain:

The motion approved by consensus.

7. INFORMATION AND ANNOUNCEMENTS

a) Updates on SB 1482 (J. Warner)

The Board further discussed the signing of AB1482 that occurred in Oakland.

C. Franklin Minor and O. Luby were part of a consortium meeting with other jurisdictions to discuss the stance on authority. C. Franklin Minor provided information that

- Many jurisdictions in the state are looking for direction from the largest jurisdiction, Los Angeles, and possible direction that may be provided from the Attorney General.
- All housing counselors will be providing the same information to citizens which would serve to inform them that newly covered tenants may take their landlord to small claims if they have paid the increase or not pay the increase and use the defense if an eviction is pursued by the owner.
- Further discussions within the next month and she will report back with more information.
- Current program is restricted by the fee to send postcards to units that are not covered under local Ordinance but wants to work on creative ways that the Housing Department and Council can work to get the word out to tenants who are newly covered.

8. COMMITTEE REPORTS AND SCHEDULING

J. Warner requested a report of what changes would go into effect such as

- Type of units that will be affected
- Differences between City/State

J. Warner also requested that an item regarding updates on the status of the Efficiency Ordinance be added to the next agenda.

J. Warner also requested to add an item for discussion on the recent rule changes to the HUD

requirements and the Fair Housing Act. She would also like to commend the City Attorney's office on the work they have done in this regard.

R. August requests the name of the staff member who is working on the appeal recommendations be added to the document rather than the generic term "staff." C. Franklin Minor informed R. Auguste that she would check with the City Attorney's office and get back to her.

9. ADJOURNMENT

The HRRRB meeting was adjourned at 8:32 p.m. by chair, J. Warner.

CHRONOLOGICAL CASE REPORT

Case No.:	T18-0226	
Case Name:	Baragano v. Discovery Investments	
Property Address:	209 Wayne Ave. Oakland, CA	
Parties:	Guillermo Baragano	(Tenant)
	James Vann	(Tenant Representative)
	Herman Cowan	(Tenant Representative)
	Kathy Katano Lee	(Owner Representative)

TENANT APPEAL:

Activity	Date
Tenant Petition filed	April 20, 2018
Owner Response filed	June 22, 2018
Hearing Decision mailed	March 28, 2019
Tenant Appeal filed	April 15 & April 17th, 2019

T18-0226 MS/SK → to LM → SK

CITY OF OAKLAND

CITY OF OAKLAND
RENT ADJUSTMENT PROGRAM
P.O. Box 70243
Oakland, CA 94612-0243
(510) 238-3721

For date stamp

RECEIVED
CITY OF OAKLAND
RENT ARBITRATION PROGRAM
2018 APR 20 PM 2:35

TENANT PETITION

Please Fill Out This Form As Completely As You Can. Failure to provide needed information may result in your petition being rejected or delayed.

Please print legibly

Your Name	Rental Address (with zip code)	Telephone:
GUILLERMO BARAGANO	209 WAYNE AVE. Oakland, Ca. 94606	[redacted]
		E-mail:
Your Representative's Name	Mailing Address (with zip code)	Telephone: [redacted]
JAMES VANN	251 WAYNE AVE. OAKLAND, CA. 94606	Email:
Property Owner(s) name(s)	Mailing Address (with zip code)	Telephone: [redacted]
DICK CHAN	3666 GRAND AVE. STE C Oakland, Ca. 94610	Email:
Property Manager or Management Co. (if applicable)	Mailing Address (with zip code)	Telephone: [redacted]
DISCOVERY INVESTMENTS	3666 GRAND AVE, STE C Oakland, Ca. 94610	Email:

Number of units on the property: 13.

Type of unit you rent (check one)	☐ House	☐ Condominium	☐ Apartment, Room, or Live-Work
Are you current on your rent? (check one)	☑ Yes	☐ No	

If you are not current on your rent, please explain. (If you are legally withholding rent state what, if any, habitability violations exist in your unit.)

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:**

OWNER IS NOT eligible FOR a BANKING INCREASE

☑	(a) The CPI and/or banked rent increase notice I was given was calculated incorrectly.
☑	(b) The increase(s) exceed(s) the CPI Adjustment and is (are) unjustified or is (are) greater than 10%.
☑	(c) I received a rent increase notice before the property owner received approval from the Rent Adjustment Program for such an increase and the rent increase exceeds the CPI Adjustment and the available banked rent increase.

	(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.)
	(e) The property owner did not give me the required form "Notice of the Rent Adjustment Program" at least 6 months before the effective date of the rent increase(s).
	(f) The rent increase notice(s) was (were) not given to me in compliance with State law.
	(g) The increase I am contesting is the second increase in my rent in a 12-month period.
	(h) There is a current health, safety, fire, or building code violation in my unit, or there are serious problems with the conditions in the unit because the owner failed to do requested repair and maintenance. (Complete Section III on following page)
	(i) The owner is providing me with fewer housing services than I received previously or is charging me for services originally paid by the owner. (OMC 8.22.070(F): A decrease in housing services is considered an increase in rent. A tenant may petition for a rent adjustment based on a decrease in housing services.) (Complete Section III on following page)
	(j) My rent was not reduced after a prior rent increase period for a Capital Improvement had expired.
	(k) 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).
	(l) I wish to contest an exemption from the Rent Adjustment Ordinance because the exemption was based on fraud or mistake. (OMC 8.22, Article I)
	(m) The owner did not give me a summary of the justification(s) for the increase despite my written request.
	(n) The rent was raised illegally after the unit was vacated as set forth under OMC 8.22.080.

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

Date you moved into the Unit: 1991 Initial Rent: $ 675 /month

When did the owner first provide you with the RAP NOTICE, a written NOTICE TO TENANTS of the existence of the Rent Adjustment Program? Date: 2003. 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. If you never received the RAP Notice you can contest all past increases. You must check "Yes" next to each increase that you are challenging.

Date you received the notice (mo/day/year)	Date increase goes into effect (mo/day/year)	Monthly rent increase From	To	Are you Contesting this Increase in this Petition?*	Did You Receive a Rent Program Notice With the Notice Of Increase?
3/26/18	5/1/18	$ 939	$ 1003.79	☑ Yes ☐ No	☐ Yes ☐ No
		$	$	☐ Yes ☐ No	☐ Yes ☐ No
		$	$	☐ Yes ☐ No	☐ Yes ☐ No
		$	$	☐ Yes ☐ No	☐ Yes ☐ No
		$	$	☐ Yes ☐ No	☐ Yes ☐ No
		$	$	☐ Yes ☐ No	☐ Yes ☐ No

* **You have 90 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 did not receive a *RAP Notice* with the rent increase you are contesting but have received it in the past, you have 120 days to file a petition. (O.M.C. 8.22.090 A 3)**

Have you ever filed a petition for this rental unit?

☑ Yes
☐ No

List case number(s) of all Petition(s) you have ever filed for this rental unit and all other relevant Petitions:

T13-0001, T13-0188, T13-0315, T07-0267

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 problems in your unit, or because the owner has taken away a housing service, 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, or if you checked box (h) or (i) on page 2, please attach a separate sheet listing a description of the reduced service(s) and problem(s). Be sure to include the following:

1) **a list of the lost housing service(s) or problem(s);**
2) **the date the loss(es) or problem(s) began or the date you began paying for the service(s)**
3) **when you notified the owner of the problem(s); and**
4) **how you calculate the dollar value of lost service(s) or problem(s).**

Please attach documentary evidence if available.

You have the option to have a City inspector come to your unit and inspect for any code violation. To make an appointment, call the City of Oakland, Code of Compliance Unit at (510) 238-3381.

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.

Guillermo Barego — **Tenant's Signature**

4/20/18 — **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 different Rent Adjustment Program Hearing Officer.

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 Rent Adjustment Program ("RAP") within the time limit for filing a petition set out in the Rent Adjustment Ordinance (Oakland Municipal Code, Chapter 8.22). RAP staff cannot grant an extension of time by phone to file your petition. **Ways to Submit. Mail to:** Oakland Rent Adjustment Program, P.O. Box 70243, Oakland, CA 94612; **In person:** Date stamp and deposit in Rent Adjustment Drop-Box, Housing Assistance Center, Dalziel Building, 250 Frank H. Ogawa Plaza, 6th Floor, Oakland; **RAP Online Petitioning System:** http://rapwp.oaklandnet.com/petition-forms/. For more information, please call: (510) 238-3721.

File Review

Your property owner(s) will be required to file a response to this petition with the Rent Adjustment office within 35 days of notification by the Rent Adjustment Program. When it is received, the RAP office will send you a copy of the Property Owner's Response form. Any attachments or supporting documentation from the owner will be available for review in the RAP office by appointment. To schedule a file review, please call the Rent Adjustment Program office at (510) 238-3721. If you filed your petition at the RAP Online Petitioning System, the owner may use the online system to submit the owner response and attachments, which would be accessible there for your 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
____ Rent Adjustment Program web site
____ Other (describe): _____

RECEIVED
CITY OF OAKLAND
RENT ADJUSTMENT PROGRAM
For date stamp.
2018 JUN 22 AM 11:50

CITY OF OAKLAND

CITY OF OAKLAND
RENT ADJUSTMENT PROGRAM
P.O. Box 70243
Oakland, CA 94612-0243
(510) 238-3721

PROPERTY OWNER RESPONSE

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 T - T18-0226

Your Name	Complete Address (with zip code)	Telephone: [redacted]
Dick Chan	1284 4th Ave. San Francisco, CA 94122	Email: [redacted]
Your Representative's Name (if any)	Complete Address (with zip code)	Telephone: [redacted]
Discovery Investments, Inc. Kathy Katano-Lee	3666 Grand Ave, Suite C Oakland, CA 94610	Email: [redacted]
Tenant(s) Name(s)	Complete Address (with zip code)	
Guillermo Baragano	209 Wayne Ave Oakland, CA 94606	
Property Address (If the property has more than one address, list all addresses)		Total number of units on property
209 Wayne Ave, Oakland, CA 94606		8 + 5

Have you paid for your Oakland Business License? Yes ☑ No ☐ Lic. Number: 3467333/3474089
The property owner must have a current Oakland Business License. If it is not current, an Owner Petition or Response may not be considered in a Rent Adjustment proceeding. **Please provide proof of payment.**

Have you paid the current year's Rent Program Service Fee ($68 per unit)? Yes ☑ No ☐ APN: 021-0225-005-02 021-0225-004-04
The property owner must be current on payment of the RAP Service Fee. If the fee is not current, an Owner Petition or Response may not be considered in a Rent Adjustment proceeding. **Please provide proof of payment.**

Date on which you acquired the building: 05/19/06.

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

Type of unit (Circle One): House / Condominium/ Apartment / room, or live-work

I. JUSTIFICATION FOR RENT INCREASE **You must check the appropriate justification(s) box for each increase greater than the Annual CPI adjustment contested in the tenant(s) petition. For the detailed text of these justifications, see Oakland Municipal Code Chapter 8.22 and the Rent**

Board Regulations. You can get additional information and copies of the Ordinance and Regulations from the Rent Program office in person or by phoning (510) 238-3721.

You must prove the contested rent increase is justified. For each justification checked on the following table, you must attach organized documentary evidence demonstrating your entitlement to the increase. This documentation may include cancelled checks, receipts, and invoices. Undocumented expenses, except certain maintenance, repair, legal, accounting and management expenses, will not usually be allowed.

Date of Contested Increase	Banking (deferred annual increases)	Increased Housing Service Costs	Capital Improvements	Uninsured Repair Costs	Debt Service	Fair Return
05/01/18	☑	☐	☐	☐	☐	☐
_____	☐	☐	☐	☐	☐	☐
_____	☐	☐	☐	☐	☐	☐

If you are justifying additional contested increases, please attach a separate sheet.

II. RENT HISTORY **If you contest the Rent History stated on the Tenant Petition, state the correct information in this section. If you leave this section blank, the rent history on the tenant's petition will be considered correct**

The tenant moved into the rental unit on 11/11/1991.

The tenant's initial rent including all services provided was: $ 675.00 / 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? 2/14/2001

Is the tenant current on the rent? Yes _____ No ✓

Begin with the most recent rent and work backwards. If you need more space please attach another sheet.

Date Notice Given (mo./day/year)	Date Increase Effective	Rent Increased From	Rent Increased To	Did you provide the "RAP NOTICE" with the notice of rent increase?
SEE ATTACHMENT		$	$	☐ Yes ☐ No
		$	$	☐ Yes ☐ No
		$	$	☐ Yes ☐ No
		$	$	☐ Yes ☐ No
		$	$	☐ Yes ☐ No

III. 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** 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.

IV. 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. If you need more space attach a separate sheet. Submit any documents, photographs or other tangible evidence that supports your position.

V. VERIFICATION

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.

Property Owner's Signature **Date** 6/22/2018

For more information phone (510)-238-3721.

Property Owner's Response to Tenant Petition

Petitioner Guillermo Baragano, tenant at 209 Wayne Ave, contests the rent increase effective May 1, 2018 for which notice was given on March 24, 2018. Mr. Baragano identifies as grounds for petition (1) that owner is not eligible for a banking increase (2) that the rent increase was calculated incorrectly (3) that the rent increase exceeds the CPI adjustment and is unjustified or is greater than 10% (4) that notice of the rent increase was received prior to its approval by the Rent Adjustment Program and that it exceeds the CPI adjustment and the available banked rent increase. These points will be addressed in order.

There is no merit to the claim that owner is ineligible for a banked rent increase. The rent history attached hereto shows that there has been no increase in tenant's rent based on a CPI adjustment (or Cost of Living Allowance) since 2009, nor has there been any rent increase whatsoever since 2013. The Rent Adjustment Ordinance allows one increase every twelve (12) months of no more than ten percent. The present rent increase conforms to these criteria.

As to whether there was some error in calculating the amount by which tenant's rent could be raised, the provided spreadsheet (which was generated using the City of Oakland's rent calculation tool) dispels any controversy. The annual banking limit is equal to three times the current CPI (2.3%) which in this case amounts to 6.9 percent. Mr. Baragano's rent was increased by exactly $64.79 or 6.9% of the prior base rent ($939.00) and now stands at $1,003.79. It should be noted that, contrary to tenant's contention, the rent increase quite plainly is derived from the CPI and is significantly less than ten percent.

Having left almost all of the CPI allowance from the past decade unclaimed, the owner is entitled to the maximum increase. Finally, it is stated plainly in O.M.C. Section 8.22.070 D.1 that "CPI and Banking Increases not subject to a Petition. Rent increase notices for CPI and Banking Rent increases that are not the subject of a Petition shall be operative in accordance with this Chapter and State law." The rent increase in question is unambiguously a CPI adjustment with banking and therefore does not require approval from the Rent Board prior to going into effect.

The foregoing discussion has demonstrated that the grounds for Mr. Baragano's petition are improper, and as such the owner requests that the petition be dismissed.

Kathy M. Katano-Lee

Kathy Katano-Lee
DRE #01905283
Discovery Investments, Inc.

6/22/18
Date

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
CA RELAY 711

HEARING DECISION

CASE NUMBER: **T18-0226, Baragano v. Discovery Investments**

PROPERTY ADDRESS: **209 Wayne Avenue, Oakland, CA**

DATE OF HEARING: **January 25, 2019**

DATE OF DECISION: **March 21, 2019**

APPEARANCES: **Guillermo Baragano, Tenant**
James Vann, Tenant Representative
Herman Cowan, Tenant Representative
Kathy Katano Lee, Owner Representative

SUMMARY OF DECISION

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

INTRODUCTION

The tenant filed a petition on April 20, 2018, contesting a rent increase from $939 to $1,003.70, effective May 1, 2018, on the following grounds:

1. The CPI and/or banked rent increase was calculated incorrectly;
2. The increase exceeds the CPI Adjustment and is unjustified or is greater than 10%; and,
3. The tenant received the rent increase notice before the owner received approval from the Rent Adjustment Program (RAP) for such an increase and the increase exceeds the CPI Adjustment and available banked rent increase.

In addition to checking the above boxes on the form, the tenant wrote on his petition that the "Owner is not eligible for a banking increase."

The owner filed a timely response to the tenant petition on June 22, 2018, claiming that the rent increase was justified by banking.

///

PROCEDURAL ISSUES

The Hearing was originally set in this case on October 3, 2018. The assigned Hearing Officer was Stephen Kasdin. Due to a medical leave of absence by Mr. Kasdin, the case was reassigned to Hearing Officer Linda Moroz. On September 26, 2018, an *Amended Notice of Hearing* was mailed to the parties, setting the Hearing for January 8, 2019.

On December 31, 2018, the tenant submitted a request for recusal of Linda Moroz as the Hearing Officer in this case. In the request, the tenant also requested that an "independent Hearing Officer" serve as the Hearing Officer in his case, someone that was not affiliated with the City of Oakland's Rent Adjustment Program (RAP) because he did not believe that either Linda Moroz or any of the Hearing Officers in the RAP would give him a fair Hearing. This request was based on his personal experience in case L13-0017, and the information publicly available in the *Sherman v. Michelsen* case (T16-0258). The tenant argued that the RAP is not only biased against him but is biased against tenants in general. No written response to this request was sent to the tenant.

On January 8, 2019, a Hearing was started in the case with Ms. Moroz as Hearing Officer. The tenant again orally objected to the case proceeding with Ms. Moroz as Hearing Officer, regarding the tenant's perceived objection to a bias she held against tenants in general and reiterated his request for a different Hearing Officer. Over the tenant's renewed objection to continuing the case with her acting as Hearing Officer, Ms. Moroz ended the Hearing and reassigned the case to Stephen Kasdin, who had returned from medical leave.

On January 9, 2019, a *Notice of New Hearing Date* was sent to the parties setting the Hearing for January 25, 2019. The Notice states: "The Hearing in this case began on January 8, 2019. At that time, the tenant questioned whether the Hearing Officer, was impartial. At the request of the tenant, the Hearing was terminated. It is proper to set a new Hearing date with a different Hearing Officer."

On January 16, 2019 and January 22, 2019, the RAP received requests from the tenant for a 60 day postponement to give him the opportunity to speak with the new Program Manager regarding his concerns that the RAP staff, and Hearing Officer Linda Moroz, was "sabotaging" his case by having ex parte meetings with Kathy Katano-Lee of Discovery Investments. He based his request on two attached declarations, from himself and representative James Vann, regarding an alleged ex parte communication between Linda Moroz and Kathy Katano-Lee after the end of the Hearing on January 8, 2019. Additionally, the tenant requested the recusal/removal of Stephen Kasdin as the Hearing Officer based on his personal experience with Mr. Kasdin in case L13-0017.

The declarations attached to the tenant's request for a continuance state that the tenant and Mr. Vann witnessed an "ex parte" communication between Linda Moroz and Kathy Katano-Lee, who is the owner representative, after the Hearing ended on January 8, 2019.

On January 23, 2019, an *Order* denying the tenant's request for a continuance and request for a different Hearing Officer was served on the parties. The *Order* states:

> "An ex parte communication occurs when a party to a case, or someone involved with a party, talks or writes to or otherwise communicates directly with the judge about the issues in the case without the other parties' knowledge.
>
> On January 8, 2019, at the scheduled hearing the tenant objected to Ms. Moroz as the hearing officer. She offered to have the case heard by Mr. Kasdin since he was the hearing officer originally scheduled to hear [the] case, which was re-assigned to Ms. Moroz due to Mr. Kasdin's leave of absence, with which the tenant agreed[.]
>
> After the hearing was continued and as they were exiting the hearing room Ms. Katano-Lee asked Ms. Moroz how Mr. Kasdin was doing. She replied that Mr. Kasdin was back full time and was happy to be back in the office. This does not constitute an ex parte communication as there was no communication about any issues in the case.
>
> Regarding Mr. Kasdin, the tenant objected to Mr. Kasdin's handling of L13-0017, and was advised to appeal his decision if he disagreed with the decision. The tenant filed an appeal of that decision which was affirmed by the Rent Board.
>
> The Rent Ordinance Regulation 8.22.110(A) sets forth "good cause" requirement for postponement of a hearing and states that the request must be made at the earliest date possible upon receipt of the Notice.
>
> The tenant's request for a postponement of the above referenced hearing and to assign a different hearing officer does not constitute good cause and is denied. The hearing will proceed as scheduled on January 25, 2019 ..... Mr. Kasdin will be the Hearing Officer....
>
> Keith Mason, Program Analyst II, notified the parties of the denial of the postponement at approximately 3:28 p.m. on January 22, 2019. At 3:29 p.m. the RAP received the same request from the tenant again. This is a duplicate request which is denied on the grounds stated in this Order."

On the day of the Hearing, January 25, 2019, Mr. Kasdin was ill with the flu. The case was reassigned to Hearing Officer Barbara Cohen to hold the Hearing.

At the subject Hearing, the tenant renewed his motion for a continuance based on the alleged "ex parte communications" between Ms. Katano Lee and Hearing Officer Linda Moroz, and based on his concerns that Hearing Officers are biased against tenants and requested that an independent Hearing Officer from outside the RAP be provided to hear his case. His motion was denied.

With respect to documents produced by the parties, the tenant produced a set of documents on September 25, 2018, which included a written argument as to why he believed his claim against a banked rent increase should be granted, as well as a series of

Exhibits to that letter. The Exhibits, marked A-F, included copies of the rent increase and banking calculator related to the subject case, prior rent increase notices served by the owner[1], a portion of a transcript of a Rent Adjustment Hearing held in July of 2013, in a different case, and letters written by the tenant to the owner both about the subject rent increase and about other extraneous matters.

Additionally, on December 30, 2018, the tenant produced a packet of additional documents. The first six pages constitute the tenant's arguments that: the owner should not be entitled to a banked rent increase; that the tenant has filed a claim with the Department of Fair Employment and Housing against the owner; that the owner has not cashed his checks; that the tenant and his friends are being harassed by the owner; that the City of Oakland's policy to allow banked increases is a violation of due process; that banking is barred by laches; that the RAP, Rent Board and prior Program Manager routinely deny tenants fair hearings and due process; that these claims against the Rent Program should be investigated by the District Attorney; that the Hearing Officer assigned to the case (at that point Linda Moroz) has committed previous abuses of discretion; that the City of Oakland's rent laws are discriminatory; that the City of Oakland's Rent Program is biased and favors landlords over tenants; and that since tenant's cannot get a fair hearing in front of the RAP, an independent Hearing Officer should be assigned to the case.

Attached to this letter were 10 attachments. One of these attachments related to the case at hand (e.g., the tenant's lease, attached to the letter as Exhibit A and admitted into evidence in this case as Exhibit 1.) The other documents were not related to the tenant's claims in this case, and were not admitted into evidence. (See discussion below.) These documents included Hearing Decisions and Appeal Decisions in cases unrelated to Mr. Baragano's case, (*Sherman v. Michelsen*, case T16-0258, and *Sherman v. Michelsen*, case T12-0332) along with other documents regarding those cases; numerous letters between the tenant and the owner (one of which relates to the rent increase at issue, the rest of which relate to harassment and other issues between the parties); documents related to the tenant's filing with the Department of Fair Employment and Housing; a declaration from tenant representative Herman Cowan regarding a visit to the offices of Discovery Investments; a transcript of a portion of a Hearing in a prior case involving Mr. Baragano (case L13-0017); Hearing Decisions in prior cases involving Mr. Baragano (T13-0001, L13-0017); and prior correspondence with the Rent Program regarding his prior cases; amongst other documents.

CONTENTIONS OF THE PARTIES

The tenant contends that before property owners can bank rent increases, they must give notice on an annual basis of their intent to bank or there is a violation of due process; that before 2017, you could not combine a capital improvement and a banked rent increase, so the owner should not be able to bank a rent increase during the year that a capital improvement increase was passed on to the tenant; that the dollar amount

[1] These documents were admitted into Evidence as Exhibits 4 and 5. See below.

of the increase must be specifically stated in the rent increase notice; that because the banking calculator served with the rent increase had a mistake, no banking can be imposed; and that the owner representative was not able to testify with specificity as to the rent in 2007, and did not produce documents showing the tenant's rent in that year, so no banking can accrue. The tenant also argued that O.M.C. § 8.22.070(A)(4) and 8.22.070(H)(6) prevent the imposition of a banking rent increase in this case.

The owner representative contends that the owner is entitled to a banked rent increase.

THE ISSUES

1. Did the tenant have a right to a continuance or to a Hearing with a Hearing Officer outside of the Rent Adjustment Program?
2. When, if ever, was the tenant first served with the *RAP Notice* and was the *RAP Notice* served as required?
3. What documents are included as Exhibits at RAP Hearings?
4. How many individuals can cross-examine a single owner representative?
5. Is the owner entitled to a rent increase based on banking?
6. What if any restitution is owed between the parties and how does it affect the rent?

EVIDENCE

Rental History: The tenant testified that he moved into the subject rental unit in November of 1991, at an initial rent of $675 a month. His petition, which was sworn under penalty of perjury, states that he was first served with the *RAP Notice* in 2003. His lease for the unit was admitted into evidence as Exhibit 1.[2] The tenant was shown a copy of a summary entitled "Rent History for Guillermo Baragano..." put together by the owner and entered into evidence as Exhibit 2. He was asked if the list accurately represented his rent history. He replied: "It seems to be, but I have no knowledge one way or another to ..... it seems to be."[3] The tenant was further asked if in 2007 his rent was $934.93 and he replied "that sounds about right."[4]

The tenant further testified that he received a rent increase notice in approximately March of 2018, purporting to increase his rent from $939 to $1,003.79 a month, effective May 1, 2018.[5] This document was served with the *RAP Notice*. The notice specifies that the tenant's current base rent is $939; that the percent increase approved for 2017-2018 is 2.3%; that the banking limit is 6.9% and that the "banking available this year" is $64.79.

Official Notice is taken of the tenant's response to an owner petition in case L13-0017. In that document, which was sworn under penalty of perjury, the tenant stated that his rent was increased on November 1, 2007, to $934.93 a month.

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[2] All Exhibits referred to in this Hearing Decision were admitted into evidence without objection.
[3] Recording at 5:55-6:23.
[4] Recording at 8:50-9:02.
[5] Exhibit 3. See also Exhibit 6, which is the complete copy of all documents served on the tenant.

The tenant produced several prior rent increases he received from prior management of his unit. Exhibit 4 was a letter received in September of 2007, purporting to increase his rent to $982, based on a capital improvement pass-through.

Official Notice is taken of case T07-0267, a case in which the tenant contested this rent increase. A Hearing Decision was rendered in that case in December of 2007, which determined that the tenant's base rent was $904, and allowing a $30.93 capital improvement rent increase for a period of 5 years. This resulted in the rent being $934.93. This Hearing Decision is attached to this Decision as Exhibit "B".

The tenant also produced a rent increase notice dated August 26, 2013, in which the tenant's rent was purportedly increased from $939 to $1,078 per month. This was also for a capital improvement pass through.

The tenant testified that he paid the owner a lump sum payment for the prior capital improvement pass through in the last year from a prior seismic retrofit. He is not currently paying any capital improvement pass through.

The tenant further testified that with respect to the subject rent increase he has continued to pay rent in the amount of $939 and has not paid the contested rent increase. The owner representative agreed with this testimony.

Kathy Katano Lee testified that she created Exhibit 2 by going through the Discovery Investments file for the tenant's unit as well as the tenant's prior petitions with the RAP. She did not have access to every rent increase notice given to the tenant in the past, as the management had changed. She had access to a rent increase notice from 2006, where the tenant's rent had increased from $875.80 to $904.70, and access to another rent increase notice from 2008, where the tenant's rent increased from $934.93 to $963.88. Based on those two documents and the tenant's petitions with the RAP, she determined that in 2007 the tenant's rent must have increased from $904.70 to $934.93.

On cross-examination by the tenant, the tenant asked the owner representative which other tenants had been issued a 10 year banked rent increase and whether she had previously stated (in a prior hearing) that she had not passed on rent increases to any other tenant. The owner representative was instructed not to answer these questions based on relevancy. (See banking discussion below.) The owner representative also testified that she did not notify the tenant that the ownership was banking rent increases from 2007 to 2017. The owner representative also testified that she did not know exactly what the rent was in 2007 but that she made assumptions based on the record. Based on her summary, she believes that the rent in 2007 was $934.93. Ms. Katano Lee further testified that she made a mistake on the banking calculator when she filled in $939 in the box that says "base rent when calc. begins."

During the Hearing, the tenant began the cross-examination of the owner representative. After the tenant questioned the owner representative for a few minutes, he requested to have both of his representatives cross-examine the owner representative

as well. The tenant and his representatives were informed that only one of them could cross-examine Ms. Katano Lee. However, since they had not been informed of this ruling prior to the beginning of cross-examination, they were given an opportunity to change the person who continued to cross-examine the owner representative. The tenant and his representatives took a break and when they returned, the tenant made the affirmative choice to continue the cross-examination of the owner representative.[6]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Did the tenant have a right to a continuance or to a Hearing with a Hearing Officer outside the RAP?

Prior to the Hearing, the tenant requested several times for a Hearing Officer to be appointed who was not affiliated with the RAP. Additionally, after the case was set for January 25, 2019, he sought a continuance in this case because the matter was scheduled with Hearing Officer Stephen Kasdin, who the tenant felt was biased against him and other tenants. These motions were denied.

At the Hearing, when the parties were informed that Mr. Kasdin was out ill and that the case was reassigned to the present Hearing Officer, the tenant renewed his request for a continuance and a Hearing Officer not affiliated with the RAP. His request was based on his allegations that there had been an "ex parte" communication between a completely different Hearing Officer, Linda Moroz, and the owner representative, and that the RAP was biased against him in particular and tenants in general.

A party to a RAP proceeding does not get to choose his or her Hearing Officer. The cases are assigned on a rotating basis and when someone is out sick, are reassigned as needed. While it is true that the tenant has filed many cases with the RAP and has therefore interacted with many of the Hearing Officers, his only right is to have a Hearing Officer who does not have actual bias against him. The tenant never made any claim that the present Hearing Officer has any bias against him. Further, no bias exists against the tenant from the present Hearing Officer. There was no right to delay the proceedings because of an allegation against a prior assigned Hearing Officer, nor is there any possibility to have a RAP Proceeding without a RAP Hearing Officer.[7]

It was proper to not continue the Hearing and to proceed with the present Hearing Officer.

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[6] After the tenant finished with his cross-examination, he objected to the ruling that only one person could cross-examine the owner representative and argued that his "due process" rights were being violated.

[7] Furthermore, the tenant's claims about an "ex parte" communication between Linda Moroz and Ms. Katano Lee is a red herring. At the time of the conversation between Ms. Moroz and Ms. Katano Lee, Ms. Moroz was no longer the Hearing Officer assigned to the case therefore, even if there was an ex parte communication between them, it would not have impacted the Hearing with the present Hearing Officer. Second, according to the *Order* issued on January 23, 2019, the subject of the communication was the health of Mr. Kasdin, not the case. An ex parte communication is a communication about the case. No such communication occurred.

When, if ever, was the tenant first served with the *RAP Notice* and was the *RAP Notice* served as required?

The Rent Adjustment Ordinance requires an owner to serve the *RAP Notice* at the start of a tenancy [8] and together with any notice of rent increase or change in the terms of a tenancy.[9] An owner can cure the failure to give notice at the start of the tenancy, but may not raise the rent until 6 months after the first *RAP Notice* is given.[10]

The owner has the burden of proof to establish that *RAP Notices* have been served.

The tenant provided a Petition in the subject case in which he swore under penalty of perjury that he first received the *RAP Notice* in 2003. He testified that he was served with the *RAP Notice* with the subject rent increase. Therefore, the rules regarding the *RAP Notice* have been satisfied.

What documents are included as Exhibits at RAP Hearings?

The tenant has submitted multiple documents to the RAP in support of his claims. Many of these documents are unrelated to his petition, to the property in which he lives, or to his claim.

Only those documents that relate to the tenant's petition are admitted as evidence into a RAP proceeding. While a party has a right to introduce exhibits [see Regulations § 8.22.110 (E)(3)], it is a rule of administrative procedure (and trial law generally) that evidence must be relevant to be admissible. California Evidence Code § 210 states that relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Government Code § 11513(c) states that in Administrative proceedings "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."

In this case the tenant sought to admit into evidence the following: Hearing Decisions in cases unrelated to his claim (*Sherman v. Michelsen* for example); writs of Administrative Mandamus and other documents in the *Sherman* case; Declarations regarding his concern about the alleged "ex parte" communication of Hearing Officer Linda Moroz in this case; his prior correspondence with the Rent Adjustment Program Manager in 2013 regarding a prior case; a transcript of a portion of a prior case involving the tenant; email communication with the prior manager regarding a prior case; his communication with the DFEH regarding a claim he has made against the owner; communication between the owner regarding the subjects of cashing his rent checks and claims of harassment; a Declaration from a representative regarding a visit to the Discovery Investments office regarding harassment; prior Hearing Decisions

[8] O.M.C. § 8.22.060(A)
[9] O.M.C. § 8.22.070(H)(1)(A)
[10] O.M.C.§ 8.22.060 (C)

rendered in his cases; other communication between him and the City of Oakland regarding other cases; and documents related to a writ he filed to the Superior Court in a prior case involving the subject property.

The tenant's petition contests a single rent increase served in March of 2018, to be effective on May 1, 2018. The tenant alleged that the owner was not entitled to a banked rent increase; that the calculation was not accurate; that the rent increase was unjustified or greater than 10%, and that he received the increase notice prior to the owner receiving approval. These allegations are the core of the tenant's case, and all determinations of relevance arise based on the tenant's claims.

Only those documents that relate to the tenant's rent history and rent increase notices are admissible in evidence in the subject case. The exhibits that were admitted into evidence were the tenant's lease (Exhibit 1); a composite document produced by the owner of the tenant's rent history (Exhibit 2); the subject rent increase notice (Exhibit 3); rent increase notices from 2007 and 2013 respectively (Exhibits 4 and 5) and the owner's copy of the subject rent increase notice that included the *RAP Notice* and the banking calculator (Exhibit 6.) All other proposed exhibits were not relevant to the tenant's case and were not admitted into evidence.

How many individuals can cross-examine a single owner representative?

During the course of the Hearing the tenant began to cross-examine the owner representative. After a few minutes of questioning her, the tenant mentioned that his representatives also intended to question the witness. The tenant was informed that the procedure for cross-examination was that only one person from each "side" could cross-examine any party, and that thus, if he wanted to continue to cross-examine his representatives would not be able to. Since this rule had not been announced prior to the tenant beginning his questions, the tenant and his representatives were given an opportunity to meet and confer and to decide amongst them who wanted to proceed with the questioning. They were informed that if the tenant wanted to stop questioning and allow one of his representatives to question going forward, he would be allowed to do so, but that from there after only one person could question the owner representative. After the break, the tenant affirmatively chose to continue questioning the witness.

After his questioning was done, the tenant objected to the rule that only one person could cross examine and argued that his due process rights were being violated.

A Hearing Officer has authority to control a Hearing and to prevent unnecessary duplication of testimony and evidence. While a party has a right to cross-examine witnesses, that right is not cumulative. In *People v. Clemmons*, (1990) 224 Cal.App.3d 1500, the court considered whether a criminal defendant had a right to have both his attorneys cross examine the witnesses. The court held:

> "The right of cross-examination as a primary interest secured by the constitution right to confrontation is not absolute." Id. at 625.

The court held that in a criminal case the limitation of having only one attorney cross-examine was reasonable. Quoting another case, the court also held that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ...cross examination." Id at 626, citing *People v. Dyer*, (1988), 45 Cal. 3rd, 26 at 48.

It is obviously true that if a criminal defendant does not have the right to have multiple attorneys cross-examine, that a tenant in an Administrative Hearing also does not have that right because a criminal defendant's right to cross-examine arises from the Constitution and thus is broader than the rights in an administrative proceeding. The tenant was given a choice to stop questioning the witness and allow one of his able representatives to do so, even though he had started the questioning. His options were explained and there were no surprises. He affirmatively chose to finish the questioning.

The tenant's due process rights were not violated. Cross-examination is reasonably limited to one person questioning per party.

Is the owner entitled to a rent increase based on banking?

It has long been the law in Oakland that if an owner chooses to not increase the rent, or increase it less than the annual CPI adjustments permitted by the Ordinance, the owner is allowed to bank the unused increases, subject to certain limitations.[11] The Ordinance states that:

> "'Banking' means any CPI Rent Adjustment .... the owner chooses to delay imposing in part of in full, and which may be imposed at a later date, subject to the restrictions in the regulations." O.M.C. § 8.22.020.

However with respect to Banking the Regulations provide certain limitations. The total rent increase imposed in any one rent increase may not exceed a total of three times the then allowable CPI increase and cannot be greater than 10%.[12] In no event may any banked CPI Rent Adjustment be implemented more than ten years after it accrues.[13] Since a current year rent increase is based on the allowable CPI, to calculate a ten year banking right, it is proper to look at the tenant's rent history for eleven years.

While it is true that in past years, an owner could not impose a capital improvement pass through along with a CPI rent increase, there was never a limitation in either the current or prior Ordinance or Regulations that limits an owner's right to bank a CPI rent increase during a year in which the owner increased the rent by a capital improvement pass-through.[14] In fact, a prior case before the HRRRB stated that Banking of the

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[11] O.M.C.§ 8.22.070

[12] Regulations Appendix, §10.5.1

[13] Regulations Appendix, §10.5.3

[14] See 8.22.070(B) from 2007 Regulations which limited the right to take both the CPI and a capital improvement pass-through. This was then changed to 8.22.070(B)(2)(b) in the 2014 Regulations. This limitation existed until 2017.

current CPI was required when a rent increase was based on capital improvements. See HRRRB, *Dabit v. Beacon*, T99-0176. Therefore, the fact that the owner in this case passed on capital improvement rent increases in years past, does not preclude it from banking the CPI during those years.

The tenant contends that an owner has an affirmative obligation to provide a written notice of its intent to bank a rent increase. This is not the case. No such obligation is required, and there is no due process violation in the owner's failure to notify the tenant of its intent to bank.

The tenant also contends that pursuant to O.M.C. § 8.22.070(H)(2) a rent increase notice must state the "amount" of the CPI Rent Adjustment and the amount of any banked rent increase and that since the rent increase notice at issue does not state an "amount" it cannot be upheld. In this case, the rent increase notice states the current base rent of $939, and that the percent increase for 2017-2018 is 2.3% and the banking limit for the year is 6.9%.[15] The notice also states that the banking available this year is $64.79. The rent increase notice however does not state the dollar amount of the CPI.

Even without the dollar amount of the CPI, the rent increase notice sufficiently states the "amount" of the rent increase. According to Dictionary.com, the definition of "amount" includes "quantity; measure" and "the full effect, value, or significance." Stating the percentage of the year's CPI is stating an "amount". There is no wording in the Ordinance that the **dollar** value must be included.

The tenant also argued that the owner did not provide sufficient information to establish his rent in 2007, so no proper calculation could be made. Since the tenant contends that the owner has the burden of proof, and the owner could not provide a definitive determination of the rent in 2007, then banking should not be allowed. However, the Board has long held that a rental history stated in a tenant petition, being supplied under oath and undisputed, constitutes competent evidence to prove an owner's entitlement to banked rent increases. See HRRRB, T00-0252, *Hirsch v. Hass* (2002). It is therefore also true that the rent history can be determined from prior Hearing Decisions.

In this case, the tenant testified that it sounded "about right" that his rent in 2007 was $934.93. Even more importantly, the tenant stated in his tenant's response to an owner petition in case L13-0017 that in November of 2007, his rent was increased to $934.93 in 2007. And the Hearing Decision in case T7-0267 from 2007 (attached as Exhibit "B"), determined that the tenant's base rent in 2007 was $904. Therefore, it is proper to use that number in the Banking Calculator to determine the allowable rent.[16]

The tenant also contends that O.M.C. §§ 8.22.070(A)(4) and 8.22.070(H)(6) prevent the imposition of a banking rent increase in this case. The tenant is incorrect. O.M.C. § 8.22.070(A)(4) states that:

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[15] See Exhibit 6, page 1

[16] Since capital improvements are not considered in determining the base rent, the base rent in 2007 was $904.

> "If an owner is entitled to a rent increase or increases that cannot be taken because of the Rent increase limitations pursuant to Subsections 2. or 3. above, the owner may defer the start date of the increase to a future period, provided that in the rent increase notice that limits the owner's ability to take the increases, the owner must identify the justification and the amount or percentage of the deferred increase that may be applied in the future."

This language refers specifically to subsections where rent increases are limited because they would otherwise be more than 10% in one year or 30% in 5 years. This language does not apply to the banked rent increase in this case and does not prevent the application of banking.

O.M.C. § 8.22.070(H)(6) states that:

> "A rent increase is not permitted unless the notice required by this section is provided to the tenant. An owner's failure to provide the notice required by this section invalidates the rent increase or change of terms of tenancy....."

This section refers to the *RAP Notice*. As noted above, the *RAP Notice* was served on the tenant in accordance with the law.

The Board has long approved the use of the RAP Banking calculator to determine what rent increases are allowed. Facts needed to calculate banked increases (and to fill out the calculator) are: (1) The date of the start of tenancy or eleven years before the effective date of the increase at issue, whichever is later; (2) the lawful base rent in effect on said date; (3) The lawful rent in effect immediately before the effective date of the current proposed rent increase; and (4) the date(s) and amount(s) of any intervening changes to the base rent between dates (1) and (3).

All banked rent increases are calculated on the base rent, excluding any prior capital improvement pass through.

Finally, the tenant contends that because there was a mistake in the banking calculator attached to the rent increase notice, his rent increase cannot be upheld. However, while it is true that there was a mistake in the calculator, and that the owner input the current rent of $939 in the box that requested the "base rent when calc. begins", this mistake does not impact the allowable rent increase.

Attached to this Hearing Decision as Exhibit "A" is a properly filled out Banking Calculator in this case. It shows the tenant's move in date of November 9, 1991; the effective date of increase (which is May 1, 2018); the current rent (which is $939); and the base rent when the calculation began ($904).[17] With these numbers, the banking calculator determined that the amount of eligible banking for this year is $64.79. This is the same amount noticed by the owner in the rent increase notice served to the tenant. While the "rent ceiling" is a different amount, the rent ceiling impacts the owner's right

[17] This number was determined by the prior decision in T07-0267.

to future rent increases, and not the current rent increase. Therefore, the differences in the calculator do not affect this case.[18]

The owner is entitled to a rent increase this year of $64.79, for a total monthly rent of $1,003.79, effective May 1, 2018.

What if any restitution is owed between the parties and how does it affect the rent?

The tenant has been paying the prior rent of $939 since May 1, 2018. He has underpaid rent of $64.79 in every month. His overpayment through March of 2019 equals $712.69.

			UNDERPAID RENT				
	From	To	Monthly Rent paid	Max Monthly Rent	Difference per month	No. Months	Sub-total
	1-May-18	31-Mar-19	$939	$1,003.79	$ (64.79)	11	$ (712.69)
					$ -		-
				TOTAL UNDERPAID RENT			$ (712.69)
				RESTITUTION			
					MONTHLY RENT		$1,003.79
				TOTAL TO BE REPAID TO OWNER			$ (712.69)
				TOTAL AS PERCENT OF MONTHLY RENT			-71%
		AMORTIZED OVER		3	MO. BY REG. IS		$ (237.56)

The tenant is required to begin to add the restitution owed to his rent, after this Hearing Decision becomes final. The decision is final if no party has filed an Appeal within 20 days of the date the Hearing Decision is mailed to the parties.

ORDER

1. Petition T18-0226 is denied.

2. The tenant's base rent, effective May 1, 2018, is $1,003.79.

3. The tenant has underpaid rent, through March 31, 2019, of $712.69.

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[18] Even if the banking calculator or the *Notice of Change in Terms of Tenancy* served on the tenant had an incorrect number for the allowable rent increase, it has long been held that providing the tenant had been given the correct number of days for notice of a rent increase, a Hearing Decision could correct the amount of the rent increase if it was calculated incorrectly.

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) 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: March 21, 2019

Barbara M. Cohen
Hearing Officer
Rent Adjustment Program

CITY OF OAKLAND

Department of Housing and Community Development
Rent Adjustment Program
http://rapwp.oaklandnet.com/about/rap/

250 Frank Ogawa Plaza, Suite 5313
Oakland, CA 94612
(510) 238-3721

CALCULATION OF DEFERRED CPI INCREASES (BANKING)

Initial move-in date	9-Nov-1991
Effective date of increase	1-May-2018
Current rent (before increase and without prior cap. improve pass-through)	$939.00
Prior cap. imp. pass-through	
Date calculation begins	1-May-2007
Base rent when calc.begins	$904.00

MUST FILL IN D9, D10, D11 and D14

Case No.: T18-0226
Unit: 209 Wayne

CHANGE YELLOW CELLS ONLY

ANNUAL INCREASES TABLE

Year Ending	Debt Serv. or Fair Return increase	Housing Serv. Costs increase	Base Rent Reduction	Annual %	CPI Increase	Rent Ceiling
5/1/2018				2.3%	$ 25.99	$ 1,156.07
5/1/2017				2.0%	$ 22.16	$ 1,130.07
5/1/2016				1.7%	$ 18.52	$ 1,107.92
5/1/2015				1.9%	$ 20.31	$ 1,089.40
5/1/2014				2.1%	$ 21.99	$ 1,069.08
5/1/2013				3.0%	$ 30.50	$ 1,047.09
5/1/2012				2.0%	$ 19.93	$ 1,016.60
5/1/2011				2.7%	$ 26.20	$ 996.66
5/1/2010				0.7%	$ 6.75	$ 970.46
5/1/2009				3.2%	$ 29.88	$ 963.71
5/1/2008				3.3%	$ 29.83	$ 933.83
5/1/2007				-	-	$904

Calculation of Limit on Increase

Prior base rent		$939.00
Banking limit this year (3 x current CPI and not more than 10%)		6.9%
Banking available this year	$	64.79
Banking this year + base rent	$	1,003.79
Prior capital improvements recovery	$	-
Rent ceiling w/o other new increases	$	**1,003.79**

Notes:

1. **You cannot use banked rent increases after 10 years.**
2. CPI increases are calculated on the base rent only, excluding capital improvement pass-throughs.
3. The banking limit is calculated on the last rent paid, excluding capital improvement pass-throughs.
4. Debt Service and Fair Return increases include all past annual CPI adjustments.
5. An Increased Housing Service Cost increase takes the place of the current year's CPI adjustment.
6. Past increases for unspecified reasons are presumed to be for banking.
7. Banked annual increases are compounded.
8. The current CPI is not included in "Banking", but it is added to this spreadsheet for your convenience.

CITY OF OAKLAND

250 FRANK H. OGAWA PLAZA, SUITE 5313, OAKLAND, CALIFORNIA 94612-2034

Community and Economic Development Agency
Rent Adjustment Program

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

HEARING DECISION

CASE NUMBER: **T07-0267, Baragano v. Wellington Property Co.**

PROPERTY ADDRESS: **209 Wayne Ave., Oakland, CA**

APPEARANCES: **Guillermo Baragano (Tenant)**
Randal Lee (Landlord Agent)

DATE OF DECISION: **December 18, 2007**

CONTENTIONS OF THE PARTIES

The tenant filed a petition that contests a rent increase which the tenant claims exceeds the Consumer Price Index (C.P.I.) adjustment and is unjustified.

The landlord filed a timely response to the tenant petition in which it is claimed that the contested rent increase is justified by Capital Improvements.

THE DECISION

The tenant petition is granted in part. The rent for the rental unit is set forth in the Order below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background: The tenant rents a unit that is located in a 13-unit residential complex which encompasses 4 buildings. He received a notice of rent increase, in which the landlord proposes to increase the rent from $904 to $982, effective November 1, 2007.

Exhibit "B"

Capital Improvements: A rent increase in excess of the C.P.I. Rent Adjustment may be justified by capital improvement costs.[1] Capital improvement costs are those improvements which materially add to the value of the property and appreciably prolong its useful life or adapt it to new building codes. The improvements must primarily benefit the tenant rather than the landlord. Capital improvement costs are to be amortized over a period of five years, divided equally among the units which benefited from the improvement. The reimbursement of capital expense must be discontinued at the end of the 60-month amortization period.[2]

Normal routine maintenance and repair of the rental unit and the building is not a capital improvement cost, but a housing service cost.[3]

The Evidence: Prior to the hearing, the landlord submitted a number of documents in support of a capital improvements increase. At the hearing, these documents were all admitted into evidence by stipulation as Landlord's group exhibit No. 1, pages 1 through 34. The categories of capital improvements, and documents in support of each, are as follows:

Exterior Painting of all Units: The landlord's agent, Mr. Lee, is an employee of Wellington Property Co., which acts on behalf of the landlord under a Management Agreement.[4] The Agreement specifies that Wellington has a variety of duties and powers, including supervision of improvements, for which Wellington is paid an additional fee on an hourly basis. Mr. Lee testified that he, acting on behalf of Wellington, oversaw all aspects of the exterior painting of the four buildings, including selection of the painting contractor, color selection, and coordination.

The landlord submitted an invoice from Wellington to the landlord and a cancelled check from the landlord to Wellington in the amount of $17,395.[5] The landlord also submitted invoices from J&D Painting and a cancelled check from Wellington to J&D Painting in the amount of $15,900.[6] Mr. Lee testified that the $17,395 payment was disbursed by paying the J&D Painting invoice and keeping the balance of $1,495 for its supervision services. This is not a routine management expense, for which Wellington is separately paid under the Management Agreement. This testimony and evidence is credited, and $17,395 is allowed as a capital improvement expense benefiting all units.

Structural Engineer: Mr. Lee testified that, after new owner purchased the building in the summer of 2006, a structural engineer was hired to determine structural work that would be needed for earthquake safety. The landlord presented bills from a structural engineering firm and negotiated checks in the amount of $729,[7] which is allowed as a capital improvement expense benefiting all units.

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[1] O.M.C. Section 8.22.070(C)
[2] Regulations Appendix, Section 10.2
[3] Regulations Appendix, Section 10.2.2(5)
[4] Landlord Exhibit No. 13
[5] Landlord Exhibit No. 1, pp. 6 & 7
[6] Landlord Exhibit No. 1, pp. 10-12
[7] Landlord Exhibit No. 1, pp. 25-30

Sewer Lateral: The landlord submitted an invoice and proof of payment to Central Plumbing & Rooter in the amount of $4,300. However, the invoice[8] describes the work as "installed building outlet cleanout and cleaned sewer" and "repaired broken section of sewer lateral." Applying the standard in the Regulations cited above, this expense is a repair, not a capital improvement cost, and is not allowed.

Fire Box Removal: Mr. Lee testified that the structural engineer told him that an inoperative brick, 3-story incinerator/chimney on the premises was damaged, and posed a danger in case of an earthquake. Therefore, this structure was removed, at a cost of $6,000.[9] The incinerator was attached to 2 of the buildings, containing 8 units, one of which is the building in which the tenant lives. The landlord contends that this cost should be passed on only to the tenants in these buildings.

The tenant argues that this structure should have been removed years before, and the cost should be considered a deferred maintenance expense, and not as a capital improvement cost. He contends that Reimbursement should also be denied because this was a "collapsing structural member," which is a "Priority 1" condition: "If the repairs are considered as "Priority 1 or 2 condition(s) as defined in this resolution, then the repairs may not be considered as capital improvement."[10] Further, since the incinerator was located next to a driveway used by all tenants, if the expense is allowed it should be divided among the 13 units.

The condition of the fire box amounted to a "collapsing structural member," which is a Priority 1 condition. However, there is no evidence that, during the course of a routine inspection, either the current or prior landlord would have been able to observe that the fire box was damaged, nor is there evidence that a Notice to Abate was issued by a City inspector. The landlord removed this structure on the advice of a structural engineer, who has particular expertise. Since there is no evidence that the removal was the result of deferred maintenance, the quoted regulation does not invalidate this expense. However, because the incinerator was located in a common area, $6,000 is allowed as an expense benefiting all units.

HVAC (Heating, Ventilation & Air Conditioning): The landlord provided documentary evidence[11] that a new wall furnace was installed in the tenant's unit at a cost of $1,645.48. The tenant contends that this expense should not be allowed because the previous heater was damaged and leaking, and was therefore a Priority 1 condition. The landlord did not present any evidence to the contrary. The condition of the heater as described by the tenant would have been noticed by the prior landlord during a routine inspection, and a responsible landlord would have replaced the heater before October of 2006, when the heater was eventually replaced. For this reason, the quoted regulation is applicable, and this cost is denied.

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[8] Landlord Exhibit No. 1, p. 18
[9] Landlord Exhibit No. 1, pp. 33-4
[10] Regulations Appendix, Section 10.2.2(3)
[11] Landlord Exhibit No. 1, pp. 31-2

Work in Garbage Area: The landlord submitted documentation of roofing and painting work in an area that encloses garbage containers. There is more than one such area on the premises, and the garbage area in question is not near the tenant's building, which has its own garbage area. The tenant testified that he never uses the garbage area in question. Mr. Lee testified that tenants on the property can use any garbage area, regardless of its location. Although Mr. Lee's testimony is undisputed, it is also clear that the area in which the work was performed is rarely, if ever, used by the tenant.

This is perhaps a classic example of work that benefits some tenants, not including the petitioner. It is reasonable to assume that tenants will use the most convenient garbage area, being the one closest to their units. The garbage area in question was not the one closest to the tenant's unit. Therefore, this claimed expense is denied.

The following Table sets forth the calculation for a rent increase based upon the allowed capital improvements expenses, being $30.93 per month. Therefore, the tenant's rent may be increased by $30.93 as a capital improvements pass-through.

CAPITAL IMPROVEMENTS

Effective Date of Increase	1-Nov-07
Number of Residential Units on Property	13

Improvements and repairs benefitting all units

IMPROVEMENT OR REPAIR	DATE COMPLETED	COST ALLOWED	NUMBER OF UNITS BENEFITTED	MONTHLY COST PER UNIT	VALIDITY CHECKS
Exterior Painting	5-Dec-06	$17,395.00	13	$22.30	OK
Structural Engineer	28-Dec-06	$729.00	13	$0.93	OK
Fire Box Removal	6-Aug-06	$6,000.00	13	$7.69	OK
			Total	$30.93	OK

ORDER

1. The base rent for the tenant's unit is $904 per month.

2. A Capital Improvements pass-through is granted in the amount of $30.93 per month, for a period of 60 months, effective November 1, 2007. The pass-through expires on October 31, 2012. On November 1, 2112, the rent will be reduced by $30.93 per month.

3. The total rent for the tenant's unit is $934.93, effective November 1, 2007. The Anniversary Date for future rent increases is November 1.

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.

Dated: December 18, 2007

Stephen Kasdin
Hearing Officer
Rent Adjustment Program

PROOF OF SERVICE
Case Number T07-0267

I am a resident of the State of California and over 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 **Hearing Decision** by placing a true copy of it in a sealed envelope in 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:

Wellington Property Co	**Guillermo Baragano**
POB 13064	209 Wayne Ave
Oakland, CA 94661	Oakland, CA 94606

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 Wednesday, December 19, 2007, in Oakland, California.

CHRISHELLE CHATMAN

PROOF OF SERVICE
Case Number T18-0226

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 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
Dick Chan, Discovery Investments
3666 Grand Avenue Suite C
Oakland, CA 94610

Tenant
Guillermo Baragano
209 Wayne Avenue
Oakland, CA 94606

Tenant Representative
Herman Cowan
1007 39th Street Oakland
CA, CA 94608

Tenant Representative
James Vann
251 Wayne Avenue
Oakland, CA 94606

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 **March 28, 2019** in Oakland, CA.

Nia Johnson

Oakland Rent Adjustment Program

CITY OF OAKLAND

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

For date stamp: 2019 APR 15 PM 12:42

APPEAL

Appellant's Name GUILLERMO BARAGANO	☐ Owner ☑ Tenant
Property Address (Include Unit Number) 209 WAYNE AVE., OAKLAND, CA. 94606	
Appellant's Mailing Address (For receipt of notices) SAME AS ABOVE	**Case Number** T18-0226 **Date of Decision appealed** MARCH 21, 2019
Name of Representative (if any) JAMES VANN	**Representative's Mailing Address (For notices)** 251 WAYNE AVE. OAKLAND, CA. 94606

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.

2019 APR 15 PM 12:12

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:* 23.

• **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 APRIL 15, 2019, 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	DICK CHAN ~ DISCOVERY INVESTMENTS
Address	3666 GRAND AVE, SUITE C
City, State Zip	OAKLAND, CA. 94606
Name	
Address	
City, State Zip	

Guillermo Barragan	4/15/19
SIGNATURE of APPELLANT or DESIGNATED REPRESENTATIVE	**DATE**

For more information phone (510) 238-3721.

CITY OF OAKLAND

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

For date stamp.

2019 APR 17 1:00

APPEAL

Appellant's Name GUILLERMO BARAGANO	☐ Owner ☒ Tenant
Property Address (Include Unit Number) 209 WAYNE AVE. Oakland, CA 94606	
Appellant's Mailing Address (For receipt of notices) SAME AS ABOVE	**Case Number** T18-0226
	Date of Decision appealed MARCH 21, 2019
Name of Representative (if any) JAMES VANN	**Representative's Mailing Address (For notices)** 251 WAYNE AVE. Oakland, CA. 94606

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.

RENT ARBITRATION

2019 APR 17 PM 1:00

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:* 24 .

• **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 April 17, 2019, 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	DICK CHAN DISCOVERY INVESTMENTS
Address	3666 GRAND AVE., SUITE C
City, State Zip	Oakland, CA. 94610
Name	
Address	
City, State Zip	

Guillermo Bolaños	4/17/19
SIGNATURE of APPELLANT or DESIGNATED REPRESENTATIVE	**DATE**

For more information phone (510) 238-3721.

Appeal of T18-0226 – This Document replaces and rescinds the prior appeal submitted on April 15, 2019.

Hearing Officer Cohen's Decision is Unlawful because it 1) Violates OMC 8.22.070.H.2(a)(b) by failing to dismiss the owner's deficient Rent Notice and, 2) Violates OMC 8.22.070.B.2 by failing to dismiss the owner's unlawful demand for a banking increase for 2013 and, 3) Owner could not prove the rental history of property and, therefore, cannot pass on the banking increase and, 4) Violates Federal Rules of Evidence 201(e) and California Code of Judicial Ethics Canon 3B(7) because Tenant is entitled to be heard on the propriety of Hearing Officer Cohen taking official [judicial] notice of Cases T07-0267 and L13-0017 and he was never given the opportunity to examine and rebut evidence against him and, 5) Violates California Law because a court [or any trier of facts] may not take judicial notice of the truth of factual findings even in such documents as orders, findings of fact and conclusions of law, and judgments [*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548] and, 6) Violates California Government Code Section 11513 and Due Process because the hearing decision in case T07-0267 was introduced after the hearing concluded and Tenant was not afforded the opportunity to examine, contest and rebut the material noticed and, 7) It was Improper for Hearing Officer Cohen To Investigate and make inquiries into prior hearing decisions in an attempt to corroborate facts in this case [California Code of Judicial Ethics Canon 3B(7)] and, 8) Suppresses relevant evidence of bias for owners by the Rent Adjustment Program and the Rent Board, 9) Is a violation of Contract Law and, 10) Is barred by Laches and, 11) Is prejudicial to Tenant and, 12) Is Discriminatory because owner has selected this Tenant to pass on a banking rent increase to while not doing so to other tenants and, 13) Is retaliation against this Tenant and, 14) Is an attempt to Constructively Evict this Tenant and, 15) Denies Tenant Due Process Rights to a Fair Hearing and, 16) Is Unconstitutional.

This Tenant has filed a complaint with Rent Adjustment Program Manager Minor regarding alleged Abuse of Power and Abuse of Process and Denial of Fair Hearing and Due Process in prior cases made by Rent Adjustment Program staff and has requested an Independent Investigation of those claims. [Exhibit A attached herewith].

This Tenant does not believe that the Rent Board will render an unbiased decision on this appeal and will likely affirm the hearing officer's decision. The Rent Board has a reputation of being biased against tenants and decisions are controlled by the so-called [Not Neutral] "neutral" Rent Board members who always cast their votes in favor of owners. These [Not Neutral] Rent Board members are handpicked by the Major of Oakland and are often Lawyers, Real Estate Brokers and Property Owners which have an inherent bias against tenants.

Owner's Rent Notice Violates OMC 8.22.070.H.2(a)(b) And Is Therefore Invalid And Hearing Officer Cohen's Statement That "There Is No Wording In The Ordinance That The Dollar Value Must Be Included" Is Wrong And A Misstatement Of The Rent Laws. Cohen Is Simply Making Things Up As She Goes Along.

Pursuant to ORD 8.22.070 H.2(a)(b) Notices For Rent Increases Based On The Banking **Must** Include The Amount Of The CPI Rent Adjustment And The Amount Of Any Banking Increase.

Section 8.22.070 H.2 states in relevant part:

Notices for Rent Increases Based on the CPI Rent Adjustment or Banking. As part of a notice to increase Rent based on the CPI Rent Adjustment or Banking, as Owner must include

a. The **amount** of the CPI Rent Adjustment; and
b. The **amount** of any Banking increase.

The landlords rent increase dated March 24, 2018 states the CPI Rent Adjustment Percentage for 2017-2018 (2.3%) and the Amount of the Banking Available for 2018 ($64.79), but the landlord has failed to **calculate the dollar amount** of the CPI for the current year. Therefore, the landlord's Rent Notice is in violation of the Rent Ordinance and is invalid.

Ms. Cohen's absurd and ridiculous argument that the "There is no wording in the Ordinance that the dollar value must be included" and "Stating the percentage of the year's CPI is stating an amount" is not only contrary to what the Ordinance states it defies logic. One only need to read the Ordinance. The Ordinance is very clear that the Notice must include the "**amount [and not the percentage] of the CPI Rent Adjustment".** If the Oakland City Council wanted the Ordinance to read "percentage" instead of "amount" they would have inserted that into the text, but they did not. Absent the word "percentage" all that remains is the word "amount" and the Owner's Notice does not include the amount as it must for the Notice to meet the requirements of a proper and legal Notice under the Ordinance. In fact, Cohen agrees with Petitioner in that the Notice does not state the "amount" of the rent increase, but instead Cohen gives her unlawful opinion that the Notice "sufficiently states the "amount" of the rent increase". Petitioner disagrees. You either state the amount or you don't, but there is no such thing as an "amount" that is "sufficiently" stated.

Cohen argues that "percentage:" and "amount" are synonymous, but one only need look at the definition of "percentage" and "amount" in the Webster's dictionary to understand that there is a vast difference between the two words. Webster's dictionary defines "percentage" as "a part of a whole expressed in hundredths" and "amount" as "the total amount or quantity". The "total amount or quantity" represents a precise and absolute number hence the word "total". What the "total amount or quantity" does not allow for is an "amount that is sufficiently stated".

Cohen's argument is nothing but a circular "hocus pocus" argument meant to distract from the real issue which is that the **Rent Notice is deficient** and, therefore, unlawful because it does **not Include the Amount of the Rent Increase as it Must** for the Notice to meet the requirements of the Ordinance. No "percentage" or "amount that is sufficiently stated" is going to replace the "total amount or quantity" that is required by the Ordinance. The fact is that "percentage" is not the same thing as amount and no amount of legal tap dancing by Cohen is going to change that.

It appears that Cohen doesn't understand that the reason that the Ordinance demands that the Notice include the "amount" of the CPI rent increase for a current year is that this "amount" is separate from the banked amount being taken even though both are being taken in one year. Stating the CPI rent amount for the current year informs the tenant what the exact amount of the pass-through is for the current CPI and what amount is the banked amount and this allows for any banked carryover [to future years] to be calculated correctly.

Hearing Officer Cohen's Decision Violates The Rent Ordinance In That The CPI Claimed By The Owner As A Banked Increase In 2013 Cannot Be Passed On To Tenant Because The Owner Chose To Pass On A Capital Improvement Instead Of The CPI In 2013. Tenant Requests That This Case Be Remanded and the Decision Changed To Reflect That The Landlord Cannot Claim The CPI For 2013.

Section 8.22.070.B.2 of the Rent Ordinance gives the owner the option of passing on **either the CPI rent increase for that year** (2013) **or a Capital Improvement Rent Increase for that year, but not both.** In the 2013 the owner passed on a Capital Improvement Rent Increase to Tenant, but now the owner wants to pass on the CPI rent increase for 2013 as well as the Capital Improvement Increase and this is a violation of the Rent Laws. The language is very specific and does allow an owner to pass on both the CPI and a Capital Improvement for any given year.

Section 8.22.070.B of the Rent Adjustment Program Regulations states in relevant part:

B. The justifications for a Rent increase in excess of the CPI Rent Adjustment.

1. The justifications for a Rent Increase in excess of the CPI Rent Adjustment are attached as Appendix A to these Regulations.

2. Except for a Rent Increase justified by banking, **Rent may be increased by either**
a. **the CPI Rent Adjustment, or**
b. **the total amount justified under provisions of OMC section 8.2.070.D.1**, whichever is greater.

The Ordinance is very clear, **an owner can pass on a CPI rent increase or a Capital Improvement rent increase, but not both**. Otherwise, the owner is essentially double dipping and this is not allowed in the Ordinance.

Cohen's Decision is deficient in that it fails to disqualify the CPI for 2013 from the Banking Rent Increase. Petitioner requests that this case be remanded so that the owner's request for a banking increase for 2013 be disallowed and the decision changed to reflect this.

Hearing Officer Cohen's Magical Definition Of The Word "Amount" Represents An Inherent Bias For Owners And A Bias By Cohen To Deny Tenant's Petition.

Cohen's failure to abide by the letter of the law is another instance of the Rent Adjustment Program's bias for landlords. The Rent Adjustment Program appears to have a history of failing to abide by the Rent Laws which this Tenant has been a victim of in cases L13-0017 and C17-0004. Other tenants have had problems with the Rent Adjustment Program's bias for landlords. Petitioner has documented several instances of that bias in his complaint to Rent Adjustment Program Manager Minor. [Exhibit A, attached herewith].

Hearing Officers At The Rent Adjustment Program Are Engaging In *Ex-Parte* Communications With This Owner's Representative, Ms. Lee. These Ex-Parte Meetings Have Contributed To Tenant's Belief That The Rent Adjustment Program Is Not Conducting Fair And Impartial Hearings.

The Rent Adjustment Program appears to have a cozy relationship with this owners's representative,

Ms. Lee, and this Tenant knows of at least two instances in which the hearing officers for cases have had *ex-parte* meetings with Ms. Lee. [See Exhibit B attached herewith].

Linda Moroz had an *ex-parte* communication with Ms. Lee on January 8, 2019, while she was the hearing officer for this case, which was witnessed by this tenant and James Vann and admitted to by Linda Moroz. The Rent Adjustment Program admits to the *ex-parte* communication between Lee and Moroz, but has attempted to whitewash this *ex-parte* communication by stating that they were instead talking about hearing officer's Kasdin's health. Petitioner nor his representatives believe the Rent Adjustment Program's explanation of the events. [See Exhibit A attached herewith].

A second instance occurred when the hearing officer for this case, Barbara Cohen, had an *ex-parte* meeting with Ms. Lee during the hearing of two Tenant petitions [which this Tenant had filed], T13-0130 and T13-0164 (*Baragano vs. Discovery Investments*) on July 16, 2013 while she was serving as the hearing officer for those cases. Ultimately, Cohen denied those two tenant petitions and this Tenant believes that the *ex-parte* communication had something with the denial of those petitions.

Hearing Officer Cohen's Decision To Allow This Landlord To "Bank" Rent Increases Without Notice To Tenants Is Fundamentally Flawed And Is A Violation Of Due Process And Is Unconstitutional.

Cohen's decision to allow this landlord to "bank" rent increases, without yearly notices that the increase is being banked, is fundamentally flawed in that this tenant did not receive a notice each year that his rent was being increased or "banked", and Notice of a rent increase was only given 10 years in the future when suddenly the landlord demands a rent increase from preceding years. In Tenant's case these landlords are demanding rent from 10 years ago. This burdens the tenant with a huge rent increase (in Petitioner's case 18.5%). Seemingly, due process and fairness, would require the landlord to, at least, give notice each year that the rent increase for that year is being "banked" and will be passed on to the tenant, at a later date, with subsequent rent increases.

Cohen states in her Hearing Decision that "It has long been the law in Oakland that if an owner chooses not to increase the rent, or increase it less than the annual CPI adjustments permitted by the Ordinance, the owner is allowed to bank the unused increases, subject to certain limitations." While it is true that the Ordinance allows for the landlord to "bank" a rent increase it is also true that the landlord never notified tenant that he was "banking" the yearly CPI and would impose that in future years. The landlord admitted to this at the hearing. Demanding a rent increase for the last ten years without notification each and every year is a violation of Due Process and is Unconstitutional.

Cohen argues that the owner does not have an affirmative obligation to provide written notice of its intent to "bank" a rent increase, but the Ordinance likewise does not state that such notice is not required either. In fact, the Ordinance does contemplate the requirement that the landlord must notify the tenant of a banked amount when the landlord is not able to take a CPI rent increase in years where a Capitol Improvement Rent Increase is passed on to a tenant and the total amount of the CPI and Capitol Improvement Exceeds 10%. In those years the "owner may defer the start date of the increase to a future period, provided that in the rent increase notice that the limits the owner's ability to take the increases, **the owner must identify the justification and the amount or percentage of the deferred increases that may be applied to the future."** [OMC 8.22.070.A.4]

If the Ordinance requires a landlord to notify a tenant of a "banked" amount or percentage in years where Capital Improvements are passed through then it seems obvious that the Ordinance also requires a Notice whenever an owner wants to "bank" an increase in all other years as well. Therefore, Cohen's argument that the owner does not have an affirmative obligation to provide written notice is a fallacious argument.

Hearing Officer Cohen's Decision To Allow The Owner To Bank A CPI Rent Increase Is A Violation Of California Rent Laws Which Specify That A Landlord Cannot Increase A Tenant's Rent Without Proper Notice.

It is fundamental to landlord/tenant law that the tenant must receive Notice of a rental increase

imposed by a landlord. California Civil Code Section 827 provides that an owner must give notice to a tenant of any rent increase. The City of Oakland's "banking" policy should not allow the landlord to increase ("bank") the rent for a certain term without notice to the tenant that the rent for that term is being increased (and "banked"). Such an unnoticed rental increase denies tenant due process and the ability to decide if he wants to pay the increased rent for the term of the rental increase and whether the amount being "banked" is not being passed on to tenant at the time, is really **irrelevant.**

A rental increase, is a rental increase whether or not it is imposed today or in the future and for it to be lawful it needs to be Noticed at the time of its occurrence and not "retroactively".

The failure to notify Petitioner of a "banked" rent increase is a violation of Due Process and a violation of Contract Law (See Below).

The Owner's Demand For Banked Rent Increases Is A Violation Of Contract Law.

Tenant has a contract to pay monthly rent to these landlords and these landlord have accepted Tenant's rent for the last ten years without mention to Tenant that Tenant's rent was deficient in any way. This landlord never informed Tenant that he was going to bank a CPI rent increase and then require Tenant to pay that rent increase in future years. What this landlord wants to do is to violate the basic elements of contract law. For a contract to be legally binding there are certain requirements that must be met (1) offer; (2) acceptance; (3) consideration; (4) mutuality of obligation; (5) competency and capacity; and, in certain circumstances, (6) a written instrument.

This landlord failed to make a required offer of new rent terms to Tenant each year by simply notifying Tenant that the owner was banking a rent increase to future years and would eventually ask Tenant to pay that rent increase in the future. Tenant was never informed that this landlord was changing the terms of the rent each year by banking a rent increase, nor was Tenant given the opportunity to accept or reject this landlords banking of the rent increase each year. Now this landlord wants to retroactively change the terms of Tenants lease for the full 10 years without having given Tenant the opportunity to accept these new terms on a yearly basis and this violates the basic elements of contract law.

An acceptance is only valid, however, if the offeree knows of the offer contemporaneously, the offeree manifests an intention to accept, and the acceptance is expressed as an unequivocal and unconditional agreement to the terms of the offer. This landlord never made an offer of new rent terms (banking increase) in any of the preceding 10 years nor did Tenant accept these new terms. This is a case of a non-existing contract that the owner now wants to impose on Tenant.

The Owner Waived His Right To All Deferred Banking Amounts By Failing To Notify Tenant In Writing Of Rent Increases Being Deferred. In Fact, Owner's Response To Tenant's Petition States That The Owner Has Not claimed The CPI Allowance For The Past Decade.

The owner failed to issue any notices informing tenant of any deferred banking amounts or percentages that owner would be deferring to future dates and in failing to do so waived his rights to any deferred banking increases. In fact, the landlord acknowledged that owner did not claim any of the CPI allowance from the past decade stating in its response to tenant's petition, "Having left almost all of the CPI allowance from the past decade unclaimed..."

Tenant understood that the owner was forgiving the annual rent increase or CPI Rent Adjustments by accepting tenant's rent check and cashing the rent checks from 2008 thru 2018 without any mention of a deferred rental increase. Owner did not inform tenant that he was deferring rent increases and by cashing tenant's check the owner entered into an agreement that the rent checks cashed between 2008 and 2018 constituted full payment of tenant's obligation to owner. Owner is now bound by this agreement and cannot change the agreement entered into with tenant by seeking to increase the rent retroactively. The landlord has waited 10 years and is now attempting to enforce a rental increase retroactively without proper notice for all these years.

Tenant asserts that owner now wants to change the terms of the tenant's rental agreement going back a full ten years without ever providing tenant a notice every year that owner is banking the yearly CPI. Owner now wishes to change the terms of tenant's rental agreement after the fact and for that matter 10 years after the fact. If the landlord wanted to make changes to the terms of rental agreement then onwer should have informed tenant of those changes on a yearly basis rather than waiting 10 years to do so.

Section 8.22.070.A.4 requires that landlords notify tenants of any deferred banking increase in years where Rent Limitations apply pursuant to 8.22.070.A.2 and 8.22.070.A.3. In such cases, the owner must "identify the justification and the amount of percentage of the deferred increase that may be applied in the future." Clearly, the Rent Ordinance requires the owner to notify the tenant of a deferred rent increases under these circumstances, therefore it would be reasonable to infer that the Rent Ordinance would require an owner to notify a tenant of a deferred rent increase every year under any circumstances and not wait ten years to notify a tenant of a deferred rent increase.

Estoppel by Laches Applies. The Owner Waived His Right To All Deferred Banking Amounts By Failing To Assert Owner's Right To Any Banking Rent Increases For 10 years.

The doctrine of laches is based on the maxim that "equity aids the vigilant and not those who slumber on their rights." (Black's Law Dictionary). The outcome is that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party. In this case estoppel by laches trumps any administrative decision by the Rent Adjustment Program.

Owner waived his right to any Banking amounts by failing to notify tenant in writing of any CPI Rent Adjustment increases being deferred. The owner's failure to assert his banking rights in a timely manner on a yearly basis results in the banking claim being barred by laches.

Estoppel by Acquiescence Applies. The Owner Knowingly Did Not Bank The CPI Rent Adjustment For All 10 Years.

Owner knowingly waived his right to any banking amounts by failing to notify tenant in writing of any CPI Rent Adjustment Increases being deferred. Owner knowingly decided to forgive tenant of all CPI Rent Adjustment increases and is estopped retroactively in seeking those increases by his acquiescence.

Hearing Officer Cohen Has Unlawfully Suppressed Relevant Evidence In An Attempt To WhiteWash Prior Alleged Acts Of Abuse Of Process And Abuse of Authority By The Rent Adjustment Program Against This Tenant And Tenant Mark Sherman.

Petitioner entered numerous court records and administrative agency records as evidence into record under the State of California's Evidence Code 450, 451, 452 and 453, which under 453 is a **mandatory taking of Evidence.** Ms. Cohen erroneously excluded these documents stating in her decision that California Evidence Code 210 states that the evidence must be relevant. Cohen is wrong on the law. First of all, the evidence introduced was introduced under the State of California's Evidence Code 450, 451, 452 and 453 and as such it is a **mandatory taking of Evidence** under 453. Judicial notice of court records and administrative records under 453 is a mandatory taking of evidence. Secondly, the records introduced also represent prior acts of **Abuse Of Process and Abuse of Authority by the Rent Adjustment Program** which goes to their Lack of Credibility in making Administrative Decisions against this and other tenants.

Tenant believes that on July 19, 2017 Connie Taylor, Program Manager for the RAP, Abused her Power and Authority and violated a court order and changed the pass-through amount in case L13-0017. The Standard Operating Procedure at the RAP is to use the power of the pen and issue *sua sponte* Administrative Decisions denying tenants Due Process and forcing Tenants to seek judicial review by way of Writ of Mandamus. When this happens Tenants then face a time consuming and costly up-hill legal battle with the judicial cards stacked against them. In Tenant's case this is exactly what happened. Tenant believes that based on the Rent Adjustment Program's prior acts of alleged Abuse of Power and Abuse of Authority with this Tenant that he did not get a Fair Hearing in this case. The documents for Taylor's Abuse of Power and Authority can be found in Exhibit J Attached to the December 31, 2018 documents entered into evidence in this case.

Linda Moroz was the Hearing Officer assigned to Landlord petition L13-0054, *Michelsen v. Sherman,* filed by Diane and Rus Michelson who sought an exemption, from the City of Oakland's Rent Ordinance, for their rental property located at 5825 Occidental Street. In that administrative proceeding, Linda Moroz, abused her discretion when she refused to consider as evidence a letter from Charles Abraham, which was introduced by tenant Mark Sherman simply because the letter was not sworn under penalty of perjury, while considering an equally deficient email, from Michelsen, from a city official which was unsworn. Sherman lost his case and after three years of back and forth litigation, both in Superior Court and at the Rent Adjustment Program, the City of Oakland reversed Linda Moroz's decision. This whole process took Mark Sherman over three years and lots of money just because Linda Moroz abused her discretion. [Exhibit J Attached To December 31, 2018 Documents]

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Hearing Officer Cohen's Official Notice Of Tenant's Base Rent Is A Violation Of California Precedent [*Sosinsky vs. Grant*] And Is Barred From Consideration In The Hearing Decision.

In *Sosinsky vs.Grant* (1992) 6 Cal. App. 4th 1548 the court ruled that a court [or any trier of fact] may not take judicial notice of the truth of factual findings by a judge who sat as a trier of fact in a previous case even in such documents as orders, findings of fact and conclusions of law, and judgments. However, that is exactly what Cohen wants to do when she attempts to take Official Notice of two prior cases, T07-0267 and L13-0017. Cohen's Official Notice of both this cases is barred by *Sosinsky*. Cohen says that she "determined that the tenant's base rent was $904" from both this cases, but she is barred from doing this. California courts have ruled on this issue and have determined that Cohen is wrong law. Cohen cannot take notice of the factual findings as to Tenant's base rent in that hearing decision because this is violation of established precedent.

Furthermore, the Rent Ordinance allows each party to introduce evidence in a hearing up to 7 daysbefore a hearing. The landlord's representative Ms. Lee did not introduce any evidence of any hearing decisions into the record. However, Cohen introduced a copy of an **unverified** hearing decision in case T07-0627 and unsubstantiated hearsay about a "tenant response to an owner petition in case L13-0017" on March 21, 2019 a full two months after the hearing in this case had concluded on January 25, 2019. The time for introducing evidence for consideration into this case had long since passed, but Cohen was not content to accept the landlord's testimony that she did not know what rent Tenant was paying in 2007 and she (Cohen) had to dig through thousands of administrative decisions to come up with an unverified hearing decision from 2007 and an unsubstantiated tenant response from 2013 which she (Cohen) says proves the landlord's case.

This evidence is barred from the consideration in the hearing decision of case T18-0228 and what is left is Ms. Cohen's recital of Ms. Lee "that she did not know exactly what the rent [for Tenant] was in 2007.

Hearing Officer Cohen's Official Notice Of An Unverified Hearing Decision In Case T07-0267 And Hearsay In Case L13-0017 Was Unlawful And A Violation Of Federal Rules Of Evidence Rule 201.

Standards of Judicial notice require that a judge to give notice and an opportunity to be heard before or after taking judicial notice. [Federal Rules of Evidence Rule 201(e), Formal Opinion 478 American Bar Association, *Pickett v. Sheridan Health Care Center 664 F. 3d 632*]

In this case, Ms. Cohen never gave notice to Tenant of any documents she was judicially noticing or gave Tenant an opportunity to be heard. Tenant was never given the opportunity to examine, contest or rebut the documents Cohen introduced into the record.

It Was Unlawful For Hearing Officer Cohen To Investigate Facts Independently And Make Inquiries Into Prior Hearing Decisions In An Attempt To Corroborate Facts, Discredit Facts, Or Fill A Factual Gap And It Was A Violation Of Rule 2.9 Of The Model Code Of Judicial Conduct [American Bar Association].

Ms. Cohen's inquiries and introduction of documents were adjudicative in nature and it was improper for a judge to do so.

A judge shall not investigate facts in a matter independently, and shall consider only the evidence

presented and any facts that may be properly judicially noticed. Judges decision must be presented on the record or in open court and that is available to all parties. [Formal Opinion 478 American Bar Association, Rule 2.9 Of The Model Code Of Judicial Conduct]

Cohen's introduction of documents in this case was made after the administrative hearing had concluded, and was never made available to this Tenant for examination or rebuttal.

Owner Representative Ms. Lee Was Unable To Prove The Rental History Of The Tenancy And Is Barred From Passing On The Banking Rent Increase To Tenant.

From page 6 of the Owner's Guide to the RAP and the Owner Response Form regarding "Banking": If challenged by a Tenant Petition, the **owner must be able to prove the rental history of the tenancy** and the basis of the calculation to justify imposing previously deferred increases." Ms. Lee stated that she did not know what rent the Tenant was paying from 2007 and in order to properly calculate the banking amount you need to know what the rent was at the start of the banking calculation. According, to Cohen Ms. Lee stated "that she did not know exactly what the rent was in 2007", therefore, a proper banking calculation cannot be made and the banking cannot be passed on.

Tenant Had Proven His Case That The Owner Could Not Establish The Rent Tenant Was Paying In 2007, But Hearing Officer Cohen Ignored The Owner's Testimony And Set About To Attempt To Prove Owner's Case For Them.

The Ordinance states that the owner must be able to prove the rental history of a unit in deferred banking cases. From the Tenant's Guide to the Tenant Petition and RAP, **page 3** "Deferred Annual Increases": The **owner must be able to prove the rental history of your tenancy to justify imposing previously deferred increases".** When the landlord's representative, Ms. Lee, was asked what the rent was in 2007 her responses were "I am not sure" and "This is our best guess" and "There was a lot of confusion back then." In other words, Ms. Lee did not know what the rent was in 2007 and admitted as much and according to the law the tenant had proven his case and a banked rent increase should have been disallowed.

However, Ms. Cohen ignored the landlord's testimony and set about to attempt to prove the landlord's case by doing her own research [or perhaps obtaining additional documents from the owner after the hearing had concluded] and came up with a hearing decision from 2007 which she attached to her decision.

Cohen's decision states that she is taking "Official Notice of the tenant's response to an owner petition in case L13-0017" and that "In that document, which was sworn under penalty of perjury, the tenant stated that his rent was increased on November 1, 2007, to $934.93 a month", however, no such document exists as part of the administrative record. Where is this Officially Noticed document she is referring to and where is the document that Cohen says Tenant supposedly swore under penalty of perjury and why was Petitioner not allowed to rebut this document at the hearing? And more importantly why was this document not entered as evidence before the hearing by the owner, but suddenly shows up now in Cohen's decision.

Cohen's decision states "that a rental history stated in a tenant petition, being supplied under oath and undisputed constitutes competent evidence to prove an owner's entitlement to banked rent increases"

is a **Red Herring** as no such document of this "rental history" "under oath" exists in the administrative record of this case. Cohen's statements are nothing more than unsubstantiated hearsay. Where is this document in the administrative record that Cohen is making reference to? It doesn't exist and if it doesn't exist in the administrative record it cannot be considered as evidence.

Therefore, this unsubstantiated claim by Cohen cannot be considered as evidence and her unlawful attempt to include it as evidence after the hearing has concluded is *prima facie* evidence of bias against this tenant.

Ms. Cohen forgets that she is not Ms. Lee's representative and that she is supposed to be an unbiased arbiter of an administrative hearing. However, Cohen actions prove otherwise.

Tenant Was Not Permitted His Due Process Rights To Review, Contest And Rebut The Documents Hearing Officer Cohen Officially Noticed. Thus, Tenant Was Denied A Fair Hearing.

Tenant was denied his Due Process rights to examine and present rebuttal of the unverified Hearing Decision in case T07-0267 and the unsubstantiated hearsay from case L13-0017. Ms. Cohen's introduction of these new documents and hearsay two months after the hearing had concluded did not permit tenant an opportunity to review these documents and present his rebuttal of these documents. Cohen's insertion of these documents two months after the hearing in this case had concluded is nothing but a violation of Due Process Requirements guaranteed under the law. Thus, this is a violation of this tenant's rights to a Fair Hearing.

Hearing Officer Cohen's Introduction of Documents And Hearsay Two Months After The Administrative Hearing Had Concluded Is Proof That Cohen Is Biased And It Is Proof That Tenant Was Denied A Fair Hearing.

When Ms. Cohen went out of her way to search for an unverified hearing decision from 2007 and make hearsay comments from a landlord petition she was acting as the owner's representative and was trying to prove the owner's case rather than being an unbiased hearing officer. The case was already decided when the owner admitted that she could not recall what the exact rent was for the tenant was in 2007, but Cohen was not happy to let that stand and she had to attempt to prove the case for the owner. This is evidence of an inherent bias at the Rent Adjustment Program and with Cohen. This is what this Tenant has been saying all along and now Cohen has just proven that the Rent Adjustment Program is biased against this Tenant.

Incredibly, Ms. Cohen has stated in her decision that a tenant is entitled to a Hearing Officer that is not biased against him and that she (Cohen) does not have any bias against this tenant. The fact the Cohen introduced evidence, which Tenant was not allowed to examine or rebut, supports Tenant's claim of bias.

This evidence was not provided by the owner at the hearing, but was inserted into this case in some back room by a hearing officer, who claims she is not biased, two months after the hearing had concluded without notice to the tenant. This tenant believes that this is *prima facie* evidence of bias and violations of Due Process by this hearing officer and the Rent Adjustment Program.

It Is The Opinion Of This Tenant That Hearing Officer Cohen Lacks The Fundamental Knowledge Of California Law That Would Permit Her To Act As A Competent Hearing Officer.

Ms. Cohen is supposed to know the laws of the State of California, but she ignored precedent when she decided to notice two prior rent board cases in her decision. California Law as stated in *Sosinsky* bars her from taking [official] notice of any "factual" findings in either of the two cases she referred to in her decision.

Ms. Cohen's refusal to abide by Evidence Code 453 is also troublesome. Ms. Cohen is supposed to know the law as it applies to the introduction of evidence into the administrative hearing process, but she does not. Hearing Officers act in quasi-judicial functions as Ms. Cohen and Ms. Cohen demonstrated a lack of knowledge of the laws of the State of California and court rulings and it is the tenant's opinion that she does not have the legal skillset necessary perform the functions of a hearing officer.

Hearing Officer Cohen's Claim That Tenant's Claims About An *Ex-Parte* Communications Is A Red Herring Is An Attempt To Distract From The Conduct Of Linda Moroz And That Of Cohen As Well.

When Ms. Cohen went out of her way to search the catalog of hearing decisions going back to 2007 she was acting as the owner's representative and was attempting to prove the owner's case rather than being an unbiased hearing officer.

When Cohen noticed two prior rent board cases in her decision she was in violating of prior court rulings.

When Cohen introduced evidence into this case two months after the hearing had concluded and did not provide this Tenant with an opportunity to examine that evidence, question witnesses or provide rebuttal she violated Tenant's Due Process Rights to a Fair Hearing and she demonstrated a bias for this owner.

When Tenant attempted to introduce evidence under Evidence Code 453 (Mandatory Taking of Evicence) and Cohen refused to consider the evidence this was a clear violation of the law. However, Cohen then introduced her own evidence two months after the hearing in this case was concluded. This is double standard that is being applied by Cohen in this case.

Both Cohen and Linda Moroz have engaged in *ex-parte* communications with the owner's representative, Ms. Lee, in the past and this tenant does not believe the Rent Adjustment Program's explanation that Ms. Lee was asking about Mr. Kasdin's health.

Ms. Moroz's actions in *Sherman vs. Michelsen* are well known and have been included as part of the record in this case. Her refusal to accept a signed document as evidence in Sherman's case just because it wasn't done under penalty of perjury is another example of bias by hearing officers at the Rent Adjustment Program.

Hearing Officer Cohen's Refusal To Allow Tenant's Representatives To Question The Owner Is A Denial Of Due Process And A Denial Of A Fair Hearing.

Ms. Cohen refused to allow Tenant's representatives the opportunity to question owner representative Ms. Lee stating that only one person could question Ms. Lee. When Tenant asked Ms. Cohen to quote the Rent Ordinance section that prohibited Tenant and his representatives from asking questions of Ms.

Lee, Ms. Cohen admitted that there was nothing in the Rent Ordinance that prevented Tenant and his representatives from questioning Ms. Lee, but that in this hearing she would only permit one person to question Ms. Lee. When tenant representative James Vann stated that he had been present when other hearing officers had allowed other parties and their representative(s) to question all parties present at a hearing Ms. Cohen simply dismissed this by repeating that in **this particular** hearing she would only allow one party to question Ms. Lee.

Ms. Cohen has again demonstrated a bias for owner representative Ms. Lee.

Landlord Has Chosen To Discriminate Against Tenant And Pass A Banking Rent Increase To Tenant Which The Landlord Has Not Passed On To Other Tenants.

Randy Lee, property manager and minority owner, stated on July 15, 2013 at a Rent Adjustment Program Hearing for Tenant Petition L13-0017, that "**We also haven't raised rents on an annual basis, as well.**" Lee made it clear that he and the other owners have not raised rents (plural) on the other tenants. Suddenly, Lee decided to raise this Tenant's rent going back ten years which he has not imposed on other tenants. Lee is selectively imposing a 10 year deferred rent on tenant in one **foul swoop** while not doing so for other tenants.

The Ultimate Interpretation of the Banking Regulation Is For The Courts to Decide. Tenant Does Not Believe That He Will Get A Fair and Unbiased Interpretation Or Ruling Of The Banking Regulation From The Rent Adjustment Program Hearing Officer Or The Rent Board. Therefore, He Will Be Seeking Judicial Review Of The Administrative Decision.

The ultimate interpretation of a statute or regulation is a matter for the courts. [*Yamaha Corp. of Am. v State Board of Equalization* (1998) 19 Cal.4th 1, 7] Because administrative agencies are agencies of limited jurisdiction, they can only act within the confines of their establishing laws. If they promulgate a regulation that conflicts with statutory law or seeks to expand the agency's power into an area the legislature did not intend, the regulation may be struck down by the court on mandamus review and any decision based on the regulation will be overturned. [*Yamaha Corp. of Am. v State Board of Equalization* (1998) 19 Cal.4th 1, 11]

Ultimately, tenant's case will be decided in court as tenant does not believe he will get a fair hearing at the Rent Adjustment Program or at their Appeal's Board. Tenant believes that both the Rent Adjustment Program and the Appeal's Board is biased and cannot and will not make a fair and unbiased decision in this case.

RENT ARBITRATION

2019 APR 17 PM 1:01

CITY OF
RENT ARBITRATION

2019 APR 15 PM 12:13

EXHIBIT H

April 10, 2019

Chene Franklin Minor
Rent Adjustment Program Manager
City of Oakland Rent Adjustment Program
250 Frank H. Ogawa Plaza, Suite 5313
Oakland, Ca. 94612

Barbara Kong-Brown
Hearing Officer
City of Oakland Rent Adjustment Program
250 Frank H. Ogawa Plaza, Suite 5313
Oakland, Ca. 94612

2019 APR 15 PM 12:13

Response To Your Letter Of January 22, 2019 And Request For Independent Investigation Into The Actions of The Rent Adjustment Program Which I Believe Constitute Abuse of Authority, Abuse of Process and Denial of Fair Hearings and Due Process.

Dear Mesdames,

The following is a response to Barbara Kong-Brown's letter dated January 22, 2019 and a request for an Independent Investigation into the actions of the Rent Adjustment Program in Cases L13-0017 (*Baragano vs. Discovery Investments*), C17-0004 (*Baragano vs. Discovery Investment*), T13-0135 (*Baragano vs. Discovery Investments*), L13-0054 (*Sherman vs. Michelsen*), T16-0258 (*Sherman vs. Michelsen*).

I am also documenting the actions of Hearing Officer Barbara Cohen in case T18-0226 (*Baragano vs. Discovery Investments*) which I believe have denied me Due Process and a Fair Hearing in that case.

First, I wish to address Barbara Kong-Brown's letter of January 22, 2019 which responded to my allegations that owner representative Ms. Lee had an improper *ex-parte* communication with Hearing Officer Linda Moroz after the Hearing of Case T18-0226 (*Baragano v. Discovery Investments*) on January 8, 2019. Ms. Kong-Brown responded that Ms. Lee had only asked Ms. Moroz about Mr. Kasdin's health which did not constitute an *ex-parte* communication. I don't believe Kong-Brown's explanation and neither do either one of my representatives in that case. What I believe happened is exactly as I have stated in my sworn declaration i.e., Ms. Moroz had an inappropriate (if not unethical) *ex-parte* communication with Ms. Lee about case T18-0226 and now the Rent Adjustment Program wishes to whitewash what took place. Ms. Kong-Brown did not included any sworn statements, under penalty of perjury, from either Ms. Moroz or Ms. Lee, about their *ex-parte* communication nor was I given the opportunity to question Ms. Moroz or Ms. Lee. Therefore, Ms. Kong-Brown's statements are nothing but hearsay which does not constitute evidence of what took place. Furthermore, Ms. Kong-Brown has already admitted to me in a letter dated Oct. 10, 2013 that she had "done previous work for Ms. Katano-Lee as a hearing officer" and this alone should disqualify Kong-Brown from being able to render an unbiased investigation of this *ex-parte* communication.

I have included two sworn statements from myself and my representative Herman Cowan which we believe accurately portray Hearing Officer Barbara Cohen's behavior during the hearing of case T18-0226. Both Mr. Cowan and I believe that Ms. Cohen's behavior at the hearing reflected a bias that Ms. Cohen had for the owner and his representative, Ms. Lee, and that this bias led Ms. Cohen to deny my tenant petition and rule in favor of the owner in direct violation the City of Oakland's Rent Laws, California Civil Code 827, the laws governing California Contract Law as well as other State and Federal Laws requiring Due Process.

2019 APR 15 PM 12:13

In her hearing decision in case T18-0226 Ms. Cohen refers to my complaint of the *ex-parte* communication between Ms. Lee and Ms. Cohen as a "Red Herring", but the only Red Herring I believe exists here is an attempt by the Rent Adjustment Program and Ms. Cohen to cover up behavior that in any court of law would be deemed unethical. Furthermore, Ms. Cohen engaged in her own *ex-parte* communications with Ms. Lee in the past. [See Attached Baragano Declaration].

I believe that the Rent Adjustment Program has engaged in the following actions which should be investigated and I am requesting that they be investigated by an Independent Party:

1- *Ex-Parte* communications between Hearing Officer Linda Moroz and owner representative Kathy Katano-Lee on January 8, 2019 at the City of Oakland's Rent Adjustment Program after the hearing of case T18-0226 (*Baragano vs. Discovery Investments*). See attached Declarations of James Vann and Guillermo Baragano.

2- *Ex-Parte* communications between Hearing Officer Barbara Cohen and owner representative Kathy Katano-Lee on July 16, 2013 at the City of Oakland's Rent Adjustment Program during the hearing of two tenant petitions (T13-0130 and T13-0164, *Baragano vs. Discovery Investments*). See attached Declaration of Guillermo Baragano.

3- *Ex-Parte* communications between former Program Manager Connie Taylor and Matthew Quiring, attorney for owner Dick Chan, in case C17-0004 (*Baragano vs. Discovery Investments*) which led to Connie Taylor Violating a Court Order in Alameda County Case RG14-732655 (*Baragano vs. Dick Chan, et al)* and issuing an Administrative Decision denying me my Due Process rights to a hearing under the Rent Laws
to a hearing.

4- Denial of Due Process and Abuse of Authority in the suppression of evidence by Hearing Officers in the following cases:
   a- L13-0017 (*Baragano vs. Discovery Investments*)– Hearing Officer Stephen Kasdin suppressed all evidence that I presented in that case and refused to let me finish my arguments in support of my case.
   b- L13-0054 (*Sherman vs. Michelsen*) – Hearing Officer Linda Moroz suppressed a signed letter from Charles Abraham by refusing to consider it as evidence simply because the letter was not signed under penalty of perjury while simultaneously considering the equally deficient email from a city official which was unsworn and favored the position of Michelsen.
   c- T18-0226 (*Baragano vs. Discovery Investments*) – Hearing Officer Barbara Cohen suppressed all evidence of alledged prior acts of Abuses of Authority and Abuses of Process by the Rent Adjustment Program against Tenant Baragano which go to the issue of credibility of the Rent Adjustment Program. See attached Declaration of Herman Cowan and Guillermo Baragano.

5- Abuse of the Administrative Decision making process by Hearing Officers at the Rent Adjustment Program and Rent Program Manager Connie Taylor.
   a- T13-0135 (*Baragano vs. Discovery Investments*) – Hearing Officer Barbara Kong-Brown issued an Administrative Decision in this case changing the pass-thru amount authorized by the Rent Board in case L13-0017 from $90.30 to $139.28 without granting Tenant Baragano a hearing in this case. This decision was tainted because Barbara Kong-Brown had admitted to doing work previously as a hearing officer for owner representative Kathy Katano-Lee.
   b- T16-0258 (*Sherman vs. Michelsen*) – Hearing Officer Linda Moroz issued an Administrative Decision dismissing Tenant Sherman's Petition for Fraud against Michelsen. This denied Sherman a hearing in this case. This was a Denial of Due process and a Denial of a Fair Hearing.
   c- T16-0258 (*Sherman vs. Michelsen*) – Rent Adjustment Program Manager Connie Taylor issued an Administrative Appeal Decision denying Tenant Sherman's appeal in this case. This denied

Sherman an Appeal Hearing in his case. This was a Denial of Due Process and a Denial of a Fair Hearing.

d- C17-0004 (*Baragano vs. Discovery Investments*) – Rent Program Manager Connie Taylor issued a Final Decision in this case which was a violation of a court order in Alameda County Case RG-732655 and denied Tenant Baragano a mandated hearing in this case.

In is my opinion that there are now quite a few instances of questionable actions by the staff at the Rent Adjustment Program which I believe need to be investigated by an Independent Party.

I have also included a two articles from the East Bay Express which echo my views on the problems that exist at the Rent Adjustment Program. In the article titled "How Oakland Landlord's Prevail in Rent Disputes" Tenant Rachel Robinson stated, "Instead of feeling like we were protected by the Rent Adjustment Program, it really felt like the Landlord Protection Program" and "The loopholes [at the Rent Adjustment Program] are big enough to drive a truck through." In the article titled "How Oakland Landlords Fight Rent Control" James Vann stated, "The [Rent] board is unfortunately very biased against tenants" and tenant advocates stated, "Sherman's battle highlights numerous ways in which the rent board process is unfairly biased towards landlords."

Sincerely,

Guillermo Baragano
209 Wayne Ave.
Oakland, Ca. 94606

Cc: James Vann
251 Wayne Ave.
Oakland, Ca. 94606

EXHIBIT B

Declaration of Guillermo Baragano

1- I Guillermo Baragano declare,

2- I am over the age of 18 and a resident of Oakland, California.

3- I am a party to the City of Oakland's Rent Adjustment Proceeding T18-0226 (*Baragano vs. Discovery Investments*).

4- On January 25, 2019 I attended an Administrative Hearing of Case T18-0226 (*Baragano vs. Discovery Investments*) at the City of Oakland's Rent Adjustment Program.

5- The Hearing Officer assigned to case T18-0226 was supposed to be Stephen Kasdin, but at the last minute Barbara Cohen was assigned to hear that case.

6- Once on record I stated that Hearing Officer Linda Moroz had *Ex-Parte* communications with owner representative Kathy Katano-Lee of Discovery of Investments which James Vann and I had documented previously and that as a result of my prior experience in case L13-0017 (*Baragano vs. Discovery Investments*) and the information publicly available in *Sherman vs. Michelsen* (T16-0258) I did not think that I could get a Fair Hearing from the Rent Adjustment Program or the City of Oakland. I then asked for a neutral hearing officer to hear my case. Barbara Cohen denied this Request.

7- During the proceeding I witnessed behavior and heard statements from Barbara Cohen which, in my opinion, reflected a bias against me. Ms. Cohen's general demeanor and overall approach was to interrupt me whenever I spoke in order to prevent me from entering argument and evidence into the record while simultaneously permitting Ms. Lee to argue and question me on irrelevant matters.

8- I witnessed Ms. Cohen leading Ms. Lee with regard to her testimony and summation as if Ms. Cohen was a representative of Ms. Lee rather than an impartial hearing officer. At the time when all parties were to make their summations Ms. Cohen suggested that Ms. Lee address certain arguments that I had made during the hearing. I believe that this behavior was leading Ms. Lee and was inappropriate and suggested a bias Ms. Cohen had for Ms. Lee.

9- When I asked Ms. Lee as to whether she or Discovery Investments had notified me that the landlord would be deferring the CPI increase for any of the years from 2008 to 2017 Ms. Lee responded that she had not. While I was asking these questions Ms. Cohen was making all kinds of faces and was grimacing and shaking her head as if answering the questions for Ms. Lee. When I asked Ms. Lee if she had notified me that the landlord would be deferring the CPI for 2018, Ms. Cohen interrupted me and answered for Ms. Lee stating, "No, 2018 is the current year." Ms. Cohen is not Ms. Lee's representative and should not be answering questions for Ms. Lee. This is yet another instance of bias that Ms. Cohen displayed towards Ms. Lee.

10- In one instance, my representative Herman Cowan argued that a banked rent increase was in fact a rent increase for that year even though the landlord waited ten (10) years to impose that rent increase and to my surprise I found Ms. Cohen arguing in favor of Ms. Lee and the owner by stating that I benefitted from not having to pay the rent increase in the years that the rent increase was being deferred. I think Ms. Cohen's remark was indicative of a bias that Ms. Cohen had in favor of granting the banking increase to Ms. Lee.

11- It is my belief that Ms. Cohen raised an irrelevant issue as to whether or not I paid the CPI rent Increase for those deferred years and, furthermore, it was not Ms. Cohen's purview, as a supposedly impartial hearing officer, to present argument in favor of Ms. Lee and the owner.

12- When I stated that I was judicially noticing court records and administrative agency records, as evidence under the State of California's Evidence Code 450, 451, 452 and 453, which under 453 is a mandatory taking of evidence code, Ms. Cohen erroneously excluded these documents as evidence from case T18-0226. When I argued that under the State of California's Evidence Code 450, 451, 452 and 453 a court **must** take judicial notice of any court records as well as any administrave agency records, Ms. Cohen once again erroneously excluded these documents from consideration as evidence. I stated that Ms. Cohen was incorrect on the law and that these documents and evidence were part of the record according to California State Law.

13- It is my opinion that Ms. Cohen was in violation of California State Evidence Code 450, 451, 452, 453 in preventing me from judicially noticing court records, administrative agency records and arguments in support of my petition and in so doing suppressed evidence.

14- On numerous occasions Ms. Cohen interrupted me for no reason at all explaining that my statements were irrelevant or repetitive while simultaneously letting Ms. Lee ask numerous irrelevant questions of me without ever interrupting or correcting Ms. Lee.

15- On one occasion when my representative Herman Cowan wanted to ask a question of Ms. Lee, Ms. Cohen interrupted Mr. Cowan and said that only one person, myself or **one** of my representatives, could ask questions of Ms. Lee. When I asked Ms. Cohen to quote the Rent Ordinance section that prohibited me and my representatives from asking questions of Ms. Lee, Ms. Cohen admitted that there was nothing in the Rent Ordinance that prevented me and my representative from questioning Ms. Lee, but that in this (Ms. Cohen's) hearing she would only permit one person to question Ms. Lee. At this time, my other representative, James Vann, interrupted Ms. Cohen and stated that both of us had been present when other hearing officers had allowed other parties and their representative(s) to question other parties. Ms. Cohen simply dismissed this by repeating that in **this particular** hearing she would only allow one party to question Ms. Lee.

16- It is my opinion that Ms. Cohen was in violation of the Rent Ordinance and general principles of Due Process requirements under both California State Law as well as Federal Law in preventing me and my representatives from questioning Ms. Lee. It believe that Ms. Cohen makes up her own rules as she goes along and that ultimately this is an attempt to suppress the lawful questioning of Ms. Lee and the lawful introduction of evidence from the questioning of Ms. Lee.

17- It is my opinion, that the evidence and that Ms. Cohen suppressed was relevant to my argument that I could not receive a Fair Hearing by the Rent Adjustment Program or the City of Oakland and as such was pertinent to case T18-0226. The evidence introduced by me were Court Records from the Alameda County Superior Court and prior Rent Adjustment Program Hearing Decisions that represented errors committed by Hearing Officer Linda Moroz in cases L13-0054 and T16-0258 (*Sherman vs. Michelsen)* as well as violation of a Court Order by Rent Adjustment Program Manager Connie Taylor in case L13-0017 (*Baragano vs. Discovery Investments).*

18- It is my opinion, that the Rent Adjustment Program and its Hearing Officers have a history of

suppressing evidence. Hearing Officer Linda Moroz refused to consider a written and signed statement by a witness for Sherman in case L13-0054 (*Sherman vs. Michelsen*) just because the document was not signed under penalty of perjury. By refusing to consider this critical piece of evidence Linda Moroz ruled in favor of his Sherman's landlord (Michelsen). This is an example of how the Rent Adjustment Program abuses its power and in so doing denies tenants Fair Hearings and Due Process.

19- In my opinion, Ms. Cohen was both dismissive of my arguments and made every attempt to argue in favor of Ms. Lee case. In addition, I believe that Ms. Cohen was professionally biased and did not provide me with a Fair Hearing.

22- In my opinion, Ms. Cohen lacks the fundamental knowledge of California Law that would permit her to act as a competent Hearing Officer. Hearing Officers act in quasi-judicial functions as Ms. Cohen demonstrated a lack of knowledge of the laws of the State of California.

23- I personally witnessed Ms. Cohen have an *ex-parte* communication with Ms. Lee on July 16, 2013 at The City of Oakland's Rent Adjustment Program during the hearing of two tenant petitions, T13-0130 and T13-0164 (*Baragano vs. Discovery Investments*), I had filed. Ms. Cohen was the Hearing Officer in both those cases and Ms. Lee was the owner's representative at both those hearings. During a 15 minute break I saw Ms. Cohen meet with Ms. Lee in the hallway and then after several minutes of talking I saw both Ms. Cohen and Ms. Lee enter and exit the ladies' bathroom together. Ultimately, Ms. Cohen ruled in favor of Ms. Lee in both those cases and I believe that the *ex-parte* communication between Ms. Cohen and Ms. Lee had something to do with this.

24- This is not the first time I have personally witnessed Hearing Officers from the Rent Adjustment Program have ex-parte communications with Ms. Lee during a hearing. Both James Vann and I filed complaints regarding Hearing Officer Linda Moroz having an *ex-parte* meeting with Ms. Lee on January 8, 2019. Therefore, it appears that the practice of Hearing Officers having *ex-parte* with Ms. Lee is an accepted practice at the Rent Adjustment Program even though it is an ethical violation in any court of law.

25- Based on my firsthand knowledge of *ex-parte* communications that appear to occur on a routine basis between hearing officers at the Rent Adjustment Program and owners such as Ms. Lee it is my belief that it is impossible for the Rent Adjustment Program to conduct impartial hearings in any of its cases.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and if called upon to testify thereto I could and would competently do so; and that this declaration was executed in Oakland, California on April 10, 2019.

Guillermo Baragano
Signature

GUILLERMO BARAGANO
Print Name

2019 APR 17 PM 1:01

2019 APR 15 PM 12:13

Declaration of Guillermo Baragano 2019 APR 15 PM 12:

1- I Guillermo Baragano declare,

2- I am over the age of 18 and a resident of Oakland, California.

3- I am a party to the City of Oakland Rent Adjustment Proceeding T18-0226 *Baragano vs. Discovery Investments.*

4- On January 8, 2019 I attended an administrative hearing for case T18-0226 at the City of Oakland's Rent Adjustment Program.

5- The Hearing Officer assigned to case T18-0226 was Linda Moroz.

6- Once on record I stated that I thought that the Rent Adjustment Program had engaged in Ex-Parte Communications with Discovery Investments regarding the T18-0226 case being heard that day. Hearing Officer Linda Moroz responded that no Ex-Parte communications had occurred between any of the Rent Adjustment Program staff and Discovery Investments.

6- During the proceeding I asked that Hearing Officer Linda Moroz recuse herself from case T18-0226 because I felt that I could not receive a Fair Hearing from either Linda Moroz or the City of Oakland's Rent Adjustment Program. Ms. Moroz agreed to recuse herself and the hearing on T18-0226 abruptly concluded with Ms. Moroz promising to re-assign case T18-0226 to another hearing officer.

7- Upon exiting the conference room where the administrative hearing of case T18-0226 took place I saw Kathy Katano-Lee, Discovery Investment's representative for case T18-0226, enter Linda Moroz's office and begin an Ex-Parte conversation with Ms. Moroz.

8- I informed my representative James Vann, who had accompanied me to the hearing of case T18-0226, of the Ex-Parte communication and then I spoke to the Foyer Representative in attendance at the front desk and asked to speak to Ms. Moroz.

9- Ms. Moroz exited the offices of the Rent Adjustment Program and I explained to Ms. Moroz that any Ex-Parte communications between any party and a hearing officer of a Rent Adjustment Program case is improper. Initially, Ms. Moroz denied having an Ex-Parte conversation with Kathy Katano-Lee, but when I told Ms. Moroz that I saw Kathy Katano-Lee enter Ms. Moroz's office and begin a conversation with Ms. Moroz it was then that Ms. Moroz admitted to having an Ex-Parte communication with Kathy Katano-Lee. Ms. Moroz explained that she (Ms. Moroz) was no longer the hearing officer in case T18-0226 as if to say that she (Ms. Moroz) had done nothing wrong. However, a hearing officer is still the hearing officer of a case until that case is re-assigned.

10- Hearing Officer Moroz had an improper Ex-Parte communication with Kathy Katano-Lee and improper communications are prohibited by the City of Oakland's Rent Laws as well as numerous codes of ethics the prevent decision makers from meeting with one party outside the presence of another, interested party. As a result, I believe that this Ex-Parte communication prevents me from receiving a Fair Hearing in case T18-0226 by any of the hearing officers at the City of Oakland's Rent Adjustment Program.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and if called upon to testify thereto I could and would competently do so; and that this declaration was executed in Oakland, California on January 16, 2019.

Guillermo Baragano

Signature

Guillermo Baragano

Print Name

2019 APR 15 PM 12:14

2019 APR 17 PM 1:01

2019 JAN 16 PM 5:55

2019 APR 15 PM 12:11

DECLARATION OF JAMES E VANN

2019 JUL 16 PM 5:55

I, James Vann, declare:

1. I am over the age of 18 and a resident of Oakland, California.

2. I am not a party to any litigation involving Discovery Investments, Kathy Katano-Lee, Randy Lee, Martin Chan, or Diane Daley-Smith.

3. I am not a sworn party to any City of Oakland Rent Adjustment Proceedings against Discovery Investments, Kathy Katano-Lee, Randy Lee, Martin Chan, or Diane Daley-Smith.

4. On January 8, 2019, I accompanied Mr. Guillermo Baragano to the City of Oakland's Rent Adjustment Hearing of Case T18-0226 (*Baragano vs. Discovery Investments*) because I serve as Mr. Guillermo Baragano's representative in this Tenant Petition.

5. The Hearing Officer assigned to Case T18-0226 was Ms Linda Moroz.

6. Once on the record, Mr. Baragano stated that he believed that the Rent Adjustment Program staff had engaged in Ex-Parte Communications with persons of Discovery Investments regarding the T18-0226 case being heard that day. Hearing Officer Moroz responded that no Ex-Parte communications had occurred between any of the Rent Adjustment Program staff and Discovery Investments.

7. During the proceeding, Mr Baragano requested that Hearing Officer Moroz recuse herself from Case T18-0226 because he felt he could not receive a fair and impartial Hearing from Ms Moroz as the Hearing Officer.

8. Following a brief discussion, Hearing Officer Moroz asked Mr Baragano if it was his preference not to proceed with today's Hearing and that a different Hearing Officer be assigned to Case T18-0226. Mr Baragano stated "yes," whereupon Ms Moroz agreed to recuse herself, and refer the case to be re-assigned, and whereupon the Hearing was concluded.

9. Upon exiting the conference room where the Administrative Hearing of Case T18-0226 was scheduled, Mr. Baragano brought to my attention that he saw Ms Kathy Katano-Lee, a party of Discovery Investment – who followed us from the room -- enter the space where Ms Moroz was waiting for all the parties to depart.

10. I waited with Mr Baragano in the Rent Program Foyer for Ms Kathy Lee to follow us in existing from the Hearing room.

11. After about 3 minutes, when Ms Kathy Lee did not exit into the Rent Program Foyer, Mr Baragano asked the Foyer Receptionist to inform Hearing Officer Moroz that he would like to speak with her.

2019 JUL 17 PM 1:01

12. Hearing Officer Moroz and Ms Lee then appeared at the doorway of the Foyer of the Rent Program, whereupon Mr Baragano stated to Hearing Officer Moroz that he believed it was improper that she and Ms Lee should engage in Ex Parte Communications after the Hearing had been concluded and the parties dismissed.

13. As Ms Lee exited into the Foyer, I moved away while a brief conversation ensued between Mr Baragano and Hearing Officer Moroz.

14. Tenant and landlord parties then departed the Rent Program Foyer. Mr Baragano asked if I thought he was correct in his interpretation that an Ex Parte Communication had occurred.

15. Based on my recollection of reading a prior RAP informational document which directed that during the period when a Hearing is in process, that communications of the parties to a Case with the Hearing Officer are prohibited *[as Ex Parte communications]* before a decision in the Case has been rendered.

16. Within days of the aborted Hearing, Mr Baragano informed me of his intent to file a complaint, and asked if I would be willing to attest to what I experienced, as Tenant Representative, in relation to the aborted Hearing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief, and if called upon to testify thereto I could and would competently do so. This declaration was executed in Oakland, California on January 15, 2019.

James E Vann

Signature

JAMES E VANN

Print Name

CHRONOLOGICAL CASE REPORT

Case No.:	L17-0062	
Case Name:	Kahan v. Tenants	
Property Address:	2642 35th Ave., Oakland, CA	
Parties:	Irma Galvez	(Owner Representative)

OWNER APPEAL:

Activity	Date
Owner Petition filed	March 29, 2017
No Tenant Responses filed	----------
Hearing Decision mailed	May 9, 2018
Owner Appeal filed	May 29, 2018

RECEIVED
CITY OF OAKLAND
RENT ARBITRATION PROGRAM
2017 MAR 29 AM 10:52

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

For date stamp.

RECEIVED
CITY OF OAKLAND
RENT ARBITRATION PROGRAM
2017 MAR 29 AM 10:52

LANDLORD PETITION FOR CERTIFICATE OF EXEMPTION
(OMC §8.22.030.B)

Please Fill Out This Form Completely As You Can. Failure to provide needed information may result in your petition being rejected or delayed. Attach to this petition copies of the documents that prove your claim. Before completing this petition, please read the Rent Adjustment Ordinance, section 8.22.030. A hearing is required in all cases even if uncontested or irrefutable.

Section 1. Basic Information L17-0062 KM/MA

Your Name	Complete Address (with zip code)	Telephone
Tobias Kahan	2501 Channing Way Berkeley, CA 94704	Day: [redacted]
Your Representative's Name	Complete Address (with zip code)	Telephone Day:
Property Address 2642 35th Ave, Oakland, CA 94619		Total number of units in bldg or parcel. 4

Type of units (circle one)	Single Family Residence (SFR)	Condominium	Apartment or Room
If an SFR or condominium, can the unit be sold and deeded separately from all other units on the property?		Yes	No

Section 2. Tenants. You must attach a list of the names and addresses, with unit numbers, of all tenants residing in the unit/building you are claiming is exempt.

Section 3. Claim(s) of Exemption: A Certificate of Exemption may be granted **only** for dwelling units that are **permanently** exempt from the Rent Adjustment Ordinance.

New Construction: This may apply to individual units. The unit was newly constructed and a certification of occupancy was issued for it on or after January 1, 1983.

Substantial Rehabilitation: This applies only to entire buildings. An owner must have spent a minimum of fifty (50) percent of the average basic cost for new construction for a rehabilitation project. The average basic cost for new construction is determined using tables issued by the Chief Building Inspector applicable for the time period when the Substantial Rehabilitation was completed.

Single-Family or Condominium (Costa-Hawkins): Applies to Single Family Residences and condominiums only. If claiming exemption under the Costa-Hawkins Rental Housing Act (Civ. C. §1954.50, et seq.), 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 a notice of rent increase under 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?
8. When did the tenant move into the unit?

I (We) petition for exemption on the following grounds (Check all that apply):

☐	New Construction
☒	Substantial Rehabilitation
☐	Single Family Residence or Condominium (Costa-Hawkins)

Section 4. Verification Each petitioner must sign this section.

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

_____ 9 March 2017

Owner's Signature **Date**

_____ _____

Owner's Signature **Date**

Important Information

Burden of Proof 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.

File Review Your tenant(s) will be given the opportunity to file a response to this petition within 35 days of notification by the Rent Adjustment Program. You will be sent a copy of the tenant's Response. Copies of attachments to the Response form will not be sent to you. However, you may review any attachments in the Rent Program Office. Files are available for review by appointment only. For an appointment to review a file, call (510) 238-3721. Please allow six weeks from the date of filing for notification processing and expiration of the tenant's response time before scheduling a file review.

3/29/17

RE:
2642 35th Ave, Oakland 94619

TENANT

Khalilah El-Amin	2642 35th, Ave #A
Katrina Jenkins	2642 35th #B
Tynesha Staten	2642 35th #C
Carrie Golston	2642 35th #D

Kitchen				
Cabinets and counters - Material	$3,000.00	4		12,000.00
Sink, garbage disposal, faucet, range hood - Material	$1,200.00	4		4,800.00
Bathroom				
Bathtub	$345.00	4		1,380.00
Vanity	$420.00	4		1,680.00
Toilets	$150.00	4		600.00
Misc Framing (backing, sheetrock, wallpaper, linolium, racks, holders, poles, etc.)	$600.00	4		2,400.00
Bathroom Tile (Backing, screws, tile) (77 sqft / bathroom)	$9.75	308		3,003.00
Misc.				
Material (Plywood, nails, lumber, facia board, etc.)	$3,750.00	1		3,750.00
Walls (Sheetrock, tape, texture, insulation) - Material	$4,200.00	1.00		4,200.00
Windows - Material + Labor	$7,500.00	1.00		7,500.00
Wood Laminate Flooring - Material	$4.50	2200		9,900.00
Garage Doors - (Material + Labor)	$4,200.00	2		8,400.00
Outside Handrail, Gate (Material + Labor)	$6,750.00	1		6,750.00
Paint (Int/Ext) - Material	$2,700.00	1		2,700.00
Redwood Stairs	$3,750.00	1		3,750.00
Roofing (Partial)	$1,500.00	1		1,500.00
Other (Doors, baseboard, moulding, trim, etc.)	$5,250.00	1		5,250.00
Fees, permits, etc.				
Work Permits (est. 1500-2000)				
PG&E Start Work Fee	$1,000.00	1		1,000.00
Total Material				**138,228.00**
Labor				
Demolition - Labor	$40.50	243		9,841.50
Hauling - Labor	$40.50	238		9,639.00
Electrical				
New Main Panel - Labor	$52.50	168		8,820.00
New Subpanel - Labor	$52.50	164		8,610.00

Rough - Labor	$52.50	324		17,010.00
Finish - Labor	$45.00	234		10,530.00
Plumbing				
Rough - Labor	$52.50	384		20,160.00
Water Heaters - Rellocation Labor	$52.50	126		6,615.00
Finish - Labor	$45.00	201		9,045.00
Misc.				
Kitchen Labor	$40.50	275		11,137.50
Bathroom Labor (4 bathrooms)	$40.50	469		18,994.50
Framing Labor	$40.50	334		13,527.00
General Construction				
Walls - Labor	$40.50	222		8,991.00
Flooring - Labor	$40.50	317		12,838.50
Paint - Labor	$40.50	154		6,237.00
Stairs - Labor	$40.50	148		5,994.00
Total Labor				177,990.00
			SUBTOTAL	$316,218.00
OTHER COMMENTS			Taxes	(Included)
1. Tax included in all materials prices.				
			TOTAL	**$316,218.00**
			Make all checks payable to	
			Clovis Management	

Thank You For Your Business!

Clovis Management

INVOICE

DATE:	1/5/2017
INVOICE #	12

2501 Channing Way
Berkeley, CA 94704

510-841-4228
510-841-2654 Fax

BILL TO:

Tobias Kahan

3175 Teigland Rd
Lafayette, CA 94549
[redacted]

DESCRIPTION				AMOUNT
Job Name: 2642 35th Ave, Oakland, CA 94619				
Fire Damage Restoration and Rennovation				
Description	**Rate**	**Quantity**		
Materials and Payables				
Electrical				
Hauling - Dump Fees	$375.00	18		6,750.00
New Main Panel - Material	$5,520.00	1		5,520.00
New Subpanel - Material	$1,905.00	4		7,620.00
Rough - Material	$3,045.00	1		3,045.00
Finish (Fixtures, fans, outlets, switches, etc) - Material	$5,025.00	1		5,025.00
Plumbing				
Rough - Material	$5,055.00	1		5,055.00
Water Heaters - Rellocation Material	$1,770.00	4		7,080.00
Finish - Material	$1,620.00	1		1,620.00
Sewer Line (Material + Labor)	$7,950.00	1		7,950.00
Water Meters (Payable to EBMUD)	$8,000.00	1		8,000.00

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

CITY OF OAKLAND

Department of Housing and Community Development
Rent Adjustment Program

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

HEARING DECISION

CASE NUMBER: **L17-0062, Kahan v. Tenants**

PROPERTY ADDRESS: **2642 35th Avenue, Oakland, CA**

DATE OF HEARING: **January 29, 2018**

DATE OF DECISION: **April 30, 2018**

APPEARANCES: **Irma Galvez, Owner Representative**

SUMMARY OF DECISION

The owner's petition is denied. The units in the subject building are not exempt from the Rent Adjustment Ordinance.

CONTENTIONS OF THE PARTIES

The owner filed a petition on March 29, 2017, for a Certificate of Exemption on the grounds that the subject building was "substantially rehabilitated," pursuant to Oakland Municipal Code (O.M.C.) Section 8.22 and Rent Adjustment Program Regulations. No tenant filed a response to the owner's petition.

THE ISSUE

Is the subject building exempt from the Rent Adjustment Ordinance as being a "substantially rehabilitated" building?

EVIDENCE

At the Hearing, the owner representative testified that the owner, Tobias Kahan, purchased the subject property in November of 2015. At the time, the property was vacant and uninhabitable due to fire damage. Shortly after purchasing the property, the

owner began construction to restore and renovate the entire four-unit building. The owner representative testified that the renovation project began in January of 2016, and construction was completed by October of 2016. The owner contracted with Clovis Management, a construction management company owned by Mr. Kahan's mother, Gail Giffen, and her partner Christopher Pisarra, to do the construction. The owner representative testified that Mr. Kahan made a verbal agreement with his mother, whereby Clovis Management would manage and pay for the entire renovation, and Mr. Kahan would repay Clovis Management in two years, after the construction was complete and he was able to get a refinancing loan for the property. On January 16, 2018, Mr. Kahan repaid Clovis Management with a one-time lump sum payment totaling $316,218.00. The owner representative submitted the following documents regarding the building:

(1) A Final Invoice from Clovis Management dated January 18, 2017, totaling $316,218.00 in construction costs for the restoration and renovation project.[1] This document includes an itemized list of construction expenses for the renovation project.
(2) A check dated January 16, 2018, in the amount of $316,218.00 issued to Clovis Management from the Tobias Kahan 2010 Living Trust.[2]
(3) A Permit Inspection Record and Permits issued by the City of Oakland.[3] The Permit Inspection Record states that the permit was issued on January 6, 2016, and "finaled" on October 12, 2016. The work listed on this document includes fire repair to unit #3; remodel kitchens & bathroom for 4-plex; replace 25 windows with retrofits.
(4) Receipts for payment of permit fees totaling $5,549.15.[4]
(5) A Compliance Certificate for Private Sewer Lateral dated May 3, 2016.[5]
(6) Credit card statements of Christopher Pisarra, owner of Clovis Management, showing purchases at Home Depot.[6] Highlighted portions of these statements indicate purchases made at Home Depot from February 2016 through May 2016.
(7) Photographs of the subject property before and after the restoration and renovation project.[7]
(8) An Incident Report dated March 13, 2015, for a fire on the property.[8]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

O.M.C. § 8.22.030(A)(6) states that dwelling units located in "substantially rehabilitated buildings" are not "covered units" under the Rent Ordinance. Additionally, the Ordinance states that:

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[1] Exhibit No. 1
[2] Exhibit No. 2
[3] Exhibit No. 3
[4] Exhibit No. 4
[5] Exhibit No. 5
[6] Exhibit No. 6
[7] Exhibit No. 7
[8] Exhibit No. 8

a. "In order to obtain an exemption based on substantial rehabilitation, an owner must have spent a minimum of fifty (50) percent of the average basic cost for new construction for a rehabilitation project and performed substantial work on each of the units in the building.

b. The average basic cost for new construction shall be determined using tables issued by the chief building inspector applicable for the time period when the substantial rehabilitation was completed.

c. An Owner seeking to exempt a property on the basis of substantial rehabilitation must first obtain a certificate of exemption after completion of all work and obtaining a certificate of occupancy. If no certificate of occupancy was required to be issued for the property, in lieu of the certificate of occupancy an owner may provide the last finalized permit. For any property that has a certificate of occupancy issued on or before the date of enactment of this subparagraph O.M.C. 8.22.30B.2.c. for which an Owner claims exemption as substantially rehabilitated, the Owner must apply for such exemption not later than June 30, 2017 or such exemption will be deemed vacated."[9]

Here, the owner is seeking an exemption from the City of Oakland's Rent Adjustment Ordinance. The general rule of law about exemptions is that they are to be "strictly construed." See *DaVinci v. San Francisco Residential Rent Board*, (1992) 5 Cal. App. 4th 24, 27. In *DaVinci* the Court cited *Barnes v. Chamberlain* (1983) 147 Cal. App. 3rd 762 in stating that:

> "In interpreting exceptions to the general statute courts include only those circumstances which are within the words and reason of the exception. ... One seeking to be excluded from the sweep of the general statute must establish that the exception applies."

Additionally, the Court in *DaVinci* stated that the rules regarding the interpretation of a municipal ordinance are the same rules as those that govern the construction of statutes. *DaVinci* at 27, citing *City of Los Angeles v. Los Olivos Mobile Home Park* (1989) 213 Cal. App. 3d 1427, 1433. In other words, an owner has the burden to prove an exemption, and any attempt to exempt a property from the Ordinance must be strictly construed.

It is well established that an owner cannot seek a substantial rehabilitation exemption until the work has been completed and paid for. The record reflects that the invoice from Clovis Management was dated January 18, 2017, and the check for the payment issued to Clovis Management was dated January 16, 2018. Therefore, the renovation project was not completed and paid for until January 16, 2018, almost a year after the petition filing date of March 29, 2017, and mere days before the hearing date.

[9] O.M.C. § 8.22.030(B)(2)(a-c)

The regulations clearly require that all work be completed and paid for prior to filing for an exemption based on substantial rehabilitation.

In addition, the owner only submitted a final invoice listing a summary of construction expenses and failed to submit contracts, invoices/receipts, or proof of payments to substantiate the breakdown of construction expenses listed in the final invoice. The owner also failed to provide evidence of the square footage of the subject property. The owner has failed to sustain his burden of proof for an exemption based on substantial rehabilitation and the owner petition is denied.

ORDER

1. Petition L17-0062 is denied. The subject property is not exempt from the Rent Adjustment Ordinance.

2. 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: April 30, 2018

Maimoona Ahmad
Hearing Officer
Rent Adjustment Program

PROOF OF SERVICE
Case Number L17-0062

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
Tobias Kahan
2501 Channing Way
Berkeley, CA 94704

Tenants
Carrie Golston
2642 35th Ave #D
Oakland, CA 94619

Katrina Jenkins
2642 35th Ave #B
Oakland, CA 94619

Khalilah El-Amin
2642 35th Ave #A
Oakland, CA 94619

Tynesha Staten
2642 35th Ave #C
Oakland, CA 94619

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 May 9, 2018 in Oakland, CA.

Maxine Visaya
Oakland Rent Adjustment Program

CITY OF OAKLAND

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

For date stamp.
2018 MAY 29 PM 2:23

APPEAL

Appellant's Name TOBIAS KAHAN	☒ **Owner** ☐ **Tenant**
Property Address (Include Unit Number) 2642 - 35TH AVENUE, OAKLAND, CA	
Appellant's Mailing Address (For receipt of notices) 2501 CHANNING WAY BERKELEY, CA 94704	**Case Number** L17-0062 **Date of Decision appealed** APRIL 30, 2018
Name of Representative (if any) MARK E. RUBKE	**Representative's Mailing Address (For notices)** 1999 HARRISON, SUITE 1800 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.)*

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 ***are limited to 25 pages from each party.*** *Please number attached pages consecutively. Number of pages attached:* 2.

You must serve a copy of your appeal on the opposing party(ies) or your appeal may be dismissed.

I declare under penalty of perjury under the laws of the State of California that on 5/29, 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	SEE ATTACHED MAILING LIST
Address	
City, State Zip	
Name	
Address	
City, State Zip	

MARK	5/29/2018
SIGNATURE of APPELLANT or DESIGNATED REPRESENTATIVE	**DATE**

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 of the information required or your appeal cannot be processed and may be dismissed.
- Any supporting argument or documentation to be considered by the Board must be received by the Rent Adjustment Program with a proof of service on opposing party within 15 days of filing the appeal.
- 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 as to jurisdiction, 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.

MAILING LIST

Tenants:

Carrie Golston
2642 35th Ave #D
Oakland. CA 94619

Katrina Jenkins
2642 35th Ave #B
Oakland, CA 94619

Khalilah El-Amin
2642 35th Ave #A
Oakland, CA 94619

Tyncsha Staten
2642 35th Ave #C
Oakland, CA 94619

EXPLANATION RE APPEAL
L17-0062
Kahan v Tenants

This appeal is based on the grounds that the underlying decision is inconsistent with the OMC, Chapter 8.22 and the Rent Board Regulations.

Owner contends the evidence submitted at the hearing on January 29, 2018 constituted substantial evidence of exemption based on substantial rehabilitation contrary to the finding(s) of the hearing officer.

It should be emphasized at the outset that not one of one of the four (4) tenants filed any opposition to the owners petition.

It should be further noted that the evidence at the hearing established that the subject property was vacant and uninhabitable due to fire damage.

In establishing and implementing the Residential Rent Adjustment Program the City of Oakland found that a shortage of housing existed in Oakland, that the welfare of all persons who live and/or work in Oakland depend, in part, on attracting persons who are willing to invest in residential rental property in Oakland, and that the City of Oakland take action that encourages investment in residential housing. See OMC, Section 8.22.010, et seq.

Here, the uncontradicted evidence established that the subject property, which was vacant and uninhabitable, was purchased in November, 2015, that construction began in January, 2016, and was completed in October 2016, when the permit was finalized by the City. The project was paid for by owner's agent, Clovis Management in the sum of $316,218.

In its first finding, the Hearing Officer found that the project was not completed and paid for until January 16, 2018, the date the management company was reimbursed by the owner, yet the uncontested evidence established that the project was completed and paid for by owner's

agent on October 12, 2016, when it was signed off by the City. The fact that the agent was not reimbursed until some time later does not comport with the OMC as to project completion. The Code defines project completion as the date of "finalized permit." OMC, 8.22.030 (B)(2)c Thus, the project was completed prior to the filing for exemption.

In its next finding, the hearing officer found that the owner "only submitted a final invoice...and failed to submit contracts...or proof of payments to substantiate the breakdown of construction expenses..." As to contracts, the uncontradicted evidence established that the contract between owner and agent was verbal. Next, despite the finding of the hearing officer, the uncontested evidence offered "an itemized list of construction expenses for the renovation project." (See Exhibit #1)

Finally, in its third finding, the officer stated that the owner filed to provide evidence of square footage of the property, however a careful reading of both the OMC and the Regulations does not bar an exemption based on failure to submit square footage figures.

May 29, 2018

Respectively Submitted,

Mark E. Rubke
Attorney for Tobias Kahan,
Owner

Law Offices

MARK E. RUBKE

1999 Harrison Street, Suite 1800
Oakland, California 94612
Telephone (510) 834-1935
Facsimile (510) 550-2607

www.markrubke.com
mark@markrubke.com

SAN FRANCISCO OFFICE
One Sansome Street, 35th Floor
San Francisco, California 94104
Telephone (415) 255-1988

PLEASE REPLY TO:
1999 Harrison Street, Suite 1800
Oakland, California 94612

May 28, 2018

Re: Appeal of Hearing Decision / L17-0062 / 2642 - 35th Avenue, Oakland, CA

I, TOBIAS KAHAN, the owner of the above referenced property, designate Mark E. Rubke as my additional representative in this matter.

Tobias Kahan, Owner

CHRONOLOGICAL CASE REPORT

Case No.: T17-0371

Case Name: Arnold v. Farley Levine Properties

Property Address: 4246 Gilbert Street, Oakland, CA

Parties:

David Arnold	(Tenant)
Barbara Farley	(Owner)
Michael Levine	(Owner)

TENANT APPEAL:

Activity	Date
Tenant Petition filed	June 25, 2017
Owner Response filed	August 25, 2017
Hearing Decision mailed	August 2, 2018
Tenant Appeal filed	August 22, 2018
Owner filed response to Tenant Appeal	August 29, 2018

Rent Adjustment Program

RECEIVED
JUN 25 2017
OAKLAND RENT ADJUSTMENT

Staff Dashboard

T17-0371 KM | MA

Home T17-1043 **Submitted Petition Form**

Petition type: Tenant

Applicant and Property Information

Applicant Info

David Arnold,
,
4246 Gilbert St.,
Oakland, California 94611
T [redacted]
[redacted]

Property owner

Barbara Farley,
Farley Levine Properties LLC,
7 King Avenue, ,
Piedmont, California 94611
T [redacted]
[redacted]

Property manager

Barbara Farley,
Farley Levine Properties LLC,
7 King Avenue, ,
Piedmont, California 94611
T [redacted]
[redacted]

Number of units	5
Type of unit you rent	Apartment, Room or Live-work
Are you current on your rent?	Yes

Grounds for Petition

i) My property owner is providing me with fewer housing services than I previously received or is charging me for services originally paid by the owner. (OMC 8.22.070(F): A decrease in housing services is considered an increase in rent. A tenant may petition for a rent adjustment based on a decrease in housing services.)

Rent Increases

When did you move into the unit?	6/10/2020
Initial monthly rent	$1600
When did the property owner first provide you with a written NOTICE TO TENANTS of the existence of the Rent Adjustment Program (RAP NOTICE)?	7/2/2015
Did the property owner provide you with a RAP Notice, a written notice of the existence of the Rent Adjustment Program?	Yes
Is your rent subsidized or controlled by any government agency, including HUD (Section 8)?	No

Did you receive a RAP Notice with the notice of rent increase?	No
Monthly rent increase	$1294.98
Date increase effective	6/17/2017
Are you contesting this increase in this petition?	Yes
Have you ever filed a petition for your rental unit?	Yes

Description of loss of service and problems

The housing services I am being provided have decreased.	Yes
Are you being charged for a service originally provided to you by the property owner?	Yes
What is the estimated dollar value of the lost service or problem?	1294.98
Reduced Service description	Please see attachment, "Description of Loss of Service"
Date loss of this service began	2017/6/17
Loss of service documentary evidence	Description of Loss of Service.pdf
	No

Are you claiming any serious problems with the condition of your unit?

Problem documentary evidence

Additional Documentation

File name

Additional Information.pdf

Response to Allegations.pdf

Exhibit A - Lease.pdf

Exhibit B - Notices.pdf

Exhibit C - Deposition of prior owner.pdf

Exhibit D - Application for new roommate.pdf

Exhibit E - Notice of blanket denial.pdf

June 25, 2017

David Arnold

4246 Gilbert St.

Oakland, CA 94611

Description of Loss of Service

In 2010, I signed a lease with Brian Tom, prior owner of 4246 Gilbert St, to rent the 3 bedroom apartment in which I currently reside. I was, and am, the sole lessee – a single, young professional who currently travels frequently for work. I occupy, and have always occupied, one of the three bedrooms in my apartment.

At the time, I explicitly voiced my intent to sublet the other two rooms in the apartment by seeking roommates with whom to occupy the flat. In order to memorialize my right to do so, we struck the sublet prohibition from the lease (Exhibit A). Mr. Tom asked me to inform him of any roommates that might be moving in, which over the years, I did a number of times, as roommates came and went. (Exhibit B).

Mr. Tom gave sworn testimony to this effect, stating:

> "He would have … the right to sublet to somebody, because I knew that he was going to want to do that. So I thought that was a fair compromise between our two positions... If he wanted two, I was agreeable to that, too. It's a three-bedroom. But he had to let me know who was coming in." (Exhibit C)

Use of all three bedrooms for occupancy in my flat was an explicitly negotiated, agreed to service provided by the previous owner under my lease agreement.

On June 16, 2017, I submitted an application for a roommate, on the form provided by the new owner, Farley Levine Properties LLC. Application attached (Exhibit D).

On June 20, 2017, Mrs. Farley responded with a blanket denial of all potential roommates. She informed me that no roommates would be allowed, ever, for the second and third bedrooms in my apartment (Exhibit E).

This constitutes a significant reduction in housing services from those provided by the previous owner; I effectively cannot use two thirds of my apartment for its negotiated, clear and intended purpose. I calculated the value of the housing service reduction by taking each bedroom to be worth 1/3 of the 3 bedroom apartment's total rent, for a total reduction of $1,294.98.

Sincerely,

David Arnold

June 27, 2017

David Arnold
4246 Gilbert St.
Oakland, CA 94611

Additional Relevant Information

The following facts may lend context to Mrs. Farley's attempt to substantially decrease housing services. Since purchasing my apartment building, she has aggressively attempted to increase rents to market, even on rent controlled units such as my own. Mrs. Farley has demonstrated a pattern of harassment and a propensity to flout the law in seeking profit.

- From purchasing the building approximately 2.5 years ago to date, Mrs. Farley has imposed no less than five (5) rent increases. To date, of these, only one was valid and upheld by the rent board.

- On March 27, 2015 and on other dates in 2015, Mrs. Farley threatened to evict me and my housemates unless we paid an illegal rent increase from $1865 to $3150. She wrote, in an email of that date:

  > "Your lease terminates March 27, 2015. If you remain in the apartment the rental rate is $3150. per month... If you remain in the apartment and fail to pay the increased rental amount I will proceed with a 3 day notice of eviction. Please advise how you wish to proceed."

- When I petitioned the illegal rent increase with the Oakland rent board and attempted to pay my legal rent amount, she filed suit for eviction.

- Mrs. Farley allowed significant, unpermitted construction on the premises until a red tag was issued by the city of Oakland.

- When Mrs. Farley finally requested a valid permit for the work, she fraudulently understated the cost and scope of the work to be done. On her permit application, the cost of improvements she indicated had already been exceeded by work done to that date. The final bill of improvements passed on in her associated rent increases to me and my neighbors (T16-0108, T16-0331, and T16-0495) was an order of magnitude higher than the amount stated in her permit application.

- When one of my neighbors petitioned Mrs. Farley's illegal increases, the rent board struck down the pass through of many prohibited costs, such as city permit fees and improvements to coin-op laundry facilities.

  Mrs. Farley disregarded that decision and nevertheless increased my rent for those same prohibited items.

- Despite always sending my rent in a timely fashion, and retaining proof of mailing that I have done so, Mrs. Farley has claimed not to have received my rent checks and twice demanded illegal late fees. On one occasion, she threatened to illegally deduct the fee from my security deposit if I did not pay immediately (a violation of California Civil Code 1950.5).

June 27, 2017

David Arnold
4246 Gilbert St.
Oakland, CA 94611

In response to Mrs. Farley's allegations

Mrs. Farley makes several false allegations in her letter denying my right to have a roommate. While none of these address the issue at hand, since they only speak to prior roommates – I will briefly respond to those that misrepresent my actions or my history in the apartment.

1. Mrs. Farley alleges that the prior owner had no knowledge of prior roommates, writing:

> "Despite signing an Estoppel on December 4, 2014 under penalty of perjury that you were the sole resident of your unit; you were aware that this statement was untrue at the time made, in that you had two other occupants then residing in your unit without the knowledge or written consent of the current or prior Owner."

Eli Davidson was the agent of Brian Tom, prior owner, who delivered, requested, collected, and discussed the estoppel with the prior owner. Eli Davidson was certainly aware of my roommates, since he met them on multiple occasions. On 12/1/2014, he wrote:

> "I followed up with your roommate last week regarding a tenant estoppel sent via snail mail and he mentioned you are in Singapore. It is attached to this email for your review, but essentially the document is to protect you, your lease, and your tenancy in the apartment so that all are still valid and in effect for you in the change of ownership from Mr. Tom to the new buyer of the apartment building. I'm going to send it to you via DocuSign so that you can sign it while abroad."

A few days later, while out of the country, I signed what I believed was a statement regarding the status of the apartment and my lease agreement. Eli made me aware that estoppels have the power to modify lease agreements, which I certainly did not want to do – that is why I listed myself as the sole resident.

The very agent of the prior owner who collected the estoppel knew and spoke to my roommates on multiple occasions. I delivered notice to the prior owner of new roommates, with their information. My roommates were not living in hiding – they were friends with neighbors, coming and going to jobs and social events, etc. When the prior owner and his agents visited to fix a plumbing issue, inspect the house prior to sale, or show it to potential buyers, as they did over the years, it was certainly fully clear and notorious that others aside from myself lived in my apartment.

2. Mrs. Farley alleges that I ran an illegal transient occupancy business, writing:

> "You ... rented your apartment through Airbnb."

I did experiment with Airbnb to rent out one of the rooms in the apartment, at various times, between 2012 and 2013. However, Mrs. Farley's representation that I was running a hotel of "transient occupancy" is a dramatic mischaracterization. The average length of occupancy (not including my own) of roommates in my apartment was over 4 months.

At that time, Airbnb was a relatively young and exciting startup in the Bay Area. As soon as news stories hit the press investigating the legality of AirBnb rentals, I stopped immediately.

3. Mrs. Farley alleges that I ran a business out of my apartment, collecting profits from my roommates. She writes:

> "You were running a business of collecting income using your rental unit without the consent or knowledge of the Owners... often making a profit at [your subtenants'] expense."

This is clearly fallacious and akin to suggesting that when I pay the check at dinner with friends and ask them to reimburse me, I am running a business.

If, as Mr. Farley insists, we treat my apartment's occupancy as a business, then after accounting for rent paid, utilities, furnishing and expenses, I incurred a loss well in excess of $700 per month. A bit more than my share of rent.

4. Mrs. Farley alleges that, over the course of my tenancy, I and or my roommates have been a regular nuisance to neighbors. She offers nothing to substantiate this false claim.

Mrs. Farley's claim is not a reasonable representation of the facts. In the 7 years I have lived at 4246 Gilbert St., I have been made aware of exactly two issues with or complaints by neighbors.

Once, in 2011, Mr. Tom told me that the downstairs neighbors were bothered by noise that had recently started, late at night, in my apartment. The issue, we found, was a treadmill I had just installed. I immediately removed the offending device, communicated with the downstairs neighbors, and ensured that they were no longer disturbed.

Once, the downstairs neighbors asked me to please walk more quietly up the stairs when coming home late at night, since the stairs are over their children's rooms. I told them I absolutely would, and would tell my roommates to as well. This was never an issue again.

I do not, and have never smoked, and have always asked my roommates to agree not to smoke at the apartment in the sublease agreements they've signed with me.

I maintain more than healthy relationships with my neighbors, many of whom have become friends, and I conscientiously practice good citizenship.

If neighbors have some issue with me or my roommates, I would ask Mrs. Farley to please let me know so I might rectify it! In an apartment situation, it is essential to be considerate and communicative with those we live neck-in-neck with, in order that we might all enjoy our homes.

It is unreasonable to blanket reject any possible occupants for a 3 bedroom apartment for past issues that were never brought to my attention or attempted to be resolved in any way.

Finally, I would gently point out that Mrs. Farley's representation of ownership having received numerous complaints regarding my roommates clearly flies in the face of her own assertion that ownership had no knowledge of my roommates.

...ope ID: BAF6456E-5ED9-49BC-A050-4CAC0F544AA4

...R PRIVATE RESIDENCE ...MENT AND/OR LEASE

...d/Lessor/Agent: Brian Tom
...ant(s)/Lessee: David Arnold
...enant(s)/Lessee:
Apartment Address: 4246 Gilbert St.
City: Oakland, CA 94611

This Rental Agreement and/or Lease shall evidence the complete terms and conditions under which the parties whose signatures appear below have agreed. Landlord/Lessor/Agent (to the left) shall be referred to as "OWNER" and Tenant(s)/Lessee(s) (to the left) shall be referred to as "RESIDENT." As consideration for this agreement, OWNER agrees to rent/lease to RESIDENT and RESIDENT agrees to rent/lease from OWNER for use SOLELY AS A PRIVATE RESIDENCE, the premises listed to the left.

$1070 ~~$1150~~ - June - 1600 July $1750 - Aug to $1120
May - 2011 $53.33 x 21 = 1120

1. TERMS: RESIDENT agrees to pay in advance $ 1600 per month on the 1st day of each month.
This agreement shall commence on June 10, 20 10 and continue: (check one)

A. ☑ Until May 31, 20 11 as a leasehold. Thereafter it shall become a month-to-month tenancy. If RESIDENT should move from the premises prior to the expiration of this time period, he shall be liable for all rent due until such time that the apartment is occupied by an OWNER approved paying RESIDENT and/or expiration of said time period, whichever period is shorter.

B. ☐ A month-to-month tenancy, that may be terminated by either party. The OWNER giving 60-day written notice to move (for more than 1 year tenancy), or a 30-day written notice to move (for less than 1 year tenancy) and the RESIDENT giving 30-day written notice of intent to terminate tenancy.

2. PAYMENTS: Rent and/or other charges are to be paid at the office or apartment of the manager of the building or at such other place designated in writing by OWNER. For the safety of the manager, all payments are to be made by check or money order and no cash shall be acceptable. OWNER acknowledges receipt of the First month's rent of: $ _____ and a Security Deposit of $ 2000, for a total payment of $ 2000. All payments are to be made payable to: Brian Tom and delivered to Jessica Lau, 1345 Diamond ST. San Francisco 94131 California, Telephone Number: [redacted] who is usually available on the following days: M-F during the following hours: 9 am - 5 pm.

3. LATE CHARGE: A late fee of $ 35 said amount not to exceed 6% of the monthly rent, shall be added to any payment of rent not made before 5 day(s) after the due date or for which a deficient (bounced) check shall have been given.

4. SECURITY DEPOSITS: The Security Deposit shall not exceed two times the monthly rent for unfurnished apartments or three times the monthly rent for furnished apartments. The total of the above deposits shall secure compliance with the terms and conditions of this agreement and shall be refunded to RESIDENT within 21 days after the premises have been completely vacated less any amount necessary to pay OWNER: a) any unpaid rent, b) cleaning costs, c) key replacement costs, d) costs for repair of damages to apartment and/or common areas above ordinary wear and tear, and e) any other amount legally allowable under the terms of this agreement. A written accounting of said charges shall be presented to RESIDENT within 21 days of move-out. If deposits do not cover such costs and damages, the RESIDENT shall immediately pay said additional costs for damages to OWNER. During the term of tenancy, RESIDENT agrees to increase the deposit upon 30 days written notice by an amount equal to any future increases in rent and/or an amount necessary to cover the cost of rectifying any damage or expense for which RESIDENT is responsible. Security deposit is not to be used as last month's rent.

UTILITIES: RESIDENT agrees to pay for all utilities and/or services based upon occupancy of the premises except water and garbage

5. OCCUPANTS: Guest(s) staying over 14 days cumulative or longer during any 12-month period, without the OWNER'S written consent, shall be considered a breach of this agreement ONLY the following listed individuals and/or animals, AND NO OTHERS shall occupy the subject apartment for more than 14 days unless the expressed written consent of OWNER is obtained in advance. (The 14 day period maybe extended by local Rent Control Laws):
~~RESIDENT shall pay additional rent at the rate of $100.00 per month or 25% (or the amount allowed under rent control) of the current monthly rent, whichever amount is greater, for the period of time that each additional guest in excess of the above named shall occupy the premises. RESIDENT shall pay the same additional monthly rent for each additional animal in excess of the above named animal(s), which shall occupy the premises.~~ Acceptance of additional rent or approval of a guest shall not waive any requirement of this agreement or convert the status of any "guest" into a RESIDENT.

6. PETS AND FURNISHINGS: Furnishings: No liquid-filled furniture of any kind may be kept on the premises. If the structure was built in 1973 or later RESIDENT may possess a waterbed if he maintains waterbed insurance valued at $100,000.00 or more. RESIDENT must furnish OWNER with proof of said insurance. RESIDENT must also comply with Civil Code Section 1940.5. Resident shall not keep on premises a receptacle containing more than ten gallons of liquid, highly combustible materials or other items which may cause a hazard or affect insurance rates such as; musical instrument, item(s) of unusual weight or dimension. RESIDENT also agrees to carry insurance deemed appropriate by OWNER to cover possible losses caused by using said items. Pets – No animal, fowl, fish, reptile, and/or pet of any kind shall be kept on or about the premises, for any amount of time, without obtaining the prior written consent and meeting the requirements of the OWNER. Said consent, if granted, shall be revocable at OWNER'S option upon giving a 30-day written notice. In the event laws are passed or permission is granted to have any item prohibited by this agreement or if for any reason such item exists on the premises, there shall be minimum additional rent of $25.00 a month for each such item if another amount is not stated in this agreement. In the event laws are passed or permission is granted to have a pet and/or animal of any kind, an additional deposit in the amount of $ 500 shall be required along with the signing of OWNER'S "PET AGREEMENT."

8. PARKING/STORAGE: When and if RESIDENT is assigned a parking space on OWNER'S property, the parking space shall be used exclusively for parking of passenger automobiles and/or those approved vehicles listed on RESIDENT'S "Application to Rent/Lease" or attached hereto. RESIDENT is hereby assigned parking space # 3 (middle) RESIDENT may not wash, repair, or paint in this parking space or at any other common areas on the premises. (RESIDENT may not assign, sublet, or allow RESIDENT'S guest(s) to use this or any other parking space.) RESIDENT is responsible for oil leaks and other vehicle discharges for which RESIDENT shall be charged for cleaning if deemed necessary by OWNER. Only vehicles that are operational may park in their assigned space. Resident is assigned storage space # n/a located

9. NOISE: RESIDENT agrees not to cause or allow any noise or activity on the premises that might disturb the peace and quiet of another RESIDENT. Said noise and/or activity shall be a breach of this Agreement.

10. LOITERING AND PLAY: Lounging, playing, or unnecessary loitering in the halls, on the front steps, or in the common areas in such a way as to interfere with the free use and enjoyment, passage or convenience of another RESIDENT is prohibited.

11. DESTRUCTION OF PREMISES: If the premises become totally or partially destroyed during the term of this Agreement so that RESIDENT'S use is seriously impaired, RESIDENT or OWNER may terminate this Agreement immediately upon three-day written notice to the other.

12. CONDITION OF PREMISES: RESIDENT acknowledges that he has examined the premises and that said premises, all furnishings, fixtures, furniture, plumbing, heating, electrical facilities, all items listed on the attached inventory sheet, if any, and/or all other items provided by OWNER are all clean, and in good satisfactory condition except as may be indicated elsewhere in this Agreement. RESIDENT agrees to keep the premises and all items in good order and condition and to immediately pay for costs to repair and/or replace any portion of above damaged by RESIDENT, his guests and/or invitees, except as provided by law. At the termination of this Agreement, all of the above-enumerated items in this provision shall be returned to OWNER in clean and good condition except for reasonable wear and tear; the premises shall be free of all personal property, trash not belonging to OWNER. It is agreed that all dirt, holes, tears, burns, or stains of any size or amount in the carpets, drapes, walls, fixtures, and/or any other part of the premises, do not constitute reasonable wear and tear.

ENANCE AND ALTERATIONS: RESIDENT shall not paint, wallpaper, alter or redecorate, change or install locks, install antenna or other equipment, screws, fastening excessively large nails, or adhesive materials, place signs, displays, or other exhibits, on or in any portion of the premises without the written consent of the OWNER except as is provided by law. RESIDENT shall deposit all garbage and waste in a clean and sanitary manner into the proper receptacles as provided and shall cooperate in keeping the garage area neat and clean. RESIDENT shall be responsible for disposing of items of such size or nature as is not normally acceptable by the garbage hauler for the building. SIDENT shall be responsible for keeping the garbage disposal clean of chicken bones, toothpicks, match sticks, celery, pits, grease, metal vegetable ties, and all other items that may tend to cause stoppage of the mechanism. RESIDENT shall pay for the cleaning out of any plumbing fixture that may need to be cleared of stoppage and for the expense or damage caused by the stopping of waste pipes or overflow from bathtubs, washbasins, toilets, or sinks, if caused by negligence or misuse by RESIDENT or their guests. Tenant must notify landlord with a written notice stating what item(s) need service or repair and give landlord a reasonable opportunity to service or repair that item(s). Should any charges be incurred by the City as a result of not notifying the Landlord in writing of such needed service or repairs, tenant shall be responsible for a minimum of $201.50 for each occurrence.

14. **SMOKE DETECTOR:** The rental unit is equipped with properly functioning smoke detectors. Resident agrees to test the smoke detectors in the rental unit monthly for proper function. Resident agrees not to interfere with their normal function or disable the smoke detectors in any manner.

15. **HOUSE, POOL AND LAUNDRY RULES:** RESIDENT shall comply with all house, pool, pet, and laundry rules, which may be changed from time to time. These rules shall apply to, but are not limited to, noise, odors, disposal of trash, pets, parking, use of common areas, and storage of toys, bicycles, tools, and other personal items (including signs and laundry), which must be kept inside and out of view. OWNER shall not be liable to RESIDENT for any violation of such rules by any other RESIDENTS or persons. Rights of usage and maintenance of the laundry room and/or pool and pool area are gratuitous and subject to revocation by OWNER at any time.

16. **CHANGE OF TERMS:** The terms and conditions of this agreement are subject to future change by OWNER after the expiration of the agreed lease period upon 30 days written notice setting forth such change and delivered to RESIDENT. Any changes are subject to laws in existence at the time of the Notice Of Change Of Terms.

17. **TERMINATION:** After expiration of the leasing period, this agreement is automatically renewed from month-to-month, but may be terminated by either party. The owner giving a 60-day notice and the resident giving a 30-day written notice of intention to terminate. Where laws require "just cause," such just cause shall be so stated on said notice. The premises shall be considered vacated only after all areas including storage areas are clear of all RESIDENT'S belongings, and keys and other property furnished for RESIDENT'S use are returned to OWNER. Should the RESIDENT hold over beyond the termination date or fail to vacate all possessions on or before the termination date, RESIDENT shall be liable for additional rent and damages, which may include damages due to OWNER'S loss of prospective new RENTERS.

18. **POSSESSION:** If OWNER is unable to deliver possession of the Apartment to RESIDENT on the agreed date, because of the loss or destruction of the Apartment or because of the failure of the prior RESIDENT to vacate or for any other reason, the RESIDENT and/or OWNER may immediately cancel and terminate this agreement upon written notice to the other party at their last known address, whereupon neither party shall have liability to the other, and any sums paid under this Agreement shall be refunded in full. If neither party cancels, this Agreement shall be pro-rated and begin on the date of actual possession.

19. **INSURANCE: RESIDENT** acknowledges that OWNER'S insurance does not cover personal property damage caused by fire, theft, rain, war, acts of God, acts of others, and/or any other causes, nor shall OWNER be held liable for such losses. RESIDENT IS HEREBY ADVISED TO OBTAIN HIS OWN INSURANCE POLICY TO COVER ANY PERSONAL LOSSES. This does not waive OWNER'S duty to prevent personal injury or property damage where that duty is imposed by law.

20. **RIGHT OF ENTRY AND INSPECTION:** OWNER or OWNER'S Agent by themselves or with others, may enter, inspect and/or repair the premises at any time in case of emergency or suspected abandonment. OWNER shall give 24 hours advance notice and may enter for the purpose of showing the premises during normal business hours to prospective renters, buyers, lenders, for smoke alarm inspections, and/or for normal inspection and repairs. OWNER is permitted to make all alterations, repairs and maintenance that in OWNER'S judgment is necessary to perform. In addition, OWNER has the right to enter pursuant to Civil Code Section 1954. If the work performed requires that RESIDENT temporarily vacate the unit, then RESIDENT shall vacate for this temporary period upon being served a 7-day notice by OWNER. RESIDENT agrees that in such event RESIDENT will be solely compensated by a corresponding reduction in the rent for those many days that RESIDENT was temporarily displaced. No other compensation shall be offered to the RESIDENT. If the work to be formed requires the cooperation of the RESIDENT to perform certain tasks, then RESIDENT shall perform those tasks upon receiving a 24-hour written notice. (EXAMPLE: oving food items from cabinets so that the unit may be sprayed for pests.) Upon 24 hours notice, RESIDENT hereby agrees to lend OWNER the keys to the premises for the purpose of having a duplicate made for OWNER'S use.

21. **ASSIGNMENT:** RESIDENT agrees not to transfer, assign [redacted] the premises or any part thereof and hereby appoints and authorizes the OWNER as his agent and/or by OWNER'S own authority to evict any person claiming possession by way of any alleged assignment or subletting.

22. **PARTIAL INVALIDITY:** Nothing contained in this Agreement shall be construed as waiving any of RESIDENT'S or OWNER'S rights under the law. If any part of this Agreement shall be in conflict with the law, that part shall be void to the extent that it is in conflict, but shall not invalidate this Agreement nor shall it affect the validity or enforceability of any other provision of this Agreement.

23. **NO WAIVER:** OWNER'S acceptance of rent with knowledge of any default by RESIDENT or waiver by OWNER of any breach of any term or condition of this Agreement shall not constitute a waiver of subsequent breaches. Failure to require compliance or to exercise any right shall not be construed as a waiver by OWNER of said term, condition, and/or right, and shall not affect the validity or enforceability of any other provision of this Agreement.

24. **ATTORNEY'S FEES:** If any legal action or proceeding be brought by either party to this agreement, the prevailing party shall be reimbursed for all reasonable attorney's fees up to $500 in addition to other damages awarded. Due to the fees that can be charged by attorneys, it is agreed by the parties that both sides will waive their right to a jury trial.

25. **ABANDONMENT:** California Civil Code Section 1951.2 shall govern Abandonment. If any rent has remained unpaid for 14 or more consecutive days and the OWNER has a reasonable belief of abandonment of the premises, OWNER shall give 18 days written notice to RESIDENT at any place (including the rented premises) that OWNER has reason to believe RESIDENT may receive said notice of OWNER'S intention to declare the premises abandoned. RESIDENT'S failure to respond to said notice as required by law shall allow OWNER to reclaim the premises.

26. The undersigned RESIDENTS are jointly and severally responsible and liable for all obligations under this agreement and shall indemnify OWNER for liability caused by the actions (omission or commission) of RESIDENTS, their guests and invitees.

27. Pursuant to Section 1785.26 of the California Civil Code, as required by law, you are hereby notified that a negative credit report reflecting on your credit history may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligation. RESIDENT expressly authorizes OWNER/AGENT (including a collection agency) to obtain Resident's consumer credit report, which OWNER/AGENT may use if attempting to collect past due rent payments, late fees, or other charges from Resident, both during the term of the Agreement and thereafter.

28. **Lead Warning Statement:** Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips and dust pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, OWNERS must disclose the presence of known lead-based paint hazards in the dwelling. RESIDENTS must also receive a federally approved pamphlet on lead poisoning prevention.

OWNER/AGENT DISCLOSURE (initial)

_____ OWNER'S initials (on left) mean OWNER has no knowledge of lead-based paint and/or lead-based hazards in or on the Premises and OWNER has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in or on the Premises, or

PJ See Attached. (A separate form is attached disclosing OWNER'S information.)

_____ Agent has informed the lessor of the lessor's obligations under 42 U.S.C. 4852(d) and is aware of his/her responsibility to ensure compliance.

Envelope ID: 8AFB450E-5ED9-49DC-A060-4CACDF541AA4

___ RENTER'S initial (on left) indicates that RENTER has received a copy of a "Protect Your Family from Lead in Your Home", and that RENTER shall notify OWNER promptly in writing of any deteriorating and/or peeling paint.

JC MOLD: The OWNER/AGENT has inspected the unit prior to lease and knows of no damp or wet building materials and knows of no mold contamination. Resident agrees to accept full responsibility and maintain this premises in a manner that prevents the occurrence of an infestation of mold in the premises. Resident also agrees to immediately report to the OWNER/AGENT any evidence of water leaks, excessive moisture or lack of proper ventilation and evidence of mold that cannot be removed by cleaning.

30. ADDITIONS AND EXCEPTIONS: Tenant shall professionally shampoo carpet prior to vacating.
Right on Anderson Floors
Subject to Re-inspection by Owner at Move out Reference
Subject to Pest Control Clearing.
Carpet protectors on carpet

31. NOTICES: All notices to RESIDENT shall be served at RESIDENT'S apartment / house and all notices to OWNER / AUTHORIZED PERSON shall be served to:
Person Authorized To Manage Property:
Name Brian Tom Address 3 Craig Ave. Piedmont, CA 94611
Phone Number 510 710-2342
Owner of property or a person who is authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for all notices and demands.
Name same Address
Phone Number
Person or Entity Authorized to Receive Payment of Rent:
Name same Address
Phone Number

32. INVENTORY: The Apartment contains the following items for use by RESIDENT: stove, refrigerator

RESIDENT further acknowledges that the subject premises are furnished with the additional furnishings listed on the attached inventory and that said attached inventory is hereby made part of this agreement.

33. RESIDENT acknowledges receipt of the following, which shall be deemed a part of this Agreement: (Please check)

☑ House Rules	☐ Pet Agreement	☐ Garage Door Opener ___
☐ Laundry Rules	☐ Pool Rules	☐ Other: ___
☑ Mailbox Keys	☑ Apartment Keys	

34. ENTIRE AGREEMENT: This Agreement constitutes the entire Agreement between OWNER and RESIDENT. No oral agreements have been entered into, and all modifications or notices shall be in writing to be valid. The undersigned Residents are jointly and severally responsible for all obligations under this agreement and shall indemnify Owner for liability caused by the actions (omission or commission) of residents, their guests and invitees.

NOTICE: Pursuant to Section 290.46 of the Penal Code, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

36. RECEIPT OF AGREEMENT: The undersigned RESIDENT hereby certifies that he/she is fluent in the English language and has read and completely understands this Agreement and hereby acknowledges receipt of a copy of this "Rental Agreement and/or Lease." (OC RESIDENT'S Initials). OR Pursuant to California Civil Code 1632, which requires translation of specified contracts or agreements that are negotiated in Spanish, Chinese, Vietnamese, Tagalog or Korean:

___ RESIDENT'S Initials (on left) hereby acknowledge that this Agreement was translated and interpreted in their foreign language of: ___

Printed Name of Interpreter | Signature of Interpreter | Date

Owner/Agent: 5/31/10 Date

Owner/Agent Date

Owner/Agent Date

Resident: 5/31/2010 Date

Resident Date

Resident Date

NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR THE ADEQUACY OF ANY PROVISION IN THIS AGREEMENT. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

CITY OF OAKLAND

CITY OF OAKLAND
RENT ADJUSTMENT PROGRAM
P.O. Box 70243
Oakland, CA 94612-0243
(510) 238-3721

For date stamp
2017 AUG 25 PM 3:19

PROPERTY OWNER RESPONSE

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 T - 17-0371 on Imi Cash T17-1043

Your Name	Complete Address (with zip code)	Telephone: [redacted]
FARLEY LEVINE PROPERTIES LLC	7 KING AVENUE PIEDMONT, CA 94611	Email: [redacted]
Your Representative's Name (if any)	**Complete Address (with zip code)**	**Telephone:** [redacted]
BARBARA S. FARLEY	7 KING AVE PIEDMONT CA 94611	Email: [redacted]
Tenant(s) Name(s)	**Complete Address (with zip code)**	
DAVID ARNOLD	4246 Gilbert ST Oakland, CA 94611	
Property Address (If the property has more than one address, list all addresses)		**Total number of units on property** 5

Have you paid for your Oakland Business License? Yes ☑ No ☐ Lic. Number: 00172278
The property owner must have a current Oakland Business License. If it is not current, an Owner Petition or Response may not be considered in a Rent Adjustment proceeding. **Please provide proof of payment.**

Have you paid the current year's Rent Program Service Fee ($68 per unit)? Yes ☑ No ☐ APN: _____
The property owner must be current on payment of the RAP Service Fee. If the fee is not current, an Owner Petition or Response may not be considered in a Rent Adjustment proceeding. **Please provide proof of payment.**

Date on which you acquired the building: 12/23/2014

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

Type of unit (Circle One): House / Condominium/ (Apartment,) room, or live-work

I. JUSTIFICATION FOR RENT INCREASE **You must check the appropriate justification(s) box for each increase greater than the Annual CPI adjustment contested in the tenant(s) petition. For the detailed text of these justifications, see Oakland Municipal Code Chapter 8.22 and the Rent**

Board Regulations. You can get additional information and copies of the Ordinance and Regulations from the Rent Program office in person or by phoning (510) 238-3721.

You must prove the contested rent increase is justified. For each justification checked on the following table, you must attach organized documentary evidence demonstrating your entitlement to the increase. This documentation may include cancelled checks, receipts, and invoices. Undocumented expenses, except certain maintenance, repair, legal, accounting and management expenses, will not usually be allowed.

Date of Contested Increase	Banking (deferred annual increases)	Increased Housing Service Costs	Capital Improvements	Uninsured Repair Costs	Debt Service	Fair Return
6-17-2017	☐	☐	☐	☐	☐	☐
_____	☐	☐	☐	☐	☐	☐
_____	☐	☐	☐	☐	☐	☐

X TENANT IS CLAIMING LOSS OF SERVICE - THERE WAS NO Rent increase

If you are justifying additional contested increases, please attach a separate sheet.

II. RENT HISTORY **If you contest the Rent History stated on the Tenant Petition, state the correct information in this section. If you leave this section blank, the rent history on the tenant's petition will be considered correct**

The tenant moved into the rental unit on JUNE 1, 2010.

The tenant's initial rent including all services provided was: $ 1600 / 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 X No _____ I don't know _____

If yes, on what date was the Notice first given? THERE WAS NO RENT INCREASE

Is the tenant current on the rent? Yes ✓ No _____

Begin with the most recent rent and work backwards. If you need more space please attach another sheet.

Date Notice Given (mo./day/year)	Date Increase Effective	Rent Increased From	Rent Increased To	Did you provide the "RAP NOTICE" with the notice of rent increase?
7-28-17	9-1-17	$ 1942.47	$ 1987.00	☑ Yes ☐ No
7-15-16	9-1-16	$	$	☑ Yes ☐ No CAPITAL IMPROVEMENT APPEAL ✓
5-24-15	7-1-15	$ 1910.00	$ 1942.47	☑ Yes ☐ No
5-23-14	7-1-14	$ 1875.00	$ 1910.00	☑ Yes ☐ No
		$	$	☐ Yes ☐ No

III. 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** 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.

IV. 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. If you need more space attach a separate sheet. Submit any documents, photographs or other tangible evidence that supports your position. –

SEE ATTACHED RESPONSE

V. VERIFICATION

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.

Barbara S. Farley
Property Owner's Signature

August 25, 2017
Date

For more information phone (510)-238-3721.

Rev. 3/28/17

IMPORTANT INFORMATION:

Time to File

This form **must be received** by the Rent Adjustment Program (RAP), P.O. Box 70243, Oakland, CA 94612-0243, within 35 days after a copy of the tenant petition was mailed to you. Timely mailing as shown by a postmark does not suffice. The date of mailing is shown on the Proof of Service attached to the response documents mailed to you. 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.

You can date-stamp and drop your Response in the Rent Adjustment drop box at the Housing Assistance Center.. The Housing Assistance Center is open Monday through Friday, except holidays, from 9:00 a.m. to 5:00 p.m.

File Review

You should have received a copy of the petition (and claim of decreased housing services) filed by your tenant. When the RAP Online Petitioning System is available, you will be able to view the response and attachments by logging in and accessing your case files. If you would like to review the attachments in person, please call the Rent Adjustment Program office at (510) 238-3721 to make an appointment.

Mediation Program

Mediation is an entirely voluntary process to assist you in reaching an agreement with your tenant. In mediation, the parties discuss the situation with someone not involved in the dispute, discuss the relative strengths and weaknesses of the parties' case, and consider their needs in the situation. Your tenant may have agreed to mediate his/her complaints by signing the mediation section in the copy of the petition mailed to you. If the tenant signed for mediation and if you also agree to mediation, a mediation session will be scheduled before the hearing with a RAP staff member trained in mediation.

If the tenant did not sign for mediation, you may want to discuss that option with them. You and your tenant may agree to have your case mediated at any time before the hearing by submitted a written request signed by both of you. If you and the tenant agree to a non-staff mediator, please call (510) 238-3721 to make arrangements. Any fees charged by a non-staff mediator are the responsibility of the parties that participate. You may bring a friend, representative or attorney to the mediation session. Mediation will be scheduled only if both parties agree and after your response has been filed with the RAP.

If you want to schedule your case for mediation and the tenant has already agreed to mediation on their petition, sign below.

I agree to have my case mediated by a Rent Adjustment Program Staff member at no charge.

_____ _____

Property Owner's Signature Date

Farley Levine Properties LLC
7 King Avenue
Piedmont, CA 94611
[redacted]

August 25, 2017

RESPONSE BY OWNER

File Name:	Arnold v. Farley Levine Properties LLC
Property Address:	4246 Gilbert Street Oakland, CA 94611
Case Number:	T17-0371/on-line case # T17-1043
Hearing Date:	November 16, 2017
Time:	10:00 A.M.
Place:	250 Frank H. Ogawa Plaza, Ste # 5313, Oakland CA 94612

This Response is submitted by Farley Levine Properties LLC (Farley Levine or Owner) to Mr. David Arnold's (Arnold) Petition to the Rental Board claiming a reduction in services at his rental unit at 4246 Gilbert Street in Oakland, California.

I. INTRODUCTION

Farley Levine's property is located at 4242-4246 Gilbert Street in Oakland, California. It is comprised of two buildings which hold five residential apartment units on the same lot. David Arnold began living at the subject property of 4246 Gilbert Street in June 2010. He continues to live there to date. His unit is a three bedroom two bathroom unfurnished apartment on the second floor of a three unit building. Arnold was the sole applicant for the lease and remains the sole authorized tenant under lease.

Mr. Arnold's Petition before this Board constitutes an improper attempt to re-litigate issues already litigated by Mr. Arnold before the courts in three separate Court Proceedings which were not resolved in Mr. Arnold's favor. Mr. Arnold seeks to utilize the Oakland Rental Board to rewrite his lease and obtain what he could not obtain in three separate court proceedings. He seeks to compel the Owner to allow him to sublease his apartment. This is not within the purview of the rental board.

The first lawsuit involving Mr. Arnold was an unlawful detainer action filed April 10, 2015 by the owner, *Farley Levine Properties LLC v. David Arnold* Case No.RG15765923 (a true and correct copy of the complaint is filed herewith as **Exhibit A**) against Mr. Arnold when it was discovered that Arnold had 2 unauthorized and unidentified individuals residing in his apartment unit without the knowledge or written consent of the Owner. The case was dismissed

on technical grounds for lack of proper notice, but Mr. Arnold moved the tenants out of his unit before a second action could be brought, to formally remove the unauthorized tenants.

Thereafter, on August 14, 2015, Arnold filed a new lawsuit, *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 (A true and correct copy of the complaint is filed herewith as **Exhibit B**) against Farley Levine Properties and the Owner manager Barbara Farley claiming he had a right to have roommates in his apartment, and that the Owner had created an uninhabitable situation repairing his front porch from dry rot over a 10 day period.

During the pendency of the second action, on December 23, 2016, Arnold filed a Third lawsuit *David Arnold vs. Farley Levine Properties LLC et al* Case No G16843593 for Declaratory Relief. Arnold sought:

> "... a judicial determination and declaration of Plaintiff Arnold's and defendants respective rights and duties under the Lease Agreement. Specifically that Plaintiff ARNOLD is allowed under the Lease Agreement to sublet the Subject Premises to at least one subletter and that Defendants should not unreasonably refuse to permit subletting on demand an illegal rent increase in order to allow subletting." (A true and correct copy of the Third Complaint is submitted herewith as **Exhibit C**)

All three lawsuits involved the lease Arnold entered into with the property's prior owner, Brian Tom and the explicit language of the lease forbidding guests from staying at the premises for more than fourteen days without the "written consent" of the owner. This Rental Board Petition is about the same issue. (A true and Correct Copy of the Lease is submitted herewith as **Exhibit D**)

During discovery in the two lawsuits the new Owner learned that Arnold had at least ten persons that had stayed in his apartment for fourteen or more days without the knowledge or written consent of the former or current Owner. Arnold also testified that additional persons stayed at the property without the owner's written consent from the start of the lease in June 2010 until Farley Levine's purchase of the property in January 2015. Arnold stated at deposition, however, that these persons were not "guests" but rather "roommates" or "subtenants." Arnold acknowledged that if he had categorized these people as subtenants instead of guests, he would have been in breach of his lease. (A True and Correct Copy of pertinent pages of David Arnold's Deposition are submitted herewith as **Exhibit E** - see, David Arnold's Deposition, 92:2-5; 148:2 – 149:9, 153.)

Following the purchase of the property from Brian Tom, Farley Levine learned of these additional individuals living on their property. They therefore asserted that Arnold was in breach of the lease and provided him with the option of removing the unlawful guests and remaining in the unit in compliance with the lease at the same rental rate or entering into a new rental agreement with these individuals listed on the lease at market rate. Arnold claimed that these actions were retaliatory and violated statutory provisions of the Oakland Municipal Code.

Arnolds' claims were unsupported by the evidence and resulted in his settlement , release, and hold harmless agreement against Farley Levine Properties from all claims, demands,

accounts, actions, causes of action , obligations, proceedings, losses, liabilities etc. of every kind and character whatsoever. Nonetheless, ignoring the release Arnold filed the instant proceeding before the Rental Board seeking a different result asserting again his "right" to sublease his unit.

It is not the job of the Rental Board to create for a tenant more rights that they are granted under their written lease agreement or to compel Owners to accommodate tenants who have repeatedly breached their lease agreement. Arnold's claim is without merit.

II. FACTS

A. Original Lease with Brian Tom

All of the following facts and issues were presented in the *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 matter before the superior court but are repeated here for purposes of this proceeding.

Arnold began his yearlong lease with the prior owner of the building, BrianTom, on or about June 2010. In pertinent part, the lease provides:

> "5. OCCUPANTS: Guest(s) staying over 14 days cumulative or longer during any 12 month period, without the OWNER's written consent…shall be considered a breach of this agreement. ONLY the following listed individuals and/or animals, AND NO OTHERS shall occupy the subject apartment for more than 14 days unless the expressed written consent of the OWNER is obtained in advance…"
>
> * * *
>
> 21. ASSIGNMENT: RESIDENT agrees not to transfer, assign ~~or sublet~~ the premises or any part thereof and hereby appoint and authorizes the OWNER as his agent and/or by OWNER'S authority to evict any person claiming possession by way of any alleged assignment ~~or subletting~~. (**Exhibit D**, strike through in original)

Both Arnold and Brian Tom signed their initials next to each change and strikethrough in order to signify their acceptance and approval of the changes.

According to Brian Tom (Declaration of Brian Tom filed in *Farley Levine Properties LLC v. David Arnold* Case No G16843593, is submitted herewith as **Exhibit F**), Mr. Tom considered Paragraph 5 of the lease to be a "material" provision of the lease agreement because [he] always wanted the ability to screen any new tenant for their background and financial ability to pay. [he] also wanted to reserve the right to change the terms of the lease as necessary." (**Exhibit F** Declaration of Brian Tom). According to Mr. Tom, he "reiterated to Mr. Arnold that if he wanted to have a roommate he needed to submit a proposed tenant application for [his] written approval in accordance with the lease." (**Exhibit F.** Declaration of Brian Tom.). Sometime after the signing of the lease, Mr. Tom consented to one roommate, Amanda Shin. Mr. Tom acknowledged that Mr. Arnold submitted a tenant application for his approval "I approved Ms. Shin as a resident of the apartment at the time under the new lease…Paragraph 21 of the lease agreement relating to ASSIGNMENT crossed out the term 'sublet' of said paragraph

to accommodate Ms. Shin as a tenant at that time without rental increase." (**Exhibit F.** Declaration of Brian Tom.)

Arnold acknowledged during his deposition that regardless of whether he read the lease agreement in its entirety, he had agreed to whatever was contained in it. (**Exhibit E** Arnold Deposition, 43:17-44:6,) At deposition, however, Arnold testified that "[his] understanding was that our agreement as signed here in this lease agreement constituted written permission for me to have ***housemates*** and ***subtenants***. If I wished to have a ***guest*** stay, not a ***housemate*** or ***subtenant*** but a ***guest, stay for more than 14 days, I was agreeing to request the owner's consent to do so."*** (*Emphasis added* **Exhibit E** Arnold Deposition 47:4 – 16.). Arnold defined a "subtenant as "someone with whom he had an agreement to rent a portion of the premises [;]" a guest on the other hand was someone with whom he would have no such agreement. (**Exhibit E** Arnold Deposition 46:13 -18). Arnold testified that a guest was "somebody who does not pay for his or her stay" and that anyone with whom he had an agreement was considered a tenant or housemate. (**Exhibit E** Arnold Deposition 46: 13-24).

Arnold testified that he did <u>not</u> obtain the written consent of the owner for any of his roommates, subtenants or guests following Amanda Shin. Arnold testified that he recalled providing Mr. Tom with information regarding some of his roommates by written letter specifically, information as to Rita Manzana, Giles Despature and Cole Wheeler.[1] (true and correct copies of the alleged letters are submitted herewith as **Exhibit G)** Arnold testified that he did not provide these letters or information to Mr. Tom to obtain written consent, however, he testified that he did not receive a response from Mr. Tom whatsoever. (**Exhibit E** Arnold Deposition 83:11 – 85:11; 134:9 – 135: 146:17 – 147:22.)

In addition to the ten roommates Plaintiff identified in discovery as having stayed at his unit for over 14 days without the owner's written consent, records were also subpoenaed during the litigation evidencing that Arnold rented out portions of his unit on Airbnb (**Exhibit H**, Airbnb Records). Arnold confirmed at deposition that Mr. Tom was not informed of Arnold renting out rooms in the unit on Airbnb. (**Exhibit E** Arnold Deposition 95:20-22).

Arnold testified that he could not recall if he sent letters to Mr. Tom informing him of his Airbnb subtenants similar to the letters he had sent regarding his roommates. Arnold also testified that if he had categorized these people as subtenants instead of guests, he would have been in breach of is lease. (**Exhibit E** Arnold Deposition 92:2-5; 148:2 – 149:9.).

Following the one-year lease, Arnold's lease became a month to month tenancy on June 1, 2011. His initial monthly rent was $1750 and it was increased to $1910 during his tenancy with Brian Tom.

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[1] Arnold's letters to Brian Tom notifying him of new subtenants consisted of the contact information for Cole Wheeler, Giles Despature., Lukas Held, Rita Manzana, and Sofia Jimenez. The letters which are also submitted to this Board were submitted as well in the underlying litigation. The letters included their move in dates. These letters, however, are not dated and no postage is attached nor have the receipt of them by Mr. Tom been verified or proven. (**Exhibit G** Letters to Brian Tom regarding new subtenants.)

During this time, Arnold never submitted any other tenant applications to Mr. Tom for approval. This is acknowledged both in Arnold' deposition testimony and Mr. Tom's declaration.

B. Arnold's Unlawful Guests at the Subject Property and Use of the Property for Business

In Arnold's responses to Special Interrogatories, Set One in *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 (A true and correct copy of the answers to interrogatories is submitted as **Exhibit I**) Arnold identified 10 persons that stayed more than 14 days in his unit from June 1, 2010 to present: Alice Provenzi, Justin Allison, Claudia Bland, Idelle de la Pena, Stacey Chapple, Zachary Cucinotta, Cole Wheeler, Rita Manzana, Giles Despature, and Sofia Jimenez. (**Exhibit I** Arnold's response to Special Interrogatory No. 64)

As to income derived from allowing persons to stay at the property for more than 14 days from June 1, 2010 to present, Arnold provided the approximate gross amount of rent received from the following individuals:

- Cole Wheeler: $13,300
- Giles Despature: $ 15,600
- Sofia Jimenez: $5,200
- Rita Manzana: $11,340.00

(**Exhibit I** Arnold's Response to Special Interrogatory No. 70)

As to those same four individuals, Arnold produced sublease agreements (agreements he created without the knowledge or consent of the landlord) which identified the following monthly rental rates:

- (no date) Cole Wheeler ($1,100/month)
- 3/29/14 Giles Despature ($1,200/month)
- 10/15/14 Sofia Jimenez Perez ($1,200/month
- 7/31/12 Rita Manzana ($945/month)

(**Exhibit J** Sublease Agreements, Arnold Deposition 163-170)

In response to Special Interrogatories, *Set Three*, in *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 Arnold provided the following information as to the specific dates persons stayed in his unit:

- Amanda Shin: August 1, 2010 – August 1, 2012 A security deposition was obtained and returned in full
- Alice Provenzi: August 1, 2013 – September 3, 2013. A security deposit was not obtained
- Justin Allison: June 15, 2013 – July 27, 2013. A security deposit was not obtained
- Claudia Bland: May 15, 2013 – June 12, 2013 A security deposit was not obtained

- Idelle De Ala Pena: April 15, 2013 – May 15, 2013. A security deposit was not obtained
- Stacey Chapple: January 1, 2013 to January 31, 2013. A security deposit was not obtained
- Zachary Cucinotta: June 13, 2012 to September 14, 2012. A security deposit was not obtained.
- Cole Wheeler, March 22, 2014 –November 8, 2014. A security deposit was obtained and returned in full.
- Rita Manzana: August 1, 2012 – August 25, 2013. A security deposit was obtained and returned in full.
- Giles Despature: May 1, 2014 to April 26, 2015 A security deposit was not obtained
- Sofia Jimenez: November 8, 2014 to April 26, 2015. A security deposit was not obtained

(**Exhibit I** Arnold's Responses to Special Interrogatories Nos 105-160).

In his Responses to Special Interrogatories. Set Three Arnold refused to disclose the amount of income he received from each of the above guests and whether the security deposits were held in an interest bearing account. At deposition however, Arnold testified that he had received the following amounts as security deposits $1,945. From Rita Manzana., approximately $600 from Lukas Held, (Lukas Held was not included in the above list of subtenants identified by Arnold but was apparently incorrectly omitted) and $1,000 from Cole Wheeler (**Exhibit E** Arnold Deposition 135:18-136: 1-7, 162:24-163.13) He further testified that he did not look into whether he had any obligation to hold these security deposits in interest bearing accounts (**Exhibit E** Arnold Deposition 154:15-24)

Specifically as to persons that Arnold rented to through Airbnb, Arnold stated that his gross income from Airbnb was $8,567 in 2013 and $5,686 in 2012, which includes persons that did not stay more than 14 days. (**Exhibit I** Arnold's Response to Special Interrogatory No 70). Arnold confirmed at deposition that Mr. Tom was not informed of Arnold renting out rooms in his unit on Airbnb. (**Exhibit E** Arnold Deposition 95:20-22). In his Responses to Special Interrogatories Set Three, Arnold identified the following persons as having stayed at the subject property through Airbnb: Jordan Chenevier, Alice Provenzi, Justin Allison, Claudia Bland, Idelle de la Pena, Bill Ful;tz, Denise Martin, Norm Heske, Stacey Chapple, Jackie Mason, Haroloula Rose, Dev Trivendi, Sharon Trivendi, Desirae King, Jonathan Cardenas, Dan Becraft, Paul Gernetzke, John Kaukem and Zachary Cucinotta. (**Exhibit I** Arnolds Response to Special Interrogatory No 162).

Simply put, Arnold operated a business of collecting income with his rental unit without the consent and or knowledge of the Owners.

C. Farley Levine Purchase of the Subject Property and Proposed New Lease

In December 2014 Barbara Farley and her husband Michael Levine (Farley Levine) purchased the subject property on Gilbert Street from Brian Tom through real estate brokers. As

part of the sale Ms. Farley received a "Receipt of Documents" form which confirmed that she received, in part, the following documents per the purchase agreement: Residential Lease Agreement, Related Addendums and Rent Increase Notices and Application for 4246 Gilbert Street Oakland CA and a Signed Tenant Estoppel for 4246 Gilbert Street Oakland, CA. The Estoppel Certificate states in part that as of its date November 19, 2014, Arnold's rent was $1910 and "the name and ages of all Residents are: David Arnold." This was signed by Arnold Certifying that this information was true and correct on December 4, 2014 (**Exhibit K,** Estoppel Certificate and Receipt of Documents.)

When Farley received Arnold's lease, she noticed that it had markings and items lined out. She asked her realtor or Mr. Tom about it and was told that Plaintiff had a girlfriend move in shortly after his lease began but that she had since moved out. Mr. Tom stated that the markings on the lease were to indicate Arnold was required to obtain written consent for a roommate and that he had approved of Arnold's girlfriend but no one else since then. At the walk through prior to the purchase, no representations were made about how many tenants were living in Arnolds unit.

According to Mr. Tom's declaration at the time of the sale, he was not aware that Arnold had people residing in his unit beyond the 14-day limitation period under the lease. Mr. Tom stated, "I never consented in writing or otherwise to Mr. Arnold having additional residents in his unit....I first learned of Mr. Arnold's violation of the lease agreement when Ms. Barbara Farley, the new owner manager of Farley Levine Properties LLC requested information from me regarding the tenant and whether I had consented to multiple residents in Unit 4246 in May 2015. I told her I had not." (**Exhibit F**. Brian Tom Declaration.)

In the legal proceeding Farley testified that after the purchase, she had received a termite and dry rot report and knew work was needed on the unit. Shortly thereafter she knocked on the door of Arnold's apartment to introduce herself and discuss repair plans for the porch of the unit. Farley learned there were additional people living in the unit when a woman answered the door and stated that she lived there with two men but would not provide her name. (A true and correct copy of Farley's Deposition is submitted herewith as **Exhibit L**) (Farley Depo: p.64: 19-25 to 65: 1-13; 98: 12-21) Farley consulted with the Oakland Rent Board regarding the issue and the Board indicated these additional illegal tenants were a liability for her. (Farley Depo. P. 66:5-16)

There were also complaints made to Farley about the foot traffic coming in and out of Arnold's unit in January/February 2015. The tenants complained about the lack of parking, noise and fear regarding who was and was not authorized to be on the premises. In addition the next door neighbor Elizabeth Lake complained to Farley about cigarettes, beer cans and other garbage being thrown onto her property and in her back yard from people using Arnold's apartment. Ms. Lake advised she had seen an Airbnb advertisement for the property which indicated to her that a tenant was running a business out of his unit. Based on the language of the lease, Ms. Farley concluded that Arnold's subletting of the apartment was a breach of the lease agreement. (**Exhibit L** Farley Depo. P. 129-131)

In February - March 2015 Farley met with Arnold at his apartment. Arnold testified that Ms. Farley wanted his roommates on the lease because of insurance, emergency situations and wanting to know all the people who lived in her building. (**Exhibit E** Arnold Depo. P. 187: 3-21). Arnold testified that he did not feel the request was unreasonable (Arnold Depo. P. 187:22 – 188:2). Arnold denied knowing that the basis for the increased rental amount was because of the additional subtenants (Arnold Depo. P.188:12-189-23). Arnold testified however that he did not want the other subtenants to be on the lease as he wanted to keep control over certain things rather than his subtenants or the owner, he therefore did not inform his subtenants of the meeting. (Arnold Depo. P.206:3-208:23.)

D. Trial April 3, 2017 Scheduled by the Court

Trial was scheduled in *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 for April 3, 2017 by the Court. The parties moved to consolidate the second action brought by David Arnold *David Arnold vs. Farley Levine Properties LLC et al* Case No. RG16843593 for Declaratory Relief for trial.

The issue of Arnold's ability to sublease the subject property was squarely presented to the Courts in both lawsuits filed by Arnold.

The parties attended a day long mediation before Steven Abern Esq. on November 30, 2016 on both of the above legal actions. The parties briefed all the issues and Farley Levine prepared for trial. As the matters proceeded to trial Mr. Arnold determined to settle his claims. The parties entered into a settlement agreement on April 3, 2017.

E. April 3, 2017 Confidential Settlement Agreement

NOTICE THIS IS A CONFIDENTIAL SETTLEMENT AGREEMENT BY AGREEMENT OF THE PARTIES.

The settlement agreement reached on April 3, 2017 of Arnolds two legal actions is submitted herein **under seal** as a "confidential" settlement agreement where "disclosure of the term of this settlement is made, the disclosure is only to be made to the extent necessary and to the person(s) to whom the disclosure is made shall be advised of the confidential nature of the settlement." (A true and correct copy of the settlement agreement is submitted as **Exhibit M.**)

In pertinent part Arnold "released" and "forever discharged" and holds Farley Levine Properties harmless from all "claims" "causes of action," "proceedings" "of every kind and character whatsoever" " arising out of his tenancy at 4246 Gilbert street, in Oakland California as alleged by Plaintiff as set forth in and arising out of the action." The Action was previously defined as *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 action and *David Arnold vs. Farley Levine Properties LLC et al* Case No G16843593.

The issue Arnold seeks to have the Rental Board resolve in the current proceeding and the issue of Arnold's purported right to sublease his unit are identical to the issues settled in the prior two legal proceedings.

While the settlement agreement did not foreclose "any claims or defenses that may be brought in the future arising out of Arnold's tenancy or affect a current challenge to a Capital Improvement Rent Increase then pending before the Rental Board, the settlement agreement nonetheless foreclosed a re-litigation of Arnolds right to sublet his apartment.

L. Current Rental Board Proceeding Case No: T17-0371 – On Line Case # T17-1043

On June 16, 2017 Arnold submitted an application for a roommate to the Owner. (A true and correct copy of the application is submitted herewith as **Exhibit N).** The Owner denied his request. . (A copy of Farley's response is submitted herewith as **Exhibit O**).

On June 25, 2017 Arnold filed the instant Proceeding with the Rental Board asserting under Oakland Municipal Code §8.22.070(F) Arnold had suffered "a decrease in housing services originally paid by owner."

The Owner denies that Arnold has a right under his lease agreement to have a roommate; denies that he has any reduced services under his lease agreement and denies that such denial constitutes a rental increase.

Mr. Arnold claims that he has suffered a reduction in housing services in an amount of $1,294.98 per month by the Owners denial of his right to a roommate.

III. CLAIMS OF RIGHT TO SUIBLEASE ARE BARRED

The April 3, 2017 settlement and release agreement specifically **precludes** Arnold from raising yet again all claims "arising out of his [Arnolds] tenancy at 4246 Gilbert Street, in Oakland California *as alleged by Plaintiff as set forth in and arising out of the action…*"

The "action" settled by Mr. Arnold was *David Arnold vs. Farley Levine Properties LLC et al* Case No G16843593 and *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 specifically raised the issue whether "Plaintiff ARNOLD is allowed under the Lease Agreement to sublet the Subject Premises." The fact that Arnold has raised this issue in two separate proceedings and failed to pursue the claim but settled the claim for compensation precludes him here from re-litigating these very same issue before the Rental Board or in any other proceeding.

The rationale behind the doctrine of *res judicata* is "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The requirement for a finding of *res judicata* is that the decision for which *res judicata* effect is sought must be a valid and final judgment. But a final judgment has been interpreted by the U.S. Supreme Court to include "settlement agreements." Res judicata is not limited

exclusively to final judgments issued by courts. In *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991), the Supreme Court stated:

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations .... that have attained finality. ...Herein, the action by HUD that served as the agency's final decision... was its entry into the settlement agreement. Rather than constituting a rejection of the defenses raised... the settlement agreement amounted to a decision by HUD not to submit the merits of the ... dispute for further formal agency review. As quoted above, the settlement agreement was the product of the parties' "desire to resolve and settle the claims raised...without further litigation." "*United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

The purpose of the settlement of the claims with Arnold was to lay to rest the claims he made in those proceedings. His claim to have a roommate was one of them. His attempt to re-litigate that issue here is barred by the doctrines of *res judicata* and *collateral estoppel* and violates the terms of the settlement agreement.

Arnold is not entitled to re-litigate the issues he resolved by settlement.

IV. TENANT HAS NO RIGHT TO SUBLEASE

Arnold is the sole tenant under his lease agreement and the sole authorized occupant of his apartment. Any right to a roommate or subtenant is "conditioned" on the Owners "Written Consent."

Paragraph 5 of the lease agreement provides clearly:

> 'Guest(s) staying over 14 days cumulative or longer during any 12 month period, **without the OWNER's written consent**...shall be considered a breach of this agreement. ONLY the following listed individuals and/or animals, **AND NO OTHERS shall occupy the subject apartment for more than 14 days unless the expressed written consent of the OWNER is obtained in advance...** (See Exhibit D)

The agreed terms of the lease are contained in the written lease agreement itself (**Exhibit D**). The written lease agreement does **not** grant to Mr. Arnold the "right" to have a roommate.

Arnold attempts to rewrite his lease agreement by unsupported assertions of his negotiations with the former landlord, Mr. Tom. But such negotiations are irrelevant and inadmissible at this stage since paragraph 34 of the Lease Agreement contains an "Integration Clause" that makes all prior statements and negotiations merge into the final written agreement.

Paragraph 34 states:

> "34. ENTIRE AGREEMENT: This Agreement constitutes the entire Agreement between OWNER and RESIDENT. No oral agreements have been entered into, and all modifications or notices shall be in writing to be valid. "(Lease Agreement **Exhibit D**).

This clause makes the lease agreement the full and complete expression of the parties. No other statements or prior negotiations are admissible to change the terms of the written agreement.

Indeed, The parole evidence rule codified in California Code of Civil Procedure § 1856 and Civil Code § 1625 provide that the terms of a writing intended to be a final expression of their agreement between the parties, may not be contradicted by evidence of a prior agreement (written or oral) or of a contemporaneous oral agreement. Hence Mr. Arnold's attempt to rewrite his written lease agreement at this stage with new and unsupported claims must be rejected as a matter of law.

Since Arnold has no right to sublease his apartment under his lease agreement his claim for lost services is improper.

V. NO RIGHT TO SUBLEASE WAS EVER GRANTED

Arnold claims that the former owner allowed him to sublease during his tenancy. He states in his petition:

> "Mr. Tom asked me to inform him of any roommates that might be moving in, which over the years, I did a number of times as roommates came and went."

However, according to Mr. Tom's deposition testimony Arnold never informed him of any roommates and was never granted any right to sublease. The ability to sublease was conditional:

> **Q:** So other than Amanda Shin, did David Arnold ever tell you anybody else that was living in the apartment at 4246 Gilbert Street?
>
> **A:** No
>
> **Q**. …Did he ever send you any type of correspondence advising you that other people were living at 4246 Gilbert Street other than Amanda Shin?
>
> **A**: No (A true and correct copy of portions of Brian Tom's Depo is submitted herewith as **Exhibit P** Depo Tom: p. 24:16-24)
>
> **Q**. Exhibit 6 is documents …..Letters that appear to be addressed to you from David Arnold regarding information regarding various subtenants. There's a Cole Wheeler, Gilles Despature…Lukas Held; Rita Manzana, Sofia Jimenez. So my question to you is did you receive these letters and correspondence from David Arnold?
>
> **A**.: No
>
> **Q.** so you never received any of these letters?
>
> **A**: Correct (Tom Depo p. 25:5-17)

In Mr. Tom's deposition (**Exhibit P**) he was asked specifically about each of Arnold's identified roommates and with each one he denied ever knowing any of them and denied ever consenting to their becoming a tenant in his building. [2]

---

[2] **Q**: Do you know who Cole Wheeler is?
A: I do not know any of these people. (Tom Depo: p 25: 5-17)
Q: You never authorized or gave consent for any of these people to live at your building at 4246 Gilbert Street, Correct?
A: Correct (Tom Depo: p. 25: 18-23)
Q: And then at some point in time were you advised that Amanda Shin moved out?
A: Yes
Q. and then thereafter Amanda Shin moved out. To be clear, Mr. Arnold never advised you of anybody else living at 4246 Gilbert Street other than himself?
A: That's correct (Tom Depo: p 32:5-12)
Q: Did he ever tell you that Zachary Cucinotta....was living at 4246 Gilbert Street..Well basically all of 2012?
A; No (Tom Depo: p.32:13-20)
Q: Mr. Arnold never asked consent or authority for Zachary Cucinotta to live at your apartment?...He did not , right?
A: That's correct, he did not. (Tom Depo: 32: 21 – 33:3)
Q: What about Stacey Chapple? Do you know who that is?
A: I don't know her
Q: Did Mr. Arnold ask you whether Stacey Chapple could live at 4246 Gilbert Street?
A: No he did not? (Tom Depo: p 33:7-12)
Q: Are you aware that Stacey Chapple was living at your apartment in January of 2013.
A: I did not know that she was living there (Tom Depo:33:13-19)\
Q What about Idelle De La Pena? Do you know who that is?
A No idea
Q: ...Do you know whether that person was living in your apartment or not in 2013.
A: I do not know that that person was living in my apartment.
Q: Did Mr. Arnold ever ask you for consent or authority for that person to live there?
A: No he did not (**Exhibit P** Tom Depo. P. 33: 21-25 – 34: 1-5)
Q. What about Claudia Bland? Do you know who that is?
A. I have no idea.
Q. Did Mr. Arnold ever ask you for authority or consent to have Claudia Bland live at your apartment at 4246 Gilbert Street?
A. No, he did not. (Tom Depo: 34:6-12)
Q. What about Justin Allison? Do you know who that is?
A. I have no idea.
Q. Did Mr. Arnold ever ask you for consent or authority for Justin Allison to live at 4246 Gilbert Street?
A. No, I did not know... he did not ask for permission. (Tom Depo: p 34: 16-25, 35: 1-3)
Q. How about Alice Provenzi? Do you know who that is?
A. I do not know.
Q. Did Mr. Arnold ever ask you for authority for Alice Provenzi to live at 4246 Gilbert Street?
A: No, he did not. (Tom Depo: p 35: 4-12)
Q. And what about Cole Wheeler? Do you know who that is?
A. No, I do not.
Q. And did Mr. Arnold ever ask you for consent or authority for Cole Wheeler to live at 4246 Gilbert Street?
A. No, he did not.
Q. What about Gilles, G-i-l-l-e-s, Despature? Do you know who that is?
A. No.
Q. Did Mr. Arnold ever ask you for consent or authority for Gilles Despature to live at 4246 Gilbert Street? (Tom Depo:p. 35: 14-25)
A. No, he did not.(Tom Depo: 36: 1-5)
Q. And what about Sofia Jimenez? Do you know who that is?

No right to sublease has been established by Mr. Arnold.

VI. O.M.C. § 8.22.070(F) DOES NOT APPLY TO LEASE INTERPRETATION

Oakland Municipal Code § 8.22.070(F) (O.M.C.) under which Arnold brings this Petition, has no application to the subleasing of an apartment unit. Nor does it relate to the definition of the term "guest", "subtenant" "roommate" or "housemate" under the provisions of the written lease agreement in this case. The definition of these terms do not constitute "services" under the statute.

O.M.C. §8.22.010 defines "services" as "insurance, repairs, maintenance, painting, utilities, heat, water, elevator service, laundry facilities, janitorial service, refuse removal, furnishings, parking, security service, and employee services." Arnold's claimed right to sublease his apartment is not an identified "service" under the Municipal Code.

Arnold cannot rewrite his contract or convert prior negotiations to rights under his written agreement. In fact in Arnolds deposition testimony he admits no such right was ever given to him.

Q: Did Mr. Tom tell you that anytime you wanted a roommate you just needed to let him know so that he could approve of the roommate? Did he say something to that effect?

A: No (**Exhibit E** Arnold Depo. P 33:4-8)

Arnold claims in his current petition that: "Use of all three bedrooms for occupancy in my flat was an explicitly negotiated agreed to service provided by the previous owner under my lease. " (Arnold Description of Loss of Service p. 1).

But in Mr. Tom's deposition testimony he states:

Q. So it was your understanding that the rent---the apartment would be rented to Mr. Arnold. And did you agree to allow him to have one roommate? (Tom Depo: p 17: 23-25)

A. I couldn't agree ahead of time. I had to find out who that roommate was. I had to approve that roommate's background, credit, employment, et cetera.

A. No, I do not.
Q. Did Mr. Arnold ever ask you for consent or authority for Sofia Jimenez to live at your apartment at 4246 Gilbert Street?
A. No, he did not. (Tom Depo: p. 36:7-16)
Q. At the time that you sold the building the subject building on Gilbert Street, in December of 2014 Mr Arnold was a tenant in your building?
A. Yes He was
Q. And do you know if Mr. Arnold had anybody else living with him at that time that you sold the building?
A. No I did not know that he had someone else living with him (Tom Depo: p 10:5-12)
Q. so as far as you knew, Mr. Arnold was occupying the apartment by himself?
A.: That's correct (Tom Depo: p 10:13-14)

Q. So when Mr. .Arnold came to look at the apartment, did he tell you that he already had a roommate that would be moving in with him?

A. He either has a roommate or had somebody in mind or he was going to look for a roommate. You have to remember, when we had this conversation, he would give me more than one answer about that. He would say either that he had somebody in mind or that he would find somebody. I don't think he was that sure himself at that point. (**Exh. P** Tom Depo: p. 18: 1-12)

There is no evidence of agreement other than the written lease agreement which does not grant to Arnold a right to a subtenant.

VII. ARNOLD ENGAGED IN MULTIPLE VIOLATIONS OF HIS LEASE AGREEMENT AND THE LAW

A. Violation of Zoning Ordinances

Arnold signed a lease contract in June 2010 as the "sole lessee." After his residency the Owner allowed a single roommate Amanda Shin to reside in Arnold's apartment. Thereafter no other roommate(s) were disclosed to or approved by the original Owner or subsequent Owner. Nonetheless Arnold utilized his apartment as a means of generating money for himself by renting his apartment to transient and semi transient individuals.

The subject property 4246 Gilbert Street, Oakland is Zoned as RM-2. (see zoning reference under Oakland Zoning Map **Exhibit Q**)Under Oakland's Planning Code section 17.17.010 under Mixed Housing Type Residential (RM) regulations states in pertinent part:

> "The intent of the RM regulations is to create maintain, and enhance residential areas typically located near the City's major arterials and characterized by a mix of single family homes, townhouses, small multi-unit buildings and neighborhood businesses where appropriate. "

This chapter establishes land use regulations that apply specifically to RM-2 neighborhoods and specifically single family homes, duplexes, townhouses, small multi-unit buildings and neighborhood businesses. Permitted and conditionally permitted activities are listed in table 17.17.01 under section 17.17.030 of the Planning Code. The code provides that **Semi- transient (occupancy of living accommodations partly on a weekly or longer basis and partly for a shorter time period) (17.10.120) and transient habitation (lodging services to transients guests) (17.10.440)** are **PROHIBITED** in RM-2 zoned areas. (Oakland Planning Code §17.17.030). Arnold's rental of his apartment to multiple short term tenants over the period of his lease constituted a violation of the Oakland Planning Code and subjected the Owner to potential penalties and fines.

B. Operation of Apartment as Hotel

Arnold operated the subleasing of his apartment as a business for profit charging both short term and long term guests for their stay. Arnold advertised his unit for short term rental on

Airbnb as an "Oakland Gem" seeking to attract renters for profit. He made thousands of dollars from his business on an annual basis and used his apartment unit as a hotel. As such Arnold was subject to Sections 7280 and 7282.5 of the California Revenue and Taxation Code established to cover "*rent received by the operator of a lodging establishment for transient accommodations.*" As well Oakland's new rental registration and transient occupancy tax would apply to Mr. Arnold's business. So too, Arnold was required to obtain an Oakland Business license to engage in such activities. Arnold complied with none of these regulations. Nor would the city have allowed such activities in violation of their zoning ordinances.

Neighbors of the property complained about the transient rentals on Airbnb. (**Exhibit L** Farley Depo: 132: 5-11) Arnold created a nuisance with his rentals to other neighbors, violated the law in Oakland and violated his lease agreement.

C. Multiple Breaches of the Lease Agreement

Arnold is the "ONLY" authorized occupant under his lease agreement. (see Paragraph 5 Lease Agreement **Exhibit D**). This provision was violated multiple times as Arnold ignored the lease restrictions and housed between 10-20 or more individuals at various times without the knowledge or prior written consent of the Owner.

Arnold allowed unidentified individuals in his apartment violating Paragraph 9 of the lease agreement disturbing the peace and quiet enjoyment of other residents of the building and neighbors to the property. (Deposition of Barbara Farley submitted herewith as **Exhibit L**)

Arnold allowed unidentified individuals to utilize the laundry facilities and loiter on the front of the building causing fear in the other tenants who did not recognize whether the strangers were allowed to be on the premises. This was a violation of Paragraph 10 of the rental agreement. **(Exhibit L** Farley Depo: 131: 4-21)

The building is a nonsmoking building. (see Lease Agreement **Exhibit D**) Mr. Arnold allowed individuals to smoke on the premises creating a fire hazard for other tenants and adjacent property owners. **(Exhibit L** Farley Depo: 131: 4-21)

The owner received complaints from adjacent neighbors that individuals from Mr. Arnold's unit were throwing garbage and cigarette butts on their property. (**Exhibit L**, Farley Depo: 129:10-25, 130:1-11)

Each unit is given one off street parking place. Because Mr. Arnold had multiple unidentified tenants utilizing his apartment it created parking issues for adjacent neighbors and the existing tenants. Because of the activity in Mr. Arnold's apartment it created noise, traffic and parking problems for neighbors and tenants of the Arpartment.

Further there are several small children residing in the apartment with their parents. They often utilize the front lawn to play and multiple unidentified transient individuals utilizing Mr. Arnold's unit created a safety issue.

Arnold assumed no responsibility for the people he brought into his apartment and instead ignored the rules and obligations of his lease agreement and violated his lease on multiple occasions.

VIII. LANDLORD RESPONSIBLE FOR QUIET ENJOYMENT OF PROPERTY FOR ALL TENANTS.

Under California law, all tenants have the implied covenant of "quiet enjoyment" under their lease agreements. (California Civil Code, § 1927). In fact the landlord has the duty to preserve the quiet enjoyment of the premises for all tenants. (*Davis v. Gomez* (1989) 207 Cal.App.3d 1401, 1404.)

Similarly the Landlord is charged with providing a safe environment for the tenants in their buildings and once they know of a problem they are charged with "foreseeability" in not addressing problems about which they have become aware. Hence the landlord who fails to address a problem about which he is aware makes himself liable for the foreseeable consequences of his inaction in addressing the problems. (California consequential damages laws; see *Robinson v. N.Y. City Housing Authority*, 150 A.D.2d 208, 540 N.Y.S.2d 811 (1989). While a landlord is not an insurer of a tenant's safety and has no general duty to protect tenants from criminal acts of third persons, the landlord does have a duty to protect tenants from foreseeable conduct. *Ten Associates v. McCutchen,* 398 So.2d 860 (Fla. App. 1981). Cal.Civil Code. §1941.1

Arnold has repeatedly and chronically violated his lease agreement. He has endangered the other tenants in the building with transient and unidentified individuals utilizing his apartment as a rental without the knowledge or consent of the landlord. Arnolds "tenants" were under no obligation to comply with the terms and conditions of the existing lease agreement and indeed were not even aware of the provisions of the lease. They engaged in smoking, partying, littering, disturbing neighbors and tenants and created a continuing nuisance for all around Mr. Arnold's apartment. Mr. Arnold was oblivious to the complaints of neighbors and other tenants and seeks to utilize this Rental Board to rewrite his rental agreement to allow him to continue his illegal activities.

The entire concept of "consequential damages" arises out of a lawsuit caused as a direct and foreseeable result of wrongdoing. Arnold's conduct in multiple violation of both laws and breaches of his lease agreement compels the Owner to take action to stop the continued violations or become complicit in them and places the Owner in a position of liability if it does not address the problem.

Arnold has no right to subtenants in his apartment and by his multiple breaches and violations of the law cannot compel the Owner to grant him that privilege.

IX. Conclusion

In light of the prior settlement agreement, the obligations of the landlord to all tenants under law, and the prior conduct of Mr. Arnold, the Owner is under no obligation to consent to Mr. Arnold's efforts to restart activities that have violated his lease agreement in the past. This does not constitute a "reduction in service" as Mr. Arnold's ability to sublease his apartment is "conditioned" on the landlords "consent." It was never a right under his lease agreement. Mr. Arnold remains the sole authorized tenant. He continues to utilize his rental under the Lease agreement. The claim is improperly brought under the applicable Municipal Code. There has been no reduction in any services to Arnold. Arnold's claim must be rejected.

Dated: August 25, 2017

Respectfully Submitted

Barbara S. Farley

Farley Levine Properties LLC

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

CITY OF OAKLAND

Housing and Community Development Department
Rent Adjustment Program

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

HEARING DECISION

CASE NUMBER: **T17-0371 Arnold v. Farley Levine Properties**

PROPERTY ADDRESS: **4246 Gilbert Street, Oakland, CA**

HEARING DATE: **March 8, 2018**

DATE OF DECISION: **July 19, 2018**

APPEARANCES:

David Arnold	**Tenant**
Barbara Farley	**Owner**
Michael Levine	**Owner**

SUMMARY OF DECISION

The tenant petition is DISMISSED.

ISSUE PRESENTED

1. Does the Rent Adjustment Program have jurisdiction to hear this case?

INTRODUCTION

The tenant filed a petition on June 25, 2017, claiming that his housing services have decreased because the owner is refusing to allow him to sublet his unit to roommates.

The owner filed a timely response, denying the allegations, and claiming that the tenant previously filed several lawsuits in Superior Court regarding his right to sublease the subject property, which resulted in a monetary settlement. Therefore, the tenant should be barred from relitigating the same issue before the Rent Adjustment Program.

A hearing was held on March 8, 2018, limited to the issue of whether the Rent Adjustment Program has jurisdiction over the tenant's claims based on the prior lawsuits about his right to sublet.

EVIDENCE

At the hearing, the owner testified that the tenant previously filed two separate lawsuits in Superior Court claiming he had a right to sublet his unit to roommates. The first lawsuit, *David Arnold vs. Farley Levine Properties LLC et al Case No. RG15782101*, was filed on August 14, 2015.[1] In that case, the tenant claimed he had a right to sublet his unit to roommates, and that the owner created an uninhabitable environment during construction on the property. During the pendency of that action, he filed another lawsuit, *David Arnold vs. Farley Levine Properties LLC et al* Case No. G16843593 on December 23, 2016, seeking Declaratory Relief.[2] In the subsequent suit, the tenant sought

"...a judicial determination and declaration of Plaintiff Arnold's and Defendants' respective rights and duties under the Lease Agreement, specifically, that Plaintiff Arnold is allowed under the Lease Agreement to sublet the Subject Premises to at least one subletter and that Defendants should not unreasonably refuse to permit subletting or demand an illegal rent increase in order to allow subletting."

On April 3, 2017, the parties signed a confidential Settlement Agreement and Release of all Claims ("Settlement Agreement") and the tenant received monetary compensation to resolve both legal actions.[3] The owner argued that the release in the Settlement Agreement precludes the tenant from raising all claims "arising out of his tenancy at 4246 Gilbert Street, in Oakland, California, as alleged by Plaintiff as set forth in and arising out of the Action." The Action (previously defined as *David Arnold vs. Farley Levine Properties LLC et al Case No. RG15782101* and *David Arnold vs. Farley Levine Properties LLC et al Case No. G16843593*) specifically raised the issue of whether "Plaintiff Arnold is allowed under the Lease Agreement to sublet the Subject Premises."

The owner argued that the issue in the current tenant petition, namely the tenant's purported right to sublease his unit, is identical to the issue settled in the prior two legal proceedings, and the tenant is barred from re-litigating the same issue again by the release in the Settlement Agreement.

Finally, the owner argued that the tenant petition is also barred as a matter of law based on the doctrine of res judicata. Under res judicata, a final judgment on the merits bars further claims by parties based on the same cause of action. The rationale behind the doctrine of res judicata is "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate, [it] protects their adversaries from the expense and vexation [of] attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

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[1] Exhibit 1

[2] Exhibit 2

[3] Exhibit 3; The owner submitted this Settlement Agreement under seal to the Hearing Officer. This Settlement Agreement remains confidential and is not a public record. Disclosure of this document is only to be made to the extent necessary to hearing officers and those requiring access to issue a ruling on the tenant's claims.

The requirement for a finding of res judicata is that the decision for which res judicata effect is sought must be a valid and final judgment. But a valid and final judgment has been interpreted by the U.S. Supreme Court to include settlement agreements. *Astoria Fed. Sav. And Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

The owner argued that the purpose of the Settlement Agreement was to lay to rest the claims the tenant made in the prior lawsuits. His right to sublet to roommates was one of those claims. Therefore, his attempt to relitigate that issue here is barred by the doctrine of res judicata.

The tenant testified that the Settlement Agreement specifically states that the release "does not apply to or have any bearing or effect on any pending or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the City of Oakland Rent Adjustment Program".[4] Therefore, he argued, based on the plain language of the Settlement Agreement, he is entitled to bring this claim before the Rent Adjustment Program.

The owner testified that the intent of that provision in the Settlement Agreement was to ensure that the agreement does not affect a pending appeal before the Rent Board of a prior Hearing Decision involving capital improvements to the subject property. In addition, it was intended to preserve the tenant's right to file future petitions for any new claims that may arise during his tenancy but the provision does not apply to the same claims that were already raised in the prior lawsuits. It was never the intent of the owner to agree to give the tenant free reign to file the same subletting claim repeatedly in different venues. The owner further testified that she would never have agreed to a substantial monetary payout if the tenant was going to continue filing claims about his right to sublet indefinitely.

The tenant argued that the prior lawsuits and Settlement Agreement only addressed past denials by the owner of his request to sublet. After settling the prior lawsuits, he submitted a new application for a roommate, in June of 2017, and the owner denied that application, stating that she did not consent to the subleasing of tenant's unit. He argued that this most recent denial of his request to sublet is not the same claim, but rather a new claim, and he is entitled to bring this new claim before the Rent Adjustment Program.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction of the Rent Adjustment Program

It is clear from the testimony of the parties and the evidence submitted that the tenant previously filed two lawsuits in Superior Court about his right to sublet his unit to roommates. Both of those matters were resolved via a Settlement Agreement and the tenant received a substantial monetary settlement. The tenant had a full and fair

[4] Exhibit 3

opportunity to litigate those matters before a court and he chose to settle his claims for compensation.

The tenant is now bringing the same claim before the Rent Adjustment Program, namely, his right to sublet his unit to roommates. His argument that it is not the same claim, but rather a new claim is unpersuasive. In the prior case, *David Arnold vs. Farley Levine Properties LLC et al* Case No. G16843593, the tenant sought Declaratory Relief, essentially a declaration from the court that he is allowed to sublet his unit to at least one subletter. There is nothing in that complaint that suggests that the prior proceeding was limited to past denials of his requests to sublet and did not apply to any future requests to sublet the unit. The complaint sought a general declaration regarding his right to sublet.

In the Settlement Agreement signed by the parties, the tenant accepted a monetary payment in "full compromise, settlement and satisfaction of the Actions", and generally released the owner from all claims against the owner "arising out of his tenancy at 4246 Gilbert Street, in Oakland, California, as alleged by Plaintiff as set forth in and arising out of the Action."

The Settlement Agreement goes on to state that "It is not the intent of the parties that this Agreement affect any pending or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the City of Oakland Rent Adjustment Program". The tenant argues that this provision grants him the right to file the current petition regarding his right to sublet. The owner disagrees, arguing that the intent of this provision was to preserve the tenant's right to file future petitions for any new claims that might arise during his tenancy but the provision was not meant to apply to claims that were already raised in the prior lawsuits.

This provision in the Settlement Agreement is poorly crafted, and ambiguous with respect to whether the term "future petitions" only applies to new claims or to all claims, even those that have already been litigated. When the language of a document is unclear, we must turn to the intent of the parties to guide our interpretation. Here, the owner argues that the intent of this provision was to preserve the tenant's right to file future petitions for any *new* claims only, not claims that were already raised in the previously settled lawsuits. It was never the intent of the owner to agree to give the tenant free reign to file the same subletting claim repeatedly in different venues. The owner testified that she would never have agreed to a substantial monetary payout if the tenant was going to continue filing claims about his right to sublet indefinitely. The Hearing Officer agrees. It is not reasonable or equitable to interpret this provision as granting the tenant carte blanche to file the same claim regarding his right to sublet indefinitely. The Settlement Agreement precludes the tenant from raising the previously litigated claim about his right to sublet before the Rent Adjustment Program.

Additionally, the tenant's claim is barred as a matter of law by the doctrine of res judicata. The rationale behind the doctrine of res judicata is "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate, [it] protects their adversaries from the expense and vexation [of] attending multiple lawsuits,

conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The tenant previously raised the issue of his right to sublet to roommates in two separate proceedings and chose to settle his claims for monetary compensation. The purpose of the settlement was to lay to rest the claims he made in those proceedings. He has had the full and fair opportunity to litigate his claims before a Court and is barred from relitigating the same claims before the Rent Adjustment Program.

Conclusion

For the reasons stated above the Rent Adjustment Program does not have jurisdiction to hear the tenant's claims. Therefore, the tenant petition is dismissed.

ORDER

1. Petition T17-0371 is dismissed for the reasons stated above.

2. 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 date to file is a weekend or holiday, the appeal may be filed on the next business day.

Dated: July 19, 2018

Maimoona Sahi Ahmad
Hearing Officer
Rent Adjustment Program

PROOF OF SERVICE
Case Number T17-0371

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:

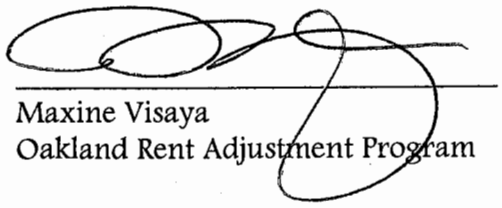
Documents Included
Hearing Decision

Owner
Barbara Farley, Farley Levine Properties LLC
7 King Avenue
Piedmont, CA 94611

Tenant
David Arnold
4246 Gilbert St.
Oakland, CA 94611

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 August 02, 2018 in Oakland, CA.



Maxine Visaya
Oakland Rent Adjustment Program

CITY OF OAKLAND

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

For date [illegible] **RECEIVED**
AUG 22 2018
RENT ADJUSTMENT PROGRAM
OAKLAND APPEAL

Appellant's Name David Arnold	☐ **Owner** ☒ **Tenant**
Property Address (Include Unit Number) 4246 Gilbert St., Oakland CA 94611	
Appellant's Mailing Address (For receipt of notices) 4246 Gilbert St., Oakland CA 94611	**Case Number** T17-0371 **Date of Decision appealed** August 2, 2018
Name of Representative (if any)	**Representative's Mailing Address (For notices)**

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:* 18 .

• **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 August 21, 20 18, 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	Barbara Farley, Farley Levine Properties LLC
Address	7 King Avenue
City, State Zip	Piedmont, CA 94611
Name	
Address	
City, State Zip	

	August 21, 2018
SIGNATURE of APPELLANT or DESIGNATED REPRESENTATIVE	**DATE**

For more information phone (510) 238-3721.

David Arnold
4246 Gilbert St.
Oakland, CA 94611
August 21, 2018

Appeal of Hearing Decision Case Number: T17-0371
Rent Adjustment Program

APPEAL OF HEARING DECISION CASE NUMBER: T17-0371

Dear Rent Adjustment Board,

This explanation document supports the attached appeal submission on my RAP petition T17-0371 for Decreased Housing Services. For clarity, please see the following timeline of relevant events referenced in the hearing decision regarding this case. Herein, "DA" refers to me – the petitioner and tenant. "FLP" refers to Barbara Farley and Farley Levine Properties LLC, the landlord.

	Date	Description
1.	Apr 10, 2015	FLP files Unlawful Detainer Action against DA and his housemates.
2.	Apr, 2015	DA's two housemates, Gilles Despature and Sofia Jimenez, move out.
3.	June 24, 2015	FLP denies DA request for a new housemate.
4.	Aug 14, 2015	Alameda Superior Court issues judgement in favor of DA on Unlawful Detainer action.
5.	Aug 14, 2015	DA files Complaint for Retaliatory & Wrongful Eviction Action against FLP.
6.	Dec 23, 2016	DA files Complaint for Declaratory Relief Action against FLP.
7.	Jan, 2017	Retaliatory & Wrongful Eviction Action and Declaratory Relief Actions are joined.
8.	Apr 3, 2017	DA & FLP settle and release all existing claims arising from two above complaints.
9.	June 16, 2017	DA applies, with form and process provided by FLP, for new housemates.
10.	June 17, 2017	FLP denies all housemates and possible future housemates.
11.	June 25, 2017	DA files instant petition for reduced housing services, T17-0371.
12.	July 19, 2018	Hearing officer issues hearing decision dismissing petition T17-0371.

The facts, Rent Adjustment Program policies and procedures, and OMC 8.22 support my right to petition Farley Levine Properties LLCs significant reduction in my housing services.

My case should be heard on its merits and Farley Levine Properties LLC ordered to pay back-rent for my significant and burdensome 67% overpayment of rent since June 17, 2017.

Grounds for my appeal follow:

1. The hearing decision was issued on the predicate that I previously litigated the same claims I now raise for compensation, and that the doctrine of res judicata precludes me from bringing the instant claim. The evidence does not support this conclusion, and the conclusion does not follow as a matter of law.

> "The tenant previously filed two lawsuits in Superior Court about his right to sublet his unit to roommates. Both of those matters were resolved via a Settlement Agreement and the tenant received a substantial monetary settlement. The tenant had a full and fair opportunity to litigate those matters before a court and he chose to settle his claims for compensation. The tenant is now bringing the same claim before the Rent Adjustment Program, namely, his right to sublet his unit to roommates."

It is crucial to distinguish that my petition is not a claim of my right to sublet. My right or lack thereof to sublet may be critical to deciding the instant claim, but in fact my claim is that Mrs. Farley on June 17, 2017, reduced my housing services in her unreasonable refusal to allow me to move in housemates. It is a claim about a specific wrong committed by Mrs. Farley.

In April of 2017, I could not have litigated or settled any claims regarding Mrs. Farley's behavior on June 17, 2017, as it had not yet occurred. No claims regarding her behavior on June 17, 2017 were or could possibly have been set forth in the actions previously settled.

In addition, the hearing decision's characterization of the cases previously settled is fundamentally mistaken. The first and primary lawsuit referenced here was filed the very same day that the Court issued judgement on Mrs. Farley's unlawful detainer action in my favor; that timing was not accidental. This lawsuit arose out of FLP's Retaliatory and Wrongful attempt to evict me from my home.

After more than a year of litigating Mrs. Farley's illegal attempt to evict, it became abundantly clear to all parties that my right to have housemates was critical to the question of liability. Mrs. Farley asserted that her unlawful detainer action was lawful due to the presence of my housemates being a violation of my lease agreement.

In order to clarify our respective rights under the lease agreement and better define FLP's liability under the Wrongful Eviction case, I filed an action pleading for Declaratory Relief from the Court on my right to sublet.

Pleadings for declaratory relief are a legal strategy to support a separate claim or cause of action surrounding an existing controversy.[1] [2]

---

[1] "Declaratory Judgment Actions—An Effective Tool for Serious Situations", FREDERICK W. CLAYBROOK, JR., AND J. CHRIS HAILE, 2006

[2] Columbia Pictures Corp. v. De Toth (1945) 26 Cal.2d 753, 760

The claims thus settled were those in the Retaliatory Eviction case: regarding damages arising out of the wrongful eviction, FLP's ousting of my housemates in April of 2015, and other related behavior.

While Mrs. Farley's actions regarding her ousting of my housemates in April 2015 and others up to April 2017 have been settled, the question of whether I have the right to sublet has *not* been judicated or settled. To the contrary, the settlement explicitly retains and does not modify my rights under my lease:

> "The PARTIES agree that this Release does not revise, add, limit, change or have any bearing or effect on the PARTIES' agreement to be bound by the terms of the Rental Agreement and/or Lease as between PLAINTIFF and DEFENDANTS as to the Subject Premises in the PARTIES' ongoing relationship as Landlord and Tenant, respectively."

2. The hearing decision was issued on the predicate that in settling my prayer for declaratory relief in 2017 on the question of whether I was permitted to have housemates, I henceforth waived all right to make any future claim arising out of my right to have housemates. The evidence does not support this conclusion, and the conclusion does not follow as a matter of law.

   The settlement agreement states:

   > "It is not the intent of the PARTIES that they release each other from any claims and/or defenses that they may bring in future litigation arising out of PLAINTIFF's tenancy at the Subject Premises. It is also not the intent of the PARTIES that this Agreement affect any pending or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the City of Oakland Rent Adjustment Program."

   Separately, it explicitly states, with italics in the original document:

   > "This full and final Release does *not* apply to or have any bearing or effect on any current or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the City of Oakland Rent Adjustment Program or future ligation between the PARTIES involving the Subject Premises."

   The hearing decision concludes that despite these explicit and specific disclaimers, I have waived all right to make any future claim arising out of my right to have housemates:

   > "It is not reasonable or equitable to interpret this provision as granting the tenant carte blanche to file the same claim regarding his right to sublet indefinitely. The Settlement Agreement precludes the tenant from raising the previously litigated claim about his right to sublet before the Rent Adjustment Program."

This interpretation is flawed as a matter of law because:

1. The claim itself, regarding Mrs. Farley's behavior on June 17, 2017, is not the same claim as any set forth in the actions, nor could it possibly be, as Mrs. Farley's behavior on June 17, 2017 had not yet occurred at the time of the actions.
2. When any ambiguity exists in a legal document, the doctrine of contra proferentem states that the document must be interpreted against the drafter. In this case, Mrs. Farley drafted the settlement agreement.
3. When any ambiguity exists in a legal document, the more specific language controls. The more specific language in this case is the language specifically highlighting exceptions to what is covered by the release.

The hearing decision justifies its conclusion under the assertion that the specific controlling language would "grant... the tenant carte blanche to file the same claim ... indefinitely." This is false, as such a claim could only be judicated to conclusion once. The settlement agreement rather retains my reasonable right to make one claim about each individual violation of my right to sublet.

Finally, the interpretation offered in the hearing decision must be rejected as unreasonable because it would render meaningless not only the aforementioned explicit provisions of the settlement agreement, but also any and all provisions of the lease agreement granting the tenant the right to sublet – thus granting Mrs. Farley carte blanche to breach the lease agreement indefinitely without fear of repercussion.

3. The hearing decision was issued on the predicate of the interpreted intent of the parties in crafting and signing the settlement agreement. However, the only evidence of that intent considered was Mrs. Farley's statements in the hearing room, while my intent was not considered. Evidence of both parties' intent contradicts Mrs. Farley's testimony.

   Mrs. Farley's claim of intent during our hearing that she never would have signed the agreement had I not given up my right to sublet flies in the face of the facts: I explicitly refused to sign away my right to sublet, despite multiple negotiation attempts to have me waive those rights in settlement talks. My intent to retain my right to sublet was clear to all parties.

   On November 30, 2016, Mrs. Farley and her counsel proposed a settlement[3] requiring:

[3] Exhibit A.

> "Absolutely no other occupants allowed in unit/apt, including but not limited to subtenants, sublesees. Guests beyond 14 days are also prohibited."

Their settlement proposal included a lease addendum document, stating:

> "Tenant David Arnold agrees not to transfer, assign or sublet the premises, or any part thereof. Tenant David Arnold shall be the only occupant of the premises other than non-paying guests of less than 15 days duration."

I did not accept.

On February 15, 2017, my legal counsel, Charles Ostertag, wrote to Mrs. Farley's legal team and discussed their requests for me to relinquish that right explicitly. He wrote on my behalf[4]:

> "The declaratory relief action was only brought about by ... the rather strange 11th-hour insistence at mediation that Mr. Arnold waive his subletting rights through a lease modification as a necessary condition to settlement (which, notably, assumes that Mr. Arnold has the right to sublet).
>
> In light of Brian Tom's deposition testimony, there is no doubt Brian Tom agreed for Mr. Arnold to have one or more subletters...
>
> As to the demand of having Mr. Arnold somehow agree to increase his rent in exchange for a subletter, It seems an agreement for a rent increase to "allow" subletting would be equally, if not more, susceptible to ongoing litigation than would be Ms. Farley approving the occasional subletter for Mr. Arnold. "

Ultimately Mrs. Farley chose to sign a settlement agreement that very clearly did not limit my right to sublet, limit or modify my rights under the lease agreement, or limit my right to make future claims arising out of future behavior or my rights under the lease agreement.. To the contrary, I demanded the explicit clause:

> "The PARTIES agree that this Release does not revise, add, limit, change or have any bearing or effect on the PARTIES' agreement to be bound by the terms of the Rental Agreement and/or Lease as between PLAINTIFF and DEFENDANTS as to the Subject Premises in the PARTIES' ongoing relationship as Landlord and Tenant, respectively."

My intent in signing the settlement agreement, as testified to here and in the hearing, and as evidenced in my rejection of settlement offers, was never to waive any right to sublet I retained under my lease.

---

[4] Exhibit B

Mrs. Farley's intent, as evidenced by her attempts to negotiate such a waiver but ultimate acceptance of a settlement without it, was clearly to settle the claims at hand without any modification of the existing lease agreement between us.

4. In preparing my case and defending my claims, as a layman I concluded that the plain language of the settlement agreement prohibiting its application to a Rent Adjustment Program Petition would be sufficient to allow the case to proceed on its merits.

   I was unprepared for the hearing officer's decision at the time of the hearing that the only issue which would be considered was the question of jurisdiction.

   While Mrs. Farley is herself a lawyer with decades of experience and the ability to craft an legal argument about the interpretation of a settlement agreement and related cases on the fly, I was set at a disadvantage in a dispute over contract law with no advance notice or counsel available, as would have been if Mrs. Farley had brought her allegations of my settlement agreement breach to the venue prescribe din the contract itself.

   The rent board should therefore consider the independent opinion of expert counsel provided herein on the matter of interpreting the settlement agreement.[5]

   Further, as the hearing officer opened the question of intent at the time of the hearing, with no advance notice, the rent board should consider the evidence of intent provided herein on the question of each party's intent in signing the settlement agreement.

[5] Exhibit C

Exhibit A

CONFIRMATION OF SETTLEMENT AS A RESULT OF MEDIATION

Mediator: Steven Abern Date: November 30, 2016

Case Name: David Arnold v Farley Levine Properties, LLC et al.

Alameda County Superior Court, Action No. RG15782101

Plaintiff(s) and defendant(s) agree that they have reached a full and final stipulated settlement of all claims arising from the above-entitled litigation including a waiver of California Civil Code section 1542. Plaintiff/Tenant is David Arnold. Defendants/Landlord, is Farley Levine Properties, LLC and Barbara Suzanne Farley.

The terms of settlement are:

The sum of $ 35,000.00 shall be paid by said defendant(s), by and through their carrier, to plaintiff(s) who accept(s) said sum as full settlement of all claims for injuries and damages against said defendant(s). This settlement is not an admission of liability. Settlement funds shall be paid 30 days upon receipt of a fully executed settlement agreement and release, completed W9 and executed dismissal.

Additional Terms: - 1542 waiver

~~- absolutely no other occupants allowed in unit/apt, including but not limited to subtenants, subleasees, guests beyond 14 days are also prohibited.~~

- Rent at $1942.42 subject to rent increase per statute/ordinance
- mutual confidentiality and non-disparaging

Plaintiff(s) is/are responsible for payment of all of plaintiff's attorney's fees and all of plaintiff's medical liens and bills and will defend and hold said defendant(s) harmless therefrom. Each party shall bear their own costs. Defendant(s) will prepare a release of all claims and a request for dismissal with prejudice of the action against said defendant(s) and will forward those documents to plaintiff's attorney for execution. Upon receipt of the executed release(s) and dismissal, payment will be made as set forth above.

The parties agree that this settlement document is admissible in evidence and is exempt from the confidentiality provisions of California Evidence Code section 1119 et seq., and may be judicially enforced pursuant to Code of Civil Procedure section 664.6.

Plaintiff:

Name: Charles Ostertag
Attorney for and on behalf of Plaintiff
Plaintiffs' Attorney's Tax ID#:

Name:
On behalf of Chubb Insurance Company

Name: Helen Lee Greenberg
Attorney for and on behalf of Defendants

Addendum to the lease, titled Lease Agreement, signed by Parties, dated November 30, 2016, is part of the Lease Agreement.

Additional Terms:

- LL does not waive capital improvement rent increase including but not limited to increase imposed on September 1, 2016.
- Tenant not waive challenge to rent increase including but not limited capital improvement rent increase on September 1, 2016.
- Tenant to continue to comply with all terms of lease and pay bills.

LEASE ADDENDUM NO. 1

This addendum modifies the terms of the Rental Agreement and/or Lease for 4246 Gilbert Street, Oakland, California, dated May 31, 2010.

Notwithstanding Paragraphs 6 and 21 of the Agreement, Tenant David Arnold agrees not to transfer, assign or sublet the premises, or any part thereof. Tenant David Arnold shall be the only occupant of the premises other than non-paying guests of less than 15 days duration.

Landlord's remedy for breach of this term shall be an unlawful detainer action, following appropriate notice to cure or quit, in which Landlord may seek possession of the premises and reasonable attorney's fees not to exceed $500.

Tenant David Arnold	Date
Barbara Suzanne Farley, on behalf of Landlord Farley Levine Properties, LLC	Date

Exhibit B

Gmail David Arnold [redacted]

Email to Defense "Arnold v. Farley Levine Properties: Settlement Issues"

Charles R. Ostertag, Esq. [redacted] Wed, Feb 15, 2017 at 4:39 PM
To: David Arnold [redacted], David Arnold [redacted]

Hello David,

Just getting this email out now. My apologies for the delay. I'll keep you updated regarding a response. I purposely left off the topic of money, for now.

---------- Forwarded message ----------
From: **Charles R. Ostertag, Esq.** [redacted]
Date: Wed, Feb 15, 2017 at 12:37 AM
Subject: Arnold v. Farley Levine Properties: Settlement Issues
To: "Greenberg, Helen Lee" [redacted], "Peralta, Maria" [redacted]

PRIVILEGED SETTLEMENT DISCUSSION (California Evidence Code Sections 1152 and 1154)

Helen and Tessa,

I wanted to revisit some seeming impediments to settlement in light of the trial date continuance and our extra time.

First, regarding your recently-filed motion to consolidate--as I explained at Brian Tom's deposition some weeks ago--I am opposed to consolidation. Declaratory relief actions are entitled to trial-setting priority on the court's calendar per CCP 1062.3 through a noticed motion. I think it is in both parties' interest to determine what subletting rights exist for Mr. Arnold; however, I think it's clear Mr. Arnold has the right to sublet to at lease one person.

The declaratory relief action was only brought about by: (1) Ms. Farley outright denying Mr. Arnold's request and application for a subletter after she agreed to allowed subletting (post unlawful detainer); and (2) the rather strange 11th-hour insistence at mediation that Mr. Arnold waive his subletting rights through a lease modification as a necessary condition to settlement (which, notably, assumes that Mr. Arnold has the right to sublet).

In light of Brian Tom's deposition testimony, there is no doubt Brian Tom agreed for Mr. Arnold to have one or more subletters. Helen: I recall you stating before Brian Tom's deposition that you considered Mr. Arnold to no longer have any subletting rights. If this is your position, can you please explain? As I mentioned before, if Mr. Arnold was in violation of his lease, the lease is voidable (and not void), and Ms. Farley must terminate the lease in an unlawful detainer action, which Ms. Farley failed to do.

For background, post unlawful detainer, Ms. Farley in May of 2015 invited Mr. Arnold to submit an EBRHA form to apply for a subletter with Ms. Farley's written approval. (See the attached correspondence from Ms. Farley to Mr. Arnold demonstrating the same). When Mr. Arnold submitted such a form, Ms. Farley changed her tune and outright denied Mr. Arnold the option of subletting after Mr. Arnold submitted the exact application Ms. Farley was looking for. (This subletter application is also attached to this email for your review).

For example, on June 24, 2015, Ms. Farley wrote the following email:

From: [redacted]
Date: Wed, Jun 24, 2015 at 9:41 PM
Subject: Re: Information for possible subtenant
To: [redacted]

Dear Mr. Arnold:

We do not currently allow any subleasing of the units. Therefore we do not give our consent to your proposed subtenant.

Thank you for your inquiry.

Barbara S Farley, Manager
Farley Levine Properties LLC

Unreasonable denial of a subletter application is wrongful when the lease permits subleasing with the landlord's written consent. *Compare* Civ. Code 1995.250 - 1995.260 (dealing with commercial tenancies, but instructive for residential ones) *with* Oakland Muni. Code 8.22.360.A.2 (stating "a landlord shall not endeavor to recover possession of a rental unit . . . if the landlord has unreasonably withheld the right to sublet following a written request by the tenant, so long as the tenant continues to reside in the rental unit and the sublet constitutes a one-for-one replacement of the departing tenant(s).")

As of today, Mr. Arnold is within his rights to submit a subletter application to Ms. Farley and then move in the subtenant after Ms. Farley unreasonably denies the subletter. Under the Oakland Municipal Code, Mr. Arnold would have a defense to any unlawful detainer action brought by Ms. Farley under these circumstances.

In an effort to revisit settlement, is Ms. Farley agreeable, without a rent increase, to the following:

1. Permit Mr. Arnold only one subletter; and
2. Limit the amount of rent Mr. Arnold can collect for a subletter, allowable to be increased over time only under the same terms as the Oakland Rent Ordinance

Mr. Arnold is willing to sign a lease modification to this effect. It seems to me if this subletter issue can come to terms, all current actions can be settled. As I mentioned to you before, Mr. Arnold has no short- or medium-term plans to sublet the premises out of fear that his subletter will cause a lease violation (and, hence, bring on an unlawful detainer action) while Mr. Arnold is abroad in Asia.

Lastly, as to the demand of having Mr. Arnold somehow agree to increase his rent in exchange for a subletter, I draw your attention to the Oakland Rent Ordinance, Oakland Municipal Code Section 8.22.180. This section, titled "Non-waiverability," states: "Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this chapter is waived or modified, is against public policy and void." During mediation, you were concerned that if Mr. Arnold did not sign away his subletting rights, more lawsuits could follow. While I disagree, it seems an agreement for a rent increase to "allow" subletting would be equally, if not more, susceptible to ongoing litigation than would be Ms. Farley approving the occasional subletter for Mr. Arnold.

Please advise.

Sincerely,
Charles Ostertag

--
Charles R. Ostertag
Principal Attorney

Alamere Law
802 B Street
San Rafael, California 94901
Office: 415-938-7823
Fax: 415-873-3197
costertag@alamerelaw.com

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2 attachments

Arnold Subletter App_6-21-15.pdf
4208K

Subleasing Notification_Farley Levine Prop_5-24-15.pdf

Exhibit C

CLAYTOR LAW GROUP

James D. Claytor

March 13, 2018

Sent via Email only

To: David Arnold

From: James D. Claytor

Re: Settlement Agreement with Farley Levine Properties et al

You have advised that you have filed a Petition pursuant to the City of Oakland Rent Adjustment seeking to over-ride the decision by Ms. Farley, your landlord, refusing your request to have a subtenant share your leased space.

Previously, you filed two (2) civil actions against Ms. Farley, the second of which was a Declaratory Relief Complaint brought in December of 2016. In that action you sought a declaratory judgment interpreting the lease that you had signed with Ms. Farley's predecessor.

Your Complaint alleged, among other things, that the lease allowed you to sublet the property, and that in March of 2014 and November of 2015, you had done that, and also that you had given the prior owner, meaning the owner before Ms. Farley, notice of the subletting.

Then, in February of 2015, the two (2) subtenants were ousted, following which you requested that Ms. Farley consent to a further subletting, which was denied, although allegedly Ms. Farley stated that she would consent if you would agree to an increase in the rent beyond what was allowed by the City's rent control.

You refused, and filed the Complain seeking a judgment that the lease did allow you to sublet, alleging further, as is common in Declaratory Relief Complaints, that a judicial declaration of the parties' rights and duties under the lease, in particular a declaration that you were permitted to sublet, was necessary in order to avoid you being in the position of accepting subtenants, and then being faced with an unlawful detainer action.

2000 Crow Canyon Place, Suite 270 San Ramon, CA 94583
Tel (925) 866-8899 Fax (925) 866-8898 jdc@claytorlawgroup.com www.claytorlawgroup.com

The Declaratory Relief Complaint never went to trial, nor did the other action you had brought against Ms. Farley, of which I do not have a copy.

However, effective in March of this year, you and Ms. Farley signed a Settlement Agreement and Release of All Claims, which leads to the question you have asked:

Ms. Farley is objecting to your Petition filed with the City seeking, as I understand it [not having seen a copy], an order or ruling from the City that you may sublet. Ms. Farley is claiming that the above Settlement Agreement and Release of All Claims extinguished your right to now claim, meaning after the earlier actions were settled and dismissed, the effect of that was to bar any claim you might make after the settlement that the lease gave you the right to sublet.

Your question is whether or not the Settlement Agreement and Release of All Claims does, as Ms. Farley argues, cut off your right to claim that you now have the right to sublet.

To begin, and as I said, it is very common for parties, when settling disputes that have ripened into a civil action to sign a release that provides, in general terms, that in consideration of what one side is giving, the other side releases all claims, demands etc that were made in the operative pleadings or, even if not plead, if the claims, demands arose prior to the date of the settlement. A standard release goes on to provide that the release of the claims/demands not only includes those which the releaser knew about but also any unknown claims/demands. However, because of a statute in California, Civil Code Section 1542, which is recited in your Settlement Agreement, a party cannot give a release of unknown claims, loosely referred to as a general release, if the unknown claims, had the releaser known about them, would have impacted the decision to settle. The party who wants the release gets around that by reciting Section 1542 in the Release, and then adding that the party who is giving up the claims "waives" any rights under that Section.

That verbiage is included in the document you and Ms. Farley signed, so even if you did not know of a claim at the time you signed, it is gone.

But, and getting back to the language that one sees in releases, at times a party who is giving the consideration not only wants a release from claims, both known and unknown, that were plead in any pleading by the other side and/or which existed as of the date of the release, the party wants even "future" claims to be precluded.

As I mentioned over the phone, this kind of expansive release is not common, and courts will not, so to speak, bend over backwards to interpret the wording of a release to include future claims unless that was the clear intent as measured by the words of the release.

How does your release stack up in that regard?

The second recital on the first page of the settlement document, and I will abbreviate here, states that you, in consideration of the payment of $35,000, accept the payment in "full compromise, settlement and satisfaction of the Actions", and that further, you generally release Farley et al from every claim etc which you and your successors or assigns,

> "...can, shall or may have against any of the DEFENDANTS arising out of his [your] tenancy...as alleged by PLAINTIFF as set forth in the Actions..."

If one stopped right there, an argument might be made that even a future claim by you regarding what you claim is the correct interpretation of the lease is gone:

The argument would be that, because the release extends to claims that you "may have", as set forth in one the actions you brought against Ms. Farley, the document should be construed to bar future claims re whether the lease allowed subletting because, you alleged in the Complaint #RG16843593 that the lease should be interpreted as allowing subleasing, and thus such claim, even one that might arise in the future, was one that you "may have", which was "set forth in the Actions", and thus was extinguished.

Frankly, I would consider this argument a stretch if that was where the analysis stopped, meaning even though paragraph 12 of the document, a standard clause that provides that in the event of an ambiguity the document will not be construed "against" one party, what in the Latin is referred to as a *contra preferentum clause*, the document is, in my view, subject ambiguity with respect to whether it was the intent of the parties that future claims would be barred.

However, the analysis does not stop here: The fourth recital on the first page reads;

> "It is not the intent of the PARTIES that they release each oft her from any claims and/or defenses that they may bring in future litigation arising out of PLAINTIFF'S tenancy at the Subject Premises. It is also not the intent of the parties that this Agreement affect any pending or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the city of Oakland Rent Adjustment Program."

Moreover, in # 2 of the Release, it states that,

> "The PARTIES agree that this release does not revise, add, limit, change or have any bearing or effect on the PARTIES' agreement to be bound by the terms of the Rental Agreement and/or Lease as between PLAINTIFF and DEFENDANTS as to the Subject Premises, in the PARTIES ongoing relationship as Landlord and Tenant, respectively."

Finally, in # 3 of the release, the clause that pertains to Section 1542 and the release of all claims whether known or unknown [as discussed above], it states that you warrant that this is full and final release of all unknown claims, including,

> "...all claims now existing or arising out of the Actions, including those known or disclosed. This full and final release does *not* apply or have any bearing or effect on any current or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the City of Oakland Rent Adjustment Program or future litigation between the PARTIES involving the Subject Premises...."

Notwithstanding the above language in the Settlement Agreement, Ms. Farley **has argued that** a release of "all claims now existing or arising out of the Actions" **should be interpreted to mean that any future claim by you that you are allowed to sublet should be barred because the claim in your Declaratory Relief action was just that.**

However, the three (3) passages in the Settlement Agreement above, in my view, unequivocally state that no future claims you might have re the meaning of the lease, and in particular, any petition you might file with the City, are precluded by the Settlement Agreement, is barred.

Therefore, and in conclusion, I would expect any lawyer, hearing officer or judge who was presented with the above argument made by Ms. Farley would find that your current claim is not barred by either your earlier action or the Settlement Agreement which resolved same.

Please let know if I can be of any further assistance.

CLAYTOR LAW GROUP, PC

James D. Claytor

James D. Claytor

Farley Levine Properties LLC
7 King Avenue
Piedmont, CA 94611
[redacted]

August 29, 2018

RESPONSE OF OWNER TO TENANT APPEAL

File Name: Arnold v. Farley Levine Properties LLC
Property Address: 4246 Gilbert Street Oakland, CA 94611
Case Number: T17-0371
Hearing Date: March 8, 2018
Date of Decision July 19, 2018
Date Owner Served: August 27, 2018
Hearing Date: No Hearing Date Set as of this filing.

This Response is submitted by Farley Levine Properties LLC (Farley Levine or Owner) to Mr. David Arnold's (Arnold) APPEAL of the Rental Board Decision of July 19, 2018 denying his claim against the Owner for a "reduction in services" at his rental unit, 4246 Gilbert Street, Oakland, California.

I. INTRODUCTION

This is an appeal from a ruling by the Rental Board holding Mr. Arnold's claimed "right to sublet" his apartment is barred by the doctrine of *res judicata* and *collateral estop*pel as having been litigated and settled in prior legal proceedings. The claim cannot be resurrected by the Rental Board under Arnold's claim of "reduction in services."

The first lawsuit, *Farley Levine Properties LLC v. David Arnold* Case No. RG15765923 was an unlawful detainer action filed April 10, 2015 by the owner, (see Exh. A to Owner's Opposition to Petition) against Mr. Arnold for housing two unauthorized and unidentified individuals in his apartment without the knowledge or written consent of the Owner. The case was dismissed on technical grounds for lack of proper notice, but Mr. Arnold moved the tenants out before a second action could be brought.

Thereafter, on August 14, 2015, Arnold filed a new lawsuit, *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 (see Exh. B to Owners Opposition to Petition) against Farley Levine Properties and the owner manager Barbara Farley claiming he had a right to have roommates in his apartment, and that the Owner had created an uninhabitable situation repairing his front porch from dry rot.

During the pendency of the second action, on December 23, 2016, Arnold filed a Second lawsuit *David Arnold vs. Farley Levine Properties LLC et al* Case No G16843593 for Declaratory Relief seeking:

"... a judicial determination and declaration of Plaintiff Arnold's and defendant's respective rights and duties under the Lease Agreement. Specifically, that Plaintiff ARNOLD is allowed under the Lease Agreement to sublet the Subject Premises to at least one sub letter and that Defendants should not unreasonably refuse to permit subletting or demand an illegal rent increase in order to allow subletting." (See Exhibit C to Opposition to Petition)

Arnolds' claims were unsupported by the evidence and resulted in his settlement, "release, and hold harmless agreement against Farley Levine Properties from all claims, demands, accounts, actions, causes of action, obligations, proceedings, losses, liabilities etc. of every kind and character whatsoever."

Nonetheless, ignoring the release Arnold filed the instant proceeding before the Rental Board seeking a different result asserting again his "right" to sublease his unit claiming this time that by denying his application to sublease his unit the owner had "reduced his housing services" in violation of Municipal Code § 8.22.070(F). This ordinance does not apply.

Arnold argued before the Rental Board that his claim was not the same as that litigated in the three prior court proceedings and makes the same argument on appeal. Except he admits "**My right or lack thereof to sublet may be critical to deciding the instant claim"** (emphasis added). Nonetheless he goes on to assert that he really is attacking the "behavior" of the owner in "that Mrs. Farley on June 17, 2017, reduced my housing services in her unreasonable refusal to allow me to move in housemates." (Appeal Brief p. 2 ¶ 3). His "right" to sublet was in fact settled in the prior litigation. His re-characterization of the same claim in terms of the "behavior" of the Owner is a transparent attempt to re-litigate the claimed right to sublease his apartment. It is the same claim between the same parties and is barred by the doctrines of *res judicata* and *collateral estoppel.*

II. FACTS

Arnold has had three opportunities to take to court his claim of "right" to sublet his unit under his lease agreement. In fact, the reason Arnold settled his claim was that the law and facts did not support it.

The evidence overwhelmingly showed that Arnold had abused his lease, during his tenancy, ignored the required consent of the landlord to add additional tenants in his unit and without knowledge or consent of the Landlord set up a business on Air BNB renting out his apartment to transient and semi transient individuals over the course of his tenancy.

As set forth in the Owners Opposition to Arnolds Petition Arnold admitted in discovery in *David Arnold vs. Farley Levine Properties LLC et al* Case No RG15782101 that he had subleased his apartment to 10 separate individuals and rented on multiple occasions to individuals on shorter stays, generating income to himself of over $50,000.00 all without the knowledge or consent of the Landlord. Nor did Arnold obtain an Oakland business license or seek to comply with local zoning laws which would have precluded his activities.

Simply put, Arnold operated an illegal business of collecting income with his rental unit without the consent or knowledge of the Owners or the City.

When his illegal activity was brought to an end by the new owner, Arnold brought multiple lawsuits asserting his right to sublet his unit. Neither the law nor facts supported Arnolds claim and his own violations undermined his case such that his attorney advised settlement.

The settlement would not have been reached but for Arnolds "release and hold harmless agreement against Farley Levine Properties from all claims, demands, accounts, actions, causes of action, obligations, proceedings, losses, liabilities etc. of every kind and character whatsoever." The claim raised in this Appeal is the same claim already waived and released by the prior settlement. It is barred, and the Rental Board has no jurisdiction to resurrect it.

III. ARNOLD'S CLAIM IS BARRED

In his first argument Arnold attempts to re-characterize his claim not as a "right to sublet" but as a claim against the Owner for her "behavior" in refusing to allow [him] to move in housemates." Arnold asserts that this was a "new" application unrelated to his prior litigation. He complains further that his two prior lawsuits, one for "wrongful eviction" and the other for "declaratory relief" related only to the then existing controversy, and his "right to sublet has not been judicated [*sic*] or settled." (Arnold Appeal p 2-3). Mr. Arnold is wrong.

Res judicata also known as "claim preclusion", refers: in both civil law and common law legal systems to cases in which there has been a final judgment or settlement and is no longer subject to appeal. The legal doctrine bars or precludes continued litigation of a case on the same issues between the same parties. The issue here is the same. Arnolds right to sublet has been settled and new claims on that issue are barred by the settlement.

The very nature of Arnold's prior litigation brought into focus his claimed right to sublet his apartment. By virtue of Arnold's settlement, he has waived his right to re-litigate that issue. Mr. Arnold did not take the matter to trial, did not seek a court adjudication of that issue, did not appeal any ruling and did not challenge the settlement agreement but pocketed the settlement cash. If the matter was not put to rest the owner would not have settled.

In Arnold's original Declaratory Relief action (Exh D to Owners Opposition) Arnold prays for:

> "A declaration of the rights and responsibilities of the parties with respect to Plaintiff Arnold Subletting the subject premises under the lease Agreement, specifically Plaintiff Arnold Seeks a judgment that plaintiff Arnold is allowed to sublet the subject premises under the Lease Agreement..." (Complaint for Declaratory Relief p 5:14-28).

In this Rental Board application Arnold seeks a ruling that a denial by the landlord of his application for a subtenant constitutes a "reduction in services." His re-characterization of the same issue does not create new rights in Arnold. The Rental Board's finding that it is "neither reasonable nor equitable to interpret the settlement agreement provisions to grant the tenant carte blanche to file the same claim regarding his right to sublet indefinitely" simply restates the law on this subject.

IV. SETTLEMENT AGREEMENT PRECLUDES RE-LITIGATION

Mr. Arnold argues on appeal that the Settlement Agreement does not preclude his re-litigation of his alleged right to sublease his unit because the settlement agreement states that:

> "It is not the intent of the PARTIES that they release each other from any claims and/or defense that they may bring in future litigation arising out of PLAINTIFF'S tenancy at the Subject Premises. It is also not the intent of the PARTIES that this Agreement affect any pending or future petitions filed with the City of Oakland Rent Adjustment Program or hearings before the City of Oakland Rent Adjustment Program."

At the time of the settlement the Owner and Arnold had pending before the Rental Board a challenge to a rental increase because of Capital Improvements. It was not intended that the settlement impact that pending appeal or preclude future challenges by Arnold who remained a tenant in the premises. BUT as to issues litigated and now settled those issues were and are now foreclosed from further litigation. To believe otherwise would be to make null and void the entire legal principal of *res judicata* and *collateral estoppel* which precludes the re-litigation of the same issues between the same parties.

Arnold argues further that the landlord's "behavior" in denying him the right to sublease his unit is not the same as his claim of right to sublease his unit. This is a distinction without a difference and nonsensical. Arnold argues that his recent application to sublease had not occurred at the time of the prior settlement and hence the claim is "new." But the issue is the same. His right to sublease has already been resolved by his own settlement.

Arnold next states that "where an ambiguity exists in a legal document ...*contra proferentem*" requires the document be interpreted against the drafter. He claims that the Owner was the drafter of the settlement agreement. This statement is false. Both parties were represented by independent counsel, underwent formal mediation before a third legal counsel and the settlement was the result of arm's length negotiations. The owner was not the drafter of the agreement.

Arnold can't keep the benefits of the settlement agreement with no obligation to comply with its provisions. In a bizarre rationale for his claim Arnold next states: "The settlement agreement rather retains my reasonable right to make one claim about each individual violation of my right to sublet." In other words, Arnold can keep re-litigating the same issue over and over again each time he submits an application to sublease.

Fortunately, the law does not work that way. If it did there would never be an end to any litigation. 'The doctrine of *res judicata* rests upon the ground that the party to be affected has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of the litigants alike require that there be an end to litigation.' "(*Needleman v DeWolf Realty Co., Inc* (2015) Appeal 1711430, Cal App. ; *Fairchild v. Bank of America* (1958) 165 Cal.App.2d 477, 482, italics added.)

In the Court of Appeal case of *Needleman v DeWolf Realty Co Inc.*, a tenant entered into a lease agreement with DeWolf Realty Co for an apartment in San Francisco. After the lease

expired the tenant continued on a month to month basis. In December 2011 the Landlord served a three-day notice on the Tenant alleging that Needleman violated the terms of the lease agreement by harassing other tenants in the complex. The tenant answered the complaint in January 2012. The parties thereafter entered into a settlement agreement that included the right to pursue a stipulated judgment on 24-hour notice that the tenant was required to comply with the lease, that Tenant waived any claims he had, and that tenant agreed that any property left in the unit would be deemed abandoned.

In May 2012 Landlord notified Tenant that it was moving *ex parte* to enter a stipulated judgment for possession against the tenant for violating the settlement agreement. Tenant failed to appear at the hearing. The tenant was locked out. The Tenant then moved to set aside the judgment which was denied. The court holding the settlement agreement was sufficient to enter judgment against the tenant. Tenant appealed, and the Appellate Court affirmed the lower courts Judgment.

The tenant then filed a new lawsuit against the Landlord with claims were largely based on issues that were raised during the unlawful detainer proceeding. After several motions the court dismissed Tenant's case finding his claims were barred by *res judicata* and the settlement agreement. Tenant appealed asserting his claims were not barred by the judgment or the settlement agreement because the settlement agreement violated constitutional protections and the 24-hour notice for the *ex parte* hearing was insufficient. The Court of Appeal held the claims barred by the doctrine of *res judicata* because the tenant had an opportunity to litigate the matter. The Court found that although no trial ever occurred the mere fact that the Tenant filed an answer and chose to settle the matter was sufficient to trigger *res judicata* of the claims. Further he chose not to appear, so his due process rights were not violated.

Arnolds argument that the Rental Board's hearing decision must be rejected as unreasonable because it would render meaningless not only the ...explicit provisions of the settlement agreement but also any and all provisions of the lease agreement granting the tenant the right to sublet" (Appeal p. 4 ¶ 4) is incorrect. Arnold retains all of his rights under his lease and settlement agreements. He simply cannot relitigate issues that were raised and litigated in those proceedings again. Arnold had the opportunity to litigate his alleged "right to sublet" under his lease and chose instead to settle his claim. Arnold as well had the opportunity to carve out exceptions in the settlement agreement preserving his right to re-litigate his right to sublet but chose not to include such provision. As the Court of Appeal stated in *Needleman* supra, "*the mere fact that the Tenant filed an answer and chose to settle the matter was sufficient to trigger res judicata of the claims.*"

V. EVIDENCE OF SETTLEMENT DISCUSSIONS INADMISSIBLE

Mr. Arnold next attempts to bring in partial evidence of negotiations of the parties for the settlement agreement, but the submissions are incomplete, and do not reflect the positions of the parties in settlement and may not be submitted or considered by this Board. All such submissions are inadmissible and barred by Evidence Code § 1152 which states:

> "...Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in any proceeding...on appeal."

Further Mr. Arnold improperly seeks to rewrite the settlement agreement by attempting to introduce evidence of negotiations altering the meaning of the agreement he signed. California's Parole Evidence Rule, Cal. Code of Civil Procedure §1856 precludes any such submission. The Code states:

> (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.

Section 1625 of the Civil Code further provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

The parol evidence rule is a principle that preserves the integrity of written documents or agreements by prohibiting the parties from attempting to alter the meaning of the written document through the use of prior and/or contemporaneous oral or written declarations that are not referenced in the document.

Terms of a contract are commonly proposed, discussed, and negotiated before they are included in the final contract. When the parties to the negotiations do put their agreement in writing and acknowledge that the statement is the complete and exclusive declaration of their agreement, they have "integrated" the contract. The parol evidence rule applies to integrated contracts and provides that when parties put their agreement in writing, all prior and contemporaneous oral or written agreements merge in the writing. Courts do not permit integrated contracts to be modified, altered, amended, or changed in any way by prior or contemporaneous agreements that contradict the terms of the written agreement. Mr. Arnolds submissions are in contravention of this rule and are inadmissible in this proceeding.

VI. OPINIONS INADMISSIBLE AS USURPING POSITON OF BOARD

In his final argument, Arnold asserts that in preparing his case for submission to the Rental Board he was unprepared at the hearing that the only issue that would be decided was the issue of "jurisdiction." (Appeal p 6 ¶ 3). He claims he had no advance notice or counsel available to assist him in dealing with the Rental Board's determination not to take evidence, but to rule on the preclusive effect of *res judicata.*

Mr. Arnold's argument is disingenuous. Mr. Arnold filed his claim before the Rental Board on June 25, 2017. The Owner filed its Response on August 25, 2017 and specifically raised in its first argument:

> "The "action" settled by Mr. Arnold was *David Arnold vs. Farley Levine Properties LLC et al Case No G 16843593* and *David Arnold vs Farley Levine Properties LLC et al Case No RG 15782101* specifically raised the issue whether "Plaintiff ARNOLD is allowed under the Lease Agreement to sublet the Subject Premises." The fact that Arnold has raised this issue in two separate proceedings and failed to pursue the claim but settled the claim for compensation precludes him here from re-litigating these very same issues before the Rental Board or in any other proceeding." :(Owners Opposition p. 9 ¶ 7)

The doctrine of *res judicata* is thereafter fully discussed and sets forth in detail why Arnold is precluded from proceeding. (See Opposition to Petition pp. 9-10)

Arnold had 7 months between the time of filing the Owners opposition to review, analyze, confer with counsel, study, and or research the Owners objections as well as prepare for the hearing that was not held until March 8, 2018 on his Petition.

A. **Improper Opinion Testimony Offered**

Mr. Arnold next claims disadvantage because of "no advance notice" of the Owners position. As stated above, Mr. Arnold had 7 months to address the Owner's position. Nonetheless Arnold asks the Rental Board to consider the opinion of "expert counsel on the matter of interpreting a settlement agreement."

Owner objects on multiple grounds and moves *in limine* for the exclusion of the submission by Arnold of an opinion by his attorney regarding interpretation of the meaning of the settlement agreement which bars Arnolds recovery. First, expert opinion testimony is inadmissible on issues that are considered questions of law or how a contract should be legally interpreted. (CCP § 2034; *People v. Torres 33* Cal. App. 4th 37, 45-46 (1995) *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal. App. 4th 1094, 1100 (expert's interpretation of the meaning of a contract is inappropriate). Brian D. Chase, *Expert Witnesses and Motions in Limine*,). Here Mr. Arnold seeks to supplant the opinion of the Rental Board, by submitting third party opinion on how this body should rule. It is the job of the Rental Bard to interpret the law on the matter before it. The submission is inappropriate, inadmissible and irrelevant.

There are additional multiple grounds for objection to admission of Mr. Claytor's written opinion which include: (1). He is not a qualified expert; (2) has no particular focus or expertise in any subject; (3) no experience or expertise in landlord tenant law: (4) he has not been disclosed as an expert; and (5) he should know, as an attorney, that his opinion testimony is precluded from consideration by the Rental Board. CCP § 2034; CCP § 2034(j)(1); *Kalaba v. Gray*, 116 Cal. Rptr. 2D 570; *C.C.P.* § 2034(f)(2)(B). *Bonds v. Roy*, 20 Cal. 4th 140, 147 (1999).

Arnold has failed to comply with any of the rules regarding use of expert testimony and admits that he is offering the opinion "interpreting the settlement agreement" which is precluded as a matter of law. As such the submission of opinion testimony by Mr. Claytor must be excluded.

VII. CONCLUSION

For each and all of the foregoing reasons the Rental Board Hearing Officers 'ruling should be affirmed.

DATE: August 29, 2018

Respectfully Submitted

Barbara S. Farley

Barbara S. Farley, Owner/Manager
Farley Levine Properties LLC

CITY OF OAKLAND, CALIFORNIA
RENT ADJUSTMENT PROGRAM

PROOF OF SERVICE

File Name: Arnold v. Farley Levine Properties LLC

Property Address: 4246 Gilbert Street Oakland, CA 94611

Case Number: T17-0371

Appeal Hearing Date:

I, the undersigned, declare that I and was at the time of service of papers herein referred to, over the age of eighteen years and not a party to the within action. My Address is 1052 Park Lane, Piedmont, California 94610. On August 29, 2018 I served the following document(s).

RESPONSE OF OWNER TO TENANT APPEAL

on the parties as shown below:

David Arnold
4246 Gilbert Street
Oakland, California 94611

___ **BY FACSIMILE [Code Civ. Proc sec. 1013(e)]** by sending a true copy from The Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's facsimile transmission telephone number (510- 652-9592) to the fax number(s) set forth below, or as stated on the attached service list. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

I am readily familiar with the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC's practice for sending facsimile transmissions, and know that in the ordinary course of the Offices business practice the document(s) described above will be transmitted by facsimile on the same date that it (they) is (are) placed at the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC for transmission.

X **BY U.S. MAIL [Code Civ. Proc sec. 1013(a)]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC ,

7 King Avenue, Piedmont, California 94611 in accordance with the Offices ordinary business practices.

I am readily familiar with the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that in the ordinary course of the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's business practice the document(s) described above will be deposited with the United States Postal Service for collection and mailing on the same date that it (they) is (are) placed at the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's with postage thereon fully pre-paid.

BY OVERNIGHT DELIVERY [Code Civ. Proc sec. 1013(d)] by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by UPS 6114 LA SALLE AVE **OAKLAND**, CA 94611 in accordance with the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC '

s ordinary business practices.

I am readily familiar with the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's business practice the document(s) described above will be delivered to an authorized courier or driver authorized by UPS's Overnight to receive documents on the same date that it (they) is are placed at the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC ' for collection.

X **BY PERSONAL SERVICE [Code Civ. Proc sec. 1011]** by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and delivery at the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC ', causing personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's practice for the collection and processing of documents for hand-delivery and know that in the ordinary course of the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's business practice the document(s) described above will be taken from the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's and hand-delivered to the document's addressee (or left with an employee or person in charge of the addressee's office) on the same date that it is placed at the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC .

☐ **BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6]** by electronically mailing a true and correct copy through the Offices of Barbara S. Farley, manager to FARLEY LEVINE PROPERTIES LLC 's electronic mail system to the e-mail address(s) set forth below, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 29th day of August 2018

Taylor E. Ferris