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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CV AMALGAMATED LLC dba CALIGROWN, a California limited liability company,

Plaintiff,

v.

CITY OF CHULA VISTA, a California public entity; and DOES 1 through 100,

Defendants.

Case No. 24cv1348 RSH DDL

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT

Date: October 31, 2024
Judge: Hon. Robert S. Huie
Crtrm.: 3B

[Filed concurrently with the Notice of Motion; Request for Judicial Notice; Declaration of Alena Shamos with Exhibits; and Certification of Interested Parties]

Assigned to:
Hon. Robert S. Huie, Courtroom 3B
Hon. David D. Leshner, Courtroom 3A

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a cannabis permitting case. In January 2019, CV Amalgamated LLC dba Caligrown ("Plaintiff" or "CVA") filed applications for four storefront retail cannabis licenses pursuant Ordinance No. 3418, Defendant City of Chula Vista's ("City") brand new ordinance regulating commercial cannabis businesses. The City received a total of 136 applications, which contractor Hinderliter, de Llamas & Associates ("HdL") scored. Relying on HdL's scoring, the City's Finance Director rejected CVA's applications.

On September 22, 2020, CVA filed a Petition for Writ of Mandate in San Diego Superior Court (the "Writ Action") to challenge the City's rejection of CVA's applications. Although the Petition prayed for an order enjoining the City from issuing any licenses to others while the litigation was pending, CVA ***did not*** (1) name other applicants for storefront retail cannabis licenses as real parties in interest; (2) appeal the trial court's denial of its temporary restraining order at the inception of the Writ Action (or otherwise pursue a preliminary injunction); or (3) appeal the portion of the judgment entered in 2021 denying CVA's request for a permanent injunction prohibiting the City from processing and issuing licenses to other applicants, or invalidating those licenses, while CVA's Writ Action and subsequent appeal were pending.

After the trial court denied the writ in its entirety, CVA appealed in part as discussed below. In a published opinion captioned *CV Amalgamated LLC v. City of Chula Vista*, 82 Cal. App. 5th 265 (2022), the California Court of Appeal reversed the 2021 judgment (as to the portion appealed) and ordered the trial court to issue a writ compelling the City to process and re-score CVA's applications in accordance with the City's rules. The trial court did so in 2023, but no Court ordered the City to issue licenses to CVA or to invalidate existing licenses.

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The City promptly complied with the writ and re-scored CVA's applications. But because the City had granted all eight available storefront retail cannabis licenses to other applicants while the Writ Acton and appeal were pending, the City rejected CVA's applications.

Stymied by its own decision not to name other applicants as defendants or to seek to enjoin the City from issuing permits in the Writ Action, CVA filed this action seeking more than $13,842,281.81 in "general, special, and consequential damages" for the City's alleged violations of CVA's civil rights and negligence.

Following meet and confer efforts regarding the defects in CVA's original Complaint, CVA's amendment thereof (Dkt. 6), and further efforts to meet and confer[1], the City files this motion to dismiss CVA's First Amended Complaint ("FAC"). The Motion should be granted without leave to amend for five reasons. First, CVA's entire FAC is barred by res judicata. CVA could have included the 42 U.S.C. § 1983 ("Section 1983") and Negligence claims in its Writ Action. Having failed to do so, CVA is barred from pursuing them here. Second, because CVA's claims accrued in 2020, its October 13, 2023 government claim was untimely under Government Code section 911.2, which provides a six-month deadline to bring a claim against state and local governmental entities in California for personal injury, death, or personal property damage. Third, the FAC is time barred by the applicable two–year statute of limitations for Section 1983 and Negligence. Cal. Code Civ. Proc. §§ 335, 335.1 (negligence); *Shalabi v. City of Fontana*, 11 Cal. 5th 842, 847 (2021) (Section 1983); *IV Sols., Inc. v. Off. Depot Emp. Welfare Benefit Plan*, No. EDCV071603VAPJCRX, 2008 WL 11334489, at *6 (C.D. Cal. May 23, 2008).

Fourth, even if the FAC is not barred by the statute of limitations and/or res judicata, CVA's First Cause of Action ("COA") under Section 1983 fails as a matter

[1] Dkt. 1 (Removal package, including original Complaint; Declaration of Alena Shamos ("Shamos Dec.) ¶¶ 9–14; Exhs. G and H thereto.

of law because the City cannot be sued under Section 1983 for constitutional violations inflicted solely by its employees or agents. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Rather, CVA must allege facts demonstrating "that an official policy, custom, or pattern on the part of [defendant] was the actionable cause of the claimed injury." *Id.* CVA has failed to satisfy this burden. And even if CVA had alleged such facts, CVA failed to plead sufficient facts to state a cause of action for violations of Equal Protection or Due Process.

Finally, CVA's Second COA for Negligence fails as a matter of law because CVA failed to identify any statutory basis for imposing such liability against the City. As explained below, the California Government Claims Act abolished all common law or judicially declared forms of liability for public entities except for liability based on the state or federal constitution. Because CVA has not identified a statute under which the City can be liable for negligence, the Second COA fails as a matter of law. Cal. Civ. Proc. Code § 335, 335.1.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. The City's Cannabis Ordinance.

In 2018, the City enacted an ordinance regulating commercial cannabis businesses (the "Cannabis Ordinance"). *CV Amalgamated LLC*, 82 Cal. App. 5th at 270. Among other things, the Cannabis Ordinance allows for a maximum of eight storefront retail cannabis business licenses, with up to two licenses in each of the City's four council districts (the Council Districts). *Id.* The procedure to apply for a license is set forth in the Cannabis Ordinance and supplemented with regulations. *Id.*

The application process has two phases. *Id.* In Phase One, an applicant submits an application with required information. *Id.* at 270–71. The Finance Director and Police Chief review the Phase One application to determine whether it meets minimum requirements. *Id.* at 271. The Finance Director's discretion to reject a Phase One application is proscribed by the Ordinance. *Id.* at 271, n.4. "The

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Cannabis Ordinance does not provide the Finance Director with the discretion to reject the application for any reason beyond those listed." *Id.*

An applicant approved in Phase One qualifies for Phase Two. *Id.* To determine which applicants are allowed to submit a Phase Two application, applicants are scored in four categories: (1) Experience/Qualifications of the business owner/team (150 points); (2) Liquid Assets (50 points); (3) Business Plan (150 points) and (4) Operating Plan (150 points). *Id.* at 271–72. Applicants with the highest ranking in this discretionary process are in line to receive permits until all storefront licenses are taken. *Id.* at 272, 284 ("In deciding what merit-based score to assign to an applicant, the City indisputably exercises discretion and judgment ….").

The City began accepting applications in 2019. It received a total of 136 applications for retail cannabis license activities, 84 of which were for the 8 storefront licenses (2 per Council District). *Id.* at 273, n.6.

B. CVA's Application.

In January 2019, CVA applied for four storefront retail cannabis licenses, one in each of the four Council Districts. However, the FAC addresses CVA's applications in Council Districts 1, 3, and 4. Dkt. 6 at ¶ 14. The City hired HdL to score applications. *CV Amalgamated LLC*, at 273, n.6.

On January 31, 2020, the Finance Director and Police Chief rejected CVA's applications because, among other things, CVA failed to rank high enough in the merit-based evaluation, which HdL scored. Dkt. 6 at ¶ 15; *CV Amalgamated LLC*, at 274. CVA appealed to the City Manager. Dkt. 6 at ¶ 15. Following an administrative hearing, the City Manager granted CVA's appeal and directed HdL to re-score its applications. *CV Amalgamated LLC*, at 275.

On August 21, 2020, the City sent CVA a letter enclosing (1) a letter from HdL describing its re-scoring; and (2) revised notices of decision from the Finance Director notifying CVA its applications had been rejected because they "failed to rank high enough to be given a Phase Two application slot." *CV Amalgamated LLC*,

at 275–76; Dkt. 6 at ¶ 16. The notices advised CVA the rejection was final and could not be appealed to the City Manager. *CV Amalgamated LLC*, at 276.

On September 22, 2020, CVA filed the Writ Action in San Diego Superior Court to challenge the City's denial of CVA's District 1, 3, and 4 applications. Request for Judicial Notice ("RJN") Exh. A; Shamos Dec., Exh. A (2020 Petition in Writ Action without Exhibits ("Writ Pet."[2]). CVA's Writ Petition alleged causes of action for traditional mandamus (Cal. Code Civ. Proc. § 1085), administrative mandamus (Cal. Code Civ. Proc. § 1094.5), declaratory relief, and promissory estoppel. Shamos Dec., Exh. A, Writ Pet. at ¶¶ 67-85.

The Writ Petition sought, among other things, a (1) writ of mandate enjoining the City from issuing any "City Licenses" related "to storefront retail cannabis commercial activity . . . in City districts 1, 3, and 4" and for a declaration that any "City Licenses" issued before judgment would be declared null and void; and (2) preliminary and permanent injunctions restraining the City from issuing any "City Licenses" for storefront retail cannabis in City districts 1, 3, and 4 until CVA's application had been reinstated and correctly rescored. Shamos Dec., Exh. A at p. 32–33.

Almost immediately after serving the Petition on the City in October 2020, CVA applied for a restraining order halting the City's processing of license applications and issuance of licenses. RJN Exh. B, Shamos Dec., Exh. B. The trial court denied CVA's application on October 29, 2020. RJN Exh. C; Shamos Dec., Exh. C. CVA never refiled its application, and never appealed the trial court's October 29, 2020 order. See, Cal Code Civ. Proc. § 904.1(a)(6) (order denying injunction appealable).

[2] Exhibits to the Petition in the Writ Action are almost 170 pages long, and all but the Ordinance and Regulations are excluded for brevity and the convenience of the Court. They can be made available at the Court's request.

On January 29, 2021, the trial court denied CVA's motion for a peremptory writ of mandate on the merits.[3] This time, CVA appealed, but did not seek an order enjoining the City from processing other applications during the appeal. CVA's appeal was limited in scope. CVA sought an order directing the trial court to issue a writ of mandate compelling the City to "(1) to rescind its rejection of CVA's applications for storefront retail cannabis business licenses in Council Districts One, Three and Four; (2) to process those applications in accordance with the City's Cannabis Ordinance and Cannabis Regulations; and (3) to rescore those applications in their entirety (not just with respect to the Experience/Qualifications category) in compliance with the directive of the City Manager." *CV Amalgamated LLC*, at 278.

The Court of Appeal reversed the judgment and ordered the trial court to issue a writ on two grounds: (1) that the Finance Director breached ministerial duties by rejecting CVA's applications when they met minimum requirements (*id.* at 280–84), and (2) that the City breached its ministerial duty because HdL failed to re-score CVA's applications "in compliance with the directive of the City Manager." *Id.* at 284–86.

The Court of Appeal noted CVA's narrowed request for relief on appeal (*id.* at 288, 298) concluding "[a]s the relief that CVA seeks in this appeal does not include an order invalidating any licenses that the City may have issued to other parties, other parties will not be prejudiced by any writ that we direct the trial court to issue." *Id.* The Court also distinguished authority regarding the effect of its holding on third parties because CVA sought no such relief. *Id.* at n.16.

On remand, the Superior Court entered a judgment with the limitation of scope articulated by the Appellate Court, and a writ compelling the City to (1)

[3] After the Court denied Plaintiff's motion for a peremptory writ of mandate, Plaintiff voluntarily dismissed its claims for administrative mandamus, declaratory relief, and promissory estoppel. *CV Amalgamated LLC*, at 278 n.13.

rescind its rejection of CVA's applications; (2) process CVA's applications in accordance with the City's Cannabis Ordinance and Cannabis Regulations; and (3) re-score CVA's applications in their entirety without regard to formatting "in compliance with the directive of the City Manager." (See RJN Exh. D, Shamos Dec., Exh. D; Dkt. 6 at ¶ 16.)

In September 2023, the City re-scored CVA's applications in accordance with the judgment and writ. Dkt. 6 at ¶ 17. That same month, the City notified CVA of its new scores and that its applications were rejected because the City already issued the maximum number of licenses allowed for Council Districts 1, 3, and 4 to other applicants.[4] RJN Exh. E, Shamos Dec., Exh. E.

Thereafter CVA submitted a government claim to City. Dkt. 6 at ¶¶ 19 -20. The City rejected the claim, in part based on untimeliness. RJN Exh. F; Shamos Dec., Exh. F. This action followed.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of a complaint's allegations. In ruling on a Rule 12(b)(6)

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[4] The City had no duty to cease processing storefront cannabis license applications, or issuing licenses, pending Plaintiff's state court litigation. It could not simply cease following the mandatory procedures articulated in its laws, and halt processing of third-party applications in violation thereof, because litigation was pending. See, CVMC Chapter 5.19; CV Can. Regs. § 0501 (Exhibits 1 and 2 to RJN Exh. A). Under California law, Plaintiff had the burden of making requisite arguments, and meeting the legal standards required to obtain a court order staying the City's process pending litigation. Cal. Civ. Code., §§ 526, subd. (b)(4) and 3423, subds. (d) & (f); *Tahoe Keys Prop. Owners' Assn. v. State Water Res. Control Bd.*, 23 Cal. App. 4th 1459, 1472–1473 (1994); see, *O'Connell v. Superior Ct.*, 141 Cal. App. 4th 1452, 1471 (2006); *Ciani v. San Diego Tr. & Sav. Bank*, 233 Cal. App. 3d 1604, 1621 (Cal. Ct. App. 1991) No stay or injunction against the City's processing of applications, or issuance of licenses, was ever ordered. And no automatic stay was ever in effect. see, *Reed v. Superior Ct.*, 92 Cal. App. 4th 448, 453–454 (2001)(appeal of order denying injunction not stayed pending appeal); *Hicks v. Michael*, 15 Cal. 107, 109-110 (Cal. 1860).

motion, a court will consider the allegations contained in the pleadings, exhibits attached to the complaint and matters properly subject to judicial notice. *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

A court should grant a 12(b)(6) motion for either "lack of a cognizable legal theory" or "absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). A properly pled complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The court must accept factual allegations as true and draw all reasonable inferences in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337 –38 (9th Cir. 1996).

However, the court need not accept threadbare recitals of a cause of action supported by conclusory statements alleged as "facts." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 555). A plaintiff must allege specific facts, not conclusory allegations, for each cause of action. *McCarthy v. Mayo*, 827 F.2d 1310, 1316 (9th Cir. 1987). And CVA must provide more than a "formulaic recitation" of the elements of a cause of action. *Twombly*, 550 U.S. at 555, quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

To avoid dismissal, the FAC must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A claim is facially plausible if a plaintiff pleads facts that allow a court to draw a reasonable inference the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more

than a sheer possibility that a defendant has acted unlawfully." *Id.*., quoting *Twombly*, 550 U.S. at 557. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility for entitlement to relief.'" *Id*., quoting *Twombly*, 550 U.S. at 557. A court cannot assume, however, that "the [plaintiff] can prove facts that [he or she] has not alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

The Court should dismiss this action in its entirety, as a preliminary matter, because it is evident from the face of the FAC and judicially noticeable evidence it is barred by the doctrine of res judicata. The entire action is also time barred under the applicable statute of limitations and for failure to present a timely government claim *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (statute of limitations); Cal. Gov't Code § 911.2 (government claim deadline). Further, the FAC should be dismissed because both causes of action, as detailed *infra*, "even when construed in the light most favorable to plaintiff, [they] fail[] to plead sufficiently all required elements of a cause of action." *Student Loan Mktg. Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998).

IV. THE FAC IS BARRED BY RES JUDICATA

"Res judicata, or claim preclusion, prohibits lawsuits on 'any claims that were raised *or could have been raised*' in a prior action." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (emphasis added). To determine whether res judicata applies, courts look to whether "there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011).

All three factors are present here. Factors one and two are discussed below. The third factor, privity, is easily disposed of as the parties to both actions are identical. Therefore, CVA "was required to bring at one time all of the claims against" the City "relating to the same transaction or event." *Adams v. California Dep't of Health Servs.*, 487 F.3d 684, 693 (9th Cir. 2007), overruled on other grounds by *Taylor v. Sturgell*, 553 U.S. 880 (2008). CVA failed to do so when it filed its Writ Action in 2020, instead opting to file this successive, duplicative action almost four years later.

The City respectfully asks this Court to dismiss CVA's FAC "with prejudice …[thereby] "preventing [CVA] from "fragment[ing] a single cause of action and [ ] litigat[ing] piecemeal the issues which could have been resolved in one action." *Flynn v. State Bd. of Chiropractic Examiners*, 418 F.2d 668, 668 (9th Cir. 1969) (per curiam).

A. <u>The Claims Raised in the FAC are the Same as in the Writ Action.</u>

In determining whether there is an "identity of claims," courts assess four factors: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Liquidators of European Federal Credit Bank*, 630 F.3d at 1150. The fourth factor—the same nucleus of facts—is the most important. *Id.* Indeed, if the transactional or common nucleus of operative fact criterion exists, the court need not consider the other factors and res judicata will apply. See *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005) ("We have often held the common nucleus criterion to be outcome determinative under the first res judicata element."). And "[w]hether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Int'l Union of Operating Engineers-Emps.*

Const. Indus. Pension, Welfare & Training Tr. Funds v. Karr, 994 F.2d 1426, 1429 (9th Cir. 1993).

The FAC and the Writ Action (in which *CV Amalgamated* was decided) involve the same parties and arise from the same nucleus of facts. *See* FAC and Shamos Dec. Exh. A. As it does here, CVA alleged in the Writ Action that in January 2019, it applied for storefront retail cannabis licenses in Districts 1, 3, and 4 of the City, as well as District 2. Dkt. 6 at ¶ 14; Writ Pet., ¶ 26, p. 9. CVA alleged its applications "exceeded all requirements" for licenses in Districts 1, 3, and 4. Dkt. 6 at ¶ 14; Writ Pet., ¶ 1, p. 2:3-4. CVA alleged it incurred costs of hundreds of thousands of dollars in reliance on the City's laws and duties in preparing and submitting its applications and was entitled to damages. Dkt. 6 at ¶ 14, 30, 35; Writ Pet., ¶ 85, p. 31, ll.15-22. It alleged the City violated its laws and duties in rejecting and improperly rescoring CVA's District 1, 3, and 4 applications, and in so doing the City prejudiced and harmed CVA and taxpayers. Dkt. 6 at ¶¶ 14, 15; Writ Pet., ¶ 1, p. 2:8-10. CVA asked the Court to overturn the City's rejections. And, demonstrating its knowledge that the City would process other applications, and issue licenses, during the pendency of the Writ Action (see, Dkt. 6 at ¶¶ 17-18), CVA pled:

> The City must also be enjoined from issuing any cannabis business licenses until CVA's applications have been properly rescored and CVA has been given a fair interview, and thus the opportunity to show it should be advanced to Phase Two of the application process and ultimately be issued a cannabis business license.

Writ Pet., ¶ 45, p.19:10-13, ¶ 81, p. 30, ll. 20-21; see, Writ Pet. Prayer ¶¶ 1 4, & 5, p. 32:3-7 & 33. CVA also asserted a cause of action for Promissory Estoppel in which it sought damages arising from the City's alleged violations of its laws and denial of CVA's applications. Writ Pet., ¶¶ 82-85.

Both suits involve the alleged infringement of the same right; the City's denial of CVA's 2019 cannabis permit applications. Thus, substantially the same

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"evidence" would be presented in this case as was presented in Writ Action, the record for the City's denial of CVA's cannabis license applications.

It matters not that CVA has added new causes of action to its FAC in this lawsuit. In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003), the court held that plaintiff's claims were barred by res judicata although they asserted additional causes of action. The Court stated in part:

> Res judicata bars relitigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits. It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought. *Id.* at 1078.

The Court went on to state:

> Now, [plaintiff] has returned to court and filed a new action essentially seeking relief from the same alleged wrongs it unsuccessfully protested before. Once again, the plaintiffs ask for damages based on the same nucleus of facts. *Id.*

Stated another way, "res judicata applies to issues that were not raised in the prior action, if they "could have been raised in that action," ... and 'applies even where new claims are based on newly discovered evidence, unless the evidence was either fraudulently concealed or it could not have been discovered with due diligence." *Cho v. Blackberry Ltd.*, 991 F.3d 155, 168 (2d Cir. 2021).

CVA could and should have, pursued the claims and remedies it seeks here in 2020 when it filed its Writ Action. It failed to do so and, beyond conclusory allegations, fails to allege how it was prevented or what evidence was "fraudulently concealed or …could not have been discovered with due diligence." *Id.* To the contrary, CVA's allegations and actions in the Writ Action show its awareness.

This constitutes a waiver supporting the bar of res judicata. Thus, to the extent CVA has viable claims against the City (which it does not), they are all barred by res judicata because all four factors recited above are met. It is thus within this Court's discretion to dismiss the present litigation.

B. There was a Final Judgment on the Merits.

The issue of whether the City should have been prohibited from processing third party applications—the foundation for CVA's FAC, was fully litigated, and decided, in Writ Action. CVA sought an injunction barring the City from processing applications and issuing licenses, and did not appeal the Superior Court's repeated denial thereof in 2020 and 2021. Exh. A and B to the Shamos Dec., *CV Amalgamated LLC*, at 288, 298; *see also Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("To determine the preclusive effect of a state court judgment, federal courts look to state law.")

Under California law, portions of a judgment not appealed are "deemed final, being a final judgment of the facts and rights which they determine…." *Gonzales v. R. J. Novick Constr. Co.*, 20 Cal. 3d 798, 804–805 (1978) (quoting *Whalen v. Smith*, 163 Cal. 360, 362–363 (1912)); *see also ReadyLink Healthcare v. Cotton*, 126 Cal. App. 4th 1006, 1015 (2005). "Modification or reversal of the portion of the judgment from which the appeal has been taken has no effect upon the other portions." *American Enterprise, Inc. v. Van Winkle,* 39 Cal.2d 210, 216 (1952); *People v. Buycks*, 5 Cal. 5th 857, 876 (2018) (judgment is final when the time to appeal *expires*).

Giving CVA a second bite at the apple would violate the doctrines of res judicata and primary rights, as well as the principles of judicial efficiency and economy. "The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." *Aerojet-Gen. Corp. v. Am. Excess Ins. Co.*, 97 Cal. App. 4th 387, 402 (2002) (original emphasis). That different relief is sought in a second suit is irrelevant, otherwise " 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' "

Interinsurance Exch. of the Auto. Club v. Superior Ct., 209 Cal. App. 3d 177, 181 (Cal. Ct. App. 1989).

The FAC should be dismissed as successive and duplicative of the Writ Action, and the question of whether the City could issue third-party licenses has already been decided, thereby precluding this action. *Barker v. Hull*, 191 Cal. App. 3d 221, 236 (Cal. Ct. App. 1987); *Lucido v. Superior Ct.*, 51 Cal. 3d 335, 341 (1990) ("Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.") Despite CVA's claim that it is attempting to save taxpayer funds, the opposite is true. CVA wastes public funds by filing improper, successive litigation, in pursuit of its desire for a cannabis license.

V. THE FAC IS TIME BARRED

This action is also time barred. The statute of limitations for Section 1983 and negligence claims is two years. Cal. Civ. Proc. Code § 335, 335.1 (negligence); *Shalabi*, 11 Cal. 5th at 847 (Section 1983).

CVA's Section 1983 and Negligence Claims accrued in August 2020, because that is when CVA knew, or had reason to know of, or suspect, its claims. Cal. Gov't Code § 901; *Jefferson v. Cnty. of Kern*, 98 Cal. App. 4th 606, 610 (2002). The statute has long since run. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. 2007) (42 U.S.C. § 1983); *Torres v. Dep't of Corr. & Rehab.*, 217 Cal. App. 4th 844, 849 (2013) (negligence). This litigation should therefore be dismissed as untimely because the 2024 Complaint, and CVA's underlying October 2023 government claim (discussed in section under Section VII), were both untimely. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

VI. CVA'S SECTION 1983 CLAIM FAILS AS A MATTER OF LAW

There is "no cause of action directly under the United States Constitution." *Golden Gate Hotel Ass'n v. City & Cnty. of San Francisco*, 18 F.3d 1482, 1486 (9th Cir. 1994). Therefore, "a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Id.* A explained below, CVA's First COA against

the City under Section 1983 fails as a matter of law because CVA has failed to allege (1) that the alleged constitutional violation was caused by an official City policy, custom, or pattern; (2) sufficient facts to state an actionable equal protection claim; (3) the requisite property interest for a procedural or substantive due process claim; or (4) that the City's allege conduct "shocks the conscience," as required for a substantive due process claim.

A. CVA Does Not Allege A Government Policy, Practice Or Custom.

Local governments may not be sued under Section 1983 for constitutional violations inflicted solely by their employees or agents. *Monell*, 436 U.S. at 694. In other words, a "municipality cannot be held liable under § 1983 on a respondeat superior theory." (*Id.* at 692.) A municipality is only liable when a violation of a federally protected right can be attributed to: (1) an official municipal policy, *id.*; (2) "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law," *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (citation and quotations omitted); (3) a decision made or ratified by a person with "final policymaking authority," *id.* at 123, 127; or (4) inadequate training or supervision that is deliberately indifferent to an individual's constitutional rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). To state a *Monell* claim, CVA must allege facts demonstrating "that an official policy, custom, or pattern on the part of [defendant] was the actionable cause of the claimed injury." *Apothio, LLC v. Kern Cnty.*, 599 F. Supp. 3d 983, 1011 (E.D. Cal. 2022).

Complaints pleading *Monell* liability must comply with principles set forth in *Twombly* and *Iqbal*, specifically (1) the complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively"; and (2) the "factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing

party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *see also, AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 636–37 (9th Cir. 2012).

The FAC contains several allegations intended to satisfy *Monell*. None is sufficient. First, CVA alleges that the City Manager adopted a policy of rejecting all applications that received fewer than 400 points. Dkt. 6 at ¶ 23. CVA's allegation is contradicted by the City's ordinances and judicially noticeable facts. Under the City's Cannabis Ordinance, permits are awarded based on (1) the applicant's score in four categories; and (2) the number of available permits in each council district. *CV Amalgamated LLC*, 82 Cal. App. 5th at 271–72. CVA did not receive permits in 2020 because its "score of 385 [] failed to rank high enough to be given a Phase Two application slot." (*Id.* at 276.) CVA did not receive permits in 2023 — when the City re-scored its applications to comply with the Writ — because "the allowed number of licenses" in each district had "been issued, and there are no available licenses." Shamos Decl., Exh. E at p. 5, ll. 13-17. CVA failed to plead specific facts showing that the City Manager adopted a policy of rejecting all applications that scored fewer than 400 points, or that that CVA did not receive a permit because its applications received fewer than 400 points.

Second, CVA alleges the City Manager "ratified" HdL's failure to correctly score its applications. Dkt. 6 at ¶¶ 24, 25. Municipal ratification may be the basis of municipal liability under Section 1983 if "an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it." *Gillette v. Delmore*, 979 F.2d 1342, 1346–47 (9th Cir. 1992). However, there must be evidence that the policymaker made "a deliberate choice to follow a course of action . . . from among various alternatives . . . with respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986); *Gillette*, 979 F.2d at 1348. "Simply going along with discretionary decisions made by one's

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subordinates is not a delegation to them of the authority to make policy." *Praprotnik*, 485 U.S. at 130.

CVA fails to plead facts showing the City Manager "ratified" HdL's scoring of CVA's application. Rather, the FAC and judicially noticeable facts establish (1) the City Manager (aka "hearing officer") granted CVA's administrative appeal challenging HdL's original scoring and directed HdL to re-score CVA's application, Dkt. 6 at ¶ 15; *CV Amalgamated LLC*, 82 Cal. App. 5th at 274–75, 285; (2) HdL only re-scored one of the four categories in CVA's application, Dkt. 6 at ¶ 16, *CV Amalgamated LLC*, 82 Cal. App. 5th at 285–86; (3) the City's decision — based on HdL's re-score — that CVA had not scored high enough to be eligible for a permit was not appealable to the City Manager, *CV Amalgamated LLC*, 82 Cal. App. 5th at 276; and (4) CVA thus filed its Writ Action. Dkt. 6 at ¶ 16.

CVA fails to allege any specific facts that would indicate the City Manager knew of and specifically approved HdL's failure to re-score CVA's applications following the City Manager's decision to grant CVA's administrative appeal. The fact that "the City Manager did not overrule" HdL when the Municipal Code did not provide for a second administrative appeal "cannot form the basis of municipal liability under section 1983." *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). As the Ninth Circuit confirmed, "[t]o hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle *respondeat superior* liability into section 1983 law." *Gillette*, 979 F.2d at 1348.

The FAC fails to plead facts establishing municipal liability under *Monell*. Accordingly, the City's motion to dismiss CVA's first cause of action should be granted and the claim dismissed with prejudice. *Segura v. City of La Mesa*, 647 F. Supp. 3d 926 (S.D. Cal. 2022) (granting motion to dismiss where no policy alleged); *Apothio, LLC*, 599 F. Supp. 3d at 1013–14 (granting motion to dismiss where inadequate *Monell* allegations were alleged); *A.B. v. City of Santa Ana*, No.

SACV181553DOCADS, 2019 WL 1578380, at *4–5 (C.D. Cal. Feb. 11, 2019) (granting motion to dismiss where plaintiff failed to allege specific facts regarding municipal ratification).

B. Even if CVA Pleads Sufficient Facts To Establish a Municipal Policy Under *Monell*, CVA Pleads No Constitutional Violation.

Even assuming, *arguendo*, that CVA pleads an actionable policy, practice, or custom, CVA must still plead specific facts establishing it had a constitutional right of which it was deprived. *Van Ort v. Est. of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). As explained below, CVA did nothing more than invoke the constitutional buzzwords of "equal protection" and "due process." CVA has thus failed to plead an actionable Section 1983 claim as a matter of law.

C. CVA's Equal Protection Claim Fails as a Matter of Law.

The purpose of the Fourteenth Amendment is to protect individuals from arbitrary and intentional discrimination. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000). CVA has not alleged membership in a protected class. See Dkt. 6 at ¶¶ 1-35. While a successful Equal Protection claim can be brought by a "class of one" when a plaintiff "alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," (*Olech*, 528 U.S. at 564-55) such a claim requires CVA to demonstrate three elements: (1) CVA was treated differently than other similarly situated persons; (2) the different treatment was intentional; and (3) there was no rational basis for the difference in treatment. *Id.* at 564.

CVA has not alleged it was intentionally treated differently from others similarly situated or that there is no rational basis for the treatment. Dkt. 6 at ¶¶ 1-35. Accordingly, the FAC fails to plead an actionable Equal Protection claim. *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1123 (9th Cir. 2022) (affirming order granting motion to dismiss where plaintiff failed to allege that it was similarly situated); *Walker v. Woodford*, 454 F. Supp. 2d 1007, 1018–19 (S.D. Cal. 2006)

(granting motion to dismiss Equal Protection claim where plaintiff failed to allege that he had been intentionally treated differently than others similarly situated); *Prime Healthcare Servs., Inc. v. Harris*, 2017 WL3525169 at *12-15 (S.D. Cal. Aug. 16, 2017) (same).

D. CVA's Due Process Claim Fails as a Matter of Law.

CVA alleges a Due Process violation resulting from the denial of its permit application. But, to succeed on a Due Process claim – substantive or procedural – CVA must first demonstrate it was deprived of a constitutionally protected property interest. *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). CVA has not made no such allegations.

A person may have a constitutionally protected property interest in a government benefit, such as a license or permit. *The Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *see also Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001). A person must, however, have more than "an abstract need or desire" for the government benefit to have a "property interest" in it. *Roth*, 408 U.S. at 577. Rather, they must have "a legitimate claim of entitlement to it." *Id.* "State law creates a legitimate claim of entitlement when it imposes significant limitations on the discretion of the decision maker." *Gerhart*, 637 F.3d at 1019 (citations and internal quotation marks omitted).

In the Ninth Circuit, a person has a property interest in a permit "when a state law or regulation requires that the permit be issued once certain requirements are satisfied." *Id.*; *see also Braswell v. Shoreline Fire Dep't*, 622 F.3d 1099, 1102 (9th Cir. 2010); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (property interest existed where city had a ministerial duty to issue building permit "once an applicant's building plans comply with the code and other applicable laws and the fees are paid"). But procedural requirements do not necessarily transform an expectation of an interest into a constitutionally protected property interest. *Goodisman v. Lytle*, 724 F.2d 818, 820–21 (9th Cir. 1984). Where the decision

maker retains significant discretion to grant or deny the permit, a property interest is not created. *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010).

Here, CVA had no constitutionally protectible property interest in a cannabis permit for several reasons. *ARMLA One, Inc. v. City of Los Angeles*, No. 2:20-CV-07965-SB-RAO, 2020 WL 8372965, at *7 (C.D. Cal. Dec. 9, 2020). First, the number of available licenses was limited because the "Cannabis Ordinance allows for a maximum of eight storefront retail cannabis business licenses, with up to two licenses in each of the City's four council districts (the Council Districts)." *CV Amalgamated LLC*, at 298 (citing CVMC § 5.19.040). Second, throughout the City's two-phase application process, the City retained discretion to reject applications. *Id.* at 271–272. In fact, the phase one application process that CVA completed only determined eligibility to participate in phase two. And, as the *CV Amalgamated* Opinion explained, "[a]n applicant who is approved in Phase One is qualified to participate in Phase Two, but depending on the number of qualified candidates, that applicant may not end up being offered a Phase Two application slot." *Id.* at 271. Should applicants be scored on the merits during Phase Two, "there are no binding rules requiring that any particular score be given in any particular circumstance." *Id.* at 284.

Even if applicants reach Phase Two, they have no guarantee whatsoever that they will receive a license. "Under [the City's] selection process, an applicant for a storefront license that is deemed qualified in Phase One remains eligible to possibly obtain an application slot in Phase Two until all of the storefront licenses are issued in each Council District." *Id.* at 273. CVA identifies no law or rule requiring the City to issue a license to every applicant.

The issuance of a storefront cannabis license, accordingly, is not "mandatory in nature." *ARMLA One, Inc.*, 2020 WL 8372965, at *7, citing *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998). Accordingly, the City's Motion to dismiss CVA's Section 1983 Claim should be granted with prejudice. *49Hopkins,*

LLC v. City & Cnty. of San Francisco, No. 19-CV-00811-SI, 2020 WL 5232420, at *12–13 (N.D. Cal. Sept. 2, 2020) (granting motion to dismiss for lack of property interest in a cannabis permitting action); *ARMLA One, Inc.*, 2020 WL 8372965, at *6–7 (granting motion to dismiss cannabis applicant's Due Process claim).

E. CVA's Substantive Due Process Claim Fails as a Matter of Law.

Finally, CVA's Section 1983 Claim based on an alleged violation of substantive Due Process also fails as a matter of law. "To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998). To constitute a violation of substantive Due Process, the alleged deprivation must "shock the conscience and offend the community's sense of fair play and decency." *Id.*; *see also Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (citations omitted).

CVA alleges the City violated Due Process by (1) refusing to score Plaintiff's actions; (2) the "arbitrary, capricious, and unauthorized rejection of Plaintiff's application," and (3) the erroneous and unauthorized issuance of licenses to other applicants while Plaintiff's writ lawsuit was pending. Dkt. 6 at ¶ 32. But CVA failed to allege facts sufficient to show that any of the City's actions "shock the conscience." CVA's Section 1983 Claim based on substantive Due Process fails as a matter of law. *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195–96 (9th Cir. 2013) (affirming order dismissing substantive Due Process claims because alleged procedural deficiencies did not "shock the conscience"); *Leen v. Thomas*, 611 F. Supp. 3d 955, 962 (E.D. Cal. 2020) (granting motion to dismiss).

VII. CVA'S NEGLIGENCE CLAIM FAILS AS A MATTER OF LAW

CVA's Second COA for Negligence alleges the City breached its "mandatory and ministerial duty to score, rank, and process Plaintiff's" cannabis applications by "fail[ing] to score, rank, and process" those applications in 2020. Dkt. 6 at ¶¶ 29, 31. CVA's Negligence Claim is barred by the California Government Claims Act (Cal.

Gov't Code § 814 *et seq.*) (the "Act") for two reasons, because CVA (1) failed to identify any statute that imposes such liability against the City,[5] and (2) failed to present a timely government claim to the City.

A. CVA Identifies No Statutory Basis for Imposing Negligence Liability.

The Act abolished all common law or judicially declared forms of liability for public entities. California Government Code section 815 provides that, "[e]xcept as otherwise provided by statute . . . a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." The Legislative Committee Comments for California Government Code section 815 specifically admonish that "[t]his section abolishes all common law or judicially declared forms of liability for public entities . . . ." The Comments explain that "the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts." *Searcy v. Hemet Unified Sch. Dist.*, 177 Cal. App. 3d 792, 802 (Cal. Ct. App. 1986) (duty imposed on a public entity must be grounded in statute).

Thus, a public entity may only be liable for injury arising out of an alleged act or omission of the entity to the extent provided by statute. *Zelig v. Cnty. of Los Angeles*, 27 Cal. 4th 1112, 1127 (2002); *Susman v. City of Los Angeles*, 269 Cal. App. 2d 803, 808 (1969); *Van Ort v. Est. of Stanewich*, 92 F.3d 831, 840 (9th Cir. 1996).

"Ordinarily, negligence may be pleaded in general terms and the plaintiff need not specify the precise act or omission alleged to constitute a breach of duty."

[5] Plaintiff's claim for negligence is a state law claim because it does not arise under federal statutory or constitutional law or fall within the narrow categories of federal common law. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 518 (1988) (holding that federal common law displaces state law only in "few and restricted" instances). Federal courts apply state substantive law when adjudicating state law claims but apply federal procedural law to the proceedings. *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 426 (1996).

Lopez v. S. Cal. Rapid Transit Dist., 40 Cal. 3d 780, 795 (1985). However, "because under the Government Claims Act all governmental tort liability is based on statute, the general rule that statutory causes of action must be pleaded with particularity is applicable." *Id.* "Since the duty of a governmental agency can only be created by statute or 'enactment,' ***the statute or 'enactment' claimed to establish the duty must at the very least be identified***." *Searcy*, 177 Cal. App. 3d at 802 (emphasis added); *see also Becerra v. Cnty. of Santa Cruz*, 68 Cal. App. 4th 1450, 1458 (1998) (same).

The FAC identifies no statute or enactment that imposes tort liability on the City for its alleged "fail[ure] to score, rank, and process" its applications.[6] Dkt. 6 at ¶¶ 36-40; *compare with* Cal. Veh. Code § 17001 (negligence operation of vehicle) *and* Cal. Civ. Code § 2100 (common carrier duty of care). Because the City cannot be liable for negligence under the common law, the City's motion to dismiss CVA's Second COA for Negligence should be granted. *See, e.g., Searcy*, 177 Cal. App. 3d at 805 (affirming order sustaining demurrer for failure to cite statute creating a mandatory duty/imposing government tort liability for failure to discharge mandatory duty); *Rodriguez v. Inglewood Unified Sch. Dist.*, 186 Cal. App. 3d 707, 720 (Cal. Ct. App. 1986) (affirming order sustaining demurrer to negligence claim where plaintiff failed to identify statute imposing tort liability on public agency); *Creason v. Dep't of Health Servs.*, 18 Cal. 4th 623, 635 (1998) (affirming order sustaining demurrer for failure to identify statute); *Cnty. of San Bernardino v. Superior Ct.*, 77 Cal. App. 5th 1100, 1109, 1111 (2022) (vacating order denying demurrer for failure identify statute).

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[6] Moreover, the scoring, ranking and processing of Plaintiff's applications involves the exercise of discretion. When the statute "leaves implementation to an exercise of discretion," the City's alleged failure to implement the statute does not give rise to liability. *State Dep't of State Hosps. v. Superior Ct.*, 61 Cal. 4th 339, 350 (2015).

B. The Negligence Claim is Barred By CVA's Failure to Present a Timely Government Claim to the City.

The Act requires "all claims for money or damages against local public entities" to be filed with the public agency prior to the institution of any suit (subject to exceptions not relevant here).[7] Gov. Code § 905; *City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 738 (2007). As the Supreme Court explained:

> [N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity and has been acted upon ... or has been deemed to have been rejected . . . . (Gov. Code § 945.4.) Thus, under these statutes, **failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity**.

Id. at 738, emphasis added. "[F]ailure to allege facts demonstrating or excusing compliance with the claims presentation requirement subjects a claim against a public entity to a demurrer for failure to state a cause of action." *Id.* The "submission of a claim to a public entity . . . is a condition precedent to a[n] . . . action and the failure to present the claim bars the action." *State of California v. Superior Ct.*, 32 Cal. 4th 1234, 1240 (2004). "Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused are subject to a general demurrer for not stating facts sufficient to constitute a cause of action." *Shirk v. Vista Unified Sch. Dist.*, 42 Cal. 4th 201, 209 (2007).

CVA's Second COA for Negligence is based on the City's alleged failure to properly "score, rank, and process" the applications CVA submitted for storefront retail cannabis licenses in January 2019. Dkt. 6 at ¶¶ 14, 37-39. CVA alleges that if

[7] The purpose of the short timelines for the presentation of claims is "to give the public entity sufficient information to enable it to adequately investigate claims, and, if appropriate, settle them." *City of San Jose v. Superior Ct.*, 12 Cal. 3d 447, 455 (1974).

the City had "scored ranked, and processed Plaintiff's applications," "Plaintiff would have been issued [] City License[s]" in 2020. Dkt. 6 at ¶ 16, 39. Instead, due to the City's alleged "failur[e] to score" CVA's applications, the City "rejected Plaintiff's applications" in August 2020. Dkt. 6 at ¶ 16. CVA seeks "general, special, and consequential damages in an amount to be proven at trial." Dkt. 6 at ¶ 40. CVA's Negligence claim seeks damages, it is therefore subject to the Act's claims presentation requirements. See *V.C. v. Los Angeles Unified Sch. Dist.*, 139 Cal. App. 4th 499, 509 (2006) (Negligence).

CVA was required to present a government claim to the City no later than six months after its Negligence claim accrued. Cal. Gov. Code § 911.2. The accrual date is "the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable" if the action were before private litigants. Gov. Code § 901; *Rubenstein v. Doe No. 1*, 3 Cal. 5th 903, 906 (2017). A cause of action for negligence accrues on the date of the injury. *Ventura29 LLC v. City of San Buenaventura*, 87 Cal. App. 5th 1028, 1044 (2023).

CVA's cause of action accrued in August 2020, on the date the City issued the notice of decision finally rejecting CVA's applications. Dkt. 6 at ¶ 16; *Id.* at 1044. CVA was thus required to present a government claim no later than January 2021, but it did so October 13, 2023, more than two years after the deadline. Accordingly, the City's Motion to Dismiss CVA's Second COA for Negligence should be granted.

VIII. CONCLUSION

The City recognizes that courts will (and should) construe complaints liberally and indulge all reasonable inferences in favor of the pleader so that parties with a legitimate claim to relief have an opportunity for their "day in court." But there are limits. If an examination of a pleading results in the conclusion that an action is time barred, or that a party has not met basic pleading requirements, justice mandates the case proceed no further. This is such a case. The Court should grant

the City's Motion. CVA has already been given an opportunity to amend, and the FAC demonstrates there is no reasonable possibility its defects can be cured by further amendment. The City respectfully the Court to grant its Motion without leave to amend.

Dated: September 26, 2024

BURKE, WILLIAMS & SORENSEN, LLP

By: */s/ Alena Shamos*
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CITY OF CHULA VISTA

PROOF OF SERVICE

CV Amalmagated LLC dba CALIGROWN v. City of Chula Vista
Case No. 37-2024-00023455-CU-MC-CTL

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Riverside, State of California. My business address is 1770 Iowa Avenue, Suite 240, Riverside, CA 92507-2479.

On September 26, 2024, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** on the interested parties in this action as follows:

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BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 26, 2024, at Riverside, California.

/s/ Sandra D. McLeod
Sandra D. McLeod