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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; MARY V. KACHADOORIAN, an individual; and HINDERLITER, DE LLAMAS & ASSOCIATES, a California corporation; and DOES 1 through 100, Defendants.	CASE NO: 3:24-cv-01348-RSH-DDL CV AMALGAMATED LLC DBA CALIGROWN'S OPPOSITION TO CITY OF CHULA VISTA'S AND CITY MANAGER MARIA V. KACHADOORIAN'S (ERRONEOUSLY SUED AS MARY V. KACHADOORIAN) MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE [PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT] Assigned to: Hon. Robert S. Huie, Courtroom 3B Hon. David D. Leshner, Courtroom 3A Date: May 21, 2025 Judge: Hon. Robert S. Huie Crtrm: 3B Complaint Filed: July 30, 2024 Trial Date: Not Set

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TABLE OF CONTENTS

FINCH, THORNTON & BAIRD, LLP
4747 Executive Drive - Suite 700
San Diego, CA 92121
(858) 737-3100

TABLE OF AUTHORITIES

Page

Cases

FINCH, THORNTON & BAIRD, LLP
4747 Executive Drive - Suite 700
San Diego, CA 92121
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FINCH, THORNTON & BAIRD, LLP
4747 Executive Drive - Suite 700
San Diego, CA 92121
(858) 737-3100

Statutes

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San Diego, CA 92121
(858) 737-3100

Court Rules

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I

INTRODUCTION

Defendants City of Chula Vista's (the "City") and City Manager Maria V. Kachadoorian's ("City Manager") ("City" and "City Manager" are sometimes collectively referred to herein as "Defendants") motion to dismiss Plaintiff CV Amalgamated LLC dba Caligrown's ("CVA") second amended complaint ("SAC") should be denied. CVA alleges clear and unambiguous facts that not only put the Defendants on notice of the claims brought against them, but also entitle CVA to recovery. Therefore, the Defendants fail to meet the standard for a motion to dismiss under Federal Rules of Civil Procedure section 12(b)(6). The Defendants' reliance on a statute of limitations defense is similarly misguided. CVA's claims arise from the continuing and uncured failure of the City to score, rank and process its applications as required by law, which failure, only became final and apparent, at earliest, in September of 2023 when CVA was finally rejected. In the alternative, CVA should be granted leave to amend its SAC, as it can easily cure any pleading defects the Court might find to have merit.

II

STATEMENT OF FACTS

Chapter 5.19 ("Cannabis Ordinance") of the Chula Vista Municipal Code ("CVMC") and the related controlling cannabis regulations ("Cannabis Regulations") (the Cannabis Ordinance and the Cannabis Regulations are sometimes referred to collectively as the "CO&R") require that all applications for storefront Cannabis permits be scored and ranked along with all other applications. SAC, ¶ 10. This has not happened as a result of the City's unlawful and tortious conduct. SAC, ¶¶ 1, 24-29.

On January 31, 2020, the City rejected CVA's applications for licenses in Districts 1, 3, and 4. SAC, ¶ 14. At the administrative hearing, the hearing officer ordered the City to score and process CVA's applications after finding the

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City failed to score and arbitrarily assigned low scores without considering applications. *Id.* In August 2020, the Defendants rejected CVA's license applications based on an arbitrarily and capriciously assigned score and disparate treatment of CVA. SAC, ¶ 15.

After nearly two years of litigation, initially in the Superior Court for the State of California and then before the California Court of Appeal ("Writ Action"), confirmed the City's violations of the law, shockingly, the City did not immediately score and rank CVA against all applicants after the California Court of Appeal published its decision on July 19, 2022 (*CV Amalgamated LLC v. City of Chula Vista* 82 Cal. App. 5th 265 (2022) ("Decision")). SAC, ¶ 1. The Superior Court of the County of San Diego issued a Writ of Mandate ordering the City to score and rank CVA's applications – as it should have done in 2020. SAC, ¶ 17. But again, in September 2023, the City still arbitrarily rejected CVA's applications without having ranked them against all other applications. SAC, ¶ 17.

The City continued to issue cannabis licenses without having scored and ranked all applications as required by law. Thus, the Defendants knowingly violated the law and ignored the ruling of the Court of Appeal. SAC, ¶¶ 1 and 17. The Defendants plainly erred when the City issued licenses (without any public notice or disclosure) in September 2021, December 2021, April 2022, June 2022, October 2022, and April 2023 despite not having scored, ranked and processed CVA's applications as required by law and by the Court of Appeal. *Id.* Most egregious of all is the City's issuance in April of 2023, nine months after the Decision, of the final license in District 3 of the City despite the City never having scored CVA's application for a license in District 3. SAC, ¶ 1.

The City arbitrarily and capriciously ignored its own laws and the Decision, and acted in error and without authority. SAC, ¶¶ 1 and 19. Rather than confronting its errors, the City compounded them during the years that this

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litigation has been ongoing by secretly issuing licenses including after the Court of Appeal ruled. *Id.* The City has unclean hands. The law, and equity, demand that the consequences of the City's conduct be borne by the City – not CVA.

On October 13, 2023, CVA submitted a California Government Code section 910, et seq., claim against the City. SAC, ¶ 20. However, the City rejected the claim on November 27, 2023, and CVA initiated this lawsuit to hold the City accountable. SAC, ¶ 21.

III

LEGAL STANDARD ON MOTION TO DISMISS

A court should deny a motion to dismiss for failure to state a claim when a plaintiff alleges "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 12(b)(6). A claim has facial plausibility when plaintiff pleads facts that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When determining plausibility, the court must accept as true all well-pleaded factual allegations in the complaint. *Id.* at 679. Plausibility "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claims]." *Twombly*, 550 U.S. at 556. A complaint should survive a motion to dismiss when there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). It is beyond the scope of a motion to dismiss to determine the truth or probability of the disputed facts. *Id.* at 1217.

When ruling on a 12(b)(6) motion, the complaint must be construed in the light most favorable to the plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Moreover, the court may consider documents attached to the complaint, documents incorporated by reference in the

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complaint, and matters of judicial notice without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Even if the court finds a complaint does not state a cause of action, then leave to amend must be granted if there is a possibility that the defect can be cured by amendment. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)).

Furthermore, affirmative defenses may not be raised by motion to dismiss when the defense raises disputed issues of fact. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). A motion to dismiss on an affirmative defense will only be sustained if "the complaint establishes the defense." *U.S. Commodity Futures Trading Comm'n v. Monex Credit Co.*, 931 F.3d 966, 972 (9th Cir. 2019).

IV

LEGAL ARGUMENT

A. CVA Has Adequately Alleged a Policy and Is Not Time Barred

The City, through the actions of the City Manager and HDL, adopted a policy that all applications scoring less than 400 be arbitrarily rejected ("400 Threshold"). SAC, ¶¶ 22-29. This unlawful policy violates the CO&R, which requires all applicants to be scored and ranked and thereafter selected in the order of that ranking. The adoption of this policy by the City Manager and HDL and its improper application across all applicants by Defendants, including but not limited to CVA, is alleged in detail in the SAC. SAC, ¶¶ 22-29. In sum, 39 of 95 applicants scored 400 or greater and each and every one of these 39 applicants and **only these** 39 applicants received interviews. SAC, ¶ 24. All other applicants were rejected. *Id.* Following the improper rejection of CVA via this policy in 2020, and continuing even after the Decision in July of 2022, Defendants issued licenses in all four districts, including to applicants of their

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choosing that had not timely applied in District 1. Ultimately, in 2023 Defendants relied on these illegal issuances as justification for pounding the final nail in CVA's coffin. SAC, ¶ 28. In sum, but for the policy of rejecting CVA based on the 400 Threshold, the City, and specifically the City Manager, would not have been able to execute Cannabis Licensee Operating Agreements (see SAC, ¶¶ 18-19). Rather, had the City and the City Manager followed the CO&R they would have had to consider CVA's applications along with other similarly situated applicants.

CVA also alleges that due to the pattern of scoring and ranking failure, it did not receive a permit and Defendants intentionally failed to remedy its failures in any way – thus continuing their pattern of failing to properly score CVA. SAC, ¶¶ 1, 13-19. *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) ("Policy or custom may be inferred if, after [constitutional violations occurred], . . . officials took no steps to reprimand or discharge the[ir subordinates], or if they otherwise failed to admit the [subordinates'] conduct was in error."). Thus, even as late as September 2023, after years of litigation, Defendants continue to refuse to void licenses issued erroneously in violation of the CO&R. See CVMC section 5.02.080 cited at paragraph 28 of the SAC. This failure to take a remedial step reveals a policy by Defendants of insuring their illegal 400 Threshold sticks and is implemented and ensuring CVA is put out in the street with no remedy.

Defendants effectively concede the existence of the 400 Threshold and the sufficiency of CVA's pleading as to policy by instead focusing their arguments on the statute of limitations. However, their argument fails as the earliest date for the accrual of this claim is September of 2023 when the Defendants reaffirmed all of their past tortious and unconstitutional policies and conduct by finally rejecting CVA. In fact, the Court rejected the City's statute of limitations argument once already and should do so again. ECF No. 14 at 10-11. Oddly,

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Defendant's motion makes no reference to the Court's prior ruling, nor does the motion make any novel legal argument or identify any facts that would change the Court's prior holding. ECF No. 26-1 at 7. Accordingly, the Court should again reject the City's argument as to the statute. The earliest CVA's claim arose was in September 2023 after the Defendants finally scored but failed to rank and process CVA's applications. Here the instant action was filed on May 21, 2024 in state court, and thus CVA's claims are timely if they accrued on or after May 21, 2022. Accordingly, the claim is timely. *Harlow v. Cnty. Of Riverside*, 295 F. App'x 252, 254 (9th Cir. 2008); Cal. Code of Civ. Proc. § 335.1; *Olsen v. Idaho State Bd. Of Med.*, 363 F.3d 916, 926 (9th Cir. 2004).

B. CVA Has Adequately Alleged Ratification

CVA alleges that Defendants approved of HDL's failure to score CVA rather than just failing to overrule it or lacking awareness of it. SAC, ¶¶ 24-29. Defendants effectively concede CVA has sufficiently pleaded ratification by the City Manager, as the core of its argument is premised on the presentation of an alleged new set of facts. However, the simple truth is these new facts do not conflict with the allegations of CVA that the City Manager approved of the many unwarranted ejections of CVA, the decision of the City not to take any remedial steps to follow the CO&R and the CVMC, and the bases for these decisions. Defendants seek to hide the City Manager from her actions by claiming letters on stationary that read "The Office of the City Manager" are not from the City Manager but are limited acts of either an "Assistant City Manager" or "Deputy City Manager". The City Manager's office, according to Defendants, fumbles around blind and rudderless, without direction from the City Manager. Until receiving the motion from Defendants making this claim, such a ridiculous notion that simply steamrolls subordinates, had never occurred to CVA. Consider, the Defendants have submitted, among other items, emails in 2023 and a letter dated August 7, 2023, apparently signed by Assistant City Manager,

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Tiffany Allen, utilizing stationary that reads "Office of the City Manager" and suggests Ms. Allen acted unilaterally and the City Manager had no knowledge of the action taken or the basis for the action?

In essence, after **several years** of litigation, including an appellate court decision finding the City Manager had overseen a licensing process that arbitrarily and capriciously did not follow the law, and even after the City Manager had finalized and executed at least 8 Cannabis License Operating Agreements on behalf of the City, the City Manager still had no awareness of what was happening or why it was happening? Similarly, the City asserts the Finance Director acted alone in September 2023 and the City Manager, the person most responsible for the mess in Chula Vista that has led to years of litigation, was in the dark? CVA alleges the opposite and stands by its allegations. SAC, ¶¶ 24-29.

The law supports CVA. In *St. Louis v. Praprotnik*, 485 U.S. 112 (1988) the court acknowledged that it would be different "if a series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware." *Id.* at 130. In such a case, the court noted that "the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official." *Ibid.* This is the case here, where CVA alleges that the City Manager must have known of HDL's failure to properly score the applications, of the 400 Threshold, of the Decision, and of the communications and scoring decisions reached by the "Office of the City Manager" in 2023 to reject CVA - yet again.

Plaintiff also alleges that the Defendants contracted with HDL to review and score the applications, and the City Manager was at all times responsible for the performance by HDL of its responsibilities under the CO&R. SAC, ¶¶ 10,

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12. In short, assuming the allegations to be true, as is required at the motion to dismiss stage, CVA has properly alleged an official government policy, practice, custom, or pattern to proceed with a Section 1983 claim.

C. CVA Properly Alleges an Equal Protection Claim

Defendants ignore relevant allegations in the SAC and make arguments outside the scope of a motion to dismiss. Defendants argue CVA merely invokes the constitutional buzzword of equal protection. However, this ignores the entirety of the allegations of the SAC that assert the Defendants intentionally treated CVA differently with no rational explanation. CVA pleaded facts sufficient to show that HDL, the Defendants' contractor, scored applications by all applicants other than CVA with no rational basis for its disparate treatment. SAC, ¶¶ 15-16, 32. CVA further details the way the Defendants treated its applications differently than other applicants and non-applicants with specific dates and outcomes. SAC, ¶¶ 17-19. Specifically, CVA identifies that the Defendants issued a license for District 1 to TD Chula Vista 1, Inc. even though the applicant had not applied, and that CVA was the only qualified and highest scored applicant for that District. SAC, ¶ 19. Further, CVA alleges it was similarly situated when "HDL scored applications by all applicants other than CVA." SAC, ¶ 16. Further, CVA alleges it is similarly situated to other applicants using its charts pertaining to score and rank of other applicants. SAC, ¶ 18. The allegation of irrational differential treatment is all that is required from CVA at this stage of the proceedings.

Defendants misunderstand the minimum requirements for an equal protection claim by arguing CVA did not allege membership in a protected class. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (allowing a class of one to bring an equal protection claim when the plaintiff alleges it was intentionally treated differently from others similarly situated with no rational basis for the differential treatment). Assuming CVA's detailed allegations to be

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true, as is required at the motion to dismiss stage, CVA has properly alleged an official government policy, practice, custom, or pattern to proceed with a Section 1983 claim. Thus, CVA alleges the City violated CVA's equal protection rights and in fact did violate them. Therefore, assuming these allegations to be true, CVA's equal protection claim is sufficiently pleaded to survive the City's motion to dismiss.

D. CVA Properly Alleges a Due Process Claim

CVA properly alleges a due process claim under the Constitution. Defendants ignore relevant allegations in the SAC and make arguments outside the scope of a motion to dismiss. Defendants also argue CVA merely invokes the constitutional buzzword of due process. CVA alleges it has a protected property interest in its applications for a City License in Districts 1 and 3 of the City and that the City has no discretion to reject these applications without scoring and ranking them in accord with the CO&R as well as the CVMC. SAC, ¶¶ 28-29. CVA further alleges that the Defendants purported to act under the color of state law and policy enacted in the CO&R by depriving CVA of these protected property rights without authority under the CO&R. SAC, ¶ 37.

This is a case of first impression. There is no case precedent addressing analogous facts cited by Defendants are of which CVA is aware. Defendants emphasize case law addressing vested property interests in the permit context. However, such cases are not controlling here and the rationale they apply merely confirms that CVA has pled a taking of its property. Thus, the Defendants argue that person has a property interest in a permit only when the law "requires that the permit be issued once certain requirements are satisfied." ECF No. 26-1 at 14, ln 7-12. The Defendants construe this rule as confirming their argument because where discretion remains to be exercised prior to permit issuance, as here, the permit issuance is not "required" and there is no property interest. The flaw in Defendants analysis is treating the property interest at issue as the final

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vested permit. The property interest violated in this case is in the application and the fair handling of that application. Again, there is no case law on point. CVA's argument is simple and powerful. The discussions in *Wedges/Ledges of Cal. v. City of Phx.*, 24 F.3d 56, 64 (9th Cir. 1994) and *N. Pacifica, L.L.C. v. City of Pacifica*, 234 F. Supp. 2d 1053, 1057 (N.D. Cal. 2002) are instructive and support CVA. The only case of interest cited by Defendants is the District Court decision in *ARMLA One, Inc. v. City of Los Angeles*, NO. 2:20-CV-07965-SB-RAO, 2020 WL 8372965 (C.D. Cal. Dec. 9, 2020). The rationale of *ARMLA One* is of limited use, as that case dealt with a Los Angeles ordinance, did not address a mandatory and ministerial process like that at hand, did not address a case where the City simply failed to consider an application, as it did here,, and in any event, that Court wrongly focused on the guaranty of a permit as the be all end all consideration. It is not. An application, under the circumstances of this case, is a property interest.

Once CVA timely applied and met all requirements it was holding an application that the CO&R and the Defendants had promised to score, rank and process per the law. At that moment, CVA held a vested interest in that application and it was a constitutionally protected property interest. As the CO&R set up a limited playing field CVA could trade on its asset in commerce with third parties. CVA had spent money and time developing this asset. While there was not yet a permit, it held the vested right to an application that would be scored, ranked and processed. This asset held value to CVA and it had an undeniable expectation that the scoring, ranking and processing would occur. When the Defendants violated the law, they took this property interest from CVA in violation of the Constitution. The case law in this area and the underlying rationale of that body of law supports CVA.

Thus, State law creates a legitimate claim of entitlement that gives rise to a protected property interest if it "impose[s] 'significant limitation[s] on the

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discretion of the decision maker.'" *Nunez v. City of Los Angeles*, 147 F.3d 867, 873 n.8 (9th Cir. 1998). Here, CVA alleges the Defendants have no discretion to reject these applications without scoring them in accord with the CO&R since they meet all requirements under the CO&R. SAC, ¶ 32. Moreover, throughout its SAC CVA alleges Defendants' obligations to score the applications was mandatory, and ministerial, rather than discretionary. SAC, ¶¶ 12-19, 33-35. The Court in the Decision agreed with these allegations and found the City had violated a mandatory and ministerial duty. Assuming these allegations to be true, as is required at the motion to dismiss stage, CVA has properly alleged the deprivation of a constitutionally protected interest in its applications for licenses based on the City's lack of discretion over the scoring and ranking process. This scoring and ranking procedure and the City's total lack of discretion as alleged created CVA's expectation that its applications would be scored, ranked, and processed in accord with the CO&R.

Giving non-applicants licenses deprives CVA of an interest contrary to mandatory procedure. Issuing a license to every applicant was not mandatory but issuing a license in accordance with the law as set forth in the CO&R and the CVMC was. The CO&R provisions for review and scoring cannabis applications, conducting applicant interviews, and compiling a final report, with scores and merit-based ranking to inform the final selection process, all imposed a significant restraint on the Defendants' discretion as alleged that left no room for discretion in the score or merit-based ranking. SAC, ¶ 10.

Defendants argue any violations of substantive due process must shock the conscience and offend the community's sense of fair play and decency. However, the SAC alleges Defendants failed to score CVA's applications multiple times and unfairly granted licenses to non-applicants in District 1 and applicants that scored lower than CVA in District 3. SAC, ¶¶ 13-19. CVA alleges the Defendants had no rational basis and proceeded with no regard for

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CVA's rights and in flagrant violation of the CO&R. SAC, ¶ 15. "Where, as here, circumstances afford reasonable time for deliberation before acting, we consider conduct to be conscience-shocking if it was taken with deliberate indifference toward a plaintiff's constitutional rights." *Sylvia Landfield Tr. v. City of L.A.*, 729 F.3d 1189, 1195 (9th Cir. 2013) (citing *Lewis*, 523 U.S. 833 at 846). Here, Defendants had years to read the CO&R and CVMC and follow the law.

CVA's allegations in the SAC plausibly suggest that the Defendants unreasonably, and arbitrarily and capriciously, favored other license applicants over CVA. Therefore, assuming these allegations are true, CVA has sufficiently pleaded a due process claim that survives the City's motion to dismiss.

Defendants further contend that the Finance Director – not the City Manager – violated the CO&R in 2023, and therefore there is no allegation of conduct by a policy maker that satisfies *Monell*. The Defendants are wrong. First, the Defendants concede the rescoring in 2023 was directed by the City Manager, as the new facts presented simply state a notice of decision sent from the City Manager's office was signed by the Finance Director. This alleged fact, even if true, is not inconsistent with the allegations as to the City Manager's culpability, as explained above. Second, the final 2023 decision is simply the final act in a continuing stream of tortious and unlawful conduct of the Defendants as alleged in the SAC, including at paragraph 29 of the SAC. The Defendants argument has no impact on the sufficiency of the allegations.

E. CVA's Negligence Claim Does Not Fail as a Matter of Law

1. The City Manager and the City Are Not Immune

CVA's claim for relief is a negligence claim pursuant to California Civil Code § 1714, CVMC 5.02.080 and California Government Code sections 815.2, 815.4 and 815.6. Defendants' contention, in effect, is that they are empowered to ignore the law and those harmed have no recourse. Their conclusions are

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misguided. Preliminarily, there is no case precedent on point and controlling of the facts at hand. Defendants cite to *Eastburn v. Reg'l Fire Prot. Autho.*, 31 Cal. 4th 1175 (2003), but in *Eastburn* the court was addressing an allegation of negligence by 911 dispatchers and found that section 1714 is an insufficient statutory basis standing alone for imposing direct liability on a public agency. Similarly, the City cites to *de Villers v. Cnty. Of San Diego*, 156 Cal. App. 4th 238 (2007), but that case involved alleged negligence in connection with the failure of the County and its employees to stop an employee from stealing toxic materials form the County and using them to murder her husband. These cases are distinguishable on the facts and have no bearing on the matters at issue. Moreover, they confirm that California law does provide that a public entity may be vicariously liable for the grossly negligent and bad faith conduct of its employees and independent contractors. *de Villers v. Cnty. Of San Diego*, 156 Cal. App. 4th 238, 247 (2007). This is precisely the situation here, where the City, and the City's employees and consultants, specifically the City Manager and HDL, broke the law and willfully harmed CVA, all as alleged in the SAC.

Section 815.2 of the Government Code provides in key part: "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Cal. Gov. Code § 815.2(a). Here, the City Manager and its staff, and HDL, did not fulfill a ministerial and mandatory duty to follow the law, and the City is liable for this tortious conduct just as the City Manager is.

Section 815.4 of the Government Code provides: "A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section

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subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity." Cal. Gov. Code § 815.4. Here, HDL violated the CO&R and the City is liable for this tortious conduct just as HDL is.

Section 815.6 of the Government Code provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Cal. Gov. Code § 815.6. Here, the injury to CVA is applying for a license only to have its application left unscored, unranked and unprocessed, while competing business including those that did not apply are issued licenses based on disparate, unequal, and non-merit based treatment. This non-competitive process opens the door to corruption and would not exist if the City and the City Manager implement a process, as was mandatory of scoring and ranking qualified applicants. Thus, Section 815.6 creates statutory liability for the Defendants. There is no case law addressing these novel circumstances and the plain language of the statute controls. The Defendants claim that CVA has not specifically identified the statute creating the mandatory duty is somewhat shocking. ECF No. 26-1 at 22, ln 3-5. CVA refers Defendants to the Decision, the SAC, and the CO&R, including sections 5.19.050.A of the Cannabis Ordinance, and section 0501(N) of the Cannabis Regulations, as well as Section 5.02.080 of the CVMC.

The Defendants' contentions that they are saved by Government Code sections 818.2, 818.4, 820.2, and 821.2 are all wrong. In short, public entities and their employees are liable for failure to follow the law and perform mandatory and ministerial functions. Section 818.2 of the Government Code

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provides limited immunity for a "public entity" (not a City Manager) where an injury is caused "…by adopting or failing to adopt an enactment or by failing to enforce any law." Defendants falsely equate following the law, which is what did not happen here, with enforcement of law. Of course, the Courts construe section 818.2 as applying to actual law enforcement and the attempted application of this section here by Defendants borders on the frivolous. Defendants do not cite and there is no case we have found that would apply this immunity in the case at bar. "[T]o enforce a law normally means to compel obedience to the law by actual force, such as involuntary detention, arrest or punishment. [Citations.]" *Ronald S. v. Cty. of San Diego*, 16 Cal. App. 4th 887, 896 (1993).

California courts addressing the interplay between section 818.4 and section 815.6 hold that the immunity conferred by section 818.4 does not attach where the harm complained of is caused by the failure of an entity to discharge a mandatory duty. *Elson v. Pub. Utils. Comm'n*, 51 Cal. App. 3d 577, 587 (1975). In *Elson*, the lower court granted a demurrer based on government immunity, but the Court of Appeals reversed the decision and held the government has no immunity in suits pertaining to mandatory licensing decisions. *Id.* The court emphasized that the California Torts Claims Act "do[es] not purport to change the prior law that a public employee *was* liable for his failure to perform a mandatory duty" and "[n]o chilling of governmental activity occurs if it is the performance of, or omission to perform, a *mandatory* duty that is involved." *Id.* (emphasis on original). A mandatory duty is "an obligatory duty which a governmental entity is required to perform, as opposed to a permissive power which a governmental entity may exercise or not as it chooses." *Morris* v. *County of Marin*, 18 Cal.3d 901, 908 (1977).

CVA's SAC alleges repeatedly that the City's duty to score CVA's applications in accordance with the CO&R was mandatory. SAC, ¶¶ 12-19, 33,

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36. The Writ of Mandate compelling the City to process CVA's applications in accordance with the CO&R proves it was a mandatory procedure. SAC, ¶ 16. The City cannot now try to get out of responsibility for its mandatory duties by claiming immunity for those decisions that are in no way discretionary.

Section 821.2 of the Government Code states:

> A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization **where he is authorized by enactment** to determine whether or not such authorization should be issued, denied, suspended or revoked.

Bold added. This immunity applies only where there is discretion authorized by the enactment and does not apply here where the allegations relate to mandatory and ministerial acts. *Elson v. Public Utilities Commission*, 51 Cal.App.3d 577, 587 (1975).

Moreover, the elements of negligence are pleaded with specificity to the extent required in the SAC. CVA alleges that the Defendants had a mandatory and ministerial duty to score, rank, and process CVA's applications for a City License. SAC, ¶ 41. CVA alleges a breach of this duty when the Defendants failed to score, rank, and process its applications for Districts 1 and 3 of the City. SAC, ¶ 42. CVA alleges this failure caused it harm because the Defendants' failure prevented the issuance of any City Licenses to CVA. SAC, ¶ 42. Further, CVA quantifies its substantial harm to be proved at trial. SAC, ¶ 44. The City is not immune from liability for the injuries caused by its failure to follow the CO&R to CVA's detriment. Therefore, the SAC pleads with enough sufficiency a cause of action for negligence, and the Defendants cannot prevail on its motion to dismiss for failure to state a claim.

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2. CVA Presented a Timely Government Claim to the City in Accordance with the California Tort Claims Act

CVA properly and timely presented a claim to the City in accordance with the California Tort Claims Act. "A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented . . . not later than six months after the accrual of the cause of action" and "a claim relating to any other cause of action shall be presented . . . not later than one year after the accrual of the cause of action." Cal. Gov. Code § 911.2. "[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." Cal. Gov. Code, § 945.4. The accrual date of the statute of limitations "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 thereto if there were no requirement that a claim be presented to and be acted upon by the public entity before an action could be commenced thereon." Cal. Gov. Code, § 901.

As the Court has already held, and as discussed above, City's latest rejection of CVA's applications, which was in fact September of 2023, is the date that the claims and causes accrued. CVA alleges and did bring its government claim on October 13, 2023, which was within the required six months of its injury. SAC, ¶ 19

However, even if Defendants disagree, case laws shows that if CVA can prove facts that would establish the timeliness of its claim, it must survive a motion to dismiss. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682; *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

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3. CVA Had No Right to Appeal to the City Manager in 2023 and the City Manager's Final Unlawful Act In 2023 Is Sufficiently Alleged

The Defendants' failure to read and comprehend the CO&R continues to this day. The Defendants argue, in part: " The finance Director's decision was appealable to the City Manager. CVMC § 5.19.050(A)(6) But CVA did not appeal." ECF No. 26-1 at 10. The City is wrong. The final decision in 2023 was not appealable to the City Manager. The CO&R provides in key part at Section 0501, subdivision (P)(4)(a), with bolding added:

> If the City Manager makes a determination that an Applicant's score is erroneous and no other basis for rejection of the application exists, the City Manager shall grant the appeal….City must then cause a reassessment of the Applicant's score to be conducted, and thereafter issue a new Notice of Decision to the applicant; **such Notice of Decision shall be final and contain no right to appeal to the City Manager.**

Following the 2020 decision, the City did not rescore CVA as required, which led to the Decision and the Writ Lawsuit judgment. The scoring finally occurred in 2023 at which point the decision was not appealable as a matter of law. There was not further administrative remedy to exhaust as a matter of law.

F. Failure to Follow the Law Is A Valid Cause of Action

CVA's third cause of action is not invalid or untimely. It is an alternative cause of action to the first and second causes to recover for the wrongful conduct of the Defendants. Fed. R. Civ. P. 8(d)(2). The SAC adequately alleges that Defendants failed to follow the law by issuing licenses to other applicants while refusing to score, rank and process CVA's applications.

Nor is this claim duplicative of the Writ Action as it is based on facts that did not exist 5 years ago and that had not accrued. Further, CVA's remedy in the Writ Action is not monetary relief for the wrongful illegal conduct, it is strictly injunctive. Accordingly, the primary rights are different and the allegations of splitting claims is not persuasive. To the extent the City claims that the alternative and secondary remedy pleaded in the SAC of "declaring the Plaintiff

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the highest ranked applicant" (SAC at 13, ln. 8-9) is arguably addressed in the still pending Writ Action, the City has not filed a motion to strike as required by the Federal Rules of Civil Procedure. This part of CVA's claim is not an essential element, even if duplicative, and is not standing alone sufficient grounds for dismissal of the entire claim. Notably, the City is engaged in arguing in the Writ Action that the California Court has no jurisdiction to offer any remedy at all to CVA. The Court should deny the motion to dismiss on these grounds. At minimum, CVA requests the opportunity for additional briefing and for leave to amend.

Defendants' additional arguments to dismiss this third cause of action are not persuasive. In fact, the Defendants' argument that a 90-day statute of limitation at Government Code section 65009 applies in this case is frivolous. First, the issuance of a business license under Chapter 5.19 of the CVMC is not a land use decision. Section 5.19.050, subdivision (D)(3) of the CVMC provides: "Issuance of a City License does not create a land use entitlement." CVMC § 5.19.050, subd. (D)(3). The City conveniently omits this citation from its Motion. Second, the 90-day statute applies only to decisions of a "legislative body." (Govt. Code § 65009, subd. (c)(1)). Third, the issuance of this business license is not one of the types of decision described under Govt. Code section 65009, subd. (c)(1)(E). The tortured and truncated analysis of the Defendants is wrong. The case law is distinguishable and does not apply in this case.

G. CVA Has Stated Claims Against the City Manager

1. CVA States a 1983 Claim Against the City Manager

As discussed above, CVA has stated a section 1983 claim against the City Manager as well as the City. The City Manager improperly attacks the truth of the matters asserted and misconstrues the very simple allegations in the SAC in hopes of misleading the Court into dismissal.

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First, contrary to the Defendants' contentions, the City Manager has a duty to follow the law, including to implement the CO&R for applications in this case and to void erroneously issued business licenses under the CVMC. The City Manager's contentions to the contrary are disingenuous. That duty includes, under the CO&R, the mandatory and ministerial duty to score, rank and process applications per the CO&R. The City Manager's arguments that it had discretion not to follow the CO&R are wholly without merit. The City Manager has no discretion under the CO&R when it comes to the obligation to score, rank and process applications. After five years and hundreds of thousands of dollars of litigation the City Manager still pretends not to understand the difference between the acts of scoring and ranking (which is mandatory and ministerial) and the methods applied to make the scores and maintain a ranking (which involves discretion). The former has been at issue for five years, not the latter. It is and was the duty of the City Manager under the CO&R to score, rank and process the applications. The City Manager's arguments to the contrary are in bad faith and a waste of time. In fact, the City Manager cites to *Ellis v. City Council of City of Burlingame*, 222 Cal. App. 2d 490 (1963) but utilizes a misleading partial citation. The full citation confirms CVA's position:

> Although it is true that a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. "Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious."

Id. at 500. This rule is exactly the point of CVA's claim.

Second, the City Manager's factual arguments that it did nothing are not convincing, nor should they be decided on a motion to dismiss. The City Manager, among other things and without limitation, hired and managed HDL,

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notified applicants of rejections and scoring decisions, and signed each of the final issued license agreements. The attempt to claim non-responsibility is not believable and exposes the City Manager's moral bankruptcy.

The City Manager's fall back arguments as to special immunities of the City Manager are similarly not persuasive as they rely exclusively on cases where public officials were protected against liability in connection with discretionary acts. Again, here, the allegations are not about discretion. They are about not following the law and failing to perform mandatory and ministerial duties. Thus, the City Manager cites to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) for the proposition that an extra pleading burden of a "clearly established constitutional right" applies or else the City Manager is entitled to qualified immunity. But that concept has no application here. In *Harlow* a qualified immunity was applied to discretionary acts of aides to the President of the United States. Here, the allegations are as to mandatory and ministerial non-actions and actions of a City Manager that violate the law.

The City Manager points to *Braco ex rel. Ramirez v. Hsu*, 404 F. Supp.2d 1195 (C.D. Cal. 2005). But again, that case involved discretionary acts of school officials conducting an allegedly tortious search and seizure of a student, and that case was decided at summary judgment phase. It has no bearing on the alleged failure to follow ministerial duties at issue here. Last the City Manager cites to *Freeny v. City of San Buenaventura*, (222 Cal. App. 2d 490 (1963), but that case as noted by the City Manager, addressed discretionary legislative decisions of a City Council. It has no impact here.

2. CVA Exhausted Administrative Remedies

CVA's Government Code claim alleged adequately and fully provided notice of the claims in the SAC. To wit, the City Manager, HDL, and the City failed to follow the law and have harmed CVA. There is no change in the persons or the conduct complained of. The City Manager is integral in the

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claim, contrary to the perverse reading of the claim by the City Manager. Thus the claim states in part: "If the City has any difficulty assessing these filings or grasping the many negligent, arbitrary and capricious, and illegal actions of the City **and its agents of the past five years**, we are happy to assist and provide additional copies of relevant documents." City RJN, Ex. L, bold added. The claim goes on to state:

> The City has acted in a grossly negligent and arbitrary and capricious manner in connection with CVA's applications. Most recently, the City on September 29, 2023, rejected CVA's applications for licenses in Districts 1, 3 and 4, claiming that no licenses were available to be issued. The City contends that although CVA is the highest ranking applicant in District 1 and the second ranked applicant in District 3, no license may be issued to CVA, because licenses have already been issued in those Districts and no licenses are available. If in fact the City has issued licenses in Districts 1 and 3 such issuances are themselves, necessarily, illegal, void, and the result of grossly negligent and arbitrary and capricious conduct by the City. The City is not permitted to act outside the provenance of its own laws. Those laws provide that licenses may only be issued in order of the ranking. Any issuance outside that order – as the City claims it has done – is necessarily void at its inception as such conduct is beyond the power of the City. CVA will seek relief in Court if available to protect the City and its taxpayers from this latest lawless act by the City.

Ibid. The City Manager is the agent responsible for the egregiously unethical actions perpetrated by the City, including without limit, in 2023. Thus the City Manager's argument that all statements in the SAC as to the City Manager tie to 2020 and the prior City Manager are simply false. The City Manager was the person signing Cannabis License Agreements to eliminate any remedy for CVA in 2023 and it is the City Manager that is alleged to have managed, directed, and ultimately sent the rejection of CVA's applications, including in 2023. The City Manager, as discussed above, seeks to hide from responsibility for these failings and pin them on subordinates or presumably HDL. CVA alleges the City Manager is responsible and seeks its day in court.

The conduct complained of by CVA has always been that CVA's applications were not scored, ranked and processed as required by law. Any person at the City engaged in this failure was put on notice by the Government

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Code claim of CVA. The requirements of Government Code section 910 are to provide the date, place, and circumstances of the occurrence or transaction which gave rise to the claim, and these requirements are fully satisfied. California law does not require pleading of the tort elements in a Government Code claim that may be required in a complaint. *Blair v. Superior Court*, 218 Cal. App. 3d 221, 225 (1990). As the Court found in *Blair*, there is no requirement to specify the particular act or omission of particular state officers. *Ibid.* Thus, in *Blair,* which is cited by the City Manager misleadingly with a partial squib quote, the Court of Appeal ultimately ruled in favor of the claimant and vacated the granting of a motion to strike in the trial court because the extra pleading requirements were not necessary. The Court here should similarly deny the motion to dismiss of the City Manager.

Notably, the City Manager does not cite a case with analogous facts to support its position. In *City of Stockton v. Superior Court*, 42, Cal. 4th 730 (2007), the California Supreme Court addressed a breach of contract case where the claimant had failed entirely to submit a Government Code Claim. The case has no relevance here. In *Watson v. State of California*, 21 Cal. App. 4th 836 (1993) the case involved an injured prisoner and the Court of Appeal affirmed summary judgment in part because of the deficient Government Code claim of the plaintiff which described a failure to summon medical care while the lawsuit shifted to the negligent provision of medical care. In short, the facts of the incident, unlike here, were not part of the government code claim. The case has no bearing here where the facts at issue now are the same facts in the Government Code claim.

3. The City Manager Is Not Immune

The City Manager's arguments as to immunity are already addressed above and all lack merit. Section 820.2 of the Government Code also does not apply as that provision, titled "Exercise of discretion" is only applicable where

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the employee's "act or omission was the result of the exercise of the discretion vested in him…" The City presents no argument or case law that distinguishes these rules of law and instead cites cases where discretionary actions of public actors applied. The simple fact is, contrary to the City Manager's unsupported and self-serving statements, there is no discretion here, as was held by the California Court of Appeal in the Decision and as discussed above.

The City Manager continues its litany of bad arguments regarding immunities with references to the police power and some discretionary duty inherent in this lawsuit. The argument is incomprehensible. There simply is no "police power" issue in this case. While the City Manager alludes to discretion, there is no argument or exposition of what that discretion is and how it applies. The superficial cite to *Sonoma Ag Art v. Dep't of Food & Agric*., 125 Cal. App. 4th 122 (2004) is nonsensical. In that case, the public entity engaged in significant discretionary acts investigating, analyzing and issuing certificates as to grapevines. There is no similar discretionary act at issue here. Here, the City Manager did not score, rank and process CVA's applications as was a mandatory and ministerial requirement imposed by the CO&R and confirmed by the Court of Appeal.

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V

CONCLUSION

For the foregoing reasons, CVA respectfully requests that the Court deny the Defendants' motion to dismiss the SAC in its entirety. In the alternative, if the Court does find any element to require additional factual exposition, CVA should be granted leave to amend.

DATE: May 7, 2025

Respectfully submitted,

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