DENNIS J. HERRERA, State Bar #139669
City Attorney
ALEX G. TSE, State Bar #152348
Chief Attorney
YVONNE R. MERÉ, State Bar #173594
JENNIFER CHOI, State Bar #184058
JILL CANNON, State Bar #203471
Deputy City Attorneys
Fox Plaza
1390 Market Street, Sixth Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3874
Facsimile: (415) 437-4644

Attorneys for Plaintiffs
CITY AND COUNTY OF SAN FRANCISCO and
PEOPLE OF THE STATE OF CALIFORNIA

ENDORSED
FILED
Superior Court of California
County of San Francisco

FEB 19 2009

GORDON PARK-LI, Clerk
BY: _____
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

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| CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and the PEOPLE OF THE STATE OF CALIFORNIA, by and through DENNIS J. HERRERA, City Attorney for the City and County of San Francisco,<br><br>Plaintiffs,<br><br>vs.<br><br>SKYLINE REALTY INC., CITIAPARTMENTS INC., GAYLORD HOTEL LLC, TROPHY PROPERTIES V LLC, TROPHY PROPERTIES V DE LLC, PRIME APARTMENT PROPERTIES LLC, LSL PROPERTY HOLDINGS II DE LLC, 737 PINE DE LLC, TROPHY PROPERTIES VI LLC, TROPHY PROPERTIES IV DE LLC, NOB HILL TOWER DE LLC, AND DOE ONE THROUGH DOE FIFTY<br><br>Defendants. | Case No. CGC 06-455-241<br><br>**NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**<br><br>Date Action Filed: August 16, 2006<br>Trial Date: Not Yet Set<br><br>Hearing Date: March 20, 2009<br>Judge: John E. Munter<br>Time: 3:00 p.m.<br>Place: Dept. 305<br><br>Attachments: Exhibits A-B |

## NOTICE

TO DEFENDANTS AND THEIR COUNSELS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 20, 2009, at 3:00 p.m., or as soon thereafter as the matter can be heard in Department 305 of this Court, located at 400 McAllister Street, San Francisco, Plaintiffs CITY AND COUNTY OF SAN FRANCISCO and PEOPLE OF THE STATE OF CALIFORNIA will move the Court for leave to file a Third Amended Complaint, pursuant to California Code of Civil Procedure §§ 473 and 576.

The motion will be made on the grounds that the Third Amended Complaint[1] is in furtherance of justice. This motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, Declaration of Yvonne Mere, all served and filed herewith, the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: February 19, 2009

DENNIS J. HERRERA
City Attorney
ALEX G. TSE
Chief Attorney, Neighborhood and Resident Safety Division
JILL CANNON
JENNIFER CHOI
YVONNE MERE
Deputy City Attorneys

By: _____
YVONNE MERE
JENNIFER CHOI
JILL CANNON
Attorneys for Plaintiff
CITY AND COUNTY OF SAN FRANCISCO AND
PEOPLE OF THE STATE OF CALIFORNIA

[1] A copy of the proposed Third Amended Complaint containing all additions (underlined) and deletions (crossed-out) is attached as Exhibit A. A clean copy of the Third Amended Complaint is also attached with Exhibit B.

## MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

This action arises out of Defendants' past and ongoing unlawful, unfair, and fraudulent business practices relating to their ownership, management, operation and/or maintenance of multi-unit residential properties in San Francisco. Specifically, Plaintiffs allege that Defendants have systematically harassed and intimidated tenants into surrendering possession of their rent-controlled units, then renovated those newly vacated units without permits, subsequently re-letting them to new tenants with markedly increased rental rates.

Plaintiffs, THE CITY AND COUNTY AND SAN FRANCISCO and THE PEOPLE OF THE STATE OF CALIFORNIA, now move to file a Third Amended Complaint to add additional parties, legal theories, and facts occurring after the filing of the complaint.

## STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

Plaintiffs commenced this action on August 16, 2006 to remedy Defendants' unlawful business practices in managing residential rental properties in the City and County of San Francisco. Declaration of Yvonne R. Meré in Support of Plaintiff's Motion for Leave to File Third Amended Complaint, dated February 19, 2009 ("Meré Decl.") at ¶3. Plaintiffs allege that Defendants engage in a pattern of unlawful business practices in which they acquire or manage apartment buildings governed by the San Francisco Rent Ordinance, target rent control tenants for harassment in an effort to force them to vacate, renovate the units vacated by those tenants without obtaining permits and health and safety inspections or otherwise complying with the Building, Plumbing and Electrical Codes, and finally relet those units at a higher market rate. Meré Decl. at ¶3.

This original complaint was never served; instead Plaintiffs filed a First Amended Complaint on October 12, 2006 and served all Defendants with that document. Meré Decl. at ¶¶4-5. On November 27, 2006, Defendants filed a Demurrer and Motion to Strike setting the matter for hearing on December 21, 2006. Meré Decl. at ¶6. In that Motion, Defendants argued that Skyline Realty owned rental properties in San Francisco, that Defendant CitiApartments managed rental properties owned by Skyline Realty, and that the properties owned and managed by Skyline Realty and

CitiApartments included the properties that are specifically mentioned in this action. Meré Decl. at ¶6. Throughout 2006 and 2007, Defendants continued to make similar representations, often under oath, that CitiApartments had employees and that it managed residential properties. Meré Decl. at ¶¶8, 10, 13, 14, 19.

In early 2008, Defendants started responding to Plaintiffs' propounded discovery and began denying that CitiApartments had employees or managed properties. Meré Decl. at ¶¶21, 25-26, 29. Those denials and inconsistencies coupled with Plaintiffs' issues with Defendants' discovery responses set in motion a long discovery battle. Meré Decl. at ¶¶30-39. Plaintiffs sent written discovery to Defendants and began the depositions of the persons most knowledgeable on behalf of Defendants Skyline Realty, Inc. and CitiApartments, Inc. Meré Decl. at ¶¶16, 18, 22-26, 28. The parties met and conferred in an attempt to resolve the discovery issues without the need for court intervention. Meré Decl. at ¶¶32, 34, 39. The parties raised unresolved discovery disputes with the Court during the ensuing Case Management Conferences. Meré Decl. at ¶¶33, 35, 39. The Court issued orders from the bench and encouraged Defendants to respond to Plaintiffs' requests. Meré Decl. at ¶¶33, 35, 39.

In late November 2008, Defendants produced more than 10,000 pages of documents. Meré Decl. at ¶33. Those documents and the responses provided in January 2009 painted a picture of a group of entities that exist in name only and that exist, function and are controlled by a discrete number of individual owners. Meré Decl. at ¶¶40, 41.

Now that Defendants have finally divulged information regarding the true nature of the Defendant entities, Plaintiffs ask this Court for the opportunity to amend the Second Amended Complaint to add individuals as well as additional legal theories and facts.

## LEGAL ARGUMENT

### I. MOTIONS FOR LEAVE TO AMEND ARE LIBERALLY GRANTED BY COURTS

A court may, in the furtherance of justice, allow a party to amend any pleading on any terms as may be proper. Code Civ. Proc. §§ 473(a), 576. "This statutory provision giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state." *Klopstock v. Superior Ct.* (1941) 17 Cal.2d 13, 19; *see also Nestle v. City of Santa*

*Monica* (1972) 6 Cal.3d 920, 939. "That the trial courts are to liberally permit such amendments, at *any* stage of the proceeding, has been established policy in this state since 1901." *Hirsa v. Superior Ct.* (1981) 118 Cal.App.3d 486, 488-89 (emphasis in original). Even on the eve of trial, for example, the court of appeal determined that it was error to deny the amendment of a cross-complaint to add an additional theory of recovery where the delay in seeking the amendment was attributable to the opposing party's failure to comply with discovery requests. *Sachs v. City of Oceanside* (1984) 151 Cal.App.3d 315, 319.

The policy favoring leave to amend is so strong that it is an abuse of discretion to deny an amendment unless the adverse party can show meaningful prejudice, such as the running of the statute of limitations, trial delay, the loss of critical evidence, or added preparation costs. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761; *Solit v. Taokai Bank, Ltd.* (1999) 68 Cal.App.4th 1435, 1448. Absent a showing of such prejudice, delay alone is not grounds for denial of a motion to amend. *See Kittredge Sports Co. v. Superior Ct.* (1989) 213 Cal.App.3d 1045, 1048; *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 563-65.

## II. LEAVE TO AMEND IN THE PRESENT CASE SHOULD BE GRANTED

In the present case, Plaintiffs seek to amend the Second Amended Complaint as follows: (1) substitute the names of fifteen individuals, entities, and trusts for Doe Defendants 8 through 22; (2) add an alter ego legal theory of liability as to all Defendants; and (3) add additional violations of the State Housing Law, the Unfair Competition Law and San Francisco Municipal Codes.

These amendments are in furtherance of justice and will not prejudice Defendants. This Court, therefore, should grant leave to amend.

### A. The Proposed Amendments Are Necessary And In Furtherance Of Justice

As described in detail in the Declaration of Yvonne Meré filed in support of this Motion to Amend, when this case was filed Defendants took the position that they owned and managed residential property within the City and County of San Francisco. Defendants counsel made those representations in pleadings to this Court and Defendants made those representations in declarations and verified answers. For the first almost eighteen months of this litigation Defendants maintained

those representations. Then, in February 2008, something changed. Defendants began giving grossly inconsistent and vague answers about basic information, i.e. what roles entities played in the ownership, management and operation of residential property in San Francisco, who worked for which entities, etc. For example, in April 2008, in response to a Deposition notice for the Person Most Knowledgeable ("PMK") for Defendant Skyline Realty Inc., Defendants produced Eileen Wong, the Controller of CitiFunding/Lembi Group. Meré Decl. at ¶22. Yet, five months later in September 2008, when asked in Special Interrogatories for the names of employees at CitiFunding, Defendants refused to answer. Meré Decl. at ¶31.

Similarly, CitiApartments spent the first almost eighteen months of this litigation admitting that it managed residential property in San Francisco. Yet in April 2008, when David Raynal testified at a deposition as the PMK for CitiApartments, he stated that CitiApartments was merely a "clearinghouse" and "branding entity." Meré Decl. at ¶25-26. The fact that CitiApartments represented that it managed properties under oath to this Court, advertised that they managed property, and at one time had employees, business cards, and letterhead seemed an inconsistency Defendants refused to acknowledge. Because of these types of responses, the parties embarked on what would become a very long discovery battle where Defendants delayed responding and engaged in this type of gamesmanship and obfuscation rather than responding to questions propounded.

It has only been since Defendants' latest responses in January 2009, that Plaintiffs have started receiving direct and somewhat detailed responses, free from meritless objections. Meré Decl. at ¶41. Those responses have revealed to Plaintiffs that Defendants and the proposed additional previously designated Doe Defendants are all alter egos of each other. The proposed amendments represent the fruits of this long discovery battle. Had Defendants been more direct and forthcoming with information, this request to amend might have come sooner.

Although ordinarily a judge will not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend, in this case the need and validity of the proposed amendments only serve to support the granting of this motion. *See Atkinson, supra,* 109 Cal.App.4th at 760; *Kittredge Sports Co. v. Superior Ct.* (1989) 213 Cal.App.3d 1045, 1048.

Moreover, it is in the interests of justice to permit the proposed amendments. Given Defendants' recent revelations about how these purported independent business entities function, it is clear that they are mere shells, alter egos of a discrete group of individuals acting in their own capacity and as trustees for individual trusts. To permit these individuals to hide behind a group of sham businesses to escape liability for acts they were responsible for, would be unfair and against the interests of justice.

**B. Defendants Will Not Be Prejudiced By The Proposed Amendments**

Leave to amend the complaint in the present case is authorized because Defendants and the previously designated Doe Defendants will not be prejudiced by the proposed amendments. The amendments are not barred by the statute of limitations because the amendments relate back to the filing of the original Complaint. Additionally, the proposed amendments will not delay the trial and will not necessitate any added preparation costs. *See Solit, supra,* 68 Cal.App.4th at 1448.

**1. The Third Amended Complaint Is Not Barred By The Statute Of Limitations**

Section 474 of the Code of Civil Procedure allows a plaintiff to designate a defendant by a fictitious name when the plaintiff is ignorant of the true identity of the defendant. Once the plaintiff discovers the name of the defendant, he must amend the complaint accordingly. Code. Civ. Proc. §474. Plaintiff is "ignorant" within the meaning of the statute even if he knows of the existence of the defendant sued by the fictitious name, but lacks knowledge of that person's connection with the case or with his injuries. *GM Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 593-94. Where a complaint sets forth, or attempts to set forth, a cause of action against a defendant designated by a fictitious name and his true name is thereafter discovered and substituted by amendment, he is considered a party to the action from its commencement so that the statute of limitations stops running as of the date of the earlier pleading. *Austin v. Massachusetts Bonding and Insurance Co.* (1961) 56 Cal.2d 596, 599.

Even when a plaintiff seeks to add new legal theories or causes of action, the amended complaint relates back to the date of the filing of the original complaint and thus avoids the bar of the statute of limitations so long as recovery sought in both pleadings is based upon the same general set of facts. *Smeltzley v. Nicholson Manufacturing Co.* (1977) 18 Cal.3d 932, 939-940; *See also*

*Kittredge Sports Co., supra,* 213 Cal.App.3d at 1048; *Hirsa, supra,* 118 Cal.App.3d at 489.. "A defendant unaware of the suit against him by a fictitious name is in no worse position if, in addition to substituting his true name, the amendment makes other changes in the allegations on the basis of the same general set of facts." *Austin, et al., v. Massachusetts Bonding and Insurance Co., supra,* 56 Cal.2d at 602.

In *Smeltzley,* for example, plaintiff's original complaint alleged injuries caused by defendant's failure to provide him with a safe work place. After the statute of limitations had run, plaintiff amended the complaint to add a previously unnamed defendant as a party and a separate cause of action alleging that his injuries were also caused by a defective machine manufactured by the previously unnamed defendant. The trial court sustained the newly added defendant's demurrer finding that the statute of limitations barred the amendment. The Court of Appeal reversed the trial court finding that because the injuries alleged stemmed from the same set of facts, plaintiffs' amended complaint related back to the original complaint and was therefore not barred by the statute of limitations. The Court of Appeal found that the relation back precedent rests on the fundamental policy that cases should be decided on their merits. *Smeltzley* 18 Cal.3d at 939.

In the present case, Plaintiffs' original Complaint was filed on August 16, 2006 against Skyline Realty, Inc., CitiApartments, Inc., eleven related Limited Liability Corporations and fifty fictitiously named Doe Defendants. Plaintiffs' First Amended Complaint was filed on October 12, 2006 and its Second Amended Complaint on January 16, 2007, against these same Defendants.[2] In the original Complaint, the First Amended Complaint and the Second Amended Complaint, Plaintiffs asserted that all Defendants managed and operated residential properties in San Francisco in violation of the law. Plaintiffs now seek to substitute the names of fifteen previously unnamed individuals, entities and trusts for Doe Defendants 8 through 22 as additional perpetrators of the same course of conduct. Plaintiffs also seek to add an alter ego legal theory of liability as well as another type of Unfair Competition as to all Defendants related to the same course of conduct. Because the amendments

[2] Plaintiffs have since substituted the true names of Does 1 through 7 and these previously designated Doe Defendants have filed Answers.

pertain to the same course of conduct originally pled in earlier Complaints, the additional Doe Defendants are considered parties to the action from the time of the filing of the original complaint, and the statute of limitations is no bar to adding them. Likewise, the alter ego legal theory against all Defendants relates to the same general set of facts from the original complaint – that Defendants manage and operate residential properties in violation of the law. Therefore, the alter ego theory is also not barred by the statute of limitations. Lastly, Plaintiffs seek to add another example of Defendants' violations of the Unfair Competition Law. There already exists a cause of action for violations of the Unfair Competition Law. This amendment merely adds another fact that is related to the ownership, management and operation of residential property in San Francisco.

Finally, Plaintiffs seek to amend to add additional violations of the State Housing Law and San Francisco Municipal Codes discovered at some of residential properties after the filing of the Second Amended Complaint.[3] These additional violations are simply more examples of the same course of conduct alleged in the original Complaint. Therefore, these amendments relate back to Defendants' management and operation of residential properties in violation of the law, as alleged in the original Complaint, the First Amended Complaint and the Second Amended Complaint.[4]

**2. The Third Amended Complaint Will Not Delay The Trial**

Courts apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings up to and including trial. *See Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 296-97; *see also Sachs, Inc.*, 151 Cal.App.3d at 484-85 (finding amendment proper four years after filing of original complaint and on the eve of trial where delay due to Defendants' untimely discovery responses).

In the present case, Plaintiffs have spent over a year attempting to receive basic discovery from Defendants. Only recently did Plaintiffs discover the need to add alter ego theory of liability.

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[3] Defendants were previously served by the San Francisco Department of Building Inspection with Notices of Violation documenting these additional violations discovered at their properties.

[4] Because Plaintiffs' allege on-going nuisance activity at the properties, regardless of the relation back doctrine, the statute of limitations is inapplicable. *See Nestle, supra,* 6 Cal.3d at 937.

Moreover, no trial date has been set. Therefore, Defendants will certainly not be prejudiced by any delay of the trial in this matter.

### 3. The Third Amended Complaint Will Not Necessitate Added Preparation Costs

In the present case, no trial date has been set, and the parties are still in the early stages of discovery. In fact, except for one Request for Admission and Requests for Production of Documents, Defendants have propounded no other discovery on Plaintiffs. Therefore, the Third Amended Complaint will not necessitate any added preparation costs for Defendants.

## CONCLUSION

It is in the interests of justice to permit Plaintiffs to amend the complaint to allege the facts and legal theories derived from the evidence. Defendants' unwillingness to provide candid and timely responses to proper discovery should not bar Plaintiffs from seeking this relief. Plaintiffs, therefore, respectfully request that the Court grant their Motion for Leave to File a Third Amended Complaint.

Dated: February 19, 2009

DENNIS J. HERRERA
City Attorney
ALEX G. TSE
Chief Attorney, Neighborhood and Resident Safety Division
JILL CANNON
JENNIFER CHOI
YVONNE MERE
Deputy City Attorneys

By: _____
YVONNE MERE
JENNIFER CHOI
JILL CANNON
Attorneys for Plaintiff
CITY AND COUNTY OF SAN FRANCISCO AND
PEOPLE OF THE STATE OF CALIFORNIA

## PROOF OF SERVICE

I, Morris Allen, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On February 19, 2009, I served the following document(s):

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

on the following persons at the locations specified:

James A. Lassart Esq.
Adrian Driscoll, Esq.
Stephen K. Lightfoot II, Esq.
Ropers, Majeski, Kohn & Bentley
201 Spear Street, Suite 1000
San Francisco, CA 94105

in the manner indicated below:

☐ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery ☐ is attached or ☒ will be filed separately with the court.**

☐ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed February 19, 2009, at San Francisco, California.

Morris Allen