



DENNIS J. HERRERA  
City Attorney

RONALD P. FLYNN  
Chief Deputy City Attorney

DIRECT DIAL: (415) 554-4708

E-MAIL: ronald.flynn@sfgov.org

July 3, 2018

Presiding Justice Kline and Associate Justices  
1st District Court of Appeal, Division 2  
350 McAllister Street  
San Francisco, CA 94102

Re: *City of Oakland v. Alameda County Superior Court (In Re Ghost Ship Litigation)*  
Court of Appeal Court Case No. A154686, Div. 2  
*Gregory et al. v. Ng, et al.*  
Alameda County Superior Court Case No. RG16843631 (May 2, 2018)

Amici Curiae Letter of the League of California Cities  
and The California State Association of Counties  
In Support of Petition for Peremptory Writ of Mandate

Honorable Justices:

The League of California Cities and the California State Association of Counties (collectively, "Amici") urge this Court to grant the petition for peremptory writ of mandate pending in this matter.

#### **A. Amici's Interest**

The League of California Cities ("League") is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The League's Legal Advocacy Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

#### **B. Background**

This case involves the tragic death of 36 people in the December 2, 2016 fatal "Ghost Ship" warehouse fire in the City of Oakland ("City"). Amici extend their deepest sympathies for the loss to their families, friends, and communities.

Plaintiffs sued the City, among other defendants, alleging in relevant part that the City had notice that the building was "substandard and dangerous," and therefore the City had a mandatory duty to abate the code violations in the building, but failed to do so.

The City filed a demurrer, arguing that: (1) plaintiffs failed to identify a mandatory duty that the City failed to exercise, and (2) even if there were a mandatory duty the City failed to exercise, the City is nevertheless immune from liability by virtue of Government Code section 818.6, which immunizes the City from liability for injury “caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property . . . for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.”

The Superior Court overruled the demurrer. First, the Superior Court held that the City had a mandatory duty under state law and its municipal code to enforce its building and safety standards and to abate substandard conditions. Second, it held that the City was not immune from liability under Government Code section 818.6, because plaintiffs sufficiently alleged that the City knew of the unsafe conditions as a result of conduct unrelated to the inspection process itself.

Under California law, however, local governments are not, and should not be, the insurer of private property. With due respect, the Superior Court’s decision must be set aside.

### **C. The City’s Petition for Issuance of a Writ Should Be Granted**

#### **1. Holding the City Liable Creates a Heretofore Unknown Tort of Dangerous Condition of Private Property**

Under the Government Claims Act (Gov. Code, § 810 *et seq.*), there is no common-law tort liability for public entities. Rather, absent a constitutional claim, public entities may be liable only where a statute creates liability. (Gov. Code, § 815(a); see also *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897.)

Here the Superior Court purports to base liability against the City on Government Code section 815.6, which provides for public entity liability only under limited circumstances:

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.

(Gov. Code, § 815.6.)

The Superior Court grounded that mandatory duty to enforce building and safety standards and to abate substandard conditions in California Health & Safety Code sections 13145, 17960, 17961 and 17920.3, and in the City’s municipal code. Each state law and municipal code section involves enforcing building and safety standards in local jurisdictions.

Section 815.6 does not impose liability if a public entity or its employees have discretion to carry out the requirements of an enactment. (*Haggis v. City of L.A.* (2000) 22 Cal.4th 490, 498; *Creason v. Dept. of Health Services* (1998) 18 Cal.4th 623, 631-33.) In *Haggis*, the California Supreme Court noted:

[A]pplication of section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not be taken. *It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion.*

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(*Haggis, supra*, 22 Cal.4th at p. 498, citations omitted, emphasis added; see also *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1242-44 [holding that despite the use of “shall” abate in Health & Safety Code section 17980, the statute makes clear that the enforcement authority has a choice, and therefore discretion, to choose a course of action, preventing the finding of a mandatory duty to implement abatement procedures].) The rule that abatement decisions involve discretion makes sense in the overall scheme where local governments are tasked with determining which substandard conditions to abate, and which to institute proceedings against, and which to deprioritize based upon the resources available to the local government and the severity of the conditions.

The California Supreme Court has recognized that, in some instances, a finding that there is not a mandatory duty “works some injustice against plaintiffs.” (*Guzman, supra*, 46 Cal.4th at p. 910.) Nevertheless, it held that to find a mandatory duty, a court must find the specific duty is “phrased in explicit and forceful language,” and must contain an “explicit intent” to make the government a “fail-safe” to ensure compliance. (*Id.* at pp. 910-11.) As the City’s Petition makes clear, there is no such “explicit intent” in the inherently discretionary function of enforcing building standards. (See Petition at pp. 18-28.)

In a case directly analogous to the instant one, the California Supreme Court held that a local ordinance requiring a locality to take action where it becomes aware of hazardous conditions was non-actionable under section 815.6. In *Haggis*, a homeowner brought an action against the City of Los Angeles after his home was demolished following earthquake-related landslides. (*Haggis, supra*, 22 Cal.4th at p. 496.) Though the Los Angeles Municipal Code required that the City record a certificate of substandard condition showing that the property was unstable and prone to landslides, the City had not only failed to record the property’s known substandard condition, but also permitted buildings upon the property without requiring stabilization of the land to prevent future landslides. (*Id.* at pp. 496-98.) After a large earthquake destroyed the homeowner’s property, he sued Los Angeles for failure to comply with the recording requirement, claiming it to be a mandatory duty under section 815.6. (*Id.* at p. 498.)

The *Haggis* court held that the municipality’s decision regarding “whether a property is unstable, and what conditions make it so[,] and thus must be remedied” rests with the building department, and therefore is not a mandatory duty. (*Haggis, supra*, 22 Cal.4th at p. 502.) California law routinely recognizes that enforcing building codes involves discretion, and thus finds that there is no mandatory duty.

The Superior Court’s decision runs afoul of these rulings when it uses section 815.6 to convert building codes into mandatory abatement duties on private land. This is a sweeping expansion of the tort of dangerous condition of public property to include private property. A public entity is liable for a dangerous condition to *public* property. (Gov. Code, § 835.) In that statutory tort, a plaintiff must establish the existence of a “dangerous condition” and that the City had actual or constructive notice of the dangerous character. (Gov. Code, § 835.2.) A “dangerous condition” is “a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.” (Gov. Code, § 830, subd. (a).) Public property includes real property “owned or controlled” by the public. (Gov. Code, § 830, subd. (c).) But the reach of the statute excludes “easements, encroachments and other property that are located on the property of a public entity *but are not owned or controlled* by the public entity.” (*Ibid.*, emphasis added.) The legislature wisely distinguished between public property, which the government controls, and private property, which it does not.

The Superior Court's ruling, however, wipes away the distinction between public and private property – and between property that the government controls and that which it does not – and now includes liability for public *and private* property where (1) a dangerous condition exists, and (2) the public entity has notice of that condition. This transformation cannot be supported by the simple recitation of section 815.6.

## 2. Statutory Inspection Immunity Is Broad

Even assuming *arguendo* that a mandatory duty exists, to the extent that plaintiffs' allegations hinge on failures of City officials to act once they had knowledge of the substandard conditions of the warehouse, the City is immune.

A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property [...], for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

(Gov. Code, § 818.6.)

In *Haggis*, discussed above, the California Supreme Court held that liability was precluded not only because there was not a mandatory duty, but also due to statutory inspection immunity. The *Haggis* court reasoned that allowing liability would negate the important public policies underpinning the statutory immunity of section 818.6:

[A]llowing liability for failure to fully report, by recordation, the results of an inspection, while immunizing the failure to make an inspection at all, would have the effect, contrary to the evident legislative intent, of discouraging municipal safety and health inspections. Even if plaintiff's first cause of action stated a valid claim for breach of a mandatory duty, therefore, section 818.6 would immunize the City from liability for that breach. (See Gov. Code, § 815(b) [immunity provisions of Tort Claims Act prevail over liability provisions].)

(*Haggis*, *supra*, 22 Cal.4th at p. 505.)

In another case, *Cochran v. Herzog Engraving Co.* (1984) 155 Cal.App.3d 405, the Court of Appeal, First District, looked to legislative history in holding that section 818.6 has broad scope. There, the San Mateo Fire Marshall learned – through a telephone call in 1975, rather than through an inspection – that hazardous conditions existed in a building. Two subsequent inspections in 1977 and 1978 differed on whether the hazardous condition existed. (*Id.* at p. 408.) When a fire broke out in 1978, the court held the city was immune.

As the legislative committee comment to section 818.6 points out: 'Because of the extensive nature of the inspection activities of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity were not granted.' This legislative statement clearly underscores the important reasons of public policy which support the broad scope of this immunity.

(*Id.* at p. 412.)<sup>1</sup>

The Superior Court here unreasonably limited the immunity to instances in which the City learned of the unsafe conditions through an inspection itself, and excluded immunity for any instances where the City learned of it “as a result of conduct unrelated to any inspection activity” or through “the by-product of an observation unconnected to any inspection activity.” (Superior Court Order at pp. 17-18.) But *Cochran* also involved a dangerous condition that a city learned of unrelated to an inspection, instead learning of it through a phone call. (*Cochran, supra*, 155 Cal.App.3d at p. 408.) Two years later the city conducted inspections, the first of which noted the dangerous condition, and the second of which missed it. (*Ibid.*) The fire broke out just after the second inspection. Under the Superior Court’s reasoning, the city would have been liable for failing to abate the condition upon receipt of the phone call, and not entitled to immunity merely because of the manner it learned of the dangerous condition. While it is unclear whether the Superior Court here would find immunity for the later fire given the intervening inspections, what is clear is that the decision below erases the term “failure to make an inspection” from the immunity statute. The narrowing of the statutory inspection immunity has no support in the law.

The City is entitled to the same broad scope of the immunity under section 818.6, as identified by this Court and our Supreme Court, whether it learned of the substandard conditions through an inspection or otherwise.

### **3. Public Policy Requires That Local Governments Maintain Close Ties to the Community Without Becoming the Insurer of All Private Property**

The Superior Court’s decision finding that a case can proceed against the City on these facts not only contravenes the law, but creates uncertainty, and potentially vast liability, for local governments throughout California. The Superior Court’s decision ignores the many ways in which cities and counties come into contact with residential and commercial buildings in our communities, potentially exposing cities and counties to liability in any instance in which they gain knowledge of a substandard structure.

Cities and counties have set up 311 call centers to make it easy for community members to report all types of issues to the government, which can include complaints about code violations on private property. Currently, 311 call centers route those calls to the proper departments, which in turn set up systems to process them. Under the Superior Court’s ruling, forwarding those reports to the building inspector would create instant liability for the city or county, no matter how reasonable and diligent the city or county is in addressing those complaints – the city or county would be liable for damages simply because it had knowledge of the alleged dangerous condition. Such a result would discourage cities and counties from using 311 call centers or other complaint-based enforcement systems, resulting in less-safe conditions and undermining the public policy underlying the inspection immunity.

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<sup>1</sup> The California Supreme Court cited this same legislative committee comment when it held that “section 818.6 must reasonably be construed to insulate a public entity from any liability which might arise as a result of an entity’s failure to detect noncompliance with one of the myriad safety regulations contained in local or statewide building codes.” (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 916.) The *Morris* Court ultimately decided that inspection immunity did not apply to a county’s failure to insure compliance with a workers compensation insurance coverage requirement, but that does not narrow the Court’s broad construction of section 818.6 reaching noncompliance with the state’s various building codes.

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Local social service agencies go to workplaces and homes to meet with individuals who are receiving services for any number of needs, including workforce engagement, direct services to families in need, and evaluations for conservatorship. Those professionals are charged with carrying out their duties to make our communities safer by providing much needed safety net services, not with inspecting properties.

Local public health departments send home healthcare workers into our communities to assist the elderly and infirm. Those workers enter the homes, not to look for "obvious dangerous conditions," but instead to provide comfort, care and assistance to those in need.

Local police officers enter homes and buildings to assist community members in need: to respond to on-going break-ins, to intervene in domestic violence incidents, and to investigate other serious and violent crimes. Those officers should not be diverted to assessing building violations rather than focusing on the tasks at hand.

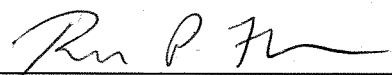
But the Superior Court's decision leads to these exact situations. It relies on plaintiffs' allegation "that the City knew of the unsafe conditions, not because it had conducted an inspection, but as a result of conduct unrelated to any inspection activity" in setting aside section 818.6 immunity. (Superior Court Order at p. 17.) And it couples that with its newly announced rule that a local government may be relieved of its mandatory duty only if "no City employee charged with enforcing the subject building and safety code violations ever had notice of the conditions of an unsafe and substandard building." (*Ibid.* at p. 14.) In order to avoid liability a city or county would need to take immediate action to abate every code violation it learns of outside the context of a formal inspection.

The Superior Court's reasoning not only eviscerates the broad statutory immunity, but potentially turns all city workers into de facto building inspectors. Or, worse, encourages them to ignore any unsafe conditions for fear that the homes they visit will be "red-tagged" by the city or county simply for reporting an unsafe condition to the building department.

Cities and counties should be able to prioritize nuisance abatement in their jurisdictions without becoming the insurer for all private property. Residents should be able to contact their local government without fear of the potential loss of their home. Cities and counties of California should be able to rely on the well-balanced tort and immunity system set up by the Legislature. The Superior Court's decision upends that reliance, and Amici respectfully request that the Court take immediate action in issuing a writ vacating the Superior Court's order.

Very truly yours,

THE LEAGUE OF CALIFORNIA CITIES,  
THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

By:   
RONALD P. FLYNN  
Chief Deputy City Attorney  
Office of the City Attorney, Dennis J. Herrera

**PROOF OF SERVICE**

I, Pamela Cheeseborough, 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, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102.

On July 3, 2018, I served the following document(s):

Amici Curie Letter of the League of California Cities and  
The California State Association of Counties  
In Support of Petition for Peremptory Writ of Mandate

on the following persons at the locations specified:

Superior Court of California  
County of Alameda  
Honorable Brad Seligman, Dept. 23  
1221 Oak Street  
Oakland, CA 94612

Max Harris, #BLM855  
Santa Rita Jail  
5325 Broder Blvd.  
Dublin, CA 94568

***Defendant, In Pro Per***

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.

and on the following persons at the locations specified:

Barbara J. Parker, Esq. City Attorney Otis McGee, Esq. Erin Bernstein, Esq. Jamilah Jefferson, Esq. Office of the City Attorney One Frank Ogawa Plaza, 6th Floor Oakland, California 94612 Telephone: 510.238.3601	<b><u>Counsel for Petitioner</u></b>  City of Oakland
Raymond C. Marshall, Esq. Robert J. Stumpf, Jr., Esq. Sheppard Mullin Richter & Hampton LLP	<b><u>Counsel for Petitioner</u></b>  City of Oakland

<p>Four Embarcadero Center, 17th Floor  San Francisco, California 94111-4109  Telephone: 415.434.9100  Facsimile: 415.434.3947</p>	
<p>Mary E. Alexander, Esq.  Jennifer L. Fiore, Esq.  Sophia M. Aslami, Esq.  Casey A. Gee, Esq.  Mary Alexander &amp; Associates, P.C.  44 Montgomery Street, Suite 1303  San Francisco, CA 94104  Telephone: (415) 433-4440  Fax: (415) 433-5440  Email:  malexander@maryalexanderlaw.com  Email: jfiore@maryalexanderlaw.com  Email: saslami@maryalexanderlaw.com  Email: cgee@maryalexanderlaw.com</p>	<p><b><u>Plaintiffs' Liaison Counsel for all related actions and Attorneys for Plaintiffs in</u></b></p> <p>Jose Avalos v. Ng, et al Alameda County Superior Court Case No. RG17866659 ; Janet and John Barmby, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17869155;  Carmen Brito v. Ng, et al. Alameda County Superior Court Case No. RG17861366;  David Calvera v. Ng, et al. Alameda County Superior Court Case No. RG17869151,  Ivannia Chavarria v. Ng, et al. Alameda County Superior Case No. RG 17872007;  Bruce and Nancy Fritz, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17853255,  Lucienne Ghassart, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17848401; David and Kimberly Gregory, et al. v. Ng, et al. Alameda County Superior Court Case No. RG16843631;  Natalie Jahanbani v. Ng, et al. Alameda County Superior Court Case No. RG17848158;  Nicole Kelber v. Ng, et al. Alameda County Superior Court Case No. RG17861368;  Adam Kennon v. Ng, et al. Alameda County Superior Court Case No. RG 17866657  Andrew Kershaw, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17861362, Catherine and Michael Madden, et al. v. Ng, et al. Alameda County Superior Court Case No. RG16843633;  Michael and Toshiko Morris, et al. v Ng, et al. Alameda County Superior Court Case No. RG17845655;  Hunter Morton v. Ng, et al. Alameda County Superior Court Case No. RG17871997;</p>



	<p>Kyle O'Brien v. Ng, et al. Alameda County Superior Court Case No. RG 17881032;  Gretchen Porter, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17860470;  Andrew Ruiz, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17877854  Michael Russell v. Ng Alameda County Superior Court Case No. RG17872021  <i>Susan Slocum. V. Ng, et ai</i>, Alameda County Superior Court Case No. RG17854977;  <i>Leah, Manuel and Maria Vega v. Ng, el al.</i> Alameda County Superior Court Case No. RG17866652;  <i>Edward and Susanne Wadsworth, et al. v. Ng, et al.</i> Alameda County Superior Court Case No. RG16843856</p>
<p>Bobby Thompson, Esq.  Thompson Law Offices, P.C.  700 Airport Blvd., Suite 160  Burlingame, CA 94010  Telephone: (650) 513-6111  Fax: (650) 513-6071  Email: <a href="mailto:bobby@tlopc.com">bobby@tlopc.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Jose Avalos v. Ng, et al Alameda County Superior Court Case No. RG17866659 ;  Janet and John Barmby, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17869155;  Carmen Brito v. Ng, et al. Alameda County Superior Court Case No. RG17861366;  David Calvera v. Ng, et al. Alameda County Superior Court Case No. RG17869151,  Ivannia Chavarria v. Ng, et al. Alameda County Superior Case No. RG 17872007;  Bruce and Nancy Fritz, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17853255,  Lucienne Ghassart, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17848401;  David and Kimberly Gregory, et al. v. Ng, et al. Alameda County Superior Court Case No. RG16843631;  Natalie Jahanbani v. Ng, et al. Alameda County Superior Court Case No. RG17848158;</p>

	<p>Nicole Kelber v. Ng, et al. Alameda County Superior Court Case No. RG17861368; Adam Kennon v. Ng, et al. Alameda County Superior Court Case No. RG 17866657 Andrew Kershaw, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17861362 Catherine and Michael Madden, et al. v. Ng, et al. Alameda County Superior Court Case No. RG16843633; Michael and Toshiko Morris, et al. v Ng, et al. Alameda County Superior Court Case No. RG17845655; Hunter Morton v. Ng, et al. Alameda County Superior Court Case No. RG17871997; Kyle O'Brien v. Ng, et al. Alameda County Superior Court Case No. RG 17881032; Gretchen Porter, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17860470; Andrew Ruiz, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17877854 Michael Russell v. Ng Alameda County Superior Court Case No. RG17872021 Susan Slocum. V. Ng, et ai, Alameda County Superior Court Case No. RG17854977; Leah, Manuel and Maria Vega v. Ng, el al. Alameda County Superior Court Case No. RG17866652; Edward and Susanne Wadsworth, et al. v. Ng, et al. Alameda County Superior Court Case No. RG16843856</p>
<p>Joshua Cohen Slatkin, Esq. Law Office of Joshua Cohen Slatkin 2001 Wilshire Blvd., Suite 320 Santa Monica, CA 90403 Telephone: (310) 627-2699 Fax: (310) 943-2757 Email: <a href="mailto:jcohenslatkin@jcslaw4you.com">jcohenslatkin@jcslaw4you.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Jack Bohlka v. Ng, et al. Alameda County Superior Court Case No. RG17846748</p>

<p>Gregory Vanni, Esq.  Raffi H. Ohanian, Esq.  Then Beck Vanni Callahan &amp; Powell  1100 East Green Street  Pasadena, CA 91106-2513  Telephone: (626) 795-8333  Fax: (626) 449-9933  Email: <a href="mailto:gvanni@thonbeck.com">gvanni@thonbeck.com</a>  Email: <a href="mailto:rohanian@thonbeck.com">rohanian@thonbeck.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Margaret Bohlka v. Ng, et al. Alameda County Superior Court Case No. RG17851011</p>
<p>Thomas Brandi, Esq.  Brian Malloy, Esq.  The Brandi Law Firm  354 Pine Street, 3rd floor  San Francisco, CA 94104  Telephone: (415) 989-1800  Fax: (415) 989-1801  Email: <a href="mailto:tjb@brandilaw.com">tjb@brandilaw.com</a>  Email: <a href="mailto:bjm@brandilaw.com">bjm@brandilaw.com</a></p> <hr/> <p>Christopher T. Aumais, Esq.  Ashkahn Mohamadi, Esq.  Kelly Winter, Esq.  Girardi Keese  1126 Wilshire Blvd.  Los Angeles, CA 90017  Telephone: (213) 977-0211  Fax: (213) 481-1554  Email: <a href="mailto:caumais@girardikeese.com">caumais@girardikeese.com</a>  Email: <a href="mailto:amohamadi@girardikeese.com">amohamadi@girardikeese.com</a>  Email: <a href="mailto:kwinter@girardikeese.com">kwinter@girardikeese.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Rodney Clark v. Ng, et al. Alameda County Superior Court Case No. RG 17854628  Colleen Dolan v. Ng, et al. Alameda County Superior Court Case No. RG 17860682</p> <hr/> <p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Sadao Dennis v. Ng, et al. Alameda County Superior Court Case No. RG17863866  Emillie Grandchamps, et al. v. Ng et al. Alameda County Superior Court Case No. RG17849318;  Robert Jacobitz v. Ng, et al. Alameda County Superior Court Case No. RG17863858  Aaron Marin v, Ng, et al. Alameda County Superior Court Case No. RG17863850  Colleen and Gene McCarty, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17856893  Yrjo Timonen, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17851540  Benjamin Langfur v. Ng, et al. Alameda County Superior Court Case No. RG18890521</p>
<p>Ibiere N. Seek, Esq.  Marcelis Morris, Esq.  The Cochran Firm  4929 Wilshire Blvd., Suite 1010</p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Emillie Grandchamps, et al. v. Ng, et al. Alameda County Superior Court Case No.</p>

<p>Los Angeles, CA 90010  Telephone: (323) 435-8205  Fax: (323) 282-5280  Email: <a href="mailto:iseck@cochranfirm.com">iseck@cochranfirm.com</a>  Email: <a href="mailto:mmorris@cochranfirm.com">mmorris@cochranfirm.com</a></p>	<p>RG17849318;  Colleen and Gene McCarty, et al. v. Ng, et al.  Alameda County Superior Court Case No.  RG17856893  Yrjo Timonen, et al. v. Ng, et al.  Alameda County Superior Court Case No.  RG17851540</p>
<p>Robert S. Ams, Esq.  Jonathan E. Davis, Esq.  Kevin M. Osborne, Esq.  Robert C. Foss, Esq.  The Ams Law Firm  515 Folsom St., 3rd Floor  San Francisco, CA 94105  Telephone: (415) 495-7800  Fax: (415) 495-7888  Email: <a href="mailto:rsa@amslaw.com">rsa@amslaw.com</a>  Email: <a href="mailto:jed@amslaw.com">jed@amslaw.com</a>  Email: <a href="mailto:kmo@amslaw.com">kmo@amslaw.com</a>  Email: <a href="mailto:rcf@amslaw.com">rcf@amslaw.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Gary and Valerie Plotkin, et al. v Ng, et al.  Alameda County Superior Court Case No.  RGI7850334</p>
<p>W. Gordon Kaupp, Esq.  Kaupp &amp; Feinberg LLP  One Sansome Street, 35th Floor  San Francisco, CA 94104  Telephone: (415) 896-4588  Fax: (415) 294-9127  Email: <a href="mailto:gordon@kauppfeinberg.com">gordon@kauppfeinberg.com</a></p> <hr/> <p>Ryan J. Vlasak, Esq.  Bracamontes &amp; Vlasak, P.C.  220 Montgomery Street, Suite 870  San Francisco, CA 94104  Telephone: (415) 835-6777  Fax: (415) 835-6780  Email: <a href="mailto:rvlasak@bvlawsf.com">rvlasak@bvlawsf.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Samuel Maxwell v. Ng, et al. Alameda  County Superior Court Case No.  RGI7853077</p> <hr/> <p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Samuel Maxwell v. Ng, et al. Alameda  County Superior Court Case No.  RG17853077</p>
<p>Ronald Goldman, Esq.  Timothy Loranger, Esq.  Diane Moore, Esq.  Baum Hedlund Aristei Goldman, PC  12100 Wilshire Blvd., Ste. 950</p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Robert Lapine v. Ng, et al. Alameda County  Superior Court Case No. RG17854328</p>

<p>Los Angeles, CA 90025  Telephone: (310) 207-3233  Email: <a href="mailto:rgoldman@baumhedlundlaw.com">rgoldman@baumhedlundlaw.com</a>  Email: <a href="mailto:tloranger@baumhedlundlaw.com">tloranger@baumhedlundlaw.com</a>  Email:  <a href="mailto:dmargermoore@baumhedlundlaw.com">dmargermoore@baumhedlundlaw.com</a></p>	
<p>Paul A. Matiasic, Esq.  Hannah E. Mohr, Esq.  Matiasic &amp; Johnson LLP  44 Montgomery Street, Suite 3850  San Francisco, CA 94104  Telephone: (415)675-1089  Fax: (415) 675-1103  Email: <a href="mailto:matiasic@mjlawoffice.com">matiasic@mjlawoffice.com</a>  Email: <a href="mailto:mohr@mjlawoffice.com">mohr@mjlawoffice.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Yraina L Kopelman v, Ng, et al Alameda County Superior Court Case No. RG17854105  John and Kathe Matlock, et al. v. Ng, et al. Alameda County Superior Court Case No. RG17864342  Randall Wittenauer. V. Ng, et al. Alameda County Superior Court Case No. RG 17864346</p>
<p>John R. Browne, III, Esq.  Law Offices of John R. Browne, III  50 California Street, Suite 3500  San Francisco, CA 94111  Telephone: (415)421-6700  Fax: (415) 398-2438  Email: <a href="mailto:johnrbrowne@sbcglobal.net">johnrbrowne@sbcglobal.net</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>George D. Kellogg v. Ng, et al. Alameda County Superior Court Case No. RG 17857948</p>
<p>Christopher Dolan, Esq.  Isabelle Tan, Esq.  Aimee Kirby, Esq.  Dolan Law Firm PC  1438 Market Street  San Francisco, CA 94102  Telephone: (415) 636-8160  Fax: (415) 421-2830  Email: <a href="mailto:chris@cbdlaw.com">chris@cbdlaw.com</a>  Email: <a href="mailto:isabelle.tan@dolanlawfirm.com">isabelle.tan@dolanlawfirm.com</a>  Email: <a href="mailto:aimee.kirby@dolanlawfirm.com">aimee.kirby@dolanlawfirm.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Carol Cidlik v. Ng, et al. Alameda County Superior Court Case No. RG 17860699  Brian and Judy Hough v. Ng, et al. Alameda County Superior Court Case No. RG 17860697  John Georges Igaz v. Ng, et al. Alameda County Superior Court Case No. RG17863541  Lorraine and Richard Runnels v. Ng, et al. Alameda County Superior Court Case No. RG17860700</p>
<p>John M. Feder, Esq.  Rouda Feder Tietjen McGuinn  44 Montgomery Street, Suite 750</p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p>

<p>San Francisco, CA 94104  Telephone: (415) 398-5398  Fax: (415) 398-8169  Email: <a href="mailto:jfeder@rftmlaw.com">jfeder@rftmlaw.com</a></p>	<p>Christopher Danemayer, et al. v. Ng, et al.  Alameda County Superior Court Case No. RG17861609  Pamela Krueger, et al., v. Ng, et al.,  Alameda County Superior Court Case No. RG17861609</p>
<p>Roger A. Dreyer, Esq.  Robert B. Bale, Esq.  Anton J. Babich, Esq.  Dreyer Babich Buccola Wood Campora, LLP  20 Bicentennial Circle  Sacramento, CA 95826  Telephone: (916) 379-3500  Fax: (916) 379-3599  Email: <a href="mailto:rdreyer@dbbwc.com">rdreyer@dbbwc.com</a>  Email: <a href="mailto:rbale@dbbwc.com">rbale@dbbwc.com</a>  Email: <a href="mailto:ababich@dbbwc.com">ababich@dbbwc.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Dennis and Kerry Cline, et al. v. Ng, et al.  Alameda County Superior Court Case No. RG17862635;  Tamra and Phillip McGill, et al. v. Ng, et al.  Alameda County Superior Court Case No. RG17869439;  Manuel and Maria Vega, et al. v Ng, et al.  Alameda County Superior Court Case No. RG17845597;  James and Deborah Walrath, et al. v. Ng, et al.  Alameda County Superior Court Case No. RG17854654</p>
<p>Do Kim, Esq.  Law Offices of Do Kim APLC  3435 Wilshire Blvd Ste 2700  Los Angeles, CA 90010-2013  Telephone: (213) 251-5440  Fax: (213) 232-4919  Email: <a href="mailto:dkim@dokimlaw.com">dkim@dokimlaw.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Yoo Sook Jo and Caleb Seong Jo, et al. v. Ng, et al.  Alameda County Superior Court Case No. RG17871131</p>
<p>J. Gary Gwilliam, Esq.  Winston W. Moody, Esq.  Gwilliam, Ivory, Chiosso, Cavalli &amp; Brewer  1999 Harrison Street, Suite 1600  Oakland, CA 94612  Telephone: (510) 832-5411  Fax: (510) 832-1918  Email: <a href="mailto:ggwilliam@giccb.com">ggwilliam@giccb.com</a>  Email: <a href="mailto:wmoody@giccb.com">wmoody@giccb.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Farzaneh Farsoudi-Hoda. v. Ng, et al.  Alameda County Superior Court Case No. RG 17871774</p>
<p>Dan Siegel, Esq.  Siegel &amp; Yee  475 14th Street, Suite 500  Oakland, CA 94612</p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p>

<p>Telephone: (510) 839-1200  Fax: (510) 444-6698  Email: <a href="mailto:dansiegel@siegelyee.com">dansiegel@siegelyee.com</a></p> <hr/> <p>Sandra Ribera Speed, Esq.  Ribera Law Firm  157 West Portal Avenue, Suite 2  San Francisco, CA 94127  Telephone: (415) 576-1600  Fax: (415) 842-0321  Email: <a href="mailto:sribera@riberalaw.com">sribera@riberalaw.com</a></p>	<p>Farzaneh Farsoudi-Hoda. v. Ng, et al.  Alameda County Superior Court Case No.  RG 17871774</p> <hr/> <p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Christopher Askew v. Ng, et al. Alameda  County Superior Court Case No.  RG17873709</p>
<p>Elinor Leary, Esq.  David L. Winnett, Esq.  The Veen Firm, P.C.  711 Van Ness Avenue, Suite 220  San Francisco, CA 94102  P.O. Box 7296  San Francisco, CA 94120  Telephone: (415) 673-4800  Fax: (415) 771-5845  Email: <a href="mailto:EL.Team@veenfirm.com">EL.Team@veenfirm.com</a>  Email: <a href="mailto:d.winnett@veenfirm.com">d.winnett@veenfirm.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Leisa Askew v. Ng, et al. Alameda County  Superior Court Case No. RG1783957</p>
<p>Paul L. Alaga, Esq.  Law Office of Paul L. Alaga  885 Bryant St., 2nd Floor  San Francisco, CA 94103  Telephone: (415)581-0885  Fax: (415) 581-0887  Email: <a href="mailto:paulalaga@sflaw.net">paulalaga@sflaw.net</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p><i>Anthony Perrault v. Ng, et al.</i> Alameda  County Superior Court Case No.  RG17884460</p>
<p>Randal F. Blair, Esq.  Law Office of Randal Blair  770 Warfield Avenue, Floor 1  Oakland, CA 94610-2758  Telephone: (415) 205-3766  Email: <a href="mailto:rfb-law@comcast.net">rfb-law@comcast.net</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p><i>Sylvan, et al. v. Ng, et al.</i> Alameda County x  Superior Court Case No. RG17884203</p>
<p>Joshua Cohen Slatkin  Law Offices of Joshua Cohen Slatkin  11726 San Vicente Blvd., Suite 200  Los Angeles, CA 90049  Email: <a href="mailto:jcohenslatkin@jcslaw4you.com">jcohenslatkin@jcslaw4you.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Jack Bohlka</p>

<p>Gregory R. Vanni  Raffi H. Ohanian  Thon Beck Vanni Callahan &amp; Powell  1100 East Green Street  Pasadena, CA 91106-2513  Email: <a href="mailto:ganni@thonbeck.com">ganni@thonbeck.com</a>  Email: <a href="mailto:rohanian@thonbeck.com">rohanian@thonbeck.com</a></p>	<p><b><u>Attorneys for Plaintiffs in:</u></b></p> <p>Margaret Bohlka</p>
<p>Raymond Meyer, Jr., Esq.  Stephen C. Dreher, Esq.  Keith G. Bremer, Esq.  Bremer Whyte Brown &amp; O’Meara LLP  300 Frank H. Ogawa Plaza  The Rotunda Building, Suite 355  Oakland, CA 94612  Telephone: (510) 540-4881  Fax: (510) 540-4889  Email: <a href="mailto:rmeyer@bremerwhyte.com">rmeyer@bremerwhyte.com</a>  Email: <a href="mailto:sdreher@bremerwhyte.com">sdreher@bremerwhyte.com</a>  Email: <a href="mailto:kbremer@bremerwhyte.com">kbremer@bremerwhyte.com</a></p>	<p><b><u>Defendants’ Liaison Counsel for all related actions and Attorneys for Defendants Chor Nar Siu Ng, Individually and as Trustee of the Chor Nar Siu Ng Revocable Trust Dated September 28,2007 and Eva Ng</u></b></p>
<p>Raymond Marshall, Esq.  Krystal Bowen, Esq  Sheppard Mullin Richter &amp; Hampton LLP  Four Embarcadero Center* 17th Floor  San Francisco, CA 94111-4109  Phone: (415) 774-3167  Facsimile: (415)403-6230  Email: <a href="mailto:RMarshall@sheppardmullin.com">RMarshall@sheppardmullin.com</a>  Email: <a href="mailto:kbowen@sheppardmullin.com">kbowen@sheppardmullin.com</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>City of Oakland</p>
<p>Orestes Alexander Cross, Esq.  Valor Legal, P.C.  2600 Tenth Street, Ste. 435  Berkeley, CA 94710  Phone: (415) 545-8394  Facsimile: (415) 520-9695  E-mail: <a href="mailto:ocross@valorlegal.com">ocross@valorlegal.com</a></p>	<p><b><u>Attorneys for Defendant and Cross-Complainant</u></b></p> <p>Jonathan Hrabko</p>



<p>S. Dean Ruiz, Esq.  Harris, Perisho &amp; Ruiz  Brookside Corporate Center  3439 Brookside Road, Suite 210  Stockton, CA 95129  Telephone: (209) 957-4254  Fax: (209) 957-5338  Email: <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>Daniel Lopez</p>
<p>Kate Dyer, Esq.  Clarence Dyer &amp; Cohen LLP  899 Ellis Street  San Francisco, CA 94109  Telephone: (415)749-1800  Fax: (415) 749-1694  E-mail: <a href="mailto:kdyer@clarencedyer.com">kdyer@clarencedyer.com</a></p> <hr/> <p>Laurie Edelstein, Esq.  Seth Sias, Esq.  Steptoe &amp; Johnson LLP  One Market Street  Steuart Tower, Suite 1800  San Francisco, CA 94105  Telephone: (415) 365-6700  Fax: (415) 365-6699  Email: <a href="mailto:ledelstein@steptoe.com">ledelstein@steptoe.com</a>  Email: <a href="mailto:ssias@steptoe.com">ssias@steptoe.com</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>Pacific Gas &amp; Electric Company and  PG&amp;E Corporation</p> <hr/> <p><b><u>Attorneys for Defendant</u></b></p> <p>Pacific Gas &amp; Electric Company and  PG&amp;E Corporation</p>
<p>Jesse F. Ruiz, Esq.  Messner Reeves LLP  160 West Santa Clara Street, Suite 1000  San Jose, CA 95113  Phone: (408) 397-298-7120  Phone: (408) 792-5906 - direct  Facsimile: (408) 295-0477  E-mail: <a href="mailto:mjackson@behblaw.com">mjackson@behblaw.com</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>Defendant Russell E.L. Butler aka Black  Jeans</p>


<p>Anderson Franco, Esq. De la Pena &amp; Holiday, LLP One Embarcadero Center, Suite 2860 San Francisco, CA 94111 Telephone: (415) 268-8000 Fax: (415) 268-8180 Email: <a href="mailto:AFranco@dlphlaw.com">AFranco@dlphlaw.com</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>Benjamin Cannon</p>
<p>Otis McGee, Jr. Michelle M, Meyers Oakland City Attorney's Office 1 Frank H. Ogawa Plaza, 6th Floor Oakland, CA 94612 Telephone: (510) 238-3601 Fax: (510) 238-6500 Email: <a href="mailto:omcgeejr@oaklandcityattorney.org">omcgeejr@oaklandcityattorney.org</a> Email: <a href="mailto:mmeyers@oaklandcityattorney.org">mmeyers@oaklandcityattorney.org</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>City of Oakland</p>
<p>Omar Vega 2641 Crestmore Circle Stockton, CA 95206 Telephone: (510) 332-4092 Email: <a href="mailto:customaudio510@yahoo.com">customaudio510@yahoo.com</a></p>	<p><b><u>Defendant</u></b></p> <p>Omar Vega</p>
<p>Kimberly Miller Bird Marella Boxer Wolpert 1875 Century Park E. #23 Los Angeles, CA 90067 Email: <a href="mailto:km@birdmarella.com">km@birdmarella.com</a></p>	<p><b><u>Attorneys for Defendant</u></b></p> <p>100% Silk, Amanda Brown and Britt Brown</p>

in the manner indicated below:

- BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through **TrueFiling** in portable document format ("PDF") Adobe Acrobat.

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

Executed July 3, 2018, at San Francisco, California.

  
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Pamela Cheeseborough