21-16649

In the
United States Court of Appeals
For the Ninth Circuit

RICHARD WOLF,

Plaintiff-Appellant,

v.

CITY OF MILLBRAE, a government entity, MILLBRAE HEIGHTS HOMEOWNERS ASSOCIATION, a domestic nonprofit, T-MOBILE USA, INC., a foreign corporation, TONY DEBLAUWE, DANIEL LOUIE, VOLTAIRE WARDA, YURI REGELMAN AND ALAN ARSHALL, individually and as board members of the Millbrae Heights Homeowners Association,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN CALIFORNIA, OAKLAND, CASE NO. 04:21-CV-00967-PJH
HONORABLE PHYLLIS J. HAMILTON

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF JURISDICTION

A. Basis for District Court's Subject-Matter Jurisdiction

The United States District Court, Northern District of California possessed jurisdiction over this action pursuant to 28 U.S.C. §1331 (Federal Question); 42 U.S.C. §§12133 and 12134 (The Americans With Disabilities Act); and 28 U.S.C. §§2201 and 2202 (Declaratory Judgment).

The United States District Court, Northern District of California possessed supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367 because the claims arose from a common nucleus of operative fact and were so intertwined with other matters pending before the Court as to make exercise of supplemental jurisdiction appropriate.

B. Basis for Court of Appeals' Jurisdiction

Jurisdiction is conferred on the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1291 in that this appeal lies from a final decision of the United States District Court, Northern District of California.

C. Filing Dates Establishing Timeliness of Appeal and Assertion that Appeal is From Final Order or Judgment

On August 23, 2021, Hon. Phyllis J. Hamilton, U.S.D.J. issued an Order granting the three motions to dismiss filed by Defendants-Appellees in their entirety. Appellants' Excerpts of Record ("AER") at 3. The Order granted Plaintiff-Appellant leave to amend as to certain claims. AER at 20. On September 20, 2021, the Plaintiff-

Appellant filed a Notice of Intent not to Amend and Request for Dismissal. AER at 69. On September 21, 2021, Hon. Phyllis J. Hamilton, U.S.D.J. issued an Order of Dismissal (AER at 68) and Judgment (AER at 2) dismissing the entirety of the action with prejudice. On October 6, 2021, the Plaintiff-Appellant filed a Notice of Appeal. AER at 471.

It is submitted that this appeal is from a final Order and Judgment and is timely.

STATEMENT OF ISSUES AND STANDARD FOR REVIEW

A. Statement of Issues

(1) Whether the District Court erred by holding that Plaintiff-Appellant's request for an accommodation under the ADA (and FHA/FEHA) was *per se* unreasonable because it would violate Federal Law, to wit, the Telecommunications Act of 1996.

(2) Whether the District Court erred by holding that Plaintiff-Appellant failed to state fair housing claims against the Defendant-Appellee HOA.

(3) Whether the District Court erred by holding that Plaintiff-Appellant did not possess due process rights to individual self-defense, personal security and bodily integrity.

(4) Whether the District Court erred by holding that Plaintiff-Appellant failed to state a private nuisance claim.

(5) Whether the District Court erred by holding that Plaintiff-Appellant failed to state a breach of fiduciary duty claim against the Defendant-Appellant HOA.

B. Standard for Review

The standard of review for the district court's dismissal for failure to state a claim is *de novo*. *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1175 (9th Cir. 2021), *citing Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir. 2010).

STATEMENT OF THE CASE

A. Introduction

At a time when our society is confronting issues of equality, justice, liberty and individual dignity, the Defendants-Appellees, as sanctioned by the District Court, have sought to carve out a unique exception, under the guise of the Telecommunications Act of 1996 (TCA), to permit discrimination against disabled individuals suffering from electromagnetic sensitivities. While every other disabled person in the United States can seek a reasonable accommodation on account of his or her disability, Plaintiff-Appellant, and others like him, apparently cannot (and never will).

B. Plaintiff-Appellant is Disabled Under the Americans With Disabilities Act

The U.S. Architectural and Transportation Barriers Compliance Board or "Access Board," the federal agency charged with advising on disability-related matters, recognizes electromagnetic hypersensitivity ("EHS") as a disabling

condition under the Americans With Disabilities Act ("ADA"). AER at 322; see 69 Fed. Reg. 44087 (July 23, 2004).

According to Dr. Tiffany Baer, a Board-Certified Internal Medicine Physician licensed in the state of California, the Plaintiff-Appellant is an individual who suffers from EHS as a result of being exposed to electromagnetic fields ("EMF"). AER at 322. In Dr. Baer's professional opinion, this medical condition severely impairs Plaintiff-Appellant's neurological system and many major life activities, including, but not limited to, the following symptoms: insomnia, tiredness, fatigue, loss of energy, dizziness, difficulty concentrating, dry mouth, dry eyes, headaches, nervousness and weight gain. To enjoy a better quality of life, Dr. Baer recommends Plaintiff-Appellant to minimize EMF exposure. AER at 322, 398.

C. A Cell Tower is Installed Six-Feet Above Plaintiff-Appellant's Residence Without His Knowledge or Consent

In or about 2010, Defendant-Appellee T-Mobile USA, Inc. ("T-Mobile") installed a cell tower above Plaintiff-Appellant's Condominium Unit #41, Millbrae Heights, 320 Vallejo Drive, Millbrae, CA 94030, where Plaintiff-Appellant resided since 2000 before he was constrained to move out of his dwelling (the "Residence"). AER at 323. This wireless communications facility/cell tower is located approximately six (6) feet above the Residence. *Id*.

The location of T-Mobile's cell tower was not disclosed in the materials prepared by Plaintiff-Appellant's homeowners association, Defendant-Appellee the

Millbrae Heights Homeowners Association (the "HOA") and the individual Defendants-Appellees who comprise the Board of the HOA. *Id*. The HOA intentionally misled the Plaintiff-Appellant and induced him to sign documents without revealing this material and critical condition. *Id*.; AER at 388. Had Plaintiff-Appellant known about the location of the cell tower, he would have never signed the approval packet. AER at 323.

From 2010 when T-Mobile erected the cell tower until now, the Plaintiff-Appellant experienced increasingly severe EHS symptoms inside his Residence. *Id*. This is because, as Plaintiff-Appellant has alleged, T-Mobile has amped up the power of its wireless communication facility over time. *Id.* The cell tower originally had a "Level 3" power, but T-Mobile installed new equipment that amped up the facility to "Level 4" power. *Id.* More recently, as Plaintiff-Appellant has alleged, it appears that T-Mobile further amped up the power of its cell tower to "Level 5." *Id.*

By letter dated July 27, 2018, Nanci Freedman, acting as an agent of the Plaintiff-Appellant, informed the HOA of the dangers of T-Mobile's cell tower. The HOA ignored this communication and took no action. AER at 324. Then, during the COVID-19 pandemic and its period of mandatory quarantine, Plaintiff-Appellant's mental and physical well-being severely worsened due to months of uninterrupted, extremely high levels of RF radiation a mere six-feet overhead of his Residence, where Plaintiff was forced to spend the majority of his time. *Id*.

On July 30, 2020, the Plaintiff-Appellant hired a certified building biologist specializing in electromagnetic radiation to prepare an electromagnetic evaluation at the Residence. *Id*. The expert recorded EMF measurements inside the Residence and concluded that "radiofrequency fields (RF) dramatically exceeded Building Biology precautionary levels in all rooms…2,500 times higher than Building Biology Extreme Radiation levels were found in the living room and master bedroom, directly under the cell tower mounted on the rooftop above the unit." *Id*.; AER at 375. These findings were confirmed in a separate report prepared by a second certified building biologist also specializing in electromagnetic radiation. AER at 405.

D. Plaintiff-Appellant's Requests for Reasonable Accommodations are Ignored

Faced with the spectrum of having to leave his condominium unit and being unable to sell his unhabitable home, the Plaintiff-Appellant hired an attorney and submitted two (2) distinct requests for ADA accommodation to T-Mobile and his HOA. AER at 385; 391. In both correspondences, Plaintiff-Appellant's attorney outlined Plaintiff-Appellant's status as a qualified individual with a disability under the ADA, requested meetings to address available reasonable accommodations and underscored the urgency of this matter. *Id*. Plaintiff-Appellant's efforts yielded no results, as both the HOA and T-Mobile refused to provide a reasonable accommodation or entertain the requests whatsoever. AER at 325.

T-Mobile and the HOA renewed their lease agreement for the cell tower in or around September 2020, a decision which utterly disregarded Plaintiff-Appellant's rights under federal law and his several requests for reasonable accommodation, including all the evidentiary material in support of same (*e.g.*, medical reports and EMR measurements inside the Residence). *Id*.

On September 24, 2020, the Plaintiff-Appellant became seriously ill and could no longer tolerate his severe symptoms. He had suffered a stroke and was in a very vulnerable state, such that he was forced to move out of his unhabitable Residence. *Id*. After evacuating his Residence, Plaintiff-Appellant's physical and mental condition started to improve, as confirmed by Dr. Baer. AER at 326; 400.

Desperate to receive the reasonable accommodation to which he was legally entitled to under the ADA and the Fair Housing Act ("FHA"), the Plaintiff-Appellant served a final reasonable accommodation request upon the attorney for Defendant-Appellee the City of Millbrae (the "City") on December 24, 2020. AER at 326; 394.

Plaintiff-Appellant has alleged that both the City Community Developer Director, who is vested with the power to approve administrative permits for wireless communications facilities under §10.30.050(A) of the City's Code, and the Planning Commission, the local government body vested with the responsibility to perform all land use planning functions and issue use permits for wireless communications facilities under § 0.30.050(B) of the City Code, have routinely

granted T-Mobile and other wireless carries and/or site developers permission to build small cells, DAS systems and/or cell towers around the City without considering the rights of EHS disabled individuals under the ADA and FHA. AER at 326. Specifically, the City has no policy, practice or procedure through which the City can (a) notify adversely affected third-parties of applications for wireless communications facilities in close proximity to their homes; (b) notify adversely affected third-parties of any administrative permits issued to wireless carriers and/or site developers for the construction of wireless communications facilities in close proximity to their homes, which are approved by the City Community Developer Director without public hearings under §10.30.050(A) of the City Code; (c) consider an individual's EHS disability at any point in time before approving either an administrative or use permit; (d) grant reasonable accommodations to EHS disabled individuals; and (e) mandate wireless carriers and/or site developers to provide reasonable accommodations to EHS disabled individuals. *Id*.

As it pertains directly to this matter, once the City received Plaintiff-Appellant's request for a reasonable accommodation with notice of the uninterrupted, extremely high levels of RF radiation emitted by the cell tower operated by T-Mobile, the City took no affirmative actions to assess, investigate, monitor, treat, remove or remediate the hazardous condition. AER at 327. The City, as well as the HOA and its Board, ignored Plaintiff-Appellant's requests, violated

his rights under the ADA and FHA, utterly disregarded his symptoms and the seriousness of his disability, and permitted T-Mobile to keep operating its cell tower in a manner injurious to Plaintiff-Appellant and other residents. *Id*.

E. Relevant Procedural History

Plaintiff-Appellant commenced this action on February 8, 2021. AER at 421. On March 2, 2021, the Plaintiff-Appellant filed his Verified First Amended Complaint for Injunctive and Declaratory Relief and Damages, the operative pleading (the "Complaint"). AER at 312.

On May 6, 2021, the T-Mobile, the City and the HOA all filed motions to dismiss the Complaint for a failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). AER at 209; 246; 279. On June 10, 2021, Plaintiff-Appellant filed opposition to the triumvirate of motions to dismiss. AER at 128; 151; 172. On June 24, 2021, the Defendants-Appellees filed replies in further support of their motions to dismiss. AER at 71; 91; 109. On July 29, 2021, Hon. Phyllis J. Hamilton, U.S.D.J. held a hearing on the motions to dismiss. AER at 23.

On August 23, 2021 Hon. Phyllis J. Hamilton, U.S.D.J. issued an Order granting the motions to dismiss in their entirety, but granted leave to Plaintiff-Appellant to amend certain claims. AER at 3. On September 20, 2021, the Plaintiff-Appellant filed a Notice of Intent not to Amend and Request for Dismissal. AER at 69. On September 21, 2021, Hon. Phyllis J. Hamilton, U.S.D.J. issued an Order of

Dismissal (AER at 68) and Judgment (AER at 2) dismissing the entirety of the action with prejudice.

The Plaintiff-Appellant hereby appeals from the District Court's Order and Judgment. AER 2; 3.

SUMMARY OF THE ARGUMENT

A. The District Court Erred in Dismissing the ADA and FHA Claims

The principal error of the District Court's Order was the determination that Plaintiff-Appellant's request for an accommodation under the ADA (and the FHA/FEHA) was unreasonable because it would require the City to violate federal law, i.e., the TCA. AER at 8-10.

The District Court stated that the "TCA precludes local regulation of 'the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions' where the facility complies with the FCC's RF exposure regulations. 47 U.S.C. §332(c)(7)(B)(iv)." AER at 8. The District Court then determined Plaintiff-Appellant's request for a reasonable accommodation to be "*per se* unreasonable" because it sought to either (1) prohibit T-Mobile from operating the cell tower at its current location or (2) apply RF exposure standards that differ from the standards set by the FCC. AER at 9. The District Court reasoned that either accommodation would violate the TCA's "protection against local regulation..." *Id.*

Such analysis was flawed because complying with *federal* law (i.e., the ADA and FHA) is not violative of the TCA.

The TCA is narrowly and purposefully focused on "local" regulation by the cities and states. The entire scope of the Section is balancing retention and circumvention of "local zoning authority," which, indeed, is the topic heading for Section 332. Thus, when the City or any local government makes an accommodation required by its own compliance with preemptive *federal* laws, the City is not exercising "local zoning authority" nor is it "imposing" local impediments upon the installation or operation of cell towers.

Simply put, a municipality providing a reasonable accommodation would be complying with the requirements of *federal* law, not imposing local regulation, and thus it would not be violative of the TCA, contrary to the District Court's holding. The District Court created a conflict where none exists.

Indeed, The TCA's savings clauses explicitly direct avoidance of a presumed conflict:

- 47 U.S.C. § 414 provides, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

- While 47 U.S.C. §152 note, Pub. L. No. 104-104, § 601(c)(1)(1996) further provides, "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

Insofar as the ADA was enacted some five years before the TCA, these savings clauses clearly evidence Congress' express desire to leave ADA rights and remedies intact. *See AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1328 (11th Cir. 2000) (holding that Telecommunications Act's broad savings clause preserved availability of existing § 1983 remedies); *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898, 915-16 (S.D. Cal. 2004) (finding the Telecommunications Act's savings clause "broad, sweeping, and a clear indication that Congress intended to leave federal laws untouched and unaltered unless they specified otherwise explicitly").

It is clear that the ADA and FHA can coexist with the TCA and a qualified individual with a disability cannot be denied a reasonable accommodation, or even the opportunity to engage in the interactive process to determine the extent of his disability and the viability of all possible options for accommodation. It was error for the District Court to hold otherwise.

In erroneously determining Plaintiff-Appellant's accommodation request to be *per se* unreasonable, the District Court strictly and narrowly misconstrued his requests and failed to account for other available accommodations that could have been reached, had the Defendants-Appellees engaged in the interactive process required by these federal acts.

Further error can be found in the District Court's denial of Plaintiff-Appellant's FHA and FEHA claims as against the HOA. As stated in the Order:

> "While Wolf seeks relocation of the cell site, the reports of his expert, incorporated into the FAC, observe several RF sources beyond the contested cell site. Among these sources of RF emissions are 126 cell towers and over 116 cell antennas within a two-mile radius of the residence, including a mobile cell antenna less than 0.03 miles away. [AER at 366]. Wolf has not alleged facts to support the claim that if the cell site was removed, it would ameliorate the plethora of health woes he suffers as a result of his electromagnetic hypersensitivity. Plaintiff fails to allege that the requested accommodation was *necessary* to afford him the opportunity to use and enjoy his residence. He thus fails to plead a fair housing violation." AER at 19.

Firstly, whether it was the contested cell site, perpetually located six feet above Plaintiff-Appellant's head, that was the cause of his "health woes" or whether it was due to the other outside sources of RF emissions, requires a factual determination not suitable at this pre-answer, pre-discovery stage of the litigation. *See*, *e.g.*, *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005).

Secondly, Plaintiff-Appellant did, in fact, allege facts to support the claim that if the cell tower was removed, it would ameliorate his EHS condition when he alleged that after evacuating his Residence, his physical and mental condition started to improve, as confirmed by Dr. Baer. AER at 326; 400.

Finally, this portion of the Order presumes that "relocation" of the cell tower was the only accommodation requested, when there could have been other potential

options had the Defendants-Appellees meaningfully and lawfully responded to any one of Plaintiff-Appellant's requests and engaged in the process to discuss the issues and arrive at a reasonable solution.

In sum, the ruling of the District Court blessed Defendants-Appellees' unlawful conduct and has the sweeping effect of rendering *any* requested accommodation concerning a wireless facility made of a municipality, wireless communications company or any other entity to be *per se* unreasonable because it would be prohibited by the TCA. Logically, this would mean that the TCA has the effect of preempting the ADA (and FHA) when that expressly was not the intent of the Acts and is simply not the case.

B. The District Court Erred in Dismissing the Claim for a Deprivation of Liberty Interests Pursuant to 42 U.S.C. §1983

In dismissing Plaintiff-Appellant's claim for a deprivation of liberty interests pursuant to 42 U.S.C. §1983, the District Court erroneously held that he failed "to allege a cognizable right under the federal constitution" because "there exists no Due Process right to be free from RF emissions." AER at 14-15. The District Court misconstrued Plaintiff-Appellant's argument and the cognizable right he articulated and which he does possess, that is his right to self-defense, personal security and bodily integrity.

Plaintiff-Appellant was not claiming a right to be free from RF emissions, as misread by the District Court. Rather, he was asserting the aforementioned rights of

self-defense, personal security and bodily integrity within the confines of his own home, to be free from harmful intrusions caused by the RF emissions as confirmed by Plaintiff-Appellant's doctor. AER at 398. This is an important distinction which was glossed over by the District Court.

C. The District Court Erred in Dismissing the Private Nuisance Claim

In dismissing the private nuisance claim, the District Court, once again, referenced other RF sources and improperly made a summary, factual determination "that reasonable persons generally do not find the cell site placement unreasonable." AER at 16. In the face of a sufficiently pled private nuisance claim, it was inappropriate for the District Court to resolve such a complex factual issue on a motion pursuant to Fed. R. Civ. P. 12(b)(6) which is a question of fact. *Tesoro Refining and Marketing Company LLC v. City of Long Beach*, 334 F. Supp. 3d 1031, 1051, *fn.* 15 (C.D. Cal. 2017).

D. The District Court Erred in Dismissing the Breach of Fiduciary Duty Claim

In plain error, the District Court held that Plaintiff-Appellant "fails to establish even the first element of the [breach of fiduciary duty] claim. Wolf offers no authority to establish that the HOA or its directors owe him a fiduciary duty" and "fails to articulate which of the HOA's actions or omissions breached such a duty." AER at 20. This is not so. The Complaint had plainly and sufficiently alleged these elements.

However, in its initial motion to dismiss, the HOA did not attack the sufficiency of the pleading of the breach of fiduciary claim, only claiming a right to dismissal on statute of limitations grounds (AER at 300-301), which the District Court did not reach. Thus, in opposition, the Plaintiff-Appellant only addressed timeliness. AER at 148-149. It was only within its reply papers where, for the first time, the HOA challenged the sufficiency of the breach of fiduciary claim as alleged. AER at 125. Inasmuch as this argument was raised for the first time on reply, the District Court should not have considered it. *See FT Travel--New York, LLC v. Your Travel Center, Inc.*, 112 F. Supp. 3d 1063, 1079 (C.D. Cal. 2015).

Contrary to the District Court's holding, the Complaint sufficiently detailed how the HOA and its individual board members did, in fact, owe fiduciary duties to the Plaintiff-Appellant. AER at 352-353. *See Wong v. Village Green Owners' Association*, 2014 WL 12586442 (C.D. Cal. 2014) ["A homeowners association has a fiduciary relationship with its members"]. The Complaint further alleged how these Defendants-Appellees breached such duties by failing to disclose the location of T-Mobile's cell tower in the materials prepared by the HOA. AER at 323. The HOA intentionally misled the Plaintiff-Appellant and induced him to sign documents without revealing this material and critical condition. *Id.*; AER at 388. Plaintiff-Appellant further alleged that had he known about the location of the cell tower, he would have never signed the approval packet. AER at 323. Finally, Plaintiff-

Appellant sufficiently alleged how he was damaged by the breaches by being forced to vacate the Residence and incurring the associated expenses. AER 353-354.

ARGUMENT

POINT I

STANDARD OF REVIEW ON A MOTION TO DISMISS PURSUANT TO FED R. CIV. P. 12(b)(6)

This appeal concerns the District Court's erroneous granting of the Defendants-Appellees' three motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). To defeat a motion pursuant to Rule 12 (b)(6), "a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, [which] requires only that the complaint include a '*short and plain statement of the claim* showing that the pleader is entitled to relief.'" *HDI-Gerling America Ins. Co. v. Homestead Ins. Co.*, 2008 WL 2740338, at *1 (N.D.Cal. 2008) (emphasis supplied); *see* Fed. R. Civ. P. 8(a)(2). Under the liberal rules of pleading, "[p]leadings must be construed so as to do justice" and "[s]pecific facts are unnecessary—the statement need only give the defendant 'fair notice of the claim and the grounds upon which it rests.'" *Id*.

The complaint's factual allegations must simply raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows 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) (citing *Twombly*, 550 U.S. at 556). Plaintiff is not required to plead allegations negating an affirmative defense. *See, e.g., Thomas v. Indep. Twp.*, 463 F.3d 285, 291 (3d Cir.2006).

On a Rule 12(b)(6) motion, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Dept of Fair Employment & Hous. v. Lucent Technologies*, 2008 WL 1815799, at *1 (N.D.Cal. 2008) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). The moving party bears the burden of showing that no claim has been stated. *Gould Electronics, Inc. v. U.S.*, 220 F.3d 169, 178 (3rd Cir.2000). The Court may also consider "exhibits attached to the complaint, and "documents referenced extensively in the complaint and documents that form the basis of the plaintiff's claims." *Cisco Systems, Inc. v. Chung*, 462 F.Supp.3d 1024, 1037 (N.D.Cal. 2020) (internal citations omitted). Aside from those documents and exhibits, "the court may not consider any material beyond the pleadings when ruling on a Rule 12(b)(6) motion." *HDI-Gerling America Ins. Co.,* 2008 WL 2740338, at *2.

POINT II

IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS THE PLAINTIFF-APPELLANT'S ADA AND FHA CLAIMS

The principal error of the District Court's Order was the determination that Plaintiff-Appellant's request for an accommodation under the ADA (and the FHA/FEHA) was unreasonable because it would require the City to violate federal law, i.e., the TCA.[1] AER at 8-10.

Quoting the TCA, the District Court stated that the "TCA precludes local regulation of 'the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions' where the facility complies with the FCC's RF exposure regulations. 47 U.S.C. §332(c)(7)(B)(iv)." AER at 8. The District Court adjudged Plaintiff-Appellant's request for a reasonable accommodation to be "*per se* unreasonable" because it sought to either (1) prohibit T-Mobile from operating the cell tower at its current location or (2) apply RF exposure standards that differ from the standards set by the FCC. AER at 9. The District Court reasoned that either accommodation would violate the TCA's "protection against local regulation..." *Id.*

[1] The District Court did not reach whether or not EHS was a "qualified disability" under the ADA, accepting as true the Plaintiff-Appellant's condition and symptoms. AER at 8. As set forth above, The U.S. Architectural and Transportation Barriers Compliance Board or "Access Board," recognizes EHS as a disability under the ADA. AER at 322; see 69 Fed. Reg. 44087 (July 23, 2004); see also *Metallo v. Orlando Utilities Comm'n*, 2015 WL 5124866, at *2 (M.D.Fl. 2015).

The District Court's analysis was flawed because complying with *federal* law (i.e., the ADA and FHA) is not violative of the TCA.

A. Affording a Reasonable Accommodation Under the ADA and FHA Does Not Run Afoul of the TCA

47 U.S.C. §332(c)(7)(B)(iv) states: "No *state or local* government or instrumentality thereof may regulate ... personal wireless service facilities." (emphasis supplied). The TCA is narrowly and purposefully focused on "local" regulation by the cities and states. As explained by the Supreme Court, Congress enacted Section 332(c)(7) to reduce "impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams* 544 U.S. 113, 115 (2005). The entire scope of the Section is balancing retention and circumvention of "local zoning authority," which, indeed, is the topic heading for Section 332.

When the City or any local government makes an accommodation required by its own compliance with preemptive *federal* laws, the City is not exercising "local zoning authority" nor is it "imposing" local impediments upon the installation or operation of cell towers. This Court (and other Circuit Courts) have recognized that even some local restrictions do not constitute impermissible "regulation" as the term is used in Section 332. *Omnipoint Comms. v. City of Huntington Beach,* 738 F.3d 192, 200-01 (9th Cir. 2013) ("voter approval is not the type of zoning and land use decision covered by§ 332(c)(7), we conclude that it was not preempted by that

section."); *Sprint Spectrum L.P. v. Mills,* 283 F.3d 404,412 (2d Cir. 2002) (excludes proprietary activity).

Neither Congress nor the FCC have taken the position that its regulations are intended to limit the application of either the ADA or the FHA. Indeed, in 1997, when comments were submitted as to the FCC's proposed RF radiation regulations, contending that the permitted levels, still existing today, would be harmful to particularly sensitive persons, the FCC concluded that it would be "impractical" to adopt universal exposure levels sufficient to address "such controversial issues as non-thermal effects and whether certain individuals might be 'hypersensitive' or 'electrosensitive.'" *ln re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)[B)(v),* 12 FCC Red 13494, 13504 (1997). The FCC did not determine that such sensitive individuals, now known to suffer from EHS, would not have any remedy, nor that these comments concerning the risk of RF emissions to certain people were erroneous or unfounded.

In response to an action commenced against the FCC contending that its regulations would interfere with the ability of local governments to comply with the requirements under the ADA, the FCC did not concur that Section 332 regulations would impact municipalities' ability to accommodate RF sensitive people, and the court ultimately left it as an open question whether "local governments may or may not be affected by the FCC's challenged guidelines." *Cellular Phone Taskforce v.*

F.C.C. 217 F.3d 72, 32 (2d Cir. 2000), *cert den.,* 531 U.S. 1070. The FCC and the Circuit Court did not read the TCA in the conflicting and restrictive manner advanced by the instant Defendants-Appellees and sanctioned by the District Court in its Order.

Simply put, a municipality providing a reasonable accommodation would be complying with the requirements of *federal* law, not imposing local regulation, and thus it would not be violative of the TCA, contrary to the District Court's holding. The District Court created a conflict where none exists. As recently stated by the Supreme Court, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic Sys. Corp. v. Lewis,* 138 S.Ct. 1612, 1624 (2018). Defendants-Appellees did not meet this burden.

Indeed, The TCA's savings clauses explicitly direct avoidance of a presumed conflict:

- 47 U.S.C. § 414 provides, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

- While 47 U.S.C. §152 note, Pub. L. No. 104-104, § 601(c)(1)(1996) further provides, "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

Insofar as the ADA was enacted some five years before the TCA, these savings clauses clearly evidence Congress' express desire to leave ADA rights and remedies intact. *See AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1328 (11th Cir. 2000) (holding that Telecommunications Act's broad savings clause preserved availability of existing § 1983 remedies); *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898, 915-16 (S.D. Cal. 2004) (finding the Telecommunications Act's savings clause "broad, sweeping, and a clear indication that Congress intended to leave federal laws untouched and unaltered unless they specified otherwise explicitly").

It is clear that the ADA and FHA can coexist with the TCA and a qualified individual with a disability cannot be denied a reasonable accommodation, or even the opportunity to engage in the interactive process to determine the extent of his disability and the viability of all possible options for accommodation. It was error for the District Court to hold otherwise.

B. Defendants-Appellees Violated the ADA, FHA and FEHA by Failing to Provide a Reasonable Accommodation and by Ignoring Plaintiff-Appellant's Request Altogether

In enacting the ADA and FHA, Congress invoked its constitutional authority to establish a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," *Tennessee v. Lane,* 541 U.S. 509,516 (2004); 42 U.S.C. § 12101(b)(4), (b)(l), and declare the "policy of the

United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This very Court, interpreting the ADA "strongly counsels against carving out spheres in which public entities may discriminate on the basis of an individual's disability." *McGary v. City of Portland,* 386 F. 3d 1259, 1269 (9th Cir. 2004) (internal quotations omitted).

That the disability at issue is EHS does not change the analysis because Title II of the ADA makes no distinction between various methods of discrimination nor does it allow discrimination against one class of disabled person while forbidding it against another. 28 C.F.R. § 35.130(a); cf.§ 35.108(g). Title II "applies to ***all services, programs, and activities*** provided or made available by public entities." 28 C.F.R. § 35.102(a) (emphasis supplied).

Similarly, the FHA obligates the City to "make reasonable accommodations in ***rules, policies, practices, or services,*** when such accommodations may be necessary to afford a person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B) (emphasis supplied); *see also* 24 C.F.R. § 100.204(a) ("It shall be unlawful for any person to refuse to make reasonable accommodations in ***rules, policies, practices, or services,*** when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit.") (emphasis supplied).

As this Court so aptly stated, "Congress intended to issue 'a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream.'" *Garcia v. Brockway*, 526 F.3d 456, 476 (9th Cir. 2008), *quoting* House Report at 18, 1988 U.S.C.C.A.N. at 2179. The Supreme Court has echoed Congress' "clear pronouncement" in many of its FHA decisions by affording the FHA the broadest, most liberal and generous construction possible to achieve the "broad remedial intent" of the Act. *Id*. at 476, *fn*. 10 (citations omitted); *see also Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) (the FHA carries a broad mandate "to eradicate discriminatory practices within a sector of our Nation's economy.").

In erroneously determining Plaintiff-Appellant's accommodation request to be *per se* unreasonable, the District Court strictly and narrowly misconstrued his requests and failed to account for other available accommodations that could have been reached, had the Defendants-Appellees engaged in the interactive process required by these federal acts. The Order limits Plaintiff-Appellant's requests only as either "prohibiting T-Mobile from operating the cell site at its current location" or "applying RF exposure standards that differ from the standards set by the FCC." AER at 9. While, those were indeed potential options suggested by the desperate and suffering Plaintiff-Appellant, his accommodation requests to the City and the other

Defendants-Appellees, offer other alternatives and evidence his attempts to have a meeting to engage in the process to arrive at a reasonable solution.

Plaintiff-Appellant suggested a *temporary* halt of the cell tower's operation until the parties could meet and confer and a determination could be made, (a) whether Plaintiff-Appellant was entitled to a reasonable accommodation and (b) what that reasonable accommodation should be. AER at 396.[2] *See, e.g., DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1179 (9th Cir.2006) ("After [plaintiffs] requested an accommodation, the Condominium Association granted them a temporary exemption from the bylaw while it investigated and decided what to do.") Furthermore, Plaintiff-Appellant simply asked the City to assess the current effective radiated power and its impact on the Residence. AER at 396.

Plaintiff-Appellant's numerous requests to all Defendants-Appellees were entirely ignored. The Defendants-Appellees did not engage in an interactive process relating to the nature and scope of the requested accommodations. Failure to engage in an interactive process and explore potential alternatives is a clear violation of the FHA. *See Montano v. Bonnie Brae Convalescent Hosp Inc.*, 79 F.Supp.3d 1120

[2] In his letter to the HOA, "as a first step in reaching a reasonable accommodation" Plaintiff-Appellant proposed a Zoom meeting for the stated purpose of "discuss[ing] this complex situation, and endeavor to reach a reasonable accommodation." AER at 390.

(C.D.Cal. 2015). If there was skepticism of the nature of Plaintiff-Appellant's disability or the Defendants-Appellee's required additional documentation, they had an obligation to simply ask. *Id*. at 1128. Instead, the Defendants-Appellees conveniently chose to ignore Plaintiff-Appellant's correspondences and took no action—the polar opposite of what an "interactive" process should entail. The Defendants-Appellees failed to reasonably accommodate Plaintiff-Appellant, and such conduct constitutes a violation of the ADA and FHA.[3]

Further error can be found in the District Court's denial of Plaintiff-Appellant's FHA and FEHA claims as against the HOA. As stated in the Order:

> "While Wolf seeks relocation of the cell site, the reports of his expert, incorporated into the FAC, observe several RF sources beyond the contested cell site. Among these sources of RF emissions are 126 cell towers and over 116 cell antennas within a two-mile radius of the residence, including a mobile cell antenna less than 0.03 miles away. [AER at 366]. Wolf has not alleged facts to support the claim that if the cell site was removed, it would ameliorate the plethora of health woes he suffers as a result of his electromagnetic hypersensitivity. Plaintiff fails to allege that the requested accommodation was *necessary* to

[3] Even if this Court agrees with the District Court that T-Mobile is not subject to the FHA and FEHA because "its actions do not involve the provision of housing-related services" (AER at 13), T-Mobile is still bound by the dictates of the ADA and the District Court did not rule otherwise. Similarly, to the extent this Court agrees that the HOA is not subject to the ADA because the "placement of the cell site in an otherwise inaccessible area of a residential complex does not transform the premises into a place of public accommodation" (AER at 18), the District Court soundly held that the HOA is "clearly covered" by the FHA and FEHA. *Id*. However, the District Court erred by nonetheless dismissing those claims as against the HOA due to the unreasonableness of the accommodation request, the flawed analysis of which is discussed above.

> afford him the opportunity to use and enjoy his residence. He thus fails to plead a fair housing violation." AER at 19.

Firstly, whether it was the contested cell site, perpetually located six feet above Plaintiff-Appellant's head, that was the cause of his "health woes" or whether it was due to the other outside sources of RF emissions requires a factual determination not suitable at this pre-answer, pre-discovery stage of the litigation. *See*, *e.g.*, *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005); *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 735 Fed. Appx. 241, 249 (9th Cir. 2018).

Secondly, Plaintiff-Appellant did, in fact, allege facts to support the claim that if the cell tower was removed, it would ameliorate his EHS condition. Plaintiff-Appellant alleged that after evacuating his Residence, his physical and mental condition started to improve, as confirmed by Dr. Baer. AER at 326; 400.

Finally, once again this portion of the Order presumes that "relocation" of the cell tower was the only accommodation requested, when there could have been other potential options had the Defendants-Appellees meaningfully and lawfully responded to any one of Plaintiff-Appellant's requests and engaged in the process to discuss the issues and arrive at a reasonable solution.

Further ignoring the spectrum of possible accommodations and the lack of even an engagement of the process, the District Court gave the HOA a pass, stating that "any unilateral action by the HOA to restrict or relocate the cell site may have

exposed the HOA to liability for violation of its lease with T-Mobile." AER at 19. Yet, any injuries to the HOA and T-Mobile under the terms of their lease are entirely self-inflicted. The District Court's Order ignores the allegations that the HOA knew of Plaintiff-Appellant's disability and the dangerous RF levels in his condominium unit *before* the lease was renewed in September 2020. AER at 325. In a July 27, 2018 letter, an agent of the Plaintiff-Appellant informed the HOA of the dangers of T-Mobile's cell tower. AER at 324.

As Plaintiff-Appellant's disability progressed, he followed up his original objections with more accurate statements, including an e-mail communication on September 5, 2020 and a telephone call to the HOA's manager on September 17, 2020. These attempts in September of 2020 came after Dr. Baer visited Plaintiff-Appellant on September 1, 2020 to evaluate his disability. AER at 397. Dr. Baer's findings were memorialized in a written medical diagnosis on October 1, 2020, wherein she determined that Richard suffered from classic symptoms of RF exposure and "[his] health would continue to be adversely affected if he does not decrease his exposure levels." AER at 400. The lease between T-Mobile and the HOA cannot be a shield to protect the HOA from their obligations under federal law.

In sum, the ruling of the District Court blessed Defendants-Appellees' unlawful conduct and has the sweeping effect of rendering *any* requested accommodation concerning a wireless facility made of a municipality, wireless

communications company or any other entity to be *per se* unreasonable because it would be prohibited by the TCA. Logically, this would mean that the TCA has the effect of preempting the ADA (and FHA) when that expressly was not the intent of the Acts and is simply not the case.

POINT III

IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS PLAINTIFF-APPELLANT'S CLAIM FOR A DEPRIVATION OF HIS LIBERTY INTERESTS PURSUANT TO 42 U.S.C. §1983

In dismissing Plaintiff-Appellant's claim for a deprivation of liberty interests pursuant to 42 U.S.C. §1983, the District Court erroneously held that he failed "to allege a cognizable right under the federal constitution" because "there exists no Due Process right to be free from RF emissions." AER at 14-15. The District Court misconstrued Plaintiff-Appellant's argument and the cognizable right he articulated and which he does possess, that is his right to self-defense, personal security and bodily integrity.

42 U.S.C. § 1983 provides a cause of action against any person acting under color of law who deprives "any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. The Supreme Court long ago has held that:

> By the plain terms of § 1983, ***two—and only two—allegations are required*** in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal

> right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Gomez v. Toledo, 446 U.S. 635, 640 (1980) (emphasis added). In addition, for a municipal entity, such as the City, to be held liable, a plaintiff must allege that it was the "moving force" behind the violation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

Here, Plaintiff-Appellant aptly pled three fundamental federal rights that are deeply rooted in this Nation's history and tradition: (1) individual self-defense; (2) personal security; and (3) bodily integrity.

"Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and…is "the central component" of the Second Amendment right. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (citations omitted). The Supreme Court has noted that "the need for defense of self, family, and property is most acute" in the home. *Id*.; *see* also 3 W. Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle."). As for personal security, this right also falls within the historic liberties protected by the Due Process Clause of the Fifth Amendment. In fact, "[w]hile the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and

punishment … [such that] the state cannot hold and physically punish an individual except in accordance with due process of law. *Ingraham v. Wright*, 430 U.S. 651, 674–75, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (internal citations omitted). Lastly, bodily integrity is a fundamental liberty interest under the Due Process Clause of the Fifth Amendment to the United States Constitution, as incorporated and applicable to the states through the Fourteenth Amendment. *See, e.g., Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 467 (5th Cir.1994); *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 849, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (noting the importance of protecting "bodily integrity.").

Plaintiff-Appellant was not claiming a right to be free from RF emissions, as misread by the District Court. Rather, he was asserting the aforementioned rights of self-defense, personal security and bodily integrity within the confines of his own home, to be free from harmful intrusions caused by the RF emissions as confirmed by Plaintiff-Appellant's doctor. AER at 398. This is an important distinction which was glossed over by the District Court.

As addressed in Point II, *supra*, when Plaintiff-Appellant informed the City about the extreme RF emissions that were injuring him inside his Residence, the City simply ignored his right to self-defense inside his home and permitted T-Mobile to continue to inflict severe bodily harm to Plaintiff-Appellant. Under such regulatory

framework, Plaintiff-Appellant was deprived of the rights to defend himself or his property both before and after the City issues a permit for a cell tower. As a result of the City's policy and its deliberate refusal to investigate the matter, Plaintiff-Appellant was under constant punishment. He was in such a vulnerable state that he was forced to vacate his Residence to preserve his life. The City's refusal to take any actions (or let Plaintiff-Appellant take any actions) to protect his body and home violated his federal rights.

Accordingly, the Plaintiff-Appellant had stated a claim for a deprivation of such fundamental liberty interests pursuant to 42 U.S.C. §1983 and it was error for the District Court to hold otherwise.

POINT IV

IT WAS ERROR FOR THE DISTRICT COURT TO DISMISS PLAINTIFF-APPELLANT'S PRIVATE NUISANCE CLAIM

To allege a claim for private nuisance, a party must show an injury specifically referable to the use and enjoyment of her land that is substantial and unreasonable in nature. *Koll-Irvine Center Property Owners Assn. v. County of Orange*, 24 Cal.App.4th 1036, 1041 (1994); *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 126 (1971). Nuisance is generally "[a]nything which is injurious to health, ... indecent or offensive to the senses, or an obstruction to the free use of property...." *El Escorial Owners' Assn. v. DLC Plastering, Inc.*, 154 Cal.App.4th 1337, 1348 (2007) (citing Civ. Code, § 3479). This definition under California law

is so broad that it could be "applied indiscriminately to everything." (*City of San Diego v. U.S. Gypsum Co.*, 30 Cal.App.4th 575, 584 (1995)).

As such, "activities that disturb or prevent the comfortable enjoyment of property have been held to constitute nuisances even though they did not directly damage the land or prevent its use." *Venuto*, 22 Cal.App.3d at 126 (citing *Eaton v. Klimm*, 217 Cal. 362, 368 (1993) (smoke from asphalt mixing plant); *Willson v. Edwards*, 82 Cal.App. 564, 568–69 (1927) (noise and offensive odors from operation of refreshment stand); *Fendley v. City of Anaheim*, 110 Cal.App. 731, 736 (1930) (noise and vibration from machinery); *Morton v. Super. Ct.*, 124 Cal.App.2d 577 (1954) (noise and excessive dust from rock quarry); *Snow v. Marian Realty Co.*, 212 Cal. 622, 625 (1931) (smoke from donkey-engine, discoloring the plaintiff's building); *Miles v. A. Arena & Co.*, 23 Cal.App.2d 680, 683–85 (1937) (poisonous dust carried by wind to the plaintiff's land)).

Here, the Plaintiff-Appellant pled that the cell tower's RF levels were 2,500 times higher than the Extreme Radiation levels set forth by the Building Biology. AER at 375. The power output emitted by the cell tower and the proximity to the Residence substantially and unreasonably interfered with the Plaintiff-Appellant's use and enjoyment of his Residence. AER at 345. In fact, the interference was so severe in nature that Plaintiff-Appellant had to vacate his home. AER at 325. He has also pled that the Residence is now unhabitable and unsellable because he would

have to disclose the location of the cell tower to a prospective buyer, including the EMR reports attached to the FAC. AER at 325; 343; 352; 354. Therefore, the pleading alleged with sufficient particularity that any person (not just Plaintiff-Appellant) would be substantially annoyed or disturbed by the emissions. The levels of RF emissions set forth by the Building Biology are general standards for every person—not only EHS disabled individuals. The Complaint sufficiently alleged that living in that condition, with a cell tower perpetually six feet overhead, would be objectively dangerous for everybody.

In dismissing the private nuisance claim, the District Court, once again, referenced other RF sources and improperly made a summary, factual determination "that reasonable persons generally do not find the cell site placement unreasonable." AER at 16. In the face of a sufficiently pled private nuisance claim, it was inappropriate for the District Court to resolve such a complex factual issue on a motion pursuant to Fed. R. Civ. P. 12(b)(6). A determination whether conduct is sufficiently substantial and unreasonable is a question of fact which must "be determined by the trier of fact in each case in light of the circumstances of that case." *Tesoro Refining and Marketing Company LLC v. City of Long Beach*, 334 F. Supp. 3d 1031, 1051, *fn.* 15 (C.D. Cal. 2017), *quoting San Diego Gas & Elec. Co. v. Superior Court*, 55 Cal.Rptr. 2d 724 (1996); *Quechan Indian Tribe v. U.S.*, 535 F.Supp. 2d 1072, 1123 (S.D. Cal. 2008) ["Reasonableness is a question of fact"];

Andrews v. Plains All American Pipeline, L.P., 2020 WL 1650031 at *4 (C.D. Cal. 2020) ["Whether an interference is substantial and unreasonable is judged by an objective standard of a reasonable person, and is a question of fact"].

Accordingly, it was error for the District Court to dismiss Plaintiff-Appellant's claim for private nuisance.

POINT V

THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFF-APPELLANT'S BREACH OF FIDUCIARY DUTY CLAIM

The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. *Andreoli v. Youngevity International, Inc.*, 2018 WL 1470264 at *10 (S.D. Cal. 2018); *Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP*, 593 F. Supp. 2d 1153, 1169 (S.D. Cal. 2008).

In plain error, the District Court held that Plaintiff-Appellant "fails to establish even the first element of the claim. Wolf offers no authority to establish that the HOA or its directors owe him a fiduciary duty" and "fails to articulate which of the HOA's actions or omissions breached such a duty." AER at 20. This is not so. The Complaint had plainly and sufficiently alleged these elements.

In its initial motion to dismiss, the HOA did not attack the sufficiency of the pleading of the breach of fiduciary claim, only claiming a right to dismissal on statute of limitations grounds (AER at 300-301), which the District Court did not reach.

Thus, in opposition, the Plaintiff-Appellant only addressed timeliness. AER at 148-149 ["The HOA and the Individual Defendants concede that Wolf has stated a claim for breach of fiduciary duty, and moved to dismiss on statute of limitations grounds"].

It was only within its reply papers where, for the first time, the HOA challenged the sufficiency of the breach of fiduciary claim as alleged. AER at 125. Inasmuch as this argument was raised for the first time on reply, the District Court should not have considered it. *See FT Travel--New York, LLC v. Your Travel Center, Inc.*, 112 F. Supp. 3d 1063, 1079 (C.D. Cal. 2015); *Ellison Framing, Inc. v. Zurich American Ins. Co.*, 805 F. Supp. 2d 1006, 1011, *fn. 1* (E.D. Cal. 2011).

However, contrary to the District Court's holding, the Complaint sufficiently detailed how the HOA and its individual board members did, in fact, owe fiduciary duties to the Plaintiff-Appellant. AER at 352-353. *See Wong v. Village Green Owners' Association*, 2014 WL 12586442 (C.D. Cal. 2014) ["A homeowners association has a fiduciary relationship with its members"]; *quoting Ostayan v. Nordhoff Townhomes Homeowners Assn., Inc.*, 110 Cal. App. 4th 120, 126-127 (2003).

The Complaint further alleged how these Defendants-Appellees breached such duties by failing to disclose the location of T-Mobile's cell tower in the materials prepared by the HOA. AER at 323. The HOA intentionally misled the

Plaintiff-Appellant and induced him to sign documents without revealing this material and critical condition. *Id.*; AER at 388. Plaintiff-Appellant further alleged that had he known about the location of the cell tower, he would have never signed the approval packet. AER at 323. Finally, Plaintiff-Appellant sufficiently alleged how he was damaged by the breaches by being forced to vacate the Residence and incurring the associated expenses. AER 353-354.

As such, the Plaintiff-Appellant had sufficiently stated a claim for breach of fiduciary duty and it was error for the District Court to hold otherwise.

CONCLUSION

Based upon the foregoing, the Plaintiff-Appellant prays that this Court reverses the District Court's Order and Judgment dismissing the Complaint in its entirety (AER 2; 3); that it remands this action to the District Court to proceed with discovery; and that it grants such other and further relief as it deems just, equitable and proper.

Dated: Merrick, New York
February 10, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I electronically filed the foregoing Brief for Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All of the participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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