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September 9, 2019

Acting Presiding Justice Sandra L. Margulies
Associate Justice Gabriel P. Sanchez
Associate Justice Kathleen M. Banke

California Court of Appeal
First District, Division One
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication of Decision
Reynolds v. Lau (A151825), filed on August 19, 2019

Dear Acting Presiding Justice Margulies and Justices Sanchez and Banke,

The Small Property Owners of San Francisco Institute and the San Francisco Apartment Association respectfully request publication of this court's decision in *Reynolds v. Lau*, Case No. A151825.

Requesters

This office represents the Small Property Owners of San Francisco Institute (SPOSFI), which is the education and litigation arm of the Small Property Owners of San Francisco, a non-profit organization dedicated to fairness for "mom and pop" landlords in San Francisco. SPOSFI, and formerly SPOSF, have litigated several lawsuits to protect the rights of small property owners, among them: *Tom v. San Francisco* (2004) 120 Cal.App.4th 674 (Court found ordinance restricting owner-occupancy of property violated constitutional right of privacy); *Johnson v. San Francisco* (2006) 130 Cal.App.4th 7 (Court found local Ellis Act restriction violated the Ellis Act); *Small Property Owners v. San Francisco* (2006) 141 Cal. App. 4th 1388 (takings challenge to ordinance requiring landlords to pay 5% interest on security deposits when prevailing bank rate was 2%); *Coyne v. San Francisco* (2017) 9 Cal. App. 5th 1215 (challenging municipal relocation payment ordinance that imposed a prohibitive price on withdrawing from the rental market); and *Small Property Owners v. San Francisco* (2018) 22 Cal. App. 5th 77 (challenging Planning Code discrimination against property owners invoking the Ellis Act in prohibiting alterations to legal, nonconforming units). SPOSFI has also filed amicus briefs in the California courts, including *Drouet v. Superior Court* (2003) 31 Cal.4th 583.

SPOSFI is involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive San Francisco regulations harm both tenants and landlords; and through research projects, it aims to separate hyperbole from fact on the effect of rent control on housing stock. SPOSFI serves the approximately 1200 members of SPOSF, who are owners of small rental properties generally consisting of one to six units. Given these small-scale operations, the members often need to rely on the owner/qualified relative move-in provisions when they choose to occupy dwelling units

leased to tenants.

This office also represents San Francisco Apartment Association (SFAA) is an affiliate of the California Apartment Association. SFAA is dedicated to educating, advocating for, and supporting the rental housing community so that its members operate ethically, fairly, and profitably. SFAA's is a trade association whose main focus is to support rental owners by offering a wide variety of benefits that address all aspects of rental housing industry. Its membership includes over 3,000 residential property owners who provide rental housing in San Francisco. Members are greatly impacted by the ever-changing dynamics of San Francisco's rent and eviction controls. SFAA has litigated several lawsuits to protect the rights of small property owners, among them: *SFAA v. San Francisco* (2016) 207 Cal. Rptr. 3d 684 (challenging a Planning Code prohibition on merger of dwellings following withdrawal from the rental market under the Ellis Act); *Larson v. San Francisco* (2011) 192 Cal. App. 4th 1263 (asserting constitutional challenges to tenant harassment ordinance); and *SFAA v. San Francisco*, Case No. CPF-19-516566 (challenging local prohibition on landlords increasing rent in compliance with preemptive state law).

Counsel for Requesters

Zacks, Freedman & Patterson, PC represents property owners who are members of SPOSFI and SFAA and others similarly situated. These small landlords face various burdens that large, institutional landlords do not face, such as the need to owner occupy their buildings, an emotional commitment to their properties or simply an economic reliance on the equity in their real property. (*See Price v. District of Columbia Rental Housing Com'n* (D.C. 1986) 512 A.2d 263, 267, fn. 3 (rent control imposes disproportionate burden on many small landlords).)

Reynolds v. Lau Meets the Standards for Publication and Should Be Ordered Published

Armed with a panoply of local regulations designed to address San Francisco's unique housing issues, the City has become a battleground for landlords and tenants. The cost of litigation filed by tenants imposes a massive burden on small property owners, often encouraging them to remove their properties from the rental market, sell a building they have owned for many years, and/or otherwise become embittered to the legal system which many see as stacked against them. The costs of prosecuting all evictions in San Francisco will continue to increase with Proposition F, the "No Eviction Without Representation Act of 2018" (SF Admin. §58.4(a) providing for free, full scope legal representation for residential tenants irrespective of merit or their ability to pay. The likelihood of having to *defend* against litigation has also increased, with the ability to file lawsuits based on perceived misconduct, irrespective of merit. (See, SF Ord. 160-17, expanding the damages, class of plaintiffs and time to file lawsuits for alleged owner move-in evictions conducted in "bad faith"; SF Ord. 5-19, rendering putatively any rent increase unlawful, provided it "defrauds", "intimidates" or "coerces" a tenant to vacate in "bad faith".)

For these reasons, we write to request that this Court order publication of its decision in *Reynolds v. Lau*, issued on August 19, 2019, as the case thoroughly addresses many evidentiary ambiguities in the law of owner move-in (OMI) evictions, and related tenant remedies for bad

faith OMIs.

This request is based on California Rules of Court, rule 8.1105(c)(4) and (6). The *Reynolds* opinion advances a new interpretation and clarification of San Francisco's OMI ordinance (which would likely guide application of all California cities with similar provisions). The ability of a property owner to occupy the property that they own is a matter of continuing public interest, particularly in San Francisco, where the OMI ordinance has been amended many times (two of which featured a battle between legislative amendment and ballot initiative (*Garber v. Levit* (2006) 141 Cal. App. 4th Supp. 1, 6), and one of which (amplifying penalties for fraudulent evictions) was adopted so recently it post-dates the OMI in the present action (SF Ord. 160-17)).

Publication would advance these causes, because despite decades of valid, substantive local eviction controls in California (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129), very little case law guides the good faith landlord in safely recovering their real property for personal or family use. With some regional variation, these local regulations generally require a minimum percentage of recorded ownership (*e.g., Garber, supra*, 141 Cal. App. 4th Supp. at 4 fn.1), a minimum time for the landlord to reside in the unit (*e.g., Zimmerman v. Stotter* (1984) 160 Cal. App. 3d 1067), a prohibition against performing an OMI eviction when the landlord has a vacant, comparable unit (*e.g., Bakanauskas v. Urdan* (1988) 206 Cal. App. 3d 621, 626), and a "good faith" requirement. Publication of *Reynolds v. Lau* will bring much needed guidance on "good faith" OMI requirements.

Decades ago, *Zimmerman, supra,* 160 Cal. App. 3d 1067 evaluated whether res judicata/collateral estoppel barred the re-litigation of the landlord's "good faith intent" to use a rental property for their relatives/remove it from rental use, in the tenant's wrongful eviction lawsuit after the tenant raised bad faith as a defense in the unlawful detainer. The landlord's family did not move in as planned. Instead, the landlord planted "for lease" signs one year after the writ of possession issued. The landlord moved for summary judgment in the tenant's suit for damages, which the trial court granted (despite finding fraudulent intent) on the basis of res judicata. The Court of Appeal reversed, observing that it was "not the right, but the abuse of that right, which appellant seeks to litigate" (*Id.* at 1075), distinguishing between the landlord's intent leading to judgment for possession, versus the landlord's intent thereafter. "It takes little or no imagination to conclude the obvious: that the purpose for seeking possession [removal from the rental market and family occupancy] . . . has not materialized" (*Id.* at 1079).

However, the Court ultimately questioned how long a landlord must wait before returning a withdrawn property to the rental market (under Los Angeles' then-existing eviction control ordinance, which did not specify a duration). "The answer to this question is, **within a reasonable time**" (*Id.* at 1079; emph. added), and so the fact-finder would be given substantial latitude. This was a prudent interpretation of the relevant statute, but does not guide landlords and tenants under more contemporary ordinances, like Los Angeles' current version (See, LARSO §151.30(B), requiring occupancy for two consecutive years), San Francisco's Admin. Code §37.9(a)(8), requiring 36 continuous months, or the later-enacted Ellis Act (Cal. Gov., §§7060, et seq.) rent-restricting any new tenancies for five years from withdrawal of the

accommodations (Cal. Gov., §7060.2(a)(2)(B)) and requiring first rights of refusal for displaced former tenants for 10 years (Cal. Gov., §7060.2(c)).

More modern ordinances actually quantify a landlord's burdens and obligations in recovering use of their property. This can be seen in *City of W. Hollywood v. Kihagi* (2017) 16 Cal. App. 5th 739, where the Court evaluated a city enforcement action for violations of the Ellis Act's post withdrawal regulations, applying a reductive, mathematical analysis to the whether the landlord's re-rental violated the law, unit-by-unit, and distinguishing between the various time-based restrictions (*Id.* at 751). Kihagi was not altogether innocent, but the Court properly held her only to her actual violations of law, and did not indulge prosecution merely for bad optics (i.e., renting a unit following its withdrawal from the market - even if in compliance with the Ellis Act).

Without this reductive and principled focus, the trial in the present case "focused on extraneous matters involving whether Lau's actions were generally in 'good faith', without 'ulterior motive', and with 'honest intent', rather than on the legally permissible inquiry whether 'Lau's reason and motive for seeking to recover possession of 456 Broadway was to use and occupy the property continuously for 36 months'." (Opinion at p. 10 citing to Statement of Decision.)

The tenants were able to mutate good facts into bad ones. Lau had the good faith intent to move into the second floor apartment above the family-run grocery store, so he didn't have to commute for his seven-day/week, 12-hour/day obligations from San Bruno (Opinion, p. 6), made all the more urgent because his own rent was increasing. This somehow prompted scrutiny over whether he lied about exactly *how much* his rent was going up (information he was under no obligation to share with his tenant) (Opinion, p. 7).

The fact that he reformed the (curable) behavior of his other tenant (in violating short term rental laws) prompted speculation as to whether he ought to evict a tenant *other than for the basis he actually wanted possession* and move into that unit instead (Opinion p. 16), even though the chosen unit was more suitable for the growing family (Opinion p. 6). Although Lau ultimately did nothing wrong, the lack of guidance on in limine motions and jury instructions led to a $670,574.00 judgment against him!

Fortunately, the trial court (Hon. Judge James Robertson) issued a thoughtful and thorough 68-page Statement of Decision, having granted the landlord's JNOV, and vacating the verdict and resulting judgment. This Court agreed "with the trial court that the 'good faith', 'without ulterior reason', and 'honest intent' requirements do not trigger a wide-ranging inquiry into the general conduct and motivations of an owner who seeks to recover possession of a unit" (Opinion, p. 14). The relevant inquiry is whether they moved into the apartment within three months and were still permanently residing there at the time of trial (Opinion, p. 15), and that the apartment they chose was the more desirable one for them (based on size and location) (Opinion, p. 15).

The recently published *DeLisi v. Lam*, No. A151014, 2019 WL 4214100 provides only collateral guidance to the OMI landlord, and its rendering of a good faith *relative* move-in (RMI) standard is best viewed as an example of what not to do. *DeLisi* is one of three appeals from a wrongful eviction action. (Two tenants were displaced by an RMI eviction and one by an OMI, but only the RMI-displaced DeLisi prevailed at trial against the owner.)

An RMI eviction requires the owner to principally reside in the same building and in good faith intend that their qualified relative occupy the subject dwelling for 36 months. (SFRO §37.9(a)(8)(ii).) After performing the OMI, the owner subsequently performed an RMI for his brother. A jury determined the RMI was in bad faith. Division 2 affirmed, finding that although the jury found the OMI was in *good* faith (*Id.* at 10 fn.8), it was still up to the jury to assess the brother's credibility in desiring to move. Evidence showed the brother was aware of the plan, but was generally disinterested in/unaware of many of the essential details of the arrangement. Based on this, the jury's could assess whether the owners genuinely wanted him to live there at the time they served the RMI notice. That *DeLisi* allowed circumstantial evidence for the jury to infer the owners' intent from the *brother's* intent gives little guidance in scrutinizing an OMI landlord who wants to simply follow the rules.

Division 2 rejected the Lam's argument that the OMI ordinance was *unconstitutionally* vague, but it is vague. There are severe penalties for fraudulent/wrongful OMIs and RMIs. (For instance, DeLisi obtained judgment in the amount of $462,450.62, even though the move-in it was based on "indisputably occurred" (*Id.* at 11).) The time has come for brighter lines.

San Francisco voters adopted the current architecture for OMIs in 1998. Proposition G first required that landlords move in within 3 months and occupy for 36 months (up from 12). It limited OMI evictions to one-per-building. It prohibited RMIs unless the owner occupied the building and prohibited evictions if a landlord owned a comparable unit. It ensconced the "protected tenant" status/defense for particularly vulnerable tenants. But it left to the courts the task of interpreting the good faith requirement.

Given the stakes and the swings, property owners, the associations that educate them, and the attorneys that advocate for them all need guidance on complying with the law. *Reynolds v. Lau* presents such an opportunity. We just need to be able to cite to it. For these reasons, we respectfully request publication.

Sincerely,

ZACKS, FREEDMAN & PATTERSON, PC

By: Justin A. Goodman,
Attorneys for Small Property Owners of San Francisco Institute and San Francisco Apartment Association

PROOF OF SERVICE

California Court of Appeal-First Appellate District-Division One
Appeal No. A151825

I, Angelica Nguyen, declare that:

I am employed in the County of San Francisco, State of California. I am over the age of 18, and am not a party to this action. My business address is 235 Montgomery Street, Suite 400, San Francisco, California 94104.

On September 9, 2019, I served:

Request for Publication of Decision-Reynolds v. Lau (A151825), filed on August 19, 2019

in said cause addressed as follows:

Jenny Jin Hooshmand Law Group 505 14th Street, Suite 320 Oakland, CA 94612 *(E-service and Mail)*	Mark Hooshmand Hooshmand Law Group 22 Battery Street, Suite 610 San Francisco, CA 94111 *(E-service and Mail)*
Gregory Ramon De La Peña De La Peña & Holiday LLP One Embarcadero Center, Suite 2860 San Francisco, CA 94111 *(E-service and Mail)*	California Court of Appeal First District, Division One 350 McAllister Street San Francisco, CA 94102 *(Mail Only)*

/XX/ (BY MAIL) By placing a true copy thereof enclosed in a sealed envelope to the addressees listed above. I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at San Francisco, California, following ordinary business practices.

/XX/ (BY E-SERVICE) By filing and serving the document through the First District Court of Appeal's electronic filing system pursuant to Rule 8.71(f) and First District Court of Appeal Local Rule 16(j).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 9, 2019, at San Francisco, California.

ANGELICA NGUYEN