4th Civil No. D066393

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

MARIO GARCIA and ESPERANZA GARCIA,

Plaintiffs and Appellants,

v.

MICHELE HOLT and NEIL MAMERTO,

Defendants and Respondents.

Appeal from San Diego Superior Court,
Case No. 37-2012-00101101-CU-PO-CTL
Honorable Joel R. Wohlfeil, Judge Presiding

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Court of Appeal
State of California
Fourth Appellate District, Division One

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: D066393

Case Name: **MARIO GARCIA et al. v. MICHELE HOLT et al.**

Please check the applicable box:

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INTRODUCTION

After handing over the keys and exclusive possession to new tenants, landlords have no right to conduct random warrantless searches of the tenants' homes to find out if the tenants are engaging in illegal or dangerous activities. But that is what appellants would require. The opening brief hypothesizes that landlords leasing to tenants on a month-to-month basis not only have such a right, but they also have a *duty* to periodically inspect the property to make sure they are not engaging in dangerous activities. The law is contrary.

Absent knowledge or at least suspicion of dangerous conditions or activities occurring at residential rental premises and the right to enter, landlords have no duty to inspect. Accordingly, landlords cannot be held liable for injuries to third-parties resulting from the tenants' dangerous activities hidden inside the leased premises, of which the landlords were unaware, and which was not revealed during the walk-through inspection at the tenancy's inception.

This case arises out of egregious, illegal, hidden conduct by a tenant. After conducting a background check of seemingly-normal prospective new tenants—uncovering nothing suspicious—property owners of a single family home unknowingly rented to a bombmaker. Five years into the tenancy, nobody had ever noticed anything suspicious that would lead anybody to reasonably believe that one of the tenants was manufacturing bombs and explosive materials behind closed doors and windows,

including the plaintiff landscaper that the landlords hired to maintain the property. Nobody ever even made a noise complaint about the tenants. The landscaper visited the property over 200 times, and he never noticed *anything* suspicious.

One day, seemingly no different than any other day, the landscaper came to the house to do his job, and triggered an explosion by simply walking across some loose gravel in the backyard (in an area that he had walked over several times before), sustaining injuries.

In the landscaper's lawsuit against the property owner-landlords, the landscaper seeks to impose a legal duty on the landlords, even though it is undisputed that they were unaware of the tenant's bombmaking activities and even though they had no right to enter under the lease or the law.

In granting the landlords' summary judgment motion, the trial court properly rejected the plaintiff-landscaper's duty theory based on a well-established bright-line rule that governs whether residential landlords owe a duty to inspect: Landlords owe *no* duty to visitors, such as landscapers, *unless* they have (1) actual knowledge that there is dangerous activity occurring on the premises, *and* (2) the right to enter the property in order to eliminate the danger. This bright line rule is based on traditional concepts of duty and foreseeability: Where a landlord could not have reasonably foreseen the resulting injury, he cannot be held liable for failing to prevent it.

The opening brief tries to side-step this rule in various ways—for instance, by relying on inapposite commercial tenancy cases, an irrelevant exception, and alternative bracketed language in an inapplicable CACI jury instruction. Each and every attempt misses the mark.

The opening brief's theory is that landlords owe a heightened inspection duty when they lease to tenants on a month-to-month basis that supposedly arises instantaneously and fleetingly at the end of every month upon "renewal" but is not actually triggered every month because monthly inspections would be too onerous; therefore, they have a duty to inspect randomly over some undefined period in contravention of the tenant's right to exclusive possession. Even that theory does not make sense as, given the 30-day notice provision to terminate the month-to-month tenancy, there is not even a theoretical time when the landlord has a right of possession.

According to long-standing authorities, it is a legal fiction that there is a renewal and corresponding right of entry at the beginning of every month in a month-to-month tenancy. Month-to-month tenants who extend a written lease under its notice provisions do not have lesser tenancy rights or privacy rights. And, the law expressly forbids landlords to enter tenants' homes once they've handed over the keys. Month-to-month tenants do not give up possession and control at the end of every month. They do not "renew" the lease; they merely "extend" it—in possession and control—and continue under the same terms as the written lease.

The opening brief's attempt to fashion a new inspection duty to suit appellants' theory, a duty that has no support in the law, is squarely contradicted in the use notes of the CACI instruction it argues should apply, and makes no common sense. The undue burden that would fall on landlords if such a duty were imposed further weighs against imposing such a duty. The trial court's grant of summary judgment should be affirmed.

And, with no predicate tort claim to support plaintiff Esperanza Garcia's loss of consortium claim, the court's rejection of that cause of action must also be affirmed.

STATEMENT OF FACTS

A. The Defendants Purchase A Single Family Home And Rent It Out.

Defendants and respondents Michele Holt and her husband, Niel Mamerto (the Landlords),[1] purchased a single family home in Escondido, California and decided to rent it out. (CT 28 ¶2, 30 ¶2, 78 ¶3; MTA 47-48, 143-144.)[2] They agreed that Ms. Holt would primarily handle the financial aspects of the Premises—e.g., paying the bills—while Mr. Mamerto would primarily deal with the tenants and any maintenance issues. (CT 28 ¶2, 30 ¶2, 31 ¶7; MTA 43-46, 145-146.)

After sprucing it up, they initially rented the Premises to a friend for about a year. (MTA 47-49, 144.)

B. Inspections And Tenancy.

1. The Landlords thoroughly inspect the Premises.

After the Landlords' friend moved out, Mr. Mamerto thoroughly inspected the interior and exterior of the Premises and made a few minor

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[1] Niel Mamerto was erroneously sued as Neil Memerto.

[2] The following abbreviations are employed for record citations throughout the brief: Clerk's Transcript = "CT"; Respondents' Unopposed Motion to Augment = "MTA"; Notice of Lodgment of Exhibits In Support of Opening Brief = "NLE Exh. [#]"; Appellants' Opening Brief = "AOB"; Reporter's Transcript = "RT."

repairs. (CT 31 ¶4, 80-81 ¶7; MTA 47.) He observed no problems or defects, and saw no explosive materials. (*Ibid.*)

2. The Landlords interview prospective tenants and run a full background check.

In October 2005, Mr. Mamerto interviewed prospective tenants, George Jakubec and his wife (the Tenants), and showed them the Premises. (CT 80 ¶6; MTA 50-54.) At the time, Mr. Mamerto thought they seemed nice and personable. (MTA 55.)

The Landlords also conducted a full background check of the Tenants, which included their criminal, credit, and eviction histories. (CT 80 ¶6; MTA 56.) All of their records were clear. (*Ibid.*) Mr. Mamerto verified Mr. Jakubec's employment as a software engineer, confirmed his $170,000 annual salary, and reviewed his bank statements. (CT 80 ¶6; MTA 51-58, 103-118.)

Nothing that Mr. Mamerto saw in the reports or heard from others about the Tenants concerned him. (CT 80 ¶6; MTA 55.) There was no evidence of past criminal activity and nothing that would raise a red-flag about an interest in explosives. (CT 80 ¶6; see MTA 108-115.)

3. After a walk-through inspection, the Landlords and Tenants enter into a one-year lease.

On October 15, 2005, the Landlords and Tenants entered into a one-year lease. (MTA 60, 64; NLE Exh. 1, p. 1.)

a. The walk-through inspection.

Before turning over the keys to the Tenants, Mr. Mamerto conducted a walk-through inspection of the Premises with Mr. Jakubec, and observed no problems or defects. (CT 31 ¶5, 81 ¶8; MTA 86-87.) He also saw no evidence of any explosive materials. (CT 31 ¶5, 81 ¶8.)

b. The lease.

The lease prohibited the Tenants from using the Premises "for any unlawful purposes, including, but not limited to . . . violat[ing] any law or ordinance," and causing a "nuisance on or about the Premises." (NLE Exh. 1, p. 3 ¶14.A; see CT 90 ¶12.)[3] It also expressly prohibited manufacturing or storage of explosives or any other illegal or dangerous materials. (NLE Exh. 1, p. 2 ¶8.A.)

Once the Tenants were in possession of the Premises, the Landlords had no duty under the lease to inspect or maintain the interior of the Premises. (NLE Exh. 1, p. 2 ¶11.A.) Rather, it was the Tenants' duty to "properly use, operate and safeguard the Premises," and to "immediately

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[3] For the Court's convenience, the lease is attached as Exhibit A.

notify Landlord, in writing, of any problem, malfunction or damage." (*Ibid.*; NLE Exh. 2, pp. 21-22.)

In addition, once the Tenants were in possession, the Landlords' right of entry was restricted. The Landlords were required to give the Tenants 24-hour written notice to enter unless: (1) there was an emergency; (2) the Tenants gave consent and were present at the time of entry; (3) the Tenants abandoned or surrendered the Premises; or (4) there was an oral agreement to enter for specific repairs and the entry took place within one week of that agreement. (NLE Exh. 1, p. 3 ¶18.B.)

The lease terms provided that it would begin as a one-year tenancy, and then would "continue[] as a month-to-month tenancy" if neither party gave 30 days notice of termination and the Landlords accepted rent from the Tenants the first month after the year term. (NLE Exh. 1, p. 1 ¶2.; CT 88 ¶2.) The written lease's "terms and conditions" remained "in full force and effect" throughout the entire tenancy. (NLE Exh. 1, p. 1 ¶2.B.; CT 88 ¶2; MTA 64, 66-67.)

4. The one-year tenancy converts into a month-to-month tenancy.

After a year, the Tenants decided to stay. (MTA 64, 66.) Thus, it is undisputed that in October 2006, the lease converted into a month-to-month tenancy. (CT 88 ¶2; AOB 4, 9; MTA 66; see also MTA 64 ["(I)f nothing had changed in the contract, then the same terms would roll over into the following year"].)

As month-to-month lessees, the Tenants were permitted to occupy the Premises indefinitely until either party gave 30 days notice of termination. (NLE Exh. 1, p. 1 ¶2.)

5. The Landlords have no reason to suspect that there is any dangerous activity occurring on the Premises during the tenancy.

a. Once the Tenants are in possession, the Landlords have no reason to enter the Premises.

Over the course of the Tenants' entire five year tenancy, Mr. Mamerto and Mr. Jakubec maintained a cordial landlord/tenant relationship, communicating over e-mail when necessary. (MTA 75-76; see also MTA 120, 122, 124; NLE Exh. 3, pp. 1-11.)

The Tenants never notified the Landlords of any issues that required interior entry and they never invited them to enter. (NLE Exh. 2, p. 19; CT 29 ¶5, 31 ¶10.) At no time during the tenancy did the Landlords receive any complaints about the Tenants, or any warnings that the Tenants were creating or storing any type of explosives or explosive material, or that they were committing any crimes. (CT 29 ¶5, 31 ¶10, 84-88 ¶¶17-19.)

Thus, after handing over the keys, it is undisputed that the Landlords never set foot inside the dwelling during the tenancy. (CT 57, 89-90 ¶¶9-10, 91 ¶17; AOB 4.)

b. The Landlords hire independent contractors to handle their maintenance duties; they report nothing suspicious.

Pursuant to the Landlords' lease duties to maintain landscaping and provide periodic pest control, the Landlords contracted with a pest control company to make quarterly visits to the Premises, and hired plaintiff Mario Garcia (the Landscaper), to regularly maintain the landscaping. (CT 82-83 ¶¶10-11, 88 ¶1; MTA 74-78, 83, 96, 122, 136-137; see NLE Exh. 1, pp. 2 ¶11A., 4 ¶24.) Neither contractor ever reported anything suspicious. (CT 31 ¶9, 84-88 ¶¶16, 18-19; MTA 14-15, 21-24, 134.)

The Landscaper: The Landscaper's schedule for maintaining the Premises depended upon growth cycles: He or his employees usually came once a week during heavy-growth months and every other week during slow-growth months. (CT 61 ¶2, 83 ¶11; MTA 6-11.)

Like Mr. Mamerto, the Landscaper found Mr. Jakubec to be polite when they had occasion to speak to each other. (MTA 34.) Nothing about Mr. Jakubec's demeanor caused the Landscaper or his employees to suspect any unlawful activities. (CT 84 ¶16; MTA 34.)

The Landscaper never went inside the house, nor was he ever able to see inside of the house through an open door or window, and the window curtains were always closed. (MTA 10, 21-22.) It is undisputed that the

Landscaper was never "aware of anything on the Premises that created cause for concern regarding his safety or the safety of his employees." (CT 84 ¶16; see also MTA 21-24 [Landscaper testifying that the Premises "seemed to me normal, in the past year, so – the past two years"].) And, nothing made the Landscaper or his employees feel they were at a greater risk of injury than at any other landscaping job. (CT 84 ¶16; MTA 14-15.)

During the fifth (and final) year of the tenancy, the Landscaper once knocked on the Tenants' door because there were boxes in the way on the back patio that prevented use of the blower machine to clean garden debris in that area. (MTA 11-14, 16; see also MTA 31.) Mr. Jakubec said he didn't mind if they cleaned around the boxes. (MTA 13-14, 30.) So that's exactly what they did. (*Ibid.*) The plaintiff-Landscaper never informed the Landlords about their conversation. (MTA 23.)

Pest Control: The Landlords contracted with a pest control company to spray around the exterior of the Premises on a quarterly basis. (CT 31 ¶8; MTA 74-83, 136.) They hired a different extermination company on one occasion to spot treat the attic for termites. (MTA 79-81, 83, 126-134.) Neither company ever reported anything suspicious. (MTA 126-137; CT 31 ¶9.)

Sink Repair: The only other time that a contractor entered the Premises interior was when the Tenants needed their garbage disposal

replaced. (MTA 84, 91-94, 139.) After the repairman and his boss left the Premises, Mr. Mamerto spoke to each of them individually and asked: "'How's everything at the house?'" (MTA 94.) They responded that "everything was fine." (MTA 93-94.) According to Mr. Mamerto, the repairmen are "sticklers, so if there was anything out of the ordinary, they would have told [him]." (MTA 92.)

c. During Mr. Mamerto's only visit to the Premises' exterior during the tenancy, he observes nothing suspicious.

On one occasion during the tenancy, Mr. Mamerto visited the exterior of the Premises to discuss a sprinkler repair issue with the Landscaper. (CT 81 ¶9, 85-86 ¶18, 90 ¶10; MTA 88-90.) From his vantage point on the front-porch, Mr. Mamerto observed nothing out of the ordinary. (CT 81-82 ¶9; NLE Exh. 2, p. 19.) He couldn't see the backyard at all from the front porch. (CT 81 ¶9.)

d. No suspicions arise from Mr. Jakubec's fence repair e-mails.

Between June and October of 2010, Mr. Jakubec and Mr. Mamerto corresponded through e-mail about a 10-foot section of damaged fence on the Premises. (CT 88-89 ¶¶3-6; NLE Exh. 2, pp. 13-14, Exh. 3, p. 5.) Mr. Mamerto offered to hire someone to fix the fence, but Mr. Jakubec

offered to fix it himself, noting that he had a general contractor's license. (NLE Exh. 2, p. 14, Exh. 3, p. 5.)

After Mr. Jakubec e-mailed Mr. Mamerto with various cost options, Mr. Mamerto agreed to let him fix it. (CT 88-89 ¶5; NLE Exh. 2, p. 14, Exh. 3, pp. 6-11.) Thus, the Landlords never visited the Premises to personally inspect the damage to the fence. (CT 88 ¶4; NLE Exh. 2, pp. 14-18.) Nothing in these correspondences caused the Landlords concern.

C. The Incident.

1. The Landscaper drops his employee off at the Premises and returns later in the day.

On the day of the incident, five years into the tenancy, the Landscaper dropped off his employee in the morning to begin weeding. (MTA 16-20.) Nothing looked unusual at the Premises. (MTA 21.)

Later in the afternoon, the Landscaper returned. (MTA 16, 25.)

2. The explosion.

The Landscaper walked along the side of the house and toward the backyard where his employee was working. (MTA 26.) He tried calling out to get his employee's attention, but his employee couldn't hear because the sound from the weedwacker was too loud. (*Ibid.*) So he proceeded closer, walking through a gravel area that he had previously walked through many times without incident. (CT 83 ¶13; MTA 26-27, 29.) This gravel area is not visible from the street. (CT 84 ¶15.)

Before reaching his employee, the Landscaper heard a big explosion, which caused him to sustain injuries. (MTA 27.) He was taken to the hospital. (NLE Exh. 6, p. 1.)

3. The police discover that tenant Mr. Jakubec has been manufacturing unstable explosives while in control of the Premises.

Mr. Jakubec was arrested and admitted to manufacturing bombs and other homemade explosive materials on the Premises. (NLE Exh. 6, pp. 2, 6.)[4] The police opined that the Landscaper was injured by an unstable explosive product that spilled outside on the gravel area where the Landscaper walked. (NLE Exh. 6, pp. 5, 7.) The explosion caused the Landscaper "to sustain blast injuries." (NLE Exh. 6, p. 7.)

The police report from the incident concluded that Mr. Jakubec "had dominion and control" over the Premises. (NLE Exh. 6, p. 7.)

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[4] Although not in the record before the trial court, judicially noticeable records reveal that Mr. Jakubec pleaded guilty to bank robbery charges in exchange for having his bombmaking-related charges dropped, and is currently serving a mandatory minimum sentence of 30 years in federal prison. (*United States v. Jakubec* (Dec. 21, 2011) No. 3:10-cr-04828-LAB [Amended Judgment; Dkt. No. 45].)

D. The Lawsuit.

1. The Landscaper sues the Landlords and bombmaker for his personal injuries.

The Landscaper and his wife sued Mr. Jakubec, the bombmaker, and both Landlords for premises liability and loss of consortium. (CT 1-7.)

2. The court grants the Landlord's summary judgment motion, finding that the Landscaper's case has no merit and that the Landlords owed the Landscaper no legal duty to inspect the Premises during the tenancy.

The Landlords moved for summary judgment, arguing that: (1) they owed no legal duty to the Landscaper because they had no actual or constructive knowledge of Mr. Jakubec's dangerous bombmaking activities, (2) they owed no legal duty to the Landscaper because the risk of the Landscaper being injured was unforeseeable, and (3) the claim for loss of consortium necessarily failed because the tort claim had no merit. (CT 14-25.)

In opposition, the Landscaper asserted that disputed factual issues remained as to whether the Landlords acted reasonably in the maintenance and inspection of their property during the bombmaker's tenancy. (CT 52-58.) Specifically, he argued that the Landlords "had the duty to inspect the property each time the lease renewed, which would have been every month once the lease converted to a month-to-month tenancy." (CT 57.) And,

"the standard in the industry is to inspect it periodically and some landlords do so at least on an annual basis." (*Ibid.*)

The court granted the Landlords' motion. (CT 194-199.) It found that (1) the Landscaper's cause of action had no merit, (2) the Landlords owed no legal duty to the Landscaper (or his plaintiff wife) because the Landlords had relinquished control of the property and had no knowledge of a dangerous condition on the land, and (3) the loss of consortium claim necessarily failed without a predicate tort claim. (CT 194.)

The court rejected as speculative the Landscaper's argument positing that the Landlords would have discovered the dangerous condition if they had visited the property during the tenancy, because the Landscaper himself had visited the property several times in the months prior to the explosion but had not seen anything that made him suspect any illegal or dangerous activities or conditions. (CT 195-196.)

The court noted that "[i]f there was something there"—i.e., "some reasonable basis that an inference could be drawn that the [Landlords] had a clue of what was going on at their property"—it "wouldn't hesitate to deny [the summary judgment] motion." (RT 8.) But under these circumstances, where there was no evidence of any direct or indirect knowledge to create a triable issue of material fact, the court was persuaded that the Landlords carried their burden. (RT 7-8.)

3. The trial court enters judgment and the Landscaper and his wife timely appeal.

The court entered judgment in favor of the defendant owner. (Signed "Judgment," attached as Exh. B.)[5] Plaintiff timely appealed. (*Ibid.*; CT 245-246.)

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[5] Initially, the Landscaper and his wife appealed from a nonappealable summary judgment order, but the court subsequently signed an appealable final judgment, attached to the brief as Exhibit B.

ARGUMENT

I. LANDLORDS OWE NO ONGOING DUTY TO LANDSCAPERS TO INSPECT RESIDENTIAL RENTAL-PROPERTIES TO DETERMINE IF TENANTS ARE ENGAGED IN DANGEROUS BOMBMAKING ACTIVITIES.

A. Once Landlords Give Up Possession And Control To Tenants, They Have No Further Duty To Inspect The Premises For Dangerous Activities Unless They Have Actual Knowledge Of Dangers Occurring Thereon And The Right To Cure Them.

1. Landlords cannot be liable to third-parties for premises liability unless they owe a legal duty.

Premises liability claims are grounded in ordinary negligence principles. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119; *Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, 1407-1408.) Thus, an injured person suing a landowner for premises liability must establish, as a threshold matter, that the landowner owed the plaintiff "a legal duty to use due care." (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594; see also *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 593 [fundamental is the existence of a legal duty running from the defendant to the plaintiff]; Civ. Code, § 1714 [ordinary negligence standard applied to landowners].)

If the alleged wrongdoer owes no duty to the injured person—or to the class of persons to which the injured person is a member—there can be no liability. (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63; *A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 663.) "[B]y limiting the scope of *duty*," "liability for unforeseeable consequences is avoided." (*Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1131, original emphasis, citing *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339 [162 N.E. 99, 59 A.L.R. 1253].) "The absence of duty ends the analysis of liability." (*Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 897.)

In *Rowland v. Christian*, our Supreme Court laid out the principal factors to weigh in determining whether a landowner owes a legal duty to a third-party land-entrant. (69 Cal.2d at p. 113; accord, *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)[6] "Foreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations, but in a given case one or more of the other *Rowland* factors may be determinative of the duty analysis." (*Castaneda*, at p. 1213; see *McGarry v. Sax* (2008)

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[6] The factors include: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff will suffer injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved. (*Rowland*, at p. 113.)

158 Cal.App.4th 983, 997 ["foreseeability is a critical factor in determining the existence of a duty"].)

Under *Rowland*'s duty analysis—which governs both landowners' and landlords' duties (see *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 923)—courts do *not* analyze whether a *particular* plaintiff's injury was foreseeable; rather, courts must assess whether the general category of conduct is "sufficiently likely" to result in the kind of harm that warrants the imposition of liability (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6). "'[S]ufficiently likely'" means "'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.'" (*Martinez, supra*, 82 Cal.App.4th at p. 895, quoting *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57.)

"Duty, being a question of law, is particularly amenable to resolution by summary judgment." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 465.) The statute governing summary judgment procedures, Code of Civil Procedure section 437c, specifically authorizes summary judgment where "one or more defendants . . . did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc., § 437c, subd. (f)(1).)

2. During tenancies, a "bright line rule" limits out-of-possession landlords' duty to inspect: They owe *no* duty unless they have actual knowledge of a dangerous activity occurring and the right and ability to cure it.

Based upon *Rowland*'s governing legal duty principles, the Supreme Court and Courts of Appeal have defined several bright line rules determining whether imposing a duty of care on landowners and landlords is appropriate, and clarifying the scope of any duty, if one exists.

For instance, landowners have a general duty to "maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5, citing Civ. Code, § 1714 and *Rowland, supra*, 69 Cal.2d 108.) And, landowners who lease their property—and thus, become landlords—have a duty to "exercise due care in the management of their property to avoid foreseeable injury to others." (*Stoiber, supra*, 101 Cal.App.3d at p. 923.)

Out of these generic sounding obligations, negligence law has evolved to impose specific duties of reasonable care on landlords that require "making sure the property is safe at the beginning of the tenancy, and repairing any hazards the landlord learns about later." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 612.) But landlords owe no duty—absent prior similar incidents or similar notice—

to protect third parties from others' criminal conduct. (E.g., *Castaneda*, *supra*, 41 Cal.4th at p. 1222; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1189-1191; *Ann M.*, *supra*, 6 Cal.4th at p. 679.) Likewise, once tenants have taken possession, the law imposes *no* duty of care on landlords to inspect the property for dangerous conditions or activities absent actual knowledge of the dangers occurring and the right to eliminate them. (E.g., *Bisetti v. United Refrigeration Corp.* (1985) 174 Cal.App.3d 643, 648-649.)

Our Supreme Court has "placed major importance on the existence of possession and control" as a necessary basis for imposing a legal duty on landowners and landlords vis-à-vis third-parties who come upon their land. (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 30, additional quotation marks omitted; see *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1158 ["'*The crucial element is control*,'" original emphasis]; *Preston v. Goldman* (1986) 42 Cal.3d 108, 119 [same]; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 ["the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises"].)

When a landowner leases to a tenant—relinquishing possessory interest in the property—the duties imposed in connection with activities that occur on the land are *not* placed on the title-owner, but, rather, on the tenant-possessor because of the possessor's "'supervisory control over the activities conducted upon, and the condition of, the land.'" (*Sprecher*, *supra*, 30 Cal.3d at p. 368; accord, *Alcaraz*, *supra*, 14 Cal.4th at pp. 1157-1158.) "The general duty of care owed by a landowner in the management

of his or her property is attenuated when the premises are let because the landlord is not in possession, and usually lacks the right to control the tenant and the tenant's use of the property." (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369.) The "'person who is in occupation of the land with intent to control it'" is the person who may be held liable for injuries caused by a dangerous activity. (*Alcaraz*, at p. 1159, quoting Rest.2d Torts, § 328E, p. 170.)

Thus, an out-of-possession landlord's duties are limited in comparison to an occupying landowner. (*Stone*, *supra*, 163 Cal.App.4th at p. 614; see *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1605 [where dangerous condition arises after tenant takes possession, the landlord is generally absolved of liability].) Likewise, an out-of-possession landlord's duty owed *to third parties* who are injured on the land is "attenuated as compared with the tenant who enjoys possession and control." (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412, additional quotation marks omitted.)

A "bright line rule" has, thus, developed "to moderate the landlord's duty of care owed to a third party injured on the property" in cases where the landlord "has relinquished control of property to a tenant": "[B]efore liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, *plus* the right and ability to cure the condition." (*Salinas*, *supra*, 166 Cal.App.4th at p. 412, additional quotation marks and internal citations

omitted, emphasis added; *Stone*, *supra*, 163 Cal.App.4th at p. 612 [same]; *Mata v. Mata* (2003) 105 Cal.App.4th 1121, 1131-1132 [same]; *Bisetti*, *supra*, 174 Cal.App.3d at pp. 648-649 [same]; *Rosales v. Stewart* (1980) 113 Cal.App.3d 130, 134 [same]; see also *Resolution Trust Corp. v. Rossmoor Corp.* (1995) 34 Cal.App.4th 93, 102 ["The defendant must be aware of the specific dangerous condition and be able to do something about it before liability will attach"].)[7]

"The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease." (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 511.) "A leasehold estate gives the lessee the exclusive possession of the premises against all the world, including the owner, for the term of the lease." (*Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1190; see *Santa Monica Rent Control Bd. v. Bluvshtein* (1991) 230 Cal.App.3d 308, 316 [lessee gets exclusive "'possession and use of a lesser

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[7] The opening brief attempts to avoid the bright line rule by erroneously contending that *Salinas*'s discussion of the rule is dicta. (AOB 10.) Just because the plaintiff in *Salinas* did not meet the rule's requirements doesn't mean the rule itself is dictum. As the trial court noted, *Salinas* is factually distinguishable because—unlike the Landlords here—the landlord "was not an absentee landlord with limited access to the property." (166 Cal.App.4th at p. 413; CT 195.) Further, the Landlords here gave up possession and control; whereas there, the landlord "did *not* surrender his possessory interest in the property in any way; he continued to control the premises." (*Ibid.*, emphasis added.) Thus, *Salinas* overtly acknowledges that the bright line rule—applied in countless other cases—is supposed to be employed in the exact situation presented here.

estate in his property'"]; see also Civ. Code, § 1006 ["Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession"].)

"As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and *he has no right even to enter without the permission of the lessee*. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. *Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer*, even when they create a nuisance.'" (*Uccello*, *supra*, 44 Cal.App.3d at pp. 510-511, internal citations omitted, emphases added.) "[A] landlord should not be held liable for injuries from conditions over which he has no control." (*Id.* at p. 512; Civ. Code, § 3526 ["No man is responsible for that which no man can control"].)

By limiting landlords' duties in such situations, it releases them "from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested." (*Salinas*, *supra*, 166 Cal.App.4th at p. 412.)

The opening brief argues that knowledge is not a prerequisite to imposing a duty to inspect on landlords. (AOB 11, citing *Portillo v. Aiassa*

(1994) 27 Cal.App.4th 1128, 1134.) Wrong. The authority that it relies on for this novel proposition doesn't govern. *Portillo* deals with the duty of a building owner to prevent injuries to a customer injured by the tenant liquor store's guard dog that was known to be vicious. (27 Cal.App.4th at p. 1135.) The landowner in *Portillo* owed a duty of care to the injured customer because it was "reasonably foreseeable that a guard dog kept in a business open to the general public w[ould] injure someone . . . ." (*Ibid.*)

Portillo found that the injury to the customer caused by the guard dog was foreseeable because if the building owner had conducted a reasonable inspection of the premises—which was open to the public—he most likely would have known of the dog's dangerous propensities by observing the sign posted in the liquor store near the counter "which read: 'Beware of Dog . . . WE HAVE A GUARD DOG!! DO NOT PET OR TEASE!'" (*Id.* at pp. 1132, 1135.) There was also a copy of a newspaper article about the dog posted near the entrance entitled, "Guard dog not amused by 'joke.'" (*Id.* at p. 1132.) The picture accompanying the article was the guard dog with its paws on the store counter and its mouth open as if he were about to attack. (*Ibid.*) "The article referred to the dog as '[a] furry juggernaut, replete with iron trap jaws, razor sharp fangs and a rotten disposition,' and discussed the dog's recent attack on an attempted robber in the store." (*Ibid.*) All of this information was publicly available and obvious to anyone who visited the store, and the building owner had the right to enter any time just as the general public could enter. A tenant's publicly-proclaimed danger is far different from a hidden one.

Here, on the other hand, the property was *not* open to the public and the dangerous activity—bombmaking—was far from obvious. The dangerous activity and materials were hidden inside a private residential dwelling where the doors and windows were always closed, the curtains were always drawn, and entry without consent was expressly prohibited by the lease's terms and by law. (MTA 10, 21-22; see § I.B.1.b., *post.*) Therefore, *Portillo* is inapposite. (See *Laico v. Chevron U.S.A., Inc.* (2004) 123 Cal.App.4th 649, 665 ["Absent evidence of a danger present at the site when (the tenant) took possession, and absent evidence of (the landlord's) knowledge of and ability to control hazardous practices by (the tenant's) employees, we can find no basis for imposing on (the landlord) a duty to avert the harm suffered by (the plaintiff)," distinguishing *Portillo*]; *Martinez, supra*, 82 Cal.App.4th at pp. 893-894 [*Portillo* does not govern where the defendant did not transfer possession and control under a lease, property was not used for public admission, the defendant did not know of danger, and the defendant did not possess or control property].)

The opening brief's attempt to avoid the established bright line rule that the court applied here must be rejected.

B. With No Knowledge Of Any Dangerous—Or Even Suspicious—Activities Occurring At The Rental Property, And No Right To Enter While The Residential Tenants Were In Possession, The Landlords Had No Duty (Or Right) To Conduct Random Periodic Inspections To Look For Unforeseeable Dangers.

1. The Landlords' lack of knowledge about the Tenants' bombmaking activities and the lack of a right to enter each negate any duty to inspect.

Once the Landlords transferred possession and control of the house to the Tenants, they gave up any right or duty to inspect, as a matter of law, because they had *neither* the knowledge of the dangerous bombmaking activities occurring *nor* the right to enter in order to discover them. (*Salinas*, *supra*, 166 Cal.App.4th at p. 412; *Stone*, *supra*, 163 Cal.App.4th at p. 612.) The opening brief's failure to demonstrate either prong of the bright line test—i.e., (a) the Landlord's awareness, *or* (b) the right to enter the dwelling—requires affirmance. As shown below, the plaintiff-Landscaper failed to establish both.

a. It is undisputed that the Landlords did not know and had no reason to know about the Tenants' bombmaking activities.

A landlord's unrefuted statement that he "'was unaware of the existence of the [dangerous materials] which allegedly caused the plaintiff

injury'" is a sufficient basis to grant summary judgment. (*Bisetti*, *supra*, 174 Cal.App.3d at p. 649 [affirming summary judgment where the landlord demonstrated that he had no knowledge of a dangerous vat of chemicals on the leased premises or of a hole in the fence through which the plaintiff trespassed].) That's exactly what the undisputed statements showed in this case. (See CT 29 ¶5, 31 ¶10, 84-88 ¶¶17-19.)

The evidence is undisputed that over the course of the five-year tenancy, the Landlords were never made aware—from first-hand or second-hand information—that there was anything dangerous occurring inside the dwelling or that there were dangerous materials on the Premises. Nor did they learn of any suspicious behavior or activity that should have given them a reason to know that there were dangerous bombmaking activities and material on the Premises.[8]

No first-hand knowledge. The Landlords interviewed the Tenants before they signed the lease. They seemed nice and personable. (MTA

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[8] Technically, whether the Landlords *should* have known is irrelevant. The Landscaper was required to prove that the Landlords had *actual* knowledge. (*Bisetti*, *supra*, 174 Cal.App.3d at pp. 648-651; *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1839; *Uccello*, *supra*, 44 Cal.App.3d at pp. 510-511, 514 [bright line rule negates duty even in cases where a landlord might have discovered the condition exercising reasonable diligence].) "Some cases have held constructive knowledge of the condition is enough, essentially placing a duty of inquiry or investigation on the landlord. [Citation.] But that duty only arises 'if [the landlord has] some reason to know there [is] a need for such action.' [Citation.]" (*Resolution Trust Corp.*, *supra*, 34 Cal.App.4th at p. 102, fn. 8.) In any event, here, there is also no evidence demonstrating that the Landlords should have known of any dangers on the Premises. (See pp. 32-35, *post*.)

55.) The Landlords also investigated the Tenants' criminal, credit, and eviction histories and uncovered no evidence of any previous illegal or suspicious activities. (CT 80 ¶6; MTA 56; see also MTA 108-115; cf. *Castaneda*, *supra*, 41 Cal.4th at pp. 1219-1222 [landlord owed no duty to evict suspected gang members].) Mr. Mamerto verified that Mr. Jakubec was employed, that he was making a $170,000 annual salary, and that he had sufficient funds in his bank account to make him a good lessee candidate (at least on paper). (CT 80 ¶6; MTA 51-58, 103-118.) Nothing in his investigations raised any red-flags or suspicions about the Tenants.

After the Landlords completed a walk-though inspection and handed over the keys to the Tenants—transferring possession and control—it is undisputed that the Landlords never went back inside the dwelling. (CT 57, 89-90 ¶¶9-10, 91 ¶17; AOB 4.) There was no need to. (See *Stone*, *supra*, 163 Cal.App.4th at p. 612 [after initial walk-through, landlord has no duty to inspect during tenancy unless he is aware of the hazards and has the right to enter].) Over the course of the entire five-year tenancy, the Tenants never complained to the Landlords of any issues that required entry and they never asked the Landlords to enter. (NLE Exh. 2, p. 19; CT 29 ¶5, 31 ¶10.) Mr. Mamerto and Mr. Jakubec communicated only via e-mail throughout the tenancy and their conversations were always cordial. (MTA 75-76; see also MTA 120, 122, 124; NLE Exh. 3, pp. 1-11.) After the Landlords handed over the keys, they never spoke face to face.

On the *only* occasion that Mr. Mamerto visited the *exterior* of the Premises, he met with the Landscaper outside on the front porch to discuss

a sprinkler repair issue. (CT 81 ¶9, 85-86 ¶18, 90 ¶10; MTA 88-90.) It is undisputed that from that vantage point, Mr. Mamerto observed nothing out of the ordinary. (CT 81-82 ¶9; NLE Exh. 2, p. 19.)

The opening brief fails to point to any evidence that the Landlords should have known (let alone knew) that the Tenants were engaging in dangerous bombmaking activities. That's because there is none. Instead, it suggests that a duty to inspect was triggered by a series of e-mails between Mr. Mamerto and Mr. Jakubec regarding a 10-foot damaged section of fence at the Premises. (AOB 3, 13; CT 88-89 ¶¶3-6; NLE Exh. 2, pp. 13-14, Exh. 3, p. 5.) But the substance of those e-mails proves that no duty was triggered: When Mr. Mamerto offered to send someone to fix the fence, Mr. Jakubec offered to fix it himself, noting that he had a general contractor's license. (NLE Exh. 2, p. 14, Exh. 3, p. 5.) Thereafter, the Landlords had no duty to maintain the fence. (NLE Exh. 1, p. 2 ¶11.) These e-mails, therefore, created no triable duty issue. As the trial court noted in granting summary judgment, "it is undisputed that [the damaged fence] did not result in actual knowledge of any kind of dangerous or illegal activity. Thus, this evidence is immaterial and not relevant." (CT 195.) The "premise that such things give rise to a duty to inspect" is false. (*Ibid.*)

Nor did the e-mails trigger any sort of duty to repair that would have required the Landlords to come to the property. For such a duty to exist, the damaged fence would need to cause the dwelling unit to be uninhabitable, unfit for occupation, or "untenantable." (Civ. Code, §§ 1941, 1941.1, 1941.2, 1941.3, 1941.4, 1942.) There's no evidence of that

here. The Landlords' awareness of the damaged fence creates no triable issue as to whether they knew about any dangerous activities.

The opening brief also suggests that Mr. Jakubec's phone call to the Landlords on a single occasion that the Tenants would be paying rent late is a factor "that tilt[s] in favor of a duty to inspect" because it demonstrates "financial difficulty." (AOB 13.) How a single tardy rent payment in five years creates a duty to inspect for dangerous activities, the opening brief doesn't say. There's no evidence that the late payment caused the Landlords to be suspicious or aware about any dangerous or illegal activities or even caused them any concern that the Tenants were having financial problems. (NLE Exh. 5, p. 3.) One late rent payment does not make bomb-related injuries more foreseeable.

No suspicious second-hand reports. Not only did the Landlords have no personal knowledge of dangerous activities occurring, but they also had no second-hand knowledge. Nobody *ever* alerted the Landlords about anything dangerous or illegal or gave them any inkling that anything suspicious was going on that should have raised a red-flag that Mr. Jakubec was making bombs, including the Landscaper himself. (CT 29 ¶5, 31 ¶10, 84-88 ¶¶17-19.) Indeed, as we show below, nobody even made a noise complaint about the Tenants.

The plaintiff-Landscaper saw nothing suspicious. The plaintiff-Landscaper spent much more time than the Landlords on the Premises. For five years, he was there every week during heavy-growth months—

either working in the yard or dropping off employees—and every two weeks during light-growth months. (CT 61 ¶2, 83 ¶11; MTA 6-11.) Thus, conservative calculations demonstrate that he visited the Premises more than 200 times during the tenancy. He testified that:

- He never saw anything suspicious, let alone dangerous, criminal, or explosive. (CT 84 ¶16; MTA 11-15, 21-24.)
- When he had occasion to speak to Mr. Jakubec, he found him to be polite. (MTA 34.)
- Nothing caused him or his employees to suspect that Mr. Jakubec was involved in unlawful activities. (CT 84 ¶16; MTA 34.)
- The Premises "seemed to [him] normal." (MTA 21-24.) Nothing at all caused him "concern regarding his safety or the safety of his employees." (CT 84 ¶16.)
- Nothing made the Landscaper or his employees feel they were at a greater risk of injury than at any other landscaping job. (CT 84 ¶16; MTA 14-15.)

The trial court granted the Landlords' summary judgment motion, in large part, because the undisputed evidence established that the Landscaper himself had visited the property dozens of times in the months prior to the explosion but he had not seen anything that made him suspect any illegal or dangerous activities or conditions, and the record was undisputed that the Landlords had only visited the Premises' exterior once in five years.

(CT 195-196.) In so doing, the court rejected as speculative the Landscaper's hypothesis that the Landlords would have discovered the danger had they visited the property during the tenancy, especially since the Landscaper himself hadn't discovered it. (*Ibid.*)

Other contractors also reported nothing suspicious:

- The Landlords hired a pest control company to spray around the exterior of the Premises on a quarterly basis; its employees never reported anything suspicious. (CT 31 ¶8; MTA 74-83, 136.)
- When a termite exterminator went inside the house to spot treat the attic, he reported nothing suspicious. (MTA 79-81, 83.)
- When the Tenants needed their garbage disposal replaced, the repairman and his boss reported to Mr. Mamerto that "everything was fine" inside the house. (MTA 84, 91-94, 139.) According to Mr. Mamerto, these repairmen were "sticklers, so if there was anything out of the ordinary, they would have told [him]." (MTA 92.)

None of this evidence creates any factual dispute about whether the Landlords knew, or even should have known, of any dangerous activities on the Premises. The Landlords knew nothing, and had no reason to know. The trial court noted that it "wouldn't hesitate to deny [the summary judgment] motion" "[i]f there was something there"—i.e., if there was

"some reasonable basis that an inference could be drawn that the [Landlords] had a clue of what was going on at their property." (RT 8.) But where, as here, there is *no* evidence of any direct or indirect knowledge to create a triable issue of material fact (RT 7-8), summary judgment is proper.

b. The Landlords had no right—under the lease or the law—to enter the dwelling during the tenancy.

There's another problem with the opening brief's construct. Having failed to demonstrate that the Landlords had actual knowledge of a dangerous activity occurring at their rental property, it also fails to establish that the Landlords had any means of obtaining such knowledge—e.g., any right to enter the property unannounced to inspect it. A landlord's duty to inspect "derives from his control and ability to prevent dangerous conditions on his property." (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1839.) By giving up possession and control of the Premises to the Tenants, the Landlords "necessarily gave up the ability to directly and promptly control the conditions which existed on his land at the time of [the Landscaper's] injury." (*Leakes v. Shamoun* (1986) 187 Cal.App.3d 772, 776; accord, *Martinez, supra*, 82 Cal.App.4th at p. 892.) Thus, as we now show, even if the Landlords were aware of the dangerous bombmaking activities (they weren't), they had no right to eliminate them.

The lease's express entry limitation. According to the opening brief, the Landlords' lease with Mr. Jakubec "reserve[d] a right of entry and provide[d] a procedure to exercise that right that is proper under the statutes." (AOB 9.) Not even close. The lease's terms expressly *prohibited* entry: Once the Tenants were in possession, the Tenants—*and not the Landlords*—were responsible to "safeguard the Premises." (*Ibid.*; NLE Exh. 2, pp. 21-22.)

The Landlords had *no duty* to inspect or maintain the interior of the Premises. (NLE Exh. 1, p. 2 ¶11.A.) The lease expressly *prohibited* the Landlords from entering except under specifically defined conditions such as the existence of an emergency or an oral agreement to enter to make specific repairs at a set time. (NLE Exh. 1, p. 3 ¶18.B.) These "terms and conditions" remained "in full force and effect" throughout the entire five-year tenancy. (NLE Exh. 1, p. 1 ¶2.B.; CT 88 ¶2; MTA 64, 66-67.) The lease carved out *no* other exceptions to the Tenants' duty to maintain the property other than landscaping and pest control. (NLE Exh. 1, p. 2 ¶11.)

The legal entry limitation. The Landlords granted the Tenants "exclusive possession" of the residential premises throughout the tenancy. (*Avalon Pacific-Santa Ana*, *supra*, 192 Cal.App.4th at p. 1190; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163.) Thereafter, their legal right to access the interior of the dwelling for almost any reason was virtually non-existent. (Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2014) ¶¶ 2:856.1, 4:80, pp. 2F-2, 4-28 to 4-29 (Friedman).) As the trial court held, "a residential tenant in exclusive possession has a

right to undisturbed enjoyment of the property free from intrusion by the landlord." (CT 195.)

Civil Code section 1954 addresses the circumstances under which landlords are legally authorized to enter an occupied residential dwelling. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1049.) It echoes the lease's express prohibition against giving random unnoticed inspections, permitting landlords to enter the leased dwelling *only* under very specifically-defined, limited conditions. (Civ. Code, § 1954, subds. (a)-(d).)[9]

Section 1954 does *not* permit random periodic inspections, as the opening brief advocates. (*Ibid.*) And, it specifically prohibits landlords from "abus[ing] the right of access or us[ing] it to harass the tenant." (Civ. Code, § 1954, subd. (c).) Civil penalties are even available for the commission of "a significant and intentional violation of Section 1954." (Civ. Code, § 1940.2, subd. (a)(4).)

In fact, if the Landlords unlawfully entered the Premises—as the opening brief suggests they were required to do periodically—they would be trespassing. (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674; *McDowell v. Hyman* (1897) 117 Cal. 67, 70-71.) And, depending on the extent and intrusive nature of the entries, the Tenants could also be

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[9] Civil Code section 1950.5, subdivision (f)—which describes a landlord's right to a final inspection upon termination of the tenancy—also does not allow a final inspection to happen periodically and randomly.

entitled to invasion of privacy or intentional infliction of emotional distress damages. (Friedman, *supra*, ¶ 4:97, p. 4-35.)

Further, if the entry seriously interfered with the Tenants' beneficial use of the property—such as by conducting as many as 50 random inspections over a five-year period as the opening brief recommends (AOB 3)—the Landlords could be in breach of the covenant of quiet enjoyment, constituting a constructive eviction, giving the Tenants the right to vacate and recover consequential damages. (Civ. Code, § 1927; *Nativi v. Deutsche Bank Nat'l Trust Co.* (2014) 223 Cal.App.4th 261, 293; *Avalon Pacific-Santa Ana*, *supra*, 192 Cal.App.4th at p. 1191; see also *Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 138 ["Beyond the statutory covenant, the landlord is bound to refrain from action which interrupts the tenant's beneficial enjoyment"].)

All of these reasons establish the Landlords' lack of an entry right while the Tenants were in possession. Thus, the Landlords had no right or ability to inspect because they had no right under the lease or the law to enter the Premises. (See *Martinez*, *supra*, 82 Cal.App.4th at p. 893 [landlord's lack of "ability to directly and promptly control conditions" negates duty to inspect].)

2. Even without the bright line rule negating the duty to inspect, weighing *Rowland*'s duty factors yields the same result.

Rowland's multi-factor analysis compels the same conclusion as the bright line rule: The Landlords owed the Landscaper no duty. Foreseeability and the extent of the burden to the defendant are the essential *Rowland* factors to consider in this case. (*Castaneda*, *supra*, 41 Cal.4th at p. 1213.) Both weigh heavily in favor of the Landlords.

a. The Landscaper's injuries, resulting from the Tenants' illegal bombmaking activities, were legally unforeseeable.

"[F]oreseeability, like light, travels indefinitely in a vacuum.' [Citation.]" (*Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 486.) The opening brief nowhere even mentions foreseeability—a critical factor in establishing the existence of a duty (*Dillon v. Legg* (1968) 68 Cal.2d 728, 739)—leaving a foreseeability vacuum. The failure to demonstrate how the risk of the Landscaper incurring bomb-related injuries was foreseeable requires affirmance.

The Supreme Court's decisions over the past two decades make clear that, for purposes of the duty analysis, foreseeability of harm is a legal question for the court. (E.g., *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146 ["foreseeability, when analyzed to determine the scope of a duty, is a question of law that an appellate court will

determine de novo"]; *Ann M., supra*, 6 Cal.4th at p. 678 ["Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court"]; see also *Ericson v. Federal Exp. Corp.* (2008) 162 Cal.App.4th 1291, 1300.)

The famous, nearly-century-old, *Palsgraf* case illustrates why unforeseeable dangers trigger *no* legal duty and preclude liability. In *Palsgraf*, a man carrying a package of fireworks wrapped in a newspaper attempted to jump aboard a moving train and, because he seemed unsteady, a railroad employee tried to help him by pushing him from behind. (248 N.Y. 339, 340-341 [162 N.E. 99, 99].) In this act, the package was dislodged, and fell on the tracks, exploding. (*Id.* at p. 341.) The shock from the explosion reverberated down the platform where Mrs. Palsgraf was standing several feet away, causing scales to fall from the platform and injure her. (*Ibid.*) The court held that Mrs. Palsgraf could not recover from the railroad company because there was nothing about the package's appearance that indicated its danger to persons far away, and the railroad owed no duty to Mrs. Palsgraf because the event and resulting harm were legally unforeseeable. (*Id.* at pp. 341, 344.)

For the same reasons that the railroad company owed Mrs. Palsgraf no legal duty, the Landlords owed the Landscaper no duty to inspect for dangerous bombmaking activities: "Nothing in the situation gave notice of the dangers" and "there was nothing in the situation to suggest to the most cautious mind that the [concealed danger] would spread wreckage . . . ." (*Palsgraf, supra*, 248 N.Y. at pp. 341, 345) The law does not impose

a duty on people to anticipate and foresee such an unpredictable chain of events. "The wrongdoer as to [injured party] is the man who carries the bomb . . . ." (*Id.* at p. 343.) It is an understatement to say that a residential tenant's use of the premises to make bombs is rare and unforeseeable. (See Patch.com, *'Bomb House' Resident George Jakubec Gets 30 Years in Prison* (June 14, 2011) <http://patch.com/california/ramona/bomb-house-resident-george-jakubec-gets-30-years-in-prison> (as of Mar. 11, 2015) [press reports describing as "unprecedented" the amount of bombs and explosives found inside the house].)

Likewise, for the same reasons that landlords "'have no duty to prevent unexpected and random crimes'" (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1209) and have "'no duty to inspect the premises for the purpose of discovering the existence of a tenant's dangerous animal'" (*Martinez*, *supra*, 82 Cal.App.4th at p. 892), the Landlords here owed no duty to the Landscaper to inspect for dangerous bombmaking activities: Absent knowledge that such activities are occurring, the dangers are legally unforeseeable. (*Ann M.*, *supra*, 6 Cal.4th at pp. 676-679; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1191; *Nicole M. v. Sears, Roebuck & Co.* (1999) 76 Cal.App.4th 1238, 1247; *Donchin*, *supra*, 34 Cal.App.4th at p. 1838.)

The foreseeability of a tenant criminally making bombs inside a residential rental house, and then being careless with unstable explosive liquid materials, enough so to trigger an explosion by the mere stepping on unremarkable loose gravel in the backyard that had never exploded before,

is "impossible to anticipate, and the particular criminal conduct so outrageous and bizarre, that it could not have been anticipated under any circumstances." (*Wiener, supra*, 32 Cal.4th at p. 1150; accord, *J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 398 ["Because there was no evidence showing (the landlord) had actual knowledge of (the third-party's) assaultive tendencies or that he posed any risk of harm, his conduct was not foreseeable and (the landlord) owed no duty to protect against the attack"].) Thus, because the risk of the Landscaper's injury was unforeseeable, the court properly granted summary judgment.

b. Requiring random periodic inspections of month-to-month tenants—as the opening brief advocates—would put an undue burden on landlords.

In addition, a duty to inspect for dangerous activities here would depend on "'how financially and socially burdensome'" random periodic inspections would be to a landlord who leases units on a month-to-month basis. (*Castaneda, supra*, 41 Cal.4th at p. 1214, quoting *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 285.)

There is no doubt that imposing a duty requiring landlords to conduct random periodic inspections after giving up possession and control to month-to-month tenants—as the opening brief advocates—would create an onerous burden for landlords, not to mention an unreasonable imposition on tenants' privacy rights (see, e.g., Cal. Const., art. I., § 1).

The opening brief contends that "Mr. Jakubec renewed his lease approximately 50 times during the five years that he rented the property, which gave Respondents a legal right of possession (i.e. a right to enter) on each of those occasions." (AOB 3.) According to this logic, the Landlords had the right to periodically search the Tenants' dwelling whenever they deemed it would be reasonable, up to about ten times per year. The opening brief concedes what it cannot deny: "The law does not support such an onerous standard." (AOB 8, fn. 6.)

And an onerous standard it would be indeed. Imagine for instance, a typical situation where a landlord manages an apartment complex with 200 units filled with month-to-month tenants: It would be unreasonable to require the owner of such an apartment building to enter each unit and conduct a monthly inspection. At over 2,000 annual inspections, fulfilling this duty would become a full time job. And, how would a landlord even know how to conduct a reasonable inspection in these circumstances? What number of periodic inspections would be reasonable? What time of day would be reasonable? How many rooms and closets need to be inspected to fulfill the duty? Does the landlord have to give 24-hour notice allowing the tenant to hide any evidence of illegal activities? None of these questions are answered in the opening brief.

And, nowhere does the opening brief explain how a landlord's fictional possession of the property once a month (arguably at midnight at the beginning of each month, or 30 days before termination when notice is given) can be transformed into a right of random intrusion at any time. Nor

does it explain how imposing a right of inspection after a landlord gives due notice (e.g., 24-hour notice) would likely lead to the discovery of illegal activities that might be hidden away. Does the landlord have the right to inspect drawers and containers and rummage through all of the tenant's personal belongings?

It is fair to presume that if there are no dangerous conditions at the inception of the tenancy when the landlord has a duty to inspect, then any subsequently arising dangerous conditions will be reported to the landlord by the tenant. Requiring landlords to maintain a constant vigil over their tenants' activities on leased property would be too great a burden to impose and would create a substantial intrusion on the tenants' rights of exclusive possession and privacy.

3. The Landscaper's commercial landlord cases do not create any inspection duty for out-of-possession residential landlords.

The opening brief exclusively relies on commercial leasehold cases to support its position, ignoring the important distinction in the law between residential and commercial tenancies. (See AOB 7-9, citing *Burroughs v. Ben's Auto Park* (1945) 27 Cal.2d 449; *Dennis v. City of Orange* (1930) 110 Cal.App. 16; *Owsley v. Hamner* (1951) 36 Cal.2d 710; *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771.) The crucial distinction—between the property being open to the public or not—relates back to the foreseeability discussion: Residential properties are open to a few tenants

who are intimately familiar with their rented home; therefore, the risk of injury remains far less than where premises are open to the general public. On the other hand, when premises are open to an unsuspecting public—who has no reason to suspect dangers—the risk of injury from a potentially-dangerous condition or activity is far greater. Likewise, where the property is open to the public, the landlord can stop by and perceive what any other member of the public can see with no imposition on tenants' privacy or exclusive possession rights.

It is undisputed that the leased Premises in this case is a single-family residential home in a residential area. The commercial cases cited in the opening brief involving property open to the public have no bearing on what is foreseeable in a residential dwelling, such as this case, where the landlords have no right to enter. Likewise, the opening brief fails to illustrate the additional burdens that residential landlords would face if they were required to conduct random periodic inspections that commercial tenants would not have to face. Its proposed duty is unworkable for residential landlords; no such duty can be imposed.

4. No exception applies.

The opening brief does not dispute the existence of the bright line rule that strictly limits the Landlords' inspection duty here. (AOB 8, quoting *Salinas v. Martin*, *supra*, 166 Cal.App.4th at p. 412.) And, it doesn't dispute the Landlords' total lack of any knowledge about the bombmaking activities that were occurring inside the house. But it argues

that an exception applies "'where there is a nuisance existing on the property at the time the lease is made *or renewed.*'" (*Ibid.*, quoting *Uccello*, *supra*, 44 Cal.App.3d at p. 511, emphasis added in AOB.)

In order for the "renewal" exception to apply, the landlord must have retained or acquired "'a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury.'" (*Bisetti*, *supra*, 174 Cal.App.3d at p. 648.) As already shown above, the Landlords did not have control over the dangerous activity. Even under the Landscaper's theory, the Landlords' "control," if any, was ephemeral and hypothetical at best, popping up and disappearing instantaneously. Precedent "reject[s] the argument that nuisance theories can be used like a light beam to render a landowner liable for crimes . . . ." (*Medina*, *supra*, 40 Cal.App.4th at p. 486.)

The cited exception does not apply. In any event, as we now show below, the lease was not "renewed."

C. The Fact That The Tenancy Was On A Month-To-Month Basis Did Not Impose A Heightened Duty Requiring The Landlords To Conduct Random Periodic Inspections.

The opening brief rises and falls on a single erroneous premise based on a misreading of alternate language in a CACI jury instruction: It posits that after the Tenants' one-year written lease converted to a month-to-month lease, every month thereafter constituted a lease "renewal," giving the Landlords a legal right of possession, "'a right to re-enter the

property,'" "'control of the property'" upon entry, and a corresponding legal duty to "'inspect the premises to make the premises reasonably safe from dangerous conditions.'" (AOB 5-6, 9, quoting *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781; CACI No. 1006.)

But realizing how unworkable and "onerous" its own suggestion of *monthly* landlord inspections would be, the opening brief abandons the argument that the duty to inspect should be imposed at the exact time of "renewal"—even though the only rationale for its argument is a hypothetical monthly momentary right to possession. Instead, it advocates for imposing a duty on the Landlords to make random "reasonable periodic inspections," without any timing requirements (i.e., at times when the landlord has *no* right of possession). (AOB 5-13, see also AOB 8, fn. 6.) Imposing the opening brief's heightened random periodic inspection duty on landlords who have month-to-month tenants is contrary to both the law and public policy.

1. Continuing a tenancy on a month-to-month basis is simply a right of indefinite possession subject to 30 days notice of termination and, at most, merely "extends" the written lease; it does not constitute a "renewal" for each new period.

It is undisputed that the Tenants' one-year lease converted to a month-to-month tenancy after a year of occupancy, and continued under the

same terms and conditions as the written lease for four more years. (CT 88 ¶2; AOB 4, 9; MTA 64, 66-67; NLE Exh. 1, p. 1 ¶2.B.)

The opening brief's erroneous characterization of these monthly extensions as "renewals" in order to trigger a landlord's right of entry is squarely contradicted by the lease and settled law. (AOB 1, 3, 5-9, 11.) The lease is explicit. After one year, the tenant has the continuous right to occupy the premises unless and until one party or the other (tenant or landlord) gives 30 days notice of termination. (NLE Exh. 1, p. 1 ¶2.) Under that arrangement, the Landlords *never* had any right of possession or entry without first giving 30 days notice of lease termination.

A month-to-month tenancy so structured is not even a tenancy for a fixed term that is periodically extended, "but rather [is] a tenancy having no fixed term that continues indefinitely until terminated." (*Silveira v. County of Alameda* (2006) 139 Cal.App.4th 989, 997.) Month-to-month tenancies are of such continuing character that landlords are not even deemed in constructive possession at the end of each monthly term. (*Drum v. Pure Oil Co.* (Fla.Ct.App. 1966) 184 So.2d 196, 198; see *Wagner v. Kepler* (1952) 411 Ill. 368, 375 [104 N.E.2d 231] ["The proposition that a tenancy from month to month is continuous and does not constitute a new demise at the beginning of each month . . . is supported both by reason and authority"].) Indeed, it is a "'legal fiction that there is a re-entry and a re-renting at the beginning of every month'" in a month-to-month tenancy. (*Janofsky v. Garland* (1941) 42 Cal.App.2d 655, 659, quoting *Ward v. Hinkleman* (1905) 37 Wash. 375, 381 [79 P. 956].)

The opening brief's entire argument based on its erroneous characterization of the monthly lease extensions as a series of "renewals" is baseless.

But even if the lease were not construed as indefinite, subject to termination on notice, but as somehow extending automatically every month, it would not fall within the opening brief's "renewal" construct. There is a "clear distinction" between "renewing" a lease and "extending the terms thereof." (*Beatty Safway Scaffold, Inc. v. Skrable* (1960) 180 Cal.App.2d 650, 654; *Robertson v. Drew* (1917) 34 Cal.App. 143, 144.)

"'An extension is a stretching or spreading out of the term of the lease. A renewal, on the other hand, creates a new and distinct tenancy, and is not merely a perpetuation of the old one.'" (*In re Marriage of Joaquin* (1987) 193 Cal.App.3d 1529, 1534, internal citation omitted.) A lease "renewal" involves the execution of a new written document. (*Howell v. Hamburg Co.* (1913) 165 Cal. 172, 177; *Robertson, supra,* 34 Cal.App. at p. 144.) On the other hand, a tenancy that continues under the written lease's notice terms, without a new document is not considered a "renewal," but rather a mere "extension." (*Howell*, at pp. 177-178; *Robertson*, at p. 144.) "'When a tenant under a lease remains in possession of the leased premises with the permission of the lessor from month to month after the term expires a new tenancy is not created but the original tenancy is deemed to have been extended . . . .'" (*Schmitt v. Felix* (1958) 157 Cal.App.2d 642, 646, quoting *Knox v. Wolfe* (1946) 73 Cal.App.2d 494, 502.)

Here, there was only one written instrument. (See NLE Exh. 1.) After the year term expired, the Landlords triggered the lease's extension provision by refraining from giving 30 days notice of termination and by accepting the Tenants' rent every month. (NLE Exh. 1, p. 1 ¶2.) The lease, by its own terms, described this as a "*continu[ation]*" of the written lease, not a lease *renewal*. (*Ibid.*) Thus, even if it is customary to inspect *some* rental properties "upon lease renewal," as the opening brief contends (AOB 13, citing NLE Exh. 7 pp. 3, 7), there is no *duty* to inspect where, as here, the lease merely continues uninterrupted every month.

Without this incorrect characterization of a continuing month-to-month tenancy terminable on 30 days notice, the opening brief's entire premise falls like a house of cards.

2. CACI No. 1006 and its use notes, the opening brief's sole authority for its periodic inspection theory, do not govern the Landlords' duty.

The opening brief provides a single "authority" for its proposition that the Landlords owed the Landscaper a duty "to make reasonable periodic inspections"—CACI Civil Jury Instruction No. 1006. (AOB 3, 5, 6, 10, 12.) But (1) CACI jury instructions are not legal authority, and (2) even if CACI No. 1006 correctly stated the law, its use notes do not support—and in fact, directly contradict—the opening brief's argument.

a. CACI instructions are not legal authority and are often contrary to the law.

"Although pattern jury instructions are prepared by distinguished legal scholars and provide a valuable service to the courts, they are not the law and are not binding." (*People v. Mojica* (2006) 139 Cal.App.4th 1197, 1204, fn. 4; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217 [pattern instructions are merely "an attempt" to accurately state the law]; *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 82 ["Pattern jury instructions . . . while designed to accurately reflect the law, are not the law itself"]; *People v. Runnion* (1994) 30 Cal.App.4th 852, 858 ["instructions are not binding in and of themselves"].)

Indeed, courts—including our Supreme Court—regularly disapprove of form instructions as being directly contrary to established law. (See, e.g., *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [disapproving CACI No. 2500]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1056 [disapproving BAJI No. 3.75]; *Wilson v. Southern California Edison Company* (Feb. 9, 2015) ___ Cal.App.4th ___ [2015 WL 522578, at p. *23] [disapproving CACI No. 2021]; *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229-1231 [criticizing CACI No. 2505, and urging its redraft]; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297-298 [disapproving CACI No. 3704]; *Casas v. Maulhardt Buick, Inc.* (1968) 258 Cal.App.2d 692, 699 [disapproving BAJI No. 140.1].)

Therefore, the opening brief's sole argument—based on CACI No. 1006—crumbles under its very foundation.

b. The alternative bracketed portion of CACI No. 1006 that the opening brief relies on does not apply.

The brief's single erroneous premise—that the Landlords had a legal right of possession upon each monthly "renewal" and a corresponding duty to make "reasonable periodic inspections of the property"—is based upon the opening brief's misreading of alternative bracketed language in CACI No. 1006. (AOB 6, 8, 9, 12.) CACI No. 1006 and its use notes directly contradict this hypothesis.

According to the first part of CACI No. 1006, "[a] landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession." The opening brief relies on the next sentence as authority for its novel heightened month-to-month duty theory: "'Before giving possession of leased property to a tenant ***[or on renewal of a lease]*** [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process." (AOB 6, emphasis added in AOB, quoting CACI No. 1006.)

CACI No. 1006's use notes suggest adding the opening brief's emphasized bracketed language—i.e., "'or on renewal of a lease'"—

"for *commercial* tenancies." (Use Note to CACI 1006, quoting *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781, emphasis added.) But the directions reject using the bracketing language to create a duty to inspect during a month-to-month tenancy: "While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, *it would seem impossible to impose such a duty with regard to a month-to-month tenancy*. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved." (Use Note to CACI No. 1006, emphasis added.)

Further, a different part of CACI No. 1006 suggests adding *other* alternative language, which provides the correct legal standard for this case: "[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control *if* the landlord has actual knowledge of the condition and the right and ability to correct it.]" (See *Salinas*, *supra*, 166 Cal.App.4th at p. 412, emphasis added [no duty to inspect unless "the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition"].)

The opening brief ignores this part of the instruction, and instead attempts to create binding authority from a misreading of a different, inapplicable part of the jury instruction. The bottom line is that the bracketed portion of CACI No. 1006 that the opening brief heavily relies on does not apply.

II. BECAUSE THE LANDSCAPER'S PREMISES LIABILITY CLAIM HAS NO MERIT, HIS SPOUSE'S LOSS OF CONSORTIUM CLAIM NECESSARILY FAILS.

The trial court held that plaintiff Esperanza Garcia has no cause of action for loss of consortium because her husband's premises liability claim failed. (CT 194.) The opening brief doesn't contest this ruling. "[A]n appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal." (*Christoff v. Union Pacific R. Co.* (2005) 134 Cal.App.4th 118, 125; see *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Reply will be too late. (E.g., *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 821.)

In any event, the court was correct: "Since [the Landscaper] has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067.) "[A]n unsuccessful personal injury suit by the physically injured spouse acts as an estoppel that bars the spouse who would claim damages for loss of consortium." (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1034-1035.) The trial court's ruling must be affirmed.

CONCLUSION

Landlords owe no duty to inspect for and discover dangerous activities within residential leased units where the undisputed evidence demonstrates that they were unaware of dangers the tenants hid inside the dwelling. They have no right to make random, warrantless inspections of private homes leased to tenants. The opening brief's attempt to create a new inspection duty for out-of-possession landlords who lease on a month-to-month basis has no merit. Summary judgment should be affirmed.

Respectfully submitted,

Dated: March 18, 2015

BOLES & DIMASCIO
John D. Culver Jr.

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Gary J. Wax

By: _____
Gary J. Wax

Attorneys for Defendants and Respondents
MICHELE HOLT and NIEL MAMERTO
(erroneously sued as NEIL MAMERTO)

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this **RESPONDENTS' BRIEF** contains **12,611** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: March 18, 2015

Gary Wax

Exhibit A

CALIFORNIA ASSOCIATION OF REALTORS®

RESIDENTIAL LEASE OR MONTH-TO-MONTH RENTAL AGREEMENT

(C.A.R. Form LR, Revised 10/04)

Michele Holt, Niel Mamerto ("Landlord") and
Marina Ivanova, George Jakubec ("Tenant") agree as follows:

1. PROPERTY:
   A. Landlord rents to Tenant and Tenant rents from Landlord, the real property and improvements described as: 1954 Via Scott, Escondido Ca 92026 ("Premises").
   B. The Premises are for the sole use as a personal residence by the following named person(s) only: Marina Ivanova and George Jakubec.
   C. The following personal property, maintained pursuant to paragraph 11, is included: _____ or ☐ (if checked) the personal property on the attached addendum.
2. TERM: The term begins on (date) October 15, 2005 ("Commencement Date"), (Check A or B):
   ☐ A. Month-to-Month: and continues as a month-to-month tenancy. Tenant may terminate the tenancy by giving written notice at least 30 days prior to the intended termination date. Landlord may terminate the tenancy by giving written notice as provided by law. Such notices may be given on any date.
   ☒ B. Lease: and shall terminate on (date) October 15, 2006 at 18.00 ☐ AM/ ☒ PM. Tenant shall vacate the Premises upon termination of the Agreement, unless: (i) Landlord and Tenant have in writing extended this agreement or signed a new agreement; (ii) mandated by local rent control law; or (iii) Landlord accepts Rent from Tenant (other than past due Rent), in which case a month-to-month tenancy shall be created which either party may terminate as specified in paragraph 2A. Rent shall be at a rate agreed to by Landlord and Tenant, or as allowed by law. All other terms and conditions of this Agreement shall remain in full force and effect.
3. RENT: "Rent" shall mean all monetary obligations of Tenant to Landlord under the terms of the Agreement, except security deposit.
   A. Tenant agrees to pay $ 1,800.00 per month for the term of the Agreement.
   B. Rent is payable in advance on the 1st (or ☒ 15th) day of each calendar month, and is delinquent on the next day.
   C. If Commencement Date falls on any day other than the day Rent is payable under paragraph 3B, and Tenant has paid one full month's Rent in advance of Commencement Date, Rent for the second calendar month shall be prorated based on a 30-day period.
   D. PAYMENT: Rent shall be paid by ☒ personal check, ☒ money order, ☒ cashier's check, ☐ other _____, to (name) Niel Mamerto (phone) (858)231-2313 at (address) P.O. Box 720364, San Diego, Ca 92172 (or at any other location subsequently specified by Landlord in writing to Tenant) between the hours of _____ and _____ on the following days _____. If any payment is returned for non-sufficient funds ("NSF") or because tenant stops payment, then, after that: (i) Landlord may, in writing, require Tenant to pay Rent in cash for three months and (ii) all future Rent shall be paid by ☒ money order, or ☒ cashier's check.
4. SECURITY DEPOSIT:
   A. Tenant agrees to pay $ 1,250.00 as a security deposit. Security deposit will be ☒ transferred to and held by the Owner of the Premises, or ☐ held in Owner's Broker's trust account.
   B. All or any portion of the security deposit may be used, as reasonably necessary, to: (i) cure Tenant's default in payment of Rent (which includes Late Charges, NSF fees or other sums due); (ii) repair damage, excluding ordinary wear and tear, caused by Tenant or by a guest or licensee of Tenant; (iii) clean Premises, if necessary, upon termination of the tenancy; and (iv) replace or return personal property or appurtenances. SECURITY DEPOSIT SHALL NOT BE USED BY TENANT IN LIEU OF PAYMENT OF LAST MONTH'S RENT. If all or any portion of the security deposit is used during the tenancy, Tenant agrees to reinstate the total security deposit within five days after written notice is delivered to Tenant. Within 21 days after Tenant vacates the Premises, Landlord shall: (1) furnish Tenant an itemized statement indicating the amount of any security deposit received and the basis for its disposition and supporting documentation as required by California Civil Code § 1950.5(g); and (2) return any remaining portion of the security deposit to Tenant.
   C. Security deposit will not be returned until all Tenants have vacated the Premises. Any security deposit returned by check shall be made out to all Tenants named on this Agreement, or as subsequently modified.
   D. No interest will be paid on security deposit unless required by local law.
   E. If the security deposit is held by Owner, Tenant agrees not to hold Broker responsible for its return. If the security deposit is held in Owner's Broker's trust account, and Broker's authority is terminated before expiration of this Agreement, and security deposit is released to someone other than Tenant, then Broker shall notify Tenant, in writing, where and to whom security deposit has been released. Once Tenant has been provided such notice, Tenant agrees not to hold Broker responsible for the security deposit.
5. MOVE-IN COSTS RECEIVED/DUE: Move-in funds made payable to _____ shall be paid by ☐ personal check, ☐ money order, or ☐ cashier's check.

Category	Total Due	Payment Received	Balance Due	Date Due
Rent from 10/15/2005 to 10/14/2006 (date)	$21,600.00	$1,800.00	$19,800.00	09/15/2006
*Security Deposit	$1,250.00	$1,250.00		
Other Pet Deposit	$200.00	$200.00		
Other n/a				
Total	$23,050.00	$3,250.00	$19,800.00	

*The maximum amount Landlord may receive as security deposit, however designated, cannot exceed two months' Rent for unfurnished premises, or three months' Rent for furnished premises.

Tenant's Initials (M.I)(G.J.)
Landlord's Initials (_____)(_____)

Reviewed by _____ Date _____

Agent: Niel Mamerto Phone: 8582183400 Fax: Prepared using WINForms® software

01-000001

Premises: 1954 Via Scott, Escondido, CA 92026 Date: 09/21/2005

6. LATE CHARGE; RETURNED CHECKS:
   A. Tenant acknowledges either late payment of Rent or issuance of a returned check may cause Landlord to incur costs and expenses, the exact amounts of which are extremely difficult and impractical to determine. These costs may include, but are not limited to, processing, enforcement and accounting expenses, and late charges imposed on Landlord. If any installment of Rent due from Tenant is not received by Landlord within 5 (or ☐ _____) calendar days after the date due, or if a check is returned, Tenant shall pay to Landlord, respectively, an additional sum of $ 180.00 or 10.000 % of the Rent due as a Late Charge and $25.00 as a NSF fee for the first returned check and $35.00 as a NSF fee for each additional returned check, either or both of which shall be deemed additional Rent.
   B. Landlord and Tenant agree that these charges represent a fair and reasonable estimate of the costs Landlord may incur by reason of Tenant's late or NSF payment. Any Late Charge or NSF fee due shall be paid with the current installment of Rent. Landlord's acceptance of any Late Charge or NSF fee shall not constitute a waiver as to any default of Tenant. Landlord's right to collect a Late Charge or NSF fee shall not be deemed an extension of the date Rent is due under paragraph 3 or prevent Landlord from exercising any other rights and remedies under this Agreement and as provided by law.
7. PARKING: (Check A or B)
   ☒ A. Parking is permitted as follows: Use of the two car garage, circular driveway and driveway leading to home.
   The right to parking ☒ is ☐ is not included in the Rent charged pursuant to paragraph 3. If not included in the Rent, the parking rental fee shall be an additional $ _____ per month. Parking space(s) are to be used for parking properly licensed and operable motor vehicles, except for trailers, boats, campers, buses or trucks (other than pick-up trucks). Tenant shall park in assigned space(s) only. Parking space(s) are to be kept clean. Vehicles leaking oil, gas or other motor vehicle fluids shall not be parked on the Premises. Mechanical work or storage of inoperable vehicles is not permitted in parking space(s) or elsewhere on the Premises.
   OR ☐ B. Parking is not permitted on the Premises.
8. STORAGE: (Check A or B)
   ☒ A. Storage is permitted as follows: Use of utility shed located in the back of the home.
   The right to storage space ☒ is ☐ is not included in the Rent charged pursuant to paragraph 3. If not included in the Rent, storage space fee shall be an additional $ _____ per month. Tenant shall store only personal property Tenant owns, and shall not store property claimed by another or in which another has any right, title or interest. Tenant shall not store any improperly packaged food or perishable goods, flammable materials, explosives, hazardous waste or other inherently dangerous material, or illegal substances.
   OR ☐ B. Storage is not permitted on the Premises.
9. UTILITIES: Tenant agrees to pay for all utilities and services, and the following charges: _____ except $75.00 credit to water landscape, which shall be paid for by Landlord. If any utilities are not separately metered, Tenant shall pay Tenant's proportional share, as reasonably determined and directed by Landlord. If utilities are separately metered, Tenant shall place utilities in Tenant's name as of the Commencement Date. Landlord is only responsible for installing and maintaining one usable telephone jack and one telephone line to the Premises. Tenant shall pay any cost for conversion from existing utilities service provider.
10. CONDITION OF PREMISES: Tenant has examined Premises and, if any, all furniture, furnishings, appliances, landscaping and fixtures, including smoke detector(s).
   (Check all that apply:)
   ☐ A. Tenant acknowledges these items are clean and in operable condition, with the following exceptions: _____
   ☐ B. Tenant's acknowledgment of the condition of these items is contained in an attached statement of condition (C.A.R. Form MIMO).
   ☐ C. Tenant will provide Landlord a list of items that are damaged or not in operable condition within 3 (or ☐ _____) days after Commencement Date, not as a contingency of this Agreement but rather as an acknowledgment of the condition of the Premises.
   ☐ D. Other: _____
11. MAINTENANCE:
   A. Tenant shall properly use, operate and safeguard Premises, including if applicable, any landscaping, furniture, furnishings and appliances, and all mechanical, electrical, gas and plumbing fixtures, and keep them and the Premises clean, sanitary and well ventilated. Tenant shall be responsible for checking and maintaining all smoke detectors and any additional phone lines beyond the one line and jack that Landlord shall provide and maintain. Tenant shall immediately notify Landlord, in writing, of any problem, malfunction or damage. Tenant shall be charged for all repairs or replacements caused by Tenant, pets, guests or licensees of Tenant, excluding ordinary wear and tear. Tenant shall be charged for all damage to Premises as a result of failure to report a problem in a timely manner. Tenant shall be charged for repair of drain blockages or stoppages, unless caused by defective plumbing parts or tree roots invading sewer lines.
   B. ☒ Landlord ☐ Tenant shall water the garden, landscaping, trees and shrubs, except: _____
   C. ☒ Landlord ☐ Tenant shall maintain the garden, landscaping, trees and shrubs, except: _____
   D. ☐ Landlord ☐ Tenant shall maintain _____
   E. Tenant's failure to maintain any item for which Tenant is responsible shall give Landlord the right to hire someone to perform such maintenance and charge Tenant to cover the cost of such maintenance.
   F. The following items of personal property are included in the Premises without warranty and Landlord will not maintain, repair or replace them: _____

Tenant's Initials (M.I.) (G.J.)
Landlord's Initials (_____) (_____)
Reviewed by _____ Date _____

Premises: 1954 Via Scott, Escondido Ca 92026 Date: September 21, 2005

12. **NEIGHBORHOOD CONDITIONS:** Tenant is advised to satisfy him or herself as to neighborhood or area conditions, including schools, proximity and adequacy of law enforcement, crime statistics, proximity of registered felons or offenders, fire protection, other governmental services, availability, adequacy and cost of any speed-wired, wireless internet connections or other telecommunications or other technology services and installations, proximity to commercial, industrial or agricultural activities, existing and proposed transportation, construction and development that may affect noise, view, or traffic, airport noise, noise or odor from any source, wild and domestic animals, other nuisances, hazards, or circumstances, cemeteries, facilities and condition of common areas, conditions and influences of significance to certain cultures and/or religions, and personal needs, requirements and preferences of Tenant.
13. **PETS:** Unless otherwise provided in California Civil Code § 54.2, no animal or pet shall be kept on or about the Premises without Landlord's prior written consent, except: for one small canine .
14. **RULES/REGULATIONS:**
    A. Tenant agrees to comply with all Landlord rules and regulations that are at any time posted on the Premises or delivered to Tenant. Tenant shall not, and shall ensure that guests and licensees of Tenant shall not, disturb, annoy, endanger or interfere with other tenants of the building or neighbors, or use the Premises for any unlawful purposes, including, but not limited to, using, manufacturing, selling, storing or transporting illicit drugs or other contraband, or violate any law or ordinance, or commit a waste or nuisance on or about the Premises.
    B. **(If applicable, check one)**
    ☐ 1. Landlord shall provide Tenant with a copy of the rules and regulations within _____ days or _____.
    OR ☐ 2. Tenant has been provided with, and acknowledges receipt of, a copy of the rules and regulations.
15. ☐ **(If checked) CONDOMINIUM; PLANNED UNIT DEVELOPMENT:**
    A. The Premises is a unit in a condominium, planned unit development, common interest subdivision or other development governed by a homeowners' association ("HOA"). The name of the HOA is _____. Tenant agrees to comply with all HOA covenants, conditions and restrictions, bylaws, rules and regulations and decisions. Landlord shall provide Tenant copies of rules and regulations, if any. Tenant shall reimburse Landlord for any fines or charges imposed by HOA or other authorities, due to any violation by Tenant, or the guests or licensees of Tenant.
    B. **(Check one)**
    ☐ 1. Landlord shall provide Tenant with a copy of the HOA rules and regulations within _____ days or _____.
    OR ☐ 2. Tenant has been provided with, and acknowledges receipt of, a copy of the HOA rules and regulations.
16. **ALTERATIONS; REPAIRS:** Unless otherwise specified by law or paragraph 27C, without Landlord's prior written consent, (i) Tenant shall not make any repairs, alterations or improvements in or about the Premises including: painting, wallpapering, adding or changing locks, installing antenna or satellite dish(es), placing signs, displays or exhibits, or using screws, fastening devices, large nails or adhesive materials; (ii) Landlord shall not be responsible for the costs of alterations or repairs made by Tenant; (iii) Tenant shall not deduct from Rent the costs of any repairs, alterations or improvements; and (iv) any deduction made by Tenant shall be considered unpaid Rent.
17. **KEYS; LOCKS:**
    A. Tenant acknowledges receipt of (or Tenant will receive ☐ prior to the Commencement Date, or ☐ _____):
    ☒ 2 key(s) to Premises, ☒ 2 remote control device(s) for garage door/gate opener(s),
    ☒ 2 key(s) to mailbox, ☐ _____,
    ☐ _____ key(s) to common area(s), ☐ _____.
    B. Tenant acknowledges that locks to the Premises ☐ have ☒ have not, been re-keyed.
    C. If Tenant re-keys existing locks or opening devices, Tenant shall immediately deliver copies of all keys to Landlord. Tenant shall pay all costs and charges related to loss of any keys or opening devices. Tenant may not remove locks, even if installed by Tenant.
18. **ENTRY:**
    A. Tenant shall make Premises available to Landlord or Landlord's representative for the purpose of entering to make necessary or agreed repairs, decorations, alterations, or improvements, or to supply necessary or agreed services, or to show Premises to prospective or actual purchasers, tenants, mortgagees, lenders, appraisers, or contractors.
    B. Landlord and Tenant agree that 24-hour written notice shall be reasonable and sufficient notice, except as follows: 48-hour written notice is required to conduct an inspection of the Premises prior to the Tenant moving out, unless the Tenant waives the right to such notice. Notice may be given orally to show the Premises to actual or prospective purchasers provided Tenant has been notified in writing within 120 days preceding the oral notice that the Premises are for sale and that oral notice may be given to show the Premises. No notice is required: (i) to enter in case of an emergency; (ii) if the Tenant is present and consents at the time of entry or (iii) if the Tenant has abandoned or surrendered the Premises. No written notice is required if Landlord and Tenant orally agree to an entry for agreed services or repairs if the date and time of entry are within one week of the oral agreement.
    C. ☐ (If checked) Tenant authorizes the use of a keysafe/lockbox to allow entry into the Premises and agrees to sign a keysafe/lockbox addendum (C.A.R. Form KLA).
19. **SIGNS:** Tenant authorizes Landlord to place FOR SALE/LEASE signs on the Premises.
20. **ASSIGNMENT; SUBLETTING:** Tenant shall not sublet all or any part of Premises, or assign or transfer this Agreement or any interest in it, without Landlord's prior written consent. Unless such consent is obtained, any assignment, transfer or subletting of Premises or this Agreement or tenancy, by voluntary act of Tenant, operation of law or otherwise, shall, at the option of Landlord, terminate this Agreement. Any proposed assignee, transferee or sublessee shall submit to Landlord an application and credit information for Landlord's approval and, if approved, sign a separate written agreement with Landlord and Tenant. Landlord's consent to any one assignment, transfer or sublease, shall not be construed as consent to any subsequent assignment, transfer or sublease and does not release Tenant of Tenant's obligations under this Agreement.
21. **JOINT AND INDIVIDUAL OBLIGATIONS:** If there is more than one Tenant, each one shall be individually and completely responsible for the performance of all obligations of Tenant under this Agreement, jointly with every other Tenant, and individually, whether or not in possession.

Tenant's Initials (M.I.) (C.F.)
Landlord's Initials (_____) (_____)

Reviewed by _____ Date _____

EQUAL HOUSING OPPORTUNITY

22. ☐ **LEAD-BASED PAINT (If checked):** Premises was constructed prior to 1978. In accordance with federal law, Landlord gives and Tenant acknowledges receipt of the disclosures on the attached form (C.A.R. Form FLD) and a federally approved lead pamphlet.
23. ☐ **MILITARY ORDNANCE DISCLOSURE:** (If applicable and known to Landlord) Premises is located within one mile of an area once used for military training, and may contain potentially explosive munitions.
24. ☒ **PERIODIC PEST CONTROL:** Landlord has entered into a contract for periodic pest control treatment of the Premises and shall give Tenant a copy of the notice originally given to Landlord by the pest control company.
25. **DATABASE DISCLOSURE: NOTICE:** The California Department of Justice, sheriff's departments, police departments serving jurisdictions of 200,000 or more, and many other local law enforcement authorities maintain for public access a database of the locations of persons required to register pursuant to paragraph (1) of subdivision (a) of Section 290.4 of the Penal Code. The data base is updated on a quarterly basis and a source of information about the presence of these individuals in any neighborhood. The Department of Justice also maintains a Sex Offender Identification Line through which inquiries about individuals may be made. This is a "900" telephone service. Callers must have specific information about individuals they are checking. Information regarding neighborhoods is not available through the "900" telephone service.
26. **POSSESSION:**
    A. Tenant is not in possession of the premises. If Landlord is unable to deliver possession of Premises on Commencement Date, such Date shall be extended to the date on which possession is made available to Tenant. If Landlord is unable to deliver possession within 5 (or ☐_____) calendar days after agreed Commencement Date, Tenant may terminate this Agreement by giving written notice to Landlord, and shall be refunded all Rent and security deposit paid. Possession is deemed terminated when Tenant has returned all keys to the Premises to Landlord.
    B. ☐ Tenant is already in possession of the Premises.
27. **TENANT'S OBLIGATIONS UPON VACATING PREMISES:**
    A. Upon termination of the Agreement, Tenant shall: (i) give Landlord all copies of all keys or opening devices to Premises, including any common areas; (ii) vacate and surrender Premises to Landlord, empty of all persons; (iii) vacate any/all parking and/or storage space; (iv) clean and deliver Premises, as specified in paragraph C below, to Landlord in the same condition as referenced in paragraph 10; (v) remove all debris; (vi) give written notice to Landlord of Tenant's forwarding address; and (vii) _____.
    B. All alterations/improvements made by or caused to be made by Tenant, with or without Landlord's consent, become the property of Landlord upon termination. Landlord may charge Tenant for restoration of the Premises to the condition it was in prior to any alterations/improvements.
    C. **Right to Pre-Move-Out Inspection and Repairs as follows:** (i) After giving or receiving notice of termination of a tenancy (C.A.R. Form NTT), or before the end of a lease, Tenant has the right to request that an inspection of the Premises take place prior to termination of the lease or rental (C.A.R. Form NRI). If Tenant requests such an inspection, Tenant shall be given an opportunity to remedy identified deficiencies prior to termination, consistent with the terms of this Agreement. (ii) Any repairs or alterations made to the Premises as a result of this inspection (collectively, "Repairs") shall be made at Tenant's expense. Repairs may be performed by Tenant or through others, who have adequate insurance and licenses and are approved by Landlord. The work shall comply with applicable law, including governmental permit, inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. It is understood that exact restoration of appearance or cosmetic items following all Repairs may not be possible. (iii) Tenant shall: (a) obtain receipts for Repairs performed by others; (b) prepare a written statement indicating the Repairs performed by Tenant and the date of such Repairs; and (c) provide copies of receipts and statements to Landlord prior to termination. Paragraph 27C does not apply when the tenancy is terminated pursuant to California Code of Civil Procedure § 1161(2), (3) or (4).
28. **BREACH OF CONTRACT; EARLY TERMINATION:** In addition to any obligations established by paragraph 27, in the event of termination by Tenant prior to completion of the original term of the Agreement, Tenant shall also be responsible for lost Rent, rental commissions, advertising expenses and painting costs necessary to ready Premises for re-rental. Landlord may withhold any such amounts from Tenant's security deposit.
29. **TEMPORARY RELOCATION:** Subject to local law, Tenant agrees, upon demand of Landlord, to temporarily vacate Premises for a reasonable period, to allow for fumigation (or other methods) to control wood destroying pests or organisms, or other repairs to Premises. Tenant agrees to comply with all instructions and requirements necessary to prepare Premises to accommodate pest control, fumigation or other work, including bagging or storage of food and medicine, and removal of perishables and valuables. Tenant shall only be entitled to a credit of Rent equal to the per diem Rent for the period of time Tenant is required to vacate Premises.
30. **DAMAGE TO PREMISES:** If, by no fault of Tenant, Premises are totally or partially damaged or destroyed by fire, earthquake, accident or other casualty that render Premises totally or partially uninhabitable, either Landlord or Tenant may terminate this Agreement by giving the other written notice. Rent shall be abated as of the date Premises become totally or partially uninhabitable. The abated amount shall be the current monthly Rent prorated on a 30-day period. If the Agreement is not terminated, Landlord shall promptly repair the damage, and Rent shall be reduced based on the extent to which the damage interferes with Tenant's reasonable use of Premises. If damage occurs as a result of an act of Tenant or Tenant's guests, only Landlord shall have the right of termination, and no reduction in Rent shall be made.
31. **INSURANCE:** Tenant's or guest's personal property and vehicles are not insured by Landlord, manager or, if applicable, HOA, against loss or damage due to fire, theft, vandalism, rain, water, criminal or negligent acts of others, or any other cause. Tenant is advised to carry Tenant's own insurance (renter's insurance) to protect Tenant from any such loss or damage. Tenant shall comply with any requirement imposed on Tenant by Landlord's insurer to avoid: (i) an increase in Landlord's insurance premium (or Tenant shall pay for the increase in premium); or (ii) loss of insurance.
32. **WATERBEDS:** Tenant shall not use or have waterbeds on the Premises unless: (i) Tenant obtains a valid waterbed insurance policy; (ii) Tenant increases the security deposit in an amount equal to one-half of one month's Rent; and (iii) the bed conforms to the floor load capacity of Premises.

Tenant's Initials (M.I.)(G.T.)
Landlord's Initials (_____)(_____)

Reviewed by _____ Date _____

Premises: 1954 Via Scott, Escondido Ca 92026 Date: September 21, 2005

33. **WAIVER:** The waiver of any breach shall not be construed as a continuing waiver of the same or any subsequent breach.
34. **NOTICE:** Notices may be served at the following address, or at any other location subsequently designated:
Landlord:. Tenant: _____

35. **TENANT ESTOPPEL CERTIFICATE:** Tenant shall execute and return a tenant estoppel certificate delivered to Tenant by Landlord or Landlord's agent within 3 days after its receipt. Failure to comply with this requirement shall be deemed Tenant's acknowledgment that the tenant estoppel certificate is true and correct, and may be relied upon by a lender or purchaser.
36. **TENANT REPRESENTATIONS; CREDIT:** Tenant warrants that all statements in Tenant's rental application are accurate. Tenant authorizes Landlord and Broker(s) to obtain Tenant's credit report periodically during the tenancy in connection with the modification or enforcement of this Agreement. Landlord may cancel this Agreement: (i) before occupancy begins; (ii) upon disapproval of the credit report(s); or (iii) at any time, upon discovering that information in Tenant's application is false. A negative credit report reflecting on Tenant's record may be submitted to a credit reporting agency if Tenant fails to fulfill the terms of payment and other obligations under this Agreement.
37. **MEDIATION:**
    A. Consistent with paragraphs B and C below, Landlord and Tenant agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action.
    B. The following matters are excluded from mediation: (i) an unlawful detainer action; (ii) the filing or enforcement of a mechanic's lien; and (iii) any matter within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the mediation provision.
    C. Landlord and Tenant agree to mediate disputes or claims involving Listing Agent, Leasing Agent or property manager ("Broker"), provided Broker shall have agreed to such mediation prior to, or within a reasonable time after, the dispute or claim is presented to such Broker. Any election by Broker to participate in mediation shall not result in Broker being deemed a party to this Agreement.
38. **ATTORNEY FEES:** In any action or proceeding arising out of this Agreement, the prevailing party between Landlord and Tenant shall be entitled to reasonable attorney fees and costs, except as provided in paragraph 37A.
39. **CAR FORM:** C.A.R. Form means the specific form referenced or another comparable form agreed to by the parties.
40. **OTHER TERMS AND CONDITIONS; SUPPLEMENTS:** (1) Verified work relocation/transfer of 100 miles will terminate lease with no penalty; otherwise, penalty fee of (1) one month's rent is due (7) seven days from notice of lease cancellation.
The following ATTACHED supplements are incorporated in this Agreement: ☐ Keysafe/Lockbox Addendum (C.A.R. Form KLA); ☐ Interpreter/Translator Agreement (C.A.R. Form ITA); ☐ Lead-Based Paint and Lead-Based Paint Hazards Disclosure (C.A.R. Form FLD)

41. **TIME OF ESSENCE; ENTIRE CONTRACT; CHANGES:** Time is of the essence. All understandings between the parties are incorporated in this Agreement. Its terms are intended by the parties as a final, complete and exclusive expression of their Agreement with respect to its subject matter, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed except in writing. This Agreement is subject to California landlord-tenant law and shall incorporate all changes required by amendment or successors to such law. This Agreement and any supplement, addendum or modification, including any copy, may be signed in two or more counterparts, all of which shall constitute one and the same writing.
42. **AGENCY:**
    A. **CONFIRMATION:** The following agency relationship(s) are hereby confirmed for this transaction:
    Listing Agent: (Print firm name) _____
    is the agent of (check one): ☐ the Landlord exclusively; or ☐ both the Landlord and Tenant.
    Leasing Agent: (Print firm name) _____
    (if not same as Listing Agent) is the agent of (check one): ☐ the Tenant exclusively; or ☐ the Landlord exclusively; or ☐ both the Tenant and Landlord.
    B. **DISCLOSURE:** ☐ (If checked): The term of this lease exceeds one year. A disclosure regarding real estate agency relationships (C.A.R. Form AD) has been provided to Landlord and Tenant, who each acknowledge its receipt.
43. ☐ **TENANT COMPENSATION TO BROKER:** Upon execution of this Agreement, Tenant agrees to pay compensation to Broker as specified in a separate written agreement between Tenant and Broker.
44. ☐ **INTERPRETER/TRANSLATOR:** The terms of this Agreement have been interpreted for Tenant into the following language: _____. Landlord and Tenant acknowledge receipt of the attached interpreter/translator agreement (C.A.R. Form ITA).
45. **FOREIGN LANGUAGE NEGOTIATION:** If this Agreement has been negotiated by Landlord and Tenant primarily in Spanish, Chinese, Korean or Vietnamese. Pursuant to the California Civil Code Tenant shall be provided a translation of this Agreement in the language used for the negotiation.

Tenant's Initials (M. L.) (G T.)
Landlord's Initials (_____) (_____)
Reviewed by _____ Date _____

Premises: 1954 Via Scott, Escondido Ca 92026 Date: September 21, 2005

Landlord and Tenant acknowledge and agree Brokers: (a) do not guarantee the condition of the Premises; (b) cannot verify representations made by others; (c) cannot provide legal or tax advice; (d) will not provide other advice or information that exceeds the knowledge, education or experience required to obtain a real estate license. Furthermore, if Brokers are not also acting as Landlord in this Agreement, Brokers: (e) do not decide what rental rate a Tenant should pay or Landlord should accept; and (f) do not decide upon the length or other terms of tenancy. Landlord and Tenant agree that they will seek legal, tax, insurance and other desired assistance from appropriate professionals.

Tenant _____ Marina Ivanova Date October 15, 2005
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

Tenant _____ George Jakubec Date October 15, 2005
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

46. ☐ **GUARANTEE:** In consideration of the execution of the Agreement by and between Landlord and Tenant and for valuable consideration, receipt of which is hereby acknowledged, the undersigned ("Guarantor") does hereby: (i) guarantee unconditionally to Landlord and Landlord's agents, successors and assigns, the prompt payment of Rent or other sums that become due pursuant to this Agreement, including any and all court costs and attorney fees included in enforcing the Agreement; (ii) consent to any changes, modifications or alterations of any term in this Agreement agreed to by Landlord and Tenant; and (iii) waive any right to require Landlord and/or Landlord's agents to proceed against Tenant for any default occurring under this Agreement before seeking to enforce this Guarantee.

Guarantor (Print Name) _____
Guarantor _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

47. **OWNER COMPENSATION TO BROKER:** Upon execution of this Agreement, Owner agrees to pay compensation to Broker as specified in a separate written agreement between Owner and Broker (C.A.R. Form LCA).
48. **RECEIPT:** If specified in paragraph 5, Landlord or Broker, acknowledges receipt of move-in funds.

Landlord _____ Michele Holt Date October 15, 2005
(Owner or Agent with authority to enter into this Agreement)

Landlord _____ Niel Mamerto Date October 15, 2005
(Owner or Agent with authority to enter into this Agreement)

Landlord Address _____ City San Diego State Ca Zip 92129
Telephone _____ Fax (858)764-5488 E-mail nielmamerto@gmail.com

REAL ESTATE BROKERS:
A. Real estate brokers who are not also Landlord under the Agreement are not parties to the Agreement between Landlord and Tenant.
B. Agency relationships are confirmed in paragraph 42.
C. **COOPERATING BROKER COMPENSATION:** Listing Broker agrees to pay Cooperating Broker (Leasing Firm) and Cooperating Broker agrees to accept: (i) the amount specified in the MLS, provided Cooperating Broker is a Participant of the MLS in which the Property is offered for sale or a reciprocal MLS; or (ii) ☐ (if checked) the amount specified in a separate written agreement between Listing Broker and Cooperating Broker.

Real Estate Broker (Leasing Firm) _____
By (Agent) _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

Real Estate Broker (Listing Firm) _____
By (Agent) _____ Date _____
Address _____ City _____ State _____ Zip _____
Telephone _____ Fax _____ E-mail _____

Published and Distributed by:
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a subsidiary of the California Association of REALTORS®
525 South Virgil Avenue, Los Angeles, California 90020

Reviewed by _____ Date _____

Exhibit B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION

MARIO GARCIA, an individual; and ESPERANZA TORRES GARCIA, an individual,

Plaintiffs,

vs.

MICHELE HOLT, an individual; NEIL MAMERTO, an individual; GEORGE JAKUBEK, an individual; and DOES 1 through 50, inclusive,

Defendants.

AND RELATED CROSS-ACTIONS.

Case No.: 37-2012-00101101-CU-PO-CTL
[IMAGED]
UNLIMITED JURISDICTION

ASSIGNED TO FOR ALL PURPOSES:
HON. JOEL R. WOHLFEIL
DEPT: C-73

~~[PROPOSED]~~ JUDGMENT

The motion for summary judgment of defendants MICHELE HOLT and NIEL MAMERTO (erroneously sued as NEIL MAMERTO), on the complaint of plaintiffs MARIO GARCIA and ESPERANZA TORRES GARCIA having been granted on March 7, 2014:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED

1. Plaintiffs shall take nothing and judgment is hereby entered in favor of DefendantsMICHELE HOLT and NIEL MAMERTO (erroneously sued as NEIL MAMERTO).

///

2. Defendants MICHELE HOLT and NIEL MAMERTO (erroneously sued as NEIL MAMERTO) shall recover form Plaintiffs costs of $4,133.60.

Dated: 10-2-14

JOEL R. WOHLFEIL
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM

Dated: 9/25/14

LAW OFFICE OF ROBERT JACKSON APC

By: _____

ROBERT W. JACKSON, ESQ, and **BRETT R. PARKINSON, ESQ** Attorneys for Plaintiffs MARIO

Dated: 9/25/14

BOLES & DI MASCIO

By: _____

JOHN D. CULVER, JR., ESQ. Attorneys for defendants MICHELE HOLT and NIEL MAMERTO (erroneously sued as NEIL MAMERTO)

Re: Garcia v. Holt, et al.
Case Number: 37-2012-00101101-CU-PO-CTL [IMAGED]

PROOF OF SERVICE
Code of Civil Procedure §§ 1013a, 2015.5

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 3111 Camino Del Rio North, Suite 700, San Diego, CA 92108. On March 9/26 2014, I served the following document(s):

[PROPOSED] Judgment

✓ by placing the document(s) listed above in a sealed envelope, addressed as set forth below, and placing the envelope for collection and mailing in the place designated for such in our offices, following ordinary business practices.

____ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

____ By causing a true copy thereof to be personally delivered to the person(s) at the address(es) set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on March 9/26, 2014, at San Diego, California.

IRASEMA HEREDIA

Re: Garcia v. Holt, et al.
Case Number: 37-2012-00101101-CU-PO-CTL [IMAGED]

SERVICE LIST

Robert W. Jackson, Esq.
Brett R. Parkinson, Esq.
Law Offices of Robert Jackson, APC
205 West Alvarado Street
Fallbrook, CA 92028

Attorney for Plaintiff, MARIO GARCIA
Phone: (760) 723-1295
Fax: (760) 723-9561

George Djura Jakubek
Register # 23140-298
USP Lompoc
U.S. Penitentiary
3901 Klein Blvd.
Lompoc, CA 93436

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **March 18, 2015**, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the parties in this action by serving:

Robert W. Jackson, Esq.
Brett Richard Parkinson, Esq.
Law Offices of Robert W. Jackson, APC
205 West Alvarado Street
Fallbrook, California 92028
[Attorneys for Plaintiffs and Defendants: Mario Garcia and Esperanza Garcia]

Hon. Joel R Wohlfeil
Dept.: SD-73
Hall of Justice, Sixth Flr.
330 West Broadway
San Diego, California 92101

CALIFORNIA SUPREME COURT

[Electronic Service under Rule 8.212(c)(2)]

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **March 18, 2015**, at Los Angeles, California.

(X) (State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Leslie Barela