IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION 2

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and the PEOPLE OF THE STATE OF CALIFORNIA, by and through DENNIS J. HERRERA, City Attorney for the City and County of San Francisco, Plaintiffs and Respondents, v. CHUCK M. POST, individually and d/b/a APARTMENTSINSF.COM; LEM-RAY PROPERTIES I DE, LLC; and DOE ONE through DOE FIFTY, Defendants and Appellants.	CASE NO. A149136

DEFENDANTS' AND APPELLANTS' BRIEF

San Francisco Superior Court No. CGC-15-548551
Honorable Ronald Quidachay

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INTRODUCTION

The California State Legislature enacted a comprehensive statute to fight discrimination in employment and housing known as the California Fair Employment and Housing Act of 1959 ("FEHA"). FEHA expressly occupies the field of regulation of discrimination in housing, exclusive of all other laws banning discrimination in housing by any city, city and county, or county. FEHA expressly regulates the area of housing discrimination based upon "source of income."

The City and County of San Francisco ("San Francisco") also purports to regulate the field of housing discrimination. And, like FEHA, San Francisco purports to expressly regulate the area of housing discrimination based upon "source of income."

San Francisco's invasion of the field of source of income housing discrimination law is significant. Under FEHA, the California State Legislature made a statewide policy decision to maintain the voluntary nature of participation in the federally subsidized housing voucher program entitled the United States Housing Act of 1937 and commonly known as "Section 8" by excluding Section 8 voucher payments from "source of income" housing discrimination. San Francisco attempts to undo the California State Legislature's policy choice by making a landlord's refusal to accept Section 8 voucher payments a form of "source of income" housing discrimination.

Appellants are a real estate broker and a property owner caught up in San Francisco's effort to undo the statewide policy favoring voluntary participation in the Section 8 program. Respondents sued Appellants for expressly stating in advertisements that landlord did not accept Section 8 voucher payments for the rental of rooms in a San Francisco Single Room Occupancy Hotel. In this brief, Appellants will demonstrate that San Francisco's source of income housing discrimination law is expressly and impliedly preempted by FEHA.

STATEMENT OF FACTS

Prior to April 2010, landlords and tenants disagreed over whether refusing Section 8 Vouchers constituted housing discrimination under FEHA. [Declaration of Chuck Post ¶ 3 at 2 CT 0406]. That disagreement was resolved in favor of landlords in *Sabi v. Sterling* (2010) 183 Cal.App.4th 916. The decision was widely publicized by real estate organizations. The San Francisco Apartment Association published an article by noted San Francisco landlord attorney Cliff Fried. [Declaration of Chuck Post ¶ 3 at 2 CT 0406]. In the article, Mr. Fried stated that *Sabi v. Sterling* makes clear that San Francisco landlords can refuse Section 8 Vouchers. [Declaration of Chuck Post Exhibit 1 at 2 CT 0409].

Appellant Chuck Post read about this decision in real estate trade journals and discussed the matter with legal counsel. [Declaration of Chuck Post ¶ 5 at 2 CT 0406]. Based upon the articles he read and discussions with legal counsel, Appellant Chuck Post understood that San Francisco landlords had no obligation to accept Section 8 Vouchers.

Appellant Chuck Post admits that between May 8, 2013 and May 15, 2014, he posted seven advertisements on Craigslist advertising Single Room Occupancy Hotel rooms available for rent at 935 Geary Street, San Francisco, California. All seven advertisements stated that landlord would not accept Section 8 vouchers. [Plaintiffs' Complaint ¶¶ 21 through 27 at 1 CT 0013-0014; Defendants' First Amended Answer ¶ 1 at 2 CT 0393]. Appellant Lem-Ray Properties I DE, LLC admits that Appellant Chuck Post was acting as Appellant Lem-Ray Properties I DE, LLC's agent in posting the seven advertisements. [Plaintiffs' Complaint ¶ 34 at 1 CT 0015; Defendants' First Amended Answer ¶ 11 at 2 CT 0394-0395].

STATEMENT OF THE CASE

On October 21, 2015, Respondents filed a complaint alleging violation of the San Francisco source of income discrimination ordinance. [1 CT 0009]. On February 24, 2016, Appellants filed a demurrer to the Respondents' complaint arguing that the San Francisco source of income housing discrimination ordinance was preempted by FEHA. [1 CT 0051-0070]. On March 22, 2016, the trial court overruled Appellants' demurrer. [1 CT 0275].

On April 19, 2016, Respondents filed a motion for a preliminary injunction to enjoin Appellants from violating San Francisco's source of income housing discrimination ordinance. [2 CT 0287-0392]. The trial court granted the preliminary injunction. [2 CT 0450]. Appellants appeal from the order granting preliminary injunction.

STATEMENT OF APPEALABILITY

A party may appeal from a trial court's granting or dissolving of an injunction. [CCP § 904.2(g)]. Respondents served a notice of entry of the order granting the preliminary injunction on May 23, 2016. [2 CT 0453]. Appellants timely filed their notice of appeal on July 20, 2016.

STANDARD OF REVIEW

Ordinarily, a trial court's granting of a preliminary injunction is reviewed for abuse of discretion. *Bart Thomsen v. City of Escondido* (1996) 49 Cal.App. 4th 884, 890. However, where the granting of the injunction is based solely on interpretation of a legislative enactment, the decision is reviewed de novo. *Id* at 890. In this case, the Appellants argue that the trial court incorrectly determined that FEHA did not preempt San Francisco's source of income housing discrimination ordinance. Accordingly, the appellate court reviews the trial court's decision de novo.

APPELLANTS' ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT FEHA DID NOT PREEMPT SAN FRANCISCO'S SOURCE OF INCOME HOUSING DISCRIMINATION ORDINANCE.

FEHA's source of income housing discrimination law preempts San Francisco's source of income housing discrimination ordinance under two separate legal tests. First, San Francisco's source of income housing discrimination ordinance is expressly preempted because it enters an area expressly occupied by state law. Second, San Francisco's source of income

housing discrimination ordinance is impliedly preempted by FEHA because forcing landlords to participate in the voluntary Section 8 voucher program is contradictory and inimical to FEHA.

A. FEHA's Source of Income Housing Discrimination Law Expressly Preempts San Francisco's Source of Income Housing Discrimination Ordinance

A local ordinance is expressly preempted if it enters an area expressly occupied by state law. *O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1067. The California Fair Housing and Employment Act ("FEHA") prohibits certain forms of discrimination in employment and housing. [Govt. Code § 12900 et seq.]. Specifically, FEHA makes it unlawful for a landlord to "otherwise make unavailable or deny a dwelling based on discrimination because of * * * source of income." [Govt. Code § 12955(k)]. FEHA was expressly intended to preempt local housing discrimination regulations. The express preemption is written into the legislation. FEHA states:

> "[w]hile it is the intention of the Legislature to occupy the field of regulation or discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivisions of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code." Government Code § 12993(c).

The Court of Appeal has construed Government Code § 12993 as excluding all local housing discrimination laws. The Court of Appeal wrote:

> "[r]ead in the context of the fair housing act, the meaning of the ambiguous subdivision (c) phrases is clear; consistent with the Legislature's intent to occupy the field of housing discrimination regulation, the fair housing act was to exclude all other *local* laws banning housing discrimination, but was not to be construed to limit the application of Civil Code section 51." *Rojo v. Kliger* (1990) 52 Cal.3d 65, 78 [emphasis in original].

The statute goes out of its way to exclude housing discrimination laws of any "city and county," which speaks directly to San Francisco. The legislature's preemption could not be clearer.

San Francisco has a similar ordinance prohibiting discrimination in employment and housing. As set forth in the San Francisco Police Code:

> "[i]t is the policy of the City and County of San Francisco to eliminate discrimination based upon race, color, ancestry, national origin, place of birth, sex, age, religion, creed, disability, sexual orientation, gender identity, weight or height within the City and County." [San Francisco Police Code § 3301].

After setting forth the anti-discriminatory policy, the San Francisco Police Code goes on to prohibit specific discriminatory conduct in both employment and housing. With respect to housing, the Police Code specifically prohibits source of

income discrimination. The ordinance reads:

> "(a) Prohibited Activity. It shall be unlawful for any person to do any of the following acts wholly or partially because of a person's actual or perceived race, color, ancestry, national origin, place of birth, sex, age, religion, creed, disability, sexual orientation, gender identity, ***source of income***, weight, or height:
>
> (1) To interrupt, terminate, or fail or refuse to initiate or conduct any transaction in real property, including but not limited to the rental thereof; to require different terms for such transaction; or falsely to represent that an interest in real property is not available for transaction." [San Francisco Police Code § 3304][emphasis added].

FEHA expressly regulates source of income discrimination in housing. FEHA also expressly occupies the field of source of income housing discrimination to the exclusion of all local laws. Accordingly, the San Francisco source of income housing discrimination ordinance is expressly preempted.

B. FEHA's Source of Income Housing Discrimination Law Impliedly Preempts San Francisco's Source of Income Housing Discrimination Ordinance

A local ordinance is impliedly preempted if it contradicts state law. *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067. A local ordinance contradicts state law where the local ordinance eliminates a choice provided by state law. *Northern California Psychiatric Society v. City of Berkeley* (1986) 178

Cal.App.3d 90, 105-106. In this case, San Francisco's source of income housing discrimination ordinance conflicts with FEHA because it eliminates a landlords choice to refuse participation in the Section 8 voucher program.

The statewide policy choice to protect a landlord's right to refuse participation in the Section 8 voucher program is well documented in controlling case law. In April 2014, a tenant tested the limits of FEHA by alleging that a landlord had committed "source of income" discrimination by refusing to participate in the Section 8 voucher payment program. *Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 923. The trial court dismissed the cause of action and the tenant appealed. *Id* at 924.

The appeal drew the attention of interest groups representing both landlords and tenants, including the Tenderloin Housing Clinic, the California Apartment Association, and Legal Services of Northern California. *Id* at 921. The appeal led to a detailed review of the legislative history and amendments to Government Code § 12955, which were themselves battle grounds over whether the state should require landlords to accept Section 8. From this detailed review, the Court of Appeal determined that "[g]iven the awareness about the problem, the Legislature chose not to enact legislation that would have effectively compelled landlords to accept section 8 assistance payments." *Id* at 939.

The Court of Appeal concluded:

"In conclusion, we find no indication that the purpose of the 1999 and 2004 amendments is to compel landlords to participate in the

> Section 8 program. *The only indication of any legislative purpose on this issue is to the contrary*; this is the provision in subdivision (p) of section 12955 that the landlord is not the tenant's representative. While we appreciate that in other jurisdictions some courts have concluded that, as far as source of discrimination is concerned, Section 8 assistance payments should be included in the tenant's income, we must address what the California Legislature has enacted and that, in our opinion, excludes section 8 assistance payments from the tenant's income." *Id* at 942 [emphasis added].

The Court of Appeal affirmed the trial court's dismissal of the "source of income" discrimination claim based upon landlord's refusal to accept Section 8 voucher payments. The California Legislature has neither amended Government Code § 12955 in response to *Sabi v. Sterling,* nor has any appellate court overruled or limited *Sabi v. Sterling.*

The San Francisco source of income housing discrimination ordinance takes the opposite view on voluntary participation. Where FEHA defines source of income as expressly excluding Section 8 voucher payments, the San Francisco housing discrimination ordinance defines source of income as:

> "all lawful sources of income or rental assistance from any federal, State, local, or nonprofit-administered benefit or subsidy program." [San Francisco Police Code § 3304(a)(5)].

Both as written and applied, the San Francisco source of income housing discrimination ordinance requires landlords to participate in the otherwise voluntary Section 8 voucher program. This directly contradicts the policy choice made by the legislature in FEHA, which protected landlords' rights to not participate in the otherwise voluntary Section 8 voucher program. Accordingly, the San Francisco source of income housing discrimination ordinance is also impliedly preempted by FEHA.

C. Respondents' Arguments Attempting to Distinguish the Local Discrimination Ordinance from FEHA Fail

Respondents have previously argued that FEHA's source of income housing discrimination law has a different purpose or addresses a different practice than San Francisco's source of income housing discrimination ordinance. These arguments fail on their face and are not supported by the case law previously cited.

In Respondents' opposition to demurrer, they argued that the inclusion of Section 8 vouchers in the local source of income housing discrimination ordinance was not to prevent discrimination, but to prevent a housing crisis among low-income renters. [Plaintiffs' Opposition to Demurrer pages 12-13 at 1 CT 0086-0087]. That is a distinction without a difference. Under FEHA, the state already expressly protects low income renters from discrimination in housing by prohibiting landlords from excluding the source of benefits and subsidies paid to tenants in determining the tenant's eligibility to rent an apartment. [Govt. Code § 12955(p)(1)]. The San Francisco source of income

housing discrimination ordinance achieves no new purpose. Instead, it simply adds a category of "source of income" that FEHA expressly excluded.

In Respondents' opposition to demurrer, they also argued that the inclusion of Section 8 vouchers in the local source of income housing discrimination ordinance addressed a practice not covered by FEHA. [Plaintiffs' Opposition to Demurrer at 1 CT 0087]. Again, Respondents' argument ignores the fact that FEHA expressly covers source of income discrimination. Respondents disagree with the statewide policy choice to maintain the voluntary nature of the Section 8 voucher program. However, that policy disagreement argues for finding preemption because Respondents seek to undo the efforts of the state legislature.

In the court below, Respondents cited *Rental Housing Association v. City of Oakland*, 171 Cal.App.4th 741 (2009) for the proposition that FEHA has limited preemptive effect on local ordinance. The case is easily distinguished because the local ordinance in that case regulated a classification not addressed by FEHA. In *Rental Housing*, the City of Oakland passed legislation which provided special protections to tenants at least 60 years old. In rejecting a FEHA preemption challenge to the law, the Court of Appeal wrote:

> "[a]n alternative grounds on which section 7.D may be upheld, should one consider the underlying purpose of the provision to be the prevention of age discrimination, is that age discrimination is not prohibited by FEHA, and FEHA preempts only 'the field of

> regulation of discrimination in employment and housing *encompassed by the provisions of* [that statute]." *Id* at 761 fn. 15 [emphasis in original].

Unlike the local ordinance at issue in *Rental Housing,* in this case, FEHA expressly regulates "source of income" discrimination, which is the same form of discrimination Respondents seek to regulate. Accordingly, *Rental Housing* is not controlling.

Respondents also cited *Citizens for Uniform Laws v. Cnty of Contra Costa*, 223 Cal.App.3d 1468 (1991). In *Citizens*, Contra Costa County passed legislation prohibiting discrimination against persons testing positive for HIV. In rejecting a FEHA challenge, the Court of Appeal wrote:

> "FEHA does not forbid housing discrimination based on physical handicap. Thus the portion of the ordinance forbidding discrimination in business establishments and county facilities and services are clearly not preempted by FEHA, and it is arguable that FEHA does not occupy the field of housing discrimination based on physical handicap." *Id* at 1473.

Again, unlike in *Citizens*, FEHA expressly regulates "source of income" discrimination. Again, *Citizens* is not controlling.

CONCLUSION

FEHA is a comprehensive statewide statute addressing source of income housing discrimination. FEHA expressly states an intention to occupy the entire field of source of income housing discrimination to the exclusion of local ordinances. Material to this case, FEHA contains a policy decision to maintain the voluntary nature of the Section 8 voucher payment program. Respondents' efforts to undo the statewide policy choices embodied in FEHA fail under both express and implied preemption. Accordingly, this Court should reverse the trial court's order granting Respondents' preliminary injunction on the grounds that San Francisco Police Code § 3304 is preempted by FEHA.

Respectfully Submitted

April 27, 2017

/s/ Edward C. Singer, Jr.

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CERTIFICATE OF WORD COUNT

(CRC 8.204)

The text of this brief consists of 2,769 words as counted by the WordPerfect word-processing program used to prepare the brief.

April 27, 2017

/s/ Edward C. Singer, Jr.

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DECLARATION OF SERVICE

I, ***Meaghan Murphy***, declare as follows:

I am over eighteen years of age and not a party to the within action; I am employed at One Daniel Burnham Court, Suite 265C, San Francisco, CA 94109.

On ***April 27, 2017,*** I served the attached:

DEFENDANTS' AND APPELLANTS' BRIEF

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April 27, 2017
/s/ Meaghan Murphy

_____
Meaghan Murphy