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8 MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT
9 COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

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11 HOLLYWOOD KNICKERBOCKER) Case No.: 96U12640
12)
13 Plaintiff,) DEFENDANT'S OPPOSITION TO MOTION
14 vs.) IN LIMINE
15) Date: Sept. 25, 1996
16 ROSITA TIMASHPOLSKAYA) Time: 8:30 am
17) Division: 20
18 Defendant.) Date of Trial: Sept. 25, 1996
19)

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[JAN 20 1997]
NATIONAL DEFENDANT'S HOUSE
FOR PUBLIC DEFENDERS, INC.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 2
- II. STATEMENT OF FACTS 3
- III. POINTS AND AUTHORITIES 4
 - A. A Motion in Limine Should Only Act to exclude evidence that is irrelevant or unduly prejudicial 4
 - B. The Following Evidence Should Not Be Excluded 5
 - 1. Evidence whether plaintiff waived defendant's alleged breach by accepting rent 5
 - 2. Evidence whether plaintiff had to change the terms of the tenancy to prohibit the conduct described in the notice to quit 6
 - 3. Evidence whether defendant suffers from a disability, or the extent of any disability 8
 - a. Defendant has Covered Disabilities 8
 - b. Plaintiff Has Not Complied With the Disability **Laws** 9
 - 4. Evidence whether plaintiff had a duty to reasonably accommodate disabled defendant 12
 - a. Plaintiff has not Satisfied its Duty to Reasonably Accommodate Defendant's Disability 13
 - b. A minimal reasonable accommodation would have been a written warning so that defendant would understand the gravity of the situation 13

1
2
3
4
5
6
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9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS
(Continued)

5. Evidence whether plaintiff retaliated against a subsidized tenant to avoid **paying** relocation benefits to subsidized tenants in the face of an impending mass eviction 15

IV. CONCLUSION 15

TABLE OF AUTHORITIES

	<u>CASES</u>	<u>PAGE</u>
1		
2		
3	<u>Chautauaua Park v. McMullen,</u>	
4	1992 Ohio. App. Lexis 5378 (Ohio Ct. App. 1992)	7
5	<u>Clemens v. Amer. Warrantv Co.,</u>	
6	(1987) 193 <u>Cal.App.3d</u> 444,449, 238 CR 339	4
7	<u>EDC Assocs., Ltd. v. Gutierrez</u>	
8	(1984) 153 <u>Cal.App.3d</u> 167, 200 <u>Cal.Rptr.</u>	5
9	<u>Fairview Company v. Idowu,</u> 148 Misc. 2d 17, 18 (1990);	
10	559 <u>N.Y.S.2d</u> 925, 927; 1990 N.Y. Misc.	
11	LEXIS 407, 4-5	8
12	<u>Ferry v. Roosevelt Bank,</u> 883 F. Supp. 435,	
13	440 (<u>E.D.Mo.</u> 1995)	13
14	<u>Friedman v. LaLonde,</u> 113 <u>Wis.2d.</u> 726	
15	(Wis.Ct. of Appeals, Dist. II, 1983)	7
16	<u>Levinsston et.al v. Rental Manasement, Inc.</u>	
17	(1993) Ark. App. LEXIS 440	6
18	<u>Palmer v Ted Stevens Honda, Inc. (1987)</u>	
19	193 <u>Cal.App.3d</u> 541, 238 CR 363	4
20	<u>Park East Land Corp. v. Finkelstein</u>	
21	299 N.Y. 70, 75; 85 <u>N.E.2d</u> 869, 871 (1949)	7
22	<u>Roe v. Housing Authority for the City of Boulder,</u>	
23	909 F. Supp. 814, 821 (1995)	10, 13, 14
24	<u>Roe v. Susar River Mills Associates,</u> 820 <u>F.Supp.</u>	
25	639 (1993)	11,13,14
26	<u>Schmidt v. Safeway</u>	
27	864F. Supp. 991, 997 (D.Ore. 1994)	11, 13, 14
28	<u>White Earth Housins Authority v. Schwabe,</u>	
	375 <u>N.W.2d</u> 568 (Minn.Ct.App., 1985)	7

TABLE OF AUTHORITIES
(Continued)

1		
2		
3	<u>STATUTES</u>	
4	<u>Americans With Disabilities Act</u>	
	42 U.S.C. §§ 12101 et seq.)	8
5	<u>Calif. Fair Employment and Housins Act</u>	
	(Cal. Gov. Code §§ 12900 et seq.)	8
6	Cal. Gov. Code §12955(a)	9
7	Cal. Gov. Code §12927(d)(1)	9
8	<u>Federal Fair Housing Act</u>	
9	(42 U.S.C. §§ 3601 et seq.)	8
10	24 § CFR 100(c)	11
11	24 CFR 100.202(c)(1)	11
12	24 CFR 100.204(a)	14
13	24 CFR 248.165	15
14	<u>AUTHORITIES</u>	
15	<u>Cal.Prac. Guide-Civil Trials and Evidence,,</u>	
	(1995 TRG) §4:240-253	5
16	<u>Cal.Prac Guide: Landlord-Tenant</u>	
17	(1995 TRG) §2:506	5
18		
19	<u>MISCELLANEOUS</u>	
20	Evid C.§ 312, 351, 352	4
21	42 U.S.C. §§ 3604(f)(3)(B); 12132	9
22		
23		
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1 I. INTRODUCTION

2 PLEASE TAKE NOTICE that on Sept 25, 19'96 at 8:30 am, in
3 Division 20 of the above entitled court located at 110 North Grand,
4 Los Angeles, CA 90012, defendant will move this court to deny, with
5 one exception, plaintiff's Motion In Limine seeking to instruct
6 defendant and her counsel from presenting evidence supporting any
7 of the following affirmative defenses:

8 1. Evidence whether plaintiff waived defendant's alleged
9 breach by accepting rent.

10 Plaintiff knowingly accepted rent from defendant three days
11 after the alleged terminating incident, then changed its mind.
12 There is no "change your mind" exception to the rule of waiver,
13 even when plaintiff scribbles out evidence of **the waiver.**

14 2. Evidence whether plaintiff had to **change** the terms of the
15 tenancy to prohibit the conduct described in the notice to quit.

16 The conduct as described by the notice, even if believed by
17 the jury, is not material non-compliance with the Lease.

18 3. Whether defendant suffers from a disability, or the extent
19 of any disability.

20 Evidence of defendant's physical and mental disability must be
21 included because plaintiff had actual or constructive knowledge of
22 the disability, because plaintiff is not forbidden by law to
23 inquire into disability, and because plaintiff must accommodate
24 even one disabled tenant.

25
26 1. Evidence whether plaintiff gave written notice to the Housing
27 Authority that it was terminating the tenancy. Defendant agrees
28 to strike this affirmative defense, and stipulates to its
exclusion.

1 4. Evidence whether plaintiff had a duty to reasonably
2 accommodate disabled defendant.

3 If plaintiff had properly analyzed reasonable accommodation
4 as required by law, infra, and found that no reasonable
5 accommodation could ameliorate a proven direct threat to the health
6 or safety or property of others, plaintiff would have fulfilled its
7 duty to reasonably accommodate. However, plaintiff instead did no
8 accommodation analysis in this case. Plaintiff's error of law
9 should not be compounded by allowing it to hide its mistake.

10 5. Evidence whether plaintiff filed this action to retaliate
11 asainst defendant for beina a subsidized tenant.

12 Plaintiff has a financial interest in removing subsidized
13 tenants before an impending move-out of all its subsidized tenants.

13 II. STATEMENT OF FACTS

14 Plaintiff alleges defendant inadvertently and apparently
15 drunkenly dropped cigarette butts in the halls of her building,
16 culminating with defendant causing a small fire causing \$450.00
17 damage. Plaintiff cannot prove these allegations. Furthermore,
18 even if plaintiff's allegations were true, they are not a material
19 breach of the lease necessary to evict the defendant.

20 Additionally, plaintiff failed to account for defendant's
21 known physical and mental disabilities, including angina and
22 depression. These disabilities cause defendant to tire easily, act
23 and talk unusually, and appear wobbly, or drunk. Federal and state
24 law requires that a landlord must reasonably accommodate such
25 disabilities. Nevertheless, plaintiff failed to do so.

26 ///

27 ///

28

1 Plaintiff inexplicably failed to give defendant any written
2 warnings that her disability-induced behavior constituted an actual
3 or even potential breach of the lease. In fact, plaintiff's HUD
4 approved eviction guidebook requires such warning notices in all
5 non-rent cases (attached hereto as Exhibit A, pp. 6-1 & 3).
6 Nevertheless, plaintiff failed to give **defendant** any opportunity to
7 alleviate a potential breach, for example by barring her from
8 smoking inside the building or by giving her written notice she
9 could show to interested physicians, social workers or family
10 members.

11 III. POINTS AND AUTHORITIES

12 A. A Motion in Limine Should **Only** Act to exclude evidence
13 that is irrelevant or **unduly prejudicial**

14 A Motion In Limine should be granted only when the evidence
15 sought to be excluded is either so irrelevant or prejudicial that
16 it outweighs the interest in allowing a full presentation of
17 relevant evidence. Evid C. § 312, 351, 352, Palmer v. Ted Stevens
18 Honda, Inc. (1987)193 Cal.App.3d 541, 238 CR 363 [erroneous
19 exclusion of evidence relevant to plaintiff's actual damages
20 resulted in a "miscarriage of justice"].² Such evidence is
21 typically collateral source payments, subrogee information or tax
22 consequences of the award in a personal injury context, prejudicial
23 facts regarding plaintiff(e.g., criminal, illegal immigrant, etc.),
24

25 2. In Clemens v. American Warranty Co., (1987) 193 Cal.App.3d
26 444,449, 238 CR 339, cited by plaintiff, a motion in limine was
27 proper because defendant failed to state any cause of action,
28 e.g., defective pleading alleging contract liability for non-
signatories to the contract. Here plaintiff simply disagrees with
defendant's factual and legal contentions under the **anti-**
discrimination acts, which is not an issue for this Motion.

1 or facts to curry sympathy for a defendant. Wegner, et al,
2 Cal.Prac. Guide-Civil Trials and Evidence., (1995 TRG) §4:240-253.

3 If defendant's disability were offered simply to curry
4 sympathy with the jury, it would **be** properly barred. However, as
5 described below, defendant's disability and plaintiff's failure to
6 comply with its statutory duty to take **any** steps to reasonably
7 accommodate said disability is a central issue in this case.

8 B. The Following Evidence Should Not Be Excluded

9 1. Evidence whether plaintiff waived defendant's **alleged**
10 breach by accepting rent.

11 The terminating incident, or fire occurred on Monday night,
12 April 29, 1996. Defendant thereafter tendered her May, 1996, rent
13 check dated April 29, 1996. Plaintiff apparently endorsed, or date
14 stamped the back of the check. Plaintiff then crossed out the
15 date or endorsement stamp, making it impossible to discern the
16 writing. A copy of the front and back of this check, and envelope
17 returning the check to defendant on May 3, 1996, is attached hereto
18 as Exhibit B. Plaintiff now seeks to exclude this evidence as
19 "irrelevant or prejudicial." It is neither.

20 "As a general rule,
21 covenant, and thus the right to evict based on that breach by
22 **accepting rent with full knowledge of the facts constituting the**
23 **breach."** EDC Assocs., Ltd. v. Gutierrez (1984) 153 Cal.App.3d 167,
24 200 Cal.Rptr. 333, Friedman, et al., Cal.Prac Guide: Landlord-
25 Tenant (1995 TRG) §2:506.

26 Here, landlord accepted the rent after the fire. Three
27 business days later, landlord changed its mind. Worse, landlord
28 marked up the evidence, making it impossible to discern the date of

1 the endorsement stamp on the back of the check. Whether the
2 landlord changed its mind in a timely fashion to obviate a waiver
3 is relevant. Further, that landlord scribbled away a date **or**
4 endorsement stamp is probative not only of **waiver**, but of
5 plaintiff's credibility as to this and other issues. In plaintiff's
6 resident manager Sara Moscovitz' deposition, she states that while
7 the rent check may have been endorsed or stamped by mistake, the
8 decision to cross out the stamp was not. (Deposition of Moscovitz,
9 pp 34-38, attached hereto as Exhibit C.) As Moscovitz is
10 defendant's primary witness alleging bad acts against defendant,
11 her actions regarding May, 1996 rent are relevant and probative as
12 to waiver and her credibility.

13 2. Evidence whether plaintiff had to **change** the terms of the
14 tenancy to prohibit the conduct described in the notice to quit.

15 The conduct as described by the notice, even if believed by
16 the jury, does not constitute material non-compliance with the
17 Lease.

18 **a)** Defendant's actions did not constitute criminal or other
19 unlawful activity. Paragraphs **13.b.(1) & (2)** of Lease, (Depo. of
20 Moscovitz, pp. 109-110)

21 **b)** Defendant's actions did not constitute a hazard, or material
22 noncompliance with Paragraph 24 of her lease, borne out **by**
23 plaintiff's failure to give written warnings regarding dangerous
24 behavior, despite being required to do so by plaintiff's
25 handbook. Exhibit A. See Levinaston et al. v. Rental Management
26 Inc., 1993 Ark. App. LEXIS 440 (defendants received **multiple**
27 written **warnings** regarding illegal behavior before landlord
28

1 initiated eviction proceedings under §247.3) (attached as Exhibit
2 D).

3 c) Defendant's behavior is not material noncompliance with
4 Paragraphs 10.(b)(3) & (4) of her lease. Defendant denies starting
5 the fire, even by accident. However, assuming arquendo that
6 defendant inadvertently started the fire, her actions caused only
7 a small amount of damage to a **corner** of the lobby near an ashtray.
8 Exhibit E, attached hereto.

9 An unintentional and minor accident is not good cause to evict
10 defendant from her home. Plaintiff concedes defendant's actions
11 were unintentional. (Dep.of Moscovitz, p. 153). See, e.g., Friedman
12 v. LaLonde, 113 Wis.2d. 726 (Wis.Ct. of Appeals, Dist. II, 1983)
13 (tenant repeatedly blocked hallways with furniture); White Earth
14 Housing Authority v. Schwabe, 375 N.W.2d 568 (Minn.Ct.App.,
15 1985) (tenant repeatedly held loud and noisy parties); Chautauqua
16 Park Apartments v. McMullen, 1992 Ohio. App. Lexis 5378 (Ohio Ct.
17 App. 1992) (tenants strewed refuse around building and damaged'
18 walls and furniture). Attached as Exhibits E,F and G. As
19 defendant's actions were unintentional they do not violate her
20 lease under 24 CFR §247.3.

21 d). Finally, if defendant's unintentional acts violated her lease,
22 unless plaintiff can show defendant inadvertently causing a fire
23 constituted a **substantial** violation of her lease, that one event
24 alone is not sufficient grounds to evict defendant under §247.3.
25 In an oft-cited case from 1949, the Court of Appeals of New York
26 held that "**substantial**" can only "**be** defined with reference to the
27 peculiar legal and factual setting in which it **occurs.**" Park East
28 Land Cora. v. Finkelstein, 299 N.Y. 70, 75; 85 N.E.2d 869, 871

1 (1949) (occupancy of apartment by parties other than leaseholders
2 was a technical but **not** substantial violation of the lease).
3 Attached hereto as Exhibit H.

4 Here, the court must consider an elderly, mentally and
5 physically disabled woman who, at worst, inadvertently caused a
6 small fire estimated at \$450 in damage. Fire Dept. Report, attached
7 as Exhibit I. While, as per her lease, defendant agreed not to
8 damage her unit or the building's common areas, this small amount
9 of damage arising from an accident constitutes at most a minor
10 violation of her lease, not warranting eviction. See also Fairview
11 Company v. Idowu, 148 Misc. 2d 17, 18 (1990); 559 N.Y.S.2d 925,
12 927; 1990 N.Y. Misc. LEXIS 407, 4-5 (single water overflow clogging
13 several apartments not material noncompliance. Attached hereto as
14 Exhibit J. Therefore, the conduct described in the notice does not
15 constitute a breach of the lease.

16 3. Evidence whether defendant suffers from a disability:or
17 the extent of any disability.

18 a. Defendant has Covered Disabilities

19 Plaintiff misperceived defendant's wobbly gait, loud or
20 slurred speech, unusual behavior, including nighttime walks and odd
21 affect as drunkenness or carelessness.(Depo. Of Moscovitz, pp 68-
22 69,147). These perceived prior "bad acts" are the erroneous basis
23 for plaintiff's eviction. Instead, defendant's disabling
24 conditions are covered under applicable federal and state law. She
25 suffers from angina and mental illness and is covered under the
26 provisions of the Americans With Disabilities Act (42 U.S.C. §§
27 12101 et seq.) ("ADA"), the Federal Fair Housing Act (42 U.S.C. §§
28 3601 et seq.) ("FHA") , and the California Fair Employment and

1 | Housing Act (Cal. Gov. Code §§ 12900 et seq.) ("**FEHA**"). (Depo. Of
2 | Defendant, pp. 18-19, 48) The FHA and ADA both define disability
3 | as "a physical or mental impairment that substantially limits one
4 | or more of the major life activities of such individual . . . or
5 | **being regarded as having such an impairment.**" 42 USC §§
6 | **3602(h)(1,3); 42 USC §§ 12102(2)(A,C).** [emph. Added] Additionally
7 | federal law requires plaintiff to make an effort to reasonably
8 | accommodate defendant prior to initiating any attempt to evict her.
9 | 42 U.S.C. §§ 3604(f)(3)(B); 12132. Similarly, FEHA makes it
10 | illegal "for the owner any housing accommodation to discriminate
11 | against any person because of the . . . disability of that person."
12 | Cal. Gov. Code §12955(a). Under FEHA, "'Discrimination' includes
13 | [the] refusal to . . . rent or lease housing accommodations" as
14 | well as any **"refusal to make reasonable accommodations** in rules,
15 | policies, practices and services when those accommodations may be
16 | necessary to afford a disabled person equal opportunity to use and
17 | enjoy a dwelling." Cal. Gov. Code §12927(d)(1) (emph. added).

18 | Because plaintiff cannot show compliance with these statutes,
19 | it may not evict defendant from her long-time home,
20 | and evidence pertaining thereto is relevant to her defense.

21 | b. Plaintiff Has Not Complied With the Disability Laws

22 | Plaintiff nevertheless makes four arguments why this evidence
23 | should be excluded:

24 | 1) "Defendant only has a heart condition." (Pltff. Mot In. Lim p. 4)

25 | This is puzzling as angina is a disability causing defendant
26 | to walk and act in a way that may be misperceived as drunkenness.
27 | Depo. of Defendant pp. 21-32, 39; Depo. of Moscovitz p. 69; Depo.
28 | of neighbor Rosa Dyachenko p 27:15,30-33. However, plaintiff also

1 grossly miscites defendant's deoosition testimony. Under further
2 questioning by plaintiff defendant added she has a "very serious
3 mental disease..," " ..maybe schizophrenia..," and was "a client of
4 a mental clinic -in Russia for 30 years." Depo. of Defendant pp 48-
5 51, attached hereto as Exhibit K.

6 2. "Defendant never told plaintiff of her disability, and 'didn't
7 need **help.** (Pltff. Mot. In Lim. p. 4)

8 Plaintiff had direct constructive knowledge of defendant's
9 disability. While a landlord must reasonably **accommodate a**
10 tenant's disability only if they have knowledge of her condition,
11 there are many ways that covered entities **can** acquire such
12 knowledge. See Schmidt-v. Safeway, 864 F. Supp. 991, 997 (D.Ore.
13 1994) ("An employer knows an employee has a disability when the
14 employee tells the employer about his condition, or when the
15 employer otherwise becomes aware of the condition, such as through
16 a third party **or by observation.** ") [emph added], Exhibit L, and Roe
17 v. Housins Authority for the City of Boulder, 909 F. Supp. 814, 821
18 (knowledge of defendant's type of disability gained through
19 **observation of defendant's behavior** and knowledge he was on
20 medication).Exhibit M.

21 Here, plaintiff's agents and their friends admit seeing
22 defendant talking "like a drunk," loud, laughing a lot and not
23 walking straight. Depo. of Moscovitz 68-9, and Depo. of Rosa
24 Dyachenko pp 30-31. Whether or not defendant informed plaintiff of
25 her condition, repeated observations of defendant's erratic
26 mannerisms were sufficient to put plaintiff on notice either that
27 defendant is mentally disabled or suffers from alcoholism. While
28 defendant denies drinking, **both** conditions are covered.by the

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NATIONAL CHAIRMAN'S HOUSE
FOR THE... INC.

TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	2
II.	<u>STATEMENT OF FACTS</u>	3
III.	<u>POINTS AND AUTHORITIES</u>	4
	A. A Motion in Limine Should Only Act to exclude evidence that is irrelevant or unduly prejudicial	4
	B. The Following Evidence Should Not Be Excluded	5
10	1. Evidence whether plaintiff waived defendant's alleged breach by accepting rent	5
11		
12	2. Evidence whether plaintiff had to change the terms of the tenancy to prohibit the conduct described in the notice to quit	6
13		
14		
15	3. Evidence whether defendant suffers from a disability, or the extent of any disability	8
16		
17	a. Defendant has Covered Disabilities	8
18		
19	b. Plaintiff Has Not Complied With the Disability Laws	9
20		
21	4. Evidence whether plaintiff had a duty to reasonably accommodate disabled defendant	12
22		
23		
24	a. Plaintiff has not Satisfied its Duty to Reasonably Accommodate Defendant's Disability	13
25		
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27		
28		

TABLE OF CONTENTS
(Continued)

4
6
8
10
11
12
13
14
15
16
15
18
19
20
21
22
23
24
25
26
27
28

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1
2
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12
13
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STATUTES

Americans With Disabilities Act
42 U.S.C. §§ 12101 et seq.) 8

Calif. Fair Employment and Housins Act
(Cal. Gov. Code §§ 12900 et seq.) 8

Cal. Gov. Code §12955(a) 9

Cal. Gov. Code §12927(d)(1) 9

Federal Fair Housins Act
(42 U.S.C. §§ 3601 et seq.) 8

24 § CFR 100(c) 11

24 CFR 100.202(c)(1) 11

24 CFR 100.204(a) 14

24 CFR 248.165 15

AUTHORITIES

Cal.Prac. Guide-Civil Trials and Evidence,,
(1995 TRG) §4:240-253 5

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MISCELLANEOUS

Evid C. § 312, 351, 352 4

42 U.S.C. §§ 3604(f)(3)(B); 12132 9

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I. INTRODUCTION

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1. Evidence whether plaintiff waived defendant's alleged breach by accepting rent.

Plaintiff knowingly accepted rent from defendant three days after the alleged terminating incident, then changed its mind. There is no "change your mind" exception to the rule of waiver, even when plaintiff scribbles out evidence of the waiver.

2. Evidence whether plaintiff had to **change** the terms of the tenancy to **prohibit** the conduct described in the notice to quit.

The conduct as described by the notice, even if believed by the jury, is not material non-compliance with the Lease.

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Evidence of defendant's physical and mental disability must be included because plaintiff had actual or constructive knowledge of the disability, because plaintiff is not forbidden by law to inquire into disability, and because plaintiff must accommodate even one disabled tenant.

1. Evidence whether plaintiff gave written notice to the Housing Authority that it was terminating the tenancy. Defendant agrees to strike this affirmative defense, and stipulates to its exclusion.

4. Evidence whether plaintiff had a duty to reasonably accommodate disabled defendant.

If plaintiff had properly analyzed reasonable accommodation as required by law, infra, and found that no reasonable accommodation could ameliorate a proven direct threat to the health or safety or property of others, plaintiff would have fulfilled its duty to reasonably accommodate. However, plaintiff instead did no accommodation analysis in this case. Plaintiff's error of law should not be compounded by allowing it to hide its mistake.

5. Evidence whether plaintiff filed this action to retaliate against defendant for being a subsidized tenant.

Plaintiff has a financial interest in removing subsidized tenants before an impending move-out of all its subsidized tenants.

II. STATEMENT OF FACTS

Plaintiff alleges defendant inadvertently and apparently drunkenly dropped cigarette butts in the halls of her building, culminating with defendant causing a small fire causing \$450.00 damage. Plaintiff cannot prove these allegations. Furthermore, even if plaintiff's allegations were true, they are not a material breach of the lease necessary to evict the defendant.

Additionally, plaintiff failed to account for defendant's known physical and mental disabilities, including angina and depression. These disabilities cause defendant to tire easily, act and talk unusually, and appear wobbly, or drunk. Federal and state law requires that a landlord must reasonably accommodate such disabilities. Nevertheless, plaintiff failed to do so.

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1 Plaintiff inexplicably failed to give defendant any written
2 warnings that her disability-induced behavior constituted an actual
3 or even potential breach of the lease. In fact, plaintiff's HUD
4 approved eviction guidebook requires such warning notices in all
5 non-rent cases (attached hereto as Exhibit A, pp. 6-i & 3).
6 Nevertheless, plaintiff failed to give defendant any opportunity to
7 alleviate a potential breach, for example by barring her from
8 smoking inside the building or by giving her written notice she
9 could show to interested physicians, social workers or family
10 members.

13 III. POINTS AND AUTHORITIES

12 A. A Motion in Limine Should Only Act to exclude evidence
13 that is irrelevant or unduly nrejudicial

14 A Motion In Limine should be granted only when the evidence
15 sought to be excluded is either so irrelevant or prejudicial that
16 it outweighs the interest in allowing a full presentation of
17 relevant evidence. Evid C. § 312, 351, 352, Palmer v. Ted Stevens
18 Honda, Inc. (1987)193 Cal.App.3d 541, 238 CR 363 [erroneous
19 exclusion of evidence relevant to plaintiff's actual damages
20 resulted in a "miscarriage of justice"].² Such evidence is
21 typically collateral source payments, subrogee information or tax
22 consequences of the award in a personal injury context, prejudicial
23 facts regarding plaintiff (e.g., criminal, illegal immigrant, etc.),
24

25 2. In Clemens v. American Warranty Co., (1987) 193 Cal.App.3d
26 444,449, 238 CR 339, cited by plaintiff, a motion in limine was
27 proper because defendant failed to state any cause of action,
28 e.g., defective pleading alleging contract liability for non-
signatories to the contract. Here plaintiff simply disagrees with
defendant's factual and legal contentions under the **anti-**
discrimination acts, which is not an issue for this Motion.

1 or facts to curry sympathy for a defendant. Wegner, et al,
2 Cal.Prac. Guide-Civil Trials and Evidence, (1995 TRG) §4:240-253.

3 If defendant's disability were offered simply to curry
4 sympathy with the jury, it would **be** properly barred. However, as
5 described below, defendant's disability and plaintiff's failure to
6 comply with its statutory duty to take any steps to reasonably
7 accommodate said disability is a central issue in this case.

8 B. The Following Evidence Should Not Be Excluded

9 1. Evidence whether plaintiff waived defendant's alleged
10 breach by accepting rent.

11 The terminating incident, or fire occurred on Monday night,
12 April 29, 1996. Defendant thereafter tendered her May, 1996, rent
13 check dated April 29, 1996. Plaintiff apparently endorsed, or date
14 stamped the back of the check. Plaintiff then crossed out the
15 date or endorsement stamp, making it impossible to discern the
16 writing. A copy of the front and back of this check, and envelope
17 returning the check to defendant on May 3, 1996, is attached hereto
18 as Exhibit B. Plaintiff **now seeks** to exclude this evidence as
19 "irrelevant or prejudicial." It is neither.

20 "As a general rule, landlords waive a tenant's breach of
21 covenant, and thus the right to evict based on that breach by
22 accepting rent **with full knowledge of the facts constituting the**
23 **breach.**" EDC Assocs., Ltd. v. Gutierrez (1984) 153 Cal.App.3d 167,
24 200 Cal.Rptr. 333, Friedman, et al., Cal.Prac Guide: Landlord-
25 Tenant (1995 TRG) §2:506.

26 Here, landlord accepted the rent after the fire. Three
27 business days later, landlord changed its mind. Worse, landlord
28 marked up the evidence, making it impossible to discern the date of

1 the endorsement stamp on the back of the check. Whether the
2 landlord changed its mind in a timely fashion to obviate a Waiver
3 is relevant. Further, that landlord scribbled away a date or
4 endorsement stamp is probative not only of Waiver, but of
5 plaintiff's credibility as to this and other issues. In plaintiff's
6 resident manager Sara Moscovitz' deposition, she states that while
7 the rent check may have been endorsed or stamped by mistake, the
8 decision to cross out the stamp was not. (Deposition of Moscovitz,
9 pp 34-38, attached hereto as Exhibit C.) As Moscovitz is
10 defendant's primary witness alleging bad acts against defendant,
11 her actions regarding May, 1996 rent are relevant and probative as
12 to waiver and her credibility.

13 2. Evidence whether plaintiff had to **change** the terms of the
14 tenancy to prohibit the conduct described in the notice to auit.

15 The conduct as described by the notice, even if believed by
16 the jury, does not constitute material non-compliance with the
17 Lease.

18 **a)** Defendant's actions did not constitute criminal or other
19 unlawful activity. Paragraphs **13.b.(1) & (2)** of Lease, (Depo. of
20 Moscovitz, pp. 109-110)

21 **b)** Defendant's actions did not constitute a hazard, or material
22 noncompliance with Paragraph 24 of her lease, borne out by
23 plaintiff's failure to give written warnings regarding dangerous
24 behavior, despite being required to do so by plaintiff's
25 handbook. Exhibit A. See Levinsston et al. v. Rental Management
26 Inc., 1993 Ark. App. LEXIS 440 (defendants received **multiple**
27 written **warnings** regarding illegal behavior before landlord
28

1 initiated eviction proceedings under §247.3) (attached as Exhibit
2 D).

3 c) Defendant's behavior is not material noncompliance with
4 Paragraphs 10.(b)(3) & (4) of her lease. Defendant denies starting
5 the fire, even by accident. However, assuming arsuendo that
6 defendant inadvertently started the fire, her actions caused only
7 a small amount of damage to a **corner** of the lobby near an ashtray.
8 Exhibit E, attached hereto.

9 An unintentional and minor accident is not good cause to evict
10 defendant from her home. Plaintiff concedes defendant's actions
11 were unintentional. (Dep. of **Moscovitz**, p. 153). See, e.g., Friedman
12 v. LaLonde, 113 Wis.2d. 726 (Wis.Ct. of Appeals, Dist. II, 1983)
13 (tenant repeatedly blocked hallways with furniture); White Earth
14 Housing Authority v. Schwabe, 375 N.W.2d 568 (Minn.Ct.App.,
15 1985) (tenant repeatedly held loud and noisy parties); Chautauqua
16 Park Apartments v. McMullen, 1992 Ohio. App. Lexis 5378 (Ohio Ct.
17 App. 1992) (tenants strewed refuse around building and damaged
18 walls and furniture). Attached as Exhibits E, F and G. As
19 defendant's actions were unintentional they do not violate her
20 lease under 24 CFR §247.3.

21 d). Finally, if defendant's unintentional acts violated her lease,
22 unless plaintiff can show defendant inadvertently causing a fire
23 constituted a substantial violation of her lease, that one event
24 alone is not sufficient grounds to evict defendant under §247.3.
25 In an oft-cited case from 1949, the Court of Appeals of New York
26 held that "**substantial**" can only "**be** defined with reference to the
27 peculiar legal and factual setting in which it occurs." Park East
28 Land Corp. v. Finkelstein, 299 N.Y. 70, 75; 45 N.E.2d 869, 871

(1949) (occupancy of apartment by parties other than leaseholders was a technical but not substantial violation of the lease). Attached hereto as Exhibit H.

Here, the court must consider an elderly, mentally and physically disabled woman who, at worst, inadvertently caused a small fire estimated at \$450 in damage. Fire Dept. Report, attached as Exhibit I. While, as per her lease, defendant agreed not to damage her unit or the building's common areas, this small amount of damage arising from an accident constitutes at most a minor violation of her lease, **not** warranting eviction. See also **Fairview Company v. Idowu**, 148 Misc. 2d 17, 18 (1990); 559 N.Y.S.2d 925, 927; 1990 N.Y. Misc. LEXIS 407, 4-5 (single water overflow clogging several apartments not material noncompliance. Attached hereto as Exhibit J. Therefore, the conduct described in the notice does not constitute a breach of the lease.

3. Evidence whether defendant suffers from a disability; or the extent of any disability.

a. Defendant has Covered Disabilities

Plaintiff misperceived defendant's wobbly gait, loud or slurred speech, unusual behavior, including nighttime walks and odd affect as drunkenness or carelessness. (Depo. Of Moscovitz, pp 68-69,147). These perceived prior "bad acts" are the erroneous basis for plaintiff's eviction. Instead, defendant's disabling conditions are covered under applicable federal and state law. She suffers from angina and mental illness and is covered under the provisions of the Americans With Disabilities Act (42 U.S.C. §§ 12101 et seq.) ("ADA"), the Federal Fair Housing Act (42 U.S.C. §§ 3601 et seq.) ("FHA"), and the California Fair Employment and

1 grossly miscites defendant's deposition testimony. Under further
2 questioning by plaintiff defendant added she has a "very serious
3 mental disease..," " ..maybe schizophrenia..," and was "a client of
4 a mental clinic **in** Russia for 30 years." Depo. of Defendant pp 48-
5 51, attached hereto as Exhibit K.

6 2. "Defendant never told plaintiff of her disability, and 'didn't
7 need **help.**(Pltff. Mot. In Lim. p. 4)

a Plaintiff had direct constructive knowledge of defendant's
9 disability. While a landlord must reasonably accommodate a
10 tenant's disability only if they have knowledge of her condition,
11 there are many ways that covered entities can acquire such
12 knowledge. See Schmidt'v. Safeway, 864 F. Supp. 991, 997 (D.Ore.
13 1994) ("An employer knows an employee has a disability when the
14 employee tells the employer about his condition, or when the
15 employer otherwise becomes aware of the condition, such as through
16 a third party or **by observation.**") [emph added], Exhibit L, and Roe
17 v. Housing Authority for the City of Boulder, 909 F. **Supp. 814, 821**
18 (knowledge of defendant's type of disability gained through
19 observation of **defendant's behavior** and knowledge he was on
20 medication).Exhibit M.

21 Here, plaintiff's agents and their friends admit seeing
22 defendant talking "like a drunk," loud, laughing a lot and not
23 walking straight. Depo. of Moscovitz 68-9, and Depo. of Rosa
24 Dyachenko pp 30-31. Whether or not defendant informed plaintiff of
25 her condition, repeated observations of defendant's erratic
26 mannerisms were sufficient to put plaintiff on notice either that
27 defendant is mentally disabled or suffers from alcoholism. While
28 defendant denies drinking, **both** conditions are covered.by the

1 pertinent legislation. See, e.g., Schmidt, supra (alcoholism s
2 covered under the ADA and FHA, 24 CFR 102.201(a)(2); Roe v. Sugar
3 River Mills, 820 F.Supp. 639 (1993) (landlord must reasonably
4 accommodate a mentally disabled tenant). Attached hereto as
5 Exhibit N.

6 Furthermore, defendant is an immigrant unfamiliar with the
7 complex nature of the regulations protecting her against
8 discrimination on the basis of her disabilities. It would violate
9 the public policy interests at the heart of the ADA, FEHA, and FHA
10 to encumber her with the duty to report and request reasonable
11 accommodation for those disabilities.

12 3. "Plaintiff was forbidden by law from inquiring whether defendant
13 was disabled or to the severity and nature of the
14 disability." (Pltff. Mot. In Lim. p. 5)

15 While 24 § CFR 100.202(c) forbids this inquiry (miscited by
16 plaintiff as §100(c)), it also carves out an exception to allow
17 such inquiry when necessary to **determine** an applicant's ability to
18 meet the requirement of ownership or tenancy." 24 CFR 100.202(c)(1),
19 attached hereto as **Exhibit O**. However, as this section is part of
20 HUD's anti-discrimination regulations, including the duty to
21 reasonably accommodate disabled tenants, **it follows** that a landlord
22 could never evaluate reasonable accommodation unless this exception
23 allows necessary inquiries to comply with the above **anti-**
24 **discrimination** mandates. Finally, plaintiff admits in its motion
25 that it does indeed inquire about its disabled tenants. **Decl. Of**
26 **Moskovitz, p.1, Pltff Mot In.Lim.**³

27 3. **Moskovitz** says her review of tenant files showed 77 disabled.
28 It strains credibility to imagine Moscovitz reviewed her files in
this fashion for only the first time during her employment for

1 4) "Defendant **is** only one of 77 disabled tenants facing
2 **eviction**"(Pltff. Mot. In Lim.p 5)

3 plaintiff cites no authority for contending the above numbers
4 somehow release plaintiff from its duty to deal with defendant in
5 a non-discriminatory **way**, including applying a reasonable
6 accommodation analysis.

7 4. Evidence whether plaintiff had a duty to reasonably
8 accommodate disabled defendant.

9 Assuming **arguendo**, that defendant inadvertently caused a small
10 fire, that fire caused no more than \$450 damage, and defendant was
11 never adequately warned, if warned at all about any prior dangerous
12 behavior. The three relevant anti-discrimination laws require
13 plaintiff to apply a cost benefit accommodation test, whether or
14 not to keep the disabled tenant. Whether such tenancy would
15 constitute a direct threat to the health or safety of other
16 tenants, or result in substantial, property damage is precisely the
17 test plaintiff should have used before beginning this eviction, and
18 also the issue for the fact finder in this case.

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28 plaintiff.

1 a. Plaintiff has not Satisfied its Duty to Reasonably
2 Accommodate Defendant's Disability.

3 Once plaintiff obtained knowledge of defendant's disability,
4 it became subject to the provisions of the **statute.**⁴ Defendant was
5 under no obligation to affirmatively request accommodation.
6 Schmidt v. Safeway, supra, 864 F. Supp. at 997; Ferry v. Roosevelt
7 Bank, 883 F. Supp. 435, 440 (E.D.Mo. 1995).

8 As plaintiff must reasonably accommodate defendant's
9 disability, relevant evidence must be adduced to determine what if
10 any actions would constitute such accommodation. See Roe v. Susar
11 River Mills Associates, 820 F. Supp. 636, 639-40 (D.N.H. 1993)
12 ("[Assuming plaintiff is handicapped, the [Fair Housing Amendments
13 Act] requires defendants to demonstrate that no 'reasonable
14 accommodation' will eliminate or acceptably minimize the risk he
15 poses to other residents . . . before they may evict **him.**") Exhibit
16 N.

17 b. A minimal reasonable accommodation would have been a
18 written warning so that defendant would understand the gravity of'
19 the situation.

20 Defendant's mental and physical disabilities could quite
21 reasonably prevent her from understanding verbal warnings.
22 Plaintiff should have expressed its concerns in **writing,**⁵ giving
23 defendant something to show her doctor, social worker or family
24 member. It also would have provided defendant or others with the

25 4. While defendant denies that she drinks, she admits she
26 suffers from depression and angina. Therefore, plaintiff may not
27 argue that defendant's denial of alcohol frees it- from having to
28 comply with the ADA, FHA and **FEHA.** Schmidt v. Safeway, supra.

29 5. In addition to plaintiff's handbook requiring it to give such
30 a warning. Exhibit A.

information necessary for defendant or others to avoid any problems
by requesting accommodation. Finally, this would allow disabled
tenant to enjoy her tenancy. 20 CFR 100.204(a). Attached hereto as
Exhibit P.

Similarly, before plaintiff may evict defendant, it "must
demonstrate that no 'reasonable accommodation' will eliminate or
acceptably minimize any risk [defendant] poses to other residents."

Roe v. Boulder, 909 F. Supp at 822. Rather than evicting
defendant, plaintiff could bar her from smoking in the building.

While plaintiff "is not required to offer an accommodation that is
likely to be futile," there is no indication here that it would be
futile to bar defendant from smoking inside the building, or to
give defendant a written notice informing her of the gravity of
plaintiff's concerns. Schmidt v. Safeway, supra, 864 F. Supp. at
996.

Furthermore, timely providing defendant with such an
accommodation does not present plaintiff with monetary cost or
other inconvenience. There is no indication that defendant would
present any threat of danger to the livability of the Knickerbocker
after plaintiff reasonably accommodates defendant's disabilities.
Sugar Mills, 820 F. Supp. at 639. Therefore, it is unreasonable
for plaintiff to refuse to make such an accommodation. Therefore,
evidence as to whether plaintiff made any effort to reasonably
accommodate defendant, and if such efforts were appropriate is
crucial to the defense in this case.

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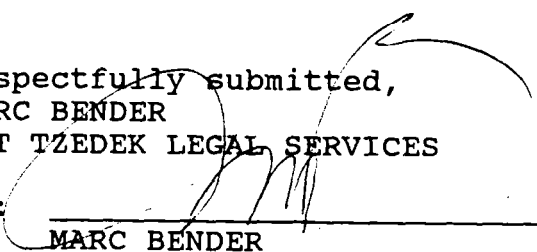
1 5. Evidence whether plaintiff retaliated against a subsidized
2 tenant to avoid paying relocation benefits to subsidized tenants in
3 the face of an impending mass eviction.

4 For over a year, plaintiff has been trying to leave its
5 current subsidy and perhaps exit the subsidy entirely. As a
6 result, plaintiff may "prepay" the mortgage and terminate the low-
7 income tenants at the building. Plaintiff recently noticed its
8 tenants that it may do **exactly that**. Exhibit Q, attached hereto.
9 When plaintiff ceases to provide subsidized housing, it must pay
10 relocation benefits equal to fifty percent of the tenant's
11 relocation costs. See 24 CFR 248.165. Moreover, plaintiff may be
12 required to allow current elderly and disabled tenants to remain
13 for an additional three years. Id . However, plaintiff will not
14 have to pay relocation benefits to tenants who have been evicted
15 for "cause" and may be plaintiff's motive for evicting defendant
16 without cause, or substantial proof thereof, and why plaintiff made
17 no effort to reasonably accommodate her disability.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the foregoing evidence and testimony are
20 probative of affirmative defenses crucial to defendant preserving
21 her subsidized tenancy. Rather than divert, inflame or prejudice
22 the jury, they will instead allow the jury to apply the facts in
23 this case to the law relevant to its disposition.

24 Dated: September 19, 1996.

25 **Respectfully submitted,**
26 **MARC BENDER**
27 **BET TZEDEK LEGAL SERVICES**
28 By: 
MARC BENDER
Attorney for Defendant