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THE CITY OF FRESNO

Exempt from filing fee pursuant to Gov't Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

KAREN MICHELI, *et al.*,

Plaintiffs,

v.

THE CITY OF FRESNO, *et al.*

Defendant.

JACKIE FLANNERY, *et al.*,

Plaintiffs,

v.

THE CITY OF FRESNO, *et al.*

Defendant.

Lead Case No.: 16CECG02937
Consolidated Case No.: 17CECG01724

Assigned for All Purposes to:
Hon. Judge Rosemary McGuire, Dept. 502

NOTICE OF ENTRY OF JUDGMENT

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 27, 2022, the Hon. Rosemary T. McGuire entered the attached Judgment in the above-captioned actions. A true and correct copy of the Judgment, filed on December 27, 2022, is attached hereto as Exhibit 1.

DATED: January 4, 2023

TROPEA MCMILLAN, LLP

Matthew D. McMillan, Esq.
Attorneys for Defendant City of Fresno

EXHIBIT 1

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Attorneys for Defendant
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FILED
DEC 27 2022
FRESNO COUNTY SUPERIOR COURT
By _____ DEPT. 502

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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Hon. Judge Rosemary McGuire, Dept. 502

[~~PROPOSED~~] JUDGMENT

On September 28, 2022, Defendant The City of Fresno's Motion for Summary Judgment or, In the Alternative, Summary Adjudication, came on for hearing before the Honorable Rosemary T. McGuire in Department 502 of the Fresno County Superior Court, Civil Department, located at 1130 "O" Street, Fresno, California 93724-0002. Shehnaz Bhujwala of Boucher, LLP appeared for Plaintiffs and Class Members. Julie Fieber of Cotchett, Pitre & McCarthy, LLP appeared for Plaintiffs and Class Members. Matthew McMillan of Tropea McMillan, LLP appeared for Defendant The City of Fresno.

On September 27, 2022, the Court issued its Tentative Ruling granting Defendant's Motion for Summary Judgment. On October 4, 2022, the Court, having reviewed and considered the supporting and opposing papers to the Motion, and having heard and considered the oral argument of counsel, issued a Law and Motion Minute Order adopting the Tentative Ruling, as Modified, as the Order of the Court. Pursuant to the October 4, 2022 Order and Ruling, the Court granted Defendant's Motion for Summary Judgment, overruled Plaintiffs' objection number 6, overruled all other objections pursuant to Code of Civil Procedure Section 437c, subdivision (q), and vacated the April 17, 2023 trial date. Attached to the Judgment as Exhibit A is a true and correct copy of the Court's October 4, 2022 Law and Motion Minute Order, with the Court's Tentative Ruling as Modified attached thereto, which are incorporated by reference into this Judgment.

The Court previously ruled on Defendant's Demurrer to Plaintiffs' Consolidated Fourth Amended Class Action Complaint, as set forth in the Court's February 26, 2021 Law and Motion Minute Order adopting the Tentative Ruling. Pursuant to the February 26, 2021 Order and Ruling, the Court overruled Defendant's Demurrer as to the entire complaint; sustained Defendant's Demurrer as to Plaintiffs' Inverse Condemnation cause of action, without leave to amend, for failure to state facts sufficient to constitute a cause of action; sustained Defendant's Demurrer as to Plaintiffs' Unjust Enrichment cause of action, with leave to amend, for failure to state facts sufficient to constitute a cause of action; and overruled Defendant's Demurrer as to Plaintiffs' Breach of Implied Warranty cause of action.

On March 8, 2021, Plaintiffs filed their Consolidated Fifth Amended Class Action Complaint alleging individual and class causes of action for Negligence, Private Nuisance, Breach of Contract,

Unjust Enrichment, and Breach of Implied Warranty, and by order dated April 8, 2021, said Unjust Enrichment cause of action was voluntarily dismissed without prejudice.

The Court previously certified Plaintiffs' causes of action for Negligence, Private Nuisance, Breach of Contract, and Breach of Implied Warranty for class action treatment by orders dated July 30, 2021 and August 2, 2021, and notice issued to Class Members before the Court ruled on Defendant's Motion for Summary Judgment.

Now, by reason of the October 4, 2022 Order, Judgment shall be entered in this matter as follows.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. On the Consolidated Fifth Amended Class Action Complaint filed on March 8, 2021, as modified by the Court's April 8, 2021 Order, and the causes of action for Negligence, Private Nuisance, Breach of Contract, and Breach of Implied Warranty set forth therein, as well as Plaintiffs' cause of action for Inverse Condemnation in Plaintiffs' Consolidated Fourth Amended Class Action Complaint to which the Court previously sustained Defendant's demurrer without leave to amend, judgment shall be entered in favor of Defendant The City of Fresno, a California municipal corporation, and against Plaintiffs and Class Representatives in the lead action, Karen Micheli, an individual and as Trustee of the Michael Micheli and Karen Micheli Trust; Michael Micheli, an individual and as Trustee of the Michael Micheli and Karen Micheli Trust; Faith Nitschke, an individual and as Trustee of the Nitschke Family Trust of 2000; David Nitschke, an individual, and as Trustee of the Nitschke Family Trust of 2000; and Jeanette Grider, an individual; and against Plaintiffs and Class Representatives in the consolidated action, Jackie Flannery, an individual; Guadalupe Meza, an individual; Ronda Rafidi, an individual; Shann Hogue (formerly known as Shann Conner), an individual; Marirose Larkins, an individual; Patricia Wallace-Rixman (also known as Patty Wallace-Rixman), an individual; Harry Rixman, an individual; and Kelly Unruh, an individual and as Trustee of the Kelly D. Unruh Living Trust. Plaintiffs shall receive nothing from Defendant The City of Fresno.

2. On the Consolidated Fifth Amended Class Action Complaint filed on March 8, 2021, as modified by the Court's April 8, 2021 Order, and the certified class causes of action for Negligence, Private Nuisance, Breach of Contract, and Breach of Implied Warranty set forth therein, judgment shall

be entered in favor of Defendant The City of Fresno, a California municipal corporation, and against members of the Class and Subclasses in the lead action and consolidated action ("Class Members"), defined as follows:

> All owners of residential, single-family real property located within the City of Fresno's Discolored Water investigation area (from E. Copper Avenue to E. Sierra Avenue, and from State Route 41 to N. Willow Avenue), who, anytime between January 1, 2016 and August 2, 2021: (1) had galvanized iron plumbing; (2) received water service from the City of Fresno; (3) reported discolored, "rusty" water at that address to the City of Fresno; and (4) have not released their claims against the City of Fresno ("Class").
>
> All owners of residential, single-family real property located within the City of Fresno's Discolored Water investigation area (from E. Copper Avenue to E. Sierra Avenue, and from State Route 41 to N. Willow Avenue), who, anytime between January 1, 2016 and August 2, 2021: (1) had galvanized iron plumbing; (2) received water service from the City of Fresno; (3) reported discolored, "rusty" water at that address to the City of Fresno; (4) obtained water quality test results from the City of Fresno indicating iron at any tested fixture above 0.3 mg/L; and (5) have not released their claims against the City of Fresno ("Subclass 1").
>
> All owners of residential, single-family real property located within the City of Fresno's Discolored Water investigation area (from E. Copper Avenue to E. Sierra Avenue, and from State Route 41 to N. Willow Avenue), who, anytime between January 1, 2016 and August 2, 2021: (1) had galvanized iron plumbing; (2) received water service from the City of Fresno; (3) reported discolored, "rusty" water at that address to the City of

Fresno; (4) have not obtained water quality test results from the City of Fresno; and (5) have not released their claims against the City of Fresno ("Subclass 2").

Class Members shall be bound by this Judgment and shall receive nothing from Defendant The City of Fresno.

3. A total of 39 individuals submitted valid requests to be excluded from the Class and Subclasses in this action. Those individuals will not be bound by the Judgment. A list of those individuals who submitted valid requests for exclusion, and therefore are not bound by the Judgment, is attached to this Judgment as Exhibit B.

4. Notice of the Judgment (and any amendment or modification thereto), shall be given to the class in the manner provided herein, pursuant to California Rules of Court, rule 3.771(b). Within 30 days of service of notice of entry of judgment, the court-appointed class notice administrator in this action, CPT Group, Inc. ("Notice Administrator"), shall post the Notice of Entry of Judgment to the class notice website, www.cptgroupcaseinfo.com/DiscoloredWaterLawsuit. Within 30 days of service of notice of entry of judgment, Defendant shall post such notice on Defendant's Department of Public Utilities website, under Announcements (www.fresno.gov/publicutilities/announcements/), for 180 days after entry of judgment.

5. Pursuant to Code of Civil Procedure Sections 1032 and 1033.5, Defendant The City of Fresno is the prevailing party and is entitled to recover its costs in the amount of $_____ from Plaintiffs, to be determined by a Memorandum of Costs which Defendant may hereinafter file and any motion to tax costs Plaintiffs may file in response thereto, as provided in the California Rules of Court, Rule 3.1700.

6. Any request for defense costs pursuant to Code of Civil Procedure section 1038, including reasonable attorneys' fees and expert witness fees, will be subject to a filed and noticed motion in this matter.

Dated: December 27, 2022

Rosemary T. McGuire

Honorable Rosemary T. McGuire
Judge of the Superior Court of California

Exhibit A

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Karen Micheli vs. The City of Fresno / LEAD CASE / CLASS ACTION**	
LAW AND MOTION MINUTE ORDER	Case Number: **16CECG02937**

Hearing Date: **October 4, 2022** From Chambers: **Ruling on Summary Judgment**
Department: **502** Judge: **McGuire, Rosemary**
Court Clerk: **Sam Garcia** Reporter/Tape: **Not Reported**

Appearing Parties:

Plaintiff: Defendant:

Counsel: **No Appearances** Counsel: **No Appearances**

[ ] Off Calendar

[ ] Continued to [ ] Set for __ at __ Dept. __ for __

[ ] Submitted on points and authorities with/without argument. [] Matter is argued and submitted.

[ ] Upon filing of points and authorities.

[ ] Motion is granted [ ] in part and denied in part. [ ] Motion is denied [ ] with/without prejudice.

[x] The matter having been under advisement, the court now rules as follows: After review and consideration the Court Adopts the Tentative Ruling as Modified.

[ ] Demurrer [ ] overruled [ ] sustained with __ days to [ ] answer [ ] amend

[x] Tentative ruling as Modified becomes the order of the court. No further order is necessary.

[x] Pursuant to CRC 3.1312(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

[x] Service by the clerk will constitute notice of the order.

[x] See attached copy of the Tentative Ruling as Modified.

[ ] Judgment debtor __ sworn and examined.

[ ] Judgment debtor __ failed to appear.
Bench warrant issued in the amount of $ __

JUDGMENT:
[ ] Money damages [ ] Default [ ] Other __ entered in the amount of:
Principal $__ Interest $__ Costs $__ Attorney fees $__ Total $__
[ ] Claim of exemption [ ] granted [ ] denied. Court orders withholdings modified to $__ per __

FURTHER, COURT ORDERS:
[ ] Monies held by levying officer to be [ ] released to judgment creditor. [ ] returned to judgment debtor.
[ ] $__ to be released to judgment creditor and balance returned to judgment debtor.
[ ] Levying Officer, County of __, notified. [ ] Writ to issue
[ ] Notice to be filed within 15 days. [ ] Restitution of Premises
[ ] Other: __

Tentative Ruling

Re: ***Micheli v. City of Fresno***
Superior Court Case No. 16CECG02937/Lead

Hearing Date: September 28, 2022 (Dept. 502)

Motion: By Defendant for summary judgment, or alternatively, summary adjudication

Tentative Ruling:

To grant the motion for summary judgment. (Code of Civ. Proc., § 437c, subd. (c).) Defendant City of Fresno is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment ruling.

To overrule plaintiffs' objection number 6. All other objections are overruled pursuant to Code of Civil Procedure, section 437c, subdivision (q).

To vacate the April 17, 2023 trial date.

Explanation:

Summary Judgment/Adjudication

A trial court shall grant summary judgment where there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., §437c, subd. (c); *Schacter v. Citigroup* (2009) 47 Cal.4th 610, 618.) In determining a motion for summary judgment or adjudication, "'we view the evidence in the light most favorable to plaintiffs'" and "'liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor.'" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97, citations omitted.)

The court does not weigh evidence or inferences (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856), nevertheless, "'[w]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647, citation omitted; Code Civ. Proc., § 437c, subd. (c).)

In addition, "when discovery has produced an admission or concession on the part of the party opposing summary judgment which demonstrates that there is no factual issue to be tried, certain of those stern requirements applicable in a normal case are relaxed or altered in their operation." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.)

The City reduces plaintiffs' claim to harm suffered by " 'aggressive, corrosive, degraded, and substandard' drinking water." (Defendant's Undisputed Material Facts (UMF) 1.) However, plaintiffs have alleged harm and injuries as a result of City's alleged failure to comply with applicable regulatory schemes including the California Safe Drinking Water Act and its implementing regulations concerning testing, treatment, notification, and reporting, and Health and Safety Code section 116550, subdivision (a) by allegedly failing to operate the NESWTF with mandated corrosion control treatment in violation of its water permit. (5AC ¶ 3.) Plaintiffs also allege exposure to excessive levels of lead and other toxic substances.

Nevertheless, plaintiffs repeatedly describe their alleged harm as "diminution of their property value, other economic harm including the cost of re-plumbing their home ...." (See 5AC, ¶¶ 11, 13, 15, 17 - 25.) In addition, plaintiffs' discovery responses state that: "this is not an action for violations of numeric drinking water standards" and "...Plaintiffs' Negligence and Nuisance claims are not premised upon the City's violation of a mandatory duty to comply with a numeric drinking water standard." (City's Appx. Ex. 15, 27.)

Plaintiffs' discovery responses also identified that documentation of City's agreement to provide water service that complies with applicable regulations and statutes was premised on the federal and California Safe Drinking Water Acts and federal and California Lead and Copper Rules. (UMF 9.) Plaintiffs' response to City's contention is also addressed in discovery responses (Plaintiffs' Additional Material Facts (AMF) 897), which essentially state that the alleged contract and breach arise from the objective standards pursued by the state and federal statutory schemes:

> The City failed to provide Plaintiffs with potable, clean, safe, reliable, non-corrosive, and non-harmful drinking water that complied with applicable drinking water regulations and statutes, including the federal and California state Safe Drinking Water Acts and federal and California state Lead and Copper Rules. The City materially and irreparably breached the contracts with Plaintiffs by failing to provide non-corrosive, non-harmful, potable, clean, reliable and safe water, and instead provided substandard and degraded water that was unfit for use by Plaintiffs in Plaintiffs' homes. The approximate date of the City's first breach is the date the City's Northeast Surface Water Treatment Facility came online and the City added surface water to its existing groundwater supply, in 2004. The City's breach was ongoing each day the City failed to provide Plaintiffs with non-corrosive, non-harmful, potable, clean, reliable and safe water that destroyed their residential plumbing and caused lead and other contaminants to leach into the water supplied through the taps in Plaintiffs' homes.
>
> Plaintiffs AMF 897. City's Evid. Ex 2, p. 15:1-11

In other words, plaintiffs seek recovery based on terms such as potable, clean, safe, reliable, non-corrosive, non-harmful as those terms are used to state statutory and regulatory objectives, i.e. those terms are not contractual duties. (*Arthur L. Sachs, Inc. v. City of Oceanside* (1984) 151 Cal.App.3d 315, 322 ["Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the

pleading or relief demanded."].) Furthermore, " 'recitations of legislative goals and policies' do not establish mandatory duties." (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 692 (*Groundwater Cases*); *Paredes v. County of Fresno* (1988) 203 Cal.App.3d 1, 12 [words such as " 'pure, wholesome, and potable' or 'pure, wholesome, healthful, and potable'" are goals to which actionable specific standards are set].)

Plaintiffs originally alleged in their pleadings that City conducted sampling at a "few residences" and detected the presence of lead. In their opposition to summary judgment, plaintiffs offer the deposition testimony of Thomas Esqueda – City's former Director of Utilities, who testified that lead was detected at a "number of residences." (AMF 938, Plts Appx. p. 45.) Although City has produced findings by the United States Environmental Protection Agency ("EPA") that the lead levels met the relevant numeric standards, plaintiffs argue - and thus clarify – that their theory of liability arises not from technical compliance with the EPA findings, which they disregard as "irrelevant," but because they "allege the City's violations of other mandatory duties imposed on it that caused Plaintiffs and Class members harm." (Opp. at p. 33:7-9.)

Accordingly, plaintiffs' alleged theories of liability all turn on whether a mandatory duty existed, plaintiffs were within the zone of protection of the mandatory duty, and City's breach of the mandatory duty caused plaintiff's harm. (See *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498-499, (*Haggis*).)

At the hearing, plaintiffs argued that the court's rulings on demurrer challenging the pleadings invoke the doctrine of the law of the case. The court disagrees. Sufficiently alleging claims for purposes of demurrer does not require the submission of admissible evidence as does a motion for summary judgment. The court's assessment of the evidence and whether there exists a triable issue of fact guides the court in its ruling on summary judgment, not whether the *allegations* support the claims asserted.

Government Code section 815.6

"It is settled that public entities ... are not liable in tort except as provided by statute." (*Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 990.) "Sovereign immunity is the rule in California. Governmental liability is limited to exceptions specifically set forth by statute." (*Colome v. State Athletic Com.* (1996) 47 Cal.App.4th 1444, 1454-1455; *In re Groundwater Cases, supra,* 154 Cal.App.4th at p. 688; *Sonoma AG Art v. Department of Food & Agriculture* (2004) 125 Cal.App.4th 122, 125.)

Accordingly, "[e]xcept as otherwise provided by statute ... [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.)

"A plaintiff seeking to hold a public entity liable under Government Code section 815.6 must specifically identify the statute or regulation alleged to create a mandatory

duty." (*In re Groundwater Cases, supra,* 154 Cal.App.4th at p. 689.) In addition, "Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered." (*State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 854, citations omitted; *Haggis, supra,* 22 Cal.4th at pp. 498-499.)

Mandatory Duties and Administrative Discretion

For section 815.6 to apply the enactment at issue must be "*obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." (*Haggis, supra,* 22 Cal.4th at p. 498; see also *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 862-863 [statutes and regulations requiring levee projects be *designed and constructed* in accordance with a federal manual did not create a mandatory duty in levee *maintenance*].) In essence, "the imposition of a 'mandatory duty' ... 'must *require* ... that a particular action be taken or not taken.'" (*Id.* at p. 863, citation omitted.)

Furthermore, general provisions do not create a mandatory duty under Government Code section 815.6. (*Groundwater Cases, supra,* 154 Cal.App.4th at p. 687.) Neither do isolated exceedances of regulatory standards (i.e. Maximum Contamination Levels ("MCL")) demonstrate violations of a mandatory duty, to the extent one exists. (*Ibid.*)

In *Haggis, supra,* 22 Cal.4th 490 the plaintiff sued to recover for compensation for property damage, loss of use and value of real property, and emotional distress, after his house was damaged by the 1994 Northridge earthquake. The plaintiff alleged his house was constructed on an unstable bluff in Pacific Palisades, and in 1966 the defendant City of Los Angeles had issued notices to the then owner to stabilize the property under a municipal ordinance. The same ordinance also required the city to record with the county recorder a "certificate of substandard condition," but the city failed to do so. (*Haggis, supra,* 22 Cal.4th at p. 496.) Accordingly, when the plaintiff purchased the property in 1991, the property's geologic instability was not apparent visually nor was it apparent from the title report because the city had never recorded the required substandard condition. The California Supreme Court held that the subject ordinance used "obligatory" language requiring the city to record a certificate of substandard condition once that determination was made. Since the city had made the predicate determination (twice, in 1966 and 1970), the ordinance "commanded" recording of the certificate – a mandatory duty was thus created. (*Id.* at p. 502.)

In *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, the plaintiffs were residents of a mobile home park who alleged the park's water had been contaminated with dangerously high levels of naturally occurring fluoride. The plaintiffs alleged the defendant county was liable under Government Code section 815.6 for breaching mandatory duties imposed by the California Safe Drinking Water Act, and its implementing regulations. Specifically, the plaintiffs identified regulations which required

the defendant county to review reports submitted by the park's owner, all of which showed contamination, and report those violations to the California Department of Health Services. (*Id.* at p. 992.) The California Supreme Court had previously rejected an implied mandatory duty by the park owner to alert his customers to the elevated fluoride and remanded the matter to the court of appeal to determine if an express mandatory duty existed. The court of appeal held that such a duty existed, given obligatory language used in the statute requiring the defendant county to review the reports by the park operator. (*Id.* at p. 993 [noting the absence of discretion with the statute's review requirements].)

Nevertheless, for purposes of establishing liability under Government Code section 815.6, "if the predicate enactment confers the exercise of discretion on government officials, the use of 'shall' and like words will not alone support liability under the California Tort Claims Act." (*Sutherland v. City of Fort Bragg* (2000) 86 Cal.App.4th 13, 20.)

Plaintiffs identify subdivision (a) of Health and Safety Code section 116550 as imposing the obligatory duty allegedly violated by City when it allegedly acted outside the scope of its permit when it added corrosion control treatment in 2012 and when it allegedly failed to include all customer complaints in its report to the State Board. (See Opp. at pp. 35-37.)

Health and Safety Code section 116550 provides that: "(a) No person operating a public water system shall modify, add to or change his or her source of supply or method of treatment of, or change his or her distribution system as authorized by a valid existing permit issued to him or her by the department unless the person first submits an application to the department and receives an amended permit as provided in this chapter authorizing the modification, addition, or change in his or her source of supply or method of treatment. (b) Unless otherwise directed by the department, changes in distribution systems may be made without the submission of a permit application if the changes comply in all particulars with the waterworks standards."

The Department of Health Services has been delegated by the legislature "the initial and primary authority, and the corresponding responsibility, for establishing drinking water standards." (See *Western States Petroleum Ass'n v. Department of Health Services* (2002) 99 Cal.App.4th 999, 1008.) In addition there are specific procedures for adjudicating compliance with a permit. (See Health & Saf. Code, § 116625.)

Considering that the legislature has vested "initial and primary" authority in the Department of Health, and the existence of a specific statutory mechanism for adjudicating compliance with a permit, it is not clear that, as a matter of law, section 116550 imposes an "obligatory" duty on City sufficient to constitute a "mandatory" duty for purposes of Government Code section 815.6. In other words, the availability of discretionary amendment procedures and a hearing process for alleged violations implies a level of discretion and permissiveness distinguishable from obligation.

Nevertheless, casting plaintiffs' opposition in the most favorable light, and assuming that such a duty is imposed, there is insufficient support for the other prongs to create a triable issue regarding liability under Government Code section 815.6.

Mandatory Duties and the Zone of Protected Interests

"The plaintiff must show the injury is ' "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty."' " (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 861.) As the California Supreme Court held in *Haggis, supra,* 22 Cal.4th 490, "[s]econd, *but equally important,* section 815.6 requires that the mandatory duty be 'designed' to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is ' "one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty."' " (*Id.* at p. 499, emphasis added.)

In essence, "[i]f the predicate enactment is of a type that supplies the elements of liability under section 815.6—if it places the public entity under an obligatory duty to act or refrain from acting, with the purpose of preventing the specific type of injury that occurred—then liability lies against the agency under section 815.6, regardless of whether private recovery liability would have been permitted, in the absence of section 815.6, under the predicate enactment alone." (*Haggis, supra,* 22 Cal.4th. at p. 500.)

In *Haggis, supra,* the California Supreme Court held that the plaintiff could not satisfy the second element for liability under Government Code section 815.6 because the purpose of the predicate ordinance was to encourage the landowner to conduct necessary stabilization work through the pressure of a recorded instrument. Any benefit or warning to potential purchasers would be "incidental" and thus not actionable. In other words, the subject ordinance existed to "protect the public against unsafe building and land conditions, not to regulate the marketing of real estate." (*Haggis, supra,* 22 Cal.4th at p. 503.)

Following the precedent of *Haggis,* the court in *Sutherland v. City of Fort Bragg, supra,* 86 Cal.App.4th 13, granted a city's motion for judgment on the pleadings. In *Sutherland,* the plaintiffs, who owned a commercial and residential two story building, alleged that the defendant city had failed to conduct a mandatory review of "site and architectural" provisions which resulted in the city's granting of a building permit for a neighboring building which blocked the air, light, and a fire escape of the plaintiffs' building. The blocked fire escape was a violation of the Uniform Fire Code. Tenancy plummeted and the loss of rental income caused plaintiffs to lose the building to foreclosure.

The *Sutherland* court followed *Haggis* and reasoned that the predicate enactment did not confer a mandatory duty because: 1) it governed general aesthetic aspects, 2) the zone of protected interests did not include the plaintiff's injury because the purpose of the predicate enactment was not to consider whether a proposed building conformed to fire and safety standards, and 3) given the amount of discretion afforded, it was too remote to find that the lack of site and architectural review would have secured the relief the plaintiffs sought. (*Sutherland, supra,* 86 Cal.App.4th at pp. 22-24.) Finally, the *Sutherland* court also noted that the Uniform Fire Code violation created by the blocked fire escape did not impose upon the city "any duty to shoulder the correction of code violations; that is the responsibility of the property owner." (*Id.* at p. 24.)

In *Guzman, supra,* 178 Cal.App.4th 983, the plaintiffs alleged their water operator allowed them to consume drinking water containing up to 4 times the limit of fluoride over the course of seven years, which resulted in pain and suffering and in injuries to their bodies and nervous systems, skeletal structures ...." (*Id.* at p. 990.) The court held the alleged personal injuries - at least for purposes of satisfying the minimal pleading standards in determining a demurrer - placed the plaintiffs within the zone of protected interests. (*Id.* at p. 995.)

The California Safe Drinking Water Act states: "[i]t is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that when present in drinking water may cause cancer, birth defects, and other chronic diseases." (Health & Saf. Code § 116270, subd. (d).) "The SDWA was meant to reduce to the lowest level feasible all concentrations of toxic chemicals in drinking water that may cause cancer, birth defects and other chronic diseases." (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 704.)

Unlike the bodily harm and injuries to nervous and skeletal systems alleged in *Guzman*, plaintiffs here repeatedly describe their alleged harm as "diminution of their property value, other economic harm including the cost of re-plumbing their home ...." (See 5AC, ¶¶ 11, 13, 15, 17 - 25.) In addition, plaintiffs' discovery responses stated that: "this is not an action for violations of numeric drinking water standards" and "...Plaintiffs' Negligence and Nuisance claims are not premised upon the City's violation of a mandatory duty to comply with a numeric drinking water standard." (City's Appx. Ex. 15, 27.) Similarly, to the extent plaintiffs attribute their property damage to implementation of corrosion inhibitors outside the scope of permission (see Response to MF 31), recovery for property damage is not consistent with the stated legislative purpose.

The stated objective of the statutory schemes asserted as a basis for liability are premised on reducing health risks that "cause cancer, birth defects, and other chronic diseases," (Health & Saf. Code § 116270.) Potential recovery for property damage is thus incidental. (*Haggis, supra,* 22 Cal.4th at p. 503; see also *Tuthill v. City of Buenaventura* (2014) 223 Cal.App.4th 1081, 1093 ["Plaintiffs fail to demonstrate that any of the provisions they rely on ... was intended to protect ineligible purchasers from economic losses."].)

Therefore, plaintiffs have not met their burden to show their injuries are within the zone of protected interests contemplated by the legislature in drafting the predicate statutes.

Mandatory Duties and Causation

The breach of the mandatory duty must be a proximate cause of the injury suffered." (*State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 854, citations omitted; Haggis, supra, 22 Cal.4th at pp. 498-499.) Furthermore, *Groundwater Cases, supra,* 154 Cal.App.4th 659 held that "isolated" - as opposed to "continue[d]" - "exceedances" are insufficient to show a violation of a mandatory duty under Government Code section 815.6 because isolated exceedances do not require an immediate cessation of water delivery. (*Id.* at p. 684.) Consequently, although the defendant exceeded a maximum contaminant level ("MCL"), because the Department of Health Services ("DHS") possessed authority to allow continued water delivery despite

the exceedance, the plaintiffs had not met the required showing of a violation of a mandatory duty sufficient to allege liability under the Government Tort Claims Act. (*Id.* at pp. 685-686.)

In addition, the governing statutes here provide a specific procedure, delegated to the Department of Health Services, for determining compliance with a permit. In particular, Health and Safety Code section 116625 provides that "The state board, after providing notice to the permittee and opportunity for a hearing, may suspend or revoke any permit issued pursuant to this chapter if the state board determines pursuant to the hearing that the permittee is not complying with the permit, this chapter, or any regulation, standard, or order issued or adopted thereunder, or that the permittee has made a false statement or representation on any application, record, or report maintained or submitted for purposes of compliance with this chapter." And primary authority is delegated to the Department of Health Services. (See *Western States Petroleum Ass'n v. Department of Health Services, supra,* 99 Cal.App.4th at p. 1008.)

Plaintiffs argue that the City violated its permit when it installed corrosion control treatment during annual plant shutdowns between 2006 and 2011. The basis for that position is a public presentation at a City of Fresno public meeting on August 17, 2016. (AMF 893, Ev. 36.) This was confirmed by previous assistant public utilities director Lon Martin and Chief of Operations Ken Heard. (*Ibid.*) Plaintiffs argue that City "routinely" took the surface water plant offline and supplied service area customers "sometimes [with] surface water and sometimes groundwater ...." (AMF 892.) However, the cited testimony does not state a "routine" practice, or continual deviation, but rather identifies isolated instances, such as an electrical problem or other problem with the plant or maintenance by the operator of the Enterprise Canal. (See Plaintiffs' Appx. Ex. 30, pp. 46:8-12; 47:9-10 [Bud Tickel deposition].)

The City has provided evidence that between 2004 and June 2022 the State Board did not issue a written citation or compliance order, nor a violation of the City's water permit. (UMF 44.) Plaintiffs' object, asserting only that City's contention is not supported by evidence, and refer generally to their evidentiary objection number 6. Evidentiary objection number 6 challenges the foundation (among other grounds) of that part of Little's Declaration where he claims, based on personal knowledge and a diligent search of records between 2004 and the present, the State Board did not issue a written citation of compliance order. The objection is overruled.

The City references the State Board's granting of a water supply permit amendment effective June 27, 2005 to show that it met the benchmark standard for optimized corrosion control. (See Declaration of Robert Little (Little Decl.), Ex 4.) As noted in the EPA's January 2017 finding, the 2005 permit amendment required City to operate the NESWTP pursuant to its June 2004 plant operating plan, which included corrosion control treatment involving pH adjustment and the addition of corrosion inhibitors. (Little Decl., Ex. 1, at p. 6.) The City also references the January 19, 2017 letter from USEPA which states: "We assessed compliance with the LCR action level of 0.015 mg/L for lead in drinking water and conclude that lead concentrations based upon the LCR regulatory sampling were consistently low and that the City is in compliance with the LCR action level for lead." The Summary of Findings (Little Decl., Ex. 1, at p. 5) states "The City is in compliance with the AL [Action Level] for lead 1993-2015."

Although plaintiffs assert the City's installation of corrosion control treatment at seven pumps during the annual plant shutdowns from 2006 to 2011 exceeded the scope of the permit (AMF 893), there is no finding by the EPA that there were permit violations. Similarly, although plaintiffs cite to a letter from the State Water Resources Control Board dated August 9, 2016, that mentions the City violated regulatory required monthly reporting of customer complaints because not all complaints were being tracked (AMF 895, Ex. 37), there is no evidence that the Department of Health Services found any permit violation or pursued an action under Health & Safety Code section 116625.

Assuming a mandatory duty exists, there is insufficient evidence presented to create a triable issue as to breach or causation. Plaintiffs' action is based on alleged violations of legislative enactments designed to protect public health. Plaintiffs are unable to present a triable issue of fact that the damage allegedly suffered is one of the consequences the enacting body sought to prevent in imposing the mandatory duty.

In light of the court's ruling granting summary judgment on the issues discussed above, the court declines to address the City's argument that plaintiffs' claims are barred by the statute of limitations.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: RTM **on** **10/4/22** .
(Judge's initials) (Date)

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	*FOR COURT USE ONLY*
TITLE OF CASE: Karen Micheli vs. The City of Fresno / LEAD CASE / CLASS ACTION	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 16CECG02937

I certify that I am not a party to this cause and that a true copy of the:

MINUTE ORDER FROM CHAMBERS/TENTATIVE RULING

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 10/04/2022 Clerk, by _____, Deputy

S. Garcia

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Los Angeles, CA 90071

☐ Clerk's Certificate of Mailing Additional Address Page Attached

Exhibit B

Micheli v. City of Fresno Opt-Out Requests		
ClaimNo	Name	Opt-Out
1	Temby, Frederick Elroy	TRUE
2	Rohlfing, Geoffrey Dahz	TRUE
3	Riterbush, Karl M.	TRUE
4	Koogler, Mark & Dori	TRUE
5	Tuck, James William	TRUE
6	Repar, Rosemary	TRUE
7	Edwards Mcdougall, Claudine	TRUE
8	Johnson, Emma	TRUE
9	Chunn, Pamela Kay	TRUE
10	Haymond, Diane	TRUE
11	Park, Kenneth K.	TRUE
12	Jason, Linda	TRUE
13	Keir, Marjorie	TRUE
14	Tomlinson, Colleen	TRUE
15	Duong, Tuan Quoc	TRUE
16	Gowen, David	TRUE
17	Tsuchiguchi, George	TRUE
18	Young, Steven Moller	TRUE
19	Blankenship, Shana	TRUE
20	Matson, Sharon Marie	TRUE
21	Alley, Nancy Jane	TRUE
22	Siemens, Glenn D.	TRUE
23	Siemens, Kristin D.	TRUE
24	Ackerman, Annette	TRUE
25	McIntyre, Kristin J.	TRUE
26	Nora, Tim	TRUE
27	Aleses, Emad	TRUE
28	Wright, Della M.	TRUE
29	Garza, Mary	TRUE
30	Jenkins, Rose	TRUE
31	Case, Allen R.	TRUE
32	Afifi, Ruth Ann	TRUE
33	Castro, Loreto	TRUE
34	Bonesteel, Cecelia	TRUE
35	Overall, Caryl	TRUE
36	Lepper, Mary	TRUE
37	Laloian, Bryan L.	TRUE
38	Rimawi, Leen Rasheed Amireh	TRUE
39	Goodrich, Christine	TRUE

Proof of Service

Karen Micheli, et al. v. The City of Fresno, et al. (Lead Case)
Jackie Flannery, et al. v. The City of Fresno, et al. (Consolidated Case)
16CECG02937 (Lead Case)
17CECG01724 (Consolidated Case)

I, the undersigned, declare: I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is 4747 Morena Blvd., Suite 250A, San Diego, California 92117. I served a copy of the following document(s):

[PROPOSED] JUDGMENT

☐ (BY MAIL) I caused each such envelope to be sealed and placed for collection and mailing from my business address. I am readily familiar with Tropea McMillan LLP's practice for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business mail is deposited with the postage thereon fully prepaid in the United States Postal Service the same day as it is placed for collection. I am aware that upon motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit. Service by this method was sent to:

☐ (BY OVERNIGHT MAIL) I am readily familiar with the practice of Tropea McMillan LLP for the collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained for overnight delivery. Service by this method was sent to:

☐ (BY FACSIMILE) This document was transmitted by facsimile transmission from (858) 533-8813 and the transmission was reported as complete and without error. I then caused the transmitting facsimile machine to properly issue a transmission report confirming the transmission.

☒ (BY ELECTRONIC TRANSMISSION) This document was transmitted by electronic transmission from rvargas@tropeamcmillan.com and the transmission was reported as complete and without error. I then caused the transmitting e-mail account to properly issue a report confirming the electronic transmission. Service by this method was sent to:

SEE ATTACHED SERVICE LIST

☐ (BY PERSONAL SERVICE) I caused each such envelope to be sealed and given to a courier for delivery on the same date. A proof of service signed by the authorized courier will be filed forthwith.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 19, 2022, at San Diego, California.

/s/ Rebecca Vargas
Rebecca Vargas

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Proof of Service

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Jackie Flannery, et al. v. The City of Fresno, et al. (Consolidated Case)
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17CECG01724 (Consolidated Case)

I, the undersigned, declare: I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is 4747 Morena Blvd., Suite 250A, San Diego, California 92117. I served a copy of the following document(s):

NOTICE OF ENTRY OF JUDGMENT

☐ (BY MAIL) I caused each such envelope to be sealed and placed for collection and mailing from my business address. I am readily familiar with Tropea McMillan LLP's practice for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business mail is deposited with the postage thereon fully prepaid in the United States Postal Service the same day as it is placed for collection. I am aware that upon motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit. Service by this method was sent to:

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SEE ATTACHED SERVICE LIST

☐ (BY PERSONAL SERVICE) I caused each such envelope to be sealed and given to a courier for delivery on the same date. A proof of service signed by the authorized courier will be filed forthwith.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 4, 2023, at San Diego, California.

/s/ Rebecca Vargas
Rebecca Vargas

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