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BASTA, Inc. is a California public benefit corporation and federally registered non-profit organization that advocates for tenants' rights and fights to eliminate substandard housing.
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October 18, 2013

Chief Justice Tani Gorre Cantil-Sakauye
California Supreme Court
350 McAllister St.
San Francisco, CA 94102-4797

Re: Request for depublication of *Hendleman v. Los Altos Apartments, LP*
Court of Appeal case no: No. B235404, Second District, Division Three

Dear Justice Cantil-Sakauye:

The Court of Appeal's opinion in *Hendleman v. Los Altos Apartments, LP,* should not be published. It creates significant confusion about the law governing the warranty of habitability by departing from analogous bodies of law and failing to reconcile its reasoning with those doctrines. Section 2(b) of the opinion, in particular, creates confusion in two ways. First, it instructed courts to employ a subjective standard for determining whether a landlord's violations of housing codes are substantial. Courts should employ an objective standard. Second, the opinion confuses the standards governing when a tenant can sue a landlord for damages with the standards governing when a tenant can withhold rent. It is well established that any breach of a contract supports an action for damages, but only a substantial breach excuses the non-breaching party from continuing to perform the contract. These ambiguities create more confusion than clarity and, therefore, the opinion should not be published.

I request depublication of this opinion because my organization, BASTA, Inc., litigates cases that revolve around the warranty of habitability. The warranty of habitability provides a defense to many of the scores of unlawful detainer actions we defend in Los Angeles County each month. It also provides the basis for large-scale suits brought against slumlords. Many of these large-scale lawsuits have been certified as class actions based on building-wide infestations of insects, wholesale failures to provide heat or water, and other conditions affect common areas that all tenants share. The class action procedure protects the most fearful and vulnerable tenants of slum housing. These tenants frequently endure substandard conditions because they fear the consequences of complaining. They do not believe they deserve better. As class action cases

progress, these people see improvements in their living conditions. Slumlords facing a class action tend to repair *all* of the apartments, not just the apartments occupied by named plaintiffs. Tenants who were once fearful begin to trust that our legal system can protect them. The cases themselves become concrete demonstrations that equal protection of the law is actually possible. The *Hendleman* opinion and its ambiguous, confusing statements of the law applied to a luxury apartment building should not disrupt this progress. Instead, the law should develop with opinions that examine more typical facts and analyze the applicable law directly and explicitly.

First, the *Hendleman* opinion confuses objective and subjective standards.

The *Hendleman* opinion employed a subjective standard for determining whether a landlord's breach of its duties is substantial. The application of this subjective standard is particularly inappropriate for a published opinion because the Court of Appeal did not explicitly state that it was employing this subjective standard. Instead, it did so implicitly, holding:

> Whether and how each tenant is affected by the alleged code violations and service reductions, and the extent and type of harm suffered, so as to establish that these conditions are "substantial" and thus actionable, is not subject to common proof.

Opinion at 13.

The focus in the Hendlman opinion on the subjective experiences of the tenants departs from analogous bodies of law. For example, claims based on nuisance and the breach of the warranty of habitability often overlap. *See, e.g., Stoiber v. Honeychuck* (1980) 101 Cal. App. 3d 903. Both nuisances and breaches of the warranty of habitability are also evaluated on a case-by-case basis.[1]

Even though every nuisance is evaluated on a case-by-case basis, each case of an alleged nuisance is judged by objective standards. *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal. App. 4th 263, 303 (citations omitted). Thus, "the question is not whether the particular plaintiff found the invasion unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable." *Id.* Even when determining whether a plaintiff has been harmed substantially, "[t]he degree of harm is to be judged by an objective standard[.]" *Id.* Thus, "[i]f normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him." *Id.*,

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[1] The Court of Appeal appears to have justified its endorsement of subjective criteria on the conclusion "that whether a defect or code violation is sufficiently substantial to constitute an actionable breach is determined on a case by case basis." Opinion at 11. Evaluating buildings (or nuisance conditions) on a case-by-case basis does not mean evaluating the case of each person who lives in the building (or encounters the nuisance) separately and subjectively. It means objectively evaluating each dilapidated building (or nuisance) independently of any other dilapidated building.

quoting Rest.2d Torts, § 821F, com. d, p. 106.[2]

The Court of Appeal in *Hendleman*, however, implied that idiosyncratically tolerant or oblivious tenants have no cause of action (as opposed to no damages) even if the same condition would affect the reasonably tenant:

> While the trial court recognized that the fire safety defects affected everyone in the building and three LAHD inspectors declared that the cited violations affected every apartment in the building, the evidence supports the trial court's finding that the alleged code violations and service reductions do not affect all of the tenants in the same manner or to the same degree.

Opinion at 12-13.

The Court of Appeal did not explain why the idiosyncratic experiences of class members would be relevant to whether the breach of the warranty of habitability was substantial. An objective analysis would ask whether the reasonable tenant would find the code violations a substantial problem. It would have rendered all of the landlords' declarations from tenants about their subjective experiences irrelevant at the class certification stage.

Applying an objective standard is particularly important for defects like those in a building's fire safety systems. Few people ever notice a smoke detector that does not work. A working smoke detector is just as silent as a malfunctioning smoke detector. Nevertheless, the objective market value of a an apartment with a working smoke detector is higher than the objective market value of an apartment with no working smoke detector.[3] Whether tenants paid for safety features that they did not receive would appear to be a typical class action where a large number of people suffered small economic injuries.

Using an objective standard to evaluate whether a landlord's violation of housing codes is substantial fits within other bodies of contract law as well. For example, whether a breach of a

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[2] Nuisance cases are amenable to litigation on a class basis. In fact, Rule 23(b)(1)(A) of the Federal Rule of Civil Procedure exists to address situations such as "individual litigations of … a claimed nuisance," because individual actions in these situations "could create a possibility of incompatible adjudications." Notes of the Advisory Committee on 1966 Amendments. California law allows the certification of classes under this rule. *Bell v. American Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1604

[3] Unlike a cause of action for nuisance, a cause of action based on the warranty of habitability does not require the tenant to suffer some kind of injury. For example, hole in the floor has been cited as part of the breach of the warranty of habitability without any suggestion that anyone had fallen into the hole. *Hinson v. Delis* (1972) 26 Cal. App. 3d 62, 64-65 (disapproved of on other grounds by *Knight v. Hallsthammar* (1981) 29 Cal. 3d 46); *see also, Smith v. David* (1981) 120 Cal. App. 3d 101, 106 ("lack of taping and texturing of walls, deficient electrical wiring, lack of floor coverings over bare wood, inoperable light fixtures, unfinished interior door frame to the front bedroom," etc.).

contract is substantial enough to justify terminating the entire contract is based upon whether "the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract." 23 Williston on Contracts § 63:3 (4th ed.).[4] In other words, the parties subjective interpretation of what is vital to the existence of the contract is not relevant. Likewise, under the terms of a satisfaction contract, "performance is tested by the question whether a reasonable man would be satisfied with the same[.]" *San Bernardino Val. Water Development Co. v. San Bernardino Val. Municipal San Bernardino Val. Water Development Co. v. San Bernardino Val. Municipal Water Dist.* (1965) 236 Cal. App. 2d 238, 242; *see also, Weisz Trucking Co. v. Emil R. Wohl Constr.* (1970) 13 Cal. App. 3d 256, 262 ("where the contract calls for satisfaction as to commercial value of quality or sufficiency which can be evaluated objectively, the standard of a reasonable person should be used in determining whether or not satisfaction has been received."). The Court of Appeal provided no apparent reason why the law governing the warranty of habitability should depart from the general pattern of using objective criteria to analyze nuisance conditions and breaches of contracts.

Instead, strong public policy reasons dictate employing objective standards for determining whether a landlord has breached the warranty. Subjective standards for determining whether a landlord has breached the warranty of habitability enable discrimination against incredibly vulnerable people.

The tenants who live in substandard housing have often learned to tolerate even worse conditions. Many have traded inhuman conditions[5] for conditions that are merely unhealthy or substandard. In my own practice, I have heard many landlords, police officers, and even health inspectors dismiss my clients' complaints with some variation of "they've seen worse where they're from." Perhaps they have, but the law should not lend such prejudices any legitimacy by incorporating a tenant's subjective experiences into the elements of a cause of action. A tenant in California who lacks hot water should be able to sue her landlord even if she spent the first fifty years of her life without any running water whatsoever. Our standards for proving a breach of the warranty of habitability should be objective so that the law protects all tenants equally.

Second, the *Hendleman* opinion confuses the standards for a lawsuit against a slumlord with the standards for a defense to an unlawful detainer action.

Moreover, the *Hendleman* opinion does not explain why tenants can sue a landlord only when the breach is "substantial." The opinion based this limitation on a case, *Green v. Superior Court* (1974) 10 Cal. 3d 616, that raised a very different question. In *Green,* the Supreme Court considered when a tenant could withhold rent. It did not consider when a tenant could sue a landlord for violating housing codes. Well-established contract law dictates treating these cases very differently. That is, the elements of an affirmative defense to an unlawful detainer action should not be identical to the elements of a cause of action against a landlord even if both include

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[4] The Court of Appeal has endorsed this provision of Williston. *Brown v. Grimes* (2011) 192 Cal. App. 4th 265, 278.

[5] www.dailymail.co.uk/news/article-2084971/Hong-Kongs-cage-homes-Tens-thousands-living-6ft-2ft-rabbit-hutches.html

a landlord's breach of the warranty of habitability.

The *Green* opinion should be understood as an application of hornbook contract law that allows a party to terminate a contract only if the other party has committed a material breach of that contract. 1 Witkin, Summary 10th (2005) Contracts , § 852, p. 938; *see also Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal. App. 3d 1032, 1051. The party who has been victimized by a trivial breach must continue to perform his or her obligations under contract, i.e., pay rent. *Green* merely applied this body of law to residential leases: the drastic remedy of a rent strike is available only to tenants subjected to substantial violations of housing standards.

The generally-applicable doctrine of substantial breach does not, however, require a substantial breach before any lawsuit can be filed. Instead, "[a]ny breach, total or partial, that causes a measurable injury, gives the injured party a right to damages as compensation therefor." 1 Witkin, Summary 10th (2005) Contracts , § 852, p. 938. The opinion in *Green* did not address, much less change, this rule. It provides no reason to require a tenant who sues his or her landlord to establish the same elements as a tenant who has taken the bold step of withholding rent entirely. Instead, tenants who suffer any measurable injury inflicted by a landlord's violation of housing standards should be able to sue that landlord, just as just as any party to a contract can recover damages inflicted by even a trivial breach of that contract. Put another way, the substantial nature of a landlord's breach should affect only a tenant's damages and have no impact on whether the tenant has a cause of action.

The *Hendleman* opinion does not even consider the distinction between an affirmative defense and a cause of action. It merely adopted the standards of *Green* uncritically. In doing so, the opinion has confused the law and should not be published.

Very truly yours,

Daniel J. Bramzon
President and Founder of BASTA, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 2500 Wilshire Boulevard, Suite 1050, Los Angeles, California 90057.

On October 18, 2013, I served the foregoing document(s) described as:

Letter requesting depublication

on the interested parties to this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on October 18, 2013 at Los Angeles, California.

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

Benjamin Ramm

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