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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

CITY OF LINCOLN, a California municipal corporation, CITY OF LINCOLN, by and for the People of the State of California,

Petitioners and Plaintiffs,

vs.

THE GATHERING INN, a California public benefit non-profit corporation; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, a California state agency, HORNE LLP, a Delaware limited liability partnership, and DOES 1 through 15 inclusive,

Respondents and Defendants.

Case No. S-CV-0053711

THE GATHERING INN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GATHERING INN'S DEMURRER TO CITY OF LINCOLN'S FIRST AMENDED COMPLAINT

Date: February 11, 2025
Time: 8:30 a.m.
Dept.: 42
Judge: The Hon. Trisha J. Hirashima

Action Filed: September 30, 2024
Trial Date: Not yet set

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The City of Lincoln (the "City") is opposed to having a state-funded medical respite facility at 1660 Third Street. Although there was a senior assisted living facility for ill and/or frail people operating at the same location until earlier this year, the City quickly mobilized its opposition upon learning that the former assisted-living facility would now be used to provide medical respite for ill and/or frail people who are also experiencing homelessness.

The City claims it was fraud and deceit for The Gathering Inn ("TGI"), the nonprofit that obtained grant funding from the State to buy the facility, not to tell it about the grant application before applying for the funding. The City says it would have opposed the purchase as, in its view, unnecessary and out of proportion to the needs of its residents. Unlike the State Department of Social Services ("CDSS"), which provided grant funding for purchase of the building and support for its future operations as part of a "broader statewide efforts to expand housing, improve treatment outcomes, and prevent the cycle of homelessness," the City focuses more narrowly on the needs of Lincoln residents, and contends that "there is no need for a 60-bed . . . medical respite facility within the City." *Compare* City First Amend. Compl. (Nov. 22, 2024) ("FAC") ¶ 3, *with* ¶ 32.

TGI demurs to the Second, Fourth, Fifth, and Sixth Causes of Action:

- The City of Lincoln's City Attorney lacks the authority to bring an Unfair Practices Act claim in the name of the People of the State of California.
- The declaratory relief claim is redundant of the substantive causes of action, the City has no rights to declare under the state funding contract, and the City instead seeks only a declaration about the legal effect of past acts.
- The City's fraud claims fail for lack of a duty to disclose. There is no fiduciary relationship between the City and TGI, and the City was not a party to any transaction. Nor did any statute impose a duty to disclose the application to the City. Moreover, the City fails to plead specifically how its opposition would have led to a different outcome.
- The "tort of another doctrine" claim fails because the City cannot recover attorney's fees as damages for fraud against someone else.

I. THE CITY'S FACTUAL ALLEGATIONS[1]

The Legislature established the Community Care Expansion Program ("CCE") in 2021 in order to expand the number of beds available as "residential adult and senior care facilities." FAC

[1] As required, this motion assumes the City's allegations are true, even though TGI may present evidence later in the case that shows they are inaccurate or incomplete.

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¶¶ 8, 10; § 18999.97(a). TGI initially applied for CCE funding to build a new 20-bed medical respite center in Roseville, but in early 2023 decided to amend its application to purchase a larger, already-constructed facility in Lincoln. FAC ¶¶ 16, 24. On February 6, 2023, the State's third-party administrator told TGI it could have one week to seek re-review of its application; the amended application was submitted on February 13, 2023. *Id.* ¶ 26 & Ex. F (Feb. 6, 2023 Email).

TGI had previously engaged in a months-long process and submitted letters of support for the medical respite center in Roseville from major health care providers in the community – Sutter Health (with which TGI has partnered for a smaller medical respite program in Auburn for the last fifteen years), Anthem Blue Cross, and California Health & Wellness – but submitted no further documentation of community support as part of the updated application. *Id.* ¶¶ 17, 27, Ex. G (TGI's Updated Application). The City claims that by filing an amended application without seeking or obtaining additional community support "from Plaintiff or other key stakeholders . . . in advance of submitting an application to CDSS," TGI committed fraud-by-concealment against the City. *Id.* ¶ 31; *see also* ¶ 84.

The City's sixth cause of action seeks attorney's fees as damages to the City for the alleged fraud against the State. The City claims TGI defrauded the State (but not the City, which didn't see the application and had no right to approve it) by claiming that the site was "ready for turnkey operations, and that no renovations were needed to operate a medical respite facility," *id.* ¶¶ 93, 39,[2] and by misrepresenting that it "had engaged in community outreach and had obtained local support for the Lincoln Site project." *Id.* ¶ 66. The City claims it is "forced to incur attorneys' fees in bringing this action to compel CDSS and/or [its third-party administrator] Horne to rescind the acceptance of TGI into the CCE Program, to terminate the Program Funding Agreement and to recover the CCE Program funds that were improperly provided." *Id.* ¶ 95.

Claiming it needs to prevent the facility from opening as a "public nuisance," the City

[2] Contradicting itself in the next breath, the City acknowledges that TGI informed the state that there would indeed be some "minimal" renovation work done. *Id.* ¶¶ 39, 40, *see also* Ex. G at question 16 (requesting funding of $302,400 for "Rehabilitation of Existing Facility for Expansion" out of total grant funding request of $6.4 million).

obtained an ex parte warrant and inspected the facility a week before filing the case.[3] *Id.* ¶ 41. It claims the structure "is not suitable for any human habitation, let alone for operation as a medical respite facility," even though it was admittedly being operated as an assisted living facility through March 2024. *Id.* ¶¶ 24, 40. TGI does not demur to the First Cause of Action, though it contends the warrant was pretextual and discriminatory, and that the City will be unable to prove its case.

II. THE CITY OF LINCOLN, LACKING A FULL-TIME CITY PROSECUTOR, CANNOT BRING A CLAIM UNDER SECTION 17200 IN THE NAME OF THE PEOPLE OF THE STATE OF CALIFORNIA.

Section 17204 provides three categories of city officials who can prosecute a 17200 Unfair Practices Act claim in the name of the People of the State of California, as the City of Lincoln's City Attorney seeks to do in the Second Cause of Action:

> Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or **by a city attorney of a city having a population in excess of 750,000**, or by a county counsel of any county within which a city has a population in excess of 750,000, or **by a city attorney in a city and county** or, **with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor** in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

Cal. Bus. & Prof. Code § 17204 (emphasis added). Lincoln is not large enough to fall into either of the first two categories: it does not have 750,000 residents, and it is not a "city and county" (only San Francisco falls in this category). FAC ¶ 32 ("The City has a population of only 52,000 residents . . . ."). Its City Attorney simply does not fall within the standard set by the Legislature.

The City's complaint attempts to invoke the third highlighted phrase: "with the consent of

[3] Notably, the City had eighteen people on hand to conduct the inspection, setting an all-time record for the most intrusive and thorough building inspection ever done in the history of the city. The inspection summary includes such claims as "replacement of [light] fixtures requires a permit," (FAC, Ex. I (Inspection Report) at question 19) and that the City could not locate other permits in its files. It complains of alleged building code violations that were never an issue before, including when the City issued the certificate of occupancy to the original owners when the building was constructed.

the district attorney, by a city prosecutor in a city having a full-time city prosecutor." *See* FAC ¶ 58. The City alleges that the district attorney has consented. *Id.* But is Lincoln's City Attorney a "city prosecutor in a city having a full-time city prosecutor" as required by section 17204? No.

First, the Government Code defines how to create a "city prosecutor." A "city prosecutor" is a role that is created by the charter in charter cities, under Government Code section 72193, and even then, refers to someone other than the city attorney. *See* Cal. Gov't Code § 72193 ("Whenever the charter of any city creates the office of city prosecutor, or provides that a deputy city attorney shall act as city prosecutor, . . . the city prosecutor may exercise the following powers: . . ."). The City of Lincoln is not a charter city, and has no charter creating the office of city prosecutor. *See* Joint Stipulation Requesting Judicial Notice Re Demurrer ("Stip. RJN"), at No. 1. By contrast, in general law cities like Lincoln, the city attorney may be authorized to prosecute certain crimes, but is not called a "city prosecutor." *See* Cal. Gov't Code §§ 41801-41805 (authorizing powers of city attorneys for general law cities), esp. 41803.5 (authorizing city attorney to prosecute misdemeanors committed within the city with the consent of the county's district attorney). While every city attorney could in theory prosecute certain crimes with district attorney permission, that does not make them a "city prosecutor" under California law. Indeed, if every city attorney is also a full-time city prosecutor, the minimum population of 750,000 rule in section 17204 would never apply; the Legislature could have simply said that every city attorney may bring an action.

Second, the City of Lincoln does not have a person acting as a "full-time" prosecutor. After meeting and conferring about the anticipated demurrer, the City added an allegation to the complaint so that the Court could address this issue as a matter of law: that Ms. Mollenkopf "performs all of the enumerated duties set forth in [LMC] [s]ection 2.17.040, and she does not spend the entirety of her time prosecuting cases on behalf of the people." FAC ¶ 58 (underlining added). Instead, she also spends time performing the other duties of a City Attorney under the Lincoln ordinance: advising the council on legal matters, preparing and approving all ordinances, drafting contracts, and performing other legal tasks as required by the council. Stip. RJN at No. 2 & Ex. A (Ch. 2.17.040 of Lincoln Code of Ordinance). As a matter of law, a city attorney is not a

"full-time city prosecutor" merely because she works full-time, works for a city, and some portion of her job functions include "prosecuting cases" as part of her work as City Attorney.

Section 17204 expressly limits which cities are allowed to enforce the Unfair Practices Act in the name of the People: only the largest cities, plus a handful of charter cities with a deputy city attorney serving as a full-time city prosecutor, qualify. The Second Cause of Action should be dismissed with prejudice.

III. THE DECLARATORY RELIEF CLAIM SHOULD BE DISMISSED.

In its Fourth Cause of Action, the City seeks declaratory relief as to the meaning of the contract between TGI and the State/CDSS, which the City is not a party to. The State's demurrer explains why the City cannot do so. The City lacks standing to enforce the contract, which provides it no rights or obligations as a party or a third-party beneficiary. *See* FAC, Ex. H (Program Funding Agreement) at Art. 19 ("The Agreement shall not be construed so as to give any other person or entity, other than the Parties and CDSS, any legal or equitable claim or right."); *supra* at § IV.A(3). Moreover, the City improperly seeks a declaration regarding past acts, instead of what the City's rights and obligations are under the TGI-CDSS contract going forward. *See City of Gilroy v. Super. Ct.*, 96 Cal. App. 5th 818, 834 (2023), *as modified on denial of reh'g* (Nov. 20, 2023) ("complaining of past acts by the defendant does not constitute an actual controversy"); *Monterey Coastkeeper v. Cent. Coast Reg'l Water Quality Control Bd.*, 76 Cal. App. 5th 1, 13 (2022) ("Declaratory relief operates prospectively"). The City also seeks to control CDSS' discretion. *See, e.g., Wilson v. Transit Auth. of City of Sacramento*, 199 Cal. App. 2d 716, 725 (1962) ("The Declaratory Relief Act does not purport to confer upon courts the authority to control administrative discretion."). TGI joins in the arguments made by the State and requests the Court to grant the demurrer to the Fourth Cause of Action.

IV. THE "FRAUD AND DECEIT" CAUSE OF ACTION SHOULD BE DISMISSED.

In its Fifth Cause of Action, the City claims that TGI engaged in fraudulent non-disclosure/concealment by failing to notify the City about its plans prior to submitting an application for CCE funding. FAC ¶¶ 82-85.

[T]he elements of an action for fraud and deceit based on concealment are: (1) the

> defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 131 (2007) (quoting *Mktg. West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 613 (1992)) (emphasis added). The City's claim here fails as a matter of law on both the second and fifth elements.

A. There Was No Duty To Inform The City Of Lincoln Of The Application For Grant Funding Or Obtain Its Approval.

"In considering a fraudulent concealment claim, 'we begin with the threshold question of duty.'" *Hoffman v. 162 North Wolfe LLC*, 228 Cal. App. 4th 1178, 1193 (2014), *as modified on denial of reh'g* (Aug. 13, 2014); *see also* Cal. Civ. Code § 1710(3) (defining deceit as "suppression of a fact, by one who is bound to disclose it").

> A duty to disclose a material fact can arise if (1) it is imposed by statute; (2) the defendant is acting as plaintiff's fiduciary or is in some other confidential relationship with plaintiff that imposes a disclosure duty under the circumstances; (3) the material facts are known or accessible only to defendant, and defendant knows those facts are not known or reasonably discoverable by plaintiff (i.e., exclusive knowledge); (4) the defendant makes representation but fails to disclose other facts that materially qualify the facts disclosed or render the disclosure misleading (i.e., partial concealment); or (5) defendant actively conceals discovery of material fact from plaintiff (i.e., active concealment).

Rattagan v. Uber Techs., Inc., 17 Cal. 5th 1, 40 (2024).

1. No Relationship Created A Duty To Disclose.

The second through fifth circumstances "presuppose a preexisting relationship between the parties," either a fiduciary/confidential relationship (for (2)), or "transactions between parties from which a duty to disclose" arises (for (3), (4) and (5)). *Id.*; *Hoffman*, 228 Cal. App. 4th at 1188 (California courts "have rejected fraud claims founded on nondisclosure where there was an absence of a relationship between the plaintiff and the defendant.").[4] But here, the City fails to

[4] Thus, for example, a person who claimed a prescriptive easement to drive on his

allege that TGI had any kind of relationship with the City which would require TGI to keep the City informed about its decision to apply for grant funding. TGI was not the City's fiduciary, or a party to any transaction with it. TGI did not buy the property from the City, or even propose any transaction with the City. As a matter of law, there was no duty sounding in fraud to disclose TGI's intention to submit a grant application for funding to acquire 1660 Third Street. *See Hoffman,* 228 Cal. App. 4th at 1187 ("Where material facts are known to one party and not the other, failure to disclose them is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose such known facts.") (quoting *LiMandri,* 52 Cal. App. 4th at 336-337 (internal quotation marks and citations omitted)). A duty to disclose sounding in fraud arises from "direct dealings" between the plaintiff and defendant, and "cannot arise between the defendant and the public at large." *Rattagan*, 17 Cal. 5th at 41 (quoting *Bigler-Engler,* 7 Cal. App. 5th at 312).[5]

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neighbor's paved area had no duty to say anything to someone who was buying the neighbor's property, because there was no fiduciary relationship, and he wasn't a party to the transaction. *Hoffman*, 228 Cal. App. 4th at 1185-1193. Similarly, a homeowner's association was not liable for nondisclosure to a townhome buyer for not telling him of construction defects and related litigation: "Here, no facts are alleged that [the association] acted as a seller, was a party to the contract, or assumed a special relationship with appellant." *Kovich v. Paseo Del Mar Homeowner's Assn.*, 41 Cal. App. 4th 863, 866-67 (1996) (affirming demurrer without leave to amend); *Deteresa v. Am. Broadcasting Cos., Inc.*, 121 F.3d 460, 467 (9th Cir. 1997) (reporter's non-disclosure that interviewee was being videotaped without her knowledge was not fraud because no fiduciary or transactional relationship). An attorney was under no obligation to tell another attorney about his client's claimed lien rights: "LiMandri alleges no existing or anticipated contractual relationship or any other relationship with Judkins that would give rise to a duty to disclose." *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 337 (1997) (affirming demurrer without leave to amend). Even the manufacturer of a medical device had no duty sounding in fraud – as opposed to products liability law, which does impose a duty to warn – to disclose risks of a medical device absent "direct dealings between the plaintiff and the defendant; it cannot arise between the defendant and the public at large." *Bigler-Engler v. Breg, Inc.*, 7 Cal. App. 5th 276, 312 (2017).

[5] *Rattagan*'s first category – that a duty to disclose may be "imposed by statute" – likewise requires a relationship. *Rattagan* itself involved a relationship between client and attorney-representative. *Rattagan*, 17 Cal. 5th at 41. The *Rattagan* Court did not expand on how a statute could impose a duty to disclose, but cited to Witkin. *Id.* at 40 (citing 5 Witkin, *Summary of Cal. Law* (11th ed. 2023) Torts ("Witkin") §§ 913-19). Witkin, in turn, cites two cases for the proposition that a duty to disclose can be imposed by statute, both of which involved a transactional relationship based on a contract. *See* Witkin, § 913 (*citing Pastoria v. Nationwide*

2. No Statute, Or Even Regulatory Violation, Created A Duty To Disclose.

Nor does the City plead a violation of a duty to disclose "imposed by statute."

The only statute cited in the complaint is Welfare and Institutions Code section 18999.97. Section 18999.97 vests the sole discretion for awarding CCE grant funds in the CDSS and directs the CDSS to prioritize awarding grants that will assist those who are experiencing homelessness or are at risk of experiencing homelessness. Cal. Welf. & Inst. § 18999.97(b)(2) & (c)(1)(C) (hereafter, § 18999.97). It says nothing about disclosing applications for grant funding to cities; the only portions of the statute dealing with notice to entities other than CDSS are (1) a requirement that CDSS report to the Legislature at a future date, and (2) provisions exempting grant funding contracts from generally applicable laws governing state contracts. *See* § 18999.97(c)(2), (h), and (j).

The City's First Amended Complaint admits that it is claiming a duty to disclose based on ***something other*** than a statute or transactional relationship. The City alleges that (1) an instruction in the CCE application form creates a duty to disclose; (2) the instruction should be treated as "effectively" a regulation; and (3) TGI violated the instruction by failing to inform the City and obtain its consent. FAC ¶ 13 (alleging "Joint RFA" was "effectively regulation" requiring "documentation that demonstrated that there was active community engagement . . . and to obtain letters of support that confirmed that there was some level of local support . . ."); *see also id.* ¶ 11 (alleging that CDSS and DHCS intended for the "Joint RFA . . . to impose requirements upon project applicants that would have the same force and effect as regulation."); ¶ 65 (claiming that eligibility requirements in the RFA instructions, as well as language in the Program Funding Agreement, "have the force and effect of regulation."). The City claims that the RFA instructions for applying for grant funding are the source of a fraud-theory duty to disclose to "the City

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Ins., 112 Cal. App. 4th 1490, 1999 (2003) (recognizing the "general rule" that the failure to disclose material facts is "usually not actionable fraud absent a fiduciary relationship giving rise to a duty to disclose[,]" but that insurer owed a duty to disclose impending rate increase to insured under state Insurance Code)) and *Lovejoy v. AT&T Corp.*, 119 Cal. App. 4th 151, 158-59 (2004) ("In the context of switching telephone service providers, the duty to disclose [to customers] is set forth in Public Utilities Code section 2889.5").

Council and top City staff." FAC ¶ 82. But regardless of whether the RFA instructions are similar enough to an all-county letter to qualify as a regulation (they aren't[6]), the City's "effectively regulation" analysis and allegation concedes the point: there is no duty "imposed by statute."

Moreover, even if the RFA instructions were a statute, they do not create a duty to disclose to any particular person, and so do not support the City's claim that TGI had a legal duty, sounding in fraud, to inform the "City Council and top City staff." FAC ¶ 82. The relevant portion of the instructions state:

> Applicant provides documentation of active community engagement and support, particularly with people with lived experience. Insights from the community should be included in project planning, design, implementation, and evaluation. Examples may include survey results, notes taken during stakeholder engagement sessions, etc.
>
> **BHCIP Launch Ready only:** City, nonprofit, or private applicants must include a letter of support from their county behavioral health agency or, if a tribal facility, the tribal board at the time of application or within the grant decision period.
>
> - The letter must indicate that BHCIP grantees that operate Medi-Cal behavioral health services will have in place a contract with their county to ensure the provision of Medi-Cal services once the financed facility's expansion or construction is complete.

City FAC, Ex. A (Joint Req. For Applications) ("RFA"); *see also id.* ¶ 11 (authenticating Ex. A). The City interprets these instructions to mean that TGI owed a duty to inform the "City Council and top City staff" and obtain their support. *Id.* ¶ 82. But the instructions actually say no such thing. The only named public official from whom the instructions require a letter of support is the county behavioral health agency or, if applicable, tribal board. And that requirement only applies to the "BHCIP Launch Ready" program, a reference to the separate Behavioral Health Continuum

[6] The phrase "all-county letters or similar instruction" is a term of art well-known to CDSS. "All County Letters" and similar notices are collected and publicized on the CDSS website. https://www.cdss.ca.gov/inforesources/letters-and-notices. CDSS has published one "similar instruction": a notice of Community Care Expansion Preservation Funds, addressed to all County Welfare Directors, dated December 14, 2022. https://www.ccegrant.com/wp-content/uploads/2023/11/PreservationACWDL12-14-22.pdf The Joint RFA is not an "all-county letter[] or similar instruction."

Infrastructure Program. TGI did not apply for BHCIP funds (*see* FAC, Ex. G at question 7) and so was not required to obtain a letter of support from the county behavioral health agency or a tribal board. The instructions contain no similar directive about informing any local municipality of an application or requiring a letter of support.

The remainder of the instruction does not require that any particular person or official be contacted or informed about the application, specify what information should be provided to them, or require that their support be obtained. Instead, it is phrased broadly, so that CDSS can then evaluate the documentation presented about what was done and then exercise its discretion – expressly granted by the statute – of whether the grant should be awarded based on whether the project meets the goals of the program. *See* § 18999.97(b)(2) and (c).

Meanwhile, the general reference to "documentation of active community engagement and support" is given additional meaning by the rest of the sentence in which it appears: "particularly from people with lived experience." The instructions contemplate that not every grant funding proposal will make sense in terms of the actual needs of the community; they thus ask that the grant applicant explain what it has done to engage with people who know about the actual needs, so that the project design is informed by real world experience and "insights." The City Council and top City staff are not people with "lived experience" of homelessness or medical respite, and so don't fall within the group that the instructions ask for documentation about engagement with. By contrast, TGI has substantial experience and engagement with the lived experience of homelessness in general, and medical respite in particular, and explained in its application that it has operated a medical respite facility for persons experiencing homelessness in Placer County since 2009. *See* FAC, Ex. G at question 8. And TGI further documented the community's needs for a larger medical respite program in Placer County by submitting letters of support from Sutter Health, Anthem Blue Cross, and California Health & Wellness. *Id.* at question 10.3; *see also* FAC, Ex. G at question 30 (data supporting need). These health care providers know well that there is a need for medical respite in Placer County and encouraged CDSS to award a grant to address the need. As CDSS will likely argue, CDSS was entitled to make a judgment call about whether this showing justified its exercise of discretion to award the grant, and the City alleges no

basis for questioning CDSS's discretionary choice. But for purposes of deciding whether it was fraud for TGI not to inform the City Council and "top City staff" before applying for the grant, the Court can determine as a matter of law that the phrasing of the instruction simply did not create a clear duty – much less a statutory one – to inform the City Council and City staff at any point in the grant application process.

The City's strained interpretation of the grant application instructions is a far cry from the limited cases where courts concluded that a duty to disclose was "imposed by statute." *See Rattagan*, 17 Cal. 5th at 40. In the cases cited by Witkin (and by extension, *Rattagan*), the statute itself imposed a clear duty to speak. In *Pastoria*, the Court of Appeal found such a duty was created by Insurance Code section 332, which states "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining." 112 Cal. App. 4th at 1499. And in *Lovejoy*, the Court of Appeal cited the detailed statute containing disclosure-and-consent requirements applicable to telephone charges. 119 Cal. App. 4th at 158 (citing Cal. Pub. Util. Code § 2889.5 and specifying the precise steps required to give notice of changes to telephone service, including requirements of follow-up call, mailing of information package, and provision of postage prepaid postcard to respond). In those other cases, the statute specifies both the required content and recipient of the information, so that the duty is clear. The vague exhortation to document "active community engagement" provides no such standard to claim that a violation is fraud.

3. The City Cannot Enforce The Instructions As A Third-Party Beneficiary.

The City also seems to be trying to claim a right to enforce the grant application instructions as a third-party beneficiary. *See* FAC ¶¶ 38 (arguing the RFA instructions are a "requirement" because they are attached to the final funding contract); 82 (referring to the funding agreement as a source of duty to the City). The Court should deny the attempt.

The funding agreement expressly states that there will be no third-party rights created. FAC, Ex. H at Art. 19 ("The State, represented by CDSS in this Agreement, is a third-party

beneficiary of this Agreement. The Agreement shall not be construed so as to give any other person or entity, other than the Parties and CDSS, any legal or equitable claim or right."); *see id.* ¶ 35 (pleading that the contract between TGI and Horne is in substantially the same form as Exhibit H). There are important policy reasons why governmental contracts generally do not confer rights on non-parties. State grant funding can affect a substantial number of people: statewide policies are intended to have broad societal impacts. Even though some or all members of the public are intended to enjoy the benefits of public programs, because the government furnishes the benefit for the public good and to accomplish a public purpose (and not as a gift), governmental contracts generally do not confer third-party beneficiary rights. *Martinez v. Socoma Companies, Inc.*, 11 Cal. 3d 394, 400-01 (1974); *see also Unite Here Local 30 v. Dep't of Parks and Rec.*, 194 Cal. App. 4th 1200, 1215 (2011) ("Of course, any contract entered into by the state . . . would presumably be for the benefit of the state's residents . . .. The fact that members of the public derive a benefit from the [state] contract does not make them intended beneficiaries of the contract . . ."). In order to create third-party beneficiary rights in a government contract, there must be an intention manifested in the contract that the promisor will "pay damages to compensate plaintiffs or other members of the public for their nonperformance." *Martinez*, 11 Cal. 3d at 402; *see also* Rest. of Contracts § 145 ("A promisor bound to [the government] by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation . . . unless . . . an intention is manifested in the contract[.]" The Program Funding Agreement signed by TGI makes no such promise. Indeed, as stated earlier, it says that no one other than CDSS is an intended beneficiary. FAC, Ex. H at Art. 19 ("The Agreement shall not be construed so as to give any other person or entity, other than the Parties and CDSS, any legal or equitable claim or right.").

B. <u>The City Fails to Adequately Allege Reliance and Damages.</u>

The fifth element of a fraud claim is that "as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Linear Tech*, 152 Cal. App. 4th at 1311, (quoting *Mktg. West*, 6 Cal. App. 4th at 613). Here, the City's claim fails because it is speculative. The City claims that it lost the opportunity to "be heard and to otherwise participate in the process

before the CCE Program funding was awarded." FAC ¶¶ 86-87. But it nowhere pleads specific facts about what it would have done, and that it did not do in reliance.

Pleading fraud with particularity requires specific allegations of how the alleged omissions were relied upon and caused damage. "The plaintiff must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations." *Small v. Fritz Cos.*, 30 Cal. 4th 167, 185 (2003) (plaintiff claiming it would have sold securities that it continued to hold must plead and prove specifically how many securities it would have sold and on what dates); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Svcs. Group, Inc.*, 171 Cal. App. 4th 35, 50 (2009) (demurrer against fraud claim granted where no pleading that Bank was in a position to intervene to prevent outcome); *Hua Nan Comm'l Bank v. HSBC Bank USA, NA*, No. CV 10-8773 PSG (EX), 2011 WL 13217782, *16 (C.D. Cal. May 19, 2011) (allegation banks "would have taken action to protect their interests" insufficient to plead reliance/causation with particularity).

The City's current opposition to a medical respite facility in Lincoln does not establish that the City would have successfully changed CDSS's decision to grant funding had it been notified earlier. The City does not plead anything specific that it would have said or did that would have changed the result. The application instructions do not require a letter of support from the City. *See* section IV.A.2 above. Indeed, the Legislature recognized that local jurisdictions, if given a choice in the matter, might not approve facilities that care for people experiencing homelessness, and so expressly overrode any city discretion to block these projects. *See* 18999.97(*l*). The City's suggestion that it could have "sought to have the facility moved to a different location" ignores that the grant funding application was to buy an existing facility, which offered substantial cost savings over new construction. The City's suggestion that there is "no need" for a 60-bed facility because there are few people experiencing homelessness at this time within Lincoln city limits ignores that the State decided that a facility of this size and in this location was well worth funding, and that homelessness is a statewide issue that needs regional solutions. The City's claim that if it had heard earlier, it could have persuaded CDSS not to award grant funding, by arguing the facility should have been located in someone else's city, or was unnecessary, is insufficient to

plead a case for fraud against TGI.

V. THE "TORT OF ANOTHER" CLAIM FAILS BECAUSE THE CITY CANNOT RECOVER DAMAGES – INCLUDING ATTORNEY'S FEES – BASED ON AN ALLEGED TORT AGAINST SOMEONE ELSE.

In its Sixth Cause of Action, the City claims that TGI committed fraud against DHSS or Horne (FAC ¶¶ 93-94)[7], and that as damages for this tort against DHSS and Horne, the City should recover the City's attorney's fees for bringing its Third Cause of Action, seeking a writ of mandate to compel DHSS and/or Horne to terminate the Program Funding Agreement). *Id.* ¶ 95. While DHSS and Horne have claimed no fraud, and the claim is otherwise meritless, it fails as a matter of law because the City cannot seek damages for fraud against a third party, based on the third party's reliance rather than its own.

The "tort of another" doctrine is merely "an application of the usual measure of tort damages." *Mega RV Corp. v. HWH Corp.*, 225 Cal. App. 4th 1318, 1337 (2014), *as modified on denial of reh'g* (May 20, 2014). It recognizes that one form of economic damages can be attorney fees incurred in litigation with third parties, suffered as a result of an alleged tort. *Id.* But here, the City's claim isn't based on a "tort of another" (i.e., TGI) against the City. That claim is in its Fifth Cause of Action. Here, the City is claiming damages based on a fraud against someone else: misrepresentations or omissions it claims were relied upon by the State. It tries to expand the doctrine so that it can claim a "tort of another against someone else." Such damages are not recoverable.

California law does not allow recovery of damages for fraud committed against a third party, as opposed to damages caused by plaintiff's own reliance. "It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1088 (1993) (declining to adopt "fraud on the market" theory where shareholder plaintiffs neither heard nor relied on the

[7] Paragraph 93 alleges TGI fraudulently induced DHSS and/or Horne to award funding and enter the Program Funding Agreement by misrepresentation or concealment "from DHSS and/or Horne." Paragraph 94 alleges DHSS and/or Horne's reliance, and that their reliance was reasonable.

misrepresentation). To establish causation for fraud requires that (1) "the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action[;]" and (2) "the detrimental action taken by the plaintiff must have caused his alleged damage." *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1062 (2012). *See Lesperance v. N. Am. Aviation, Inc.*, 217 Cal. App. 2d 336, 345 (1963) (affirming demurrer to fraud claim for failure to plead facts showing causation: "His asserted injury or damage must not only be directly alleged but its causal connection with his reliance on defendant's representations must be shown."). A plaintiff cannot recover because someone else heard a misrepresentation and relied on it, even if the plaintiff claims that this caused plaintiff's injury in trying to right the wrong. *See Russell v. Maman*, No. 18-CV-06691-RS, 2020 WL 10964919 (N.D. Cal. Apr. 10, 2020) (fraud claim cannot be based on false representation made to and relied upon by a third party whose reliance causes injury to plaintiff); *see also Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 829 (2016) (same); *Wescott v. Daniel*, No. 21-CV-10011-JCS, 2022 WL 1105079, *5 (N.D. Cal. Apr. 13, 2022) (noting that injury based on a third party's reliance is not "a theory viable under California law"). An organization that spends money to counteract a fraud against others, but does not claim that it relied on the alleged misrepresentations, does not have a viable claim for fraud. *Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 220 (1983), superseded by statute on another point as stated in *Californians for Disability Rts. v. Mervyn's, LLC*, 39 Cal.4th 223, 228 (2006) (sustaining demurrer to fraud claim which sought recovery for of dentist organization's expenditures to counteract alleged misrepresentations to parents and children about sugary cereals). Because the City does not claim that it relied on the misstatements or omissions to CDSS or Horne – indeed, it claims that it was entirely ignorant of the application at the time – its expenditures on attorney fees to unwind the transaction are not caused by its reliance on those allegedly fraudulent statements, and are not recoverable.

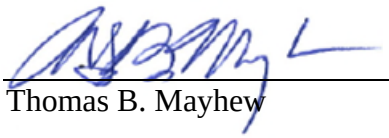
The demurrer should be granted as to the Sixth Cause of Action, with prejudice.

VI. CONCLUSION

For the foregoing reasons, the Court should grant the demurrer as to the Second, Fourth, Fifth, and Sixth Causes of Action against The Gathering Inn, in each case without leave to amend.

Dated: December 20, 2024

FARELLA BRAUN + MARTEL LLP

By: 
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