1st Civil Nos. A163757 and A164933

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE OF THE STATE OF CALIFORNIA, et al.,

Plaintiffs and Respondents,

v.

DODG CORP., a corporation, et al.

Defendants and Appellants.

Appeal From the Alameda County Superior Court
Honorable Brad Seligman
Case No. RG19022353

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Nos. A164933 and A163757

Case Name: *The People of the State of California, et al. v. DODG Corp., et al.*

Please check the applicable box:

☒ There are no interested entities or parties to list in this Certificate per California Rules of Court, rule 8.208.

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	

Please attach additional sheets with Entity or Person Information if necessary.

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INTRODUCTION

In cities like Oakland, California, where escalating housing costs make it virtually impossible for low-income workers to find affordable housing, city leaders rely on property owners to help ease homelessness by finding creative ways to shelter essential workers.

Defendants DODG Corporation (DODG) and SBMANN2, LLC (SBMANN2) are property owners leasing low-income rental units in Oakland; they re-house Section 8 tenants through multiple community housing programs. Co-defendants and husband and wife Baljit Singh Mann (Baljit) and Surinder K. Mann (Surinder) (collectively, the Manns) are the sole shareholders and members of these two entities.

Between 2016 and 2019, the City of Oakland identified violations of Oakland's Building Maintenance and Fire codes at five properties owned by either DODG or SBMANN2. Defendants cooperated with the City, attempting to timely abate the identified issues, but the COVID-19 pandemic then arrived, stalling the City's permitting process and further delaying defendants' compliance.

The City sued DODG, SBMANN2, and the Manns, seeking civil penalties and a permanent injunction under Oakland Municipal Code ("OMC") Chapter 1.08 and Oakland's Tenant Protection Ordinance ("TPO"), codified at OMC section 8.22.670(A)(2). The court, after a bench trial, concluded that defendants engaged in prohibited tenant harassment under the TPO, acted in bad faith, and caused a public nuisance. Even

though the defendants already had abated almost all issues by time of trial, the court imposed almost $4 million in civil penalties under OMC Chapter 1.08 and the TPO, and issued an injunction.

As a matter of law, the trial court erred. The court lacked jurisdiction to issue civil penalties under OMC Chapter 1.08, because the ordinance imposes only administrative penalties and the City failed to exhaust its administrative remedies and comply with other legal prerequisites designed to protect property owners' due process rights. Even ignoring the jurisdictional bar, the court erred under the primary jurisdiction doctrine and violated the defendants' due process rights by not requiring the City administrators to first evaluate and impose penalties when issuing abatement notices. The court trampled exhaustion and due-process principles by retroactively imposing civil penalties and injunctive relief for non-abatement after defendants *had already abated* most of the underlying code violations.

Nor could the court sidestep OMC Chapter 1.08's requirements by awarding penalties and injunctive relief under the TPO. Legal error also infected the TPO relief, including the failure to exhaust administrative remedies and the fact that the TPO version in effect when the violations occurred, and when the City sued, did not authorize civil penalties. The court further violated defendants' due process rights by imposing TPO civil penalties based on a version of the TPO amended (conveniently to say the least) more than a year *after* the City filed its lawsuit. Prior to that amendment, only OMC Chapter 1.08 authorized civil penalties, and they were *administrative* penalties.

The City's failure to exhaust administrative remedies and its violation of due-process-based prerequisites to relief infects the entire judgment, *both* the civil penalties and the injunction. The judgment must therefore be reversed with instructions for the entry of judgment in defendants' favor.

At a minimum, this Court must reverse the judgment as to the Manns in their individual capacities. The City never established that they were alter egos, as required to ignore the corporate privilege and find them personally liable. Instead, the court erroneously interpreted the TPO to permit personal liability on them as agents of the companies they owned.

The trial court also erred by awarding $580,000 in excessive penalties for violations at one of defendants' properties. Although civil penalties require evidence of an authorized tenancy, the City proffered no such evidence. The court awarded the maximum allowed by the statute of limitations based on improper *speculation* about the duration of certain tenancies.

The attorney fee and cost award also must be reversed. Any reversal of the judgment alters the prior analysis as to the prevailing party and amount. In addition, the court erred as a matter of law—a $1.2 million error—in imposing a 2.1 multiplier in favor of a public entity that had no contingency risk and incurred no actual fees.

Each of these legal errors requires reversal.

STATEMENT OF FACTS AND PROCEDURE

A. The City's Lawsuit Against Two Corporate Real Estate Owners And Their Principals.

1. The civil complaint alleging violations of Oakland's Tenant Protection Ordinance and maintaining a public nuisance.

In June 2019, the People of the State of California and the City of Oakland, through the Oakland City Attorney (collectively "the City"), sued two corporate real-property owners—DODG, a corporation, and SBMANN2, a limited liability company—alleging claims related to five properties located in Oakland. (1/1CT 19-20, 22-23; 1/4CT 1079.)[1] The City also sued the Manns. (*Ibid*.)

The City alleged two civil claims: (1) maintaining a public nuisance in violation of local and state law, including OMC Chapter 1.08; and (2) violations of the TPO (OMC, §§ 8.22.600, 8.22.610, 8.22.640). (1/1CT 37-41; 1/4CT 1079.)

The City sought civil penalties under OMC Chapter 1.08 and the TPO, plus a permanent injunction, restitution, attorney fees, and costs. (1/4CT 1113.)

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[1] There are two Clerks' Transcripts covering two consolidated appeals: (1) the merits appeal, and (2) the attorney fee appeal. "1/4CT 1079" refers to the Clerks' Transcript in the merits appeal/Volume 4, page 1079. 2/2CT 484 refers to the attorney fee appeal/Volume 2, page 484. The Reporter's Transcript consists of 13 consecutively-paginated volumes and two separate transcripts dated April 2, 2021 and April 5, 2021. We do not cite to the latter volumes, so we cite to the Reporter's Transcript as RT [page].

2. The property-owner corporate defendants and their property managers.

DODG and SBMANN2 own over 60 parcels in Oakland. (1/4CT 1080; RT 1476.) Both own and lease low-income rental units and frequently re-house Section 8 tenants. (RT 1059-1061, 1233-1234.) Both work closely with the City's Economic and Community Development Committee. (RT 1593-1595.)

DODG. Baljit is DODG's president. (1/4CT 1080; RT 1475.) Surinder is Vice-President and Chief Financial Officer. (1/4CT 1080; RT 1198.) DODG owns four of the five properties involved in this case:

- 276 Hegenberger Road;
- 5848 Foothill Boulevard;
- 5268-5296 Foothill Boulevard;
- 1921/1931 International Boulevard.[2]

(1/4CT 1080; RT 1049, 1529; Exh. 1 at 2, 9 at 7, 200 at 1-3, 201 at 1-2, 203 at 1.)[3]

SBMANN2. SBMANN2 owns the fifth property: 5213-5219 International Boulevard. (1/4CT 1080; RT 1049;

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[2] 1921 and 1931 International Boulevard are "adjacent but distinct properties," but the City combined them in record-keeping, and the trial court reviewed both together. (1/4CT 1097-1100; RT 615, 632; see RT 29.) For consistency, we treat them as one property.

[3] We understand the Court has copies of the trial exhibits separate from the Clerks' Transcripts. Thus, we cite the trial exhibits as "Exh."

Exh. 202 at 1.) The Manns have been the sole managing members since its founding. (1/4CT 1080; RT 1219.)

Mannedge Properties. The Manns created Mannedge Properties to initially manage the five properties at issue. (RT 1218-1219.)

RentOak, LLC. Surinder later formed a limited liability company called RentOak to manage the properties, including managing leases, administrative work, tenant communications, tenant billing, and repairs. (RT 931-934, 1273.)

B. The Five Properties Owned By The Two Corporate Defendants.

1. 276 Hegenberger Road.

After purchasing the commercial property located at 276 Hegenberger, DODG rented units to multiple tenants. (1/4CT 1085; see also RT 172 [DODG is the owner of 276 Hegenberger], 950 [same], 1049; Exh. 5 at 9.)

In January 2018, a 276 Hegenberger resident complained to the City about the building's conditions. (RT 53-54; RT 967.)[4] When the City's code enforcement unit inspected the building, it discovered multiple Code violations. (1/4CT 1086-1087; RT 54-65, 79-88, 241-253, 967; see Exhs. 2-3, 6-8.)

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[4] The person who complained wasn't a tenant; rather, Baljit allowed her to stay five or six days while he helped her find somewhere to move. (RT 1517.) She then changed the locks and refused to leave, so DODG filed an unlawful detainer action to evict her. (RT 1518-1522; Exh. 63.)

Because DODG didn't conduct timely repairs, the City issued an Order to Abate, informing DODG "that 'uninhabitable conditions on the premises represent a serious threat to the health, life safety, and welfare of the occupants and the public.'" (1/4CT 1087, quoting Exh. 2 at 1; see RT 89-95.)

The City then issued a "Notice of Substandard/Public Nuisance Declaration," revoked the property's Certificate of Occupancy, declared the building substandard and a public nuisance, and conducted an "administrative assessment" in which it imposed administrative penalties under OMC section 1.12.060. (1/4CT 1087; Exh. 3 at 1-3, 19; RT 140-142.)

Representing DODG, Baljit met with the City and agreed to comply with the City's compliance plan to address the violations. (RT 108-109.) Because tenants remained, the City posted "red tag" notices identifying 276 Hegenberger Road as unsafe to occupy. (1/4CT 1087; Exh. 4; RT 112-114, 1286.) DODG then arranged to move tenants to other properties. (RT 1525.)

DODG completed some of the compliance plan, but not by the benchmark dates. (RT 213.) DODG initially sought City approval to convert the property into a live-work space, which initially the City was "really excited to see." (RT 1286-1287, 1331.) But when the City refused to support it, DODG returned the space to commercial only. (RT 1332.)

Then, the COVID-19 pandemic arrived, slowing the City's permitting process, and further delaying DODG's compliance. (RT 204-206.) But despite the City's permitting delays, DODG

continued correcting the violations and by 2021 had spent approximately $300,000 abating them. DODG was near 100% completion, waiting for the City's final inspection, when the City sued. (RT 207, 211-212, 1339, 1355-1356, 1363; Exhs. 314, 316, 318-319, 321, 323, 326-327, 331, 340, 344, 348; see also Exh. 353 at 2 ["This permit is placed on hold per the direction from the Code Enforcement Inspector"].)

2. 5848 Foothill Boulevard.

The City also received a tenant complaint about 5848 Foothill—another DODG-owned property. (Exh. 9 at 4, 7; RT 769, 1049; 1/4CT 1088-1089.) The Code Enforcement inspector who visited the property observed that commercial units were being used as living spaces. (1/4CT 1088; RT 735.)

The City's Planning and Building Department sent a Notice of Violation, and later, an Order to Abate, to DODG. (Exhs. 9-10; RT 735-736; 1/4CT 1088-1089.) When Code Enforcement discovered a family living in three unpermitted units and multiple Fire Code violations, it issued another Notice of Violation to DODG, followed by an Order to Abate. (1/4CT 1089-1090; Exhs. 11-12.)

DODG applied for permits to convert units into combined "live-work" spaces. (1/4CT 1089; Exhs. 46-47.) The City acknowledged before trial that all conditions at 5848 Foothill had been abated. (RT 772-773; see Exh. 76 at 3.) When trial began, DODG was simply completing exterior façade work as part of a remodeling project the City supported. (RT 1299, 1386-1387.)

3. 5268-5296 Foothill Boulevard.

The City also received tenant complaints from 5268-5296 Foothill—another DODG-owned property. (RT 335-336, 1049, 1236-1237; 1/4CT 1091.) The building includes seven commercial units and seven "live-work" residential units. (RT 809, 1302.)

One tenant, Olga Figueroa—a cross-defendant in this case—performed unapproved and unpermitted construction inside her unit, secretly sublet the unit to third parties, refused to pay rent or vacate the property, and ultimately had to be evicted by DODG. (1/4CT 1093, fn. 14, 1094; RT 839, 857-858, 1066-1067, 1076, 1080-1096, 1115-1116.)

The City's Planning and Building Department investigated the property and sent DODG Notices of Violation and Re-inspection. (1/4CT 1092; RT 342-343, 349; Exhs. 17-18.)

As the issues identified in the notices weren't timely rectified, the City conducted a joint inspection with the fire department, the Alameda County Vector Control, and City Attorneys. (RT 355-357.) Because the City concluded that the fire risk at the property was high, the Fire Prevention Bureau ordered the building placed under a 24-hour fire watch until the end of 2020. (1/4CT 1093; RT 808, 811, 834-836, 840, 855; Exhs. 20, 41.) The ground floor tenants then terminated their tenancies. (RT 1305-1306.)

Initially, when the City approved DODG's permit application, it didn't require DODG to install fire sprinklers, but it later required DODG to install them. (RT 1364, 1557.) The

City delayed approving some permits, and tenants caused further delays by removing alarms and fire extinguishers, but DODG timely abated many of the issues—including installing a fire sprinkler system—within the required abatement period. (See RT 844-853, 855, 1364-1371, 1382-1383, 1385, 1555; Exh. 21.) Maintaining the 24-hour fire watch cost DODG between $100,000 and $150,000. (RT 1182-1183.) By the time trial began, the fire sprinkler system at 5268 Foothill had been operational for four to six months. (RT 1555.)

4. 1921/1931 International Boulevard.

A four-alarm fire broke out in a homeless encampment close to 1921/1931 International, which caused the City to investigate the DODG-owned property to ensure no occupants were in danger. (1/4CT 1097; RT 467-468, 473-480, 509-510, 558-560, 1049.)

When City personnel went inside, they discovered tenants living in unpermitted residential units. (1/4CT 1097; RT 480-481, 485-486.) The City "'red-tagged" the lower-level rear units, issued violation notices, began the "order to abate process," and entered into a compliance plan with DODG, which posted a bond. (1/4CT 1097-1098; RT 543, 551, 553, 611; Exhs. 29-30, 32, 37-38.)

Because DODG cooperated with the City, complied with the City's work plan, and timely abated the issues, the City returned the bond. (RT 553, 602, 611-612, 619, 622-623, 1068-1069, 1317-1318, 1336-1337; Exhs. 37-38.) The City inspector who visited the property recommended no penalties be assessed against 1921/1931 International. (RT 632.)

5. 5213-5219 International Boulevard.

SBMANN2 owns the property located at 5213-5219 International, consisting of multiple structures. (1/4CT 1080, 1095.)

After a fire damaged one unit, the City issued a notice of building code violations. (1/4CT 1096; RT 1022, 1300-1301.) After finding violations in three structures, it issued a reinspection notice. (1/4CT 1096.)

Baljit wanted to tear down the damaged structure, but eventually hired an architect to remodel it. (Exh. 49; RT 1022-1025.) He then encountered "severe delays with getting permits from the City." (RT 1391.)

C. The Court's Statement Of Decision Finding DODG, SBMANN2, And The Two Individual Defendants Liable.

The court held a thirteen-day, remote bench-trial during the COVID-19 pandemic in April 2021. (1/4CT 1079.) In a written statement of decision, it concluded that defendants (1) engaged in prohibited tenant harassment under the TPO; (2) acted in bad faith; and (3) caused a public nuisance. (1/4CT 1081-1106.) It primarily relied on the version of the TPO in effect on April 20, 2019 when the City sued. (See 1/4CT 1079, fn. 1.) But it also cherry-picked from another provision that was amended more than a year after the City sued. (1/4CT 1114, fn. 27.) In particular, the new version of the TPO amended in 2020 added civil penalties, which were not previously included. (See OMC, § 8.22.670 [7/21/20 amendment].)

The court overruled all of defendants' objections to the statement of decision. (1/4CT 1120-1133.)

1. The findings as to the corporate-defendant owners.

a. 276 Hegenberger Road.

The court found that DODG violated the TPO, beginning on June 10, 2016—the earliest date permitted by the statute of limitations. (1/4CT 1088.) It relied, in part, on the City's 2018 administrative assessment at the property, which had imposed a $5,000 administrative citation against DODG. (See 1/4CT 1086-1088, citing Exh. 3 at 1, 5-21.)

In particular, the court found that defendants failed "to provide 'housing services,'" and failed "to conduct and timely complete repairs in violation of OMC sections 8.22.640(A)(1), (2), and (3)." (1/4CT 1086-1088.) The violations included unpermitted and unsafe construction, lack of hot water, exposed electrical wires, fire hazards, inadequate safety warning systems and exits, and failure to make timely repairs after the City provided notice about these violations. (1/4CT 1086-1087, 1104.) The court additionally found that DODG engaged in harassment by renting units that were so unsafe that tenants had to vacate them—a breach of "the covenant of quiet use and enjoyment." (1/4CT 1087-1088.) It imposed civil penalties under OMC Chapter 1.08 because some violations constituted a public nuisance. (1/4CT 1103-1106 & fn. 23.)

Because the court found "multiple violations at this property" that "defendants must have been aware of given its

long-standing ownership of the property and the frequent visits made by [Baljit] Singh," the court concluded that "defendants' conduct was in bad faith," and "constituted a 'pattern and practice' of violating the TPO." (1/4CT at 1088, citing TPO Reg. 8.22.640A (2017) & OMC, § 8.22.670(A)(2); see also 1/4CT 1104 [documenting conditions].)

The court relied on OMC Chapter 1.08 and the TPO to impose penalties of $1,000 per day against DODG from June 10, 2016 through January 25, 2019, and against Baljit, individually, through May 1, 2018. (1/4CT 1115-1116.)

b. 5848 Foothill Boulevard.

The court found that DODG and Baljit violated the TPO by renting units at 5848 Foothill not intended for residential use, creating hazardous conditions under the City's building and fire codes, and failing to make timely repairs. (1/4CT 1090-1091, citing OMC, § 8.22.640(A)(1)-(2).) It found that DODG violated the TPO from June 10, 2016—the earliest date permitted by the statute of limitations—through December 17, 2019. (1/4CT 1084, 1091.) And, because it found "multiple violations" at the property that "defendants must have been aware of given their long-standing ownership of the property and the frequent visits," it concluded that the conduct was in bad faith. (1/4CT 1091.)

The court also found that DODG and SBMANN2 created nuisances per se "by renting commercial properties unfit for residential use to tenants." (1/4CT 1105.)

It assessed penalties of $750 per day from June 10, 2016 through December 17, 2019 under OMC Chapter 1.08 and the

TPO; and $500 per day thereafter though May 28, 2021. (1/4CT 1116.)

c. 5268-5296 Foothill Boulevard.

The court found that defendants violated the TPO at 5268-5296 Foothill by failing to provide housing services, and substantially interfering with tenants' right to use/enjoy their rental units. (1/4CT 1092-1093.) In particular, it found that while converting units from commercial to live/work, DODG leased units to residential tenants without required sprinklers. (1/4CT 1092.) The court found that some of DODG's violations were "serious" (1/4CT 1092-1093) and that DODG further violated the TPO by requiring tenants to release all claims when executing lease termination agreements and by failing to inform tenants of rights or making required relocation payments (1/4CT 1094-1095, citing OMC, § 15.60 et seq.). And, it concluded that nuisance conditions were present. (1/4CT 1104 & fn. 23, citing OMC, §§ 1.08.020(A), 1.08.030(B), 15.08.340.)

As for the dates of violation: The court found that DODG was liable under the TPO from July 30, 2016, the first lease start date, through March 6, 2020, the date the last tenant left. (1/4CT 1095; Exh. 53.) It assessed $350 per day in penalties under OMC Chapter 1.08 and the TPO from July 30, 2016 through December 24, 2020, and against Surinder, individually, through January 2020. (1/4CT 1116.)

The court did not impose liability on DODG for Figueroa's alterations, acknowledging that DODG had to deal with her "unpermitted construction" and "obstructive behavior," and that

DODG "could not access [her unit] in order to address the issues for some time." (1/4CT 1094; see 1/4CT 1116.)

d. 1921/1931 International Boulevard.

The court found that 1921/1931 International fell below minimum residential standards, lacked basic safety requirements, and contained nuisance conditions, including hazardous electrical, mechanical, and plumbing work, fire-safety issues and units lacking heat and ventilation. (1/4CT 1099-1100, 1105.)

It found DODG violated the TPO from February 1, 2018—the date it found evidence of a rental agreement—until April 1, 2019. (1/4CT 1100; see 1/4CT 1097; RT 991.) And, because it found multiple violations, the court found defendants' conduct "was in bad faith," and "constituted a 'pattern and practice' of violating the TPO." (1/4CT 1100.)

It assessed $1,000 per day under OMC Chapter 1.08 and the TPO from February 1, 2018 until a compliance plan was finalized on July 10, 2019. (1/4CT 1116.) It found Baljit personally liable through May 1, 2018. (*Ibid.*)

e. 5213-5219 International Boulevard.

The court found that SBMANN2 and the Manns violated the TPO (but not OMC Chapter 1.08) at 5213-5219 International Boulevard "by failing to provide required housing services and timely repairs." (1/4CT 1096, citing OMC, § 8.22.640(A)(1)-(2).)

It found that after a fire damaged a structure, defendants entered into new leases without obtaining permits or approvals

and violated the building code by installing unapproved electrical supply for the unapproved units and by not immediately correcting the issue after being instructed to do so by Code Enforcement. (1/4CT 1096.)

The court rejected the City's argument that SBMANN2 violated the TPO by requiring tenants to waive certain rights in exchange for the tenants' agreement to improve, repair or maintain portions of the dwelling. (1/4CT 1097.)

It found that SBMANN2 violated the TPO from August 1, 2018—when it signed a lease with a new tenant after receiving a Notice of Violation—until September 1, 2020. (1/4CT 1096-1097.) It assessed $250 per day in penalties under the TPO against SBMANN2 during this period. (1/4CT 1116.)

2. The findings regarding the individual defendants.

The court expressly declined to conduct any alter ego analysis regarding the Manns, the principals of DODG and SBMANN2 (1/4CT 1082-1084), but still found them personally liable (1/4CT 1086, 1089-1092, 1095, 1098-1099, 1102, 1105).

Baljit. The court found that Baljit "made verbal rental agreements and personally 'took control' of tenant contact and other management duties for some properties," and that he and his son "were the primary persons who dealt with the City concerning violations." (1/4CT 1080; see 1/4CT 1089-1091, 1095, 1098-1100, 1105 [describing Baljit's role].)

The court also found that Baljit acted as DODG's corporate agent, at least until May 2018. (1/4CT 1086, 1088.)

Surinder. The court found that Surinder "managed office operations, supervised employees, signed leases, and negotiated move-out agreements with tenants" for all of the DODG- and SBMANN2-owned buildings at issue. (1/4CT 1080, 1095.) And, she signed leases for unpermitted units at 5268 Foothill Boulevard. (1/4CT 1105.)

3. The civil penalties.

In most cases, the court awarded civil penalties to the City under both OMC Chapter 1.08 and the July 2020 version of the TPO (OMC section 8.22.670(A)(2)), which was amended after the City filed its complaint. (1/4CT 1114 & fn. 27, 1115.) As to 5213-5219 International, it only awarded penalties under the TPO. The court penalized the defendants between $250 to $1,000 per day for each property based on the misconduct's severity. (1/4CT 1115-1116.)

In total, the court awarded $3,797,050 in civil penalties against DODG—finding Baljit jointly liable for $1,385,500 and Surinder jointly liable for $448,000. (1/5CT 1171.) It awarded $190,500 against SBMANN2—finding both Baljit and Surinder jointly liable for the full amount. (*Ibid.*)

4. The permanent injunction.

The City also sought, and obtained, a permanent injunction. (1/4CT 1117; 1/5CT 1136-1146.)

The court concluded that "given the broad range of violations and repeated Notices of Violation and Orders to Abate," a five-year injunction was appropriate. (1/4CT 1117; see 1/5CT 1145.) It enjoined defendants, their agents, employees,

and officers from "[m]aintaining, operating, occupying, or using any of the OAKLAND PROPERTIES in such a manner as to constitute violations of municipal or state housing, health, or safety laws," including OMC Chapter 1.08, the TPO, OMC sections 15.08 et seq. (the Building Maintenance Code), and section 15.12 (the Oakland Fire Code), Civil Code sections 1941 and 1941.1 (Implied Warranty of Habitability), and sections 3479, 3480, 3491, and 3494 (Public Nuisance). (1/5CT 1138-1139.)

It further ordered defendants to cure any outstanding violations, to use good faith efforts to timely obtain proper permits and complete final inspections, to make relocation payments to all eligible displaced tenant households, and to provide sworn quarterly written reports to the City Attorney's Office. (1/5CT 1139, 1141-1143.)

D. The Court Denies The Individual Defendants' Motion For Judgment.

At the close of the City's case, the Manns moved for judgment under Code of Civil Procedure section 631.8. (RT 1583-1585, 1650-1654.) They argued that the record compelled judgment in their favor because there was no evidence they ever acted in their individual capacities, the City made no alter ego showing, and the TPO "does not impose the liability on the agent" but rather expressly regulates "the conduct of '*Owners*,' defined as an owner of record." (1/4CT 904-905, italics added; RT 1584, 1654; see OMC, §§ 8.22.340, 8.22.620, 8.22.640(A), 8.22.650(B), 8.22.670(B)(1).) They pointed out that neither Baljit nor Surinder were "owner[s] of record" (1/4CT 905), and that their

conduct fell within their positions as DODG and SBMANN2 corporate-LLC officers (RT 1584; see also 1/1CT 22-23 [complaint]; 1/4CT 904-905).

Recognizing the issue was purely legal—"whether liability under the Oakland statutes is limited to the record owner of the property"—the court deferred ruling until post-trial briefing. (RT 1584-1585, 1651, 1653.) It then interpreted the TPO's express language as *not* being "limited to the owner of record" because section 8.22.640, subdivision (A), refers to the "'Owner's agent'" and section 8.22.340 refers to "'an agent, representative, or successor of any of the foregoing.'" (1/4CT 1082.) It concluded, as a matter of law, that the TPO stretches "*beyond* the record owner to include agents and representatives and any person for certain liability factors" and thus authorizes imposing *personal liability* on such agents or representatives if they "'*do*' one or more of the prohibited types of harassment in bad faith." (1/4CT 1082-1083, italics added; RT 1651, italics added.) Based on that interpretation, it ruled there was "more than enough evidence" to hold the Manns personally liable as the corporate owners' agents and representatives. (RT 1651-1652; see 1/4CT 1086, 1089-1091, 1095, 1098-1099, 1102.)

The court rejected the Manns' argument that the City had to establish alter ego liability, relying on its interpretation of the TPO to conclude that alter ego "does not apply where a specific statute imposes liability." (1/4CT 1082.)

E. The Court Enters Judgment And Awards Attorney Fees; Defendants Timely Appeal And The Appeals Are Consolidated.

The court entered judgment on September 23, 2021 in the amount of $3,987,550. (1/5CT 1170-1174.) On October 19, 2021, defendants timely appealed the judgment and the court's order granting a permanent injunction. (1/5CT 1205.)

The City moved for attorney fees, requesting a 2.25 fee multiplier on the lodestar amount. (2/2CT 364-387; see also 2/2CT 483.) Defendants argued the requested fees were excessive and the multiplier was improper. (2/2CT 394-414.)

The court tabulated a lodestar amount of $1,105,026, and awarded a 2.1 fee multiplier that increased the lodestar to $2,320,554; the court then added $49,000 for time preparing the fee motion. (2/2CT 487.)

The court later entered an amended judgment, which states that the September 23, 2021 judgment "remains fully in effect" and that the new amended judgment incorporates the first judgment's terms by reference and "does not disturb it except to include the amounts of attorney's fees and costs." (2/2CT 499-501.)

Defendants then appealed the trial court's February 1, 2022 attorney fee order, and the March 10, 2022 amended judgment. (2/3CT 510-511.) This Court consolidated the appeals.

APPEALABILITY STATEMENT

The March 10, 2022 amended judgment is final, resolving all issues. (2/2CT 499-501 [incorporating September 23, 2021 judgment by reference]; see 1/5CT 1175-1178; Code Civ. Proc., § 904.1, subd. (a)(1).) The February 1, 2022 attorney fee order was included in the March 10, 2022 amended judgment and is thus appealable from that judgment. (2/2CT 483-488, 499-501; see *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1282 [attorney fee order necessarily reversed when court reversed underlying appealable order, "regardless of whether [the fee order] was separately appealed"].)

The injunction order is separately appealable and also appealable because it is included in the judgments. (1/5CT 1136-1146, 1176-1178; Code Civ. Proc., § 904.1, subd. (a)(6).)

The consolidated appeals are timely. The October 19, 2021 appeal was filed within 60 days of the September 23, 2021 judgment and the September 16, 2021 notice of entry of injunction. (1/5CT 1154-1169, 1175-1178, 1205-1207; Cal. Rules of Court, rule 8.104(a)(1).) The March 30, 2022 appeal was filed within 60 days of the March 14, 2022 notice of entry of judgment. (2/2CT 502-508; 2/3CT 510-525; Cal. Rules of Court, rule 8.104(a)(1).)

STANDARDS OF REVIEW

Interpretation of OMC. Courts interpret municipal ordinances just like statutes. (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087.) They consider the plain meaning; and if that analysis doesn't resolve the dispute, they resort to interpretive rules, extrinsic aids, reason, practicality, and common sense. (*MacIsaac v. Waste Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.)

Exhaustion of remedies. Whether the "exhaustion of administrative remedies" jurisdictional doctrine applies is a legal question reviewed de novo. (*Monterey Coastkeeper v. Monterey County Water Resources Agency* (2017) 18 Cal.App.5th 1, 12 (*Monterey Coastkeeper*).)

Satisfaction of statutory conditions. Determining whether the City met the conditions established by the OMC is a question of law reviewed de novo. (*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 711.)

Primary jurisdiction. Whether to defer to an administrative agency under the primary jurisdiction doctrine is generally reviewed for an abuse of discretion. (*Bradley v. CVS Pharmacy, Inc.* (2021) 64 Cal.App.5th 902, 913.) But where, as here, the trial court never exercised its discretion, the Court of Appeal examines "the complaint as written" to determine whether the doctrine applies. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 398 (*Farmers*).)

Personal liability for corporate debts without applying alter ego. Where, as here, the court rules the alter

ego doctrine is inapplicable based on statutory interpretation (1/4CT 1082-1083), de novo review applies (*Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 817).

Attorney fee multiplier. Although fee multiplier decisions are generally reviewed for an abuse of discretion (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49), de novo review governs where, as here, the argument is that the multiplier was impermissible as a matter of law (*Chodos v. Borman* (2014) 227 Cal.App.4th 76, 91).

ARGUMENT

I. THE ENTIRE JUDGMENT MUST BE REVERSED.

A. The Court Lacked Jurisdiction To Award Civil Penalties And Injunctive Relief Under OMC Chapter 1.08 Because The City Failed To Exhaust Administrative Remedies.

The court awarded defendants civil penalties under OMC Chapter 1.08, which provides the City with an express *administrative* remedy. (1/4CT 1106-1116; see OMC, §§ 1.08.020 ["This Chapter authorizes the *administrative assessment* of civil penalties to *effect abatement* of … [a]ny violations of the following provisions of Oakland Municipal Codes," including the Building Code, the Housing Code, the Health and Safety Code (which includes the TPO) and the Uniform Fire Code, italics added], 1.08.040(B) ["The City Manager, or his or her designee, is authorized to assess civil penalties *administratively* in accordance with the procedures established in this Chapter," italics added].)

Where, as here, a statute provides an express administrative remedy, "relief *must* be sought from the administrative body and this remedy exhausted *before* the courts will act." (*Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 292, italics added; accord, *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 382-383 [administrative remedies *must* be exhausted before resorting to the courts]; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 [same].)

This is known as the "exhaustion rule."

Under this rule, a party's administrative remedy is exhausted *only* after all available administrative procedures have been completed. (*Plantier*, *supra*, 7 Cal.5th at pp. 382-383.) The rule applies even within statutory schemes that don't expressly condition the right to sue on plaintiffs' exhaustion of the administrative remedy (*Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1271), and even where the available administrative remedy is phrased in permissive, not mandatory, language (*Morton v. Superior Court* (1970) 9 Cal.App.3d 977, 982). To satisfy the exhaustion rule, a party *must* present the *entire controversy* to the responsible administrative department and have it *fully adjudicated* before suing. (*Contractors' State License Bd. v. Superior Court* (2018) 28 Cal.App.5th 771, 779.)

The exhaustion rule is jurisdictional. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 156; *Plantier*, *supra*, 7 Cal.5th at pp. 382-383 [the exhaustion of remedies rule is not a matter of judicial discretion; it is a fundamental rule of procedure binding all courts]; *Wilkinson v. Norcal Mutual Ins. Co.* (1979) 98 Cal.App.3d 307, 318 [failing to exhaust an administrative remedy "is a jurisdictional, not a procedural, defect"].) Thus, a court violating this rule "'acts in excess of jurisdiction.'" (*Morton v. Superior Court*, *supra*, 9 Cal.App.3d at p. 981.)

It is undisputed that OMC Chapter 1.08 provided an administrative remedy to obtain civil penalties for defendants'

alleged public nuisances, and violations of the TPO, the Fire Code and Building Maintenance Code. (OMC, §§ 1.08.020, 1.08.040.) Accordingly, the City was *required* "'to initially resort to that tribunal and to exhaust its appellate procedure.'" (*Tejon Real Estate, LLC*, *supra*, 223 Cal.App.4th at pp. 155-156, quoting *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 930.) That administrative process was a "'"jurisdictional" prerequisite to judicial consideration'" of the City's claims. (*Tejon Real Estate, LLC,* at p. 156, quoting *Styne v. Stevens* (2001) 26 Cal.4th 42, 56.)

Because it's undisputed that the City failed to pursue its administrative remedies, the court lacked any jurisdiction to adjudicate the claims. (*Tejon Real Estate*, *supra*, 223 Cal.App.4th at pp. 156-157 [affirming trial court's order sustaining demurrer without leave to amend because the appellant failed to obtain final administrative decision before suing]; *Monterey Coastkeeper, supra,* 18 Cal.App.5th at p. 18 [plaintiff not entitled to relief if it fails to exhaust administrative remedy].)

The City was also required to exhaust administrative remedies before seeking and obtaining injunctive relief. (See *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 293-294 [where administrative process is available, it is improper to sue before first exhausting administrative remedies as it improperly bypasses the agencies, clogs the courts, and makes administrative agencies "impotent"]; *Morton v. Hollywood Park, Inc.* (1977) 73 Cal.App.3d 248, 254 [one who wishes to seek injunctive relief must first exhaust available administrative remedies]; *Bradley*, *supra*,

64 Cal.App.5th at p. 908 [where an administrative agency is empowered to issue an abatement order, plaintiff cannot sue for injunctive relief until exhausting administrative remedies].)

Several important policy reasons related to administrative autonomy, due process, and judicial efficiency support applying the exhaustion rule here. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501; *Plantier*, *supra*, 7 Cal.5th at p. 383.) ""The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief."" (*Sierra Club,* at p. 501.) Requiring litigants to exhaust administrative remedies also facilitates development of a complete factual record that draws on administrative expertise and experience, promotes judicial efficiency, and serves as a preliminary administrative sifting process by unearthing relevant evidence. (*Ibid.*) Where, as here, administrative remedies are available, applying the exhaustion rule also alleviates the burden on overworked courts. (*Morton v. Superior Court*, *supra*, 9 Cal.App.3d at p. 982.)

Here, defendants preserved the exhaustion defense by raising it in their Answers, their trial brief, and their opposition to the City's injunction request. (1/1CT 49 ¶ 43, 50 ¶ 61, 59 ¶ 43, 60 ¶ 61, 82 ¶ 152, 84 ¶ 171, 102 ¶ 152, 104 ¶ 171, 151 ¶ 152; 1/3CT 574; 1/4CT 1062-1063.) But the court never addressed the argument, except buried in a footnote in its statement of decision where it erroneously stated that defendants cited no authority requiring the City to exhaust the administrative process. (See

1/4CT 1119, fn. 31.) In any event, jurisdictional errors are never waived. (*Sime v. Malouf* (1950) 95 Cal.App.2d 82, 116.)

The City asserted that the exhaustion requirement "is inapplicable to the City as a government entity." (1/4CT 1074.) No authority supports that argument. It is indisputable that the City Manager *does* qualify as an administrative agency under this rule. (See OMC, § 1.08.040(B) [Oakland's "City Manager, or his or her designee, is authorized to assess civil penalties administratively"]; *Morton v. Superior Court*, *supra*, 9 Cal.App.3d at p. 982 ["It lies within the power of the administrative agency (in this case the city manager) to determine, in the first instance and before judicial relief may be obtained, whether a given controversy falls within its granted jurisdiction"]; *Brown v. Fair Political Practices Com.* (2000) 84 Cal.App.4th 137, 141 [Oakland's City Manager is an agency "administrator"].) Nor can the City create an administrative process to protect property owners' due process rights and then ignore that very process by rushing to court.

Because the City failed to exhaust the administrative process before suing, the trial court lacked jurisdiction to decide the City's claims. That compels reversal. When trial courts make jurisdictional errors, appellate courts *must* reverse. (See *County of Orange v. Lexington Nat. Ins. Corp.* (2006) 140 Cal.App.4th 1488, 1490 [jurisdictional error *necessarily* results in reversal]; *In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 997 [when court acts in excess of its jurisdiction, "the resulting judgment or order is 'voidable and reversible on appeal'"].)

B. The Court Also Erred In Awarding Civil Penalties And An Injunction Under OMC Chapter 1.08 Because The City Failed To Satisfy Multiple Statutory Due-Process-Based Preconditions.

1. OMC Chapter 1.08's requirements.

The court also erred in awarding civil penalties under OMC Chapter 1.08 without requiring the City to first comply with Chapter 1.08's specific due-process-based requirements. That ordinance plainly required the City—through the City Manager or his designee—to follow its specific rules and procedures: "The City Manager, or his or her designee, is authorized to assess civil penalties administratively *in accordance with the procedures established in this Chapter*." (OMC, § 1.08.040(B), italics added.) But the City Manager must cease assessment of civil penalties "when all major violations are wholly and permanently corrected." (OMC, § 1.08.060(D).)

Before a court may even contemplate reliance on Chapter 1.08 to assess civil penalties to effect abatement of a public nuisance under the TPO, the Fire Code or the Building Maintenance Code, Chapter 1.08 *requires* the City Manager or his designee to complete several due-process-based prerequisites:

(1) conduct "administrative assessment[s]" of the properties;

(2) officially declare that all of the subject properties are a public nuisance based on "major violation[s]";

(3) serve notice upon those responsible; and

(4) identify, in the assessment notice, the eight factors listed in section 1.08.050(D).

(OMC, §§ 1.08.030, 1.08.040(B)-(C), 1.08.050, 1.08.060.)

As we now show, the City failed to satisfy each one.

2. The City failed to conduct administrative assessments for all but one property.

a. The statutory "administrative assessment" requirement.

The court concluded, as a matter of law, that (1) "OMC Chapter 1.08 authorizes the City Attorney to recover civil penalties in a civil action," and (2) even though it is undisputed that the City failed to obtain a "prior administrative assessment under OMC Chapter 1.08," it was proper for the City Attorney to file a civil action so *the court* could conduct an assessment in the first instance. (1/4CT 1111.)

The court acknowledged that OMC section 1.08.040 does not explicitly grant the court authority to assess civil penalties. (1/4CT 1110-1111.) But it nonetheless interpreted Chapter 1.08 as giving the City discretion to select legal remedies over administrative remedies. (See 1/4CT 1111, citing OMC, §§ 1.08.020(B) [civil penalties "are *in addition to* any other administrative or legal remedy which may be pursued by the City," italics added], 1.08.090 ["Remedies not exclusive"].)

That interpretation of OMC Chapter 1.08 was legal error. The language the court cited does *not* permit the City to simply sue to have a court impose civil penalties in the first instance.

Nor was the trial court authorized to award civil penalties under Chapter 1.08 without the City first complying with its specific requirements. Instead, the ordinance clearly and unequivocally *required* the "Responsible Department"—i.e., the "City Manager or his designee"—to first conduct an "administrative assessment":

- "This Chapter authorizes the *administrative assessment* of civil penalties to effect abatement of:

  1. Any violations of provisions of the following Oakland Municipal Codes: [enumerating multiple provisions] … [or]

  3. The occurrence of any public nuisance as known at common law or in equity jurisprudence …." (OMC, § 1.08.020, italics added ["Scope"].)

- The City department that is "responsible" for issuing civil penalties "shall be the City department, its Director or Deputy Director, or other person so designated … by *the City Manager*." (OMC, § 1.08.030(C), italics added.)

- "*The City Manager, or his or her designee*, is authorized to assess civil penalties *administratively* in accordance with the procedures established in this Chapter." (OMC, § 1.08.040(B), italics added ["Authority"].)

Notwithstanding these express requirements, the City conducted *no* administrative assessments before imposing civil penalties in court as to four of the five properties at issue (all but 276 Hegenberger Road) and it sought penalties in court as to the fifth property (276 Hegenberger Road) that ignored the prior

administrative assessment. Accordingly, the City had no right to seek, and the court had no right to award, civil penalties under OMC Chapter 1.08. This, in itself, requires reversal.

The City cannot assert that no such requirement exists, given that undisputed evidence in the record—an admitted trial exhibit—establishes that it conducted an administrative assessment and imposed a civil penalty at 276 Hegenberger Road. (See Exh. 3; RT 129-144.) A "Notice of Substandard/Public Nuisance Declaration" establishes that the City's Acting Building Official conducted an administrative assessment at 276 Hegenberger Road, finding a public nuisance based on Fire and Building Maintenance Code violations, and imposed $5,000 in penalties on DODG. (Exh. 3 at 1, 19, citing, e.g., OMC, §§ 15.08.340 & 15.12.116; RT 131.) However, the City has never argued that this action seeks to recover that $5,000 assessment, and the trial court imposed almost $1 million in civil penalties on that property, dwarfing the only administrative assessment.

b. The court's erroneous interpretation of the administrative-assessment requirement.

The court rejected defendants' argument that the City's failure to obtain prior administrative assessments foreclosed the City's claims. (1/4CT 1110-1111.) The court interpreted the following Chapter 1.08 provisions as authorizing the City to bypass its own administrative process and obtain civil penalties directly from the court:

- Section 1.08.090, titled "'Remedies not exclusive'": "'The remedies provided for herein shall be cumulative and not exclusive,'" and "'[t]he enforcement official shall have the discretion to select a particular remedy to further the purposes and intent of the chapter ….'" (1/4CT 1111, italics omitted.)

- Section 1.08.020(B): "'[C]ivil penalties established in this Chapter are *in addition* to any other administrative or legal remedy which may be pursued by the City to address violations of the codes and ordinances identified in this Chapter.'" (1/4CT 1111, italics added by court.)

- Section l.08.040(G): "'[C]ivil penalties ... may be recovered by *all appropriate legal means*, … , or by *civil and small claims action brought by the City, or both*.'" (1/4CT 1111, italics added by court.)

The court's interpretation of Chapter 1.08 does not withstand scrutiny.

First, as noted above, the "exhaustion" rule *required* the City, as a matter of law, to pursue *all* available administrative remedies *before* filing a lawsuit. (§ I.A., *ante*.) Because that rule is jurisdictional, the lack of exclusivity language in Chapter 1.08 didn't authorize the court to bypass it. Nor can Chapter 1.08 be read as authorizing discretionary *court* action. It refers to an "enforcement official," which describes the City Manager or his designee, not a trial court.

Second, Chapter 1.08's reference to civil and small claims actions did not authorize the City to bypass Chapter 1.08's administrative prerequisites. Using "all appropriate legal

means" to "recover[]" civil penalties (OMC, § 1.08.040(G)) contemplates a civil or small claims action to recover *previously-assessed* administrative penalties. It is an enforcement mechanism for unpaid penalties, not a separate and distinct assessment process.

Third, the penalties here flouted OMC Chapter 1.08's purpose, which is to provide "an alternative method of code enforcement *to effect abatement of violations* of the laws, codes, ordinances and regulations identified in this Chapter." (OMC, § 1.08.010, italics added.) As the City acknowledged, the defendants already had abated (at substantial expense) most of the conditions at issue by time of trial. Having City administrative officials issue abatement notices with corresponding administrative penalties that will accrue until violations are abated will "effect abatement." But having a trial court determine after-the-fact penalties in the first instance for already-abated violations does not. Instead, it simply punishes a property owner for prior, already-abated violations, notwithstanding due-process concerns and Chapter 1.08's lack of authorization.

Fourth, the court's reliance on OMC section 1.08.090 (1/4CT 1111), which states that the available remedies are cumulative, does not overcome the requirement that penalties first be assessed administratively. It just means that "[t]he enforcement official" (i.e., the person who assesses penalties under the City Manager's direction) "shall have the discretion to select a particular remedy to further the purposes and intent of the chapter, depending on the particular

circumstances." (OMC, § 1.08.090.) It doesn't authorize a plaintiff or trial court to bypass the administrative process.

The court also erred in relying on *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1306 (*Sainez*). (See 1/4CT 1110-1111.) *Sainez* involved civil penalties awarded under the San Francisco Housing Code and Building Code, which "*explicitly [gave] the court the authority* to assess civil penalties." (1/4CT 1110, italics added.) Specifically, it permitted "*any court of competent jurisdiction*" to assess civil penalties. (*Sainez*, at p. 1309, italics added.) Since Chapter 1.08 only empowered "*[t]he City Manager, or his or her designee …* to assess civil penalties administratively in accordance with the procedures established in this Chapter" (OMC, § 1.08.040(B), italics added), *Sainez* is inapposite. (See *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 374 ["cases are not authority for propositions not considered"].)

3. The City pursued this litigation without issuing the required public nuisance declarations as to three properties, violating the owners' due process rights.

The court also ignored the codified requirement that the City must officially declare the owner's property a public nuisance before imposing civil penalties against a property owner, which includes notice of appeal rights. (OMC, § 1.08.030(A), (B); see also OMC, §§ 15.08.340 [upon the City's finding that a structure is unsafe, it has the authority to declare any building "to be a substandard building and a public

nuisance"], 15.08.350(B)-(C) [listing the declaration requirements].)

Allowing the City to bypass this requirement violated due process. Where, as here, a city invokes local ordinances to summarily abate nuisances, its actions are subject to constitutional due process requirements. (*People ex rel. Camil v. Buena Vista Cinema* (1976) 57 Cal.App.3d 497, 502; *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718.) Under a city's police power to order a property owner to abate a public nuisance to protect public health and safety, "it *must* afford the owner due process of law." (*Friedman v. City of Los Angeles* (1975) 52 Cal.App.3d 317, 321, italics added.) In the abatement context, providing due process generally requires the city to give sufficient notice, and a meaningful opportunity to be heard. (*Ibid.*; see *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212 ["opportunity to be heard" in administrative context "must be afforded 'at a meaningful time and in a meaningful manner'"].)

The Oakland ordinances include important requirements to protect property owners' due process rights: The nuisance declarations "*shall* contain … [s]tatements advising …

a. "That any person adversely affected by the Declaration of the Building Official may appeal to the Hearing Officer," and

b. "That failure to appeal will constitute a waiver of all rights to an administrative hearing and determination of the matter."

(OMC, § 15.08.350(B)(5)(a)-(b), italics added.)

Undisputed evidence establishes that DODG and SBMANN2 were *not* afforded these safeguards as to three of the five properties. There are no nuisance declarations in the record for 1921/1931 International, 5848 Foothill, and 5213-5219 International. (See Exhs. 3 [nuisance declaration for 276 Hegenberger], 42 [nuisance declaration for 5268-5296 Foothill]; 1/4CT 1112 [noting that "formal Public Nuisance Declarations" only exist for those two properties].) Where, as here, no public nuisance declaration exists, civil penalties are unavailable.

The court acknowledged that no notice exists that complies with the statutory nuisance-declaration requirements for any of these three properties. (1/4CT 1112; see Exhs. 22-23; OMC, § 15.08.340.) It concluded, however, that OMC section 15.08.340 effectively eliminated those requirements for two of them—1921/1931 International and 5848 Foothill—because those properties were "declared a 'public nuisance'" (1/4CT 1112), and OMC section 15.08.340 states that buildings "shall be deemed and hereby [are] declared to be a … public nuisance" where nuisance conditions enumerated in the Code exist (OMC, § 15.08.340).

But that interpretation necessarily fails: It would render completely meaningless and ineffectual section 15.08.350's due-process-based declaration/notice requirements. (See *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330 ["the court should avoid a construction that makes some words surplusage"]; *Mundy v. Superior Court* (1995) 31 Cal.App.4th 1396, 1405

[courts must "strive to give effect and meaning to all parts of a law if possible and avoid interpretations which render statutory language superfluous"].)

The court also concluded—notwithstanding the undisputed absence of any formal nuisance declaration—that the City's abatement orders regarding "red-tag" conditions at 1921/1931 International sufficiently satisfied the nuisance-declaration requirements. (1/4CT 1112, citing Exhs. 35-36.) But that's directly contrary to testimony from a City witness who admitted that a red-tag notice "is *not* a declaration of public nuisance; it's simply a red tag." (RT 164, italics added.) No other evidence contradicts this admission. Red-tag notices address technical violations that render a property unsafe to inhabit; a red-tag notice can be proper even though a property does not constitute a public nuisance, and a property can be a public nuisance without warranting a red-tag notice. (See 1/4CT 1097-1098 ["'red-tagged'" means that entering a particular property is prohibited "because of the risk of injury or death"]; compare Civ. Code, §§ 3479-3480 [a public nuisance can be anything that is injurious to the health of an entire community or neighborhood].)

The court—and the City—violated due process by imposing civil penalties without the required nuisance declarations.

4. The City failed to identify required factors.

In imposing civil penalties, the court also impermissibly allowed the City to bypass other due-process-based prerequisites. When serving abatement notices on DODG and SBMANN2,

the City was supposed to identify the factors specified in Chapter 1.08, including the nature of the "major violations," the assessment criteria, the duration of civil penalties, and "[t]he dollar amount and rate of recurrence." (OMC, § 1.08.050(D).) Yet none of the abatement notices mentioned any of these factors. (See Exhs. 3, 10, 19, 35, 36.) These omissions defeat the City's claims.

In concluding otherwise, the trial court simply concluded that these requirements don't apply because the City sought penalties in a court action rather than an administrative proceeding. (1/4CT 1113.) The court cited no supporting legal authority, and its reasoning ignores the due-process predicates to the notice requirements and the entire administrative process. Even ignoring that the exhaustion rule *required* the City to pursue the administrative process before resorting to the courts, the City cannot tout Chapter 1.08 as affording it the right to sue in court while at the same time ignoring all of Chapter 1.08's due-process-based prerequisites to civil penalties. Either Chapter 1.08 applies, or it doesn't. The City can't have it both ways.

C. The Court Also Violated The Primary Jurisdiction Rule By Awarding Civil Penalties And An Injunction Without An Administrative Assessment.

Even ignoring the exhaustion rule's jurisdictional bar, the court erred in imposing civil penalties and injunctive relief under Chapter 1.08 without first requiring the City Manager or his designee to conduct an administrative assessment. At a

minimum, doing so violated the "primary jurisdiction" rule. (See *Farmers*, *supra*, 2 Cal.4th 377 at pp. 390-391.) The exhaustion rule applies where a claim is cognizable in the first instance by the administrative agency alone, whereas the primary jurisdiction rule applies where a claim is originally cognizable in the courts, but the legislature has designated an administrative body—here, the City Manager, or his designee—as having "'special competence'" to resolve certain issues. (*Ibid.*) Where the primary jurisdiction doctrine applies, courts should stay an action pending the administrative body's expert resolution of the issues. (*Id.* at p. 401.)

Like the exhaustion doctrine, "the primary jurisdiction doctrine advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws." (*Farmers*, *supra*, 2 Cal.4th at p. 391.) There are at least two compelling reasons why the primary jurisdiction doctrine would apply here even if the exhaustion's doctrine's jurisdictional bar were inapplicable.

First, the City Manager is the "'chief administrative officer of the city.'" (*Brown*, *supra*, 84 Cal.App.4th at p. 147; see City Charter of Oakland (Charter), Art. V, § 500.) He or she, and all employees under his or her jurisdiction, have responsibility to administer "*all* affairs of the City." (Charter, Art. V, § 503, italics added; see also Charter, § 504 [specifying the City Manager's duties].) He or she is the person with the power to "set standards and procedures for holding administrative hearings" in order to "'adjudicate the issuance of administrative citations.'" (*Lippman*

v. City of Oakland (2017) 19 Cal.App.5th 750, 759, quoting OMC, § 1.12.080(A).) And, he or she is the person *solely* empowered to execute and enforce *all* of the City's laws and ordinances—including assessing civil penalties under the Oakland Housing Code and enforcing abatement actions. (Charter, Art. V, § 504(a); OMC, §§ 1.08.040(B), 1.08.060(A) ["The City Manager, or his or her designee, is authorized to establish a schedule of violations and assessments or similar guidelines for assessing the amount, rate of recurrence, and duration of civil penalties"], 1.12.020(A)(1) [authorizing administrative assessment of citations to effect abatement of Housing Code violations], 1.12.040(B) [authorizing the City Manager "to assess citations administratively, [i]n accordance with the procedures established in this Chapter"], 1.16.040(B) [authorized to enforce abatement actions], 8.22.150(B)(3) ["The City Manager shall designate staff authorized to issue administrative citation and civil penalties"].)

Thus, since the City Manager is the one and only person legislatively empowered—and particularly equipped—to deal with the precise legal issues involved in this case, the primary jurisdiction doctrine is directly implicated here. (See *Jonathan Neil & Assoc., Inc.*, *supra*, 33 Cal.4th at p. 934 [compelling reasons exist to invoke regulatory body's primary jurisdiction where issues raised directly implicate its regulatory authority and expertise].)

Second, considerations of judicial economy and uniformity strongly favored a court deferring to the City Manager's administrative assessment before deciding any undetermined factual and legal issues. (*Farmers*, *supra*, 2 Cal.4th at p. 396;

Jonathan Neil & Assoc., Inc., at p. 934.) Where, as here, a case involves the interpretation and application of the City's municipal codes, the City Manager's extensive experience with the regulations puts him or her in the best position to ensure regulatory uniformity. (See *Miller v. Superior Court* (1996) 50 Cal.App.4th 1665, 1677 [applying primary jurisdiction rule to stay case because the complaint's allegations "demonstrated a paramount need for specialized agency factfinding expertise"].)

In particular, the complaint sought civil penalties under OMC Chapter 1.08 and the City's TPO (OMC, § 8.22.600 et seq.) based on "wide-ranging building code violations." (1/1CT 24 ¶ 23; see 1/1CT 25-26 ¶ 30, 29-30 ¶¶ 46-49, 30-31 ¶¶ 53, 58, 33 ¶ 63, 34-35 ¶ 69, 37-38 ¶¶ 84-93, 39 ¶¶ 100-103, 40 ¶¶ 104, 109-110, 41 ¶ 119; 1/4CT 936-957, 960-963.) The Oakland City Charter's and Municipal Codes' express language establish that analyzing and addressing such violations fall uniquely within the City Manager's duties and expertise. The trial court was not well-positioned to understand the intricacies of the Oakland Building and Housing Code, nor the reasons behind the TPO's enactment, including the practical problems caused by rising "demand for rental housing in Oakland leading to rising rents, caused in part by the spillover of increasingly expensive housing costs in San Francisco." (OMC, § 8.22.610(A).) The City Manager was in a much better position to analyze the issues raised by the City's lawsuit than the court.

Thus, even ignoring the jurisdictional failure to exhaust remedies, this trial undermined the primary jurisdiction doctrine because it made the court the factfinder on each and every

complex issue about the realities of urban housing and it usurped the City Manager's expertise on adjudicating housing issues, including handling relationships with landlords and addressing the municipal codes in the context of the City's housing shortage. And, because the City barreled ahead with its lawsuit without deferring to the administrative process, the fact that defendants eventually abated *before trial* almost all of the issues for which the City sued got lost in the process.

D. The Legal Errors Regarding OMC Chapter 1.08 Are Fatal Despite The Award Of Relief Under The TPO.

The trial court awarded civil penalties and injunctive relief under both OMC Chapter 1.08 and the TPO. (1/4CT 1113-1120 & fns. 27, 31.) But the award of relief under the TPO does not cure or ameliorate the errors under Chapter 1.08. The City's non-compliance with Chapter 1.08's standards compels reversal.

1. The court based its TPO awards on Chapter 1.08 standards.

Although the court nominally awarded penalties under both OMC Chapter 1.08 and the TPO, it conflated the two standards and expressly based its TPO analysis on Chapter 1.08's standards. (See 1/4CT 1115 ["The Court considers penalties under the TPO and the OMC Chapter 1.08. The Court is guided in the exercise of its discretion in assessing penalties by the factors listed in OMC section 1.08.060(E)."].) Thus, the legal errors defeating the court's reliance on Chapter 1.08 also negated the court's TPO analysis.

2. The court improperly applied the TPO in a manner that undermines Chapter 1.08's administrative scheme, again failing to exhaust administrative remedies.

Chapter 1.08 "authorizes the *administrative assessment* of civil penalties to *effect abatement* of" violations of various Oakland municipal codes, *including the TPO*. (OMC, § 1.08.020, italics added, referencing OMC Title 8.) It authorizes the City Manager or his or her designee "to assess civil penalties *administratively* in accordance with the procedures established in this Chapter" (OMC, § 1.08.040(B), italics added) that shall not exceed $1,000 a day starting "on the date of initial occurrence of the violation, as identified by the City," and "ceas[ing] when all major violations are wholly and permanently corrected" (OMC, § 1.08.060). Thus, because the Chapter 1.08 administrative scheme expressly provides a remedy for TPO violations, "relief *must* be sought from the administrative body and this remedy exhausted *before* the courts will act." (*Abelleira, supra,* 17 Cal.2d at p. 292, italics added.)

Moreover, OMC Chapter 1.08's express purpose is to have City administrators impose administrative penalties "to effect" abatement of violations—that is, to *secure compliance* with ordinance requirements, rather than punish defendants on an ex post facto or ad hoc basis for prior violations that *already have been abated*. This language tracks the "'primary purpose' of civil penalties,'" which "'is to secure obedience to statutes and regulations imposed to assure important public policy objectives.'" (*Stone v. Alameda Health System* (2023) 88

Cal.App.5th 84, 99.) This policy purpose can only comport with due process if *City administrators* notify the landlord *concurrently* that violations exist (including TPO violations), and that the City is imposing daily penalties in a certain amount that will accrue each day until the violations are abated.

But that's not what happened here. The City only imposed a $5,000 administrative penalty on defendants as to one property, and in some instances City inspectors specifically stated no penalties were warranted. (See pp. 21, 23, 44-45, *ante*.) And yet, the court then applied the TPO in a manner that imposed almost $4 million in civil penalties on the defendants *after-the-fact* and for violations that even the trial court acknowledged the defendants had abated by time of trial. (See 1/4CT 1109 [rejecting defendants' argument that civil penalties are not recoverable "because all alleged nuisances have been abated at the properties that were at issue at trial"]; OMC, § 1.08.060(D) ["The assessment of civil penalties shall cease when all major violations are wholly and permanently corrected"].)

The court erred in construing the TPO in a manner that directly undermines the due-process predicates to the City's administrative penalty scheme and ignores exhaustion requirements. If the Chapter 1.08 relief fails as procedurally improper and a violation of due process—and as demonstrated above, it does—the TPO relief does too. That, as we now show, is particularly true given that at the time the violations occurred and the City sued, Chapter 1.08 administrative penalties were the *only* civil penalties authorized by City ordinances.

3. The court violated due process in awarding TPO civil penalties because the TPO version in effect when the violations occurred, and the City sued, did not authorize civil penalties.

At the time the TPO violations occurred and the City filed its complaint, OMC Chapter 1.08 provided the only basis for civil penalties. The TPO, at that point, only authorized the pursuit of damages, not civil penalties. It authorized tenants to sue for damages, and it authorized the City Attorney to "enforce the TPO through civil action for injunctive relief *or damages*, or both, for when the party against whom enforcement is sought has a pattern and practice of violating the TPO." (See former OMC, § 8.22.670, prior to 7/21/2020 amendment, italics added].) Damages would include, for example, reimbursement of expenses and costs associated with the City having to abate a violation itself.

In July 2020, *more than a year after the City filed its complaint*, the City re-wrote the TPO to authorize the City Attorney—for the first time ever—to "enforce the TPO through civil action for equitable relief, restitution, *and/or penalties* when the party against whom enforcement is sought has a pattern and practice of violating the TPO." (Current OMC, § 8.22.670, as amended 7/21/2020, italics added].) The City also added a brand-new provision that "[a] court may award civil penalties of up to one thousand dollars ($1,000.00) per day for each violation of subsection 8.22.640 A., B., E., G., or H." (*Ibid.*)

The trial court relied on that amendment in awarding penalties under the TPO. (See 1/4CT 1114, fn. 27.) As a matter of law, that was reversible error. Due process prohibits retroactive application of laws. (See *Wexler v. City of Los Angeles* (1952) 110 Cal.App.2d 740, 747 [statutory change did not apply retroactively to lawsuit]; *Morris v. Pacific Elec. Ry. Co.* (1935) 2 Cal.2d 764, 767-769 [defendant entitled to rely on old statute since new statute was enacted after lawsuit commenced]; *Wells Fargo & Co. v. City and County of San Francisco* (1944) 25 Cal.2d 37, 41 [actions governed by old statute because new statute did not allow a reasonable time after its effective date to exercise the right].)

Defendants had the right to rely on the law existing when the violations occurred and the City filed its complaint. Thus, as defendants argued below, the TPO version that existed when the alleged violations occurred controls. (See 1/4CT 895, fn. 1, 1056, fn. 2.) As that version did not authorize the court to award civil penalties for TPO violations, as a matter of law the TPO's new penalty provision cannot support affirmance. The flaws in the OMC Chapter 1.08 penalty awards therefore defeat the judgment and compel reversal.

E. The Remedy: The Judgment Must Be Reversed With Directions To Enter Judgment For All Defendants.

The City's failures to exhaust available administrative remedies and to comply with due-process-based prerequisites to abatement proceedings compel reversal of the judgment with

directions to enter judgment for the defendants. The City, having chosen to disregard the available administrative process and due-process-based procedures, does not get an administrative do-over to retroactively pursue the process it purposefully abandoned. (See, e.g., *Palmer v. Regents of University of California* (2003) 107 Cal.App.4th 899, 905-906 [summary judgment properly granted due to plaintiff's failure to exhaust remedies]; *Morton v. Hollywood Park, Inc.*, *supra*, 73 Cal.App.3d at p. 253 [claim for injunctive relief properly dismissed for failure to exhaust administrative remedies]; cf. *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 877 [failure to exhaust administrative remedies gives collateral estoppel effect to prior administrative findings].) No legal basis exists to send the dispute back to the City Manager to conduct an administrative assessment that the City never sought or completed.

That is particularly true given that most of the subject violations already were abated by time of trial and now have been fully abated. (See RT 772-773, 1317-1318, 1336-1339, 1354, 1387, Exh. 76 at 3; Exh. 85 at 3; Exh. 261 at 1.) Not only would any post hoc attempt to pursue administrative remedies trigger due process issues, no basis exists to commence administrative abatement proceedings for violations that already have been abated. It's too late. (See OMC, § 1.08.060(D) ["assessment of civil penalties shall cease when all major violations are wholly and permanently corrected"].)

II. THE COURT ERRED IN IMPOSING PERSONAL LIABILITY ON THE MANNS.

At an absolute minimum, the judgment against the Manns must be reversed.

A. As A Matter Of Law, The Corporate Privilege Shields Corporate Principals And Agents From Company Debts And Liabilities.

The most fundamental principle of corporate law is that corporations are separate legal entities with their own identities—distinct from their owners, officers, and directors. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) "The same is true of a limited liability company (LLC) and its members and managers." (*Curci Investments, LLC v. Baldwin* (2017) 14 Cal.App.5th 214, 220; see also Corp. Code, §§ 17701.04, subd. (a), 17703.04, subd. (a)(2) .)

This "corporate privilege" permits owners to incorporate a business for the specific purpose of individually shielding themselves from the company's liabilities. (See *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249 (*Las Palmas*).) That's why imposing liability on corporate or LLC founders, officers, and owners is generally prohibited. (*Ibid.*; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 301 ["the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require"].)

As we now show, the court wrongfully denied the individual defendants here—the Manns, the principals of DODG and SBMANN2—this legal protection.

B. The City Never Established Alter Ego Liability.

When a court disregards the corporate privilege to reach those controlling a corporation (or LLC), it has "pierced the corporate veil" under the alter ego doctrine. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1106-1107; Corp. Code, § 17703.04, subd. (b) [alter ego applies to LLCs].) Given the benefits of allowing persons to limit business risk through incorporation, sound public policy dictates that courts approach alter ego liability "with caution." (*Las Palmas, supra,* 235 Cal.App.3d at p. 1249.)

Plaintiffs bear the burden of proving alter ego liability. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212.) They must prove that (1) there is "'such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist'"; and (2) an "'inequitable result'" will follow "'if the acts are treated as those of the corporation [or LLC] alone.'" (*Mesler*, *supra*, 39 Cal.3d at p. 300.) Simply proving control of the entity is insufficient. (See *Shafford v. Otto Sales Co.* (1953) 119 Cal.App.2d 849, 862 ["complete stock ownership and actual one-man control" does not suffice].)

Plaintiffs must plead *and* prove both elements. (*Neilson v. Union Bank of California, N.A.* (C.D.Cal. 2003) 290 F.Supp.2d 1101, 1116 [plaintiff must specifically allege both elements of alter ego liability, "as well as facts supporting each"; conclusory

allegations are insufficient to state a claim].) Thus, where, as here, a plaintiff fails to plead and prove *both* alter ego requirements, *as a matter of law there can be no alter ego liability*. (E.g., *Tucker Land Co. v. State of California* (2001) 94 Cal.App.4th 1191, 1201-1202.) That's the situation here.

At the close of the City's case in chief, the Manns moved for judgment in their favor based on the corporate shield as well as the lack of alter ego evidence and proof (RT 1583-1585, 1650-1654), explaining:

a. They are not owners of "record" for the five properties at issue, a prerequisite to imposing civil penalties on them. (1/4CT 904-905; OMC, §§ 8.22.340, 8.22.620, 8.22.640(A), 8.22.650(B), 8.22.670(B)(1).)

b. All of their conduct fell squarely within the scope of their positions as DODG and SBMANN2 officers and principals, thus precluding liability as a matter of law. (RT 1584; see also 1/1CT 22-23 [Complaint]; 1/4CT 904-905.)

c. The City made no alter ego showing. (RT 1584; 1/4CT 904-905.)

In response, neither the City nor the trial court claimed there was any proof of—or basis for—alter ego liability. Instead, the court ruled that the City did not have to establish alter ego. Relying on *Atempa*, *supra*, 27 Cal.App.5th at p. 825, the court concluded that "the common law doctrine of alter ego does not apply where a specific statute imposes liability," and then interpreted the TPO as specifically imposing *personal liability* on

the Manns. (1/4CT 1082-1084.) That conclusion misses the mark for two reasons.

First, the court's refusal to apply the corporate privilege to the Manns despite the lack of alter ego liability rested solely on its interpretation of the TPO. No basis exists under the court's reasoning to hold the Manns personally liable for any civil penalties awarded under OMC Chapter 1.08. That, in itself, precludes holding the Manns personally liable because the TPO version in effect when the violations occurred and the City sued did not authorize civil penalties. (See § I.D.3, *ante*.)

Second, the court's interpretation of the TPO as negating the corporate privilege was wrong as a matter of law. *Atempa* held that the subject statutes made an employer's business structure irrelevant and "unambiguously" imposed liability on the company's founder as an "'other person'" subject to civil penalties for violating employee wage laws. (27 Cal.App.5th at pp. 817, 820, 825; see Lab. Code, § 1197.1, subd. (a) ["Any employer or other person acting either individually or as an officer, agent, or employee … shall be subject to a civil penalty …"].) As the next section shows, the TPO doesn't do that.

C. The Court Erred In Interpreting The TPO As Negating The Corporate Privilege And Imposing Personal Liability On Corporate Agents.

The court interpreted the TPO as imposing personal liability on the Manns even though the TPO only regulates the conduct of an "Owner," which is defined as an "owner of record"

(OMC, §§ 8.22.340, 8.22.620, 8.22.640(A), 8.22.650(B), 8.22.670(B)(1)), and it is undisputed that the Manns are *not* owners of record for any of the subject properties (1/4CT 1080). DODG owns four of the properties; SBMANN2 owns the other. (*Ibid.*)

The court erroneously interpreted the definition of "owner of record" to include individuals who are *not* owners of record. (1/4CT 1082-1084.) Contrary to the corporate privilege, the court read the TPO as authorizing personal liability on *individual corporate officers and agents* for their "own affirmative conduct, even if such conduct was within the scope of their employment." (1/4CT 1082.) It relied on OMC section 8.22.640(A), which "provides that '[n]o Owner or such Owner's agent, contractor, subcontractor, or employee, shall *do* any' of the enumerated forms of tenant harassment 'in bad faith.'" (*Ibid.*, italics added.) It also relied on section 8.22.340's definition of "Landlord," which "includes not only the 'owner of record' but 'an agent, representative, or successor of any of the foregoing.'" (*Ibid.*)

The court's interpretation was wrong.

While the court correctly noted that the TPO prohibits owners' agents from harassing tenants, the TPO does *not* authorize imposing personal liability for an *individual's conduct* acting only as a corporate representative or agent. At most, it imposes liability on a corporate owner for the conduct of its "agent, contractor, subcontractor, or employee." (OMC, § 8.22.640(A).) Just because a corporation can be liable for an

agent's conduct doesn't make the agent *individually* liable. (See *Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431, 1442-1443 [the corporation, not its owner or officer, is subject to vicarious liability for torts committed by its employees or agents].) The TPO does not expressly extend personal liability for civil penalties to the agents, contractors, subcontractors, or employees of the owners of record. It simply makes the *owners* liable for the conduct of their agents and representatives.

In any event, there is no substantial evidence that the Manns *individually* "did" any of the conduct enumerated in section 8.22.640(A). (See 1/4CT 1083.) Rather, everything they "did" was within the scope of their duties as corporate (and LLC) owners. Thus, the court's conclusions that the Manns acted as corporate agents by "dealing with violations," personally visiting and communicating with the tenants, or "enter[ing] into leases with tenants" for some of the properties do not justify personal liability. (See 1/4CT 1086, 1091-1092, 1095, 1098-1099.)

In effect, the court held—contrary to settled agency principles (*Sandler*, *supra*, 206 Cal.App.4th at pp. 1442-1443)—that the individuals were personally liable under the TPO for the corporations' conduct, rather than the other way around. It held—contrary to settled law that shareholders, corporate officers, and LLC members cannot be liable for the entities' acts even if they control the entities' actions (*Grosset*, *supra*, 42 Cal.4th at p. 1108; *Curci*, *supra*, 14 Cal.App.5th at p. 220)—that corporate agents or representatives may be personally liable under the TPO for their own conduct falling within the scope of employment.

If this is truly what the City intended when enacting the TPO, it needed to say so unambiguously and unequivocally. It didn't. And if the City intended from the outset to seek *personal* liability against the Manns under the TPO, then it needed to plead a factual basis for personal liability under the TPO *in its complaint*, just as a plaintiff must plead and prove a basis for alter ego liability. The City didn't do that either. (See 1/1CT 19-41.) The complaint failed to put the Manns on notice that they were exposed to personal liability.

As a matter of law, the judgment must be reversed to the extent it imposes personal liability on the Manns.

III. THE CIVIL PENALTIES AWARDED FOR 276 HEGENBERGER ROAD WERE EXCESSIVE.

An authorized tenancy involving a "Rental Unit" and a "Rental Agreement" is a prerequisite for imposing civil penalties for TPO violations. (See OMC, §§ 8.22.620, 8.22.630(A), 8.22.640.) Here, the court imposed $1,000 daily penalties on defendants at 276 Hegenberger dating back to June 10, 2016—the earliest possible date under the statute of limitations. (1/4CT 1085-1088, 1104, 1115-1116.) Yet no trial evidence establishes any authorized tenancy pre-dating the City's violation notices. The City did not introduce any rental agreements into evidence. And at the time of the City's February 15, 2018 inspection, defendants had no record of residential tenants renting the property. (RT 957:10-958:21, 982:20-25, 1064:15-25.)

The court's only support for its conclusion that "tenants were in the building" dating back to 2016 came from DODG's

answer admitting that one tenant lived in the storage warehouse for 15 years, and City employees' observing unspecified "long-term residential occupancy by families, including beds, toys, clothes, and kitchens and bathrooms in active use." (1/4CT 1085, 1088.) But this fails to establish an *authorized* tenancy or that any units were uninhabitable for nearly two years before the City first visited the property. The court's finding that the violations were "all longstanding" rests solely on impermissible speculation that "the nature of the violations, including unauthorized tenancies and fundamental building violations, did not suddenly manifest in January and February 2018 when the violations were first discovered by the City." (1/4CT 1088.) The absence of authorized tenancies pre-dating the City's notices renders the civil penalties dating back to the beginning of the statute of limitations period excessive as a matter of law.

The court awarded $1,000 in civil penalties per day for violations at 276 Hegenberger dating back to June 10, 2016, for a total of $960,000. (See 1/4CT 1115-1116.) January 11, 2018 was the date the City first inspected the building and knew about tenancies. (RT 53-56.) Thus, the court improperly awarded 580 days-worth of penalties, totaling $580,000. At a minimum, the judgment must be reduced by that amount.

IV. THE ATTORNEY FEE AND COSTS AWARDS MUST BE REVERSED.

A. Reversal Of Any Portion Of The Judgment Requires A Reversal As To Attorney Fees And Costs.

The final judgment included $2,375,491.50 in attorney fees and $24,456.01 in litigation costs awarded to the City as the prevailing party on all of its claims and requested relief. (2/2CT 505.)

Upon the judgment's reversal based on any of the arguments in this brief, the City will no longer necessarily be the prevailing party in this lawsuit nor, in any event, entitled to the same amounts previously awarded; thus, any reversal of the judgment requires reversal of the fee and costs awards and a redetermination on remand. (See *Soleimany v. Narimanzadeh* (2022) 78 Cal.App.5th 915, 924-925 ["Because we reverse the judgment in part and remand for further proceedings that may change the parties' financial obligations under the judgment, we also reverse the trial court's ruling on attorney fees and remand the matter for a new prevailing party determination and award of fees and costs as appropriate"]; *Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402 ["An order awarding costs falls with a reversal of the judgment on which it is based"].)

Thus, when the court reverses the judgment, it also must reverse the fee and costs awards. (*Ulkarim*, *supra*, 227 Cal.App.4th at p. 1282.)

B. The City Is Not Entitled To A Multiplier.

Even if this Court affirmed the entire judgment, it still would have to order deletion of the multiplier portion of the attorney fee award.

The trial court, citing OMC sections 1.08.040(G) and 8.22.670(D)(1), awarded the City attorney fees as "mandatory under both Oakland's Tenant Protection Ordinance and for public nuisance claims." (2/2CT 372, 483.) The court found that the City was entitled to a lodestar amount of $1,105,026, and then applied a 2.1 multiplier, increasing the fees by $1,215,528, to create a total award of $2,320,554. (2/2CT 487.) The application of a multiplier was legal error.

For starters, OMC section 1.08.040(G) cannot support *any* fee award (let alone a multiplier) as it does not comply with Government Code section 38773.5. Section 38773.5 authorizes cities to enact ordinances that "provide for the recovery of attorneys' fees in any action, administrative proceeding, or special proceeding to abate a nuisance" but the ordinance "*shall provide* for recovery of attorneys' fees by the prevailing party, rather than limiting recovery of attorneys' fees to the city if it prevails." (*Id.*, subd. (b), italics added.)

This requirement "applies to *any action* to abate a nuisance, not just a summary administrative or special proceeding." (*City of Monte Sereno v. Padgett* (2007) 149 Cal.App.4th 1530, 1537, italics in original.) OMC section 1.08.040(G) contains no prevailing-party provision and therefore cannot support *any* fee award. (*Id.* at pp. 1535, 1540 [ordinance

allowing city to recover its fees to abate a nuisance but lacking prevailing-party language "was invalid, as it impermissibly conflicted with Government Code section 38773.5"].)

Accordingly, the City could only seek fees under the TPO's attorney fee provision, OMC section 8.22.670(D)(1), as it contains a prevailing-party provision. But even if the City could establish the right to recover under that provision, that provision does not specify any right to a multiplier. Nor, in requesting fees, did the City cite any authority allowing *a public entity* to recover a multiplier in an abatement action, let alone a public entity that used its own in-house attorneys and therefore never paid actual attorney fees.

The lodestar method applies to a public entity's "prevailing party" attorney fees even where the public entity used in-house counsel. But the mere availability of lodestar fees does not entitle public entities to a multiplier. (See *City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65, 71 & fn. 4 [holding that lodestar method applies to calculating city's prevailing-party fees in city's red-light abatement action but noting that "fee awards to public entities may not be increased or decreased by a multiplier under Code of Civil Procedure section 1021.5"].)

The multiplier here conflicts with the California Legislature's mandate in Code of Civil Procedure section 1021.5 that "[a]ttorney's fees awarded to a public entity pursuant to this section shall *not* be increased or decreased by a multiplier based upon extrinsic circumstances…." Section 1021.5 is analogous and controlling as to the City's fee provision here

because it awards prevailing-party fees in actions resulting in the enforcement of important rights affecting the public interest. In awarding fees here, the trial court emphasized that "[t]he case … undoubtedly advanced the public interest." (2/2 CT 486.) It also emphasized "public funding and public interest" in awarding its multiplier (2/2CT 487), but section 1021.5 makes plain that such considerations do *not* justify awarding multipliers to public entities.

Also, awarding the City a multiplier here falls outside the justification for lodestar enhancements. "The purpose of a fee enhancement, or so-called multiplier, for contingent risk is to bring the financial incentives for attorneys enforcing important constitutional rights … into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) ""[L]awyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk.'" (*Id.* at p. 1136.)

That has nothing to do with this lawsuit. The City already is obliged and incentivized to protect its own constituents. It already has the right to obtain penalties, not just damages, and attorney fees. A multiplier here does not compensate the City's in-house attorneys who handled this case. Nor did those attorneys assume any risk of non-payment or turn away the ability to earn money on other cases. A multiplier here simply awards more money to the City and increases the City treasury. That's not a multiplier's purpose.

A multiplier's purpose is to incentivize attorneys to accept cases that involve significant risk. But this was not a contingency case. The City was represented by in-house municipal lawyers whose salaries were assured and who needed no contingency incentive to litigate. (See *Chodos v. Borman, supra,* 227 Cal.App.4th at pp. 82, 91, 98-100 [finding as a matter of law, no legal or equitable basis existed for applying multiplier because there was no contingency risk of nonpayment].) Even assuming the court had discretion, application of a multiplier violated the general principle that multipliers should not be imposed to punish the losing party. (*Ketchum*, *supra*, 24 Cal.4th at p. 1139.) The judgment already imposes huge penalties. The fee multiplier simply magnifies that punishment.

As a matter of law, this is not a multiplier case.

CONCLUSION

Given the City's failures to exhaust its administrative remedies and comply with provisions designed to protect property owners' due process rights, this Court should reverse the entire judgment, including the injunction and the attorney fee and costs award, with instructions to enter judgment in defendants' favor.

And even ignoring the due-process violations and failures to exhaust remedies, the Court still would have to reverse $580,000 of the civil penalties awarded as to 276 Hegenberger Road, reverse the judgment (including the attorney fee/cost awards) against the Manns, eliminate the attorney fee multiplier, and remand for a re-determination as to attorney fees and costs.

June 7, 2023

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **APPELLANTS' OPENING BRIEF** contains **13,885** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: June 7, 2023

/s/ Gary J. Wax

Gary J. Wax

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 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048; my electronic service address is chsu@gmsr.com.

On June 7, 2023, I served the foregoing document described as: **APPELLANTS' OPENING BRIEF** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as above and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business'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 in a sealed envelope with postage fully prepaid.

Executed on June 7, 2023, at Los Angeles, California.

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

Chris Hsu

Chris Hsu

SERVICE LIST

Via TrueFiling

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