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THE CITY OF FRESNO

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Superior Court of California
County of Fresno
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fee pursuant to
Gov't Code § 6103*

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF FRESNO

14 KAREN MICHELI, *et al.*,
15 Plaintiffs,

16 v.

17 THE CITY OF FRESNO, *et al.*
18 Defendant.

19 JACKIE FLANNERY, *et al.*,
20 Plaintiffs,

21 v.

22 THE CITY OF FRESNO, *et al.*
23 Defendant.

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

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

) **DEFENDANT CITY OF FRESNO'S**
) **ANSWER TO PLAINTIFFS' FIFTH**
) **AMENDED COMPLAINT**

) Lead Action Filed: September 9, 2016
) Consolidated Action Filed: May 17, 2017

) Trial Date: Not Set

1 Defendant THE CITY OF FRESNO (hereinafter, “Defendant”), for itself and for no other
2 defendant, hereby answers the Consolidated Fifth Amended Class Action Complaint (hereinafter,
3 “Complaint”) of Plaintiffs KAREN MICHELI, individually and as Trustee of the Michael Micheli and
4 Karen Micheli Trust, MICHAEL MICHELI, individually and as Trustee of the Michael Micheli and
5 Karen Micheli Trust, FAITH NITSCHKE, individually and as Trustee of the Nitschke Family Trust of
6 2000, DAVID NITSCHKE, individually and as Trustee of the Nitschke Family Trust of 2000, and
7 JEANETTE GRIDER, and Plaintiffs in the consolidated action, JACKIE FLANNERY, GUADALUPE
8 MEZA, RONDA RAFIDI, SHANN CONNER, MARIROSE LARKIN, PATRICIA WALLACE-
9 RIXMAN aka PATTY WALLACE-RIXMAN, HARRY RIXMAN, and KELLY UNRUH, individually
10 and as Trustee of the Kelly D. Unruh Living Trust, on behalf of themselves and all others similarly
11 situated (collectively hereinafter, “Plaintiffs”), as follows:

12 **GENERAL DENIAL**

13 1. Pursuant to California Code of Civil Procedure section 431.30(d), Defendant denies each
14 and every allegation contained in the Complaint, and the whole thereof, and each and every alleged
15 cause of action thereof, and denies that Plaintiffs or the putative class members sustained any injury, loss
16 or damage as alleged, or at all, by reason of any act, breach or omission on the part of this answering
17 Defendant, and further denies any liability or fault whatsoever with respect to the matters complained of
18 in the Complaint.

19 **AFFIRMATIVE DEFENSES**

20 2. Defendant asserts the following separate affirmative defenses to the Complaint, and
21 reserves the right to assert additional affirmative defenses after further discovery or investigation. In
22 asserting these affirmative defenses, Defendant does not, by stating the matters set forth in these
23 defenses, allege or admit it has the burden of proof or persuasion with respect to any of these matters,
24 and does not assume the burden of proof or persuasion as to any matters to which Plaintiffs, and each of
25 them, have the burden of proof or persuasion.

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1 **FIRST AFFIRMATIVE DEFENSE**

2 **(Failure to State a Cause of Action)**

3 3. The Complaint, and each purported cause of action therein, fails to state facts sufficient to
4 constitute claims upon which relief can be granted against this answering Defendant.

5 **SECOND AFFIRMATIVE DEFENSE**

6 **(Statute of Limitations)**

7 4. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
8 by the applicable statutory and contractual periods of limitation, including, but not limited to, California
9 Code of Civil Procedure §§ 335.1, 337, 338, 339, 342, and 343, and California Government Code §§
10 911.2 and 945.6.

11 **THIRD AFFIRMATIVE DEFENSE**

12 **(Compliance with Statutory Authorities)**

13 5. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
14 as Defendant is not liable for any acts or omissions undertaken by or at the direction or sufferance of any
15 local, state, or federal authority, including, without limitation, acts or omissions made in accordance
16 with any permit, license, statute, law, or regulation applicable at the time the acts or omissions occurred.

17 **FOURTH AFFIRMATIVE DEFENSE**

18 **(Preemption)**

19 6. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
20 as Plaintiffs' claims for damages and those of putative class members are preempted by state and federal
21 statutes, laws, and regulations, including, but not limited to, the federal and California Safe Drinking
22 Water Acts and regulations promulgated under those Acts.

23 **FIFTH AFFIRMATIVE DEFENSE**

24 **(Comparative Fault)**

25 7. Defendant is informed and believes, and on that basis alleges, that the injuries and
26 damages, if any, suffered by Plaintiffs and putative class members were proximately caused and
27 contributed to by the negligence of Plaintiffs and/or putative class members, and by reason thereof any
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1 recovery obtained by Plaintiffs and/or putative class members against this answering Defendant should
2 be barred or reduced according to the law of comparative negligence.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 **(No Duty Owed to Plaintiffs)**

5 8. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
6 because Defendant owed no mandatory duty to Plaintiffs and/or putative class members in regard to the
7 matters alleged in the Complaint.

8 **SEVENTH AFFIRMATIVE DEFENSE**

9 **(No Causation)**

10 9. The injuries and damages, if any, suffered by Plaintiffs and/or putative class members
11 were directly, legally, and proximately caused and contributed to by an unforeseeable, independent,
12 intervening and/or superseding event beyond the control of, and unrelated to any conduct of, this
13 Defendant. This Defendant's alleged acts and omissions, if any, were inconsequential and indirect, in
14 no way caused or contributed to Plaintiffs' or putative class members' alleged damages, injuries, or
15 losses, if any, and were superseded by the negligence and wrongful conduct of others, including, but not
16 limited to, Plaintiffs and putative class members, other defendants, and/or third parties.

17 **EIGHTH AFFIRMATIVE DEFENSE**

18 **(Not a Substantial Factor)**

19 10. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
20 because the acts and omissions of Defendant alleged in the Complaint were not a substantial factor in
21 bringing about the injuries and damages, if any, suffered by Plaintiffs and/or putative class members as
22 alleged in the Complaint.

23 **NINTH AFFIRMATIVE DEFENSE**

24 **(Intervening/Superseding Causes)**

25 11. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
26 because the injuries and damages, if any, of which Plaintiffs and/or putative class members complain
27 were proximately caused or contributed to by the acts of other parties, Defendants, persons and/or other
28 entities, and said acts were an unforeseeable, independent, intervening and/or superseding cause of the

1 injuries and damages, if any, of which Plaintiffs and/or putative class members complain, thus barring
2 Plaintiffs and/or putative class members from any recovery from this answering Defendant.

3 **TENTH AFFIRMATIVE DEFENSE**

4 **(Acts or Omissions of Third Parties)**

5 12. This answering Defendant denies that Plaintiffs and/or putative class members were
6 damaged as a proximate result of any conduct on the part of this answering Defendant. If Plaintiffs or
7 putative class members suffered or sustained any loss or damage, the same was directly, legally, and
8 proximately caused and contributed to by the independent acts or omissions of third parties or entities,
9 whether or not parties to this action. Plaintiffs' and putative class members' recovery against this
10 answering Defendant, if any, must therefore be reduced to the extent the damages, if any, were caused
11 by the independent conduct of third parties.

12 **ELEVENTH AFFIRMATIVE DEFENSE**

13 **(Failure to Mitigate Damages)**

14 13. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
15 because Plaintiffs and putative class members, by the exercise of diligence, could have mitigated against
16 their claimed damages, if any; therefore, Plaintiffs' and putative class members' damages, if any, must
17 be reduced, diminished or defeated by such amounts as should have been mitigated.

18 **TWELFTH AFFIRMATIVE DEFENSE**

19 **(Lack of Damages)**

20 14. Plaintiffs and putative class members have suffered no damages as a result of any act or
21 omission of Defendant; therefore, Plaintiffs and putative class members are barred from asserting any
22 cause of action against Defendant.

23 **THIRTEENTH AFFIRMATIVE DEFENSE**

24 **(Speculative Damages)**

25 15. The injuries and damages, if any, suffered by Plaintiffs and/or putative class members are
26 speculative, depend on the happening of events which are not reasonably certain to occur, may be
27 mitigated by future events, and cannot be determined with the degree of certainty required by law.

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1 **FOURTEENTH AFFIRMATIVE DEFENSE**

2 **(Assumption of Risk)**

3 16. Defendant is informed and believes, and on that basis alleges, that at all times and places
4 mentioned in the Complaint, Plaintiffs and putative class members had knowledge of, appreciated, and
5 voluntarily assumed the risk of harm and consequence of any probable and likely damage, if any.

6 **FIFTEENTH AFFIRMATIVE DEFENSE**

7 **(Necessity)**

8 17. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
9 as Defendant's conduct and practices were necessary and justified.

10 **SIXTEENTH AFFIRMATIVE DEFENSE**

11 **(Public Policy)**

12 18. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
13 by public policy.

14 **SEVENTEENTH AFFIRMATIVE DEFENSE**

15 **(Consent)**

16 19. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
17 as Plaintiffs and putative class members consented to, approved, authorized, and/or ratified the alleged
18 conduct of Defendant, thereby barring Plaintiffs and putative class members from recovering any
19 damages or relief from this answering Defendant.

20 **EIGHTEENTH AFFIRMATIVE DEFENSE**

21 **(Indispensable Parties)**

22 20. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
23 because Plaintiffs failed to join all essential parties.

24 **NINETEENTH AFFIRMATIVE DEFENSE**

25 **(Waiver)**

26 21. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
27 because Plaintiffs and putative class members, and/or Plaintiffs' and putative class members'
28 representatives and/or agents, have engaged in conduct and activities by reason of which said parties

1 have knowingly and intentionally waived any and all claims against this answering Defendant, and
2 Plaintiffs and putative class members are thereby barred and estopped from any recovery against this
3 answering Defendant.

4 **TWENTIETH AFFIRMATIVE DEFENSE**

5 **(Laches)**

6 22. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
7 by the equitable doctrine of laches.

8 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

9 **(Estoppel)**

10 23. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
11 by the equitable doctrine of estoppel.

12 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

13 **(Unclean Hands)**

14 24. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
15 by the equitable doctrine of unclean hands.

16 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

17 **(Lack of Standing)**

18 25. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
19 as Plaintiffs and putative class members lack standing to sue for some or all of the conduct alleged in the
20 Complaint.

21 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

22 **(Res Judicata and Collateral Estoppel)**

23 26. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
24 by the doctrines of res judicata and collateral estoppel.

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1 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

2 **(Unjust Enrichment)**

3 27. Defendant is informed and believes, and on that basis alleges, that any payment of money
4 to Plaintiffs and/or putative class members for the loss and damages alleged in the Complaint would
5 constitute unjust enrichment.

6 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

7 **(Complete Performance)**

8 28. Defendant is informed and believes, and on that basis alleges, that Defendant has fully
9 and completely performed and has been discharged of any and all obligations and legal duties, if any,
10 arising out of the matters alleged in the Complaint, except those obligations and legal duties this
11 answering Defendant was prevented and/or excused from performing by the acts and/or omissions of
12 Plaintiffs, other defendants, individuals, entities, and/or third parties whose identities are not now known
13 to Defendant.

14 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

15 **(Failure of Conditions Precedent)**

16 29. Defendant is informed and believes, and on that basis alleges, that Plaintiffs and putative
17 class members have failed to satisfy one or more express or implied conditions precedent to any
18 obligations allegedly owed by Defendant, such that the Complaint, and each purported cause of action
19 therein, is barred, in whole or in part.

20 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

21 **(No Consideration)**

22 30. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
23 due to lack of consideration.

24 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

25 **(Accord and Satisfaction)**

26 31. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
27 due to full accord and satisfaction.

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1 **THIRTIETH AFFIRMATIVE DEFENSE**

2 **(Statute of Frauds)**

3 32. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
4 under the statute of frauds doctrine.

5 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

6 **(Excuse)**

7 33. Defendant is informed and believes, and on that basis alleges, that Plaintiffs and putative
8 class members were obligated to perform certain conditions in order to enforce any rights under any
9 agreement or contract, oral or written, but failed to perform such conditions or otherwise breached the
10 alleged agreement or contract, if any, with this answering Defendant. Therefore, this answering
11 Defendant has been excused from the duties to perform any and all obligations set forth in the agreement
12 or contract, if any exists.

13 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

14 **(Attorneys' Fees and Costs are Barred by Law)**

15 34. Plaintiffs and putative class members are precluded by law from recovering any
16 attorneys' fees or costs of litigation from this answering Defendant.

17 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

18 **(Immunity)**

19 35. The Complaint, and each purported cause of action therein, is barred, in whole or in part,
20 because Defendant, a public entity, is immune from liability pursuant to California Government Code §
21 810, *et seq.*

22 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

23 **(Spoliation of Evidence)**

24 36. Defendant is informed and believes, and on that basis alleges, that Plaintiffs have
25 intentionally or negligently spoliated evidence integrally necessary to properly and thoroughly litigate
26 this action, resulting in irreparable injury and undue prejudice to Defendant and to Defendant's ability to
27 defend itself in this matter, such that Plaintiffs are barred and estopped from any recovery against this
28 answering Defendant.

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF FRESNO		<i>FOR COURT USE ONLY</i>
<i>Karen Micheli, et al. v. The City of Fresno, et al. (Lead Case) Jackie Flannery, et al. v. The City of Fresno, et al. (Consolidated Case)</i>		
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Attorneys for: Defendant The City of Fresno	Date: Time: Courtroom: 502	Case Number: 16CECG02937 (Lead Case) 17CECG01724 (Consolidated Case)

CERTIFICATE OF SERVICE

I, the undersigned, declare: I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is 2851 Camino Del Rio South, Suite 410, San Diego, California 92108. I served a copy of the following document(s):

DEFENDANT CITY OF FRESNO'S ANSWER TO PLAINTIFFS' FIFTH AMENDED COMPLAINT

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

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

(BY FACSIMILE) This document was transmitted by facsimile transmission from (619) 325-0231 and the transmission was reported as complete and without error. I then caused the transmitting facsimile machine to properly issue a transmission report confirming the transmission.

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

(BY ELECTRONIC TRANSMISSION) This document was transmitted by electronic transmission from rebecca@caufieldjames.com and the transmission was reported as complete and without error. I then caused the transmitting e-mail account to properly issue a report confirming the electronic transmission.

SEE SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 12, 2021, at San Diego, California.

Rebecca Vargas

Rebecca Vargas

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