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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SHERRY MONTGOMERY; MARY
BUCHANAN; JEWELL FOWLER; JULIE
CHRISTIAN; APRIL THIXTON; JERRY
THIXTON; ROYCE THIXTON,

NOS. CIV. 08-385 WBS KJM
MEMORANDUM AND ORDER RE: MOTION
TO DISMISS AND MOTION TO STRIKE

Plaintiffs,

v.

TIM BUEGE; YORKTOWN ARMS
APARTMENTS; TC PROPERTY
MANAGEMENT; MICHAEL GAVIN; JOSE
DIVAS; DOES 1 TO 10,

Defendants.

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Plaintiffs Sherry Montgomery, Mary Buchanan, Jewell
Fowler, Julie Christian, April Thixton, Jerry Thixton, and Royce
Thixton brought this action against defendants Time Buege,
Yorktown Arms Apartments, TC Property Management, Michael Gavin,
and Jose Divas alleging a variety of claims under state law and
one claim under the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-

1 3619, related to the conditions of their tenancy and ultimate
2 eviction from an apartment complex. Presently before the court
3 are defendants' motion to dismiss pursuant to Federal Rule of
4 Civil Procedure 12(b)(6) and motion to strike pursuant to Rule
5 12(f).¹

6 I. Factual and Procedural Background

7 Plaintiffs are all former residents of Yorktown Arms
8 Apartments, an apartment complex located in Fair Oaks,
9 California. (Compl. ¶¶ 2, 6-8.) Defendants--Yorktown Arms
10 Apartments and its owner, managers, and a maintenance worker
11 (Compl. ¶¶ 10-14)--allegedly failed to adequately address
12 extensive mold and mildew growth in plaintiffs' apartments
13 despite plaintiffs' requests. (Id. ¶ 2.) As a consequence,
14 plaintiffs aver that they suffered a variety of health problems,
15 some requiring emergency treatment. (Id. ¶ 26.) Plaintiffs
16 further allege that they were ultimately evicted in retaliation
17 for their complaints. (Id. ¶ 30.)

18 On February 8, 2007, all but three of the plaintiffs
19 filed a separate but related action captioned Sherry Montgomery,
20 et al. v. Time Burge, et al., Case No. 07-CV-249-WBS-KJM. That
21 case was dismissed without prejudice on January 13, 2009,
22 pursuant to the parties' agreement that plaintiffs would proceed
23 with the instant action, already filed on February 20, 2008. The
24 Complaint in this case alleges claims for breach of the implied
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26 ¹ Defendant Michael Gavin has not yet appeared in this
27 action. The instant motion was filed by the other defendants,
28 who are all represented by the same counsel. Unless otherwise
noted, all references in this memorandum to "defendants" are to
all defendants except Michael Gavin.

1 warranty of habitability, negligence, maintenance of a nuisance,
2 intentional and/or negligent infliction of emotional distress,
3 constructive eviction, breach of the written rental contract,
4 breach of the implied covenant of good faith and fair dealing,
5 negligent performance of contract, civil battery and/or sexual
6 battery (plaintiff Sherry Montgomery only), and retaliatory
7 eviction. The Complaint also alleges statutory violations of the
8 Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996;
9 the Unruh Civil Rights Act, Cal. Civ. Code § 51; the Fair Housing
10 Act, 42 U.S.C. §§ 3601-3619; and the Elder Abuse and Dependent
11 Adult Civil Protection Act, Cal. Welf. & Inst. Code §§ 15600-
12 15675.

13 In addition, the Complaint alleges claims by plaintiff
14 Julie Christian, who apparently passed away before the filing of
15 this action. (See Compl. ¶ 130.) Specifically, the fourteenth
16 cause of action alleges a claim for wrongful death "by plaintiff
17 Julie Christian against all defendants" (id. 24:11-12), and the
18 fifteenth cause of action alleges a "survival action by plaintiff
19 Julie Christian against all defendants" (id. 25:2-3). Though the
20 Complaint lists Julie Christian's "survival action" as a single
21 and independent claim, the court construes each claim in the
22 Complaint (except civil battery and/or sexual battery) as also
23 alleging a survival claim on behalf of Julie Christian. (See id.
24 ¶ 133 ("Plaintiff Julie Christian through her survival action is
25 still bringing all of her above causes of action herein.").)

26 Defendants now move to dismiss the wrongful death and
27 survival claims alleged by Julie Christian and request that the
28 court strike Julie Christian as a plaintiff. (Mot. Dismiss 4:5-

1 20.) Defendants also move to strike the three exhibits attached
2 to the Complaint: a declaration by plaintiff Jewell Fowler
3 ("Fowler declaration") and two articles from medical web sites.
4 (See id. 4:22-26; Compl. Exs. A-C.)

5 II. Discussion

6 A. Motion to Dismiss

7 On a motion to dismiss, the court must accept the
8 allegations in the complaint as true and draw all reasonable
9 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
10 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
11 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
12 (1972). Defendants contend only that the survival and wrongful
13 death claims should be dismissed because no plaintiff has
14 standing to bring those claims. (See Mot. Dismiss 6-18.) The
15 issue of standing "naturally precedes the question of whether
16 [plaintiffs have] successfully stated a claim." Moreland v. Las
17 Vegas Metro. Police Dep't, 159 F.3d 365, 369 (9th Cir. 1998).

18 Under California law, "[a] cause of action that
19 survives the death of a person passes to the decedent's successor
20 in interest and is enforceable by the 'decedent's personal
21 representative or, if none, by the decedent's successor in
22 interest.'" Quiroz v. Seventh Ave. Ctr., 140 Cal. App. 4th 1256,
23 1265 (2006) (citing Cal. Civ. Proc. Code § 377.30); see Cal.
24 Welf. & Inst. Code § 15657.3(d) (providing similar requirements
25 for a survival action under the Elder Abuse and Dependent Adult
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1 Civil Protection Act).² The Complaint alleges survival claims
2 brought by Julie Christian herself and does not identify any
3 plaintiff with standing to bring those claims on Julie
4 Christian's behalf as her successor in interest or personal
5 representative. Accordingly, the court must dismiss all survival
6 claims brought on behalf of Julie Christian.³

7 Unlike survival claims, a wrongful death claim "belongs
8 'not to the decedent . . . but to the persons specified' in
9 [California] Code of Civil Procedure section 377.60." Wilson v.
10 John Crane, Inc., 81 Cal. App. 4th 847, 860 (2000) (quoting Cal.
11 Law Revision Comm'n cmt. to Cal. Civ. Proc. Code § 377.60); see
12 Quiroz, 140 Cal. App. 4th at 1263 (explaining that a wrongful
13 death claim "is vested in the decedent's heirs") (citing Grant v.
14 McAuliffe, 41 Cal. 2d 859, 864 (1953)). "Only persons enumerated

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16 ² The FHA contains no specific provisions as to the
17 survival of an individual's claim upon death and who has standing
18 to bring that claim. Ambruster v. Monument 3: Realty Fund VIII
19 Ltd., 963 F. Supp. 862, 864 (N.D. Cal. 1997). Because the court
20 has not identified a conflict between the FHA and the California
21 survival statute for the purposes of the instant motion, the
22 court will apply state law concerning who may bring a survival
23 action to the FHA claim in this case. See 42 U.S.C. § 1988
24 (providing that, for federal civil rights statutes, state law
shall govern any "deficien[cies]" in federal law so long as it is
not inconsistent with the Constitution and laws of the United
States); Tatum v. City & County of S.F., 441 F.3d 1090, 1094 n.2
(9th Cir. 2006) (citing § 1988 and applying the California
survival statute to determine whether the plaintiff could
prosecute a § 1983 claim on behalf of the decedent); cf.
Ambruster, 963 F. Supp. at 866 (applying the California survival
statute to an FHA claim except to the extent that the state
statute bars emotional distress damages).

25 ³ The parties have not addressed whether all the claims
26 in the Complaint survive a plaintiff's death. Nevertheless,
27 because plaintiffs have failed to identify a party with standing
28 to bring any survival claim, an issue that "naturally precedes"
whether a complaint states a claim, Moreland, 159 F.3d at 369,
the court will not reach the question of whether every alleged
claim indeed survives Julie Christian's death.

1 in California Code of Civil Procedure section 377.60 have
2 standing to bring a wrongful death claim." A.D. v. Cal. Highway
3 Patrol, No. 07-5483, 2009 WL 733872, at *4 (N.D. Cal. Mar. 17,
4 2009); accord Owen ex rel. Owen v. United States, 713 F.2d 1461,
5 1468 (9th Cir. 1983) (quoting Steed v. Imperial Airlines, 12 Cal.
6 3d 115, 119 (1974)). Here, the Complaint alleges a wrongful
7 death claim brought by Julie Christian and does not identify any
8 plaintiff authorized by California Code of Civil Procedure
9 section 377.60 to bring a claim for wrongful death, such as Julie
10 Christian's personal representative or heir.⁴ Accordingly, the
11 court must grant defendants' motion to dismiss the wrongful death
12 claim.

13 Plaintiffs have requested leave to amend the Complaint
14 to substitute Jewell Fowler as Julie Christian's "executor[] and
15 successor in interest" in the event that the court grants the
16 motion to dismiss. (Opp'n 3:4-8.) The court will accordingly
17 grant plaintiffs leave to amend the Complaint, and defendants'
18 request to strike Julie Christian as a plaintiff is therefore
19 moot.

20 B. Motion to Strike

21 Pursuant to Federal Rule of Civil Procedure 12(f), the

22 ⁴ California Code of Civil Procedure section 377.60
23 provides in relevant part:

24 A cause of action for the death of a person caused by the
25 wrongful act or neglect of another may be asserted by any
26 of the following persons or by the decedent's personal
27 representative on their behalf: (a) The decedent's
28 surviving spouse, domestic partner, children, and issue
of deceased children, or if there is no surviving issue
of the decedent, the persons, including the surviving
spouse or domestic partner, who would be entitled to the
property of the decedent by intestate succession

1 court may strike from a pleading any "redundant, immaterial,
2 impertinent, or scandalous matter." The function of a motion to
3 strike "is to avoid the expenditure of time and money that must
4 arise from litigating spurious issues by dispensing with those
5 issues prior to trial." Alcaraz v. Wachovia Mortgage, FSB, No.
6 08-1640, 2009 WL 160308, at *10 (E.D. Cal. Jan. 21, 2009)
7 (O'Neill, J.) (quoting Sidney-Vinstein v. A.H. Robins Co., 697
8 F.2d 880, 885 (9th Cir. 1983)).

9 Defendants' motion to strike targets the exhibits
10 attached the Complaint rather than the allegations contained in
11 the Complaint itself. (Mot. Dismiss 4:22-26.) A "written
12 instrument" attached to a complaint may be considered part of the
13 complaint for all purposes pursuant to Federal Rule of Civil
14 Procedure 10(c). The types of instruments that qualify for
15 incorporation under Rule 10(c) "'consist largely of documentary
16 evidence, specifically, contracts, notes, and other writings on
17 which a party's action or defense is based.'" DeMarco v.
18 DepoTech Corp., 149 F. Supp. 2d 1212, 1220 (S.D. Cal. 2001)
19 (quoting Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir. 1989));
20 cf. United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)
21 (noting that a document may be considered part of a complaint
22 even if not attached when the document forms the basis of the
23 plaintiff's claims or the allegations refer extensively to it).

24 In contrast, witness affidavits and other exhibits
25 containing largely evidentiary material typically do not fall
26 within Rule 10(c)'s category of "written instruments." See
27 Ritchie, 342 F.3d at 908 ("Affidavits and declarations . . . are
28 not allowed as pleading exhibits unless they form the basis of

1 the complaint." (citing DeMarco, 149 F. Supp. 2d at 1219-21));
2 Perkins v. Silverstein, 939 F.2d 463, 467 n.2 (7th Cir. 1991)
3 (explaining that newspaper articles, commentaries, and editorial
4 cartoons referencing a scandal "are not the type of documentary
5 evidence or 'written instruments' which Rule 10(c) intended to be
6 incorporated into . . . the complaint"). See generally 5 Charles
7 Alan Wright & Arthur R. Miller, Federal Practice and Procedure §
8 1327 (2008) (providing that "exhibits containing extraneous or
9 evidentiary material should not be attached to the pleadings"
10 pursuant to Rule 10(c)).

11 Courts have granted motions to strike exhibits attached
12 to complaints when those exhibits do not qualify as "written
13 instruments" under Rule 10(c). See, e.g., DeMarco, 149 F. Supp.
14 2d at 1222 (striking an expert affidavit attached to a complaint
15 in a securities fraud action); Galvan v. Yates, No. 05-0986, 2006
16 WL 1495261, at *4 (E.D. Cal. May 24, 2006) (Ishii, J.) (striking
17 from a complaint witness declarations designed to substantiate
18 allegations that the plaintiff satisfied the presentment
19 requirements of the California Tort Claims Act).

20 In this case, plaintiffs attached three exhibits to the
21 Complaint: the Fowler declaration, which provides an account of
22 alleged water leaks in Jewell Fowler and Julie Christian's
23 apartment and Julie Christian's eventual heart attack, and two
24 articles providing general background information on pneumonia
25 and its correlation with heart problems. (See Compl. Exs. A-C.)
26 These exhibits do not form the basis of the claims alleged in the
27 Complaint, and in fact, the Complaint itself makes no reference
28 to them. The exhibits are thus "not 'written instruments' within

1 the meaning of Rule 10(c) . . . but rather are in the nature of
2 evidence submitted to bolster [] allegation[s]" contained in the
3 Complaint. Galvan, 2006 WL 1495261, at *4.

4 More generally, the court notes that the practice of
5 attaching to a complaint the kind of exhibits at issue here
6 needlessly complicates challenges to the sufficiency of
7 pleadings. The court could not consider the contents of these
8 exhibits in ruling on a motion to dismiss for failure to state a
9 claim without converting the motion into one for summary
10 judgment. See Ritchie, 342 F.3d at 909 (holding that the
11 district court could not have considered a declaration that did
12 not form the basis of a complaint and to which the complaint did
13 not refer without converting the Rule 12(b)(6) motion into a Rule
14 56 motion); Rose, 871 F.2d at 339 n.3 (explaining that treating
15 affidavits as "written instruments" under Rule 10(c) would "blur
16 the distinction between summary judgment and dismissal for
17 failure to state a claim"). This practice would undoubtedly
18 result in litigants making Rule 56(e) evidentiary challenges in
19 connection with routine motions to dismiss. Under these
20 circumstances, granting a motion to strike exhibits attached to a
21 complaint that do not qualify as "written instruments" under Rule
22 10(c) serves the purpose of "avoid[ing] the expenditure of time
23 and money . . . litigating spurious issues" later in the case.
24 Sidney-Vinstein, 697 F.2d at 885.

25 Accordingly, the court will grant defendants' motion to
26 strike the exhibits attached to the Complaint.

27 IT IS THEREFORE ORDERED that defendants' motion to
28 dismiss the survival and wrongful death claims be, and the same

1 hereby is, GRANTED with leave to amend.

2 IT IS FURTHER ORDERED that defendants' motion to strike
3 Exhibits A, B, and C attached to the Complaint be, and the same
4 hereby is, GRANTED, and defendants' motion to strike Julie
5 Christian as a plaintiff is hereby MOOT.

6 Plaintiff has thirty days from the date of this Order
7 to file an amended complaint consistent with this Order.

8 DATED: April 14, 2009

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11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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