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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BERNARD OSHER TRUST DTD, 3/8/88, *et al.*,

No. C 09-1437 SI
Related Case: C 08-4575 SI

Plaintiff,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS**

CITY OF ALAMEDA, CALIFORNIA, *et al.*,

Defendant.

On July 10, 2009, the Court heard oral argument on defendant’s motion to dismiss plaintiff’s complaint. Having considered the arguments of counsel and the papers submitted, and for good cause shown, the Court GRANTS IN PART and DENIES IN PART defendant’s motion to dismiss with leave to amend.

BACKGROUND

This case arises out of the City of Alameda’s 2004 sale of \$33 million in municipal revenue bond anticipation notes. The notes were issued to finance the construction of the City of Alameda’s cable TV and internet system. The sale was underwritten by Stone and Youngberg, who sold the notes to plaintiff, among other purchasers.¹

On April 1, 2009, plaintiff filed a complaint alleging seven claims for relief. Plaintiff’s third claim for relief alleges securities fraud under the California Corporate Securities Law of 1968, namely

¹ A detailed description of the factual background can be found in the Court’s May 20, 2009 Order in *City of Alameda v. Nuveen Municipal High Income Opportunity Fund* (Case No. C 08-4575-SI), a related case arising out of the same notes sale.

1 violations of §§ 25400, 25401, 25500, 25501, and 25504.1 of the California Corporation Code.

2 Defendant the City of Alameda (the “City”) has moved to dismiss plaintiff’s third claim for
 3 relief. In its opposition papers, plaintiff agreed (in light of certain of the Court’s ruling in the *Nuveen*
 4 matter) to omit its 25501 claim from its amended complaint, and to amend its complaint with respect
 5 to its 25500 claim to allege price manipulation. To this extent, defendant’s motion is GRANTED with
 6 leave to amend.

7 The parties’ primary dispute centers on whether, as defendant argues, the City is immune from
 8 securities fraud claims under state law. This question will be discussed below.²

10 LEGAL STANDARD

11 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
 12 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,
 13 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
 14 *Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974 (2007). While courts do not require “heightened
 15 fact pleading of specifics,” *id.*, a plaintiff must provide “more than labels and conclusions, and a
 16 formulaic recitation of the elements of a cause of action will not do,” *id.* at 1965. A plaintiff must allege
 17 facts sufficient to “raise a right to relief above the speculative level.” *Id.* In deciding whether the
 18 plaintiff has stated a claim upon which relief can be granted, the Court must assume that the plaintiff’s
 19 allegations are true and must draw all reasonable inferences in the plaintiff’s favor. *See Usher v. City*
 20 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true
 21 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”
 22 *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008).

23 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
 24 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request
 25 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
 26 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal

27
 28 ² Defendant City did not make the immunity argument in the *Nuveen* action, and counterclaims under the California Corporate Securities Law of 1968 are proceeding against the City in that action.

1 quotation marks omitted).

2
3 **DISCUSSION**

4 Plaintiff's third claim for relief is based on allegations that the City violated various provisions
5 of the California Corporate Securities Law of 1968³ prohibiting fraud and misrepresentation in the offer
6 and sale of securities. Defendant moves to dismiss on the basis that public agencies are immune from
7 such suits. Defendant finds such immunity in § 815 of the California Tort Claims Act of 1963, which
8 prohibits statutory actions against public agencies unless the Act specifically permits the action; and in
9 § 818.8 of the Tort Claims Act, which provides public entities with absolute immunity against claims
10 for fraud or misrepresentation by their employees. Plaintiff counters that the California Corporate
11 Securities Law expressly imposes liability for misrepresentation on public entities, since by its terms
12 liability may be imposed on any "person" who engages in prohibited conduct and since "persons" are
13 specifically defined to include "a government or a political subdivision of a government." Defendants
14 reply that the California Supreme Court rejected plaintiff's reasoning in *Caldwell v. Montoya*, 10 Cal.
15 4th 972 (1995), and that even if it had not, the absolute immunity from liability for misrepresentation
16 provided by § 818.8 cannot be overcome by other statutory provisions.

17 The question whether a public entity is immune from suit for its own fraud and misrepresentation
18 in the offer and sale of securities, in violation of the California Corporate Securities Law, is evidently
19 one of first impression.

20
21 **1. California Corporate Securities Law of 1968**

22 Under the California Corporate Securities Law of 1968, "any person who willfully participates
23 in any act or transaction" which violates the statute "shall be liable to any other person" for the damages
24 sustained by the latter. Cal. Corp. Code § 25500. A "person" is defined as "an individual, a
25 corporation, a partnership, a limited liability company, a joint venture, an association, a joint stock
26 company, a trust, an unincorporated organization, a government, or a political subdivision of a

27 _____
28 ³ The Corporate Securities Law of 1968 is found in the California Corporation Code, §§ 25500
et seq.

1 government.” Cal. Corp. Code § 25013. According to the draftsmen’s commentary, this definition is
 2 based on federal securities legislation, specifically § 401(i) of the Uniform Securities Act of 1956, which
 3 defines a person in virtually identical language,⁴ and the definition was intended to apply to each section
 4 of the statute. See Harold Marsh, Jr. *et al.*, *Practice Under the California Corporate Securities Law of*
 5 *1968*, Appendix A, § 25013 (1969); California Continuing Education of the Bar, *California Corporate*
 6 *Securities Law and Rules*, § 25013 (1968); California Continuing Education of the Bar, *Review of*
 7 *Selected 1968 Code Legislation*, § 25013 (1968).

8 Part Five of the Securities Law addresses “Fraudulent and Prohibited Practices.” Section 25400
 9 prohibits “unlawful acts or misrepresentations to induce purchase or sale of securities or to manipulate
 10 price,” and § 25401 prohibits the “sale or purchase of securities by means of written or oral
 11 communications containing false statements or omissions.”

12

13 **2. California Government Code § 815**

14 California Government Code § 815, which addresses liability for injuries generally, states in
 15 subdivision (a) that, except as otherwise provided by statute, “[a] public entity is not liable for an injury,
 16 whether such injury arises out of an act or omission of the public entity or a public employee or any
 17 other person.” Subdivision (b) states that, except as otherwise provided by statute, “[t]he liability of a
 18 public entity established by this part. . . is subject to any immunity of the public entity provided by the
 19 statute. . .” California Government Code § 815.2, which addresses liability for injury by a public
 20 employee and the employee’s immunity, states in subdivision (a) that “[a] public entity is liable for
 21 injury proximately caused by an act or omission of an employee of the public entity within the scope
 22 of his employment if the act or omission would . . . have given rise to a cause of action against that
 23 employee . . .” Subdivision (b) states that “except as otherwise provided by statute, a public entity is

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25 ⁴ Section 401(i) of the Uniform Securities Act of 1956 defines a person as “an individual, or
 26 corporation, a partnership, an association, a joint-stock company, a trust where the interests of the
 27 beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political
 28 subdivision of a government.” The most recent version of the statute, the Uniform Securities Act of
 2002, defines a person, in § 102(20), as “an individual; corporation; business trust; estate; trust;
 partnership; limited liability company; association; joint venture; government; governmental
 subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.”

1 not liable for an injury resulting from an act or omission of an employee of the public entity where the
2 employee is immune from liability.”

3 “Sovereign immunity is the rule in California; governmental liability is limited to exceptions
4 specifically set forth by statute.” *Harshbarger v. City of Colton*, 197 Cal. App. 3d 1335, 1339 (1988)
5 (quoting *Cochran v. Herzog Engraving Co.*, 155 Cal. App. 3d 405, 409 (1984)). In general, immunity
6 provisions of the Tort Claims Act prevail over sections that impose liability. *See Arroyo v. State of*
7 *California*, 34 Cal. App. 4th 755, 761 (1955).

8 In *Gates v. Superior Court*, 32 Cal. App. 4th 481, 510-13 (1995), the California Court of Appeal
9 considered whether public entities were immune from suit for violation of the Unruh Act (Civil Code
10 § 51 *et seq.*). It found that nothing in the legislative history of the Unruh Act showed any intent to
11 override the immunity from the payment of money damages provided to public entities by § 845 of the
12 Tort Claims Act. In *Trinkle v. California State Lottery*, 71 Cal. App. 4th 1198, 1202-03 (1999), the
13 California Court of Appeal held that § 815 rendered the state immune from liability under the Unfair
14 Competition Act (Business and Professions Code § 17200 *et seq.*) because there was no section
15 imposing liability on public entities thereunder. The court reasoned that “only through an unreasonable,
16 strained construction can the state be deemed to fall within any of the statute’s definitional categories.”
17 *Trinkle*, 71 Cal. App. 4th at 1203.

18 The California Supreme Court has also held that § 820.2⁵ of the Tort Claims Act affords
19 discretionary act immunity to individual school board members against claims brought under the
20 California Fair Employment and Housing Act (FEHA), which includes in its definition of “employer”
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27 ⁵ California Government Code § 820.2 states that “[e]xcept as otherwise provided by statute, a
28 public employee is not liable for an injury resulting from his act or omission where the act or omission
was the result of the discretion vested in him, whether or not such discretion be abused.”

1 “the state or any political or civil subdivision thereof.”⁶ *Caldwell*, 10 Cal. 4th at 978. The court
 2 reasoned that because a specific grant of immunity prevails, it “cannot be abrogated by a statute which
 3 simply imposes a general legal duty or liability.” *Id.* at 986. To overcome such a specific grant of
 4 immunity for discretionary acts there must be a “clear indication of legislative intent that statutory
 5 immunity is *withheld or withdrawn* in the particular case.” *Id.* (emphasis in original). The court
 6 emphasized, however, that its holding affected only individual employee immunity under § 820.2, and
 7 did not necessarily extend immunity against FEHA claims to the employer/school district, a question
 8 which the Court specifically declined to address.⁷ The California Supreme Court has applied *Caldwell*
 9 to afford the State Department of Health Services discretionary act immunity from a general statutory
 10 liability where the defendant agency allegedly breached a discretionary duty. *Creason v. State Dep’t*
 11 *of Health Servs.*, 18 Cal. 4th 623, 635 (1998). The California Court of Appeal has also applied *Caldwell*
 12 to afford a county agency discretionary act immunity from a general statutory liability where the agency
 13 allegedly fail to perform a discretionary act. *Ortega v. Sacramento County Dep’t of Health and Human*
 14 *Servs.*, 161 Cal. App. 4th 713, 733 (2008).

15 This case differs from those where California courts have held public entities immune from
 16 statutorily imposed liability. The California Corporate Securities Act, which specifically includes public
 17 agencies within its ambit, was passed five years after the governmental immunity statutes.
 18 *Harshbarger* involved no such statute, relying instead on common law fraud and negligence. Unlike
 19 the situation in *Trinkle*, the Corporate Securities Act explicitly includes public entities in its coverage;
 20 the Unfair Competition Act did not do so. Whereas in *Gates* nothing in the legislative history of the

22 ⁶ California Government Code § 12926(d). Upon amendment in 1999, “thereof” was replaced
 23 with “of the state.”

24 ⁷ *Caldwell*, 10 Cal. 4th at 989, n.9: “However, FEHA creates *direct* statutory rights, obligations,
 25 and remedies between a covered ‘employer,’ private or public, and those persons it considers or hires
 26 for employment. (§§ 12926, subd. (d), 12940, subds (a), (c)-(k), 12941, 12942, 12945, 12945.2,
 27 12945.5, 12946, 12947.5, 12950, 12965.) FEHA thus provides a basis of direct entity liability
 28 independent of the derivative liabilities addressed in § 815.2. Accordingly, any personal immunity of
 a public employee against a particular FEHA claim does not necessarily accrue to the benefit of the
 public entity itself as a covered ‘employer.’ (See *Bradford, supra*, 36 Cal.App.3d at p. 20; also cf.
Ramos v. County of Madera, supra, 4 Cal.3d 685, 695.)” The Court concluded that public entity
 immunity was not before it in that case.

1 Unruh Act showed any intent to override the immunity provided by § 845, here the inclusion of
2 government entities in the statute suggests that the legislature intended that the law apply to government
3 entities, and thus to overcome the governmental immunity rule established five years prior in 1963. And
4 plaintiffs seek to hold the public entity itself liable for its actions in connection with its sale of securities,
5 not individual employees of the public entity as was the case in *Caldwell*.

6 This case also differs from *Creason* and *Ortega*, where government entities were held immune
7 from liability for alleged failure to perform discretionary acts, because here the City has acted, and has
8 done so as a party in a securities transaction, rather than in a discretionary fashion. By including
9 government entities in its definition of person, the Corporate Securities Law treats these entities as it
10 does all other parties engaged in such transactions: by imposing upon them liability for fraudulent and
11 prohibited conduct.

12 13 **3. California Government Code § 818.8**

14 California Government Code § 818.8 states that “[a] public entity is not liable for an injury
15 caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation
16 be negligent or intentional.” The Legislative Committee Comments to § 818.8 state that “[t]his section
17 provides public entities with an absolute immunity from liability for negligent or intentional
18 misrepresentation.” Cal. Law Revision Com., Comment, Deering’s Ann. Gov. Code § 818.8 (1982 ed.)
19 (cited in *Harshbarger*, 197 Cal. App. 3d at 1340); *see also Masters v. San Bernadino County Employees*
20 *Ret. Ass’n*, 32 Cal. App. 4th 30, 43 (1995) (holding that publicly entities are “wholly immune” for fraud
21 and negligent misrepresentation by their employees). The Senate Committee on Judiciary Comment
22 to § 818.8 provides the following example of the Section’s applicability: “This section will provide .
23 . . . a public entity with protection against possible tort liability where it is claimed that an employee
24 negligently misrepresented that the public entity would waive the terms of a construction contract
25 requiring approval before changes were made.” Sen. Jour. p. 1889 (April 24, 1963) (cited in *Johnson*
26 *v. State*, 69 Cal. 2d 782, 800 (1968) (explaining that § 818.8 was designed to exempt government
27 entities from liability for “interferences with financial or commercial interest,” and basing its reasoning
28 on *United States v. Neustadt*, 366 U.S. 696, 697, 711 (1961), where the United States Supreme Court

1 held the government immune under a federal statute similar to § 818.8 from liability for an alleged
2 misrepresentation in an inspection and appraisal report provided to property buyers by the Federal
3 Housing Administration.)).

4 Analogizing to *Neustadt* and *Johnson*, the California Court of Appeal has held the City of
5 Hermosa Beach immune from liability for alleged financial interference resulting from a mistaken
6 description of local zoning laws in a report prepared by one of its employees even though the Tort
7 Claims Act imposed liability on public entities for such conduct. *See Grenell v. City of Hermosa Beach*,
8 103 Cal. App. 3d 864, 868, 874-75 (1980). The California Court of Appeal has also held the City of
9 Montebello immune from liability for an alleged misrepresentation when one of its police officers orally
10 promised compensation to a police informant, *see Page v. City of Montebello*, 112 Cal. App. 3d 658,
11 661, 671-72 (1980), and has held Los Angeles County immune from general liability imposed by §
12 815.2 when one of its employees mistakenly instructed local farmers to spray their crops with a pesticide
13 whose use was actually prohibited, *see Tokeshi v. State of California*, 217 Cal. App. 3d 999, 1002-03
14 (1990).

15 The application of § 818.8 to the Corporate Securities Law, however, is a novel question, for
16 which California case law provides no established answer. The only case either party has found on this
17 issue is an unpublished Los Angeles County Superior Court case which defendant discusses in its reply.⁸
18 Moreover, the issue has not been thoroughly briefed by either party, and defendant has not previously
19 raised its immunity argument against identical claims in the related *Nuveen* matter.

20 This case differs from those where California courts have applied § 818.8 to render government
21 entities immune from alleged misrepresentation by their employees. Here, the alleged misrepresentation
22 involved prospectuses issued with the City's imprimatur in the sale of \$33 million in municipal revenue
23 bond anticipation notes. Such a transaction differs substantially from the issuance of inspection and
24

25 ⁸ According to a 1998 Practising Law Institute Bulletin (1098 PLI/Corp. 915-919), in *BNY*
26 *Western Trust v. City of Los Angeles* (LASC Case No. BC 161090) the Superior Court sustained the
27 City's demurrer to securities fraud claims under § 25500 of the Corporate Securities Law based on the
28 immunity provided by § 818.8. Defendant states that its has been unable to obtain the briefs or order
from the Superior Court file. In addition to the Bulletin, defendant attached docket entries from the
California Court of Appeal, which denied the plaintiff's writ petition, and from the California Supreme
Court, which denied review.

1 residential building reports and oral promises and instructions. Whereas government entities have been
 2 held immune from liability for the “financial interference” arising from such alleged misrepresentations,
 3 the securities fraud alleged here was not a “financial interference” but rather the City’s own plan and
 4 design. In each of the cases where government entities were held immune, they were held immune for
 5 misrepresentations made by individual employees acting contrary to the government entities’ official
 6 policies. Although defendant is correct in arguing that the City cannot act without its employees also
 7 acting, here the alleged misrepresentation was not the result of a single employee acting contrary to
 8 official policy, but rather resulted from the implementation of official City policy. Moreover, as
 9 discussed above, the statute governing such transactions and applying liability to government entities
 10 engaged therein was enacted five years after the immunity rule was established. Since government
 11 entities can only act through their employees, the language in the Corporate Securities Law imposing
 12 liability on government entities would be rendered nugatory if the immunity applied.

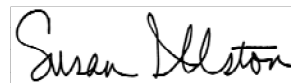
13 Under all these circumstances, the Court is not persuaded at this time that the immunity from
 14 liability for employee misrepresentation provided by § 818.8 of the Tort Claims Act of 1963 overrides
 15 the liability for misrepresentation imposed on government entities by the Corporate Securities Law of
 16 1968, and therefore DENIES defendant’s motion on the grounds of immunity under California law.⁹

18 CONCLUSION

19 For all of the foregoing reasons, the Court hereby GRANTS IN PART and DENIES IN PART
 20 defendants’ motion to dismiss plaintiff’s third claim for relief with leave to amend. (Docket No. 10).
 21 Plaintiff shall file an amended complaint no later than **August 21, 2009**.

22 **IT IS SO ORDERED.**

23 Dated: August 11 , 2009



24
 25 **SUSAN ILLSTON**
 United States District Judge

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 27 _____
 28 ⁹ In the event that defendant is able to make a further showing on this issue at a future date, it may renew its argument at that time.