

1 Timothy J. Tatro, Cal. State Bar No. 175633
Peter A. Zamoyski, Cal. State Bar No. 185579
2 TATRO & ZAMOYSKI, LLP
12264 El Camino Real, Suite 400
3 San Diego, CA 92130-3063
TEL: (858) 244-5032
4 FAX: (858) 847-0032

5 Attorneys for Plaintiff DE ANZA COVE
6 HOMEOWNERS ASSOCIATION, INC.

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

10 DE ANZA COVE HOMEOWNERS
11 ASSOCIATION, INC., a California non-profit
12 corporation,

13 Plaintiff,

14 v.

15 CITY OF SAN DIEGO, a California
16 municipality; and DOES 1-100, inclusive,

17 Defendants.

18 CITY OF SAN DIEGO, a municipal
19 corporation,

20 Cross-Complainant,

21 v.

22 DE ANZA COVE HOMEOWNERS
ASSOCIATION, INC., a California non-profit
corporation, et al.

23 Cross-Defendants.
24

Case No. GIC 821191

**PLAINTIFF'S OPPOSITION TO
DEFENDANT CITY OF SAN DIEGO'S
MOTION FOR LEAVE OF COURT TO
FILE FIRST AMENDED CROSS-
COMPLAINT**

DATE: September 24, 2004

TIME:

DEPT: 66

I/C JUDGE: Hon. Charles R. Hayes

Complaint Filed: November 17, 2003

Trial Date: June 10, 2005

25 /////

26 /////

27 /////

28 /////

1 **Issue**

2 A representative action—just like a class action—binds all individuals within the representative
3 class. But under the guise of desiring “finality,” the City of San Diego seeks to file a first amended
4 cross-complaint with six new causes of action—some of which trigger California’s anti-SLAPP
5 statute—and needlessly sue more than 850 people. Should the Court grant leave—necessitating
6 tremendous filing fees, adding scores of new attorneys, and creating an enormous and
7 unmanageable suit—when there are more practical ways to achieve a binding result in this case?
8

9 **History of the Current Motion**

10 At the Case Management Conference in June, the Court set trial and litigation dates. The City
11 did not indicate that it would seek to file a cross-complaint against any third parties beyond the
12 expected DHRG-related entities and representatives. After the Court overruled the majority of the
13 City’s second demurrer, the City answered the HOA’s complaint and filed a cross-complaint
14 against the DHRG-related representatives in mid-July. The City’s cross-complaint also had one
15 cause of action for declarative relief against the Homeowners Association, which parroted portions
16 of the Homeowners Association’s complaint. The Homeowners Association answered the cross-
17 complaint on August 18, 2004.

18 On August 19, 2004, the City of San Diego brought an *ex-parte* application for leave of court to
19 file its first amended cross-complaint and bring in over 850 new parties. The Court denied the
20 City’s *ex parte* application, ordered the parties to meet-and-confer to find alternative solutions to
21 that proposed by the City, and set this matter for a noticed motion hearing.

22 The HOA proposed several alternatives that would ensure finality of judgment without allowing
23 the case to mushroom out of control. (See Declaration of Timothy J. Tatro, Exhibit 1 (letter dated
24 August 31, 2004).)

25 First, the HOA proposed that the threshold issue of applicability of the MRL be determined
26 before new parties or causes of action are added to this case. Once this issue was decided by
27 summary adjudication, the HOA stipulated that it would reconsider the need to add any individuals
28 as parties to the case. This proposal mirrored the situation in *Tenants Association of Park Santa*

1 *Anita v. Southers* (1990) 222 Cal.App.3d 129, where the court held that the homeowners
2 association did have standing to establish liability under the MRL on behalf of all past and present
3 residents. Only after liability was established might it be necessary to determine damages on an
4 individual basis. (*Id.*) (See Declaration of Timothy J. Tatro, Exhibit 1 (letter dated August 31,
5 2004).)

6 The City would not agree to the proposal.

7 Next, although a representative action does ensure finality, the HOA's counsel called the City's
8 counsel and proposed another alternative—establishing a class action. Residents would be able to
9 formally opt in or out of the case, thus absolutely ensuring finality—assuming there were ever a
10 legitimate question of finality. (See Declaration of Timothy J. Tatro, Exhibit 2 (letter dated
11 September 14, 2004).)

12 As of the filing of this brief, the HOA is awaiting the City's response to this alternative.
13 Unfortunately, the City has not yet suggested any alternatives.

14 At this stage of the litigation, the addition of third parties and new unrelated causes of action is
15 not essential to the determination of the rights of the existing parties. The key issue, per the HOA's
16 complaint, is the applicability of the Mobilehome Residency Laws ("MRL") to De Anza Cove. The
17 causes of action that the City seeks to introduce are dependent upon a determination of the
18 applicability of the MRL. Therefore, the HOA's proposed alternatives seek to preserve the City's
19 claims and at the same time reduce the burden and expense that would result from adding hundreds
20 of individual parties.

21 Further, as the addition of the proposed third parties is only permissive and the causes of action
22 will not be barred by the statute of limitations, there would be no prejudice to the City if these
23 issues were revisited after liability under the MRL has been determined. The HOA has no objection
24 to the addition of claims against DHRG and its related entities.

25 26 **Standards Governing Motions for Leave**

27 Pursuant to Code of Civil Procedure section 472, a party is permitted to file an amended
28 pleading once as a matter of right *before* an answer is filed. On August 18, 2004, however, the

1 HOA filed its answer to the City’s cross-complaint. Therefore, the City, contrary to the
2 information in its ex parte application, now requires formal leave of this Court before it can file an
3 amended cross-complaint.

4 Next, cross-complaints against third parties are always permissive, never mandatory.
5 According to Civil Procedure section 428.50, the court has jurisdiction to grant a third-party
6 permissive cross-complaint only if adding the new parties would be “in the interests of justice.”
7 (Civ. Proc. Code, § 428.50(c)). Usually, a greater showing is required to obtain leave to file a
8 cross-complaint who is not yet a party to the action. Hence, courts should ensure that proposed
9 cross-actions and the addition of third parties do not unreasonably burden and complicate plaintiff’s
10 lawsuit. (Weil & Brown, CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2004,
11 § 6:565).)

12 Courts carefully consider whether to allow third-party cross-complaints and their added burdens
13 and complication—even where it might seem “more orderly and expeditious” to resolve all claims
14 in a single lawsuit—because defendants can always wait and pursue their rights against third parties
15 in subsequent, independent proceedings. (See *Insurance Co. of North America v. Liberty Mut. Ins.*
16 *Co.* (1982) 128 Cal.App.3d 297, 303.) Obviously, where it is *not* “more orderly and expeditious,”
17 injecting claims against hundred of individuals is even less desirable.

18 Further, a defendant can cross-complain against a third party *only* if the cause of action
19 asserted: (1) arises out of the same transaction, occurrence, or series of transactions or occurrences
20 set forth in the complaint, or (2) asserts a claim, right, or interest in the property or controversy that
21 is the subject of the cause of action brought against him. (Civ. Proc. Code, § 428.10(b).) If the
22 proposed cross-complaint meets the other procedural hurdles, but joins too many unrelated claims,
23 the court has discretionary power to order separate trials on some or all of them. (Civ. Proc. Code,
24 § 1048(b).)

25 The HOA now turns to the legal arguments as to why leave to file the first amended cross-
26 complaint should not be granted:

27 /////

28 /////

Argument

1
2 The City of San Diego asks this Court to grant it leave to file a first amended cross-complaint
3 so that it can sue approximately 850 people as cross-defendants, force them to try to retain counsel,
4 pay filing fees, prepare timely responsive pleadings, respond to discovery, and defend
5 themselves—all under the pretext of desiring “finality” of judgment. **But Plaintiff’s**
6 **representative action—just like a class action—does, as a matter of law, bring finality and**
7 **bind all individuals within the representative class.** Not only will the City’s proposed addition
8 of hundreds of new parties cause an absolute quagmire as far as case management and prejudice
9 those people and Plaintiff, its proposed new causes of action go well beyond the threshold claims
10 raised in Plaintiff’s complaint.

11 The City even attempts to bring three breach of contract causes of action against the residents
12 based on the Long Term Rental Agreements—the exact same contracts that the City asked this
13 Court dismiss in its last demurrer! (City’s P’s & A’s in support of Demurrer, p.8, lns. 18-24.) The
14 City told this Court point blank in its demurrer that it had nothing to do with the LTRAs:

15 [Plaintiff’s] complaint appears to contend that it can sue the City as a third party
16 beneficiary under the LTRAs executed by the residents of the mobilehome park.
17 This contention is specious. **The City was never party to any LTRA.** Thus, any
18 contract-based cause of action against the City flowing from the LTRAs fails
because the *sine qua non* of such a claim is lacking. A party cannot be sued for
breach of a contract to which it was never a party. Demurrer to the sixth cause of
action must be sustained without leave to amend.

19 (*Id.* (emphasis added).) But that doesn’t stop the City from claiming repeatedly in its proposed
20 amended cross-complaint that “the City was an intended third-party beneficiary of the LTRAs.”
21 (E.g., City’s First Amended Cross Complaint, p. 61, lns. 2-3.)

22 The City’s motion should be denied because (1) the representative action does provide finality
23 and a binding effect on all members of the representative class; (2) forcing more than 850 people to
24 defend themselves under the circumstances of this case would be patently unfair and prejudicial;
25 and (3) simple alternatives can easily dispatch the City’s stated concerns about finality.

27 **A. The City’s cross-complaint will defeat the purpose of a representative suit.**

28 “The statutory authorization for representative or class suits is based on the doctrine of virtual

1 representation and is an exception to the general rule of compulsory joinder of all interested
2 parties.” *Salton City Area Property Owners Assn. v. M. Penn Phillips Co.* (1977)
3 75 Cal.App.3d 184, 188. “The doctrine of virtual representation rests on considerations of
4 necessity and paramount convenience and was adopted to prevent a failure of justice.” (*Id.*)

5 Moreover, **a judgment in a representative action operates as *res judicata* against all**
6 **represented persons.** (See *Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th
7 1037, 1047.) The only time a representative action would not be binding is when: (1) a notice was
8 required, but was not given, (2) the represented person lacked interest in the subject matter of the
9 representative action, or (3) the party purporting to bring the representative action was divested of
10 representative authority before judgment was rendered. None of these exceptions apply here.
11 Similarly, in *Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695, the court concluded that where a
12 complaint properly sets forth a class, the judgment will operate as *res judicata* against all persons to
13 whom the common questions of law and fact pertain. The Darr court also held that “if the
14 existence of an ascertainable class has been shown, there is no need to identify its individual
15 members in order to bind all members by the judgment.” (*Id.*, at p. 706.)

16 There is no question of finality of judgment on the key issues of this case as the City claims.
17 Otherwise, why would the legislature have ever bothered creating a representative action if the
18 class members weren’t bound by the decision? As stated in its complaint, the Homeowners
19 Association brought the representative action:

20 in order to pursue and protect the legal rights of its members, as well as the legal
21 rights of the approximately 1,100 mobilehome present and former owners, tenants,
22 residents, and occupants of the approximately 509 lots within the De Anza Harbor
Resort mobilehome park (“Park”), located at 2727 De Anza Road, San Diego,
California.

23 The HOA has a common interest with its members and the present and former
24 owners, tenants, residents, and occupants of the Park in enforcing the applicable
25 state and local laws, and has a community of interest in the determination of the
26 questions of law and fact, causes of action, and damages as further alleged in this
27 Complaint. Plaintiff brings this action in its representative capacity as a Class
Representative on behalf of these present and former owners, tenants, residents, and
occupants of the Park both in the public interest and in the interests of necessity,
convenience, and justice.

28 (Plaintiff’s Second Amended Complaint, ¶¶ 2-3.) Thus, **plaintiff’s representative action will**

1 **operate as *res judicata* against—or in favor of—all of these represented persons and bind**
2 **them fully and finally.** (*Payne v. Nat'l Collection Systems, Inc.*, 91 Cal.App.4th at 1047.)

3 The *Tenants Association of Park Santa Anita v. Southers* case, 222 Cal.App.3d 129(1990), has
4 been briefed by the parties before. That court recognized that an association formed to pursue the
5 legal rights of its members indeed had standing to bring suit on behalf of its members. The
6 *Southers* court reasoned that since there was an ascertainable class, a community of interest in the
7 question of law and fact, and a common interest in seeing that applicable state and local
8 mobilehome park laws were enforced, the association of mobilehome tenants had standing to bring
9 action on behalf of the members. Likewise, here, the HOA has standing to bring an action on
10 behalf of its members because park residents share a common interest in compelling the City to
11 comply with state mandates.

12 Given the common interests of the members of the HOA with regard to the issues of liability
13 and the City's stated need for further assurances of finality of judgment on the key issues, the HOA
14 proposed a formal class certification solely for determination of liability issues. The HOA
15 proposed that once the determination of whether the MRL, Mello Act, and other statutory
16 provisions apply, the issues of causation and damages can be determined separately. The HOA
17 acknowledges that when the litigation proceeds to a determination of damages, facts specific to
18 each individual resident may assume importance. Therefore, if, after a determination of liability,
19 the Court concludes that the HOA can no longer suitably represent the class as to damages, an
20 opportunity can be afforded to redefine the class or to add new individual plaintiffs or cross-
21 defendants. (See *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864.) This proposal—
22 along with the HOA's proposal to simply continue with the representative action until the key
23 issues are decided by summary adjudication—makes sense here and achieves fairness, avoids
24 manifest prejudice, and promotes fiscal responsibility as well as judicial economy.

25 The City's proposed first amended complaint would undermine all these achievements, defeat
26 the very purpose of a representative action, and wreak havoc under the special circumstances of this
27 case. The Homeowners Association respectfully requests that the Court deny the City's motion—
28 but without prejudice to reconsider it after a determination is made on the key liability issues in this

1 case.

2
3 **B. Granting leave to file the first amended cross-complaint will cause undue**
4 **hardship and serious prejudice.**

5 Although the City has classified the proposed cross-defendants in four categories, each of the
6 more than 850 cross-defendants is named individually. The most likely result is a protracted and
7 disastrously expensive litigation that is complicated by hundreds of new parties each of whom have
8 to respond to the individual complaints against them, propound and respond to discovery, and
9 undergo countless depositions, leading up to a lengthy trial which may even have to be moved
10 forward to accommodate the interests of the new third parties. The court will be inundated with
11 virtually duplicative briefs from various cross-defendants, a situation that has thus far been avoided
12 due to the representative nature of the complaint. And a great number of proposed cross-
13 defendants could be steamrolled by default judgment and lose their rights just because they may not
14 know that they have to—or know how to—answer the City’s cross-complaint.

15 The economic implications of the first amended cross-complaint, by itself, are staggering: over
16 a quarter of a million dollars in filing fees just for all the cross-defendants to respond to the cross-
17 complaint. Dragging in these new parties who are not currently essential to the litigation would
18 result in untold economic hardships to these individuals, most of whom would apply for relief from
19 filing fees. In the event the City does not succeed on its claims against the proposed new parties,
20 it—and the taxpayers of San Diego—would face a quarter million dollar loss just for this first filing
21 fee.

22 Contrary to the City’s representations, *none* of the potential cross-defendants are mandatory
23 parties to this action. It makes much more sense to resolve the central issue regarding the
24 applicability of the MRL before adding new claims and parties. The interests of justice will not be
25 served by the City’s proposed amended cross complaint. The City, therefore, will not and cannot
26 be prejudiced if it is required to wait and pursue their remedies, if any, at a later stage of the current
27 proceedings or in subsequent independent proceedings.

28 ////

1 **C. The proposed amended cross-complaint will potentially be subject to an**
2 **anti-SLAPP motion.**

3 The purpose of the current motion is to determine whether the City should be permitted to file
4 an amended cross-complaint to include third parties and additional causes of action. Ordinarily, the
5 court does not need to consider the validity of the proposed amended pleading in deciding whether
6 to grant leave to amend. But the court has discretion to deny leave to amend where a proposed
7 amendment fails to state a valid cause of action or defense. (See *California Casualty General Ins.*
8 *Co. v. Sup.Ct.* (1985) 173 CA3d 274, 280-281.) Such denial is “most appropriate” where the
9 pleading is deficient as a matter of law and the defect could not be cured by further appropriate
10 amendment. Similarly, where the pleading is a “sham” pleading—such as the City’s causes of
11 action for breach of contract under the same contract that it convinced this Honorable Court did not
12 and could not conceivably apply to the City—the court is within its discretion to deny the amended
13 pleading.

14 Although each of the causes of action proposed by the City fail to state a valid cause of action,
15 which will undoubtedly be subject to roughly 850 demurrers, the HOA draws the court’s attention
16 to the proposed sixteenth cause of action to highlight its point.

17 The City’s claim against the “settling cross-defendants” is asserted on the basis that “the
18 settling cross-defendants have failed to fully perform all of their duties and obligations under the
19 settlement agreements by, among other things, filing an administrative claim.” The settling cross-
20 defendants are now being sued by the City for acts taken in furtherance of their constitutional right
21 of petition which encompasses the basic act of filing litigation. (See *Briggs v. Eden Council for*
22 *Hoppe & Opportunity* (1999) 19 Cal.4th 1106.) California’s anti-SLAPP statute—Code of Civil
23 Procedure section 425.16(b)(1)—provides that “a cause of action against a person arising from any
24 act of that person in furtherance of the person’s right of petition or free speech under the United
25 States or California Constitution in connection with a public issue shall be subject to a special
26 motion to strike unless the court determines that the plaintiff has established that there is a
27 probability that the plaintiff will prevail on the claim.”

28 In *Navellier v. Sletten* (2002) 29 Cal.4th 82, the court acknowledged that defendant Sletten’s

1 filing of counterclaims against plaintiff, despite having signed a release earlier as to the same
2 claims, was a statutory-protected activity for the purposes of California’s anti-SLAPP statute.

3 Thus granting leave to the City here virtually guarantees at least three marquee events: (1) the
4 HOA will file a special anti-SLAPP motion under C.C.P. § 425.16, which will be briefed and
5 heard; (2) each of the roughly 850 individual cross-defendants will file demurrers, which will be
6 briefed and heard, though not necessarily on the same dates; and (3) each of the roughly
7 850 individual cross-defendants will file an answer to those claims that survive demurrer, if any.
8 Moreover, one can expect countless hearings related to requests to set aside defaults, objections to
9 service individual discovery issues, and related disputes.

11 Conclusion

12 Because leave to file may be granted only if the “interests of justice” would be served—and if
13 the complaint would not be unduly complicated with cross-actions and third parties—the current
14 circumstances do not warrant leave being granted. The City’s stated intent would be better served
15 by requiring them to wait and pursue their claims at a later stage of these proceedings or in separate
16 proceedings.

17 The HOA’s proposal is simple and far more practical. Either postpone adding any new parties
18 until the central liability issue has been adjudicated—probably in December 2004—or take steps to
19 formally certify a class. Either method would provide the finality the City allegedly seeks with its
20 proposed first amended cross-complaint, while avoiding the financial and logistical strain of adding
21 hundreds of new parties.

22 The HOA, therefore, respectfully requests that the Court to deny the City leave to file its first
23 amended cross-complaint.

24 /////

25 /////

26 /////

27 /////

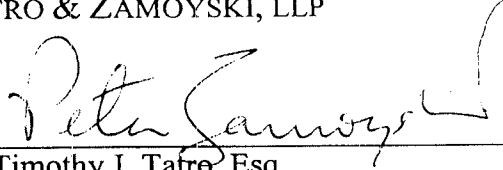
28 /////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATE: September 14, 2004

Respectfully Submitted,

TATRO & ZAMOYSKI, LLP

By: 

Timothy J. Tatro, Esq.
Peter A. Zamoyski, Esq.
Attorneys for Plaintiff DE ANZA COVE
HOMEOWNERS ASSOCIATION, INC.

1 Timothy J. Tatro, Cal. State Bar No. 175633
Peter A. Zamoyski, Cal. State Bar No. 185579
2 TATRO & ZAMOYSKI, LLP
12264 El Camino Real, Suite 400
3 San Diego, CA 92130-3063
TEL: (858) 244-5032
4 FAX: (858) 847-0032

5 Attorneys for Plaintiff DE ANZA COVE
6 HOMEOWNERS ASSOCIATION, INC.

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

10 DE ANZA COVE HOMEOWNERS
11 ASSOCIATION, INC., a California non-profit
12 corporation,

13 Plaintiff,

14 v.

15 CITY OF SAN DIEGO, a California
municipality; and DOES 1-100, inclusive,

16 Defendants.

17
18 CITY OF SAN DIEGO, a municipal
19 corporation,

20 ----- Cross-Complainant,

21 v.

22 DE ANZA COVE HOMEOWNERS
ASSOCIATION, INC., a California non-profit
corporation, et al.

23 Cross-Defendants.
24

25 I, Timothy J. Tatro, declare:

26 1. I am an attorney at law duly admitted to practice before all the courts of the State of
27 California, and am a Partner of the firm Tatro & Zamoyski, LLP, the attorneys of record herein for
28 Plaintiff De Anza Cove Homeowners Association.

Case No. GIC 821191

**DECLARATION OF TIMOTHY J.
TATRO IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT CITY OF
SAN DIEGO'S MOTION FOR LEAVE OF
COURT TO FILE FIRST AMENDED
CROSS-COMPLAINT**

DATE: September 24, 2004
TIME:
DEPT: 66
I/C JUDGE: Hon. Charles R. Hayes

Complaint Filed: November 17, 2003

Trial Date: June 10, 2005

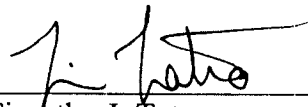
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Attached as Exhibit 1 is a true and correct copy of my letter dated August 31, 2004 to Ms. Anna Roppo.

3. Attached as Exhibit 2 is a true and correct copy of my letter dated September 14, 2004 to Ms. Anna Roppo.

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

Executed this the 14th day of September, 2004 in San Diego, California.



Timothy J. Tatro