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7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO**

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

12 Plaintiff,

13 v.

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

15 Defendants.
16

Case No. GIC 821191

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR
PROTECTIVE ORDER TO PROHIBIT
DEFENDANT'S EX PARTE
CONTACTS WITH PLAINTIFF CLASS
MEMBERS**

DATE: May 13, 2005
TIME: 2:00 p.m.
DEPT: 66
I/C JUDGE: Hon. Charles Hayes

17 AND RELATED CROSS ACTION
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1 **Table of Authorities**

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3 **Cases:**

4 *Abeles v. State Bar* (1973) 9 Cal.3d 60310

5 *Bower v. The Bunker Hill Co.* (1985) 689 F.Supp. 103212

6 *Carpenter v. State Bar of California* (1930) 210 Cal. 52010

7 *Colonial Life & Acc. Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785 14

8 *Dondore v. NGK Metals Corp.* (2001) 152 F.Supp.2d 66212

9 *Gainey v. Occidental Land Research* (1986) 186 Cal.App.3d 1051.....10

10 *Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89.....14, 15

11 *Impervious Paint Industries v. Ashland Oil* (1981) 508 F.Supp. 720.....11, 12, 13

12 *In re Marriage of Wickander* (1986) 187 Cal.App.3d 136410

13 *Mitton v. State Bar* (1969) 71 Cal.2d 52510

14 *Parris v. Superior Court* (2003) 109 Cal.App.4th 285.....15

15 *Parks v. Eastwood Insurance Services, Inc.* (2002) 235 F.Supp.2d 108212

16 *Pollar v. Judson Steel Corp.* (1984) 1984 WL 16127311

17 *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans* (1994) 24 Cal.App.4th 1139.....6, 7, 11

18 *Resnick v. American Dental Association* (1982) 95 F.R.D. 37212

19 *Turner v. State Bar* (1950) 36 Cal.2d10

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21 **Statutes & Rules:**

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24 Civil Code, § 798.23.5(a)(1)11

25 Civil Code, § 798.257, 11

26 **Supplemental Authorities**

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28 Weil & Brown, *The Rutter Group* (Civil Proc. Before Trial).....10, 14

1 *This motion and moving papers have been significantly revised and reformatted from
2 Plaintiff's submission on April 7, 2005, which is hereby withdrawn. Plaintiff requests, therefore,
3 that the Court, parties, and counsel rely exclusively on these points and authorities, declarations,
4 exhibits, and the other papers identified in the accompanying Notice of Motion and Motion.

6 **Issue**

7 The main issue in this motion for a protective order concerns the City of San Diego's *ex parte*
8 communication with the people of De Anza Cove:

9
10 **Ex parte contacts with plaintiff class members.** Ever since the Court issued the
11 TRO and Preliminary Injunction in this representative action, the City's lawyers and
12 on-site management company have communicated—and continue to
13 communicate—*ex parte* with members of the plaintiff class, trying to force them to
14 leave De Anza Cove and sign settlement agreements that waive all of their rights.
15 For example, the City misrepresented in *ex parte* communications to residents that
16 renting one's home is forbidden. If residents don't sign—or leave De Anza Cove
17 immediately—the City threatens eviction proceedings. Should the Court prohibit
18 the City from any further *ex parte* communications with plaintiff class members
19 without prior written consent of Plaintiff's counsel or Order of the Court?

21 **Statement of Facts**

22 **1. Review of pleadings and the Court's orders.**

23 **A. Plaintiff's Complaint.**

24 Pertinent to this motion, Plaintiff's Complaint identifies the members of the representative class
25 as the "present and former owners, tenants, residents, and occupants of the approximately 509 lots
26 within the De Anza Harbor Resort mobilehome park ("Park"), located at 2727 De Anza Road, San
27 Diego, California."¹

28 ¹ Plaintiff's Second Amended Complaint, ¶¶ 2-3, on file with the Court.

1 **B. The Court stops the City’s transition plan by issuing the TRO.**

2 On November 20, 2003—three days before the City took possession of the property—the Court
3 issued its Temporary Restraining Order. In the TRO, the Court enjoined the City from evicting
4 residents and from “discontinuing or diminishing any previously-provided services to the Park and
5 its residents and from closing down any common areas.”² It defined the parties protected by the
6 TRO as “the residents of De Anza Harbor Resort, located at 2727 De Anza Road.”³

7
8 **C. The Court issues the Preliminary Injunction, cementing its order to preserve the status
9 quo and halt the City’s “transition plan.”**

10 A few weeks later, the Court granted the Preliminary Injunction after finding that the HOA had
11 “established a reasonable probability of success on the merits,” meaning it was likely that the City
12 violated state law by attempting to close the park without complying with the Mobilehome
13 Residency Law. The Injunction prevented any legal action against park residents and mandated the
14 continuation of services and common areas at De Anza Cove.⁴ The Injunction protected the
15 plaintiff class members—the “residents of Mission Bay Park, formerly known as De Anza Harbor
16 Resort.”⁵ At the hearing in mid-December 2003, the Court reiterated that the City was ordered to
17 preserve the parties’ rights and maintain the status quo: **‘Is it clear what I had in mind, that the
18 status quo was going to be maintained, that things weren’t going to be changed until we get
19 this over with?’**⁶

20
21 **D. The City is ordered to stop ex parte contacts in the Order to Stay Litigation.**

22 In accord with the parties’ stipulation, on February 22, 2005, the Court ordered the City of San

23
24 ² Temporary Restraining Order, pp. 2-3, attached as Ex. 2 to Plaintiff’s Notice of Lodgment of
Exhibits in Support of Motion for Protective Order to Prohibit Defendant’s Ex Parte Contacts with
Plaintiff Class Members (hereinafter “NOL”).

25 ³ Temporary Restraining Order, p. 2, lines 24-25, Ex. 2 to NOL.

26 ⁴ See Preliminary Injunction, Ex. 7 to NOL.

27 ⁵ See Preliminary Injunction, Ex. 7 to NOL.

28 ⁶ Dec. 19, 2003 Transcript, p. 26, Ex. 5 to NOL.

1 Diego to stay all case-related matters and cease contacts with residents *except for non-payment of*
2 *rent*.⁷

3
4 **2. Through its lawyers, on-site management company, and security guards, the**
5 **City communicated—and continues to communicate—ex parte with plaintiff**
6 **class members on the subject of this litigation.**

7 At a time when the City had obtained 75 settlement agreements⁸ while residents were under
8 threat of impending evictions, the Court sought to preserve the status quo and the rights and
9 obligations of all parties when it issued its TRO. But the City secretly continued to implement its
10 “transition plan” and used different tactics to secure additional settlement agreements and waivers
11 of residents’ rights.

12 When it took possession of De Anza Cove, the City immediately began instituting changes that
13 affected residents on multiple levels. (For a detailed analysis of the facts and events that transpired
14 from the time the City took possession of De Anza Cove, please see Plaintiff’s separate Motion to
15 Appoint Receiver for De Anza Cove, filed and served concurrently herewith.) Without informing
16 Plaintiff’s counsel, the City’s lawyers and on-site management communicated *ex parte* with
17 members of the representative class, misstated the law and the governing rules and regulations to
18 residents, and actively coerced residents to leave De Anza Cove or sign settlement agreements with
19 the City—agreements that are void of the basic rights and benefits guaranteed under the
20 Mobilehome Residency Law.

21
22 **A. The City contacts residents individually—ex parte—and tells them: sign the City’s**
23 **settlement agreement...or you’ll be evicted.**

24 The City’s lawyers threatened to evict residents *regardless of full rent payment*. Even though
25 homeowners had always been allowed to rent their mobilehomes under the prior operator,⁹ the City

26 ⁷ Order dated Feb. 22, 2005, p. 5, ¶ 12, Ex. 8 to NOL.

27 ⁸ Ex. 12 to NOL, Griffith Decl., p. 4, ¶ 11.

28 ⁹ Rules and Regulations De Anza Harbor Resort, Ex. 9 to NOL (section VIII, pp. 4-5).

1 unilaterally decreed that nobody could rent their homes—*unless* both the homeowner and tenant
2 signed the City’s settlement agreement and waived all of their statutory rights and benefits.¹⁰ As
3 His Honor will recall, the City declared under penalty of perjury that these settlement agreements
4 require “residents to confirm that they are not entitled to relocation or other assistance and to agree
5 to move out.”¹¹ Residents had to waive any and all claims against the City under Civil Code
6 section 1542.¹² If residents didn’t agree to waive their rights, the City’s lawyers sent letters directly
7 to them demanding that the homeowner remove their homes from De Anza Cove immediately—or
8 the City would evict them.¹³ The City made these threats directly to residents even though it knew
9 that it could only seek evictions for failure to pay rent after seeking leave of this Court. The City’s
10 ex parte communications began early on and have continued throughout this litigation. Here are
11 but a few examples.

12 (1) Kyle Steele. Kyle Steele has lived at De Anza for ten years. For family reasons, he moved
13 last year from one home within the park to rent another home within the park. Jim Kosik—
14 Hawkeye’s President—approached him in his home in March 2004 and told him to get out.
15 Mr. Steele explained that he had the owner’s permission to rent the home. Kosik said it didn’t
16 matter, he had to leave. Mr. Steele responded that he wanted to consult with his lawyer about the
17 issue, and Kosik said that, by the time Mr. Steele got a lawyer, Kosik would already have him
18 evicted by the Sheriffs. Kosik also threatened to shut off his utilities. (Steele Decl., ¶¶ 2-8.)
19 And—*despite full rent payments*—the City kept after Mr. Steele and the homeowner, Mrs. Everson.
20 In their January 3, 2005 ex parte letter, the City’s lawyers told him he was an “unlawful occupant”
21 and demanded that he advise them “when you will be vacating space 0-41 and when the
22 mobilehome will be removed from that space.” If he didn’t immediately comply, the City’s
23 lawyers threatened to “start eviction proceedings.”¹⁴

24 ¹⁰ City’s unilaterally imposed rules & regulations, Ex. 56, ¶ 30, to NOL.

25 ¹¹ Ex. 12 to NOL, Griffith Decl., p. 4, ¶ 10.

26 ¹² See, e.g., Ex. 60, p. 2, to NOL.

27 ¹³ Letters from City directly to residents, Exs. 57-67 to NOL.

28 ¹⁴ Letter from City to Steele, Ex. 62 to NOL.

1 (2) Bernadette Moriarty. When Ms. Moriarty split up with her fiancé, she needed to find a
2 roommate to help defray the cost of rent. She was told by the City’s lawyers—in writing—that she
3 would be evicted if she tried to bring in a roommate...and evicted if she couldn’t pay her rent.¹⁵
4 The City’s attorneys stated, in bold print: **‘If you wish to get a roommate in your mobilehome,**
5 **you may only do so if you remove the mobilehome from the Property.** As long as your
6 mobilehome remains on the City’s Property, the City will seek to evict any new individuals who
7 move into your mobilehome as unlawful occupants of the City’s land.” If she really wanted a
8 roommate, the City’s lawyers told her to sign a settlement agreement or vacate the property and
9 remove her mobilehome from De Anza Cove. (See Decl. of Bernadette Moriarty, ¶¶ 2-11.)

10 (3) Grant and Gina Mulligan. The Mulligans live in Folsom, California and have guests staying
11 in their home located at space R-17. The City’s lawyers wrote directly to the Mulligans on
12 **March 1, 2005**, telling them that the City considered their guests “unlawful occupants.”¹⁶ The
13 City’s letter came *after* the Court’s February 22, 2005 Order that called a stop to all contacts that
14 were not related to non-payment of rent.¹⁷ The Mulligans were not delinquent on their rent.
15 Although the Mulligans would not sign the City’s settlement agreement, the City’s lawyers told
16 them that the City’s new rules required the Mulligans to sign the settlement agreement. If they
17 didn’t sign, the City’s lawyer instructed: “Please advise us as to when the occupants will be
18 vacating space R-17 and when you will be removing the mobilehome from that space. If you
19 would like to consider signing the non-resident Settlement Agreement with the City, we would be
20 happy to discuss same with you.”¹⁸

21 (4) Rhonda Hascall. Rhonda and her husband, Tom, have lived at De Anza for more than
22 6 years. After the City took over the property, the Hascalls decided to let their son’s young family
23 live in their home, while they decided to rent space T-13. Although rent was fully paid, the City’s
24 lawyers sent a letter on January 3, 2005, stating that “the residents currently in space T-13 are

25 ¹⁵ Letter from City to Moriarty, Ex. 59 to NOL.

26 ¹⁶ Letter from City to Mulligans, Ex. 64 to NOL.

27 ¹⁷ Order dated Feb. 22, 2005, p. 5, ¶ 12, Ex. 8 to NOL.

28 ¹⁸ Letter from City to Mulligans, Ex. 64 to NOL.

1 considered unlawful occupants of that space and rent will not be accepted for that space.” The City
2 added that the Hascalls had to immediately leave the home and remove the mobilehome from De
3 Anza Cove. Then, despite continued full rent payments, the City wrote to the Taylors—who own
4 the home—and told them on **March 22, 2005**, that the Hascalls were “unlawful occupants” and that
5 if the Taylors wanted “to enjoy the benefit of renting your mobilehome,” they had “to enter into a
6 settlement agreement with the City.”¹⁹ (See Decl. of Rhonda Hascall, ¶¶ 3-10.)

7
8 **B. The City’s ex parte legal advice—the basis that the City used to threaten evictions
9 and coerce people into signing its settlement agreements—proves to be flat wrong.**

10 The City plowed forward with this aspect of its “transition plan” despite the Mobilehome
11 Residency Law that expressly *permits* mobilehome owners to rent their homes: “Management shall
12 permit a homeowner to rent his or her home that serves as the homeowner’s primary residence or
13 sublet his or her space.”²⁰ And the park’s Rules and Regulations that were in effect at the time the
14 Court ordered the City to preserve the status quo—and thereby should still be in full effect today—
15 *confirm* the residents’ rights to rent their homes.²¹ About two months before the City took over, the
16 City asked for²²—and received²³—the park’s existing Rules and Regulations.

17 To top it off, the courts have uniformly held that **management cannot unilaterally prohibit
18 subleasing:**

19 A rule prohibiting subleasing goes to the very heart of ownership and residency.
20 Because of the home’s immobility, an owner who finds living in the park no longer
21 desirable, practical, or possible, would be forced to either sell his home or leave it
22 vacant.... **A rule when applied retroactively—that is, against a homeowner
whose lease contains no such restriction and who has not agreed to the
restriction—is contrary to the stated purpose of the MRL and is therefore
unenforceable.**²⁴

23
24 ¹⁹ Letter from City to Taylors, Ex. 67 to NOL.

25 ²⁰ Civil Code § 798.23.5(a)(1).

26 ²¹ Rules and Regulations De Anza Harbor Resort, Ex. 9 to NOL (section VIII, pp. 4-5).

27 ²² Letter from City to DHRG dated Sept. 17, 2003, p. 2, ¶ 4, Ex. 85 to NOL.

28 ²³ Letter from DHRG to City dated Oct. 3, 2003, p. 4, ¶ 9, Ex. 86 to NOL.

²⁴ *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans* (1994) 24 Cal. App.4th 1139, 1148.

1 **C. The City communicates its new “rules” and eviction threats ex parte through its**
2 **on-site management company and security guards.**

3 When the City took over, the City told its security guards—and residents—that the City could
4 create whatever rules it decided and could enforce those rules as it chose.²⁵ The City decided to:
5 prohibit parking, start towing away cars, trucks, and trailers,²⁶ and forbid residents from using their
6 storage facilities. All this, of course, violated the park’s existing Rules and Regulations.²⁷

7 Even if no status quo Order ever existed—as it does here preserving residents’ rights under the
8 park’s existing Rules and Regulations²⁸—the Mobilehome Residency Law affirmatively prohibits
9 the City from adopting and imposing unilateral rules without residents’ consent unless: (1) the
10 proposed rules are served on residents, (2) a notice of meeting to discuss the proposed rules is
11 served on residents at least 10 days before the meeting, and then, (3) if residents still do not
12 consent, management must serve a minimum 6-month written notice of proposed rule changes.²⁹
13 And, to be enforceable under the law, any unilateral rule change must still be reasonable.³⁰ The
14 City admitted under penalty of perjury during discovery that—contrary to the express provisions of
15 section 798.25 of the Mobilehome Residency Law—it didn’t meet and consult with the park’s
16 residents and representatives before unilaterally creating and imposing new rules and regulations,
17 and didn’t give lawful notice of those proposed new rules.³¹ And, obviously, the City never sought
18 leave of Court to deviate from the status quo.

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20 ///

21 _____
22 ²⁵ See Decl. of Chris Hand of National Security.

23 ²⁶ Towing photos, Ex. 27 to NOL; “No parking” signs / state of overflow parking areas, Ex. 33
to NOL (DSC 2975-2980, DSC 2984-2985); Decl. of James Lewan, ¶¶ 10-11.

24 ²⁷ Rules and Regulations De Anza Harbor Resort, Ex. 9 to NOL.

25 ²⁸ Rules and Regulations De Anza Harbor Resort, Ex. 9 to NOL.

26 ²⁹ Civil Code § 798.25; Freidman et al, *The Rutter Group (Landlord-Tenant)* pp. 11-44.1–
11-44.2, ¶¶ 11:121-11:123.

27 ³⁰ See *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans* (1994) 24 Cal.App.4th 1139.

28 ³¹ City’s verified responses to Req. for Admissions, nos. 32 & 33, Ex. 54 to NOL.

1 **D. Over the objection of Plaintiff’s counsel, the City refuses to cease its ex parte**
2 **communications with plaintiff class members.**

3 Plaintiff requested that the City stop its ex parte communications. As part of the stipulation that
4 was reached and the Order entered on February 22, 2005, the City was supposed to have stopped all
5 such communications, except for those concerning non-payment of rent. But the City’s ex parte
6 contacts continued. Surprised that the City was continuing to violate the February 22nd Order,
7 Plaintiff’s counsel twice requested in writing that the City cease and desist any further ex parte
8 contacts.³² The City’s representatives would not respond at all.

9 When the City sent out yet *another* ex parte letter threatening residents who had paid their rent
10 in full, Plaintiff wrote to the City on March 22, 2005:

11 When unknowing residents are forced to choose between eviction and signing
12 the City’s proposed agreement—especially without the benefit of input from their
13 counsel—both the agreement and the City’s motivation for extending it are
14 extraordinarily suspect. It is disturbing that the City continues to attempt to leverage
15 residents into these settlement agreements while it actively disregards the Court-
16 ordered stay. Moreover, as you know, any such agreements signed under threat of
17 eviction are voidable under standard contract defenses (e.g., coercion and duress) as
18 well as the express statutory provisions of the Mobilehome Residency Law.

19 Simply put, by sending these letters that have nothing to do with non-payment of
20 rent, the City is intentionally interfering with our attorney-client relationships,
21 violating the Court-ordered stay, and breaching the ethical obligations that all
22 attorneys have not to communicate with a represented party—all of which is being
23 done deliberately by the City to secure settlement agreements that will ultimately be
24 declared void and unenforceable as a matter of law (*see* Gov’t Code §§ 798.19,
25 798.77).

26 **The City must immediately cease and desist any and all communications**
27 **with plaintiff class members.**³³

28 The City, again, would not respond at all.

29 **E. Plaintiff’s counsel learns that the City continued its “transition plan” surreptitiously.**

30 Plaintiff’s counsel was surprised when the March 16, 2005 edition of the *San Diego Daily*
31 *Transcript* reported: **“The moveouts at the De Anza Harbor Resort Mobile Home Park on**
32 _____

33 ³² Letters from Plaintiff’s counsel dated Mar. 7, 2005, Mar. 17, 2005, Exs. 72, 75 to NOL.

³³ Letter from Plaintiff’s counsel dated Mar. 22, 2005, Ex. 76 to NOL (boldface in original).

1 **Mission Bay are moving along as planned.**³⁴ The City revealed that **it now had “no fewer than**
2 **181 settlement agreements”** and had **caused 115 homes to be vacated.** The City’s lawyer
3 proclaimed, **“The city views this as very successful.”**³⁵ The City’s real estate assets department
4 added: “Many residents at De Anza have accepted the city’s offer and have been very cooperative
5 **in assisting the city in meeting its legal mandate to restore the property to park and**
6 **recreational use.”** Interestingly, later in the article, the *Daily Transcript* reported that in “January
7 2004, the court issued a preliminary injunction that sought to preserve the status quo at the property
8 until the issues could be sorted out.”³⁶ Presumably the City’s lawyers and the City’s Real Estate
9 Assets Department were the exclusive sources of information gained by the *Daily Transcript*—
10 Plaintiff’s counsel was not the source of *any* information in the article.³⁷

11 Despite the City’s knowledge of the Court-ordered status quo, and despite the clear prejudice to
12 residents, the City stepped up its *ex parte* communication campaign so that it could surreptitiously
13 continue its “transition plan.” The full extent of the City’s *ex parte* contacts are presently unknown
14 to Plaintiff and Plaintiff’s counsel.

15 **Argument**

16 **1. A protective order is needed because the City has unlawfully communicated** 17 **ex parte with members of the plaintiff class, trying to coerce them into** 18 **signing settlement agreements that waive all their rights.**

19 The City, through its attorneys and on-site management company, has communicated *ex parte*
20 with members of the plaintiff class on the subject of this litigation. And, despite Plaintiff’s many
21 requests that the City cease and desist, the City has disregarded those requests and *continues* to
22 actively contact plaintiff class members.³⁸ No matter the stage of the litigation, no matter the status

23 _____
24 ³⁴ Daily Transcript article, Ex. 53 to NOL.

25 ³⁵ Daily Transcript article, Ex. 53 to NOL.

26 ³⁶ Daily Transcript article, Ex. 53 to NOL.

27 ³⁷ Zamoyski Decl., ¶ 14.

28 ³⁸ Exs. 72, 75, 76 to NOL.

1 of the plaintiff class, no matter the issues of ethics or propriety surrounding the City’s decisions to
2 communicate ex parte with residents regarding this litigation, the prejudice from those ex parte
3 contacts are patently clear. People’s rights are *not* being preserved. Therefore, the Court must
4 order the City to stop all ex parte contacts with present and now-former De Anza Cove residents.

5 California law is unequivocal and unbending on this straightforward issue: an attorney must
6 *never* communicate directly with an adverse party without consent of that party’s counsel. Rule
7 2-100 of the Rules of Professional Conduct clearly states that an attorney “shall not communicate
8 directly or indirectly...with a party the member knows to be represented by another lawyer...,
9 unless the member has the consent of the other lawyer.”³⁹

10 The same rule barring ex parte communications with a represented party—which has existed
11 seemingly since the genesis of the legal profession⁴⁰—applies across the entire country. Under the
12 American Bar Association’s Code of Professional Responsibility, DR 7-104, “a lawyer shall not:
13 (1) Communicate or cause another to communicate on the subject of representation with a party he
14 knows to be represented by a lawyer in that matter unless he has the consent of the lawyer
15 representing such other party... (2) Give advice to a person who is not represented by a lawyer...if
16 the interests of such person are or have a reasonable probability of being in conflict with the
17 interests of his client.”⁴¹ These prohibitions, of course, extend to class actions and representative
18 actions.

19 Once a class is established, a defendant is prohibited by statute and the Code of Professional
20 Responsibility from communicating directly with a class member on the matter in controversy
21 without opposing counsel’s prior permission or court order.⁴²

22 Unlike a class action where special procedures are first required to “certify” a plaintiff class,
23

24 ³⁹ Cal. Bar Rules of Prof. Conduct, Rule 2-100(A).

25 ⁴⁰ See, e.g., *Carpenter v. State Bar of California* (1930) 210 Cal. 520, 523; *Turner v. State Bar*
26 (1950) 36 C.2d 155, 155-157; *Mitton v. State Bar* (1969) 71 Cal.2d 525, 535; *Abeles v. State Bar*
(1973) 9 Cal.3d 603, 609; *In re Marriage of Wickander* (1986) 187 Cal.App.3d 1364, 1367.

27 ⁴¹ A.B.A. Code of Prof. Resp., DR 7-104(A).

28 ⁴² *Gainey v. Occidental Land Research* (1986) 186 Cal.App.3d 1051, 1058. Weil & Brown,
The Rutter Group (Civil Proc. Before Trial) ¶ 14:92.2, p. 14-46.

1 there is no such requirement for a representative action. Rather, **from the moment Plaintiff filed**
2 **this action, the City was put on notice that the plaintiff represented class was: “the present**
3 **and former owners, tenants, residents, and occupants of the approximately 509 lots within the**
4 **De Anza Harbor Resort mobilehome park (“Park”), located at 2727 De Anza Road, San Diego,**
5 **California.”**⁴³ And when the Court granted the TRO on November 20, 2003, and later the
6 Preliminary Injunction, it was crystal clear on the face of those orders that they applied to the
7 plaintiff represented class.⁴⁴

8 Even viewing the case, hypothetically, as a pre-certified class action, the City and its attorneys
9 are still forbidden from making any misleading or improper communications, providing legal
10 advice, or making communications that could prejudice potential class members’ rights.⁴⁵ Yet, this
11 is exactly what happened. The City misrepresented the law when it told residents that the park’s
12 Rules and Regulations that existed at the time the Court issued its TRO and Preliminary Injunction
13 were no longer in effect and ~~that~~ the City could unilaterally change those Rules.⁴⁶ It also
14 misrepresented the law that when it told residents in ex parte communications that it was illegal for
15 residents to rent their homes unless they signed the City’s settlement agreement.⁴⁷

16 In *Bower v. Bunker Hill Company*—a class action case where the class was yet to be certified—
17 defense counsel was prohibited from contacting prospective class members due to the potential for
18 prejudice. The court summed up:

19 [T]he defendants’ articulated reason for contacting class members here is to obtain
20 information to aid in the preparation of its own case. As was noted by the court in
21 *Resnick*, such a need is present in every case and can be readily filled by the use of
22 the discovery process. Moreover, class members gain no benefit from such contact.
Quite the contrary, the imbalance in knowledge and skill which exists between class
members and defense counsel presents an **extreme potential for prejudice to class**

23 ⁴³ Second Amended Complaint, ¶ 2, on file herein.

24 ⁴⁴ Order on Preliminary Injunction dated Jan. 6, 2004, Ex. 7 to NOL.

25 ⁴⁵ *Impervious Paint Industries v. Ashland Oil* (1981) 508 F.Supp. 720; *Pollar v. Judson Steel Corp.* (1984) 1984 WL 161273.

26 ⁴⁶ Civil Code § 798.25; Freidman et al, *The Rutter Group (Landlord-Tenant)* pp. 11-44.1–
27 11-44.2, ¶¶ 11:121-11:123.

28 ⁴⁷ Civil Code § 798.23.5(a)(1); *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans* (1994) 24
Cal.App.4th 1139, 1148.

1 **members' rights.** This problem has long been recognized and remedied by the
2 **proscription against such communications** found in [ABA Code of Professional
Responsibility] DR 7-104.⁴⁸

3 The *Bower* court ruled that defense lawyers must treat plaintiff class members as represented by
4 counsel and prohibited the defense from “communicating with any class member with respect to
5 matters which are the subject of this litigation without prior consent of class counsel or the court.”⁴⁹

6 In *Resnick v. American Dental Association*, the court chided that it seemed “hardly necessary to
7 spell out the reasons for the prohibition of a lawyer’s direct contact dealing with an adverse party
8 represented by counsel.... Ordinarily, this Court would deem it unnecessary to do more than
9 remind counsel of their ethical responsibilities. Here however ADA’s counsel has taken the
10 position he was not obliged to either refrain from communications or to advise class counsel
11 whether he had communicated with class members in the past.”⁵⁰ Due to this position by
12 counsel—apparently the same one advocated in this case by the City of San Diego and its
13 lawyers—the *Resnick* court ordered defense counsel: (a) not to communicate with any member of
14 the plaintiff class, (b) to advise class counsel whether any communications with plaintiff class
15 members took place, and (c) to deliver all notes, memoranda, and documents “constituting or
16 referring to any such communication to or from any class member.”⁵¹

17 Although there is a split of opinion concerning the propriety of “vanilla” disclosures made by
18 defense counsel to pre-certification class action members,⁵² **there is no equivocation in the case
19 law where there is a showing that defense counsel’s communications are misleading, provide
20 legal advice, or could prejudice the rights of potential class members.**⁵³

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22 ⁴⁸ *Bower v. The Bunker Hill Co.* (1985) 689 F.Supp. 1032, 1033.

23 ⁴⁹ *Bower*, 689 F.Supp at 1034.

24 ⁵⁰ *Resnick v. American Dental Association* (1982) 95 F.R.D. 372, 377.

25 ⁵¹ *Resnick*, 95 F.R.D. at 377.

26 ⁵² Compare *Dondore v. NGK Metals Corp.* (2001) 152 F.Supp.2d 662, 665 (initiation of class
27 action prohibits defense counsel contacts and interviews), with *Parks v. Eastwood Insurance
28 Services, Inc.* (2002) 235 F.Supp.2d 1082, 1084 (pre-certification inter-office memo sent to
employees permissible).

⁵³ *Impervious Paint Industries v. Ashland Oil* (1981) 508 F.Supp. 720; *Pollar v. Judson Steel
Corp.* (1984) 1984 WL 161273.

1 For example, the evidence in the *Impervious Paint* case showed that defense counsel and its
2 client had an explicit plan to contact potential class members, not for any regular business purpose,
3 but **to undermine the pre-class certification plaintiff class by persuading individuals to opt-**
4 **out.**⁵⁴ The defendant had sent notices—without plaintiff counsel’s consent—telling potential
5 plaintiffs to affirmatively opt out and warning them that if they didn’t opt out, they would be
6 subject to discovery and other legal procedures.⁵⁵ Even though the court commented that the pre-
7 certification ‘status of plaintiffs’ counsel in relation to the class members cannot be stated with
8 precision... **the implication is unavoidable that defendants’ counsel must treat plaintiff class**
9 **members as represented by counsel,** and must conduct themselves in accordance with both
10 sections of [ABA Code of Professional Responsibility] DR 7-104.”⁵⁶

11 The court continued: “It is essential that the class members’ decision to participate or to
12 withdraw be made on the basis of independent analysis of its own self-interest. It is the
13 responsibility of the Court as a neutral arbiter...to insure this type of free and unfettered decision.”
14 The court took particular note of the fact that the defendant’s improper contacts “had been quite
15 effective” in obtaining opt-outs. Accordingly, **the court set aside all opt-outs for those class**
16 **members and ordered a special notice sent to the class members setting forth the defendant’s**
17 **impropriety.**⁵⁷ The court reasoned convincingly: “If these class members did, in fact, make a free
18 and unfettered decision in choosing to withdraw, then they will do so again. On the other hand, if
19 they were influenced by the improper contacts, and do not choose to opt out when the impact of
20 that taint is diminished, the...defendants will be in no worse position than they would have without
21 the impropriety.”⁵⁸

22 Here, the City knew that issuance of the Temporary Restraining Order would halt its attempts to
23 continue leveraging residents into signing the City’s settlement agreement. The City’s counsel

24 ⁵⁴ *Impervious Paint*, 508 F.Supp. at 722.

25 ⁵⁵ *Id.* at 722.

26 ⁵⁶ *Id.* at 722-723.

27 ⁵⁷ *Id.* at 723-724.

28 ⁵⁸ *Id.* at 724.

1 stated to the Court during the November 20, 2003 TRO hearing:

2 The City has to be permitted to move forward with...the generation of those
3 settlement agreements for those residents that want to move forward and take part in
4 the City's transition plan. **This temporary restraining order would effectively
preclude the City from implementing its transition plan.**⁵⁹

5 But the City, its on-site management company, and its attorneys have knowingly and
6 deliberately continued communicating with members of the plaintiff class with the stated purpose
7 of getting those people to leave the park or sign settlement agreements—agreements that
8 unlawfully require residents to waive their rights under the Mobilehome Residency Law.⁶⁰ The
9 City and its lawyers have done so without plaintiff's consent, and, in fact, have done so after
10 specifically being asked—verbally and in writing—to cease and desist all such unauthorized
11 contact with representative class members.⁶¹

12 It is anticipated that the City will somehow try to argue that if the City is prevented from
13 communicating with plaintiff class members, then Plaintiff and its counsel must therefore be barred
14 from communicating with its own class members and clients. But the law shows that, of course,
15 unless there is a false communication that would violate Code of Professional Responsibility
16 Rule 1-400(d), the California Supreme Court finds “it is entirely proper (even ‘laudable’) for
17 plaintiff's attorney to furnish information” to members of the plaintiff class.⁶² The U.S. Supreme
18 Court in *Gulf Oil* agreed, holding that prohibiting plaintiff's counsel from communicating with his
19 own class clients would, among other things, violate the First Amendment.⁶³ Concerning defense
20 counsel contacts, however, the *Gulf Oil* Court remarked differently: the “rules of ethics properly
21 impose restraints on some forms of expression. See, e.g., ABA Code of Professional
22

23 ⁵⁹ Nov. 20, 2003, Transcript, p. 5, lines 4-10, Ex. 3 to NOL (emphasis added).

24 ⁶⁰ See, e.g., Hascall Decl., ¶¶ 3-9; Steele Decl., ¶ 7; Moriarty Decl., ¶ 5; Letters from City
25 directly to De Anza residents, Exs. 57-67 to NOL.

26 ⁶¹ See letters from HOA's counsel to City, Exs. 72, 75, 76 to NOL.

27 ⁶² Weil & Brown, *The Rutter Group* (Civil Proc. Before Trial) ¶ 14:93, p. 14-46 citing *Colonial
Life & Acc. Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 795.

28 ⁶³ *Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89.

1 Responsibility, DR 7-104.”⁶⁴

2 Here, Plaintiff has made a specific factual showing that the City’s ex parte communications are
3 causing direct, immediate, and irreparable harm⁶⁵ to the homeowners, residents, and occupants of
4 De Anza Cove—the representative class. The City’s ex parte contacts are purposely designed to
5 get residents to move out or waive all of their statutory rights. The extent of those ex parte
6 communications is not presently known since the City has not provided Plaintiff’s counsel such
7 information or turned over documents evidencing those contacts. Therefore, in accordance with the
8 even-handed approaches used in *Bower, Resnick*, and *Impervious Paint*, Plaintiff requests that the
9 Court enter a protective order:

- 10 (a) prohibiting the City and its agents from any further *ex parte* communications with plaintiff
11 representative class members;
- 12 (b) directing the City to identify all representative class members that the City and its
13 representatives communicated with since the time the Court issued its Temporary
14 Restraining Order on November 20, 2003;
- 15 (c) directing the City to produce all documents that constitute or refer to any communication to
16 or from any plaintiff class members since that time;
- 17 (d) staying for all purposes the enforcement of any settlement agreements entered into between
18 the City and plaintiff representative class members until further order of the Court since
19 some of the City’s settlement agreements direct residents to move-out immediately or as
20 soon as **June 2005**;
- 21 (e) sending a special Court notice to all plaintiff representative class members disclosing the
22 defendant’s ex parte communications and explaining the stay of enforcement of all
23 settlement agreements.

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27 ⁶⁴ *Gulf Oil*, 452 U.S. at 104, n. 21.

28 ⁶⁵ See, e.g., *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 299-300 (required evidentiary showing for a protective order in a *pre-certification class action* case).

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Conclusion

Ever since the Court issued the TRO and Preliminary Injunction in this representative action, the City's lawyers and on-site management company have communicated—and continue to communicate—*ex parte* with members of the plaintiff class, trying to force them to leave De Anza Cove and sign settlement agreements that waive all of their rights. The communications are riddled with misrepresentations and misstate California law. Setting aside the ethical considerations, and the City's expected pleas of confusion over what is meant when the Court's Orders and Plaintiff's pleadings consistently describe the plaintiff class as "residents of 2727 De Anza Road," Plaintiff has made a specific factual showing in this motion that the City's *ex parte* communications are causing direct, immediate, and irreparable harm to the homeowners, residents, and occupants of De Anza Cove. Thus, to prevent any future harm, the Court must stop the City's further *ex parte* communications with plaintiff class members. The harm from those contacts is real and shown by the zealously with which the City has sought to multiply its settlement agreements during the Court's status quo order: from the time of the TRO—75 agreements—to now—181 agreements.

Respectfully Submitted,

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