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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 REPLY BRIEF IN  
SUPPORT OF MOTION TO APPOINT  
RECEIVER FOR DE ANZA COVE**

DATE: July 8, 2005  
TIME: 2:00 p.m.  
DEPT: 66  
I/C JUDGE: Hon. Charles Hayes

17 AND RELATED CROSS ACTION  
18

19  
20 **Introduction**

21 *Democracy must be something more*  
22 *than two wolves and a sheep voting on what to have for dinner.*

23 — James Bovard

24 In conjunction with the Homeowners Association's motion to appoint a receiver, the Court  
25 ordered the City to show cause why a receiver should not be appointed to oversee De Anza Cove.  
26 After the City's numerous requests for extensions of time to oppose the motion, representations to  
27 the Court about the enormity of factual disputes facing the Court on this motion, and repeated  
28 denials of any wrongdoing to this Court and to the public, we expected the City to present—once

1 and for all—the results of its promised investigation or, at least, submit some kind of admissible  
2 evidence to try to justify its mistreatment of the residents of De Anza Cove, its non-compliance  
3 with the Preliminary Injunction, and its violations of the Court-ordered status quo.

4 Instead, the City did not deny a single fact, declaration, or exhibit. It did not deny *any* part of  
5 the mountain of evidence buttressing plaintiff’s case for receivership. And the City did not provide  
6 a single piece of admissible evidence to attempt to justify its deliberate actions taken against De  
7 Anza Cove’s residents over the past year-and-a-half—or the undisputed misrepresentations that it  
8 made to this Court.

9 By failing to oppose *any* of the facts supporting plaintiff’s motion, the City tacitly admits that  
10 *during* the Court-ordered status quo—as plaintiff and its counsel have maintained all along—the  
11 City purposely used its on-site management company, security guards, and lawyers to:

- 12 • Threaten residents—who’ve paid their rent—with eviction through ex parte  
13 communication by the City’s lawyers and on-site management company
- 14 • Illegally search residents’ homes and falsely imprison them
- 15 • Bring in armed guards and instruct its guards to act more aggressively towards residents
- 16 • Construct a guard shack checkpoint and gate
- 17 • Prohibit free access to the park
- 18 • Demand all who enter the park to provide personal information
- 19 • Fail to inform guards of the Court’s TRO and Injunction orders
- 20 • Fail to disclose alleged health and safety issues, like natural gas leaks
- 21 • Erect chain-link and barbed-wire fencing
- 22 • Remove all common area furniture and amenities, then lie to the Court that the City was  
23 not responsible
- 24 • Tear down the playground and refuse to replace it
- 25 • Impound all items from residents’ storage areas
- 26 • Prohibit residents’ parking in their assigned parking slots in the overflow parking area
- 27 • Tow and impound residents’ cars, trucks, and trailers
- 28 • Destroy the residents’ storage facilities and refuse to replace them

- 1 • Destroy laundry facilities and refuse to replace them
- 2 • Destroy the De Anza Mart market and refuse to replace it
- 3 • Close the Pavilion clubhouse and main laundry mat
- 4 • Create an oppressive, blighted existence for residents
- 5 • Clear-cut existing flower gardens, shrubs, trees, and lush landscaping—replaced by the  
6 City’s “flourishing weeds” and ubiquitous orange construction fencing<sup>1</sup>
- 7 • Remove the entrance fountain and landscaping
- 8 • Contact the County Assessor secretly to have residents taxed like never before
- 9 • Send unilateral notices to cut trees and shut off their water
- 10 • Threaten and even physically intimidate residents and their guests.<sup>2</sup>

11 The City Attorney himself confirmed to park residents last week that the City had indeed made  
12 the “effort to try to force people out of here [De Anza Cove] by creating an intolerable situation.”<sup>3</sup>  
13 There is no need for Retired Judge McCue to render advisory findings as to the facts in Plaintiff’s  
14 declarations and exhibits—they are all undisputed.

15 Then, in one of the most head-scratching maneuvers so far—despite its failure to deny the  
16 evidence of its abuses and harassment proven in Plaintiff’s motion—the City tried to claim in its  
17 opposition brief not only that is a Receiver not needed, but that the same City officials and lawyers  
18 who undeniably created and exacerbated this oppressive situation should not relinquish their power  
19 and authority over the mobilehome park and residents’ lives because:

- 20 • Residents are already protected by the Preliminary Injunction!
- 21 • The City has already taken care of the problem since the City Attorney’s Office said it  
22 would *recommend* changes (notably absent is evidence of client authority by the City  
23 Council, the City Manager, or the City’s Director of Real Estate Assets, Mr. Griffith, to  
24 approve any recommended change); and
- 25 • The HOA has no legal right to complain about the mistreatment of the people at De  
26 Anza Cove.

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26 <sup>1</sup> City’s Orange Flyer to Residents, Ex. 49 to NOL; Green Flyer to Residents, Ex. 50 to NOL.

27 <sup>2</sup> See sections 3.A.–3.L. of Plaintiff’s moving papers, and all facts and evidence cited therein.

28 <sup>3</sup> City Attorney Michael Aguirre, quoted in the *San Diego Union-Tribune* dated June 30, 2005.

1 The coup-de-grace in the City’s opposition brief is the City’s proclamation that the Court has  
2 no authority to protect residents’ so-called “rights.” The City then misstates the scant law it chose  
3 to submit, cites inapplicable authorities, and tries to ridicule Plaintiff’s counsel for not mentioning  
4 those (misstated, inapplicable) authorities. As shown in detail below, the City’s opposition is  
5 unsupported by the law.

6 Through its deliberate actions at De Anza Cove, the City made this case a war of attrition—  
7 forcing residents to choose between staying under oppressive conditions or leaving and giving up  
8 their unwaivable statutory rights to relocation assistance. The only prudent thing to do is place  
9 oversight responsibility into the hands of a person with no agenda, no animosity, and no financial  
10 incentive to hurry residents out of De Anza before the case is decided. The appointment of a  
11 receiver will ensure that the fate of all De Anza Cove’s hundreds of residents will not depend on  
12 their ability to withstand the City’s abuse of power—an abuse well-documented in plaintiff’s  
13 undisputed 41 supporting declarations, 98 evidentiary exhibits, and 25-minute video presentation.  
14 Unlike the City’s bureaucrats and lawyers, a receiver will be immune from political pressure,  
15 answering only to the Court, and will resolve conflicts at the park whenever the new management  
16 company needs assistance. A receiver will act as a buffer between the litigants, saving the Court  
17 substantial time and saving the parties substantial resources otherwise spent on countless law and  
18 motion hearings related solely to park-management issues. The City will get the property back—  
19 when the case is over and the City has fully complied with its obligations under State law. But, in  
20 the interim, a receiver will restore, then preserve, the status quo in a case where the City has  
21 undeniably—in virtually every way conceivable—repeatedly violated this Court’s prior orders.

22 The foxes have watched this henhouse long enough.

23 The residents of De Anza Cove respectfully request that the Court execute Plaintiff’s proposed  
24 order granting the receivership motion and immediately appoint Mr. Kipperman, or in the  
25 alternative, Ms. Gladstone, as receiver for the De Anza Cove property.

26 ///

27 ///

28 ///

1 **Argument**

2 **A. The City fails to dispute any of Plaintiff’s evidence, much less meet its**  
3 **own burden of producing evidence to show good cause as to why a**  
4 **receiver should not be appointed.**

5 The City has utterly failed to show cause or produce any admissible evidence whatsoever to  
6 dispute that a receiver is warranted based on the undisputed actions and policies that the City’s  
7 lawyers, management company, and security company wielded against the residents of De Anza  
8 Cove.

9 As bullet-listed above, the City’s inability to dispute the facts supporting plaintiff’s motion  
10 speaks volumes. Here are but three examples from plaintiff’s initial moving papers that illustrate  
11 how the City created the problems, oppression, and blight at De Anza Cove, not just with its armed  
12 security guards, but through its on-site management company and lawyers.

13  
14 **1. The City’s lawyers directly misled the Court when the Court asked how all the**  
15 **furniture and amenities had been stripped from the park’s clubhouses *after* the**  
16 **TRO was granted.**

17 The City does not dispute Plaintiff’s evidence as shown on pages 7-8 of its moving papers:

18 Before the City took over, the Bay Club and Pavilion club house common  
19 areas had functioned as the social hub and meeting place for park residents  
20 and were often used for bingo, holiday parties, church services, and other  
21 group events.<sup>4</sup> Two days *after* the Court issued the temporary restraining  
22 order, all furniture—chairs, tables, couches, pool tables, a big screen  
23 television, and other amenities<sup>5</sup>—was stripped from these common areas. So  
24 was the pool-area furniture.<sup>6</sup>

25 When these issues were raised to the Court on November 25, 2003,  
26 counsel for the City forcefully explained that DHRG—the prior park  
27 operator—had simply reclaimed its personal property. The City categorically  
28 denied to the Court that it had *any involvement* in stripping the common areas  
clean:

29 \_\_\_\_\_  
30 <sup>4</sup> See Bay Club and Pavilion photos before City took possession, Ex. 17 and Ex. 19 to NOL;  
31 Abbit Decl., ¶ 14; See also Rules and Regulations De Anza Harbor Resort (section X, p. 10-11),  
32 Ex. 9 to NOL.

33 <sup>5</sup> Letter from HOA’s counsel to City’s attorneys dated Nov. 24, 2003 listing items removed, Ex.  
34 93 to NOL; Bay Club and Pavilion photos *after* City took possession, Ex. 18, Ex. 20 to NOL.

35 <sup>6</sup> See Pool Area photos before and after City took possession, Ex. 23 to NOL.

1 THE COURT: The City is not involved in removing any  
of those items?

2 MS. ROPPO: **Absolutely not, Your Honor.**

3 THE COURT: The City has not entered into any type of  
4 an agreement concerning those items post  
the issuance of the TRO?

5 MS. ROPPO: No, Your Honor.<sup>7</sup>

6 This, however, was not the case. DHRG's attorney confirms that the City  
7 told DHRG to vacate the property and remove all items during Fall 2003. As  
8 November 23, 2003 rapidly approached, DHRG repeatedly asked the City if it  
9 could leave the furniture and amenities (listing them all in a two-page  
10 spreadsheet) for the residents as a goodwill gesture.<sup>8</sup> Then, on November 21,  
2003—the day *after* the TRO was granted—DHRG's counsel wrote again  
11 asking whether the City required the furniture removal “in light of the  
temporary restraining order.”<sup>9</sup> **The City telephoned** back that day and said  
**the City wanted DHRG to remove all its property, including all of the  
furniture from the common areas.** (See Decl. of Mark Zebrowski, Esq.)

12 Without knowing that the City had ordered the removal, the HOA asked  
13 DHRG to return the furniture as a good-will gesture. DHRG agreed to return  
the furniture to the HOA for the sum total of \$1—provided that the City did  
14 not object. (Zebrowski Decl., ¶ 7.) But the City repeatedly refused to allow  
the furniture back.<sup>10</sup>

15  
16 **2. The City's hand-picked on-site management company told its security guards to  
ratchet up the pressure and act more aggressively towards residents.**

17  
18 The City also does not dispute Plaintiff's evidence as shown on pages 13-14 of its moving  
19 papers:

20 [T]he truest indication of the City's motivation for ratcheting up security  
21 comes from those asked to carry out the City's plans. Chris Hand was the  
regional manager for National Security—the company that provided security  
22 at De Anza for the first 5 months after the City took over. Mr. Hand's  
attached declaration is an eye-opening, first-hand, and comprehensive recital  
23 of the City's management practices at De Anza Cove.

24 <sup>7</sup> Nov. 25, 2003 Transcript, p. 8, Ex. 4 to NOL (emphasis added).

25 <sup>8</sup> Nov. 18, 2003 letter from DHRG to City, Ex. 91 to NOL; See also letters from DHRG to  
26 City, Ex. 87 (p. 3, ¶¶ 2-3), Ex. 89 (p. 2) to NOL; Letter from City to DHRG, Ex. 88 (p. 3) to NOL.

27 <sup>9</sup> Letter from DHRG to City dated Nov. 21, 2003, Ex. 92 to NOL.

28 <sup>10</sup> Zebrowski Decl., ¶ 7-8; E-mails between DHRG and City, Exs. 95-97 to NOL; Zamoyski  
Decl., ¶ 3.

1 For example, Hawkeye told Mr. Hand and his guards that the mobilehome  
2 park was no longer public land and was now “Private Property.”<sup>11</sup> The City  
3 and Hawkeye **never told the security guards about any of the Court orders**  
4 **protecting the status quo.**<sup>12</sup> He and his guards “simply accepted as true that  
5 the mobilehome park had been converted to Private Property and that  
6 Hawkeye could create whatever rules it decided and could enforce those rules  
7 as it chose.”<sup>13</sup> **National Security was castigated by Hawkeye for not being**  
8 **aggressive enough with residents, for not stopping every vehicle entering**  
9 **the park, for not taking more photographs of people in each car, and for**  
10 **not ticketing more cars within the park.**<sup>14</sup> Mr. Kosic of Hawkeye told  
11 Mr. Hand that “even if there was a line of cars out to the road along Mission  
12 Bay, he didn’t care—we were to stop every car and take all this information  
13 down.” In addition, National Security was never consulted regarding the  
14 City’s decision to install klieg lights or speed bumps.

15 The City ultimately replaced National Security with armed guards—even  
16 though there hadn’t been a single incident at the park involving a weapon.<sup>15</sup>  
17 Mr. Hand observed: “Hawkeye Asset Management was and is being too  
18 aggressive with park residents. It appears that the over-aggressiveness is  
19 purposely designed to make the residents upset and want to move out.”<sup>16</sup>

20 **3. The on-site management company—including the president of that company—**  
21 **fabricates criminal activity to try to bully and intimidate residents.**

22 The City does not dispute Plaintiff’s evidence as shown on page 21 of its moving papers:

23 In the process of demolishing a neighboring unit, a worker began jack  
24 hammering the driveway that belonged to Jason Arzola. Mr. Arzola pointed  
25 out the property line to Jim Kosik—the president of Hawkeye—who promptly  
26 called for an armed guard. The guard arrived and was told by Mr. Kosik to  
27 call the police and report that “terrorist threats were being made against them  
28 by a man with a baseball bat.” Mr. Arzola did not have a bat and was not  
threatening anyone, much less making terrorist threats. The police arrived,  
interrogated Mr. Arzola, but released him when the demolition workers  
refused to corroborate Mr. Kosik’s allegations. (See Arzola Decl., ¶¶ 3-10.)

These three examples only touch upon the atrocities that the City has inflicted on the park’s  
residents—from breaking the ribs of a 62-year-old man,<sup>17</sup> falsifying crime statistics to supposedly

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<sup>11</sup> Hand Decl., ¶ 6.

<sup>12</sup> Hand Decl., ¶ 16.

<sup>13</sup> Hand Decl., ¶ 16.

<sup>14</sup> Hand Decl., ¶ 14.

<sup>15</sup> Hand Decl., ¶ 18.

<sup>16</sup> Hand Decl., ¶ 18-19.

<sup>17</sup> Dyer Declaration, ¶¶ 2-13.

1 justify ever-harsher “security” measures,<sup>18</sup> to the City’s lawyers secretly sending ex parte letters to  
2 tenants—who paid full rent—threatening them with eviction unless they signed the City’s  
3 settlement agreement.<sup>19</sup>

4  
5 **4. The City’s only apparent “facts” supplied in opposition are either flat wrong or**  
6 **completely irrelevant to this receivership motion.**

7 The only documentary “evidence” submitted by the City is documentation related to the  
8 property transfer from the State to the City of San Diego, a sample lease agreement, and the  
9 Kapiloff Bill provisions—none of which has *anything* at all to do with the current motion before  
10 the Court.<sup>20</sup> The City even incorrectly claims that a deposition transcript from the HOA’s  
11 membership chairwoman<sup>21</sup> supports their wildly wrong assertions made in its opposition brief, such  
12 as the City’s allegation that the HOA “is structured to reward the most affluent households at the  
13 Property”<sup>22</sup> or that the “Association never asked its members to authorize this lawsuit.”<sup>23</sup> Of  
14 course, *the deponent never testified as the City’s lawyers claim*. When the City’s lawyer asked  
15 Mrs. Asbury if the Association’s membership had voted to authorize the lawsuit, she responded that  
16 she didn’t remember.<sup>24</sup> She added that all she did was keep the membership information,<sup>25</sup> and that  
17 other people in the HOA would be a better source of information to answer those kinds of  
18 questions.<sup>26</sup>

19 Accompanying this Reply Brief is the Declaration of Dorie Offerman, the Homeowners

20 <sup>18</sup> Abbit Decl., ¶¶ 2-9; Confirming letter to Assistant Police Chief Maheu, Ex. 37 to NOL;  
21 Letters from HOA counsel to City, Exs. 72, 79 to NOL; Zamoyski Decl., ¶ 35.

22 <sup>19</sup> See pages 25-26 of Plaintiff’s initial moving papers.

23 <sup>20</sup> See City’s Exhibits 1, 3-5.

24 <sup>21</sup> See City’s Exhibit 2, deposition transcript.

25 <sup>22</sup> City’s Opposition Brief, p. 8, lines 10-11.

26 <sup>23</sup> City’s Opposition Brief, p. 8, line 20.

27 <sup>24</sup> See City’s Exhibit 2, deposition transcript, p. 88, lines 7-8.

28 <sup>25</sup> See City’s Exhibit 2, deposition transcript, p. 91, lines 10-24.

<sup>26</sup> See City’s Exhibit 2, deposition transcript, p. 92, lines 5-21.

1 Association’s Secretary who takes the minutes from HOA board meetings and general membership  
2 meetings. Mrs. Offerman confirms that on October 24, 2003, the HOA Board—and then on  
3 October 29, 2003, the full HOA general membership—voted unanimously to authorize and pursue  
4 litigation against the City.<sup>27</sup> Likewise, the HOA absolutely does *not* reward the most affluent  
5 households. The HOA general membership voted unanimously to reaffirm what was known since  
6 the litigation was filed: that all contributions to the HOA would be reimbursed to those members  
7 who contributed on a *pro-rata basis* if and only if the Court ultimately awards the HOA its  
8 attorneys’ fees and costs as the prevailing party. All applicable damages awarded in the suit would  
9 go directly to those individuals who suffered those damages.<sup>28</sup> *Nobody* will earn anything more  
10 than what the California statutes and laws provide. And these are the City’s “facts” supporting its  
11 already-filed summary judgment motion.

12 Other than this, the City relies on the attorney declaration of Anna Roppo that proclaims, under  
13 penalty of perjury, without any supporting evidence whatsoever: **“Since November 2003,...the**  
14 **City has gone out of its way to avoid conflict with the residents.”**<sup>29</sup> Plaintiff has proven the  
15 falsity of this statement through the numerous undisputed accounts of the City’s false arrests,  
16 assault, battery, improper searches, trespass, unlawful threats of eviction, ex parte communications,  
17 unilateral destruction of common areas, towing of residents’ vehicles that were legally parked,  
18 arbitrary park rule changes, outright lies to the Court and public, and a concerted plan designed by  
19 the City to use all of these oppressive measures to force people to leave the park—all documented  
20 by sworn declarations and various exhibits in Plaintiff’s moving papers.

21 Fundamentally, the City’s failure to produce any meaningful evidence, alone, justifies the  
22 appointment of a receiver because the City has failed to show cause. But, in an optimum of  
23 caution, plaintiff will now turn to the City’s assertions that the HOA lacks standing to request—and  
24 the Court lacks the authority to appoint—a receiver.

25  
26 <sup>27</sup> Offerman Decl., ¶ 5.

27 <sup>28</sup> Offerman Decl., ¶¶ 6-7.

28 <sup>29</sup> Decl. of Ms. Roppo, ¶ 2, page 2, lines 4-8.

1 **B. The HOA has requested relief under the appropriate receivership provision.**

2 Plaintiff seeks relief under Code of Civil Procedure section 564(b)(9)—providing for the  
3 appointment of a receiver “in all other cases where necessary to preserve the property or rights of  
4 any party.” On pages 27 and 28 of Plaintiff’s initial memorandum of points and authorities,  
5 Plaintiff correctly provided to the Court the applicable legal authorities concerning receivership—  
6 including the Code of Civil Procedure, California Rules of Court, and San Diego Local Rules; the  
7 California Judges Benchbook on Civil Proceedings Before Trial; The Rutter Group; and two  
8 appellate cases confirming the simple and well-known proposition that the Court, indeed, has the  
9 discretion to appoint a receiver which will not be overturned on appeal absent a finding of abuse of  
10 discretion:

11 [T]he court may appoint a receiver “where necessary to preserve the property or  
12 rights of any party.”<sup>30</sup> The trial court has liberal discretion in appointing a receiver,  
13 which will not be disturbed on appeal absent a showing of actual abuse of  
14 discretion.<sup>31</sup> The court may independently choose the receiver, or a party may  
15 suggest suitable receivers to the court.<sup>32</sup> Under the control of the court, a receiver  
16 has the power to take and keep possession of property, receive rents, collect debts,  
17 make transfers, bring and defend actions, and “do such acts respecting the property  
18 as the court may authorize.”<sup>33</sup>

19 The order appointing a receiver should define the scope of the receivership,  
20 specify the receiver’s powers and duties, and adequately describe the property so the  
21 receiver can take possession of it.<sup>34</sup> Under Local Rule 2.47:

22 The proposed order appointing a receiver must set forth the powers  
23 of the receiver and shall designate as precisely as possible what real  
24 and personal property will be subject to the receivership estate....  
25 Any money collected by the receiver and not expended pursuant to  
26 the receiver’s duties must be held in the receivership estate until the  
27 court approval of the receiver’s final report and discharge of the  
28 receiver.... The receiver is neutral, acts for the benefit of all who  
may have an interest in the receivership property, and holds assets  
for the court.”

30 Civ. Proc. Code, § 564(b)(9); Weil & Brown, *The Rutter Group* (Civil Proc. Before Trial)  
p. 9(II)-48.10, ¶ 9:740.

31 *City and County of San Francisco v. Daley* (1993) 16 Cal.App.4<sup>th</sup> 734; *Goes v. Perry* (1941)  
18 Cal.2d 373, 381.

32 C.R.C., Rule 1902.

33 Civ. Proc. Code, § 568; *See generally* Cal. Judges Benchbook: Civil Proceedings Before  
Trial, pp. 789-808, §§14.171-14.205 (1995) and pp. 538-545 (Update 2004).

34 Cal. Judges Benchbook: Civil Proceedings Before Trial, p. 799, § 14.189 (1995).

1 **1. The City’s incorrect statement of the law (number one).**

2 The City erroneously alleges that Plaintiff omitted to mention the alleged requirements of an  
3 undertaking mandated by the Rules of Court, Rule 1902.5.<sup>35</sup> But this argument fails because  
4 Rule 1902.5 *only applies* when the applicant seeks a receiver under one of three statutes:  
5 C.C.P. §§ 529, 566(b), or 567(b)—*not* when an applicant is seeking a receiver under C.C.P. section  
6 **564(b)(9)** as Plaintiff does here. Under those three Code sections, an applicant would have to post  
7 an undertaking *if and only if* an injunction is simultaneously moved for and granted, or when the  
8 applicant seeks a receivership on an *ex parte* basis. None of this applies since Plaintiff is seeking a  
9 receiver under a different code section and via a duly-noticed motion filed nearly three months ago  
10 in April 2005.

11 Of course, to ensure the receiver performs his duties, the receiver must post a performance bond  
12 in an amount determined at the discretion of the Court (see paragraph 2 of proposed Order filed  
13 with initial moving papers), which is normally between \$10,000 to \$50,000. The receivers  
14 proposed by plaintiff—Mr. Kipperman and Ms. Gladstone—have already declared their ability to  
15 post a bond within hours of the Court’s order.<sup>36</sup> And, once on duty, the receiver will need to  
16 determine if the existing insurance coverage for the property is sufficient, or procure additional  
17 coverage if necessary (see paragraph 13 of proposed Order).

18  
19 **2. The City’s incorrect statement of the law (number two).**

20 Next, the City, relying entirely on the *Maggiore*<sup>37</sup> and *Alhambra*<sup>38</sup> cases, tries to inject into  
21 C.C.P. section 564(b)(9) an alleged requirement that the moving party must demonstrate “a joint or  
22 common interest.”<sup>39</sup> Asserting that the Homeowners Association “cannot meet its burden to show  
23

24 \_\_\_\_\_  
<sup>35</sup> City’s Opposition Brief, p. 10, Section E.

25 <sup>36</sup> Kipperman Decl. ¶ 4; Gladstone Decl. ¶ 4.

26 <sup>37</sup> *Maggiore v. Palo Alto Inn, Inc.* (1967) 249 Cal. App.2d 706.

27 <sup>38</sup> *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1953) 116 Cal. App.2d 869.

28 <sup>39</sup> City’s Opposition Brief, p. 7, lines 10-12.

1 it has a property interest sufficient to warrant a receivership under section 564(b)(9),”<sup>40</sup> the City  
2 once again concludes that Plaintiff does not have “standing” to request receivership. No such legal  
3 requirement exists under a 564(b)(9) receivership motion.

4 Unfortunately for the City, neither *Maggiore* nor *Alhambra* even address C.C.P 564(b)(9)—the  
5 operative provision here. Instead, those cases deal with a creditor’s attempt to place a debtor’s  
6 assets into receivership under C.C.P. § 564(b)(1)—a provision that requires a plaintiff  
7 vendor/creditor to show that they jointly own property *with the defendant*. For example, in the  
8 *Alhambra* case, the Court noted that plaintiff *did* meet its burden of showing that it was the joint  
9 owner of three mines with defendant, but declined the receivership request because there wasn’t  
10 sufficient evidence that a receiver was necessary to “protect the property from being lost, removed,  
11 or materially damaged.”<sup>41</sup> The *Maggiore* case also addressed the (b)(1) requirement for a joint  
12 ownership (a hotel run by defendant—which was owned by plaintiff and located on plaintiff’s real  
13 property) and the defendant’s threats to close down the hotel.<sup>42</sup> The *Maggiore* court found the  
14 requisite property interest, irreparable harm, and ordered a receiver.<sup>43</sup>

15 The cases cited by the City do not involve a section 546(b)(9) receiver, which is the case here,  
16 and there is no legal authority of any kind for the City’s proposition that Plaintiff must show “a  
17 property interest sufficient to warrant a receivership under section 564(b)(9).”<sup>44</sup> Plaintiff has met  
18 its legal burden for a receiver based on the undisputed facts and the applicable law.

19  
20 **3. The City’s incorrect statement of the law (number three).**

21 The City overreaches again, alleging that a receiver simply cannot be appointed if there are  
22 other less drastic remedies available. The City then adds that the allegedly less drastic remedy is  
23

24 \_\_\_\_\_  
<sup>40</sup> City’s Opposition Brief, p. 7, lines 5-6.

25 <sup>41</sup> *Alhambra-Shumway Mines*, 116 Cal. App. 2d at 874.

26 <sup>42</sup> *Maggiore*, 249 Cal. App. 2d at 708.

27 <sup>43</sup> *Maggiore*, 249 Cal. App. 2d at 711-712.

28 <sup>44</sup> City’s Opposition Brief, p. 7, lines 5-6 (underscoring added).

1 the Preliminary Injunction that was issued back in January 2004.<sup>45</sup> The City literally stated that no  
2 receiver is needed—despite the undisputed City abuses over the past year-and-a-half—because the  
3 “Preliminary Injunction is sufficient to protect the residents at the property.”<sup>46</sup>

4 The Homeowners Association and its counsel have always maintained that the Court has the  
5 authority and discretion to appoint a receiver. The true long-standing precedent, which is cited  
6 over and over, is as follows: “We note at the outset that the availability of remedies does not in and  
7 of itself preclude the use of receivership. Rather, a trial court must consider the availability and  
8 efficacy of other remedies in determining whether to employ the extraordinary remedy of  
9 receivership.”<sup>47</sup> “The rule is established that the appointment of a receiver rests largely in the  
10 discretion of the trial court, and that its action in appointing a receiver or its refusal of an  
11 application for the appointment of such and officer, will not be disturbed in the absence of a  
12 showing that the court’s discretion has been abused.”<sup>48</sup>

13 Here, the only “less drastic remedy” mentioned by the City—the Preliminary Injunction—  
14 didn’t work to stop the City. In fact, the City’s refusal to abide by the Court’s orders and the  
15 Preliminary Injunction was one of the main reasons why Plaintiff moved the Court to appoint a  
16 receiver. The City does not dispute the facts of how it purposely went about violating the status  
17 quo orders and the Preliminary Injunction, and how it abused its power. Flagrant violations of  
18 court orders are just one of the approved case-law examples of when a receiver is appropriate,  
19 regardless of alleged alternative remedies.<sup>49</sup> As the *Daley* court stated, “it is difficult to imagine  
20 why the trial court would not have appointed a receiver.”<sup>50</sup>

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22 <sup>45</sup> City’s Opposition Brief, p. 5, lines 20-26.

23 <sup>46</sup> City’s Opposition Brief, p. 5, lines 11.

24 <sup>47</sup> *City and County of San Francisco v. Daley* (1993) 16 Cal. App. 4<sup>th</sup> 734, 745; *Sibert v. Shaver*  
25 (1952) 113 Cal. App. 2d 19, 21.

26 <sup>48</sup> *Alderson v. Alderson* (1986) 180 Cal. App. 3d 450, 467; *Elson v. Nyhan* (1941) 45 Cal. App.  
2d 1, 4-5.

27 <sup>49</sup> *Daley*, 16 Cal. App. 4<sup>th</sup> at 745.

28 <sup>50</sup> *Daley*, 16 Cal. App. 4<sup>th</sup> at 745.

1 **D. The HOA has proven that park operations will actually cost the City less in**  
2 **receivership than under Hawkeye’s bloated management deal.**

3 The City’s contention that placing De Anza into receivership will be too expensive—without  
4 any supporting evidence—is ludicrous given that the City spends over \$300,000 per year plus all  
5 expenses on its current management company! The City did not dispute that the management  
6 company suggested by the proposed Receiver will be a fraction of that cost.<sup>51</sup> How did Hawkeye  
7 wrangle such a lucrative contract? And why was the park management contract never put out for  
8 bid—a process that would have instantly revealed Hawkeye’s compensation to be ridiculously  
9 high? Because, according to the City, Hawkeye has unique skills. Indeed.

10  
11 **Conclusion**

12  
13 Plaintiff’s counsel extended many opportunities to the City to resolve conflicts between park  
14 management and De Anza residents from the very beginning. But the City refused. The City had  
15 every opportunity to seek leave of this Honorable Court in the event it had any doubt as to the  
16 propriety of its actions. But the City opted not to seek the Court’s permission—*ever*.

17 Instead, the City acted by fiat—managing its “assets” as it wanted, to suit its own ends, and  
18 with no regard for the harm it caused De Anza residents. The City’s chosen approach has been  
19 dangerous, unlawful, and unethical—and it has to stop.

20 Plaintiff therefore nominates Richard M. Kipperman as receiver and respectfully requests that  
21 the Court enter the [Proposed] Order Appointing Receiver without delay. If the Court does not  
22 deem Mr. Kipperman acceptable as Receiver for any reason, Plaintiff alternatively nominates  
23 Ms. Leslie Gladstone, whose accompanying declaration indicates her qualifications and experience  
24 as a receiver and trustee, and her ability to administer the park’s operations at a moment’s notice.

25 As delineated in the accompanying [Proposed] Order Appointing Receiver, the receiver’s  
26 powers should include among other things:

27 \_\_\_\_\_  
28 <sup>51</sup> See Plaintiff’s initial memorandum of points and authorities, page 24, lines 15-21;  
Kipperman Decl., ¶ 5.

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- Taking immediate possession, custody, and control of the entire Property at 2727 De Anza Road, as shown in the map provided in Exhibit 34;
  - Collecting all rents, issues, profits, and income;
  - Caring for, preserving, and maintaining the Property;
  - Incurring expenses necessary for the care, preservation, and maintenance of the Property;
  - Operating and managing the Property under the applicable terms of the Long Term Rental Agreements and the Rules and Regulations De Anza Harbor Resort dated July 1997 in accordance with the Court's status quo orders;
  - Employing and compensating unlawful detainer attorneys or eviction services with respect to the operation of the Property and ejecting tenants or occupants who fail to pay rent or fail to follow the Rules and Regulations De Anza Harbor Resort dated July 1997 as decreed in the Court's prior orders;
  - Making capital improvements and rehabilitating the Property—within commercial reason and in the Receiver's discretion with residents' input—as needed to return the property to its state prior to November 2003.

15 DATE: July 6, 2005

Respectfully Submitted,

TATRO & ZAMOYSKI, LLP

By: 

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HOMEOWNERS ASSOCIATION, INC.