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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DE ANZA COVE HOMEOWNERS ASSOCIATION, INC., et al.,

Plaintiffs,

v.

CITY OF SAN DIEGO, et al.,

Defendants.

Case No. GIC 821191

CLASS ACTION

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL; PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE AND VACATE JUDGMENT UNDER CCP §§ 663 AND 473(d)

Date: **October 10, 2014**
Time: **10:30 a.m.**
Judge: Hon. Joel Pressman
Dept: C-66

Complaint Filed: Nov. 18, 2003
Initial Bench Trial: Oct. 9, 2007

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In accordance with the briefing schedule ordered by the Court, Plaintiffs timely file this Memorandum, along with their Notice of Lodgment of Exhibits and Declarations, in support of:

A. Plaintiffs' Motion for New Trial, which moves the Court to set aside and vacate the Judgment dated and file-stamped August 20, 2014 ("the Judgment") in this action, and to enter a different, modified judgment based on the issues briefed here or, alternatively, grant an additur or new trial on compensation / damages. (See Plaintiffs' Notice of Intention to Move for New Trial, dated Sept. 4, 2014, on file with the Court.); and

B. Plaintiffs' Motion to Set Aside and Vacate Judgment under Code of Civil Procedure sections 663 and 473(d). (See Plaintiffs' Notice of Intention to Move to Set Aside and Vacate Judgment, dated Sept. 4, 2014, also on file with the Court.)

Introduction

After a bench trial, a new trial motion certainly authorizes the judge hearing the motion to grant a new trial on the issues presented by the moving party. But the new trial motion also empowers the court to reweigh and consider anew the facts, evidence, and law and reach its own conclusions and decisions, culminating in a new, different judgment without need for a retrial.

Plaintiffs' motion for new trial, in combination with the motion to set aside and vacate judgment, empowers this Honorable Court to choose from many potential remedies, from granting a new trial on the damages/compensation issues, to reassessing the law and facts afresh to reach different conclusions, correcting errors in the judgment, and entering a modified judgment comporting with the court's new findings and decisions that will bring finality to the case. (Civ. Proc. Code §§ 473(d), 662, 663.)

The De Anza Cove Plaintiffs have endured for nearly 11 years of litigation since the November 23, 2003 park-closure date. The City has, as a matter of law, violated California's Mobilehome Residency Law when it began closing the park. (See Ex. 40 MSA Order; Jdmt. dated Aug. 20, 2014, p. 2:14-23.) The modified preliminary injunction, issued in late 2005, curbed the outright thuggery used by the City to try to drive Plaintiffs out, and finally stopped the City from reaching completion of its unlawful closure of the Park. About one-third of the homes are now

gone because of the City's actions. After closing the Park in 2003, and then prohibiting any homeowners lawfully selling their homes (which is itself a violation of the Mobilehome Residency Law), the City has effectively shackled the De Anza Cove's homeowners to the land until their compensation is paid and homeowners can finance a move elsewhere. Plaintiffs want certainty and finality in the form of a just, fair, and lawful result.

California's Mobilehome Residency Law addresses the park owner's obligation "to mitigate any adverse impact of the conversion, closure, or cessation of use **on the ability of displaced mobilehome park residents to find adequate housing in a mobilehome park**." (Gov't Code § 65863.7(e) (emphasis added).) This is the standard to which the Court holds the City in this case, as ordered in the Statement of Decision: "The Court…orders the City of San Diego to fully comply with the California Mobilehome Residency Law…." (SOD, p. 11, Ex. 52; Jdmt., pp. 2:17-19, 12.) Special Master Sharkey recommended that the City be ordered to pay 84 months' of rent differential in order to compensate the Plaintiff Class Members in accordance with the MRL, the City's Relocation Guidelines, and the fact that the City itself required another mobilehome park owner to pay 84 months rent differential when it closed the Mission Valley Village mobilehome park. But, surprisingly, Judge Hayes declined to follow Special Master Sharkey's recommendation and ruled that only 48 months' rent differential was required here under the City's Relocation Guidelines. But nowhere in that compensation section of the 2014 Decision did Judge Hayes acknowledge or address the undisputed facts presented by Plaintiffs:

- none of the De Anza Cove homes can be relocated to other mobilehome parks;
- the cost to find replacement housing in other nearby mobilehome parks is $178,270 per home (or the equivalent of 109.7 months' rent differential) as is required under State law (Gov't Code § 65863.7(e));
- a municipal ordinance or guideline cannot provide less protection or benefits than State law; and
- the 48-month rent differential stated in the Relocation Guidelines is the base-*minimum* and can be adjusted upwards just as Special Master Sharkey recommended.

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And the City has not, and cannot not deny it has:

- collected tens of millions of dollars in past rent revenue from De Anza that was earmarked to pay these very relocation costs at park closure;
- projected future development revenues in excess of $100 million;
- had the opportunity to receive *over $45 million* in park-wide revenues from De Anza homeowners…*just during the time that this case has been pending.*

So, the undisputed adverse impact of park closure is all De Anza Cove homeowners lose their homes; Plaintiffs provided the undisputed real-world cost of relocating to other nearby mobilehome parks, and yet the 2014 Decision fails to address how the value of the bare minimum 48 months' rent differential in any way approximates the actual relocation costs facing De Anza Cove homeowners. There is no evidence to support Judge Hayes' conclusion.

Important to these post-trial motions, all evidence submitted to Special Master Sharkey, and all evidence submitted to Judge Hayes in 2014, was done via declarations and exhibits. The situation before the court is unlike a situation where a second jurist hearing a motion for new trial might be reluctant to reevaluate witness testimony presented during a bench trial because the prior jurist saw and heard the witness in person and may have had the opportunity to judge that witness's credibility. Here though, ***all* the evidence has been submitted on the papers**. Rather than only being limited to granting a new trial, this Honorable Court is uniquely able to review and decide for itself the applicable law; reassess and weigh the facts, declarations, and evidence; reach its own findings and conclusions; and set aside and vacate the initial judgment and enter a lawful, valid modified judgment that accurately reflects the full and final rulings of this Court—one that complies with State law and provides sufficient compensation to relocate the Class Members to other comparable mobilehome parks. The proposed Amended Judgment, submitted as Exhibit 76 herewith, accomplishes that task. This Honorable Court can put an end to this action once-and-for-all if it issues a judgment that no party is motivated to contest further.

Brief Procedural History

On October 22, 2003, the City announced to the De Anza Cove homeowners and residents that the City was closing the Park and initiating eviction proceedings beginning on November 24, 2003

against anyone who remained on the premises unless they waived their rights under State law and signed the City's unilateral take-it-or-leave-it release agreement. To stop the City's attempt to evict hundreds of homeowners in violation of State law, Plaintiffs filed suit against the City of San Diego and the court granted a TRO on November 20, 2003. A Preliminary Injunction followed as Plaintiffs proved a reasonable probability of prevailing on the merits.

Despite the TRO and Preliminary Injunction ordering the City to maintain the status quo, the City moved forward with its attempts to close De Anza Cove. Across the Park, the City destroyed laundry facilities, storage areas, and restroom/shower facilities. The City tore down the on-site grocery store and ripped out the playground. The City chopped down hundreds of trees, ordered the removal of all furniture and amenities from the Park's two community centers, brought in armed guards, installed barbed wire fences, and a stalag checkpoint replete with klieg lights. The City instructed all homeowners that they could no longer sell their homes since the Park was closed and no new residents were allowed. (See, e.g., Ex. 72, 2014 Decision, pp. 5:6-6:5.) Living in the Park under the City's thumb, all while under what were supposed to be protective status quo orders of the court, the De Anza residents endured horrendous conditions. Nobody—not the Park's residents, not the City's Councilmembers, not even Judge Hayes—could believe how far afield of the law and common decency that the City's prior attorneys, Real Estate Assets Department, and hand-picked park management had gone.

In response to what current defense counsel refers to as the City's "parade of horribles," in October 2005 the Court issued a Modified Preliminary Injunction to further protect residents from the City and park management, whose conduct was threatening the residents' rights under the MRL and the Court's ability to adjudicate this lawsuit without interference. Special protections were instituted to curtail the undeniable abuses the City inflicted after it took over Park operations. The City's then-outside legal counsel, Anna Roppo, was terminated, the deputy City attorneys were reassigned and soon left the City, the Director of the Real Estate Assets Department, William Griffith, was removed from his position, the contract with the park management company was terminated, and the armed guards were sent packing. But the damage was already done. Nearly a third of the 509-home Park was scared into signing release agreements or fleeing the Park without

any State-law-mandated relocation benefits. As of 2014, the Park has less than two-thirds of its homes remaining.

In October 2006, the Court certified the case as a class action.

In April 2007, the Court granted Plaintiffs' motion for summary adjudication, finding that the City had a duty to comply with the MRL and breached that duty in multiple ways. More specifically, the Court ruled as a matter of law that:

> a. De Anza Cove is a mobilehome park and the Mobilehome Residency Law (Civil Code §§ 798 et seq., Gov't Code §§ 65863.7-65863.8) applies in full to De Anza Cove and the City of San Diego;
>
> b. The City of San Diego is under a mandatory duty to comply with the Mobilehome Residency Law, including but not limited to Civil Code §798.56(g)-(h) and Gov't Code §65863.7, which regulate closure of De Anza Cove, the timing and content of Notices to residents, and tenant-impact-reporting and relocation assistance requirements;
>
> c. The City violated the Mobilehome Residency Law, Civil Code §798.56(g)-(h) and Gov't Code §65863.7 by failing to prepare a tenant impact report and serve lawful Notices that complied with the MRL's timing and content requirements. (Ex. 40, MSA Order, ¶ 6(a)-(c).)

At a subsequent status conference, the Court issued its first amendment of the class definition, and rejected the City's theory that De Anza Cove remained open and did not yet have a closure date. The Court concluded that the City Council's Resolution R-298609, dated November 18, 2003, together with its 1982 acceptance of the Kapiloff Bill, amounted to a park-closure effective November 23, 2003.

Finding that the City had effectuated a park closure and made a knowing and express decision to do so without issuing a tenant impact report, the Court concluded that—due to City's inherent conflict of interest as park owner, operator, and regulatory authority, along with the litany of abuses already committed by the City while it operated the Park—the Superior Court was the appropriate venue to determine compensation owed to the Class. A less than two-week bench trial took place in October 2007, recessed briefly due to the October 2007 San Diego firestorms, then concluded with closing arguments in November 2007.

The purpose of the bench trial was to determine the bifurcated issue of compensation owed to the Class. But when Judge Hayes issued his Statement of Decision in May 2008, instead of

determining the compensation owed, he *sua sponte* decided to institute an unusual process not requested by either party. The court appointed Special Master/Referee Thomas Sharkey to provide recommendations for compensation owed to the Class based on State Law, the City's past history of applying its Relocation Guidelines in other San Diego park closures, and any other relevant evidence.

The Special Master's two reports detailing his recommendations became final and were filed with the court earlier in 2014. The first report, originally dated November 9, 2012 (formally submitted to the Court in February 2014), addressed the number of months of rent differential that should be required to help mitigate the adverse effects of park closure, and the date on which the constituency of the class should be determined. **Special Master Sharkey recommended that 84 months' rent differential should be required, just as had been done in the only other park closure that had transpired under the City's Relocation Guidelines**. (1st Rpt., Ex. 3.) ("Rent differential" is a method of compensation called for under the City's Relocation Guidelines. Subtracting current space rent from comparable rent results in the "rent differential," which is then multiplied by a certain number of months in order to compensate for the loss of the home and other adverse impacts caused by park closure.) Special Master Sharkey also recommended that Class constituency should be determined as of the time trial briefs and exhibits were exchanged in September 2007. (*Id.*)

The Special Master's second report, dated June 25, 2013 (also formally submitted to the Court in February 2014), addressed myriad issues involving, among other things, lump sum payments, CPI adjustments, temporary lodging costs, disability modifications, renter benefits, and prejudgment interest. (2nd Rpt., Ex. 4.) In its briefing and argument to the Special Master, the City revived its assertion to this new audience, despite the facts and past court rulings to the contrary, that the Park had never been formally closed, so it didn't yet owe any compensation. Virtually all of these "Second Report" issues were interwoven within the determination of when the park closure was effectuated. Multiple follow-up hearings occurred over several months—most recently in February 2014. Judge Hayes ordered OPC to update the comparable rental survey it had originally completed in late 2011 so that the judgment would have the most current figures possible, and so

post-judgment interest could thereafter accrue to ensure the currency of the requisite relocation compensation regardless of whether any party might file an appeal. OPC provided the parties with its updated 2014 rental survey on March 21, 2014.

The parties timely submitted their objections to certain of the Special Master's recommendations and findings, along with supporting declarations and exhibits. (Lodged herewith as Exs. 1-68 are the same exhibits and declarations filed by Plaintiffs during that April 2014 briefing process.) Judge Hayes held a hearing on May 6, 2014, and Plaintiffs timely filed a Request for Statement of Decision. On May 30, 2014, which was the last day of his special appointment permitting him to preside over this case during his retirement, Judge Hayes issued what was entitled a "Decision on Matter Under Submission." Unfortunately for Plaintiffs, Defendant, and this Honorable Court, Judge Hayes' 2014 Decision failed to address certain key issues, failed to provide sufficient reasoning or support for certain issues that he did address, and reached certain conclusions that are inconsistent with the evidence and law. Plaintiffs timely filed Objections to Judge Hayes' 2014 Decision (Ex. 70), but this Honorable Court did not provide a ruling on those Objections before executing a judgment on August 20, 2014.

In these post-judgment motions, Plaintiffs respectfully request that the Court help bring finality to this case by reassessing and reevaluating the law, facts, and evidence presented on these compensation issues, and modify the prior decisions of the court as necessary to reach a valid, modified judgment that comports with the law. In the alternative, the facts and circumstances here show an unequivocal good cause to vacate the August 20, 2014 Judgment and grant a new trial on the compensation issues.

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1. California law provides this Court with broad power not only to grant a new trial on the compensation/damages issue, but also to consider any modification of the previous court's findings, conclusions, and decisions and enter a wholly different, valid judgment of its own.

In conjunction with Plaintiffs' Motion for New Trial and accompanying post-trial motions, the this Honorable Court is not only authorized to cure any defects in the Judgment but is also empowered to change or alter any prior decision(s) of the previous jurist who presided over this case leading up to Judgment. This Court now has the power to reevaluate the facts, evidence and law on the bifurcated compensation/damages issue, and adopt, discard, modify, or change altogether the Statement of Decision issued in 2008, Judge Hayes' subsequent May 30, 2014 Decision on Matter Under Submission, and the resulting attempt to enter a judgment based on those rulings.

The law provides broad powers under these circumstances. "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court." (Civ. Proc. Code § 661.) Code of Civil Procedure section 662 states in whole:

> In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659.

Similarly, Code of Civil Procedure section 663 gives great latitude to set aside a judgment and then enter a corrected, amended judgment:

> A judgment or decree, when based upon a decision by the court,…may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: (1) Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected. (2) A judgment

> or decree not consistent with or not supported by the special verdict. (Civ. Proc. Code § 663.)

This Court is further empowered under the Code to correct errors in the judgment and to set aside any void judgment or order:

> The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order. (Civ. Proc. § 473(d).)

A successor judge to whom a motion for new trial is addressed stands in the shoes of his predecessor, has the same power, and is charged with the same duty with respect to weighing evidence and in granting or denying motion as was vested in the prior jurist who tried case. (*Halperin v. Guzzardi* (1949) 95 Cal.App.2d 31.) A motion for new trial is appropriate whether there are issues of law, issues of fact, or a combination of issues of law and fact. (*Carney v. Simmonds* (1957) 49 Cal.2d 84; Civ. Proc. Code § 656.)

When a case is tried via a bench trial, a motion for a new trial vests the court with extensive power to reopen trial and modify the statement of decision. (Civ. Proc. Code § 662.) In a case where a successor judge granted a new trial as to the issue of damages only, the *Kershner* court ruled that "[e]ven though the judge passing upon a motion for new trial did not try the case, **his power and discretion is as broad as though he had himself been the trial judge**. This is true whether the case is tried with a jury, or by the court without a jury. (*Kershner v. Morgali* (1957) 152 Cal.App.2d 884, 884-885 (emphasis added, internal citation omitted).) "On considering the motion for a new trial, the [successor] judge to whom the motion is addressed is not bound by either verdict or findings. It is his duty to review the record of the trial and, if he then concludes that a fair trial was not had, he must grant the motion even though there is substantial evidence to support the findings. He stands in the shoes of his predecessor in the case and has the same power and is charged with the same duty with respect to weighing the evidence and in granting or denying the motion as was vested in the judge who tried the case." (Halperin v. Guzzardi (1949) 95 Cal.App.2d 31, 35, citing Civ. Proc. Code § 662.)

The California Supreme Court concurs: in *Kelly*, the Supreme Court held that a second judge was empowered under section 661 and 662 to modify the judgment and take all steps as would the

original judge. "'(I)t has been repeatedly held that the court retains power to amend or change the conclusions of law so as to point to a different judgment, and to enter a judgment different from that first announced, and that this power continues until the entry of the judgment, and such change may be made by a judge other than the one who tried the cause.' [Citations.] It is immaterial that the original judgment had already been entered before the second judge undertook to change the conclusions and render the modified judgment. Section 661 of the Code of Civil Procedure, authorizing the hearing and determination of a motion for a new trial by a judge other than the trial judge, evidences a statutory design to provide a comprehensive basis for disposition of new trial proceedings when the trial judge is unable to act. [Citation.] Consistent therewith, a judge acting under authority of that section has the power to change the conclusions of law 'so as to point to a different judgment' [Citation] and to 'modify the judgment, in whole or in part'." (*Kelly v. Sparling Water Co.* (1959) 52 Cal.2d 628, 633-634 (citing Civ. Proc. Code § 662, other citations omitted).) The *Kelly* court ultimately ruled that, although the second judge was empowered to modify the judgment as he did, the second judgment contained irreparably conflicting terms that were interdependent such that a new trial was needed to rectify those conflicting terms. (*Kelly*, 52 Cal.2d at 634.) For more than 50 years, the Supreme Court's *Kelly* decision has remained controlling.

A trial court can also correct so-called clerical errors at any time, with or without a motion by a party, and even during an appellate stay. (Code Civ. Proc., § 473(d); see 7 Witkin, Cal. Procedure (5th ed. 2008), Judgment § 67 et seq., pp. 603 ff.) "Clerical" error is not limited to mistakes of clerks; a judge's mistaken failure to enter the intended judgment is a clerical error. (*Martin v. Ray* (1946) 74 Cal.App.2d 922, 928.) So a court may amend a judgment in important and substantive ways to make it conform to the court's "comprehensive memorandum of opinion, which had been signed and filed prior to the signing of the formal judgment...." (*Ibid.*; see *Russell v. Superior Court* (1967) 252 CalApp.2d 1, 8 (correction of error of counsel who drafted the judgment, not noticed by trial judge when he signed the judgment); *Ames v. Paley* (2001) 89 Cal.App.4th 668, 672-673 (judgment failed to conform to terms of settlement agreement).) Here, if the Court finds it made any mistake translating Judge Hayes's rulings into a judgment—or if **the Court had not actually intended, or fully appreciated, the consequences of certain provisions that the City's lawyers**

had included in the proposed judgment—that error would still be "clerical." The Court could correct such an error on its own motion or on motion of a party.

2. Judge Hayes failed to re-affirm his ruling on the key issue of the effective park-closure date.

The first issue raised in Plaintiffs' Opening Brief Regarding Class Compensation was the objection to the Special Master's erroneous conclusion that the mobilehome park had not yet closed, and Plaintiffs' request that the Court re-affirm its rulings that the effective park-closure date was November 23, 2003. (Ex. 73, Pl.'s Opening Brief, pp. 8:1–12:2.) The Special Master had astutely hedged his recommendation on the park-closure-date issue and noted that his opinion would change if the Court had already ruled on the date of park closure as Plaintiffs had asserted. (E.g., Special Master's 2nd Rpt., p. 20:16-23, Ex. 4.) After presenting the facts, documents, class notice, prior Court orders, transcripts, and rulings that all supported a November 23, 2003 park-closure date, Plaintiffs concluded that entire section of the Opening Brief with: "Therefore, Plaintiffs respectfully request that the Court overrule the Special Master's recommendation on this issue and reiterate its decision that the park-closure date was November 23, 2003, and compensation is presently owed to all Class Members based on the updated 2014 survey." (Ex. 73, Pls' Opening Brief, pp. 11:27–12:2.) Plaintiffs' Reply Brief reiterated: "The Class requests that the Court rule as follows: [¶] 1. The Park Closure date was November 23, 2003, and compensation is presently owed to all Class Members based on the updated 2014 survey."

When Judge Hayes issued his Tentative Ruling on May 2, 2014, there was no ruling on: (a) the park-closure-date issue, (b) the OPC math-error issues (see *infra*), or (c) the statutory-penalties issue (see *infra*). (Tentative Ruling, Ex. 74.) At the hearing on May 6, 2014, Plaintiffs' Class Counsel raised the park-closure-date issue again, and asked Judge Hayes to re-affirm his rulings on the park-closure-date issue in his final decision. Plaintiffs' Counsel concluded its presentation with: "And the very, very last thing is that I think in the interest of a clean record just so there's no misunderstanding going forward, it should really be delineated that the park closed as of November 2003. That is not an open issue. It was briefed extensively, the City tried to argue otherwise, and I

think for the sake of clarity, we need to confirm with the Court that that closure date is effective as of November 2003. That's not an open issue." (Ex. 69, Rptr. Trans. dated May 6, 2014, p. 101:5-13.)

On May 30, 2014, Judge Hayes issued his "Decision On Matter Under Submission." (Ex. 2, Decision.) Although Plaintiffs believe that Judge Hayes' rulings and discussion on the record lead to the conclusion that Judge Hayes had once again agreed that the effective park closure date was November 23, 2003 and that the relocation compensation was presently due, in lump sum, upfront upon entry of judgment, nowhere in the 2014 Decision is there an express ruling either sustaining Plaintiffs' Objection concerning the Special Master's recommendation on the park-closure-date issue or re-affirming that the park-closure date was indeed November 23, 2003.

The City has seized on this omission to self-declare, through its proposed judgment submitted to Your Honor, that certain obligations under State Law have yet to be triggered at all. This overreach, found nowhere in Judge Hayes' 2014 Decision, has immense consequences. Therefore, the very first issue and objection raised by Plaintiffs to the Special Master's Report went unaddressed by the Court, and now causes great upheaval in the details advocated by the City in its proposed judgment that was signed by the Honorable Court. Through this new trial motion, the Court may re-examine this issue as detailed here.

A. The City initiated the closure of the De Anza Cove mobilehome park in November 2003, triggering the City's obligation to pay relocation benefits—a fact unchanged by the Court's order not to evict any more homeowners until the case is over.

Capitalizing on the fact that the Special Master was new to the case, the City represented to the Special Master (and now again the Your Honor via the City's proposed judgment) that *relocation benefits are not owed because the park has not closed yet, and will not be owed until it serves yet another park closure notice.* As a result, Mr. Sharkey opined that, *if the Park is still open*, then no relocation benefits are owed. However, Mr. Sharkey astutely hedged his opinion, allowing that it would change if indeed the Court had already ruled on the date of park closure as Plaintiffs asserted. (Ex. 4, Special Master's 2nd Rpt., p. 20:16-23.) Although it appeared clear to Plaintiffs

that Judge Hayes had communicated his ruling that the park closure date was effective November 23, 2003 and that relocation compensation would be determined based on current-day comp-rent calculations, the City has now infused the judgment with the mistaken premise that there has been no effective park closure and no compensation is due or owing until yet another round of notices go out. By way of this new trial motion, Plaintiffs respectfully request that this Honorable Court confirm that the effective park closure date was November 23, 2003, vacate the August 20, 2014 judgment, and enter judgment in accordance with the principle that relocation compensation is due and owing upon entry of judgment.

The Special Master's initial recommendation was based on two false premises advanced by the City—first, that the Park has not closed yet, and second, that the Court had not ruled on a park closure date and had not determined that relocation benefits are due and owing based on current valuation. These falsehoods derailed much of the Special Master's relocation analysis vis-a-vis the assessment and timing of payment to the Class, which the City now infused into its proposed judgment signed by the Court. The Special Master's decision to hedge his recommendation proves to be well taken, because, as detailed below, the Court indeed affirmatively ruled—on summary adjudication, pre-trial, during trial, and post-trial—that the City closed the Park in 2003.

1. Before this case was even filed, the City announced to everyone that it was closing the Park effective November 23, 2003.

Long before this case was filed more than ten years ago, 12-month, 6-month, 60-day, and 30-day Park Closure Notices were sent to the residents, informing them that the Park would close on November 23, 2003. (See Notices, attached collectively as Exs. 5-8; and MSA Order, pp. 8-9, Ex. 40.) The 60-day notice of Park closure states: "This will provide further notice to you…that your tenancy in the Park will terminate effective November 23, 2003…." (60-Day Notice, dated Sept. 15, 2003, Ex. 7; MSA Order, pp. 8-9, Ex. 40.) Then, on October 22, 2003, the City announced its "transition plan" with a November 23, 2003 park-closure date, making miniscule settlement offers to residents that didn't even cover the home-demolition costs residents that the City tried to saddle them with, let alone compensate them for losing their homes. The City threatened: "[I]f you choose not to accept the offer and do not execute the settlement documents by

November 21, 2003, the City of San Diego will be required to institute eviction proceedings against you beginning November 24, 2003." (Ex. 8, City's Oct. 22, 2003 Notice.) Thus, the City has always publically used November 23, 2003 as the official park closure date.

2. On summary adjudication, this Court rejected the City's argument that the Park had not yet closed.

On summary adjudication, the City advanced the fiction that it had not yet closed the park and thus did not yet owe any relocation benefits, stating that "there is no and has been no 'change of use' within the meaning of the MRL and Government Code section 65863.7. The City has not proposed or required any change of use, has not decided to close or actually closed the Property, and has not embarked on any zoning or planning action." (Ex. 9, City's Opp. to Pl's MSA, p. 29:19-22 (emphasis added).) But the Court squarely rejected the City's contention: "**[T]he City's position…that the City did not terminate the leases or close the Park also lacks merit.**" (Ex. 40, MSA Order, p. 10:21-22 (emphasis added).)

3. This Court approved the Class Definition and Class Notice based on the November 23, 2003 park-closure date.

Two months after the Court ruled on summary adjudication, the Court defined the Class and approved the Class definition to include residents and homeowners who resided at the Park on October 22, 2003—the date on which the City announced its transition plan with a **November 23, 2003** park closure date. Thus, 2003 was always the year of park closure for the purposes of determining who was in the Class, what laws would apply, and when relocation benefits were due. (See Ex. 10, Class Notice, p. 3:5-13.)

4. Pretrial, this Court issued an Order Redefining the Class, and reaffirming that the Park closed on November 23, 2003—again rejecting the City's argument that the Park is still "open."

In its pretrial Order Redefining the Class, this Court reaffirmed that the park "closed" on November 23, 2003, and found baseless the City's contentions that the park remained open such that it was premature to determine relocation benefits: "**defendant City's argument that there is no closure date for the Park as it is still open lacks merit**…. Clearly, both the California Legislature and the City of San Diego contemplated a Park closure date of November 23, 2003."

(Ex. 11, Order Redefining Class, dated May 21, 2007, pp. 3:23-24, 4:20-21.)

5. At trial, the City argued forcefully—and this Court reaffirmed—that the Park closed on November 23, 2003.

In its trial brief, the City acknowledged that the Court had already ruled that the Park closed on November 23, 2003: "the Court ordered that the park closure date was November 23, 2003 for the purposes of the determination of the reasonable cost of relocation." (Ex. 12, City's Trial Brief, p. 20:25-26; see also p. 3:17.) The City also filed a motion *in limine* to exclude evidence as to any park closure date other than November 23, 2003. In its motion, the City stated: **"The Court has ruled that the determination of the amount to be paid to mitigate the adverse impact of park closure will be based on a closure date of November 23, 2003."** (Ex. 13, City's Mtn. in Lim., No. 9 of 10, p. 4:17-19 (emphasis added).)

At oral argument on its *in limine* motion, the City again emphasized that the Court had already ruled on the park closure date: "Your Honor, this is a pretty significant motion in limine, and this is a motion to exclude…opinion evidence…relating to a hypothetical 2007 park closure date…. **This Court has ruled that the closure date will be November 23, 2003. That is the date that our experts relied upon…. We understand the Court's ruling that the date is November 23, 2003**…. Certainly we [the City] rely on the park's closure date." (Ex. 14, Rptr.'s Trans., Oct. 9, 2007, p. 102:15-28; p. 104:9-10 (emphasis added).) The Court agreed with the City, stating: "I think my decision was a correct one…. **The class definition mentions 11-23-03**, **and that's the date we're going to determine now the cost of mitigation of the closure of the park**…." (Ex. 14, Rptr. Trans., p. 105:11-17 (emphasis added).) Consequently, **the Court excluded evidence related to any closure date other than November 23, 2003**: "Following oral arguments of counsel the Court grants defendant's motion for the operative date of 11/23/03." (Ex. 15, Minute Order dated Oct. 9, 2007, p. 3.)

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6. Post-trial, the Court again confirmed that the Park was deemed "closed" as of November 23, 2003, and that compensation would be based on current rent differential and comparable rents.

At post-trial hearings on the appropriate scope of the Tenant Impact Report, the Court at least twice reaffirmed that the Park "closed" on November 23, 2003, and that relocation benefits would be determined for the Class based on present-day values:

> MR. TATRO: There's just one point I wrote two different ways in my notes so I want to make sure I have this right. We're talking about **November 2003 as the closure date**, and using that also as the date upon which we decide who was there and that's who's included in the report, and that's also the timeframe for whatever regulations and ordinances were in place then, that's what we're going to use now; but **we're going to use current rent differentials, market rates, moving expenses** as of 2011. Is that a fair synopsis?
>
> THE COURT: **I think that's a fair synopsis.** (Ex. 16, Rptr. Trans., Jan. 19, 2011, pp. 45:26–46:6 (emphasis added).)
>
> * * *
>
> MR. BARTOLOTTA: The date you are talking about, for purposes of the record, is the official court-decided date of closure. **November 23, 2003**, is assessed as the date of closure.
>
> THE COURT: **That was the date the City said the Park was closed**…." (Ex. 17, Rptr. Trans., Jan. 4, 2011, pp. 73:27–74:4 (emphasis added).)

Despite this overwhelming record of the Court's prior rulings, the City's own arguments at trial, and the Court's reaffirmation both during and after trial that the Park closed on November 23, 2003, the City has attempted to rewrite history and mislead the Special Master into believing that the park hasn't closed for purposes of this case and that the City's relocation payment obligations were somehow premature. Because Mr. Sharkey conditioned his recommendation regarding several related issues on there being no prior ruling as to the date of park closure, the Court must consider Mr. Sharkey's recommendations in light of the fact that he had been misinformed by the City: **the Court *has* already determined the date of park closure, and rejected the City's argument that relocation benefits are not yet due**. The November 23, 2003 park closure date, along with recognition that relocation benefits are already due and owing to the Class, shapes and greatly changes the judgment to be entered by the Court in this case.

Therefore, Plaintiffs respectfully request that the Court overrule the Special Master's recommendation on this issue and reiterate the court's prior decision that the park-closure date was

November 23, 2003, and compensation is presently owed to all Class Members based on the updated 2014 survey. The City's proposed judgment, which became the foundation for this Court's entry of judgment, should be vacated and modified to reflect that the park closure date was November 23, 2003, and that the City's obligation to pay relocation benefits is already due and owing.

3. State law requires sufficient compensation to mitigate the loss of their homes and enable them to find comparable replacement housing in other mobilehome parks.

Plaintiffs agree with the Special Master's overall conclusion that the City be held to the same standard as any other park owner in San Diego. This Court, via this new trial motion, should apply the same standard here as was applied in the Mission Valley Village park closure. The Special Master correctly relayed that 84 months' rent differential was required by the City Council in the Mission Valley Village closure and he, therefore, ruled that 84 months' rent differential should be required for De Anza. But it is the underlying basis and rationale for the increased benefits in the Mission Valley Village closure that Plaintiffs contend should apply here too. And that underlying basis was, and is, the State Law requirement that supersedes any municipal guideline, policy that does not comport with that requirement.

The MRL requires mitigation of all adverse impacts of park closure, including finding adequate replacement housing in a comparable mobilehome park. It is undisputed that none of the homes at De Anza can be relocated and that, therefore, all homes will be lost. Plaintiffs also presented undisputed evidence as to the value of the complete loss of Plaintiffs' homes, as well as the cost of replacement housing in a comparable park. The City did not provide any contradictory evidence on the cost of replacement housing. Judge Hayes's 2014 Decision failed or refused to address Plaintiffs' undisputed evidence, and failed or refused to articulate how 48 months of rent differential mitigates all adverse impacts of park closure as required by State law, including the ability of Plaintiffs to find adequate replacement housing in other mobilehome parks, the cost of which far exceeds the minimal amount awarded. (See, *e.g.*, Brabant Decl., Ex. 21, ¶¶ 11-23;

Schwartze Decl., Ex. 55.) Judge Hayes' Decision failed or refused to articulate how the City's relocation ordinance and SDHC Guidelines can trump state law requiring mitigation of all adverse impacts, including the ability of Plaintiffs to find adequate replacement housing, the cost of which far exceeds the amount awarded, based on the undisputed factual record. The 2014 Decision and resulting judgment provides inadequate compensation, is not supported by the evidence submitted, and is an error of law. (Civ. Proc. Code § 657(1), (5)-(7).)

Judge Hayes appears to rely on circular reasoning to justify his conclusion. He asserts that the San Diego Housing Commission must have known of the MRL's compensation requirements regarding replacement housing in other mobilehome parks when it drafted its Relocation Guidelines, therefore the bare-minimum 48 months of rent differential under those Relocation Guidelines must completely satisfy the compensation requirements of the MRL. (Ex. 72, p. 3:9-12.) But there is no evidence supporting this erroneous conclusion. Further, such reasoning is patently flawed. It does not follow, just because somebody knows the law, that their actions necessarily will *comply* with the law. This is the same City housing commission that, back in 2003, agreed to the fiction that the City could exempt itself from State law through a municipal resolution declaring that the Mobilehome Residency Law does not apply to De Anza Cove.

Judge Hayes's circular conclusion in the early part of his 2014 Decision concerning rent differential under the City's Guidelines seems utterly in conflict with the court's later recitation of the State Legislature's express intent at the tail end of the 2014 Decision. Judge Hayes stated on page 10, verbatim:

> The Special Master noted that, "[i]f the plaintiffs received a lump-sum payment, it would increase their option to either acquire replacement homes…." This is precisely what Government Code section 65863.7(e) intended to take place as discussed below. Accordingly, instead of monthly payments of benefits, the court orders all relocation benefits to be paid in a lump sum at the outset.
>
> Government Code section 65863.7(a) provides that a mobilehome park owner or operator proposing to close a park shall prepare a Relocation Impact Report that shall be timely served upon each park resident and the legislative body considering closure. The Report is required to "address *the availability of adequate replacement housing in mobilehome parks* and relocation costs" (emphasis supplied).
>
> Government Code section 65863.7(e) obligates the operator of a mobilehome park proposing to close the park "to take steps to mitigate any adverse impact of

the…closure…on the ability of displaced mobilehome park residents to *find adequate housing in a mobilehome park*" (emphasis supplied).

Paragraph 1.b. of the SDHC Guideline does not require payment of the rent differential component of the "reasonable [re]location expenses" be paid over a period of 48 months, neither does it prohibit a lump sum payment. It is a guideline. The court finds that, particularly under the present circumstances, and in view of the above quoted language from Government Code sections 65863.7 (a) and (e), the legislative intent of section 65863.7(e) is best served by a lump sum payment. (2014 Decision, Ex. 72, p. 10:5-24 (all emphasis in original).)

It is undisputed that the City's Relocation Guidelines are just minimums, and that additional mitigation can be required where the adverse impacts are more severe (i.e., expensive). The latter would not be possible if 48 months truly satisfied the mitigation requirements of the MRL. In other words, if 48 months' rent differential always satisfied the MRL's mitigation requirements, then that amount would be fixed, not a minimum guideline as acknowledged by everyone including the City Council. Judge Hayes did not explain how he concluded what the SDHC was thinking, or how he reconciled the idea of a minimum baseline, with the State-law requirement that all adverse impacts of park closure be mitigated, including the ability to obtain replacement housing in another mobilehome park, the latter of which requires considerably and undisputedly more than the minimum 48 months' worth of rent differential.

In his Decision, Judge Hayes opined that the closure of the Mission Valley Village ("MVV") mobilehome park was not a relevant precedent because, in his view, that park and De Anza Cove were allegedly demographically dissimilar. However, the 2014 Decision is silent on the data provided by Plaintiffs that demonstrated, among other things, that the demographics of the two parks were nearly identical and that the income levels at De Anza were actually lower than those at MVV, meaning that the justification for mitigation would be even greater, not less, at De Anza. Judge Hayes also reached a conclusion that "much of the discussion and negotiation between the owner-developer of MVV and representatives of the City of San Diego in arriving at the terms of closure was done in private, the details of which are not available." (Ex. 72, p. 4:6-9.) The Decision is again silent on the wealth of details provided to the Court setting forth precisely how the terms of park closure in MVV were achieved, including the sworn declaration of the Mission Valley Village HOA President, Homer Barrs, who gave the uncontradicted details of the proceedings. (Ex. 29.) Judge Hayes did not address this evidence, or the depth and details included

in the Special Master's report, the inclusion of which derails the conclusion that "the details" of the deal were not available.

Judge Hayes acknowledged that, more recently, the City reduced the rent differential in its relocation ordinance from 48 to 42 months, then referenced that change as a reason for not holding the City to the same 84-month standard that was imposed on the private park owner in MVV. However, no less than 3 times, Judge Hayes referenced the SDHC Guidelines as guidelines, or minimum starting points for mitigation analysis—a fact that was undisputed by the parties. Judge Hayes' Decision failed or refused to unambiguously explain how a minimum guideline would somehow *require* the reduction of rent differential for Plaintiffs from the 84 months recommended by the Special Master to 48 months.

The Mission Valley Village homeowners presented to the City Council evidence and testimony of the cost of replacement homes in other mobilehome parks, and reminded the Council about State law that requires sufficient compensation to allow homeowners to find replacement homes in comparable mobile home parks. As shown below, the evidence of the cost of replacement housing and knowledge of State law is what proved convincing to the City Council and caused the Council in the Mission Valley Village closure to nearly double the rent differential benefit. And so, while 84 months of rent differential here would be substantial and is, admittedly, the minimum standard that is required, in this instance that amount will not fully achieve the State law mandate to provide sufficient compensation to allow homeowners to find replacement homes in comparable mobilehome parks because De Anza is a coastal community and the cost of replacement homes is a little higher. In the following sections of this brief, Plaintiffs will first highlight the facts and events surrounding the Mission Valley Village park closure, followed by the present-day evidence that supports a slightly higher rent differential amount for the De Anza park closure to accomplish the goal of State law of finding replacement homes in other comparable parks.

The Special Master's Report summarized the arguments and evidence presented to the City Council and the approach and standard ultimately adopted by the City Council:

> During the council hearing on November 18, 2008, MVV residents and supporters contended, in substance, that the park should not be closed; that the mobile home park overlay zone should not be removed; and that, if the park was closed,

> **residents should receive replacement cost for their mobile homes as mitigation**. Thus, the issues that were before the Council were (1) whether the MVV mobile home park should be closed, (2) whether the mobile home overlay zone in which MVV was located should be removed, and (3) whether the OPC RIR, which proposed 48 months of rent differential…as mitigation for mobilehomes which could not be relocated, should be approved. (Ex. 3, Special Master 1st Report, pp. 16:27–17:8 (bold added).)
>
> The MVV residents opposed the closing of the park and contended, **in the event park closure was approved by the council, that Archstone should pay the cost of residents acquiring a comparable replacement mobile home** – an amount substantially greater than the sum of 48 months of rent differential. After a lengthy three and one-half hour hearing, during which speakers in favor of as well as in opposition to Archstone's request stated their views, the City Council approved closure of the park…as well as a relocation mitigation package which provided, in substance, that at the option of the displaced MVV residents, they could choose to accept either (a) physical relocation of their mobile homes to another mobile home park at Archstone's cost or (b) immediate payment of 84 months of rent differential. (Ex. 3, Special Master 1st Report, p. 12:10-19 (bold added).)

A week before the hearing even took place, the MVV HOA presented both the City Council and the San Diego Housing Commission with documentation regarding the cost of alternate housing in other parks, and stacks of data, graphs, photos, and testimonials that underscored the impossibility of finding comparable housing in another park with only 48 months of rent differential. (See Ex. 30, "Argument Against Archstone Project at Mission Valley Village," dated Nov. 10, 2008.) The MVV homeowners showed the Council and their staff that listings from nearby mobilehome parks illustrated exactly how much it would cost to acquire comparable replacement homes. (Ex. 32, Appx. G to MVV HOA's submission to City Council; Ex. 30.)

During the hearing, the MVV homeowners "reiterated that the real negative impact of park closure was being able to afford to buy an adequate home in another comparable park" and "reminded the Council about the law: 'Archstone is required by State Civil Code to provide adequate replacement housing to all displaced residents and, as the legislative body, this Council is required to ensure the state requirements are met via the relocation plan.'" (See Ex. 29, Decl. of MVV HOA President Homer Barrs, ¶ 8.) They provided sales data from nearby mobilehome parks showing the cost of buying a comparable mobilehome with an analysis of 65 homes. (Ex. 32, MVV HOA Appx. G.) They showed the Council these high costs—for example, back in 2008, it cost $179,000, $105,000, $95,000, $140,000, $113,000, and $99,000 for homes at the Linda Vista Village park; and $100,000, $120,300, $149,900, $80,000, and $117,000 in the Rancho Del Rio

park. (Ex. 32, Appx. G.) The residents summed up for the Council what was at stake: "State Code requires adequate replacement housing…. Most residents will be stripped of homeownership if this plan is approved." (Ex. 30, p. 18.)

The Council's staff met directly with the MVV HOA's President and revealed that the Council planned to deny Archstone's park-closure application unless rent differential were increased sufficiently:

> During a break in the proceedings, I was personally approached by a staff representative for Councilman Ben Hueso and a staff representative for Councilman Jim Madaffer, and we stepped outside and huddled together just outside Council chambers. Mr. Hueso's representative relayed to me that, **in light of the evidence we had submitted, if the homeowners continued to oppose the parkowner's request, the City Council would deny Archstone's application**…. But he also relayed to me an alternative—one that would allow us to afford housing in comparable parks and hopefully avoid litigation for everyone. The City Council would approve Archstone's application, but if and only if Archstone agreed to pay 7 years' worth of rent differential, in a lump sum. [¶]
>
> I discussed this proposal with my wife and the other MVV Board Members and residents who were in attendance. We considered the cost and delays of a long legal battle with Archstone, and calculated whether an 84-month lump sum would satisfy most homeowners' needs to find replacement homes in other parks. We pulled out a calculator and ran the numbers to analyze whether our residents would be made whole and would be able to buy comparable homes in nearby parks. We estimated that all homeowners, except perhaps three to six of them, would be able to afford replacement homes under the proposed plan. So, ultimately, we jointly agreed that the City Council's proposal was reasonable, and I relayed the HOA's approval to the Council staff members. (Ex. 29, Barrs Decl, ¶¶ 11-12.)

Not only were the MVV homeowners urging a rent differential payment sufficient to achieve the State law purpose to enable displaced homeowners to acquire a comparable mobile home in another park, the City Attorney attending the hearing advised the City Council that California's Mobilehome Residency Law authorized the Council to require it: "The Government Code, 65863.7[e], authorizes the City to require mitigation of any adverse impacts on the ability of displaced persons to find housing in other mobilehome parks. So, in addition to making findings to convert the mobilehome [park], you also have authority to tinker with the mitigation, the adequacy of the mitigation, and the impacts to the actual displaced persons." The Council President responded, "That I get. And I understand that there is an effort to talk about what the appropriate mitigation is." (Ex. 31, Council Trans., p. 35.)

The MVV HOA President confirmed that only "after Archstone had agreed during the hearing

to: (a) pay 84-months' rent differential, (b) make an up-front lump-sum payment using current rates at the time of park closure rather than based on what was stated in the original tenant impact report, and (c) ensure that residents would receive the full rent-differential benefits even if their homes could or would be relocated, did I, on behalf of the MVV HOA, state on the record that we believed that the relocation benefits finally complied with the requirements of both State and local law." (Ex. 29, Barrs Decl, ¶ 18.)

The Special Master considered the City's argument that Archstone had voluntarily gifted enhanced benefits to the MVV homeowners as opposed to being required to do so:

> As a first impression, much of the discussion at the hearing, particularly the dialogue between Councilmembers Madaffer and Atkins with the Archstone representatives, appears, perhaps, ambiguous or equivocal and subject to interpretation. However, a careful review of not only what was said but the entire dynamic that existed during the hearing leads me to conclude that the Council was clearly signaling to Archstone that it considered the relocation benefits in the OPC RIR to be inadequate and that unless Archstone agreed to enhance those benefits, the Council would formally impose substantial enhancements as a condition of park closure and approval of Archstone's proposed condominium development. (Ex. 3, Special Master 1st Report, p. 19:10-17.)

The Special Master continued:

> Probably the best insight into what actually transpired at the hearing is the exchange at the end of the meeting between the Archstone representatives and the Councilmembers. Archstone's attorney addressed the entire Council, stating: "You have increased the rent assistance to seven years. We acknowledge that. And I have to tell Ms. Atkins it's one of the last times I'll probably appear before you. But I was going to tell you I thought it was pure folly that you didn't accept our original offer but you've done a hell of a job for these people. And we've just agreed to give them the option of reasonable relocation cost or the buyout. And that to me City Council members, I don't know what you've done really as far as setting a precedent, because future parks are going to have to live with this. And I hope you didn't do anything against De Anza on this, unfortunately, but that's another matter." In response, Councilperson Madaffer stated: "We may have cost ourselves on the other side." **These comments are telling. It seems evident that Councilmembers as well as representatives of Archstone recognized that by not following the SDHC relocation standards and guidelines regarding mitigation benefits, the City Council was setting a precedent for other mobilehome park closures, specifically De Anza Cove**. (Ex. 3, Special Master 1st Report, pp.19:18–20:7.)

Not only did the City Council acknowledge "we may have cost ourselves" in the De Anza park closure, Councilperson Peters concluded the hearing by confirming that the City had created a new standard to be proud of: "this does set a standard I think that provides a lot of comfort to people. And I think everyone is to be congratulated." (Ex. 31, Council Trans., p. 58.)

With mitigation, in the form of a sufficient amount of rent-differential benefit, tied to the replacement cost of homes in other mobilehome parks, the compensation provided through the MVV closure plan worked as the State legislature and the City Council intended—to give the homeowners the freedom and flexibility to continue being homeowners: "For my wife and I, receiving our relocation payment in a lump sum made all the difference. It allowed us the means to buy a replacement home…and allowed us to qualify for financing. If we had received only monthly payments, we would not have qualified for the purchase loan and would not have had enough money for the down payment. We would have been relegated to being renters for the rest of our lives." (Ex. 29, Barrs Decl, ¶ 21.)

Plaintiffs have applied that same standard here—providing this Court the objective evidence of the cost of replacement housing in other comparable parks and requesting that the mitigation awarded be commensurate. James Brabant, a renowned mobilehome expert, conducted a survey of listings of coastal mobilehome parks comparable to De Anza Cove. His "Summary of Comparable Mobile Home Listings" identified 105 active mobilehome listings as of February 2014 in 18 parks. (Ex. 21, Brabant Decl., ¶¶ 11-17; Summary, Ex. A to Brabant Decl.) He found that comparable replacement mobilehomes currently range in price from $21,900 to $565,990, with an average price per square foot of $173.77. (Ex. 31, Brabant Decl., ¶ 17.) Because the average square footage at De Anza is 1,025.9 per home, the average cost for De Anza homeowners to purchase a comparable replacement mobilehome is $178,270. ($173.77 per s.f. x 1,025.9 square feet = $178,270.) Mr. Brabant opined that, based on the MRL's requirement to find adequate replacement housing in another mobilehome park, as well as based on his more than 30 years of mobilehome park expertise, it is "reasonable that the total number of months of rent differential to be awarded in this case should be calculated to approximate the cost of the comparable replacement mobilehomes." (Ex. 21, Brabant Decl., ¶ 18.)

Plaintiffs' relocation expert, Phillip Schwartze, agrees: "Financially speaking…replacement cost represents the largest adverse impact De Anza residents will face when they lose their current homes due to park closure. Accordingly, mitigation must be sufficient to allow De Anza residents to absorb that replacement cost. In this instance…mitigation of this adverse effect (home loss)

would require payment of at least 109.7 months of rent differential…." (Ex. 55, Schwartze Decl., ¶¶ 6-8.)

The data provided by Plaintiffs gives an accurate picture of homes currently available in comparable parks, as well as the true cost to buy similarly-sized homes. The City has provided nothing. Just like the facts and evidence determined the required benefits in the Mission Valley Village closure, it is undisputed here that:

1. Plaintiffs' homes cannot be moved from De Anza Cove to any other park;
2. The largest adverse impact of park closure is the total loss of the homes and the high cost to buy comparably-sized homes in other parks;
3. State law requires the park owner to mitigate all adverse impacts of park closure, including the financial ability of class members to find replacement housing in comparable parks;
4. The City Council in the Mission Valley Village park closure found the mitigation suggested by its Housing Commission's Guidelines insufficient, considered the actual cost of replacement housing, and required significantly enhanced compensation to help cover the cost of replacement housing;
5. Based on the survey of comparable parks with homes for sale in February 2014, it will take an average of 109.7 months' rent differential to cover the cost of replacement housing for the De Anza homeowners.

Therefore, in order to mitigate the loss of the De Anza homes, comply with the State law mandate to find replacement housing in comparable parks, and to equally apply here the same standard and methodology that was used in the Mission Valley Village park closure, this Court has the authority, and is respectfully requested, to award mitigation in the amount of 109.7 months' rent differential, and certainly no less than the 84 months' rent differential recommended by the Special Master.

4. After the hearing and two weeks before Judge Hayes's special appointment ended, the court raised *sua sponte* a legal issue never raised by defendant and then erroneously concluded that Civil Statutory Penalties under the Mobilehome Residency Law were barred based on governmental immunity from *punitive* damages.

In a civil action arising from the Mobilehome Residency Law, the violating party is subject to statutory penalties of up to $2,000 per person, per violation. (Civ. Code § 798.86; *see also*

Friedman et. al, *Cal. Prac. Guide—Landlord-Tenant (The Rutter Group)* ¶¶ 11:269.3-11:269.4.) Recognizing the fact that park owners typically have more leverage and resources to bear than homeowners, the Legislature added this penalty provision to promote effective enforcement of the MRL by low-income tenants, and to deter and ultimately sanction violators of the MRL. (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890.)

Surprisingly, after the matter was deemed submitted, and with two weeks left on Judge Hayes's special appointment, Judge Hayes *sua sponte* asked for briefing from the parties on whether Government Code section 818's governmental immunity from punitive damage awards might apply to the civil statutory penalties called for under the Mobilehome Residency Law. Plaintiffs were given only 5 court days to submit a brief, and had no opportunity to respond to whatever the City simultaneously submitted on the issue. Without a hearing, without giving Plaintiffs the opportunity to oppose or respond to the City's brief, Judge Hayes concluded in his 2014 Decision that, under Government Code section 818, the City is immune from the MRL's statutory penalties. **Immunity from the MRL's statutory penalties was *never* raised as an issue or defense** by any party—or the Court—at any time in over a decade of this litigation. **It was not a defense ever raised by the City in its rejection of Plaintiffs' government claim form, or in its Answer, during discovery, law and motion, or trial.** It was never raised before the Special Master, and never raised in any briefings that lead up to the oral argument on May 6, 2014. Immunity under Government Code section 818 was also never mentioned by anyone during oral argument on May 6, 2014. Judge Hayes concluded the hearing to take the compensation issues under submission and to determine the amount owed for statutory penalties.

Notably in the procedural history of this case, back in 2004, the City had moved, under Section 818, to strike Plaintiffs' prayer for Civil Code section 3294 punitive damages contained in Plaintiffs' First Amended Complaint. Plaintiffs stipulated, and the Court struck those allegations. By contrast, Plaintiffs' prayer for statutory penalties under Civil Code section 798.86 due to the City's violations of the MRL has remained correctly pleaded and requested throughout this case, including the operative Third Amended Complaint:

> 72. As a further result of CITY's (and DOES 1-15) violations of the various provisions of the Mobilehome Residency Law (Civ. Code §§ 798 et seq., Gov't Code § 65863.7), Plaintiffs and Class members have directly and proximately suffered damages according to proof. Moreover, due to Defendants' willful violations alleged above, Plaintiffs seek statutory penalties under Civil Code section 798.86 of $2,000 for each separate violation committed by Defendants as to each of the up to 509 units in the Park.
> * * *
> Prayer
> * * *
> 130. For statutory damages under Civil Code section 798.86 of $2,000 for each separate violation of the Mobilehome Residency Law committed by the CITY and/or its agents for each of the up to 509 mobilehome lots in the Park. (Third Amended Complaint, ¶¶ 72, 130, on file herein.)

Again, it cannot be emphasized enough—the City had never asserted that it was immune from the MRL's statutory penalties—not at the pleading stage, during discovery, law and motion, or at trial, and not during its final briefing submitted to the Court.

Because Judge Hayes's 2014 Decision concerning the denial of statutory penalties is an error of law and contrary to law, an irregularity in the proceedings, an improper order of the court, and also greatly affects the adequacy of damages here and came as an absolute surprise (see Civ. Proc. Code § 657(1),(3),(5)-(7)), Plaintiffs respectfully request, as detailed below in this motion for new trial, that Your Honor modify the 2014 Decision to conclude that no immunity under Section 818 applies here, and enter judgment in the amount of $14,000 in statutory penalties per Class Member, or at the least in the alternative, grant a new trial on such compensation owed to the Class. Subsection (A), below will address the law showing that there is no governmental immunity, and Subsection (B) will address the factual and legal grounds supporting the award of $14,000 in statutory penalties under the MRL.

A. The City is not immune under Government Code section 818 from the civil penalties called for under the MRL.

First, even if there were a potential immunity under Government Code section 818 (which there is not, as briefed in full below), the City regardless waived it when it failed to raise any objection to the sufficiency of Plaintiffs' claim within 20 days of submittal. (Gov't Code § 910.8.) The City had two options under the Government Claims Act—either serve a written objection to the claim based on government immunity or forever waive any defense. (Gov't Code § 911.) It is undisputed

that the City never raised immunity under Section 818, not during the claim process and not in its affirmative defenses.

Second, public entities remain liable for statutory penalties when those penalties are not solely punitive in nature; that is, Government Code section 818 immunizes public entities only from punitive damages, and from the very rare instance when statutory penalties are designed purely to punish and serve no other purpose. Section 798.86 of the MRL serves other purposes, such as encouraging compliance with the law and the Legislature's intent to protect mobilehome residents, deterring violations of the law, and providing additional compensation for the harm suffered. The amendment to Section 798.86 simply reaffirmed the Legislature's intent that homeowners and residents be afforded the right to recover all damages resulting from violations of the MRL, along with either statutory penalties for willful violations, or punitive damages for malicious conduct. Such an election of remedies would be unnecessary if punitive damages and statutory penalties were synonymous. Thus, the City of San Diego is liable for its multiple violations of the MRL and has no immunity under Government Code section 818.

The Court's decision to award statutory penalties under Section 798.86 of up to $2,000 per violation per person is guided by a number of considerations, such as the need for encouraging compliance with the law, the importance of the public policies advanced by the MRL provisions the City violated, the severity of the harm caused, the provision of additional compensation for harm caused by the City's violations, as well as the number of violations and the number of Class members affected. The Court has the discretion, authority, and requisite evidentiary record to award statutory penalties against the City of $14,000 per Class Member based on the City's seven willful MRL violations.

1. Government Code section 818 immunity from punitive damages does not apply because statutory penalties serve broader purposes and are different than punitive damages.

Government Code section 818 only refers to exemplary damages awarded in a tort action pursuant to Civil Code section 3294. It does not reference statutory claims, such as those brought under the California Mobilehome Residency Law. Government Code section 818 shields public entities from "*damages* imposed *primarily* for the sake of example and by way of punishing the

defendant." (Gov't Code § 818 (italics added).) But this limited immunity does not apply to statutory penalties under the MRL because they do not seek—as their primary purpose—to punish the public entity. Punitive damages *do* seek to punish and require a showing of oppression, fraud, or malice under a heightened burden of proof—clear and convincing evidence. (Civ. Code § 3294.) Statutory penalties under the MRL require only proof by a preponderance of the evidence of a willful violation. "Willful" has been defined by the appellate courts as simply deciding to take a particular course of action with "knowledge or consciousness of its probable results." No malice, fraud, or oppression are part of the equation. In fact, no specific intent to violate the law is even required. (Civ. Code § 798.86; *Patarak v. Williams* (2001) 91 Cal.App.4th 826, 829-830.)

Thus, **the general rule is more correctly stated as: "the immunity afforded to public entities under section 818 is narrow, *extending only to damages whose purpose is simply and solely punitive*** *or exemplary*." *Los Angeles County Metropolitan Trans. Authority v. Sup. Ct. (Lyons)* (2004) 123 Cal.App.4th 261, 275 (italics in original, emphasis added). While statutory penalties may sometimes have a punitive component, "to be condemned as punitive [for the purposes of invoking section 818], a penalty, generally speaking, must *simply* and *solely* serve that purpose." *Id.,* 123 Cal.App.4th at 272 (italics in original). **If** the statutory penalties serve any other purposes—like **encouraging compliance, providing additional compensation for the harm caused, or defraying enforcement costs—then immunity is not available**.

For example, in 1990, the California Supreme Court considered whether section 818 prevented statutory penalties against a public entity for health and safety code violations committed by a county-operated facility. *Kizer v. County of San Mateo* (1990) 53 Cal.3d 139, 146. The Supreme Court held that public entities could not avoid liability for civil penalties:

> Nowhere in the Tort Claims Act does the Legislature indicate an intention to immunize public entities from monetary sanctions authorized by the Legislature and imposed for failure to observe minimum health and safety standards adopted to protect and prevent injury to patients. Granting immunity to public entities from the penalties would be contrary to the intent of the Legislature to provide a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state. *Id*. at 146.

Likewise, courts have refused to apply section 818 immunity to civil penalties "that the Legislature has deemed necessary for the effective enforcement of civil rights laws and effective

compensation of victims." *Lyons, supra,* 123 Cal.App.4th at 273. *See also State Department of Corrections v. Workmen's Comp. Appeals Board* (1971) 5 Cal.3d 885, 890 (public entity not immune from enhanced award for willful misconduct under Labor Code because penalties were not "simply and solely" punitive and provided fuller compensation to injured employee who suffered harm from the state's non-compliance). In another instance, the California Supreme Court again upheld civil penalties against a public port authority for oil spills based on Water Code violations, holding that the sanctions, though admittedly punitive in part, *were not simply and solely* punitive because they served a compensatory and administrative purpose as well. *People ex rel. Younger v. Sup. Ct. (RPI)* (1976) 16 Cal.3d 30, 37. The courts recognize that encouraging compliance with the law, defraying the cost of enforcement, or helping compensate those harmed by the public entity's non-compliance are legitimate, non-punitive purposes well-beyond section 818 immunity.

The **California Attorney General has also issued a formal opinion establishing that statutory penalties are not prohibited by Government Code section 818** because the penalties do more than merely punish—they assure an effective statutory program, encourage compliance, help defray the costs of oversight, and serve to mitigate the harm caused. Ex. 67 (attached), Opinion No. 84-1201, 68 Ops. Cal. Atty. Gen. 55 (Cal.A.G.), 1985 WL 167459, pp. 4-5.

The Supreme Court's decision in *DuBois v. Workers' Compensation Appeals Board (Rohrer)* (1993) 5 Cal.4th 382, does not change this conclusion. In that case, the Court relied heavily on the fact that the Labor Code section at issue expressly exempted the Uninsured Employers Fund from the very type of penalty that the Workers' Compensation Appeals Board had assessed. The Labor Code itself stated: "The Uninsured Employers Fund shall not be liable for any penalties or for the payment of interest on any awards." (Lab. Code § 3716.2.) Thus, in *DuBois*, the Legislature had expressly provided **a special immunity to one particular public entity—the Uninsured Employers Fund—in its Labor Code provision**. **There is no such immunity to MRL penalties here**. Like the Supreme Court's ruling in *Kizer*, nowhere in the MRL does the Legislature indicate any intention to immunize any public entities from the statutory penalties authorized by the Legislature and imposed for willful violations of the standards intended to protect mobilehome owners. In fact, the Legislature made it clear that the MRL's park-closure provisions apply to

cities: "**This section is applicable to charter cities**." (Gov't Code § 65863.7(h).) If the Legislature had wanted to immunize cities from the MRL's statutory penalties, it could do so as it did expressly in the Labor Code for the Uninsured Employers Fund referenced in the *DuBois* case. The *DuBois* court's passing reference to section 818 at the end of the opinion reveals that it was merely dicta.

Proving this point, three years after *Dubois* was decided, our Fourth District Court of Appeal upheld the assessment of civil penalties against a state agency for unreasonable delay in payment of disability benefits. *State of Ca. v. WCAB* (1996) 44 Cal.App.4th 128. The Fourth District analyzed the potential applicability of Government Code section 818 in light of *Dubois*, and concluded that the statutory penalties equated to compensation, not punitive damages, and therefore fell outside the purview of section 818. *Id*. at 144-145.

The relaxed standard for statutory penalties—versus heighted intentional or malicious conduct required for punitive damages under Civil Code section 3294—is consistent with the State's right to incentivize compliance with its laws. Civil Code section 798.86 was intended to encourage compliance with the MRL. It reflects legislative recognition that mobilehome owners are deserving of "unique protection" under the law. Civ. Code § 798.55(a). The Supreme Court recognizes that statutory penalties help "to secure obedience to statutes and regulations imposed to assure important public policy objectives." *Kizer, supra*, 53 Cal.3d at 147-148. And, given the inherent costs of litigation, statutory penalties likewise make it feasible for low-income residents to pursue civil actions to enforce the law against opponents who otherwise hold all the cards. *Lyons, supra*, 123 Cal.App.4th at 270-271 (civil penalties "encourage private parties to seek redress through the civil justice system"). Moreover, statutory penalties help alleviate some of the harm caused by the offending party's non-compliance. *State Dept. of Corrections v. WCAB* (1971) 5 Cal.3d 885, 890 ("the increased award is not a penalty in the sense of being designed primarily to punish the defendant rather than to more adequately compensate the plaintiff").

2. The Legislature's amendment to Civil Code § 798.86 clarified its intent to ensure homeowners have the full panoply of remedies available to redress violations of the MRL.

The 2003 amendment referenced in this court's request for supplemental briefing grew out of a

previous court case involving mobilehome owners who brought suit against a park-owner for imposing excessive water charges and failing to maintain the park septic lines. Interpreting Civil Code section 798.86 narrowly, that court held that statutory penalties, not punitive damages, were the sole remedy for the prevailing residents. *De Anza Santa Cruz, supra,* 94 Cal.App.4th at 915-916. In the wake of that case, the Legislature amended section 798.86 to correct the *De Anza Santa Cruz* court's misunderstanding of both the text of the statute and the Legislature's intent:

> [The] MRL currently provides that a prevailing homeowner may, in the discretion of the court, be awarded an amount not to exceed $2,000 for each willful violation, "in addition to damages afforded by law." This provision had previously been understood to allow for the recovery of compensatory and punitive damages. Despite the plain language of the statute, however, the court in *De Anza Santa Cruz* [citation omitted] held that punitive damages were not "damages afforded by law" that could be recovered "in addition to" damages for willful violations. This holding was based on the court's understanding of the Legislature's intent. This bill would correct that misimpression. (Ex. 68, Assembly Third Reading of AB 693, pp. 1-2.)

Thus, the amendment followed an incorrect attempt by the judiciary to limit recovery under the MRL, and made it clear that prevailing homeowners can—in addition to all damages afforded by law—choose to pursue *either* punitive damages or statutory penalties. (Civ. Code § 798.86(b).) They are two different remedies. If they were synonymous, there would have been no need for this amendment. Thus, the import of the section 798.86 amendment is that it demonstrates that the Legislature views punitive damages and statutory penalties as two distinct classes of remedies. That distinction is relevant to this analysis, because—on its face—section 818 only precludes punitive damages. There is no reference at all to statutory penalties.

3. The Court's assessment of statutory penalties is guided by several key factors related to the scope of the harm caused and the public policies at stake.

Consistent with the legislative intent behind section 798.86, key factors guiding the Court's assessment of statutory penalties include: the number of MRL violations, the number of residents affected, the severity of the reasonably-anticipated consequences of those violations, the Legislature's intent to encourage compliance with the MRL, the harm caused to the Class, the need to deter future MRL violations, the fairness of providing additional compensation to help mitigate the harm caused by the City's unlawful conduct, and the importance of the public policies advanced

by the MRL provisions violated by the City.

First, the City ran roughshod over State law. Although Plaintiffs only briefed seven of the earliest and most incontrovertible MRL violations as detailed in Section B, below—four notice violations, two tenant-impact-report related violations, and one failure to mitigate violation. Plaintiffs can document dozens and dozens of additional violations the City committed over the course of several years in a deliberate pattern that affected hundreds of park residents. Second, all seven of the cited violations affected everyone in the park because the notices were sent to *everyone*, a tenant impact report would have included *everyone*, and mitigation would have been paid to *everyone*.

Third, the harm caused to the Class was palpable. For example, every time residents received a notice telling them they had no rights and had to leave the park without any relocation assistance, they felt understandably panicked, apprehensive, and insecure about where they would wind up and how they would get there. Their declarations (cumulatively Pls' Ex. 42) dating back to November 2003—while the City's threat to evict all homeowners loomed just days away—demonstrate the immediate impact that the City's MRL violations had on them:

> I am 89 years old and…I have resided at the De Anza Harbor Resort mobilehome park since 1957….I have been extremely depressed and cry often since being threatened with eviction by the City….I do not have any other family to turn to and have no other place to live but my mobilehome. (Ex. 42, Smithwick Decl., pp. 1-2.)
>
> I am 80 years old and…I am a Pearl Harbor veteran….Both my health and my wife Ginger's has worsened since learning of the City's threatened eviction. We worry a great deal and have a lot of stress. We live on a fixed income and our savings are nil. (Ex. 42, Ruffato Decl., pp. 1-2.)

These elderly residents were being told by their city government under color of authority that the residents were essentially trespassing and had to leave—even though the City knew that none of the homes at De Anza could be moved, even though the City had long before calculated the actual cost of relocation, and even though City staffers had warned the City Council in various written memoranda that the City would be responsible for relocation costs. The uncertainty and fear created by the City's actions to close the park without complying with the MRL spread further with the City's decision not to prepare a tenant impact report, a report that would have calculated the amount actually required to mitigate the hardships that were already weighing on residents who

were told they had no options. And, of course, the City's decision not to pay any relocation benefits exacerbated the inability of class members to leave the park, find alternate housing, or move on with their lives. These residents have been in limbo for nearly 11 years now. The simple fact is, but-for this lawsuit, the City would have systematically—and unlawfully—thrown everyone out.

Assessing statutory penalties also helps compensate the Class for the unique harm caused by the City's unlawful conduct. *State Dept. of Corrections v. WCAB* (1971) 5 Cal.3d 885, 890. While rent differential may partially offset the loss of one's home, it does not compensate for the premature and illegal notices designed to encourage residents to leave the park without asserting their legal rights. **Relocation costs—awarded 11 years after the fact—do not compensate for the City's attempt to bypass state law, forcing the residents to embark on a decade of litigation, while living in a Park shrouded under the dark cloud of closure. Statutory penalties address these issues, as well as the impact these particular violations had on the Class**.

Lastly, the public policies advanced by the MRL's park-closure provisions—and those so openly frustrated by the actions taken by the City at the park and by the litigation positions adopted by the City in this case—warrant the imposition of civil penalties. Feeling strongly enough to incorporate their objectives directly into the law governing mobilehome parks, the Legislature declared that: "because of the high cost of moving mobilehomes, [and] the potential for damage resulting therefrom…**it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction** afforded by the provisions of this chapter." Civ. Code § 798.55(a) (emphasis added). The City, itself, was even more specific in the goal of its park closure ordinance: **to minimize "the adverse impact on the housing supply and on displaced persons** by providing certain rights and benefits to tenants and by requiring tenant relocation assistance whenever an existing mobilehome park or portion thereof is converted to another use." S.D. Muni. Code § 143.0610. Thus, providing special protection for vulnerable homeowners by requiring detailed notice and tenant impact reporting procedures, protecting the City's shrinking affordable housing supply, and minimizing the hardships placed on San Diegans losing their homes—all three public policies highlight the

importance of strict adherence to the MRL, and justify imposition of the statutory penalties sought.

The fact that the phrase "statutory penalties" includes the word "penalties," and sometimes effectuates a result that is secondarily punitive, does not mean that statutory penalties are a form of punitive damages. Because statutory penalties advance other objectives, they are not purely intended to punish and, therefore, Government Code section 818 simply does not apply. Here, the Court has both the authority and evidentiary record to award statutory penalties in the amount of $2,000 per violation, times 7 cited violations—totaling $14,000 per Class member. There is no justifiable reason to do anything less because assessing these civil penalties: (a) protects the very policies the MRL was designed to advance, (b) encourages compliance with the law, (c) empowers ordinary citizens to challenge the improper exercise of government power, (d) deters future violations, and (e) helps repair some of the harm caused when the City misrepresented to De Anza's primarily senior community that they had no rights and would be evicted imminently if they didn't buckle under—an insidiously intimidating exercise of City authority against a vulnerable class of homeowners.

B. State law warrants the assessment of Statutory Penalties against the City for its numerous, already-proven violations of the MRL.

Here, the City committed multiple violations of the MRL in at least three major categories, and did so before even closing the Park on November 23, 2003: (a) Unlawful notices sent to Park residents; (b) Tenant Impact Report-related violations; and (c) Mitigation violations.

(a) <u>Unlawful Notices</u>. Every notice that was sent prior to park closure was a separate violation of the MRL in that each notice failed to state a legally-permissible ground for termination of tenancy as required under Civil Code section 798.56, and a tenant impact report was never attached as required. (Civ. Code § 798.56; Gov't Code § 65863.7(c); See, e.g., Notices dated November 15, 2002 (12-month notice), May 6, 2003 (6-month notice), and September 22, 2003 (60-day notice), Exs. 5-7, previously admitted as Trial Exs. 43, 82, and 45, respectively.) As the Court already noted: "The City violated the Mobilehome Residency Law…by failing to…serve lawful Notices that complied with the MRL's timing and content requirements." (Ex. 40, MSA Order, ¶ 6(c).) These illegal notices represent violation numbers 1, 2, and 3.

Furthermore, on October 22, 2003, when the City announced its euphemistic "transition plan," informing residents that they had to enter into release agreements with the City or face immediate eviction—the City committed one of its most flagrant violations of the MRL park closure requirements. The City threatened residents, in writing, with the following misstatement of law: "…in light of the expiration of the ground lease and the Sublease, the Mobilehome Residency laws pursuant to California Civil Code sections 798 *et seq*., will no longer govern Resident's occupancy/possession of the Premises." (See Notice to Residents, dated Oct. 22, 2003, Ex. 8, previously admitted as Trial Ex. 85.) This statement—made under color of authority—was completely untrue. As the Court reaffirmed on summary adjudication, the alleged expiration of the ground lease did not excuse the City from complying with all of the MRL's notice, reporting, and relocation mandates—all of which affect the residents' "occupancy/possession of the Premises." That's violation number 4.

(b) TIR-related violations. This Court has already determined as a matter of law that, at a minimum, the City violated the MRL by failing to prepare a Tenant Impact Report—violation number 5. Moreover, it is undisputed that the City failed to hold public hearings regarding the sufficiency of the TIR, or lack thereof, pursuant to Government Code section 65863.7(d). That's violation number 6.

(c) Mitigation violations. The City failed to mitigate the adverse impacts of park closure by first providing reasonable mitigation for the massive loss of homes *prior to* initiating the park closure process and attempting to evict the entire Class—in violation of the MRL. (Gov't Code § 65863.7(e), (i).) That's violation number 7.

All of these violations relate exclusively to this class action case and the City's unlawful attempt to avoid properly compensating residents as required prior to initiating park closure. Under the MRL, every one of these 7 stated violations supports the imposition of a statutory penalty as to each class member. In fact, some courts have imposed a statutory penalty against the park owner for each violation *each month it occurred*, even if it was the same violation being repeated over and over again. (*See People ex rel. Kennedy v. Beaumont Investments, Ltd*. (2003) 111 Cal.App.4th 102, 128 ["the trial court counted 14,124 statutory violations arising from two different patterns of

conduct on defendant's part"].)

Accordingly, under Civil Code section 798.86, the Court has discretion to assess a penalty of up to $2,000 per violation per resident each time such violation occurred. In this instance, the City's exposure could be expressed as follows: 7 violations x $2,000 = $14,000 per class member *per month of occurrence*.

The City committed at least an equal number of MRL violations post-November 2003 when it systematically began tearing down the Park, unlawfully stripping away amenities to encourage residents to leave. However, in the interest of simplicity and moderation, Plaintiffs focus here on only the pre-closure violations prior to November 2003—and ask the Court to simply assess statutory penalties for the first 7 violations, for each class member. This simplified approach equates to: 7 violations x $2,000 = **$14,000 per class member.**

Plaintiffs anticipate the City will argue that it lacked the requisite willfulness to trigger statutory penalties under the MRL. However, in this context, the term "willful" does not require a showing of malice as may be required for punitive damages under Civil Code section 3294; rather, it equates to a lesser showing of "intentional conduct undertaken with knowledge or consciousness of its probable results." (*Patarak v. Williams* (2001) 91 Cal. App. 4th 826, 829.) For example, where the park owner failed to properly maintain the park septic system, the court assessed statutory penalties for willful violations of the MRL even absent evidence that the owner intended to cause flooding, contamination, or sewage back-ups. The court reasoned that those consequences were reasonably foreseeable to follow from the park owner's deliberate decision not to tend to septic maintenance. "While landlord did not have the specific intent to achieve septic system failures, these occurrences resulted not from accident or simple negligence." (*Id*. at 830.)

Similarly, in this case, the City certainly knew that the MRL applied to mobilehome parks, that De Anza Cove was operated as a mobilehome park, and that local attempts to exempt the itself from State law would be preempted by the MRL. Furthermore, the MRL's park-closure provisions **expressly apply to charter cities like San Diego**. (Gov't Code § 65863.7(h).) The MRL's provisions permeated all of the Long Term Rental Agreements at De Anza, as well as the City's own internal memoranda wherein City staffers calculated in advance the total amount of relocation

benefits the City would have to pay if the City decided to maintain land use control of De Anza and undertake the concomitant relocation obligation. So any attempt by the City to argue that it didn't realize the MRL would apply lacks merit and common sense.

The City also knew that a tenant impact report should have been done. In fact, as this Court found, the prior park operator "advised the City that a tenant impact report was advisable and offered to prepare and pay for the report. **The City said no**." (Ex. 40, MSA Order, ¶ 7(q) (emphasis added).) The City decided not only to *not* do an impact report, but to reject the prior operator's offer to commission the report at no charge to the City. That was a willful act, and the consequence was foreseeable. In fact, we're still paying the price for that decision, having spent the better part of this case trying to retroactively duplicate the reporting, notice, and mitigation process that was supposed to have been done in 2002, a full year before the Park closure date.

These violations had a palpable impact on the Class, as many residents were fearful of the loss of their homes, their lack of options, and the uncertainty of when they would be thrown out on the street. Some even grew very ill from the stress. The effects of the City's violations and threats to evict were timely documented in the midst of November 2003 in numerous resident declarations. (See Decls. of Peltcher, Ruffato, Anthony, Epstein, Stevens, Smithwick, and Gloudeman, collectively Ex. 42.)

In sum, there is ample evidence that the MRL violations cited stem from deliberate actions and decisions made by the City sufficient to support a finding of willfulness: "consequences [that] were reasonably foreseeable to follow from the park owner's deliberate decision" and "occurrences [that] resulted not from accident or simple negligence." Moreover, from the vast array of actionable violations, many of which were repeated multiple times, Plaintiffs focus on only seven—all related to the pre-November 23, 2003 time frame—and suggest that the Court conservatively assess penalties against the City in the resulting amount of $14,000 for each class member.

5. Judge Hayes failed to correct a math error that takes required compensation away from the Class.

The parties and the Special Master sought to correct the mathematical, statistical, and

methodological errors that arose during OPC's initial comparable rent survey in 2011. These efforts culminated in multiple hearings before the Court and Special Master in 2014. After eradicating a number of the errors and anomalies, unfortunately one glaring error remains in the 2014 updated rental survey. Plaintiffs provided the undisputed and uncontradicted evidence from economist, Patrick Kennedy, PhD, that proved that OPC's arbitrary 15% shift in home-size breakpoints were not only arbitrary, but also mathematically and statistically erroneous. (See Ex. 3, Pl's Opening Brief, pp. 21:24–24:4, and Kennedy Decl., ¶¶ 21-27, which was Ex. 18 with Plaintiffs' Opening Papers; Ex. 7, Rprt. Trans.; See also Pl's Reply Brief, pp. 19:4–23:17, and Plaintiffs' May 6, 2014 PowerPoint presentation, all of which is on file with the Court.) The trial court failed to provide any factual and/or legal basis for this issue, other than a one-sentence conclusion: "The first purported 'math error' is not an error, but rather a difference of opinion as to how best to calculate the square-footage ranges." (Ex. 2, Decision, p. 7:21-22.) From this conclusion, it is impossible to determine whether the Court read and analyzed Dr. Kennedy's uncontradicted declaration, was aware or unaware of the specific statistical reasons that formed the basis of Dr. Kennedy's uncontested opinions, or if the Court, for some reason, disregarded the facts submitted by Plaintiffs and, if so, why. But there can be no "difference of opinion" where only Dr. Kennedy's undisputed expert testimony was offered into evidence. Other than unsupported argument from defense counsel, there was no other opinion provided to counter or rebut any of Dr. Kennedy's testimony. There was no declaration from any other expert. Thus, not only was the non-existent "opinion" evidence insufficient to justify Judge Hayes' 2014 Decision, the error results in inadequate damages to the Class—an error objected to by Plaintiffs. (Civ. Proc. Code § 657(1), (5)-(7).) As shown here and in Dr. Kennedy's declaration, OPC's 15% arbitrary shift in the break-point used for calculating comparable rent based on De Anza home-size square-footage remains incorrect statistically and mathematically.

Rather than using the median, or midpoints, consistently on both the home sizes (Column A) and comparable rents (Column C), OPC injected a subjective, unsupportable 15% markup only on the home-size break points for each tier—as shown in Column **B**, below. These artificially elevated break points in Column B cause many De Anza homes to fall into a lower comparable-rent tier than

they otherwise naturally would, and the homeowners suffer a corresponding decrease in rent differential benefits.

A	B	C
De Anza home sizes (based on actual median midpoints)	De Anza home sizes + *OPC's arbitrary 15% shift*	Median rents for apartments of comparable size and location (Feb. 2014)
1-575 sf	1-664 sf	$1,300
576 sf	665 sf	$1,750
920 sf	1060 sf	$2,600
1202 sf	1380 sf	$3,395
1412 sf	1630 sf	$3,595

OPC's "markup" error is compounded when multiplied by 84 months to calculate total rent differential. For example, Homeowner Jane has a home at De Anza Cove that measures 1,000 square feet and she pays $1,000 per month in space rent. Based on Column A, Jane's home would naturally fall into the third tier (because her 1,000 s.f. home is larger than the median 920 square feet) and the correlating median comparable rent of $2,600 per month. One month of rent differential would therefore be $1,600 ($2,600 comp rent minus $1,000 space rent). But, using OPC's artificially-inflated break points in Column B, Jane's home is smaller than the tier break-point that is now 1,060 square feet and her home is, therefore, relegated down to the second tier. That lower tier has a corresponding comparable rent of only $1,750 per month, resulting in a drop of one month's worth of rent differential from $1,600 to $750. Only once you multiply OPC's error out by the number of months of expected rent differential does the affect become truly disenfranchising. In Homeowner Jane's scenario, when multiplied by an 84-month rent differential like that required in the Mission Valley Village park closure, she's losing a heart-stopping $71,400 all because of a math error. Instead of getting $134,400, as she was supposed to get when proper mathematics and statistical methodology are applied ($1,600 rent diff'l x 84 mos. = $134,400), OPC's arbitrary markup causes her to receive only $63,000 ($750 rent diff'l x 84 mos. = $63,000). As detailed below, a 15% shift in the break points finds no basis in mathematics, statistics, the

Relocation Guidelines, or State law.

Plaintiffs' expert economist, Patrick Kennedy, Ph.D., analyzed OPC's survey, the presentation of data, and the manner in which OPC created its tiers for compensation. After careful study, Dr. Kennedy opined that, while OPC's methodology was sound insofar as the establishment of tiers based on the median sizes of the De Anza homes and corresponding median comp rent, OPC's artificial mark-up to the De Anza median home sizes lacked merit and was scientifically unsupportable: "**It is my opinion that OPC's approach has substantial limitations and does not appear to be based on an underlying statistically accepted methodology or process…. The 15% markup of the De Anza median home sizes suggested by OPC lacks a statistical foundation or methodology and introduces counter-intuitive results.**" (Ex. 18, Kennedy Decl., ¶¶ 21, 23.)

Dr. Kennedy articulated that the natural median break points reflected in Column A are the statistically correct delineations for each tier: "the De Anza median home sizes should be used without any markup to those tiers: the median 1-bedroom De Anza Cove home was 576 square feet, the median 2-bedroom home was 920 square feet, the median 3-bedroom home was 1202 square feet, and the median 4-bedroom home was 1412 square feet…. These median figures provide a consistent, objective statistical measure of the cut-off for each of OPC's rent tiers. The median is a common statistical concept that reflects the midpoint of the underlying distribution. The underlying data reflecting the median size of the De Anza Cove homes should therefore govern the cut-offs for each tier." (Ex. 18, Kennedy Decl., ¶¶ 21-27.)

Dr. Kennedy pointed out how OPC's shift in the break-points, though, make no sense at all when one actually compares the home sizes to the comp-unit sizes: "[OPC increased the De Anza 2-bedroom tier] from 920 square feet to 1,060 square feet. OPC's suggested cutoff for 2-bedrooms is therefore 160 square feet *larger* than the median two-bedroom unit in its survey. Despite the fact that the median De Anza Cove 2-bedroom home is *larger* than the median 2-bedroom in OPC's survey (920 square feet versus 900 square feet in the survey), OPC still includes a markup [resulting in a tier artificially elevated at 1060 sqft]. **The cutoff for the 2-bedroom tier should be adjusted *downward*, *not upward*, if OPC's process was accepted.**" (*Id.*, ¶ 26 (emphasis added).) OPC's

erroneous statistical underpinnings are exposed for what they are because the mark-up far surpasses even the median sizes of the comp units that OPC purported to be comparing. (*Id.*, ¶ 25.) "These markups lack a statistical foundation or methodology and introduce counter-intuitive results." (*Id.*, ¶ 26.)

OPC's experience is in relocation, not statistics and mathematics; whereas, applying proper, objective statistical and mathematical methodology is *precisely* Dr. Kennedy's profession and expertise (doctorate in Economics from Stanford University, bachelor's degree in Economics from the University of California, San Diego, and testified as an expert witness in the trial of this case). OPC undeniably had the discretion in how it collected comp-rent information and how it does its job as a relocation coordinator, but it does not have the discretion—whether knowingly or not—to take statistical liberties or apply erroneous mathematics to the results here.

Notably, the City retained their own economist/accounting expert, Mr. Dana Basney, and used him as their designated expert in this case. At all times, the City was able to consult with Mr. Basney—or any other appropriately experienced and qualified expert if Mr. Basney were not available—to assess if OPC's mark-up method was supportable or if Mr. Kennedy's opinions were incorrect. The City did not submit any declaration from anyone.

The artificial 15% markup error is not trivial when applied class-wide and multiplied by 84 months: over $17,000 would be taken away from each homeowner for no justifiable reason. Now is the last time for this mistake to be remedied. And the Court has the capacity to remedy it easily. Plaintiffs, therefore, respectfully request that the Court order that the natural median break points be used throughout, without any markup, and that the missing tier representing the larger homes and corresponding comparable rent be added:

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De Anza home sizes (based on actual median midpoints)	Median rents for apartments of comparable size and location (Feb 2014)
1-575 sf	$1,300
576 sf	$1,750
920 sf	$2,600
1202 sf	$3,395
1412 sf	$3,595

In sum, OPC's relocation analysis has to be mathematically sound—grounded in a consistent, scientific basis—so as not to saddle the Class with arbitrary losses or favor the park owner unfairly.

6. There is no legal basis for denying mandatory Temporary Lodging payments to Class Members.

The 2014 Decision has a section concerning Temporary Lodging Benefits, but there is no rationale, reasoning, or basis given for the court's decision. (Ex. 72, 2014 Decision, pp. 7:24–8:11.) The Special Master had believed that the City's Guidelines allowed for Temporary Lodging benefits only to those people whose mobilehomes could be moved to other mobilehome parks because OPC had erroneously told him that the City's Guidelines only allowed temporary lodging benefits for those with a mobilehome capable of being moved to another park. That same erroneous legal interpretation was parroted in the 2014 Decision, but with an infused modification that "other members of the class may also receive the lodging benefit upon a showing to OPC of reasonable necessity for temporary lodging (up to seven days, not to exceed $147 per night)." (Ex. 72, 2014 Decision, p. 8:7-10.) But, as Plaintiffs objected and briefed, the City's Guidelines do not limit Temporary Lodging benefits as OPC had erroneously assumed.

Without regard to the feasibility of moving the mobilehome, and without the "reasonable necessity" modification added by Judge Hayes, the text of the Guidelines requires temporary lodging benefits to all residents <u>without caveat</u>: "During relocation, the park owner…shall pay to each mobilehome tenant hotel or temporary lodging cost in the amount of $147 per night up to

seven nights." (See Ex. 3, Pls' Opening Brief, Ex. 3, pp. 24-25; Pls' Ex. 36 submitted with Opening papers, 2010 Guidelines, ¶ 2.; See also Pls' Reply Brief, pp. 30-31.) So, when a mobilehome park closes, all homeowners and residents are entitled to temporary lodging while they are relocating out of the park. No strings attached. Other than writing that the Court is adopting the Special Master's recommendation and quoting a portion of the Special Master's report, Judge Hayes provided no rationale for apparently overruling Plaintiffs' Objections to the Special Master's recommendation and adding a requirement that doesn't exist in the City's guidelines. The Relocation Policy does not contain caveats or modifiers, it states: "the park owner…shall pay to each mobilehome tenant hotel or temporary lodging cost in the amount of $147 per night up to seven nights." So as part of this new trial motion, Plaintiffs respectfully request that the Court modify the 2014 Decision, vacate the judgment, and enter a modified judgment so that the City "shall pay to each mobilehome tenant hotel or temporary lodging cost" in the amount of $588 per Class household. (Plaintiffs have requested only 4 nights lodging x $147, not 7 nights.)

7. The Judgment dated August 20, 2014 is void and must be vacated because it purports to bind persons who were not party to this class action.

The proposed judgment created by the City, then executed by the Court, contains provisions that purport to bind non-class members and to deny them rights guaranteed by State law. It is doubtful that the Court would have knowingly included such a provision since it is axiomatic that issuing a judgment against a person who is not a party to the action is beyond the court's authority, and therefore, is void. (Civ. Proc. Code § 473(d); *Moore v. Kaufman* (2010) 189 Cal.App.4th 604, 615-616; Cal. Judges Benchbook: Civ. Proc. Trial (2013 Supp.) § 16.2.) There are more than 150 De Anza households that fall outside of the class definition.

Paragraphs 18 and 19 of the Judgment appear to overstep the court's authority by purporting to deny various legal rights to those homeowners and residents who still reside at the park, but do not fall within the class definition. For example, paragraphs 18 and 19 can be read to state that non-class members are ordered by the Court via this Judgment to vacate the premises, receive no mitigation, compensation, or other relocation assistance, and "be subject to legal action for

ejectment or unlawful detainer without leave of Court." It is doubtful that the Court intended this consequence when signing the City's proposed judgment since imposing such negative consequences on a person who is not a party is not only objectionable, but renders the judgment void. If it was not the Court's express intention to subject non-parties to potential eviction and denial of relocation benefits, then such language in the judgment falls within the "clerical error" category under Code of Civil Procedure section 473(d).

As part of Plaintiffs' motion to set aside and vacate the judgment under section 663 and section 473(d) of the Code of Civil Procedure, Plaintiffs respectfully request that the Court set aside the void judgment and, instead, enter the proposed Amended Judgment that rectifies the error and limits the applicability of the judgment to Plaintiff Class Members. (See, e.g., Ex. 76, proposed Am. Jdmt. ¶¶ 18-19.)

8. As this Honorable Court recognizes, the current Judgment goes far beyond the rulings expressed in the 2014 Decision.

A judgment should not include issues that were not decided, should state the specified amount that is due to the plaintiff without need for computation, and be sufficiently clear and definite to enable the parties to comply with its requirements. (Cal. Judges Benchbook: Civ. Proc. Trial (2013) § 16.2; *Coronado Cays Homeowners Ass'n v. City of Coronado* (2011) 193 Cal.App.4th 602, 611; *Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 185; Civ. Proc. Code § 626; *M.B. Zaninovich Inc. v. Teamster Farmworker Union 946* (1978) 86 Cal.App.3d 410, 413.)

One issue concerning post-judgment interest recently arose that has called into question whether the judgment is sufficiently "clear and definite" as presently drafted.

Code of Civil Procedure section 685.020(a) provides that "interest commences to accrue on a money judgment on the date of entry of the judgment." Civil Code section 3287 provides for the payment of interest from the date that compensation is certain, and California Rules of Court, Rule 3.1802, provides that judgments must include "the interest accrued since the entry of the verdict." Accordingly, the law requires that interest begins to accrue on May 30, 2014—the date of the 2014 Decision—and 7% interest will accrue post-judgment until paid in full. (*Holdgrafer v.*

Unocal Corp. (2008) 160 Cal.App.4th 907, 935 (damages are rendered certain on the date that the jury's verdict awarding such damages is entered); Civ. Code § 3287.) Post-judgment interest is especially important in this case because the compensation is based on OPC's comparable rent survey that took place in February 2014. Without post-judgment interest, the comparable rent data used to calculate the rent differential owed would become stale and Plaintiffs' compensation would diminish by the day. Every judgment accrues post-judgment interest as a matter of law without any need for reference to post-judgment interest in the Judgment itself. But the City has informed Plaintiffs that it will not pay any post-judgment interest because it reads the Judgment as precluding any post-judgment interest. The City had never before claimed that post-judgment interest does not accrue. And nowhere has Judge Hayes ruled that post-judgment interest does not accrue. Although the City agreed that the Plaintiff Class Member Compensation Spreadsheet submitted to the Court on or about September 9, 2014, accurately reflects each and every Class Member's compensation owed up through May 30, 2014, it does not agree that any interest accrues thereafter, no matter how much time passes before the City eventually pays the judgment. By claiming that the Judgment reflects the City's contention that "the park has not closed," the City raises a principal argument in favor of setting aside and vacating the judgment and granting Plaintiffs' Motion for New Trial—namely, that Judge Hayes did not expressly reaffirm in the 2014 Decision his prior rulings that the effective park closure date was November 23, 2003.

The proposed Amended Judgment corrects the seeming lack of clarity on the accrual-of-interest issue by attaching the Compensation Spreadsheet to the judgment and stating in paragraph 5: "After May 30, 2014, interest shall accrue on all amounts owed to all Class Members at the rate of 7% per annum through the date, post-judgment, when said Class Member receives payment in full." (Ex. 76.) By attaching the Compensation Spreadsheet to the Amended Judgment, the specified amount for each and every Class Member will also be made certain and definite without need for computation. The proposed Amended Judgment also cures the objections that Plaintiffs had lodged with the Court.

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Conclusion

With this motion, the Court has a chance to fix a "broken" judgment and bring peace to a battle-worn group of elderly class members who are losing their homes. Justice means different things to different people. But everyone knows what injustice means. Allowing the City to displace hundreds of class members without providing sufficient funds to actually enable people to find replacement housing would be an injustice. Allowing the City to demand less from itself than it demands from other park owners would be wrong. And allowing the City to benefit from its false assertions on which many of the Special Master's recommendations were based would be unjust. If we are fortunate, every lawyer and every jurist has at least one opportunity to make a difference that impacts the many, an opportunity to take something half-finished and make it shine, and to do something a little bit bold, not *because* it's bold, but because it's the right thing to do. Holding the City accountable for its unlawful attempts to force seniors out of the park without the financial security legally required and needed to ensure adequate replacement housing, preserving a dwindling array of affordable housing options, and disallowing self-serving double standards in order to restore public confidence in government—these are goals of the noble laws this Class Action has sought to enforce, and ones worthy of the legacy of everyone involved in this decade-long struggle.

Accordingly, Plaintiffs request, in this order: (1) that the Court issue a modified judgment that more accurately reflects, among other things, the true costs of relocation and the number of months of rent differential recommended by the Special Master (see proposed judgment, Ex. 76); (2) in the alternative, that the Court issue an additur that allows the City an election of either accepting an increased judgment amount or facing a new trial on the compensation issues; and (3) in the event the City rejects the additur, or if the Court declines to issue an additur, that the Court grant Plaintiffs' motion for new trial on the damages/compensation issues.

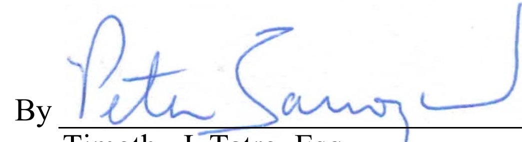
Lastly, Plaintiffs respectfully direct the attention of this Honorable Court to the requirements of Code of Civil Procedure sections 657 and 660 that the order granting new trial and stating grounds for granting the motion must be entered in the permanent minutes of the court, or be signed and filed by Your Honor, within 60 days after service of notice of entry of judgment. Plaintiffs are

informed and believe that based on the August 20, 2014 date and file-stamp on the Judgment, the expiration of the 60-day period will occur on or about October 20, 2014. If the court hadn't already included a specification of reasons as part of its order granting new trial, the court must submit those reasons in writing and file them with the clerk of the court within 10 days after issuing the order granting the new trial.

Respectfully Submitted,

DATE: Sept. 18, 2014

TATRO & ZAMOYSKI, LLP

By 

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