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17 ATTORNEYS FOR DEFENDANTS
 18 City of Aliso Viejo, City of San Juan
 19 Capistrano, and City of San Clemente

20 **UNITED STATES DISTRICT COURT**
 21 **CENTRAL DISTRICT OF CALIFORNIA**

22 HOUSING IS A HUMAN RIGHT
 23 ORANGE COUNTY, et al.,

24 Plaintiffs,

25 v.

26 THE COUNTY OF ORANGE, et al.,

27 Defendants.

Case No. 8:19-cv-00388-PA
 Honorable Percy Anderson

**DECLARATION OF JACOB M.
 ROTH IN OPPOSITION TO *EX*
PARTE MOTION FOR
 TEMPORARY RESTRAINING
 ORDER**

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DECLARATION OF JACOB M. ROTH

I, Jacob M. Roth, declare and state:

1. My name is Jacob (“Yaakov”) Roth. I am a partner at the law firm of Jones Day and counsel to Defendant City of San Clemente in this action. I am a member in good standing of the Bar of the District of Columbia, and have applied for admission *pro hac vice* to represent the City of San Clemente in the U.S. District Court for the Central District of California in this action.

2. I make this Declaration in opposition to Plaintiffs’ *Ex Parte* Motion for a Temporary Restraining Order. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, I would competently testify regarding such matters.

3. Attached as Exhibit A is a true and correct copy of a letter that was sent by Carol Sobel, counsel for Plaintiffs in this action, to the City Attorney for the City of San Clemente on May 22, 2019, threatening to seek an *ex parte* TRO.

4. Attached as Exhibit B is a true and correct copy of a letter that I sent to Carol Sobel on May 23, 2019, on behalf of the City of San Clemente, in response to her letter of the previous day.

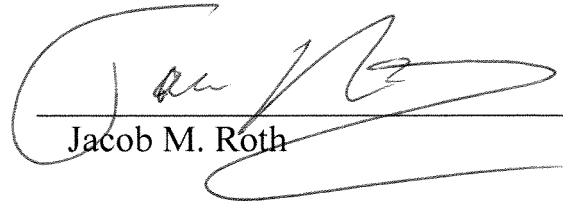
5. On Friday, June 21, 2019, I conferred for approximately 45 minutes with Brooke Weitzman and Catherine Sweetser, counsel for Plaintiffs in this action, about the motion to dismiss that the City of San Clemente intended to file.

6. Attached as Exhibit C is a true and correct copy of an email exchange between myself and Brooke Weitzman, counsel for Plaintiffs in this action, that began on Monday, June 24, 2019, and continued on Friday, June 28, 2019, regarding the meet-and-confer about the City of San Clemente’s motion to dismiss.

7. Attached as Exhibit D is a true and correct copy of an email exchange between myself and Carol Sobel, counsel for Plaintiffs in this action, that began on Friday, June 28, 2019, and continued through Sunday, June 30, 2019, regarding Plaintiffs’ intent to seek a TRO on an *ex parte* basis.

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I declare, under penalty of perjury, under the laws of the United States of America, that the foregoing is true and accurate. Dated this 1st day of July, 2019, in Washington, District of Columbia.



Jacob M. Roth

EXHIBIT A

LAW OFFICE OF CAROL A. SOBEL
725 ARIZONA AVENUE, SUITE 300
SANTA MONICA, CALIFORNIA 90401
T. 310 393-3055 E. CAROLSOBEL@AOL.COM

By email: SCOTT.SMITH@BBKLAW.COM

May 22, 2019

Scott Smith
Best, Best & Krieger
18101 Von Karman Ave., Suite 1000
Irvine, CA 92612

Re: City of San Clemente

Dear Mr. Smith:

We write to you in your capacity as the City Attorney for the City of San Clemente to object to the action taken by the City last night to require all homeless individuals in the City to move to a fenced parking lot that will be subject to monitoring and security. During the Council meeting, the City Manager stated that you had approved the ordinance.

We understand that the urgent ordinance passed by the City is believed to then allow enforcement of the City's anti-camping ordinance based on the City's misreading of the en banc decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). No doubt deliberately, in attempting to wrap itself in the cloak of authorization, the City misquoted Judge Berzon's amended opinion and omitted a key word. The full quote by Judge Berzon, at p. 617, is as follows:

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie or sleep on the streets ... at any time and at any place." [*Jones v. City of Los Angeles*, 444 F.3d Id. 1122, [1138 [(9th Cir. 2006)]. We hold only that "so long as there is a greater number of individuals in [a jurisdiction] than the number of available beds [in shelters]." the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* **That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.**

The City's representation of the *Martin* decision, omitting the key word "indoors," is fatal to the rationale for the urgency ordinance. The City may not avoid the requirement of adequate **indoor** shelter. If the City enforces its urgent ordinance, it will violate the Eighth Amendment under *Martin*.

The City's position is especially untenable in view of the decision not to open a shelter, to do the least it believes it can lawfully do, and the deliberate actions of the City over the past five years to

resist the City's obligations to address the needs of the homeless population in the City, even in the face of rebukes by the Court for the failure to adopt a lawful General Plan. Moreover, though the City complained in a recent press release that it could not afford a shelter and was not getting assistance from the County, the City refused to pass an emergency shelter motion, which would allow it to receive considerable funds through the HEAP grants. The City also has an offer of nearly \$1 million dollars from the Emergency Shelter Coalition. In any event, a defense of indigency will not excuse the City from the obligation to comply with the law in this instance.

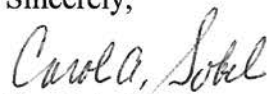
We also address the location the City announced last night. The City's plan replicates the inhumane camps now holding refugees and asylum seekers along the southern border of the United States. Unsheltered individuals are not criminals. The City is not even willing to provide basic shelters for individuals at this location. Instead, the lot identified last night would require individuals to live on a gravel base that would absorb and radiate heat as we enter summer, threatening the health of unsheltered individuals, providing no shade, and no access to necessary services. In a word, it is inhumane and cannot be the basis for enforcement and jailing people who do not move to this location.

Moreover, it is our understanding that the City selected this location, in part, touting that it will be entirely fenced and security would be provided. Requiring unsheltered individuals to stay in a fenced area with security around them would, in our view, be an unlawful seizure and a violation of the Fourth Amendment

We hope that the City will reconsider its decision and, at a minimum, not move forward with enforcement. If the City chooses to do so, we will have no option but to file a lawsuit seeking emergency relief and will contact you to meet and confer on an ex parte application for a temporary restraining order.

We are available to discuss this matter.

Sincerely,


Carol A. Sobel


Brooke Weitzman
Elder Law & Disability Rights Ctr.


Catherine Sweetser
Schonbrun, Seplow, Harris & Hoffman

cc: San Clemente City Council
Sheriff Don Barnes
County Counsel Leon Page

EXHIBIT B

JONES DAY

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Direct Number: (202) 879-7658
yroth@jonesday.com

May 23, 2019

BY ELECTRONIC MAIL

Carol A. Sobel
Law Office of Carol A. Sobel
725 Arizona Avenue, Suite 300
Santa Monica, CA 90401

Re: City of San Clemente

Dear Ms. Sobel:

I write in response to your letter of May 22, 2019, addressed to City Attorney Scott Smith. Please be advised that the City of San Clemente has retained Jones Day as special counsel for matters relating to your pending (as-yet unserved) lawsuit. Accordingly, I would appreciate if you would please direct any future communications on this subject to my attention.

On the merits, your complaints about the City's recently enacted ordinance (the "Urgency Ordinance") are frivolous, evidently designed merely as a scare tactic to pressure the City or its contract law enforcement personnel. The Urgency Ordinance designates an area of public property on which camping is permitted for individuals unable to obtain indoor shelter, while making clear that the City's anti-camping prohibitions will be fully enforced outside that designated area.

In a set of detailed findings, the City explained the grounds for this action. Among other things, unrestricted homeless encampments have obstructed public rights of way and impeded access to public facilities and infrastructure, including for disabled persons. Some of these new encampments, adjacent to electrical boxes, utilities, train platforms, and coastal areas, raise serious health, safety, sanitation, and environmental concerns that the City is obligated to address. And, as noted in your recently filed Amended Complaint, City residents have allegedly resorted to "self-help" by taking actions that threaten the safety and well-being of the homeless population. For all of these reasons, it makes abundant sense to consolidate camping activity—which the City cannot outright *forbid* for homeless individuals who lack an alternative sleeping site, as the City has long recognized—in a designated area that ameliorates these problems. Once the camping is confined to a designated area, the City will be able to provide appropriate security (including for the benefit of the homeless population) as well as access to ADA-compliant bathrooms (to avoid the public urination and defecation that have been observed around the existing encampments) and outreach services through Mercy House. The San Clemente City Council unanimously enacted the Urgency Ordinance in light of these appropriate and well-documented policy considerations.

Carol A. Sobel
May 23, 2019
Page 2

Contrary to your assertions, the Urgency Ordinance plainly complies with *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). The court in that case made perfectly clear that the Eighth Amendment does not compel cities to “allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place.” *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)). Rather, it is only enforcement of anti-camping laws “*at all times and places*” that creates constitutional difficulty, because that categorical prohibition would effectively punish homeless individuals for the “involuntary” and “unavoidable” behavior of sleeping outside. *Jones*, 444 F.3d at 1138 (emphasis added); *see also Martin*, 920 F.3d at 617 (“As long as the homeless plaintiffs do not have *a single place where they can lawfully be*, the challenged ordinances ... punish them for something for which they may not be convicted under the Eighth Amendment.” (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)). Accordingly, the court expressly declined to hold that “a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside,” because “[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside *at particular times or in particular locations* might well be constitutionally permissible.” *Martin*, 920 F.3d at 617 n.8 (second emphasis added). Finally, if there were any doubt about the opinion’s scope, its author—Judge Berzon—repeated again in her opinion concurring in the denial of en banc rehearing that “the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment.” *Id.* at 589 (emphases in original).

Under the Urgency Ordinance, camping on public land in San Clemente is not forbidden “at all times and places,” or “in *all* public spaces,” and does not leave homeless individuals without “a single place where they can lawfully be.” To the contrary, the Ordinance designates public land on which homeless individuals *may lawfully camp*, thus forbidding camping only “in particular locations.” If a person insists on camping outside the designated zone nonetheless, that conduct is neither “involuntary” nor “unavoidable,” and the City is absolutely free to enforce its anti-camping ordinances against them, without running afoul of the Constitution. Put another way, nothing in the Eighth Amendment or the *Martin* decision entitles homeless individuals to sleep *anywhere they want* in the absence of indoor shelter; it merely requires that a lawful alternative be available to them. The Urgency Ordinance provides that lawful alternative.

Your letter objects that “[r]equiring” individuals to stay in a “fenced area with security” would violate the Fourth Amendment. You cite nothing to support that claim, which has no basis in law. It is obviously appropriate and lawful for the City to provide security on public property. Indeed, if the City were to operate an indoor shelter, that shelter too would be “fenced” and security would be present, yet you admit that such a shelter would allow for the full enforcement of anti-camping laws. The same is true of the designated camping site. In light of the allegation in your Amended Complaint that San Clemente has failed to take sufficient steps to stop the harassment of homeless individuals by third parties (Am. Compl. ¶¶ 104-105), it is ironic (to say the least) for you now to be complaining about provision of security for the designated camping zone.

Carol A. Sobel
May 23, 2019
Page 3

Finally, your letter complains—and this is obviously your true objection—that the City has not opened an indoor shelter. But there is no legal requirement to do so, and you certainly do not identify any. For its part, the *Martin* decision made clear that the court was “in no way dictat[ing] to the City that it must provide sufficient shelter for the homeless.” 920 F.3d at 617. Nor is the absence of an indoor shelter a new development that would warrant emergency relief in any event, particularly in light of your nearly three-month delay in serving the lawsuit that you filed against the City in February of this year.

Indeed, in reference to your threat to seek emergency relief from the Urgency Ordinance, please treat this letter as notice, under Federal Rule of Civil Procedure 11(c), that your claims have no legal or factual support and that the City of San Clemente intends to seek sanctions (including recovery of its attorneys’ fees) if such a proceeding is instituted.

Please do not hesitate to contact me if you have any questions or would like to discuss these matters further.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Yaakov M. Roth', with a stylized flourish at the end.

Yaakov M. Roth

CC: Brooke Weitzman
Catherine Sweetser
City Manager James Makshanoff
City Attorney Scott Smith
County Counsel Leon Page

EXHIBIT C

Roth, Yaakov M.

From: Roth, Yaakov M.
Sent: Friday, June 28, 2019 3:39 PM
To: 'Brooke Weitzman'
Cc: Catherine Sweetser; Carol Sobel; Vogt, John A.
Subject: RE: HHROC v. County of Orange: meet and confer recap

Thanks, Brooke. That makes sense. We may file as early as Monday but, like I said, we intend to be reasonable with respect to scheduling matters and extensions.

Yaakov Roth ([bio](#))
Partner
[JONES DAY® - One Firm WorldwideSM](#)
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Office +1.202.879.7658
yroth@jonesday.com

From: Brooke Weitzman <bweitzman@eldrcenter.org>
Sent: Friday, June 28, 2019 1:41 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>
Cc: Catherine Sweetser <csweetser@sshhlaw.com>; Carol Sobel <carolsobellaw@gmail.com>; Vogt, John A. <javogt@JonesDay.com>
Subject: Re: HHROC v. County of Orange: meet and confer recap

Hi Yaakov,

Cathy has been in depositions all week and I'm in Judge Carter's court today entering our settlement with the North Service Planning Area. I'm not sure I can get you a useful answer today. I know we intended to get back to you by today.

So, if you do file before we are able to have an internal meeting to make a decision, we appreciate your flexibility on the extended schedule. But if we are able to have an internal meeting before you file we will of course update you with our intent to amend and request leave of the court. Would that work?

Thanks,
Brooke

Brooke Weitzman

Directing Attorney and Co-Founder

Bweitzman@eldrcenter.org

714-617-5353

1535 E 17th Street, Suite 110

Santa Ana, CA 92705



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On Mon, Jun 24, 2019 at 1:26 PM Roth, Yaakov M. <yroth@jonesday.com> wrote:

Hi Brooke and Catherine,

Thank you for speaking with me on Friday about our anticipated motion to dismiss the Amended Complaint in this case. As a recap, I explained the grounds for our motion as to the various counts. You asked for some time to think about the issues and said you'd get back to me by the end of this week to let me know if Plaintiffs intend to seek leave to further amend the complaint. Under those circumstances, we'd discuss an appropriate stipulation. In the absence of a stipulation and amendment, we'd proceed to file our motion sometime within the next two weeks, and I agreed that we'd be flexible about scheduling, particularly around the July 4th holiday. Please let me know if I've missed anything important.

Thanks,

Yaakov

Yaakov Roth ([bio](#))
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yroth@jonesday.com

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EXHIBIT D

Roth, Yaakov M.

From: Roth, Yaakov M.
Sent: Sunday, June 30, 2019 11:07 PM
To: 'Carol Sobel'
Cc: Vogt, John A.; Brooke Weitzman; Catherine Sweetser
Subject: RE: Housing is a Human Right

Respectfully, Carol, we don't think it complies with the Local Rules or the Standing Order to notify us that you intend to seek a TRO without explaining the specific grounds for the motion or the relief sought, let alone why you think there is a current emergency that warrants extraordinary relief, more than a month after the site opened. At this point, all I know is that you object that the site is on a hill, but have not identified a single individual who has been unable to access the site as a result (probably because, as I explained, the City has offered to transport anyone who has trouble reaching the site). Candidly, we view your threatened motion as a plain abuse of the ex parte procedures, and will seek appropriate sanctions from Judge Anderson, including our fees for responding to the motion.

Thanks,
Yaakov

Yaakov Roth ([bio](#))
Partner
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Washington, D.C. 20001
Office +1.202.879.7658
yroth@jonesday.com

From: Carol Sobel <carolsobellaw@gmail.com>
Sent: Sunday, June 30, 2019 10:09 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>
Cc: Vogt, John A. <javogt@JonesDay.com>; Brooke Weitzman <brookeweitzman@gmail.com>; Catherine Sweetser <csweetser@sshhlaw.com>
Subject: Re: Housing is a Human Right

I was out most of the day, so the delay in getting back to you

This was filed as a class action so the affected persons are all putative class members subject to the site. There are a myriad of problems and some are simply not correctable because they are the same reasons why the City Planning Commission determined the City could not rebuild the animal shelter here or build a shelter for people here. I understand you are in DC but some of the lawyers on your team are local, as is BBK, and I assume that they are familiar with the location.

We not going to list here everything we believe is wrong with the site. Suffice to say that it is not an issue about whether there is a disability accessible toilet. Some of the more significant issues are not correctable. For example, to reach the campsite, a person needs to climb a hill no matter from which direction they approach the site.

We gave you notice, as required by our Local Rules and Judge Anderson's Standing Order, and intend to move forward. I understand that you are not able to tell us now whether you will oppose the motion. Once you see our papers you can evaluate whether you want to oppose the TRO.

On Sun, Jun 30, 2019 at 6:56 AM Roth, Yaakov M. <yroth@jonesday.com> wrote:

Thanks for understanding, Carol. I am based in DC, so I have not visited the camping area, which is why I need you to provide the specifics of your complaints. My understanding is that the bathroom facilities are ADA-compliant and that the City has offered transportation to the site for those who are unable to get there alone.

Regardless, I can make myself available at most times this week to discuss the issues. To provide a meaningful response, what I would need to know is (1) what exactly are the conditions that are allegedly impeding access to disabled persons; (2) who are the Plaintiffs who are impacted by these conditions, and how; and (3) what is the precise relief that you expect to seek from Judge Anderson. Once these questions are answered, I will promptly speak with our client to determine the City's position.

Thanks,

Yaakov

Yaakov Roth ([bio](#))
Partner
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yroth@jonesday.com

From: Carol Sobel <carolsobellaw@gmail.com>
Sent: Saturday, June 29, 2019 10:47 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>
Cc: Vogt, John A. <javogt@JonesDay.com>; Brooke Weitzman <brookeweitzman@gmail.com>; Catherine Sweetser <csweetser@sshhlaw.com>
Subject: Re: Housing is a Human Right

No need to apologize. One of my brothers is observant. I am the heretic in the family.

Have you been to the site? I was not there until a few days ago. The site does not accommodate disabilities, among other problems. It is unsafe for a variety of reasons.

On Fri, Jun 28, 2019 at 5:25 PM Roth, Yaakov M. <yroth@jonesday.com> wrote:

Carol, I apologize, but here on the east coast the sun is about to set, and I need to sign off for the Sabbath. I will be back online tomorrow night. My suggestion would be that we all try to connect by phone early on Monday, so that we can better understand what the accessibility issues are and who they are impacting. (I understand that Mr. Nichols has been living happily at the site for several weeks, despite being offered indoor housing, and Mr. James has accepted an offer of housing, and those are the only Plaintiffs who reside in San Clemente.) The City may well be willing to address particular accessibility issues that are brought to its attention, and I believe Judge Anderson would want us to explore those possible solutions before seeking emergency ex parte relief. By the way, what exactly is the relief that you would be requesting from Judge Anderson?

Thanks,

Yaakov

Yaakov Roth ([bio](#))
Partner
[JONES DAY® - One Firm WorldwideSM](#)
51 Louisiana Ave., N.W.
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Office +1.202.879.7658
yroth@jonesday.com

From: Carol Sobel <carolsobellaw@gmail.com>
Sent: Friday, June 28, 2019 8:03 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>
Cc: Vogt, John A. <javogt@JonesDay.com>; Brooke Weitzman <brookeweitzman@gmail.com>; Catherine Sweetser <csweetser@sshhlaw.com>
Subject: Re: Housing is a Human Right

I was in court so the delay in my response. The camp has multiole disability accessibility issues that have manifested as more people moved in and we have observed how the camp cannot respond to their needs. The camp is not accessible because of geography and topography and that is not correctable.

On Fri, Jun 28, 2019, 3:06 PM Roth, Yaakov M. <yroth@jonesday.com> wrote:

Hi Carol,

Could you please say a little more about the basis for this application? Specifically, what do you mean by “the conditions at the campsite” and why do Plaintiffs think they require emergency relief? As you know, the campsite has been operating for around a month. Also, when do you intend to make this application?

Thanks,

Yaakov

Yaakov Roth ([bio](#))
Partner
[JONES DAY® - One Firm WorldwideSM](#)
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Office +1.202.879.7658
yroth@jonesday.com

From: Carol Sobel <carolsobellaw@gmail.com>
Sent: Friday, June 28, 2019 5:51 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>; Vogt, John A. <javogt@JonesDay.com>
Cc: Brooke Weitzman <brookeweitzman@gmail.com>; Catherine Sweetser <csweetser@sshhlaw.com>
Subject: Housing is a Human Right

Gentlemen:

I write to notify you that Plaintiffs intend to move for a TRO based on the conditions at the campsite. Specifically, we intend to move on the 14th Amendment substantive due process claim and the statutory disability claims. As you may be aware, the City was at the site yesterday in force, purportedly doing code enforcement.

Judge Anderson's Standing Order requires us to advise you that we intend to file an Ex Parte Application for a TRO and inform the court of your position on the motion. Please advise whether you will oppose the motion.

Carol Sobel

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