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November 30, 2020

**PRIVILEGED SETTLEMENT COMMUNICATION PURSUANT TO EVIDENCE
CODE SECTIONS 1152 AND 1154**

Via Electronic Mail Only

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Re: *People's Homeless Task Force v. County of Orange, et al.*
OCSC Case No. 30-2019-01062485-CU-CR-CJC

Dear Mr. Byer:

Please be advised that this letter is sent for settlement purposes and therefore, pursuant to Evidence Code sections 1152 and 1154, neither this letter nor its contents shall be admissible as evidence or useable in discovery.

We believe that the County Defendants will ultimately prevail in the above-referenced litigation. Our belief is based upon a number of factors including, but not limited to, the recent depositions of the County's Persons Most Qualified, the fact that the Court denied the vast majority of your client's requests for relief at the initial preliminary injunction hearing, and the Court's wholesale denial of your second request for injunctive relief on September 24, 2019. However, given the current posture of this case, the pending December 16th hearing of the County's Motion for Protective Order, and the written discovery due from your client to the County, now may be a good time to explore an informal resolution of this case to avoid further litigation expenses. Accordingly, subject to approval of the Board of Supervisors, I suggest the following:

1. Payment of \$20,000 to reimburse the attorney's fees incurred by Plaintiff People's Homeless Task Force ("PHTF"); and
2. An agreement that the County will delete from Rule 46 of the Board's Rules of Procedure, the following sentence, "No question shall be asked of any Board or staff member without first obtaining permission of the Chair."

Though this provision in the Rule 46 clarifies that neither Board members or County staff will be subjected to compulsory questioning by members of the public during a public meeting absent permission of the Chair, to the extent Plaintiffs have incorrectly and perhaps deliberately

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misconstrued this language as a prior restraint on speech, other members of the public could similarly misinterpret the language. However, as I testified at deposition, and as evidenced by the Rules and by Board practice, absent an actual disruption to the meeting, members of the public have addressed the Board, and will continue to be able to address the Board, in whatever manner they choose. If a member of the public wishes to present his or her comments in the form of a question, or series of questions, he or she may do so. Plaintiffs have no evidence suggesting otherwise.

We offer these terms in exchange for a mutual release without admission of liability and full dismissal with prejudice of PHTF's entire action. Except as otherwise agreed, each party shall bear their own fees and costs.

We believe a resolution of this matter would be in the best interests of all parties given the status of upcoming discovery, the pleadings, the expense of further protracted litigation, the high likelihood of the County's success on the merits at summary judgment (or trial) and, finally, PHTF's exposure to significant attorneys' fees. Plaintiff's members must now undoubtedly realize the reality that no other local agency in the State does a better job than the County of Orange with respect to encouraging public participation, observing the Brown Act, and protecting the First Amendment rights of the public.

Our settlement proposal recognizes this reality while acknowledging your client's interest in resolving this dispute. However, we are prepared to take this matter to trial and will recommend an appeal of any ruling or opinion against the County's interest. The Board of Supervisors is committed to respecting the First Amendment rights of the public and if a higher court should make new law, applicable to all local agencies in the State (or perhaps the country), we will all benefit from the new guidance.

As you are aware, in August 2019, the Court denied PHTF's motion for preliminary injunction as to all of the relief requested by PHTF with two exceptions: (1) the Court enjoined County Defendants from enforcing a portion of Rule 46, and (2) the Court enjoined County Defendants from enforcing the portion of the Orange County Records Management Policy that authorizes the destruction of "transitory records" at "any time." PHTF's requests for provisional relief relating to Rule 23, Rule 44, Rule 47, and Rule 48 were categorically denied. Moreover, the prayer for injunctive relief relating to the Orange County Records Management Policy is now moot in light of PHTF's voluntary dismissal of the complaint's Fourth Cause of Action. As a practical matter, Plaintiff is therefore left with a *single claim* relating to its perhaps deliberate misinterpretation of Rule 46, but without any evidence that the Board has ever actually prevented a member of the public from asking questions during his or her public comment opportunity.

In addition, County Defendants presently have a Motion for Protective Order set for hearing before the Court on December 16, 2020. We believe the County will likely prevail considering the fact that PHTF has taken **no steps** to exhaust other means of discovery before noticing the depositions of members of the County Board of Supervisors, that much of the information sought is governed by the mental process privilege, and the fact that anything not

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governed by the mental process privilege is readily available on the County's website through publicly-available, "on demand" video recordings of the Board's meetings. Should the protective order motion fail, we reserve our right to seek immediate appellate review, including but not limited to any requests for an incident stay.

County Defendants also intend on filing a motion for summary judgment and believe such motion will be granted. Indeed, though the Court expressed reluctance to rule on the legal issues at the demurrer stage, there is no doubt that the County can conclusively establish, as a matter of law, that the content-neutral Rules of Procedure are valid on their face. Given the broad discretion afforded to legislative bodies under the First Amendment¹ as well as the relevant statutory authority, we believe that PHTF's Brown Act and Public Records Act claims will likewise fail. PHTF will also be hard pressed to meet its burden of demonstrating that there is a triable issue of material fact relating to the Board's application of its Rules.

Despite the above, and though we are prepared to take this case to trial, we propose, subject to Board approval, a payment of \$20,000 and the simple revision of Rule 46 to delete the sentence outlined above, in exchange for a release, dismissal, and waiver of costs/fees. The contemplated settlement agreement would be contingent on the Board's public approval of an amendment to the Rules striking the sentence discussed above.

This case has languished before the court since April of 2019, and more than two years will have passed once we reach our trial date, assuming the case even goes forward as presently set. This is will be your best opportunity to claim a win and close out this case. This settlement offer will expire at **5:00 p.m. on Friday, December 4, 2020.**

Very truly yours,

LEON J. PAGE
COUNTY COUNSEL



Leon J. Page

LJP:jb

¹ See, *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) ("On the other hand, a City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand...A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers. Of course the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion.")