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April 18, 2016

BY ELECTRONIC MAIL:
HWhatley@chwlaw.us

Holly O. Whatley, Esq.
Counsel for Stephen Fischer & City of Oxnard
Colantuono, Highsmith & Whatley, PC
300 S. Grand Avenue, Suite 2700
Los Angeles, California 90071

Re: ***Starr v. City of Oxnard, et al.***
Contempt of Court's Order of April 15, 2106 and Effect of Appeal.

Dear Ms. Whatley:

Your clients, the City of Oxnard and City Attorney Stephen Fischer, are presently in contempt of the Court's Order and the subsequent Writ issued on Friday, April 15, 2016 in the above-entitled matter. Unless Respondents Fischer and the City of Oxnard prepare and deliver the ordered title and summary prior to the close of business today, Petitioner Aaron Starr will move *ex parte* against Respondents for a finding that Respondents are in contempt of the Court's Writ of Mandate.

Code of Civil Procedure section 1209 provides that "[t]he following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court.... Disobedience of any lawful judgment, order, or process of the court." (Code Civ. Proc., § 1209(a)(5); see also, *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1548 ["Willful failure to comply with an order of the court constitutes contempt"]; *Moss v. Superior Court* (1998) 17 Cal.4th 396, 428 ["A trial court may take action to punish contempt under section 1218 of the Code of Civil Procedure".]) Code of Civil Procedure section 1218 provides that if a party is found to be in contempt of court, "a fine may be imposed on him or her not exceeding one thousand dollars (\$1,000), payable to the court, or he or she may be imprisoned not exceeding five days, or both."

As you know, the Order and Judgment of the Court on April 15, 2016 provided specifically that Respondents were to "**immediately** issue the title and summary to the proposed initiative measure introduced by Petitioner that seeks repeal of recently enacted wastewater rate increases adopted under Oxnard Municipal Ordinance No. 2901...."

(Emphasis added.) The Court ordered immediate issuance of the title and summary after it specifically found Respondents violated the California Elections Code:

[T]he Court finds Respondents had a ministerial duty to issue to Petitioner the requested title and summary for the proposed initiative on or before March 23, 2016 under California Elections Code section 9203; and

[T]he refusal of Respondents to issue a Title and Summary to Petitioner on or before March 23, 2016 was in violation of Elections Code section 9203....

Thereafter, by order of the Court, the Clerk of the California Superior Court for the County of Ventura issued a Writ of Mandate commanding Respondents Fischer and the City of Oxnard to:

1. **Forthwith** prohibit and cease your refusal to issue the requested title and summary in response to Petitioner's Notice of Intent to Circulate an Initiative Petition seeking to repeal recently enacted wastewater rate increases adopted under Oxnard Municipal Ordinance No. 2901;
2. **Immediately** perform your ministerial duty and issue the requested title and summary to Petitioner....

(See Exhibit A hereto (emphasis added).)

Black's Law Dictionary defines "Immediately" as: "Without interval of time, without delay, straightway, or without any delay or lapse of time." (Black's Law Dict. (6th ed.1990) p. 750, col. 1.)

The words "**immediately**" and "**forthwith**" have generally the same meaning. They are stronger than the expression "within a reasonable time" and imply **prompt, vigorous action without any delay.**

(*Id* (emphasis added).)

The Court's unambiguous Writ of Mandate was electronically served on counsel for Respondents and also personally served on Respondent Stephen Fischer on April 15, 2016. At the time of service on Respondent Fischer (the ministerial officer responsible for preparing the title and summary), I made a specific demand to Respondent Fischer that he *immediately* deliver the title and summary. Respondent Fischer refused to provide

Correspondence to Holly Whatley, Esq.

April 18, 2016

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the title and summary, in direct breach of the Court's Writ of Mandate. Thereafter, also on Friday, I made a specific request of you and your colleagues by email regarding immediate delivery of the title and summary. You did not respond to this email. Three days have now passed since the Writ of Mandate was issued by the Court, and no title and summary has been provided by Respondents.

Following the Court's Order on April 15, 2016, Respondent Fischer apparently transmitted a message to the Mayor and City Council:

Honorable Mayor and Councilmembers:

This afternoon, Judge Baio granted the writ directing me to issue the ballot title and summary for the proposed wastewater rate initiative. Judge Baio indicated that he was maintaining a level playing field to allow signatures to be gathered while preserving his ability to rule on whether the initiative should be placed on the ballot if it qualifies.

The Judge modified the petitioner's proposed order to push back the time by which title and summary must be provided from Monday to Wednesday at noon, in order to allow time for the Council to discuss the matter in closed session Tuesday night. During closed session, the Council will consider the City's options, including whether to appeal today's ruling.

(<http://citizensjournal.us/aaron-starr-wins-another-round-against-oxnard-utility-increase/>) (emphasis added).

Respondent Fischer's message severely mischaracterizes the Court's Order and the Writ of Mandate. The Court did not grant Respondents until April 20, 2016 at 12:00p.m. to *comply* with the Order and Writ. Instead, the Writ gives Respondents until April 20, 2016 at 12:00p.m. to provide the Return to the Writ, *confirming Respondents' compliance* with the Writ ("setting forth your compliance with the Writ"). The action compelled by the Writ of Mandate is to be completed "immediately," without any delay.

As a result of the foregoing, we expect "immediate" and "forthwith" compliance with the Court's Writ of Mandate, as directed by the Court, and in any event not later than close of business today. Failure to comply with the Writ by its own terms is a contemptible offense that we intend to rectify with Judge Baio with an Order to Show Cause as to why Respondents should not be held in contempt of the Court's Writ of Mandate.

Finally, even in the face of an appeal, the City's obligation to comply with the prohibitory writ issued by the Court on April 15, 2016 is not stayed. The accepted rule in California is that "prohibitory portions of an order are not automatically stayed pending appeal[.]" (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709; also *Kettenhofen v. Superior Court* (1961) 55 Cal. 2d 189, 191 [if an order is both mandatory and prohibitory in effect, an appeal stays only the mandatory provisions].)

Your law firm was specifically advised of this rule by the Fifth District Court of Appeal in a case virtually identical to the present case. In that case, the Fifth DCA advised the parties as follows:

The trial court found that [the City] has a ministerial duty and is required by law and by the California Constitution to issue a title and summary to the proposed measure. As such, the trial court found that City is prohibited from refusing to comply with its ministerial duty. The fact the trial court found City was expected to comply by a date certain did not transform the court order into a mandatory injunction.

As the trial court's [] order imposed a prohibitory rather than a mandatory injunction, there is no automatic stay in place to set aside. Consequently, City is required to abide by the trial court's direction.

(See Exhibit B hereto.)

As a result, any attempt by the City to use an appeal as continued justification to refuse to issue the title and summary would be highly improper and a patent misuse of the litigation and appellate process. Indeed, given the clear authorities controlling this area of law, an appeal could be seen as misuse of the appellate process altogether – with its sole purpose to justify continued denial of the title and summary to Mr. Starr. (See *S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 42 [“(C)ontinued pursuit of meritless litigation for an improper collateral purpose... actionable under malicious prosecution principles...”].)

City Attorney Fischer's statement (above) to the Mayor and Council is accurate in one respect -- his summary of the Court's reasoning for its ruling: "maintaining a level playing field to allow signatures to be gathered while preserving his ability to rule on whether the initiative should be placed on the ballot if it qualifies." This brings into sharp focus the impact of Respondent Fischer's continued refusal to issue the title and summary – it inherently creates an uneven playing field against Mr. Starr.

The unjustified delay by Respondents to issue the title and summary is causing Mr. Starr and the voters of the City of Oxnard irreparable injury relevant to their reserved

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constitutional rights. The plain meaning of “irreparable” damage as referring to injury that cannot be adequately remedied, is well-established. Black’s Law Dictionary defines “irreparable injury” as “[a]n injury that cannot be adequately compensated in damages.” (Black’s Law Dict. (6th ed.1990) p. 786, col. 1-2.) [“The remedy for which is commonly in the nature of injunctive relief”].) “Irreparable” means “not repairable; impossible to make good, undo, repair, or remedy: ir retrievable.” (Webster’s 3d New Internat. Dict. (1993) p. 1196.) The California Supreme Court has defined “irreparable injury” as “that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other.” (*Anderson v. Souza* (1952) 38 Cal.2d 825, 834.)

Parties subject to a court order do not maintain discretion to decide whether or not to comply. A public official’s voluntary refusal to comply with a duly authorized writ of mandate is undertaken at the peril of said public official.

It is the expectation of Mr. Starr and ours that the title and summary will be issued not later than close of business today. Thank you in advance for your anticipated cooperation. Please feel free to contact me if you have any questions or require additional information.

Very truly yours,



Brian T. Hildreth

cc: Jennifer L. Pancake (jpancake@chwlaw.us)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA, HALL OF JUSTICE

AARON STARR, an individual,

Petitioner,

v.

CITY OF OXNARD, a municipal
corporation; STEPHEN FISCHER, in his
capacity as Interim City Attorney of the City
of Oxnard; and DOES 1-10,

Respondents.

CASE NO. 56-2016-00480094-CU-PT-VTA
[PROPOSED] WRIT OF MANDATE

TO: STEPHEN FISCHER, OXNARD CITY ATTORNEY AND THE CITY OF OXNARD:

YOU ARE ORDERED, pursuant to order and judgment of this Court on April 15, 2016

to:

1. Forthwith prohibit and cease your refusal to issue the requested title and summary in response to Petitioner's Notice of Intent to Circulate an Initiative Petition seeking to repeal recently enacted wastewater rate increases adopted under Oxnard Municipal Ordinance No. 2901;
2. Immediately perform your ministerial duty and issue the requested title and summary to Petitioner; and

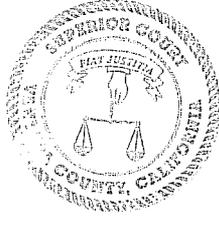
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3. File with this Court, with fax/email service to Petitioner, a Return to this Writ not later than ^{12:00 noon} 4:00p.m. on April ²⁰ ~~18~~, 2016, setting forth your compliance with the Writ set forth herein.

Dated: APR 15 2016

CLERK OF THE SUPERIOR COURT



Michael D Planet

BY: S. Legere
Deputy Clerk

S. Legere

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

JAN 16 2014

DOUG VAGIM et al.,

Petitioners,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

CITY OF FRESNO et al.,

Real Parties in Interest.

By

Deputy

F068541

(Fresno Sup. Ct. No. 13CECG03206)

ORDER

BY THE COURT:*

Generally, Code of Civil Procedure section 916 imposes an automatic stay upon the perfection of an appeal. However, while a mandatory injunction is stayed pending appeal (*Byington v. Superior Court* (1939) 14 Cal.2d 68, 70,) a prohibitory injunction is not. (*Ibid.*; *Paramont Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835.)

A determination of whether an injunction is mandatory or prohibitory is determined by the effect on the parties against whom it is imposed. A prohibitory injunction, which is a form of preventive relief, restrains specified behavior, by prohibiting a party from doing that which ought not to be done. (See Civil Code, § 3368.)

Despite incidental mandatory aspects, an injunction will not be stayed on appeal if it is substantially prohibitory in nature. (*United Railroads of San Francisco v. Superior Court* (1916) 172 Cal.80, 88.)

* Detjen, A.P.J., Franson, J., and Peña, J.

The trial court found that real party in interest, City of Fresno (City) has a ministerial duty and is required by law and by the California Constitution to issue a title and summary to the proposed measure. As such, the trial court found that City is prohibited from refusing to comply with its ministerial duty. The fact the trial court found City was expected to comply by a date certain did not transform the court order into a mandatory injunction.

As the trial court's November 25, 2013, order imposed a prohibitory rather than a mandatory injunction, there is no automatic stay in place to set aside. Consequently, City is required to abide by the trial court's direction. Accordingly, the Petition is denied.

Since the date for compliance with Code of Civil Procedure section 9203, subdivision (a) has passed, a new date for compliance should be set forthwith.

 _____ A.P.J.

PROOF OF SERVICE

I declare under penalty of perjury that the foregoing is true and correct. On January 16, 2014, I served the parties named below in said action by placing a true copy of the attached document(s) in a sealed envelope with postage thereon fully prepaid in the United States mail and/or by personal service addressed as follows:

Vagim et al. v. The Superior Court of Fresno County

F068541

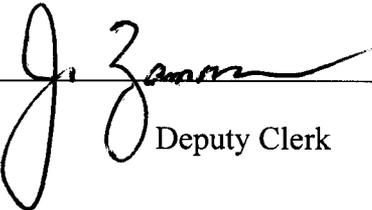
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300 S. Grand Ave., Ste. 2700
Los Angeles, CA 90071-3137

Fresno County Superior Court - Main
1100 Van Ness Avenue
Fresno, CA 93724

I hereby certify under penalty of perjury that the above is a true and correct statement.

Executed at Fresno, California on January 16, 2014.


Deputy Clerk