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CALIFORNIA, ex rel. CITY ATTORNEY OF THE
7 CITY OF SAN JOSE, and CITY OF SAN JOSE

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 CITIZENS FOR FREE SPEECH AND
12 EQUAL JUSTICE, LLC; GTL
13 ENTERPRISES, LLC,

14 Plaintiffs,

15 v.

16 CITY OF SAN JOSE,

17 Defendant.

Case Number: 5:18-cv-01919-BLF

**ANSWER AND COUNTERCLAIM FOR
VIOLATIONS OF THE SAN JOSE
MUNICIPAL CODE, CALIFORNIA
BUSINESS & PROFESSIONS CODE
§17200 et seq., INJUNCTIVE RELIEF
AND CIVIL PENALTIES**

18 PEOPLE OF THE STATE OF
19 CALIFORNIA, ex rel. CITY ATTORNEY
OF THE CITY OF SAN JOSE, and CITY
20 OF SAN JOSE,

21 Counterclaimants,

22 v.

23 CITIZENS FOR FREE SPEECH AND
24 EQUAL JUSTICE, LLC; GTL
25 ENTERPRISES, LLC; ATOUR
26 AMIRKHAS, an individual; GRACE
AMIRKHAS, an individual; and DOES 1
through 50,

27 Counterdefendants.
28

JURY TRIAL DEMANDED

ANSWER

1
2 Defendant City of San Jose (hereinafter "City") in answer to Complaint for Civil
3 Rights Violation, Injunctive and Declaratory Relief, and Damages (hereinafter "complaint"),
4 admits, denies, and alleges as follows:

5 The introductory paragraph at page 2 lines 2-9 of the complaint consists of
6 Plaintiffs' characterization of their own complaint as well as legal argument and conclusion
7 and, therefore, it requires no response; to the extent a response is required, the City
8 denies the allegations therein.

9 1. Answering paragraph 1, the City admits the allegations therein.

10 2. Answering paragraph 2, the City admits the allegations therein.

11 3. Answering the first sentence in paragraph 3, the City admits the allegations
12 therein. Answering the second sentence in paragraph 3, the City admits that it regulates
13 signs within the City; the City denies the remaining allegations therein.

14 4. Answering the first sentence of paragraph 4, it consists of legal conclusions
15 and, therefore, requires no response. Answering the second sentence of paragraph 4, it
16 consists of Plaintiffs' characterization of their own complaint and, therefore, requires no
17 response. Answering the third sentence of paragraph 4, in consists of legal argument and
18 conclusion and, therefore, requires no response.

19 5. Answering the first and second sentence of paragraph 5, they consist of
20 legal argument and conclusions and, therefore, require no response. Answering the third
21 sentence of paragraph 5, the City admits that it is a charter City in the County of Santa
22 Clara and that the real property is located in San Jose; the City denies the remaining
23 allegations therein.

24 6. Answering paragraph 6, the City admits that the parcel at 300 East Gish is
25 located in San Jose; the City denies the remaining allegations therein.

26 7. Answering paragraph 7, the City lacks sufficient information and belief to be
27 able to answer it and, therefore, denies the allegations therein.

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1 8. Answering paragraph 8, the City lacks sufficient information and belief to be
2 able to answer it and, therefore, denies the allegations therein.

3 9. Answering the first and second sentence of paragraph 9, the City lacks
4 sufficient information and belief to be able to answer it and, therefore, denies the
5 allegations therein; answering the third sentence of paragraph 9, it consists of legal
6 argument and conclusion and, therefore, requires no response.

7 10. Answering paragraph 10, it consists of legal argument and conclusions and,
8 therefore, requires no response; to the extent paragraph 10 requires a response, the City
9 denies the allegations therein; the City avers that San Jose Municipal Code sections
10 17.48.210 and 23.02.505 speak for themselves.

11 11. Answering paragraph 11, it consists of argument and conclusions and,
12 therefore, requires no response; to the extent a response is required, the City lacks
13 sufficient information and belief to be able to answer it and, therefore, denies the
14 allegations therein.

15 12. Answering paragraph 12, the City admits that on or about March 27, 2018,
16 Code Enforcement Inspector Manuel Duarte from the City of San Jose Department of
17 Planning, Building and Code Enforcement sent a letter to Atour Amirkhas and Grace
18 Amirkhas, the owners of the real property commonly known as 300 East Gish Road; the
19 City admits that a copy of the letter is attached to the complaint as exhibit A; the City avers
20 that the letter speaks for itself; the City lacks sufficient information and belief as to whether
21 Plaintiff GTL received this letter and, therefore, denies that allegation; the City denies the
22 remaining allegations in paragraph 12.

23 13. Answering the first sentence of paragraph 13, the City admits the allegations
24 therein; answering the second sentence of paragraph 13, it consists of Plaintiffs'
25 characterization of their own complaint and, therefore, it requires no response; to the
26 extent a response is required, the City denies the allegations therein.

27 14. Answering paragraph 14, it consists of legal conclusions and, therefore,
28 requires no response; the City avers that the City's Sign Ordinance speaks for itself.

1 15. Answering paragraph 15, it consists of legal conclusions and, therefore,
2 requires no response; the City avers that the City's Municipal Code speaks for itself.

3 16. Answering paragraph 16, it consists of legal argument and conclusions and,
4 therefore, requires no response; to the extent a response is required, the City denies the
5 allegations therein; the City avers that San Jose Municipal Code section 23.02.1310
6 speaks for itself.

7 17. Answering paragraph 17, it consists of legal argument and conclusions and,
8 therefore, requires no response; to the extent a response is required, the City denies the
9 allegations therein; the City avers that San Jose Municipal Code speaks for itself.

10 18. Answering paragraph 18, it consists of legal argument and conclusions and,
11 therefore, requires no response; to the extent a response is required, the City denies the
12 allegations therein; the City avers that San Jose Municipal Code speaks for itself and that
13 the *Reed v. Town of Gilbert* opinion speaks for itself.

14 19. Answering paragraph 19, it consists of legal argument and conclusions and,
15 therefore, requires no response; to the extent a response is required, the City denies the
16 allegations therein.

17 20. Answering paragraph 17, it consists of legal argument and conclusions and,
18 therefore, requires no response; to the extent a response is required, the City denies the
19 allegations therein; the City avers that San Jose Municipal Code speaks for itself and that
20 the *Reed v. Town of Gilbert* opinion speaks for itself.

21 21. Answering paragraph 21, the City incorporates the answers to paragraphs 1
22 through 20 as through fully set forth herein.

23 22. Answering paragraph 22, the City denies the allegations therein.

24 23. Answering paragraph 23, it consists of legal conclusions and, therefore,
25 requires no response; to the extent a response is required, the City denies the allegations
26 therein.

27 24. Answering paragraph 24, the City incorporates the answers to paragraphs 1
28 through 23 as through fully set forth herein.

1 25. Answering the first sentence of paragraph 25, the City denies the allegations
2 therein. Answering the remaining sentences of paragraph 25, they consist of legal
3 argument and conclusions and, therefore, require no response; to the extent a response is
4 required, the City denies the allegations therein.

5 26. Answering paragraph 26, it consists of legal conclusions and, therefore,
6 requires no response; to the extent a response is required, the City denies the allegations
7 therein.

8 27. Answering paragraph 27, the City incorporates the answers to paragraphs 1
9 through 26 as through fully set forth herein.

10 28. Answering paragraph 28, the City denies the allegations therein.

11 29. Answering paragraph 29, it consists of legal conclusions and, therefore,
12 requires no response; to the extent a response is required, the City denies the allegations
13 therein.

14 30. Answering paragraph 30, the City incorporates the answers to paragraphs 1
15 through 29 as through fully set forth herein.

16 31. Answering paragraph 31, the City denies the allegations therein.

17 32. Answering paragraph 32, it consists of legal conclusions and, therefore,
18 requires no response; to the extent a response is required, the City denies the allegations
19 therein.

20 33. Answering paragraph 33, the City incorporates the answers to paragraphs 1
21 through 32 as through fully set forth herein.

22 34. Answering paragraph 34, the City denies the allegations therein.

23 35. Answering paragraph 35, it consists of legal conclusions and, therefore,
24 requires no response; to the extent a response is required, the City denies the allegations
25 therein.

26 The remainder of the complaint consists of Plaintiffs' request for relief, to which no
27 response is required; to the extent a response is required, Defendant denies that Plaintiffs
28 are entitled to the relief sought in the complaint or to any relief whatsoever.

AFFIRMATIVE DEFENSES

1
2 1. The complaint fails to state a claim upon which relief can be granted.

3 2. Any harm Plaintiffs suffered was the result of negligent or otherwise wrongful
4 conduct of persons other than the City and the conduct of persons other than the City was
5 the sole and proximate cause of the injuries and damages alleged by Plaintiffs.

6 3. The complaint is barred by the applicable statutes of limitation, including, but
7 not limited to, those set forth in the California Code of Civil Procedure.

8 4. The City's actions towards Plaintiffs were the result of Plaintiffs' negligence
9 and/or criminal conduct and said actions of Plaintiffs were the sole and proximate cause of
10 the City's actions and any damages alleged by Plaintiffs in this case.

11 5. The City's actions were lawful and justified under the facts of this case.

12 6. Any damages or injuries suffered by Plaintiffs were occasioned by their own
13 wrongful actions.

14 7. Plaintiffs have failed to mitigate their damages.

15 8. Plaintiffs' claims are barred by the doctrine of res judicata.

16 9. Plaintiffs and each of them are collaterally estopped from bringing their
17 claims.

18 10. Plaintiffs and each of them do not have standing to bring all or a portion of
19 their claims.

20 11. Plaintiffs and each of them by their words, conduct and actions made a
21 knowing intentional and voluntary waiver of any and all claims raised in their complaint.

22 12. Plaintiffs' claims are barred by the equitable doctrine of estoppel.

23 13. Plaintiffs' claims are barred, in whole or in part, by the equitable doctrine of
24 unclean hands.

25 14. Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

26 15. The damages sought by Plaintiffs are unavailable to the extent that Plaintiffs'
27 alleged damages were caused by one or more acts or omissions of parties other than the
28 City.

1 16. Plaintiffs' claims are barred to the extent any recovery would result in unjust
2 enrichment to Plaintiffs.

3 17. Plaintiffs' claims are barred, in whole or in part, to the extent Plaintiffs have
4 failed to exhaust administrative remedies.

5 18. Plaintiffs' claims are barred, in whole or in part, by their failure to adequately
6 supervise the activities of their lessees.

7 19. Plaintiffs failed to join other necessary parties.

8 20. Plaintiff GTL Enterprises, LLC, does not own the parcel of land commonly
9 known as 300 E. Gish in San Jose.

10 21. Plaintiffs' claims are barred, in whole or in part, to the extent they do not own
11 or possess the requisite legal interest in the property commonly known as 300 E. Gish in
12 San Jose to assert any or all of their claims.

13 22. The City's conduct was lawful in all respects under the express federal,
14 state, and local laws then applicable.

15 23. Plaintiffs' claims are barred in whole or in part by the doctrine of assumption
16 of risk.

17 24. Plaintiffs lack standing under the United States Constitution, federal statutes
18 and common law to bring the claims set forth in the complaint.

19 25. Plaintiffs are not entitled to injunctive relief because they have failed to state
20 facts sufficient to show continuing acts, the threat of irreparable harm, or a reasonable
21 likelihood of repetition of the alleged conduct of the City if it were, in fact, established to be
22 wrongful.

23 26. Plaintiffs are not entitled to injunctive or declaratory relief because they have
24 a plain, common, adequate and speedy remedy at law.

25 27. The complaint does not describe its claims or events with sufficient
26 particularity to permit the City to ascertain what other affirmative defenses may exist, and
27 the City has insufficient knowledge or information to form a belief as to whether it has
28 additional, as yet unstated, affirmative defenses available to it. The City therefore reserves

1 the right to assert all affirmative defenses which may pertain to the complaint once the
2 precise nature of the claims is ascertained and in the event discovery indicates that they
3 would be appropriate.

4 WHEREFORE, the City prays:

- 5 1. That Plaintiffs take nothing by their complaint;
- 6 2. That Plaintiffs' complaint be dismissed with prejudice;
- 7 3. That the City be awarded its costs of suit, including attorney's fees incurred
8 herein; and
- 9 4. For such other and further relief as the Court deems proper.

10
11 **COUNTERCLAIM**

12 The People of the State of California, by and through Richard Doyle, City Attorney
13 for the City of San José, and the City of San José hereby allege as follows.

14 **JURISDICTION AND VENUE**

15 1. Jurisdiction in this Court is proper under 28 U.S.C. section 1367 and Federal
16 Rule of Civil Procedure 13 with respect to all counterclaims. All counterclaims arise out of
17 the same transaction or occurrence as Plaintiffs' claims and thus fall squarely within this
18 Court's supplemental/ancillary jurisdiction.

19 2. Venue in this Court is proper under 28 U.S.C. 1391(b) because the property
20 subject to this lawsuit is located within this judicial district, the violations alleged herein
21 occurred within this judicial district, Counterdefendants Citizens for Free Speech and
22 Equal Justice, LLC, and GTL Enterprises, LLC, have submitted to personal jurisdiction
23 within this judicial district by initiating the present action, Counterdefendants Atour
24 Amirkhas and Grace Amirkhas reside within this judicial district.

25 **PRELIMINARY ALLEGATIONS**

26 3. Richard Doyle, as City Attorney of the City of San José, brings this action in
27 the public interest in the name of the People of the State of California for the purpose of
28 protecting the public health, safety and welfare.

1 4. The City of San José (“City”) is a municipal corporation in the County of
2 Santa Clara, State of California. The People and the City are collectively referred to herein
3 as “Counterclaimants,” unless otherwise stated.

4 5. The City has a population in excess of 750,000.

5 6. Counterclaimants bring this action under the Unfair Business Practices Law,
6 California Business & Professions Code section 17200, *et seq.* and 17500, *et seq.*, and
7 the provisions of the San José Municipal Code sections alleged herein.

8 7. Counterdefendants own property and/or transact business within the City,
9 County of Santa Clara, State of California.

10 8. The acts and omissions of Counterdefendants, and each of them, jointly and
11 severally, as alleged herein, are in violation of the laws and public policies of the City and
12 the State of California and are inimical to the rights and interests of the general public.
13 Unless enjoined and restrained by an order of the Court, Counterdefendants are likely to
14 continue to engage in the unfair and unlawful acts and omissions alleged herein.

15 9. Counterclaimants seek to perpetually enjoin Counterdefendants from
16 engaging in unfair and unlawful business practices, based on their acts and omissions
17 constituting violations of state and local regulatory laws, and based on their acts and
18 omissions contravening public policy, as alleged herein.

19 10. Counterclaimants seek civil penalties, costs, and fees as authorized by law.

20 11. Counterclaimants are informed and believe and on such information and
21 belief allege that during the relevant times herein, Counterdefendants, in their respective
22 capacities as property owners, business owners, business operators, business licensees,
23 commercial lessees, employees, representatives, servants, assignees, agents,
24 subsequent business owners, subsequent business operators, subsequent business
25 licensees, subsequent commercial lessees, subsequent employees, subsequent
26 representatives, and/or in other capacities currently unknown to Counterclaimants, are
27 persons responsible for the unlawful business practices, unfair business practices, and
28 state and municipal code violations as alleged herein at the real property located on

1 Assessor's Parcel Number 237-27-057, commonly known as 300 East Gish Road, within
2 the State of California, County of Santa Clara, City of San Jose.

3 12. Counterdefendants Atour Amirkhas and Grace Amirkhas, individuals, own
4 the real property located at 300 East Gish Road in San Jose, County of Santa Clara,
5 California (hereinafter "Subject Property") as husband and wife, as community property
6 with right of survivorship.

7 13. The City is informed and believes, and thereon alleges, that at all times
8 relevant herein, Counterdefendants Atour Amirkhas and Grace Amirkhas own, manage,
9 control and/or operate a business on the Subject Property, and are responsible for, or
10 caused, the construction and maintenance of sign structures and programmable electronic
11 signs on the Subject Property.

12 14. Counterdefendant GTL Enterprises, LLC, is a limited liability company
13 registered with the Office of California Secretary of State. Counterdefendant Atour
14 Amirkhas is a member of GTL Enterprises, LLC. The City is informed and believes, and
15 thereon alleges, that at all times relevant herein, Counterdefendant GTL Enterprises, LLC,
16 owns, manages, controls and/or operates one or more businesses on the Subject
17 Property, and is responsible for, or caused, the construction and maintenance of sign
18 structures and programmable electronic signs on the Subject Property.

19 15. Counterdefendant Citizens for Free Speech and Equal Justice, LLC, is a
20 limited liability company registered with the Office of California Secretary of State. The City
21 is informed and believes, and thereon alleges, that at all times relevant herein,
22 Counterdefendant Citizens for Free Speech and Equal Justice, LLC, owns, manages,
23 controls and/or operates one or more businesses on the Subject Property, and is
24 responsible for, or caused, the construction and maintenance of sign structures and
25 programmable electronic signs on the Subject Property.

26 16. Counterclaimants are informed and believe and on such information and
27 belief allege that during the relevant times herein, Counterdefendants violated provisions
28 of the San Jose Municipal Code, and conducted otherwise unlawful business practices,

1 and unlawfully created and continue to create a nuisance in violation of the San José
2 Municipal Code as alleged herein within the State of California, County of Santa Clara,
3 City of San José.

4 17. Counterclaimants are informed and believe and on such information and
5 belief allege that Does 1 through 100, inclusive, are persons or entities responsible for the
6 public nuisance, unlawful business practices, and/or unfair business practices based upon
7 their acts and/or omissions in one or more of the capacities set forth herein.

8 Counterclaimants are ignorant of these fictitiously named Counterdefendants, but will
9 amend this Counterclaim to state each such Counterdefendant's true name when such
10 information has been ascertained.

11 18. Whenever reference is made in this Counterclaim to any act of
12 Counterdefendants, such allegations shall be deemed to mean the act of each and every
13 Counterdefendant, including, without limitation, the individually named Counterdefendants
14 herein and Does 1 through 100, and each of them, acting both individually and jointly.

15 19. Counterclaimants have not yet completed their investigation in this case, in
16 part because Counterdefendants have not allowed them access to inspect the Subject
17 Property. Counterclaimants' investigation may uncover additional violations of the City's
18 Sign Ordinance on the Subject Property that may require amendment of this counterclaim
19 in the future.

20 20. In March 2018, the City received a complaint regarding installation of an
21 oversized digital display on the Subject Property in violation of City and/or state law or
22 regulations.

23 21. San Jose Municipal Code section 23.02.410 defines the term "programmable
24 electronic sign" as follows: "Programmable electronic sign" means a type of animated sign
25 capable of displaying words, symbols, figures, or images that can be electronically or
26 mechanically changed by remote or automatic means. The elements may be internally
27 illuminated or may be illuminated by reflected light. The sign may be part of a permanent
28 sign that is not a programmable electronic sign. "Programmable electronic sign" includes

1 sign display screens commonly known as liquid crystal display (LCD), plasma and digital
2 displays, and their functional equivalents. This definition applies whether the display is
3 used to produce a series of still images, or images that appear to move on the display
4 screen.

5 22. San Jose Municipal Code section 23.02.1010.A.5 prohibits programmable
6 electronic signs, unless expressly allowed in Title 23 of the Municipal Code.

7 23. Title 23 of San Jose Municipal Code does not expressly allow programmable
8 electronic signs at the Subject Property.

9 24. The Subject Property, Assessor Parcel Number 237-27-057, is situated at
10 East Gish Road, and is immediately adjacent to U.S. Route 101 ("US-101") and the
11 junction and interchange of US-101 and Interstate Highway 880 ("I-880").

12 25. The programmable electronic signs are adjacent to, visible from, and fronting
13 US-101 South and from US-101 North.

14 26. Title 23 of San Jose Municipal Code does not allow a sign visible from a
15 freeway at the Subject Property.

16 27. San Jose Municipal Code section 23.02.1010 prohibits signs facing and
17 visible from a freeway, unless the parcel where the sign is located is separated from the
18 freeway by another public right-of-way or unless the parcel has direct access to the
19 freeway, among other conditions.

20 28. The Subject Property is not separated from US-101 or I-880 by a public right-
21 of-way nor does it have direct access to US-101 or I-880.

22 29. San Jose Municipal Code section 23.02.236 defines "freeway sign" as "a
23 large freestanding sign oriented to and designed to be viewed from a freeway."

24 30. Title 23 of San Jose Municipal Code, including but not limited to section
25 23.04.035, and state law, prohibit freeway signs on the Subject Property.

26 31. On or about March 27, 2018, the City sent a letter to the owners of the
27 Subject Property, Counterdefendants Atour Amirkhas and Grace Amirkhas, informing
28 them that the City's Department of Planning, Building, and Code Enforcement received a

1 complaint concerning installation of an oversized digital display without permits on the
2 Subject Property; the letter requested prompt contact in order to arrange a property
3 inspection. The City received no response to the letter.

4 32. On or about April 11, 2018, in response to a contact attempt by telephone,
5 Counterdefendant Atour Amirkhas referred the City Inspector to attorney Timothy
6 Kassouni.

7 33. On or about April 12, 2018, the City was served with a lawsuit concerning the
8 sign on the Subject Property, challenging the City's Sign Ordinance, among other issues.

9 34. On or about April 17, 2018, the City issued a written warning notice to the
10 owners of the Subject Property, Counterdefendants Atour Amirkhas and Grace Amirkhas,
11 informing them that the City's Department of Planning, Building, and Code Enforcement,
12 the Code Enforcement Division, has received and confirmed a report of the following
13 violations of the San Jose Municipal Code at the Subject Property:

14 i. Violation of San Jose Municipal Code section 23.02.820: "No person shall
15 erect, maintain or suffer, or cause to be erected, maintained or suffered,
16 any sign except in strict conformity with this title [23]."

17 ii. Violation of San Jose Municipal Code section 23.02.1300.A: "No person
18 shall erect or alter, or cause to be erected or altered, any sign except
19 pursuant to a development permit issued in accordance with Chapter
20 20.100 or pursuant to approval in accordance with Section 23.02.1300.C
21 below, unless exempted from such requirement by Section 23.02.1310."

22 San Jose Municipal Code section 23.02.1300.C provides in part: "Signs not
23 approved in conjunction with a development permit issued pursuant to
24 Chapter 20.100, and the alternation of existing signs may be approved by: .
25 . . 3. A sign permit or sign permit adjustment issued pursuant to Section
26 23.02.1330. . . ."

27 iii. Violation of San Jose Municipal Code section 24.01.130: "It shall be
28 unlawful for any person to erect, construct, enlarge, alter, repair, move,

1 improve, remove, convert, demolish, equip, use, occupy or maintain any
2 building or structure in the city, or cause or permit or suffer the same to be
3 done, in violation of this title [24] or in violation of any of the provisions of
4 the Codes adopted hereunder.”

5 iv. Violation of San Jose Municipal Code section 24.02.100: “Except as
6 specified in this part, no building, structure or building service equipment
7 regulated by this title and the technical codes shall be erected, constructed,
8 enlarged, altered, repaired, moved, improved, removed, converted or
9 demolished unless a separate, appropriate permit for each building,
10 structure or building service equipment has first been obtained from the
11 building official.”

12 35. The warning notice required the following corrective action by May 18, 2018:
13 “Remove electronic sign or obtain permit for electronic sign constructed without
14 Planning/Building approvals.” The warning notice noted that in the event of failure to timely
15 correct the violations, an administrative citation may be issued and a fine of \$250 may be
16 imposed.

17 36. Counterdefendants have built and maintain a sign structure and freestanding
18 electronic programmable signs on the Subject Property without a permit for the sign
19 structure and signs and without a building permit for the sign structure and signs, in
20 violation of San Jose Municipal Code, including, but not limited to sections 23.02.820,
21 23.02.1300, 24.02.100.

22 37. Counterdefendants have built and maintain sign structures and
23 programmable electronic signs on the Subject Property in a location where the sign
24 structure and signs are not allowed, in violation of San Jose Municipal Code, including, but
25 not limited to sections 23.02.820, 23.02.1010.5, and 23.02.1010.9.

26 38. Violations have occurred from March 2018 through the present, at the
27 Subject Property, which has continually been owned, operated, maintained and/or used in
28 violation of the San Jose Municipal Code and state law.

FIRST COUNTERCLAIM FOR RELIEF

**ACTION FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES
UNDER SAN JOSE MUNICIPAL CODE**

[Public Nuisance--“Nuisance Per Se”]

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3
4
5 39. Counterclaimants incorporate by reference paragraphs 1 through 38 as if set
6 forth in full herein.

7 40. Counterclaimants bring this first counterclaim for relief under San Jose
8 Municipal Code based on a continuing public nuisance created by Counterdefendants’
9 acts or omissions alleged herein from March 2018 through the present, constituting
10 violations of San Jose Municipal Code at the Subject Property.

11 41. Counterclaimants further bring this first counterclaim for relief to enjoin and
12 abate violations of the San Jose Municipal Code section 1.13.040 prohibiting a public
13 nuisance.

14 42. Counterdefendants have acted in one or more of the capacities set forth
15 above, and in those respective capacities Counterdefendants have conducted,
16 maintained, and/or permitted a nuisance, directly or indirectly, based on the use of the
17 Subject Property in violation of San Jose Municipal Code.

18 43. Whenever a violation of San Jose Municipal Code based on acts or
19 omissions of Counterdefendants is alleged, it shall include causing, permitting, aiding,
20 abetting, suffering or concealing the facts of such acts or omissions.

21 44. The violations of the San Jose Municipal Code constitute a “public
22 nuisance,” are subject by ordinance to injunctive relief and civil penalties, and so each of
23 these violations constitutes a “nuisance per se” as a matter of law.

24 45. California Government Code section 38771 provides that, by ordinance, the
25 City’s legislative body may declare what constitutes a public nuisance.

26 46. San Jose Municipal Code section 23.02.830 provides that “[t]he erection of
27 any sign in violation of this title [23] shall be, and is hereby declared to be, unlawful and a
28 public nuisance.” It further provides that “any court of competent jurisdiction may award

1 any relief as will abate or remove such use and restrain any person from using any
2 property contrary to the provisions of this title [23],” and that “[a]n injunction may be issued
3 by any court of competent jurisdiction for any violation of this title upon suit by the city.”

4 47. Additionally, San Jose Municipal Code section 1.08.010.G provides: “Any
5 condition existing in violation of any of the provisions of any state or federal law or
6 regulation or of this Code or any other city ordinance shall be deemed a public nuisance
7 and may be abated by the city. Nuisance shall include, but is not limited to, the factors in
8 Section 1.13.050.”

9 48. San Jose Municipal Code section 1.13.050.A defines “public nuisance” as:

10 The maintenance or use of property in the city in a manner that jeopardizes
11 or endangers the health, safety or welfare of persons on the premises or in
12 the surrounding area; or real property that has been the situs of nuisance
activity including, but not limited to the following:

13 The maintenance or use of property in the city in a manner that
14 violates, or real property that has been the situs of a violation of, any
15 provision of this code or any other city, state or federal law or
regulation.

16 49. San Jose Municipal Code section 1.08.015.A provides: “In addition
17 to all other remedies provided by law, any provision of this code may be enforced
18 by injunction issued by the superior court upon a suit brought by the City of San
19 Jose.”

20 50. San Jose Municipal Code section 1.08.015.B provides that:

21 In addition to all other remedies, as part of any civil action brought
22 by the City, a Court may assess a civil penalty in an amount not to
23 exceed two thousand five hundred dollars per violation for each
24 day, payable to the City, against any person who commits,
continues, operates, allows or maintains any violation of any
25 provision of this code.

26 51. San Jose Municipal Code section 1.13.040 provides that: “No person may
27 maintain or use property or allow their property to be maintained or used in a manner that
28 creates or fosters the creation of a public nuisance.”

1 52. San Jose Municipal Code section 1.04.110 provides that: “Whenever in this
2 code any act or omission is made unlawful, it shall include causing, permitting, aiding,
3 abetting, suffering or concealing the facts of such act or omission.”

4 53. Counterclaimants allege that the ownership, building, and maintenance of
5 programmable electronic signs on the Subject Property, without permits, in violation of
6 San Jose Municipal Code and state law, has created or fostered creation of a public
7 nuisance.

8 54. Counterclaimants further allege that the ownership, building, and
9 maintenance of programmable electronic signs without permits on the Subject Property
10 create a risk to the public’s health, safety and welfare.

11 55. Counterdefendants have violated the San Jose Municipal Code by owning,
12 building, and/or maintaining programmable electronic signs on the Subject Property in a
13 manner that jeopardizes or endangers the health, safety or welfare of persons on the
14 premises or in the surrounding area, which constitutes a public nuisance.

15 56. Counterdefendants have acted in one or more of the respective capacities
16 set forth herein relative to this cause of action. In those respective capacities, said
17 Counterdefendants have conducted, maintained, and/or permitted a nuisance, directly or
18 indirectly, based upon the ownership, building and/or maintaining programmable
19 electronic signs on the Subject Property.

20 57. The acts or omissions of the Counterdefendants have resulted in the
21 ownership, building, and/or maintenance of programmable electronic signs on the
22 Subject Property in a manner that jeopardizes or endangers the health, safety or welfare
23 of persons on the premises or in the surrounding area.

24 58. Counterclaimants bring this first counterclaim for relief to abate the
25 nuisance alleged herein.

26 59. The continuing public nuisance alleged herein constitutes great and
27 irreparable harm as a matter of law.

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1 72. Counterdefendants have acted in one or more of the capacities set forth
2 above as to this counterclaim. In those respective capacities, said Counterdefendants
3 have engaged in unfair and/or unlawful business practices on the Subject Property by
4 conducting, maintaining, or permitting a nuisance based upon the continued ownership,
5 building and maintenance of programmable electronic signs on the Subject Property in
6 violation of the San Jose Municipal Code, in a manner that jeopardizes or endangers the
7 health, safety or welfare of persons on the premises or in the surrounding area,
8 constituting a public nuisance under California Civil Code sections 3479 and 3480.

9 73. The ownership, building and maintenance of programmable electronic signs
10 on the Subject Property have created a “public nuisance” within the meaning of California
11 Civil Code sections 3479 and 3480. Thus, they constitute an unfair business practice in
12 contravention of established public policy.

13 74. The maintenance or use of the Subject Property in such a manner that
14 jeopardizes or endangers the health, safety or welfare of persons on or around the
15 premises and resulting in unsafe conditions of property is a “public nuisance” as defined in
16 San Jose Municipal Code section 1.13.050.A.1 and as such is an unfair business practice
17 in contravention of established public policy.

18 75. The maintenance or use of the Subject Property in such a manner that
19 violates or has been the situs of a violation of any provision of San Jose Municipal Code or
20 state law or regulation is a “public nuisance” as defined in San Jose Municipal Code
21 section 1.13.050.A.3 and as such is an unfair business practice in contravention of
22 established public policy.

23 76. Whenever a violation of the San Jose Municipal Code based on the acts or
24 omissions of Counterdefendants is alleged, it shall include causing, permitting, aiding,
25 abetting, suffering or concealing the facts of such acts or omissions.

26 77. Counterdefendants have acted in one or more of the respective capacities
27 set forth herein as to Counterclaimants’ third counterclaim for relief. In these respective
28 capacities, said Counterdefendants have violated provisions of the San Jose Municipal

1 Code and provisions of California Business and Professions Code as alleged in the first
2 and second counterclaims herein, and have contravened the public policies set forth in
3 said provisions of San Jose Municipal Code and California Business and Professions
4 Code, and each of them, including without limitation San Jose Municipal Code Title 23
5 and Chapter 1.13 at the Subject Property.

6 78. Counterdefendants have received or will receive income and other benefits
7 from their unlawful ownership, building and maintenance of programmable electronic signs
8 on the Subject Property, which Counterdefendants would not have received had
9 Counterdefendants not engaged in the violations of the San Jose Municipal Code and
10 California Business and Professions Code as described in this counterclaim.

11 79. Counterclaimants bring this third counterclaim for relief to perpetually enjoin
12 the unfair and unlawful business activities alleged herein and for civil penalties under
13 California Business and Professions Code section 17206.

14 Wherefore Counterclaimants pray for the relief requested below.

15 **PRAYER FOR RELIEF**

16 WHEREFORE Counterclaimants demand judgment as follows:

17 A. For a temporary, preliminary, and permanent injunction restraining and
18 enjoining Counterdefendants from engaging in or performing, directly or indirectly, any and
19 all acts or practices in violation of San José Municipal Code including, but not limited to, Title
20 23, Chapters 1.08 and 1.13, specifically, the creation of a public nuisance as defined in San
21 Jose Municipal Code sections 23.02.830 and 1.13.050.

22 B. For a final and permanent injunction restraining and enjoining
23 Counterdefendants from engaging in or performing, directly or indirectly, any and all acts or
24 practices in the State of California that constitute unfair competition in violation of California
25 Business and Professions Code sections 17200, *et seq.*, including, but not limited to,
26 violations of Title 23 and Chapter 1.13 of San Jose Municipal Code.

27 C. Counterclaimants pray that, as part of any restraining order, or preliminary
28 and/or permanent injunctive relief ordered by the Court, Counterdefendants who are

1 subject to said injunctive orders be required to notify any prospective purchaser of the
2 Subject Property, any lessee, and other successor in interest of the existence of said
3 injunctive orders, and of their application to successors in interest, prior to entering into
4 any agreement to sell or lease the Subject Property, or any portion thereof, which is the
5 subject of said injunctive orders.

6 D. For civil penalties in the amount of TWO THOUSAND FIVE HUNDRED
7 DOLLARS (\$2,500) per day per violation, in an amount according to proof, under San
8 Jose Municipal Code section 1.08.015.B.

9 E. For Counterclaimants' costs of suit incurred in this action, including but not
10 limited to, the costs of investigating and prosecuting this action incurred by the City of San
11 Jose.

12 F. Counterclaimants pray that Counterdefendants pay reasonable attorney's fees
13 as permitted by law, including but not limited to those provided under California Code of Civil
14 Procedure section 1021.5 and San Jose Municipal Code section 1.08.016.

15 G. For such other and further relief as is proper and just.

16
17 Respectfully submitted,

18 Dated: May 3, 2018

RICHARD DOYLE, City Attorney

19
20 By: s/ Margo Laskowska
21 MARGO LASKOWSKA
Sr. Deputy City Attorney

22 Attorneys for PEOPLE OF THE STATE OF
23 CALIFORNIA, ex rel, CITY ATTORNEY OF
24 CITY OF SAN JOSE, and CITY OF SAN
25 JOSÉ