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July 12, 2022

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RE: **PERK; Del Toro v. City of San Diego**

Dear Officer Devore:

While this letter is addressed to you, I am assuming you will share its contents with all of those we are representing in the above-referenced case.

Last Friday, July 8<sup>th</sup>, we appeared in Department 69 of the Superior Court before the Honorable Judge Catherine Bacal for our initial Case Management Conference.

The court observed that there is a demurrer scheduled for late October. I indicated that we were requesting that the hearing be advanced so we can bring the pleadings to a close and get on with trying the case. I indicated, too, that our case, as a request for declaratory relief, is entitled to calendar preference under Code of Civil Procedure § 1062.3. The court agreed, but indicated that until the pleadings were set, preference is not required.

It occurs to me that I have not completely explained the civil litigation process to you. So, before I go on, I want to do so. Please do not be offended if I am explaining things you already know.

A civil case is initiated by the filing of a complaint. A complaint is a written document referred to as a "pleading" and it is essentially a statement that alleges that the defendant did something contrary to the plaintiff's interests and that the plaintiff is entitled to relief of some sort.

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There are two kinds of civil relief, legal and equitable. Legal relief is a plea for monetary damages. Equitable relief is a plea for an order of some sort, such as an injunction or a declaration of the respective rights of the litigants. This goes back centuries to English law and some of the forms continue to follow original patterns. For example, for relief at law the parties are entitled to a trial by jury. For equitable relief, however, the parties are limited to a trial to the court without a jury.

I can, at some point, give you more detail and historical background with respect to the distinction between law and equity, if you would like. But, for now, it is sufficient to point out that there is a difference, though both kinds of cases are heard by the same courts.

We have sued for equitable relief in this case. That is an advantage to us because trials to the bench (as opposed to a jury) are entitled to preference and will get on calendar much more quickly than actions at law.

When a complaint is filed and served, the defendant has four choices. It can file an answer, which is a pleading that essentially says "I didn't do it and if I did I had a right to"; a demurrer, which is a kind of motion to dismiss that says that taking everything alleged in the complaint as true, the plaintiff is not entitled to relief as a matter of law. The defendant can also file a motion to strike, which is a technical motion having to do with defects in pleading or they can do nothing, in which case will go by way of default.

The City has filed a demurrer but set it months out so it can delay our receiving relief. I will not give you my opinion of the demurrer because I think it is inadvisable for us to provide written advice on this lest our advice be released to the City. Suffice it to say that we do not think the demurrer is well done or sustainable. It is a badly reasoned and badly drafted pleading that makes untenable arguments.

But until the demurrer is overruled and the City is forced to file an answer, the pleadings are "open", and the case is not at issue. So, our first goal is to get past the pleading stage and into the meat of the litigation. As a result, I requested that the court advance the hearing, given that the City has irresponsibly threatened public safety by threatening to fire police officers and firefighters from already understaffed departments.

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Judge Bacal is a fine judge who has an extremely clogged calendar so advancing dates is difficult. However, the court did so on our request and set our date for hearing on the demurrer a month earlier than it was originally set. That moves us along at least a little more swiftly.

Judge Bacal asked the deputy city attorney if he really thought he was going to win the demurrer in a clear effort to get the case moved along. He said he thought it was meritorious and provided us with an advance look at the City's main argument.

When I indicated that the case had taken on more urgency in light of the City's irresponsible threat to the jobs of firefighters and police officers, Judge Bacal invited me to bring a motion to prevent that. *That does not indicate that she is inclined to grant the motion* only that she is willing to entertain it. That is extremely important because it indicates a mind more open to our application than some other courts have been.

These are very positive developments.

In the meantime, we have served requests for production of documents and special interrogatories the responses to which are due momentarily. We anticipate that the City will stonewall us and provide no substantive responses. We are prepared for that eventuality and will immediately request court intervention if the City does so.

We are also preparing to notice the deposition of the city manager which will include a request for documents.

In addition to this, we are actively exploring the potential of amending our complaint to include claims having to do with the improper mandate of testing and the unjustifiable means of administering the tests. This has to be a longer discussion and I do not want to have that discussion in print. Suffice it to say that we need to be very skillful and focused with respect to this argument because there is a flip side that could hurt us.

It is clear that the powers that be are attempting to gin up another COVID panic over the latest variant so we can anticipate that the City will hold fast to its position and, perhaps, attempt to solidify it by imposing even more intrusive mandates. We are prepared to respond to them immediately. When even the ever-dishonest Doctor Fauci

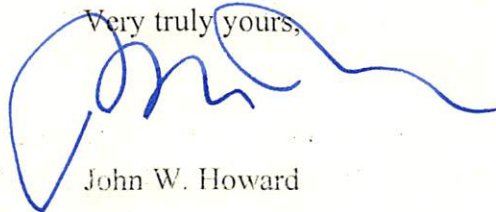
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admits that the vaccines do not work – as he did today – it is hard to sustain a panic or to justify a mandate.

In any event, this is substantial progress and while it is not moving as swiftly as we would like, we have now had the opportunity to inform the judge what the case is about and the court is willing to entertain our arguments.

I will keep you apprised of developments as they arise. Meanwhile, if you have any questions, please do not hesitate to contact me or any member of our team.

Very truly yours,



John W. Howard

JWH/dd