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**ALL CITIES REALTY, INC.**

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

ALL CITIES REALTY, INC.

Plaintiff

v.

CF REAL ESTATE LOANS, INC.

Defendant

) Case No: SACV05-615 AHS  
) (MLGx)

) **OPPOSITION TO DEFENDANTS'  
) MOTION FOR AWARD OF  
) ATTORNEY'S FEES AND COSTS  
) OF SUIT AND TERMINATING  
) SANCTIONS**

) Date: February 23, 2009  
) Time: 10:00 a.m.  
) Ctrm: 10-A

**AND RELATED COUNTER-CLAIM**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I INTRODUCTION**

4 After dissipating the various smokescreens that Defendants have blown  
5 throughout the course of these proceedings (and the other pending actions), this  
6 lawsuit boils down to one fundamental question: Does Defendant's use of the  
7 Re/Max All Cities Realty name infringe upon Plaintiff's federal trademark of All  
8 Cities Realty? The answer is so obvious that any additional discussion would be  
9 insulting to the average consumer.

10 Defendant's motion should be seen for what it really is – a desperate and  
11 misleading attempt to bamboozle the Court into dismissing an action that will likely  
12 cripple Defendant's business. By taking excerpts of various written communications  
13 out of context and speculating, Defendant has cleverly built an argument of litigation  
14 abuse which is a total fiction, and which falls apart upon even cursory scrutiny. In  
15 fact, Defendant has knowingly presented falsehoods to the Court in this motion as  
16 pointed out below. Defendant and its counsel should not be permitted to continue to  
17 file false material with impunity.

18 Defendant's motion is constructed upon four basic different (and false) items:

- 19 (1) Plaintiff has filed separate actions against others seeking similar relief  
20 for an improper purpose;
- 21 (2) The All Cities Realty Website which posts the various pleadings and  
22 orders of the Courts, and contains Joseph Miner's opinions on the  
23 litigation and the people involved, is litigation abuse;
- 24 (3) A settlement proposal that Joseph Miner transmitted to people who are  
25 NOT parties to this action was improper; and
- 26 (4) Privileged settlement discussions with attorneys who are not counsel of  
27 record in this proceeding are somehow wrongful and should be used  
28 against the person who spoke them in confidence.

1 The timing of this motion should also be scrutinized. Its hearing date is less  
2 than 30 days before trial, yet the web site has been up and running since late 2006.  
3 The other lawsuits have been pending for several years (the State Court action  
4 against the agents was filed in July 2006, and the Hollymax action was filed in  
5 February 2008, one year ago). The settlement letter sent by Miner occurred in early  
6 October 2008, and the settlement discussions of which Defendant complains  
7 occurred in the summer of 2008. So why wait to the eve of trial to file this motion?  
8 Again, the answer is so obvious that Plaintiff will leave the question for Defendants'  
9 reply brief.

10 This motion is frivolous, constitutes an example of the very litigation abuse of  
11 which Defendant complains, and should be denied outright.

12 **II UNDER THE PREVAILING LEGAL STANDARDS, NO SANCTIONS**  
13 **ARE WARRANTED AGAINST PLAINTIFF**

14 In Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991), the Court stated that it  
15 may assess attorney's fees when a party has acted in bad faith, vexatiously,  
16 wantonly, or for oppressive reasons. None of that occurred here. Defendant's  
17 complaint in this motion boils down to the following: that Plaintiff improperly filed  
18 two other actions and abused his First Amendment Privilege of free speech. Both of  
19 these accusations are false, as explained in excruciating detail below. Even if these  
20 accusations were partially true, they do not rise to the level of sanctionable conduct  
21 under the prevailing legal standards.

22 In Chambers, the sanctionable conduct consisted of fraud (placing property  
23 out of the reach of court and withholding information from the court), filing false  
24 and frivolous pleadings, delay, and harassment. Here, there is no fraud, delay or  
25 filing of frivolous pleadings or harassment. In fact, almost all of the pleadings  
26 Plaintiff has filed are in reaction to the conduct of Defendant.

27 Another case Defendant relies on, Adriana Intern. Corp. v. Thoeren, 913 F.2d  
28 1406 (9<sup>th</sup> Cir. 1990), is also distinguishable. There, Plaintiff, through counsel, had

1 violated several court orders. To justify sanctions the Adriana court cited to  
2 plaintiff's failure to produce documents as ordered by the court and subsequently by  
3 the special master; failure to attend two different depositions; making  
4 misrepresentations regarding the depositions; and providing inaccurate information  
5 about the identity of the cross-defendants. [Id. at 1411.] None of this occurred here.  
6 Mr. Miner and his attorneys have not violated any court orders.

7 In Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337 (9<sup>th</sup>  
8 Cir. 1995), the district court granted Anheuser's motion to dismiss a counterclaim  
9 with prejudice because the sanctioned party had concealed documents for three years  
10 and continuously lied about their existence under penalty of perjury. In this case  
11 there is no willful and bad faith violation of discovery rules or withholding of any  
12 documents or any similar conduct that even comes close.

13 In Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9<sup>th</sup> Cir. 1983), the  
14 Court upheld the sanction of dismissal based on findings that plaintiff's denials of  
15 falsifying documents were knowingly false and plaintiff had willfully failed to  
16 comply with discovery orders.

17 There is no case cited by Defendant and to Plaintiff's knowledge none exists,  
18 that sanctions a Plaintiff from exercising his First Amendment right to free speech  
19 (or for speaking freely during settlement discussions). The cases Defendant cites as  
20 support for its argument that the court should use its inherent power to shift  
21 Defendant's litigation costs to Plaintiff and to dismiss Plaintiff's case all point to an  
22 extremely high level of misconduct as a prerequisite to fee-shifting or dismissal  
23 sanctions. Under no reasonable standards can one argue that by posting his opinion  
24 on a website Plaintiff has "abused the litigation process," resembling the same level  
25 of misconduct as lying to the court, withholding information, violating court orders  
26 or concealing documents.

27 As discussed below, all of Plaintiff's filings and postings were for legitimate  
28 purposes and were justified.

1 **III PLAINTIFF'S THREE ACTIONS WERE FILED FOR PROPER**  
2 **PURPOSES AND ARE MERITORIOUS**

3 Defendant has made a curious argument that by filing three actions, Plaintiff is  
4 somehow attempting to improperly pressure Defendant to settle. This fiction is  
5 preposterous, as a short recap of the procedural history of these actions readily  
6 demonstrates.

7 A. Facts and Circumstances Re: the Filing of this Action

8 When All Cities Realty® first discovered the use of its trade name by Re/Max  
9 All Cities Realty, it initiated communications asking that Re/Max All Cities Realty  
10 cease and desist from use of the All Cities Realty® trade name. Initially, Re/Max  
11 All Cities Realty agreed to cease and desist, but ultimately failed to do so. That led  
12 to the filing of this lawsuit. Almost four years after the filing, the trial is set to go  
13 forward on March 17, 2009.

14 B. Facts and Circumstances Re: the Filing of the State Court Action

15 During the proceedings in this All Cities Realty® v. Re/Max All Cities Realty  
16 action, Defendant Re/Max All Cities Realty disclaimed responsibility for its real  
17 estate agents' conduct in the use and marketing of the All Cities Realty® name. (See  
18 Declaration of Jeffrey F. Sax, ¶4, and Ex. A thereto.) Based upon this "verified"  
19 position, All Cities Realty® filed a second lawsuit against the disclaimed agents in  
20 California State Court, Case No. BC 355724 ("the State Court action") who had  
21 operated under the All Cities Realty® name. This list of agents was obtained  
22 directly from Re/Max All Cities Realty and from the Department of Real Estate.  
23 (See Declaration of Joseph Miner, ¶5.) The State Court lawsuit against the agents  
24 was an attempt to bring all parties responsible for using the All Cities Realty name  
25 before a judicial tribunal. There were no settlement discussions or warnings to  
26 Defendant prior to filing. In other words, Plaintiffs did not say in substance, if you  
27 do not settle, we will file this action against your agents and former agents. Plaintiff  
28 simply filed without comment. (See Declaration of Jeffrey F. Sax, ¶5.)

1           When Re/Max All Cities Realty learned of the State Court action, it sought to  
2 intervene in the State Court action and was allowed to do so. Re/Max All Cities  
3 Realty then sought a stay of the State Court action. During the “stay” proceedings,  
4 Re/Max All Cities Realty reversed its position and stated under penalty of perjury  
5 that it would defend and indemnify any named agent that requested it. (See  
6 Declaration of Jeffrey F. Sax, ¶16, and Ex. B thereto.) However, Re/Max All Cities  
7 Realty never provided any proof to the State Court that it had the financial  
8 wherewithal to honor its commitment to the agents, even to the extent that it could  
9 pay the first appearance fee on behalf of the agents, an amount in excess of  
10 \$600,000. Without being able to pay the first appearance fee, Re/Max All Cities  
11 Realty could not honor its stated commitment to defend the defendant agents in the  
12 State Court action, and certainly, based upon that assumption, could not honor its  
13 stated promise to indemnify them. On that basis, Re/Max All Cities Realty’s  
14 representations to its agents and the court were fraudulent.

15           In this regard, two points are relevant to this situation. First, this is one area  
16 where Defendant has intentionally misrepresented facts to the Court in its moving  
17 papers. Defendant claims: (i) that ALL 1,695 agents were indemnified and  
18 defended, yet only about 400 agents signed the indemnity agreement, leaving more  
19 than 1,200 without indemnity; and (ii) NONE of the agents are represented by David  
20 Sandelands or his firm (except those in the Hollymax action), and no other lawyer  
21 has been identified as representing them. Second, this was a subject of some of  
22 Joseph Miner’s commentary in his website – questioning how could Re/Max All  
23 Cities Realty honor its indemnity commitment (and as time marched on, especially  
24 in light of the deteriorating state of the real estate market). IN FACT, MR. MINER  
25 SUGGESTED TO THE READERSHIP THAT THEY CONSULT WITH THEIR  
26 OWN LAWYERS BEFORE ACCEPTING THE INDEMNITY AGREEMENT.  
27 (See the quotes from his web site below.) Mr. Miner could not have been more fair  
28 and forthright.

1 In the State Court action, the court granted Re/Max All Cities Realty's petition  
2 for a stay and currently the State Court action is stayed pending the outcome of the  
3 All Cities Realty® v. Re/Max All Cities Realty action. Because of the stay, there  
4 has been no litigation activity in that case since about September 2006. It cannot be  
5 litigation abuse.

6 C. Facts and Circumstances Re: the Filing of the Hollymax/Commbroker  
7 Action

8 Hollymax and Commbroker appeared as offices listed together/comingled  
9 with the other "offices" of Re/Max All Cities Realty on the Re/Max All Cities Realty  
10 website when in fact they were separate California Corporations. The agents of all  
11 three corporations were also comingled and alphabetically listed with photos directly  
12 under the All Cities Realty® logo under their newly adopted All Cities Realty  
13 "umbrella name" chosen by the Defendant. The identity of what corporation they  
14 each agent truly worked for was "hidden" from the public. Plaintiff did not discover  
15 their separate existence until late 2007 or early 2008 when the third lawsuit was  
16 filed. Again, it was an attempt to bring all responsible parties before the Court.

17 In deciding who to name as defendants in the Hollymax action, Plaintiff  
18 attempted to compare the list of defendants in the State Court action to the list of  
19 agents on the Hollymax and Commbroker web pages existing on the Re/Max All  
20 Cities Realty site to avoid duplication. Those additional agents were named. In  
21 addition, it was decided to name the brokers of record for the companies since they  
22 are responsible for all real estate related activity of the companies, and certainly the  
23 trade name under which the company does business falls within that ambit  
24 (especially since the Department of Real Estate requires that the broker of record  
25 sign off on the name before it is used). [See, e.g., Holley v. Crank, 386 F.3d  
26 1248 (9<sup>th</sup> Cir. 2004), California Business & Professions Code §§10130, 10158,  
27 10159.2(a), and 10211, Cal. Code Regs. Title X, §2740, Amvest Mortgage Corp. v.  
28 Antt, 58 Cal. App. 4<sup>th</sup> 1239, 1243 (1997), Milner v. Fox, 102 Cal. App. 3d 567, 575

1 (1980), Valdez v. Downey S&L Ass'n, 2007 U.S. Dist. LEXIS 31290 (N.D. Cal),  
2 California Code of Regulations §2731(a) [10 CCR 2731 (2008)], California Code of  
3 Regulations §2725 [10 CCR 2725 (2008)], and Holley v. Crank, 400 F.3d 667 (9<sup>th</sup>  
4 Cir. 2004).]

5 Defendant in this motion attempts to twist the procedural history of this third  
6 action in the motion with other stark falsehoods. Defendant does this by using  
7 privileged statements made in settlement. Importantly, Mr. Sandelands was not a  
8 participant in those settlement discussions so he can only speculate about what  
9 occurred. The attorney dealing with the settlement discussions for Defendant,  
10 Steven Spile, has not submitted a declaration. Defendant's misstatements about  
11 settlement discussions will be addressed later in this opposition.

12 In short, Plaintiff's 2<sup>nd</sup> and 3<sup>rd</sup> actions were not filed for the purpose of, nor  
13 were they ever used as threats to induce a settlement from Defendant here. They  
14 were filed to bring the responsible parties before a judicial tribunal and Plaintiff  
15 intends to see those actions through to their logical conclusion.

16 **IV THE ALL CITIES REALTY WEBSITE IS NOT A "LITIGATION**  
17 **ABUSE" AND PLAINTIFF HAS A CONSTITUTIONAL RIGHT TO**  
18 **MAINTAIN IT**

19 As discussed below, Plaintiff has an absolute First Amendment Constitutional  
20 Right to maintain a web site, post legal documents that were filed in the courts, and  
21 comment on them. If Defendant believes that the material posted is false, Defendant  
22 has a right to bring a defamation action.

23 A. Defendant Threatened to File a Separate Action against Joseph Miner  
24 and his Wife Based upon the Web Site if he did not Settle; Defendant  
25 then Filed it, and Shortly thereafter, Dismissed it

26 **During mediation in this case conducted on September 28, 2007, a Friday,**  
27 **Defendant threatened to do just that – bring a defamation action against Joseph**  
28 **Miner on the following Monday if Plaintiff did not settle the case. This is the**

1 very same litigation abuse that Defendant now brings as a centerpiece of its  
2 motion and the person who made that threat was none other than Re/Max All  
3 Cities Realty Vice President Dan Verdin who was being represented at that  
4 time by DAVID SANDELANDS, ESQ.

5 In fact, on October 4, 2007, as promised, Re/Max All Cities Realty filed a  
6 defamation action against Joseph Miner, Los Angeles Superior Court Case No.  
7 YC056028 (and to make certain it had impact, Defendant also sued Mr. Miner's wife  
8 with not a shred of evidence against her). In that action, Miner immediately  
9 propounded discovery via deposition notices. Instead of answering that  
10 discovery, Re/Max All Cities Realty dismissed the action on October 19, 2007!

11 In a conversation with Andrew Leff, State Court counsel for Re/Max All Cities  
12 Realty, Mr. Leff stated that the action was being dismissed for that very reason –  
13 Re/Max All Cities Realty did not want to engage in discovery. (See Declaration of  
14 Jeffrey F. Sax, ¶¶13-14 and Exs. C, D, E thereto.) Now that is true litigation abuse.

15 B. Plaintiff's Web Site Contains Disclaimers and Qualifications, and  
16 Honestly Alerts the Readers as to what they are Reading and Why the  
17 Material is Posted

18 Not only is Plaintiff's web site not litigation abuse, it was created for the exact  
19 opposite purpose – as a public service to the agents (who are Mr. Miner's colleagues  
20 in the same profession) who were being misinformed by Kelli Todd, Holly Thomas,  
21 David Sandelands, and the others representing the Defendants in this action. This is  
22 readily apparent from the conspicuous messages and disclaimers that appear  
23 throughout Mr. Miner's web site. For example, Mr. Miner provides the following  
24 disclaimer on the website in multiple areas ([www.remaxlawsuits.com/](http://www.remaxlawsuits.com/letterfromminer.htm)  
25 [letterfromminer.htm](http://www.remaxlawsuits.com/letterfromminer.htm)):

26 **“Disclaimer** -- This is the personal blog of Joseph Miner regarding  
27 the Remax All Cities Realty Federal and State lawsuits. The blog is  
28 posted to keep interested parties up to date on the day to day

1 proceedings of this contentious real estate related trademark litigation.  
2 This is the David v. Goliath story of a small real estate company with  
3 a registered Federal Trademark battling the WORLDS third largest  
4 Re/Max Franchise who decided to seize the registered Federal  
5 Trademark owned by ALL CITIES REALTY, INC. > ALL CITIES  
6 REALTY® -- Certainly there are two sides to every story. **This is my**  
7 **side of this story and my opinion of the issues**, the players, the  
8 interesting history of the Re/Max players, and the twists and turns of  
9 battling one of Re/Max International's largest franchisees for more the  
10 SIX YEARS. I believe everything written here, if stated as fact, is  
11 100% accurate, and if not stated as fact it is generally commentary or  
12 opinion of Joseph Miner. Most of the FACTS are backed up by public  
13 documents which can be downloaded. If you note ANYTHING that is  
14 stated as a FACT that is not accurate, please inform me and I will  
15 remove after investigation."

16 This disclaimer could not be more apparent. In fact, no one has ever notified  
17 Mr. Miner than anything on his web site is incorrect, even though more than  
18 40,000 distinct users have accessed the site.

19 Also contained on the web site is the following conspicuous text in caps and  
20 bold for the agents' benefit:

21 **"Don't Wait –CALL YOUR ATTORNEY TODAY ASK WHAT**  
22 **YOU SHOULD DO!"**

23 And:

24 "A note about choosing your legal counsel

25 This is my personal belief and I am not an attorney. Please do not  
26 consider this legal advice.

27 My personal opinion is that in most situations "free" advice is not  
28 often the best advice. During legal actions, in most situations a "free"

1 legal defense MAY NOT be YOUR best defense.

2 Would you rather have a public defender, or the dream team?

3 In other words, you get what you pay for. Additionally, any free legal  
4 counsel offered may be serving a different master and not keeping  
5 YOUR best interests at heart.

6 If you believe that your “free” legal counsel will be protecting  
7 someone else’s interest first, and your best interests second - you  
8 should think twice, and consult an outside attorney, before you sign  
9 up for any free representation.

10 You may be standing alone in that courtroom with the finger being  
11 pointed at YOU by that free legal counsel. You will not be able to  
12 point the finger back at those you may have trusted unless you have  
13 your own attorney.

14 An attorney, who is working for YOU and only YOU, will give YOU  
15 your best legal defense. Free legal advice, or a free legal defense may  
16 not be YOUR best defense and you may have to give up some of your  
17 legal rights to get the free defense. If you have been asked to sign on  
18 the dotted line to gain your free legal representation, then read VERY  
19 carefully and consult at least one another outside attorney before you  
20 sign any of your legal rights away.

21 My opinion is that one should ALWAYS consult several attorneys  
22 and make an informed decision before choosing what path to take in a  
23 situation such as this. Attorney consultations are generally free.”

24 How many blogs written by litigants have these types of disclaimers and warnings for  
25 the benefit of their readerships? Plaintiff speculates that the answer is one – Mr.  
26 Miner’s site.

27 A second and equally important reason the web site was also created was to  
28 allow All Cities Realty to combat the massive confusion that was created in the

1 marketplace by Defendant flooding the internet with Re/Max All Cities Realty web  
2 pages, links, advertisements and the like. Plaintiff's market recognition was reduced  
3 from prominent to zero because the public believed that Plaintiff's All Cities Realty  
4 was the same company as Defendant's Re/Max All Cities Realty. It was David's only  
5 chance to combat Goliath and attempt to survive. For Goliath to now ask this Court to  
6 confiscate David's slingshot and strike him on the head with it is pure "Chutzpah."

7 C. Plaintiff's Web Site and Commentary are Absolutely Protected Free  
8 Speech Under the First Amendment

9 Plaintiff has done nothing that would justify imposition of any type of  
10 sanctions under the Chambers standards as discussed above. He has not acted in a  
11 manner that would constitute bad faith, recklessness, delay, abuse or oppressive  
12 behavior. Rather, Plaintiff has exercised his constitutionally protected right to free  
13 speech. It is clear that speech over the internet is entitled to First Amendment  
14 protections. In Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997),  
15 the Court found that there is "no basis for qualifying the level of First Amendment  
16 scrutiny that should be applied to [the internet]." "The internet is a unique  
17 democratizing medium unlike anything that has come before." [Doe v. Cahill, 884  
18 A. 2d 451, 455 (Del. 2005).] Through the internet Plaintiff has sought to mitigate his  
19 damages and to protect his validly registered trademark by informing the public of  
20 the deception and confusion caused by Defendant's continued misappropriation of  
21 his trademark. Plaintiff certainly has the right to post his opinions on his website as  
22 courts have made clear that speech on the Internet is accorded the same First  
23 Amendment protection as speech on other forums. [Reno at 870; see also, Gertz v.  
24 Robert Welch, Inc., 418 U.S. 323 (1974), holding that opinions cannot be considered  
25 defamatory.]

26 In Krinsky v. Doe 6, 159 Cal. App. 4<sup>th</sup> 1154 (2008), defendants had posted  
27 alleged defamatory statements about the plaintiff on the internet. The Court ruled  
28 that these postings were not actionable and "while reflecting the immaturity of the

1 speaker, [these statements] constitute protected opinion under the First Amendment.  
2 [Id. at 1178.]

3 The fact that Plaintiff's opinions about the misappropriation of its trademark  
4 are ostensibly offensive to the Defendant, or that the Defendant would rather  
5 Plaintiff not publicize its grievances, opinions and the actions it is taking in relation  
6 to this case, does not justify this court sanctioning Plaintiff for publishing its views.  
7 "The fact that society may find speech offensive is not a sufficient reason for  
8 suppressing it. Indeed, if it is the speaker's opinion that gives offense, that  
9 consequence is a reason for according it constitutional protection." [F.C.C. v.  
10 Pacifica Foundation, 438 U.S. 726, 745 (1978).]

11 Plaintiff has not acted in bad faith and his website is nothing more than a  
12 passive bulletin board or a blog which presents his accounts of the legal actions,  
13 opinion regarding the continued violation of his trademark, and advice to the readers.  
14 Plaintiff has not violated a gag order or any other court order in that regard and should  
15 not be punished for Defendant's dislike of its exercise of freedom of speech.<sup>1</sup>

16 D. Defendants' Selected Excerpts from Plaintiff's Web Site do Not  
17 Establish Litigation Abuse; Plaintiff's Statements of Fact are Truthful  
18 and his Opinions are Constitutionally Protected

19 It should be noted that the web site is a passive "document." It is available to  
20 those who seek and find it, but it is not transmitted to any third party. It is informative  
21 only and subject to the above stated disclaimers and qualifications.

22 Although the web site speaks for itself and the Court is encouraged to visit and  
23 peruse it, Plaintiff will respond to only those excerpts that Defendant chose to  
24 highlight in its motion (beginning on page 13 of its points and authorities).

25 ///

26 \_\_\_\_\_  
27 <sup>1</sup> One good analogy might be to ask how Gloria Allred would react to Defendant's  
28 motion to suppress Plaintiff's right of free speech. Again, since the answer is  
obvious, Plaintiff will let the question speak for itself.

1           •     Pg. 13: The web site statement that the agents will be liable for  
2 trademark infringement if Remax loses this lawsuit is simply a statement of opinion,  
3 projecting what will happen in the future. Nevertheless, there is a good chance that  
4 it is a completely true statement under the principles of res judicata and collateral  
5 estoppel. See, e.g., Gottlieb v. Kest, 141 Cal. App. 4<sup>th</sup> 110 (2006), and People v.  
6 Sims, 32 Cal. 3d 468 (1982), where the Court stated:

7           “The legal issues in the proceedings do not have to be identical for  
8 collateral estoppel to apply. Rather, if a factual issue is a necessary  
9 element to the legal issues, and the factual issue is decided in the first  
10 proceeding, the party cannot relitigate the factual issue in the second  
11 proceeding. Such relitigation is barred by collateral estoppel.” [Id. at  
12 485.]

13 The parties to each action do not have to be identical. Privity is all that is required  
14 which is likely met by the agency relationship. [Rymer v. Hagler, 211 Cal. App. 3d  
15 1171, 1178 (1989).]

16           •     Pg. 13-14:

17           (i)     As stated by the Judge in the Hollymax/Commbroker case, once  
18 we prove that the mark is valid and protectable, it’s all downhill for Remax [This is a  
19 true statement since damages will be the only issue – See Judge Carney’s May 27,  
20 2008 order, pp. 3-4 from which these statements are extrapolated];

21           (ii)    If Remax does not pay the damages at trial, then we are forced to  
22 go after the agents [This is a statement of opinion after a contingency and showing  
23 reluctance to do so – nevertheless, the State Court action exists and is stayed pending  
24 the outcome of this action];

25           (iii)   When Remax does lose, a Pandora’s box of legal action will open  
26 for everyone [This is a true statement since the stays of the state court action and the  
27 Hollymax action will be lifted];

28           (iv)    The first appearance fee is more than \$600,000 [This is true –

1 1,695 defendants x \$350 each = \$593,250; however, in complex litigation where the  
2 case currently rests, the filing fee is \$500 or more per party];

3 (v) Once a trademark infringement is found in federal court it's just  
4 damages in issue in state court [This is true under collateral estoppel discussed above];

5 (vi) If they claim bankruptcy again, it will be one big nightmare for  
6 each agent who has worked there [This is true -- All of the following have previously  
7 filed for bankruptcy: Kelli Todd, Robert Todd, Re/Max Beach Cities Realty (which  
8 became Re/Max All Cities Realty) and now Commbroker, another Todd company is  
9 now Chapter 7 in bankruptcy -- See Declaration of Joseph Miner, ¶35 (pg. 17-18) and  
10 Exs. 8, 13, 14, 16, 17, thereto; and the statement of opinion that it will be a big  
11 nightmare is also correct].

12 • Pg. 14: (a) Ms. Todd committed perjury in her statements to the Court  
13 [This is a true statement -- see Declaration of Joseph Miner, ¶¶35 (pg. 17), 38, and 42],  
14 and (b) that Plaintiff had filed a perjury motion [This statement is technically  
15 incorrect; however, the Plaintiff was confused between a motion and pointing out the  
16 perjury in oppositions to Defendant's motions]; (c) the Commbroker web site was  
17 taken down right after we pointed out the perjury [This is a true statement -- see  
18 Declaration of Joseph Miner, ¶42].

19 • Pg. 15: Defendant is playing shell games, etc. This is a colorful  
20 statement of opinion by Plaintiff given the transfer of agents between their various  
21 companies based upon public records uncovered by Joseph Miner. As for proving that  
22 they are liars, see the paragraph above.

23 • Pg. 15: Defendant's attorneys have lied to the court and are more like  
24 David Copperfield the magician. Joseph Miner's declaration at ¶39 provides the  
25 explanation for this commentary:

26 During the course of this litigation I can not tell you how many  
27 times the Defendant's declarations to the court have been false or  
28 misleading. Although it would take weeks to assemble the

1 complete document list, there have been many. In the recent  
2 declaration to Judge Carney Ms. Todd tells the Court, under the  
3 penalty of perjury, she is no longer using the All Cities Realty  
4 name. Immediately I showed my counsel, Mr. Sax, more than 59  
5 pages still on the internet on the Re/Max Commercial Brokerage  
6 website that STILL used the name All Cities Realty at least twice  
7 on each page – that was September 2008 ... 10 months AFTER  
8 Mr. Sandelands, in another declaration, claimed Ms. Todd had  
9 abandoned the name and she signed that declaration also under the  
10 penalty of perjury. Time after time after time the statements have  
11 been false, hollow, slanted or spun to make black look white.  
12 Every time we are forced into a game of check the truth then...  
13 “got cha”. This is the exact reason I have dubbed David  
14 Sandelands “the magician” on my website. Some people may think  
15 that nickname is a compliment!

16 • Pg. 15-16: Real Estate agents employed by Defendant are mentored by  
17 Convicted federal fraudsters. **This statement is absolutely correct, as convicted**  
18 **fraud felons Robert Todd and Mike Hubbard are touted on Defendant’s website**  
19 **as mentors.** (see Declaration of Joseph Miner, ¶35 (pgs. 16-19) and Exs. 9-12, 18-23  
20 hereto.)

21 • Pg. 16: Kelli Todd is the alter ego of the corporation. This paraphrases  
22 the allegations in the first amended complaint in the Hollymax action.

23 • Pg. 16: Attempts to smear Kelli Todd by referencing the fraud  
24 convictions. There is nothing false about this material. Kelli Todd is guilty by  
25 continuing to employ the federal fraudsters with her company even though she knew  
26 of the fraud convictions and that both their real estate licenses had been revoked.

27 • Pg. 16: Threatens the agents by informing them that there are 60 days to  
28 trial and asking them whether they are on the witness list. There is no threat made

1 here and Defendant's characterization is ridiculous. Plaintiff is anxiously counting  
2 down the days to trial after almost four years of waiting.

3 • Pg. 16-17: The statement of opinion that this is not the last legal battle  
4 and it is litigation hell is totally accurate as two more cases wait in the wings for the  
5 conclusion of this case.

6 • Pg. 17: Defendants accuse Plaintiff of sending open emails to agents.  
7 That is false. These open letters exist passively on Plaintiff's web site and were not  
8 transmitted to any agents by Plaintiff.

9 Thus, while Defendants are ostensibly upset over the contents of the web site,<sup>2</sup>  
10 it withstands scrutiny and is protected free speech. It is not litigation abuse.

11 **V PLAINTIFF'S OCTOBER 8, 2008 SETTLEMENT LETTER TO NON-**  
12 **PARTIES TO THIS ACTION WAS NOT A LITIGATION ABUSE**

13 This is the second motion brought by David Sandelands, Esq.'s clients arising  
14 from that letter. The first was in the Hollymax action to attempt to disqualify Jeffrey  
15 F. Sax from representing Plaintiff. Much of that motion contained false information  
16 which was pointed out in the opposition (and it is one of the places where Kelli Todd  
17 committed perjury). That motion failed. Defendant, through Mr. Sandelands, has  
18 again presented the same false information and has also partially misrepresented what  
19 occurred in that motion and its outcome to try to convince this Court that it constitutes  
20 litigation abuse. Such conduct should not be condoned.

21 Although there is a lot of information to present in a short amount of space (it  
22 takes more effort to refute a falsehood than to boldly assert it), Plaintiff will provide a  
23 summary of the salient points.

24 Falsehood #1 – Defendant claims that the agents who received the email were  
25 represented by counsel (thus making the direct communication from Plaintiff to

26 <sup>2</sup> It appears that Defendant's complaints about the web site are contrived. In a  
27 meeting with Kelli Todd and Dan Verdin, Mr. Miner was told by them that the web  
28 site does not affect them at all and that they are not bothered one bit. (See  
Declaration of Joseph Miner, ¶34.)

1 opposing parties improper). To Plaintiff's knowledge NO RECIPIENT OF THE  
2 EMAIL was represented by legal counsel and the identity of such legal counsel still  
3 remains a mystery. A simple examination of each action is enough to establish this  
4 point.

5 In this "First Federal Action" the only parties are All Cities Realty, Inc. and  
6 Re/Max All Cities Realty. There are no agents named, so none are represented. In  
7 the State Court Action there are about 1,695 agents named. **None have appeared in**  
8 **the state court action.** Thus, Joseph Miner communicated directly with  
9 unrepresented individuals.

10 Kelli Todd made the bold statement that she would defend and indemnify any  
11 agent who asked and Re/Max All Cities Realty intervened in the action. The action  
12 was stayed before there was any other litigation activity including the filing of any  
13 answers. Only about 400 of the 1,695 agents have signed indemnity agreements but  
14 that is far different than retaining counsel for them and appearing with  
15 representation. In fact, in a pleading filed in the state court action, Holly Thomas  
16 (CF's in house counsel) submitted an unsigned declaration under David Sandelands'  
17 letterhead stating that CF would defend and indemnify any agent who asked. She  
18 attached some of the indemnification requests. None of them specifically stated that  
19 counsel was retained for them and Ms. Thomas did not state that CF had, in fact,  
20 retained counsel. It was only a prospective commitment to defend and indemnify  
21 when the time came. A copy of an August 2006 memo that she wrote to the agents  
22 is attached to the Sax Declaration as Exhibit B. That is far different than having  
23 already retained counsel.

24 So whether or not any of the named Defendants in the State Court action  
25 received the October 8, 2008 email (and there is no specific proof that they did) is  
26 irrelevant because they are not represented by counsel. (According to Mr. Miner the  
27 agents who have called do not even know who David Sandelands is!)

28 ///

1 In the Hollymax action about 20 agents were named (10 each from Hollymax  
2 and Commbroker). None submitted declarations that they received the October 8,  
3 2008 email.

4 **Moreover, the email focused only on the State Court action and contained**  
5 **a settlement opportunity for the agents who received the email.** Neither this  
6 action nor the Hollymax action were involved. Also, many, if not most of these  
7 agents are no longer affiliated with Defendant. There is no bar to communicating  
8 with a former agent of a company (whether they are characterized as an employee or  
9 not). In fact, this issue has been definitively decided in favor of an attorney who  
10 communicated directly with a defendant corporation's employees. The Court held  
11 that this was not improper applying the following legal standard:

12 “[The] rule prohibiting an attorney’s contact with employees of  
13 represented parties about the subject of the representation, covered  
14 employees are limited to “control group” persons, such as officers and  
15 directors, and “managing-speaking agents,” i.e., persons whose  
16 statements might constitute an admission by employer; rule balances  
17 competing policies of protecting confidential communications and  
18 allowing discovery of factual matters concerning the litigation.”

19 [Snider v. Superior Court, 113 Cal. App. 4<sup>th</sup> 1187, 1211 (2003).]

20 Even though Plaintiff’s lawyer was not involved in the email communication,  
21 he does have the right to speak with these people directly as unrepresented third  
22 parties. This is not a litigation abuse. It should also be noted that prior to sending  
23 this email, Plaintiff did not threaten Defendant to “settle or else” or give any  
24 indication to Defendant that he intended to transmit the email. In the email itself,  
25 there is no threat by Plaintiff to Defendant to settle, nor is there any indication that if  
26 the agents settle, Plaintiff will cease and desist from this action. The email was  
27 totally unrelated to this action, and was sent for the sole purpose of attempting to  
28 settle in whole or in part a separate lawsuit. It was not litigation abuse.

1 Falsehood #2 – Defendant claims that all of the Defendants agents and former  
2 agents have tendered their defense. As noted above, this is false as only about 400 of  
3 the 1,695 State Court defendants signed the indemnification document per  
4 Defendant’s own admissions.

5 Falsehood #3 – Defendant claims that Judge Carney held that Plaintiff acted in  
6 bad faith by sending the email. In fact, the text of Judge Carney’s order, while stern  
7 towards Plaintiff, held that it did not constitute bad faith or litigation abuse. Judge  
8 Carney’s exact words were that it “tread[s] dangerously close to violating the duty to  
9 conduct litigation in good faith.” (Defendant’s Ex. H, pg. 156.) If Judge Carney had  
10 wanted to hold Plaintiff responsible for litigation abuse or bad faith, he easily could  
11 have done so. Defendant now attempts to ratchet up the findings and get this Court to  
12 take that step by mischaracterizing Judge Carney’s findings. Such conduct is  
13 inappropriate.

14 Moreover, since the letter itself is a settlement communication is it privileged  
15 and cannot be used against Plaintiff to establish liability. (See Section VI, below.)

16 **VI DEFENDANT FALSELY CHARACTERIZES PLAINTIFF’S**  
17 **SETTLEMENT COMMUNICATIONS AND IMPROPERLY REVEALS**  
18 **PRIVILEGED COMMUNICATIONS**

19 There is a strong public policy favoring settlement negotiations and the  
20 necessity of candor in conducting them combine to require exclusion. [C & K  
21 Engineering Contractors v. Amber Steel Co., 23 Cal.3d 1, 13 (1978).] Therefore,  
22 settlement discussions are inadmissible to prove liability. The Federal Rule of  
23 Evidence, Rule 408(b) parallels the California Evidence Code §1152 in this regard.  
24 Yet, Defendant inappropriately and unabashedly breaks this rule by placing statements  
25 made in settlement (out of context and hearsay) front and center in its motion. Again,  
26  
27  
28

1 such conduct should not be condoned.<sup>3</sup>

2 The remainder of this section is written upon the remote possibility that the  
3 Court considers the settlement statements in deciding the motion. Plaintiff objects to  
4 the use of such material and by responding does not waive those objections. The  
5 discussion below is limited to the communications placed in issue by Defendant.

6 1. Joseph Miner's December 10, 2007 email – Defendant mischaracterizes  
7 this email as a threat to file the Hollymax action. Although almost four pages of text  
8 are redacted from Defendant's Ex. E and they use two paragraphs from the email,  
9 nothing in those two paragraphs contains a threat to file another action. It should be  
10 noted that this email is one of a series of communications concerning settlement  
11 during that time which shortly followed the conclusion of the mediation. It was in  
12 response to an email from Kelli Todd dated December 6, 2008 in which she makes  
13 threats to Mr. Miner. So the Court can view the communications in full and proper  
14 context (if it so desires) that email string is attached to the Miner Declaration as  
15 Exhibit 1.

16 2. Jeffrey Sax's August 6, 2008 email to Steven Spile – Mr. Sandelands,  
17 who was not a party to this communication or the discussions which accompanied it,  
18 has argued that this proves the Hollymax lawsuit was filed for an improper purpose.  
19 No rational extrapolation of that email could justify such a conclusion or argument.  
20 Mr. Spile had taken the initiative to start settlement discussions (as Re/Max All Cities  
21 Realty's general litigation counsel) since communications had broken down with Mr.  
22 Sandelands. Mr. Spile had solicited a written communication for a global settlement  
23 of the three pending cases for his client's consideration and that was why it was  
24 written. (After this motion was filed, Sax communicated with Spile and Spile stated  
25 that he was not consulted before this motion was filed and he had not spoken with  
26

27 <sup>3</sup> It should be noted that in this brief, Plaintiff has made one reference to settlement  
28 discussions. This was done because in the event the Court considers Defendant's  
material, Plaintiff needed to point out Defendant's hypocrisy.

1 Sandelands about the settlement communications. Thus, Mr. Sandelands' arguments  
2 are simply speculative fiction.)

3 At the time that this email was written, the Hollymax case had been stayed.  
4 Plaintiff was preparing a motion to lift the stay and shared that information with Mr.  
5 Spile. Ultimately, Plaintiff filed such a motion and the Hollymax stay was lifted for  
6 purposes of discovery. (Then due to Commbroker's bankruptcy, perhaps filed in  
7 direct response to Judge Carney lifting the stay, the Hollymax action is again stayed  
8 pending the outcome of Plaintiff's soon to be filed petition for relief of stay.) The  
9 email specifically addresses this point by stating: "Before we escalate the litigation  
10 again by filing our motion to lift the stay in the Hollymax case ..."

11 This was not litigation abuse. It was merely a good faith attempt to settle at  
12 Defendant's direct solicitation.

13 On August 7, 2008, Defendant responded with a counter offer. In that counter  
14 offer, Defendant specifically stated that "This is remains part of the confidential  
15 settlement negotiations." Apparently, only Defendant's words were meant to remain  
16 confidential as Defendant has selectively used Plaintiff's words. A copy of  
17 Defendant's email (with numbers redacted) is attached as Ex. F to the Sax  
18 Declaration.

## 19 **VII CONCLUSION**

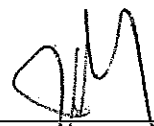
20 Defendant's well timed motion is based upon speculation, truth twisting, and  
21 outright falsehoods. Plaintiff has acted at all times within his constitutional rights  
22 and for the proper reasons. Plaintiff has not attempted to leverage the other two  
23 lawsuits into a settlement, nor has Plaintiff made any threats. Rather, Plaintiff has  
24 been the victim of Defendant's theft of his trademarked business name, subject to  
25 slanderous attacks and litigation abuse from the defense team. This motion is the  
26 coup de grace and should be seen for what it is – Defendant's last desperate attempt  
27 to avoid trial and its day of reckoning.

28 ///

1 DATED: February 9, 2009

LAW OFFICES OF JEFFREY F. SAX

2  
3 By:



4 \_\_\_\_\_  
JEFFREY F. SAX  
5 Attorneys for Plaintiff ALL CITIES  
6 REALTY, INC.  
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