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8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
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11 CITY OF SAN JOSE,  
Plaintiff,

12 vs.

13 JOHN WEBSTER,  
14 Defendant.

NO. CV815401

**CITY OF SAN JOSE'S REPLY BRIEF  
IN SUPPORT OF MOTION FOR  
PROTECTIVE ORDER**

Date: June 13, 2003  
Time: 9:00 a.m.  
Dept: 3  
Judge: Hon. Thomas Cain

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18 The City of San Jose ("City") hereby replies to Defendant John Webster's opposition  
19 to the City's Motion for Protective Order.

20 I. INTRODUCTION

21 The City of San Jose has applied for a restraining order on behalf of its employee Lt.  
22 Brenda Herbert to prohibit Defendant John Webster from returning to her home, from visiting  
23 and waiting for her outside her workplace, and from making further direct contacts with her.

24 This application, which underlies Defendant's efforts to depose Lt. Herbert and this motion  
25 for a protective order, makes a narrow request for relief tailored to prevent continuing  
26 invasions of privacy and harassment of Lt. Herbert at home and at work. Significantly, the  
27 City's application does not seek to limit Defendant's exercise of his First Amendment rights or  
28 to prevent him from petitioning anyone for redress of his alleged grievances. Consequently,

1 the testimony of Lt. Herbert is not relevant to Defendant's claimed "legitimate purpose" and is  
2 not otherwise calculated to lead to admissible evidence. A showing of the victim's subjective  
3 response to the harassing course of conduct is not required under the workplace violence  
4 safety statute, or under the Penal Code as suggested by Defendant.

5 Based on the conduct and statements of Defendant, the underlying facts of this case  
6 as set forth more fully in the moving papers, and the nature and irrelevance of the testimony  
7 sought, it is apparent that the deposition of Lt. Herbert is principally calculated to harass,  
8 annoy and oppress her. For the reasons set forth herein and in the moving papers, the City  
9 of San Jose requests a protective order to prevent the taking of the deposition of Lt. Herbert.  
10 Alternatively, the City seeks a protective order permitting Lt. Herbert, a nonparty deponent, to  
11 appear for deposition by telephone and to limit the scope of the deposition to prevent  
12 unwarranted annoyance, embarrassment and oppression to the deponent.

## 13 II. LEGAL ARGUMENT

### 14 A. A PROTECTIVE ORDER IS PROPER TO PREVENT ABUSE OF DISCOVERY AND 15 TO PROTECT DEPONENT FROM UNWARRANTED ANNOYANCE

16 The trial court has broad power to issue a protective order to prevent deposition  
17 discovery from causing "unwarranted annoyance, embarrassment, or oppression, or undue  
18 burden and expense" to any party, deponent, or other natural person. (Code Civ. Proc.  
19 §2025(i).) This statutory authorization expressly contemplates "any order that justice  
20 requires," upon a showing of good cause, which includes, but is not limited to, an order that  
21 the deposition not be taken at all, that the deposition be taken on certain terms and  
22 conditions, and that certain matters be excluded from inquiry. (Code Civ. Proc. §2025(i).)  
23 The provision for protective orders exists to give courts "the power to issue protective orders  
24 to prevent discovery abuses." *Lowy Development Corporation v. Superior Court* (1987)190  
25 Cal.App.3d 317,321. The protective order sought through this motion is necessary in the  
26 interests of justice to prevent harassment and abuse of the discovery process.

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1 **B. TESTIMONY REGARDING THE EMPLOYEE'S ACTUAL EMOTIONAL**  
2 **DISTRESS IS NOT REQUIRED BECAUSE THE APPLICATION FOR A**  
3 **RESTRAINING ORDER IS BASED ON A "CREDIBLE THREAT OF**  
4 **VIOLENCE" AND A REASONABLE PERSON STANDARD**

4 The workplace violence safety statute authorizes an employer to seek a restraining  
5 order on behalf of an employee where the employee "has suffered unlawful violence or a  
6 credible threat of violence from any individual, that can reasonably be construed to be carried  
7 out or to have been carried out at the workplace." (Code Civ. Proc. §527.8(a) (emphasis  
8 added).) As set forth in the moving papers, the City bases its application on the "**credible**  
9 **threat of violence**" rather than any "unlawful violence" by the defendant. A showing of a  
10 "credible threat of violence" is based on an objective, not a subjective, standard in that a  
11 credible threat of violence is a "knowing and willful statement or course of conduct that would  
12 place a **reasonable person** in fear for his or her safety, or the safety of his or her immediate  
13 family and that serves no legitimate purpose." (Code Civ. Proc. §527.8(b)(2) (emphasis  
14 added).) The course of conduct that underlies the credible threat may include: following or  
15 stalking an employee to or from the place of work, entering the workplace, or sending  
16 correspondence to an employee by any means. (Code Civ. Proc. §527.8(b)(3).) The City  
17 alleges that Defendant Webster has engaged in these kinds of activities, including loitering  
18 around Lt. Herbert's workplace, entering her workplace, and following her. Where the City  
19 referred to stalking, it did so in the context of these more general activities. The City is not  
20 charging that Defendant Webster has committed the crime of stalking under Penal Code

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1 §646.9<sup>1</sup> or has otherwise already committed an act of “unlawful violence” as defined by Code  
2 of Civil Procedure §527.8. Because the basis of the City's application is limited to the course  
3 of conduct giving rise to a credible threat of violence, it need only establish that a reasonable  
4 person would be placed in fear for her safety. Consequently, Lt. Herbert is not required to  
5 testify to show that she suffered “substantial emotional distress,” as Defendant Webster  
6 contends.

7 **C. HERBERT'S TESTIMONY IS NOT RELEVANT TO A “LEGITIMATE PURPOSE”**  
8 **DEFENSE BECAUSE THE SPECIFIC CONDUCT SOUGHT TO BE RESTRAINED**  
9 **CANNOT HAVE A LEGITIMATE PURPOSE**

10 Webster claims that his activities are protected by the First Amendment and serve the  
11 “legitimate purpose” of exposing police misconduct. A potential defense to a restraining order  
12 is that the conduct sought to be restrained serves a legitimate purpose. However, the City is  
13 not seeking to enjoin Webster from petitioning the government or anyone else, through the  
14 mails, the press, and other media, about his grievances arising out of the 1990 prosecution, as  
15 annoying and harassing as it may be to Herbert and those close to her. The City is only  
16 seeking to enjoin Webster from further harassing and threatening conduct by contacting  
17 Herbert directly, and by coming to her workplace and home. Even assuming that Webster has  
18 a valid grievance against Herbert arising out the 1990 criminal investigation.

19 \_\_\_\_\_  
20 <sup>1</sup>Even if the City were alleging stalking as prohibited in §646.9 of the Penal code," as Defendant claims,  
21 actual emotional distress by the victim is not a required element of that crime. Defendant cites an  
22 outdated incarnation of Penal Code §646.9 in arguing to the contrary. Penal Code §646.9, amended in  
23 2002, provides, in pertinent part, as follows.

24 (a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously  
25 harasses another person and who makes a credible threat with the intent to place that person in  
26 reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the  
27 crime of stalking.... (Emphasis added.)

28 (e) For the purposes of this section, "harasses" means engages in a knowing and willful  
course of conduct directed at a specific person that seriously alarms, annoys, torments, or  
terrorizes the person, and serves no legitimate purpose.

Thus, for the sake of argument, criminal stalking may be established by showing that the defendant has  
willfully, maliciously, and repeatedly followed the victim, which does not entail a subjective fear element.  
Harassment is a separate and distinct basis for prosecution under the criminal stalking statute. Though  
there is a subjective component in order to establish harassment, the requirement that the conduct  
"actually cause substantial emotional distress" was deleted in the 2002 amendment of Penal Code

1 that would not render legitimate a pattern of harassing, threatening behavior and invasion of  
2 privacy.

3 For years, Webster had carefully navigated his course of harassment to arguably  
4 qualify his actions as protected speech and take advantage of that safe harbor. Even if the  
5 statements about Lt. Herbert that he published in the press and on the Internet, to city  
6 residents and to her co-workers, were defamatory, her recourse would have been to bring a  
7 defamation action, which, Webster revealed, was his intent and desire. However, whatever  
8 protections may have shielded some of his prior actions from restraint, Webster has stepped  
9 beyond the bounds of arguably tolerable action. In recognition of Webster's First  
10 Amendment rights, which Webster has used for cover, the City has not sought to restrain all  
11 of his activities, only the threatening conduct that cannot serve a "legitimate purpose." If  
12 Webster's honest desire is to petition the government and seek redress through lawful  
13 channels, those avenues remain open.

14 As important as the First Amendment guarantees are, "the right to free speech is not  
15 absolute." *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121,134. The  
16 California Supreme Court has recognized, "The state may penalize threats, even those  
17 consisting of pure speech, provided the relevant statute singles out for punishment threats  
18 falling outside the scope of First Amendment protection." *Id.* (citations omitted). "While the  
19 right to free speech guarantees a powerful right to express oneself, it does not include the  
20 right to repeatedly invade another person's constitutional rights of privacy and the pursuit of  
21 happiness through the use of acts and threats that evidence a pattern of harassment  
22 designed to inflict substantial emotional distress." *People V. Borrelli* (2000) 77 Cal .App.4th  
23 703, 860 (upholding stalking statute Pen. Code §646.9 against First Amendment challenge  
24 as "[t]he aim and effect of th[e] statute are not to suppress speech, but to protect individuals  
25 in the exercise and enjoyment of their constitutional rights from invasive, oppressive conduct  
26 that infringes on those rights").

27 The conduct that the City seeks to restrain is not insulated by the First Amendment  
28 and does not otherwise serve a legitimate purpose. Even if Webster's unsubstantiated

1 allegations of evidence tampering were relevant to a "legitimate purpose" served by his appeals  
2 through the press and petition, his invasive, oppressive and threatening conduct toward Lt.  
3 Herbert does not serve a "legitimate purpose." For the same reasons, the litigation privilege  
4 codified in Civil Code §47 has no application to this case. "The privilege applies to any  
5 communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other  
6 participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some  
7 connection or logical relation to the action." *Silberg v. Anderson* (1990) 50 Cal.3d 205,  
8 212. The City is not seeking to curb Defendant's communications, only to prevent him from  
9 continuing to invade the privacy of a City employee at her home and her workplace and to  
10 prevent him from making direct contact with her. Certainly, Defendant's following Lt. Herbert to  
11 her private home, stationing himself outside her office with binoculars and a camera, and  
12 similar activities are not protected by the litigation privilege. This conduct cannot fairly be  
13 equated with petitioning a governmental agency for redress.

14 **D. THE PROTECTIVE ORDER SHOULD BE GRANTED**

15 Because the City's application for an injunction is aimed at Defendant Webster's recent  
16 Conduct, inquiry into Herbert's involvement in the 1990 criminal investigation is not relevant and  
17 is not calculated to lead to admissible evidence. The likelihood of abuse of the discovery  
18 process weighs in favor of granting a protective order preventing Webster from taking Brenda  
19 Herbert's deposition in this action.

20 At a minimum, the irrelevance of this area of inquiry warrants a protective order  
21 governing the conduct of the deposition and limiting the scope of the deposition so as not to  
22 further subject Herbert, a nonparty deponent and the person sought to be protected, to  
23 additional harassment, annoyance and oppression.

24 Defendant contends that the City chose to play in the judicial forum, and the only  
25 alternative to subjecting its employee to deposition without any limitations is to withdraw its  
26 request for a restraining order. Defendant appears to say that the employer's only choice is to  
27 allow Defendant to continue visiting Lt. Herbert at her home, wait for her outside her workplace,  
28 take photographs of her, and contact her directly until she breaks down and finally

1 "confesses" whatever he wishes her to confess. The City was compelled to take some  
2 precautionary action to ensure the safety of its employees given the recent escalation and  
3 aggressiveness of Defendant in trying to make direct contact with Lt. Herbert. Though  
4 Defendant attempts to characterize this case as big government's attempt to quiet a peaceful  
5 pamphleteer, he is hardly such a figure, and the City has not sought to curb his petitioning  
6 the media, the government, or the police department. The underlying case is really about  
7 protecting the privacy of a citizen from invasion at her home and place of work, and to protect  
8 the workplace of the City's employees, that reality is illustrated by the limited scope of the  
9 City's request for a restraining order. The City's application is narrow and reasonable and  
10 tailored to allow Defendant significant room to continue his "pamphletting" should that be his  
11 true desire. Consequently, the City's request for a restraining order should not be used as an  
12 opportunity to further harass Lt. Herbert, and to abuse the discovery process.

### 13 III. CONCLUSION

14 The City of San Jose submits that good cause exists to grant this motion, and  
15 respectfully requests that the Court grant a Protective Order precluding the deposition of  
16 Brenda Herbert. Alternatively, the City requests that the Court grant a Protective Order (1)  
17 requiring that the deposition be conducted without Defendant in the same room as Herbert  
18 and without allowing him to observe her face-to-face at any point immediately before, during  
19 or immediately after the deposition, and (2) limiting the scope of the deposition to exclude  
20 inquiry into the matter of the 1990 criminal investigation and prosecution.

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22 Dated: June 6, 2003

RICHARD DOYLE, City Attorney

23  
24 BY:   
25 NORA FRIMANN  
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26 Attorneys for CITY OF SAN JOSE  
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