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[REDACTED] 2007

VIA TELEFAX

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Attorney at Law
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Suite [REDACTED]
[REDACTED], California [REDACTED]
Telefax No. [REDACTED]

RE: [REDACTED] vs. [REDACTED] *et al.*

Dear Mr. [REDACTED]:

Pursuant to your telephone call of last Friday and your subsequent follow-up letter, this correspondence sets forth my thoughts regarding the possibility of settling the above-referenced action. I would have ordinarily responded to you earlier, but since receiving your telephone call, I have been speaking with local area real estate brokers and certified M.A.I. appraisers who are familiar with the [REDACTED] California area and, in particular, the factors that influence property values in that locale. (The reason I have been making these inquiries is set out in more detail later in this letter.)

First, a bit of housekeeping: You have indicated to me both by phone as well as in your subsequent letter that you represent only Ms. [REDACTED] and not either Ms. [REDACTED] nor Mr. [REDACTED]. You have been careful to preface your comments with the caveat that your representation does not extend to these latter two individuals "at the present time." So as an abundance of caution, I wish to apprise you that this morning I received a direct contact from Mr. [REDACTED] in the form of an e-mail that he apparently sent to Mr. [REDACTED] along with a copy to me. Given that he may be represented by either you or other counsel at some future point, I have refrained from responding to his e-mail or otherwise communicating with him in any fashion.

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Before turning to the question of if and how this litigation can be settled, I will note preliminarily that I find it interesting that maybe a small outbreak of common sense has finally taken place under the roof of the [REDACTED] residence. *Prior* to the hearing on the Order to Show Cause in re Preliminary Injunction, the same three people who are now pressing for some kind of settlement were the very same people who:

- Were told at the beginning of Summer, 2006 of the noise problem with the Mustang GT, but did nothing whatsoever to either abate it or to even try to informally talk with my clients in that good-old-fashioned-neighborly-kind-of-way that Mr. [REDACTED] is suddenly such a fan of, at least according to his e-mail of this morning.
- Received Mr. [REDACTED] letter written back in December, 2006, in which he complained about the noise problem and invited an informal discussion in a good faith attempt to resolve the matter amicably, and simply ignored this overture.
- Appeared before the Board of Directors of the [REDACTED] Homeowners' Association after the [REDACTED] had filed a complaint with that body, and made the incredible suggestions that my clients should move out of their master bedroom, go sleep in their cramped back bedroom, wear earplugs all night, and do their best to just go back to sleep every morning like nothing had ever happened following each day's 6:00 A.M. eruption of the Mustang GT's engine. Some of these incredible suggestions were equally vigorously advocated by you personally in your opposition papers to the OSC.
- Tried to put on a whole dog-and-pony show in opposition to the OSC in re Preliminary Injunction by getting one or more of the Association's Board members involved in conducting their own supposedly scientific field tests of the Mustang GT's noise emissions, and representing to the Court that these tests had conclusively established that the [REDACTED] complaint was groundless from the inception. It may interest you to know, in this connection, that Ms. [REDACTED] initiated a telephone conversation directly with Mr. [REDACTED] earlier this week, during the course of which she acknowledged that the Mustang GT was an excessively loud vehicle, and indicated that she is considering selling it. Surely this knowledge did not come as some sort of revelation inspired by the service of the Summons and Complaint on her on March 15, 2007. So she has essentially admitted that the entire position taken by Ms. [REDACTED] in response to the OSC was a baseless fabrication.

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- Have been very busy telling everyone in the [REDACTED] community about how abused they feel by the action my clients finally filed against them after first boarding up the entire front of their home for a year in an unsuccessful effort to attenuate the noise problem, and then pursuing every other conceivable remedy they might have short of resorting to the courts, all without success. Mr. [REDACTED] has dispatched quite a few e-mails offering his unsolicited opinions about this entire situation to other [REDACTED] residents, and it is clear from the tenor and content of these communications that he somehow feels that he and Ms. [REDACTED] have the right to make however much noise they want, whenever they want, the [REDACTED] Municipal Code, the Association's Declaration of Covenants, Conditions & Restrictions, and plain neighborly decency notwithstanding.

So it is these three same individuals who are now whining – mostly through Mr. [REDACTED] -- to anyone who will listen about how badly they are being treated because they now find themselves enmeshed in litigation. Pardon me, but I would also observe that before the lawsuit was ever filed, Ms. [REDACTED] also received a letter directly from me dated [REDACTED], 2007 in which I went to great lengths to point out the nature of the existing problem to her; to explain the potential consequences to her if she did not take steps to abate the problem; and to specifically invite her to speak directly with Mr. [REDACTED] in one last attempt to work the situation out in that good old “neighborly” kind of fashion with which Mr. [REDACTED] has suddenly become so belatedly enamored. That letter concluded with the following admonition:

“I suggest that it may be in your own best interest to discuss this matter directly with Mr. [REDACTED] who can be reached at his office at [REDACTED]. Or, if you have an attorney, he or she may certainly feel free to telephone me directly in order to discuss this matter. If we do not hear from you by this coming Friday, the lawsuit will be filed the following Monday, along with an immediate ex-parte application for an Order to Show Cause in re Preliminary Injunction and Temporary Restraining Order.”

We did not hear from Ms. [REDACTED] or from anyone speaking on her behalf. So, as promised, the lawsuit was filed; a TRO application was filed; and the Court subsequently issued the Order to Show Cause in re Preliminary Injunction, upon which the [REDACTED] prevailed at the [REDACTED], 2007 hearing attended by both Ms. [REDACTED] and Mr. [REDACTED]. For people who were

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acting rather smugly going into the hearing, I'm sure they are now finding it a bit humiliating to be in the position of attempting to grovel for a settlement. *That* is a problem that could have been avoided a long time ago had anyone from the [REDACTED] household ever bothered to do what Mr. [REDACTED] is now advocating in his e-mail of earlier today, namely, contacting Mr. [REDACTED] "...as one man to another..." and endeavoring to "...resolve this like gentlemen." It unfortunately took a lawsuit and a court order to correct the previous misconception that the rights of Mr. and Mrs. [REDACTED] to peaceably enjoy and reside on their own property were somehow subordinate to the rights of the people living under the [REDACTED] roof to do as they pleased at all hours of the day and night.

End of civics lesson. Pardon me if this letter so far sounds like I am lecturing a fellow attorney. That is not my intent. You and I are professionals and we have both been in practice long enough to have seen situations like this come and go many times before. It is my hope that you will pass this letter on to Ms. [REDACTED] Ms. [REDACTED] and Mr. [REDACTED] so that maybe – just maybe – they will finally have some clues to help them understand why my clients have resorted to their only remaining remedy of seeking redress through the courts. Mr. [REDACTED] in particular seems to have not yet comprehended how his and his mother's and girlfriend's actions have brought the parties to where they currently rest. Reading his ongoing deluge of e-mails and hearing from other [REDACTED] residents about his continuing insistence that this whole state of affairs has resulted from unjustified actions taken by the [REDACTED] is not improving my clients' overall enthusiasm level about settlement even one tiny bit, for whatever *that* may be worth. Neither is getting an e-mail like the one sent this morning, in which Mr. [REDACTED] suggested that it is time for everyone to just "...let this thing go." The time for that has long passed. Your clients need to do a reality check and reconcile themselves to the fact that their intentional and volitional course of conduct has resulted in two very definite, non-negotiable truths: First, they are going to be enjoined and restrained from further acting in the fashion they have been used to acting in the past. Second, they are going to be paying some money to get out of this predicament into which they have placed themselves; the only question left at the end of the day is: How much?

That's that. So: Settlement possibilities. Here's the deal:

1. The Court has already granted my clients' request for a Preliminary Injunction. An absolute *conditio sine qua non* to any final settlement will be the willingness of Ms. [REDACTED] Mr. [REDACTED] (even though he is not presently named as a party to the

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pending action), and Ms. ██████████ to enter into a Stipulation for Judgment providing for the entry of a Final Judgment and Permanent Injunction. The currently operative wording contained in the Preliminary Injunction will need to be expanded to provide that the ██████████ property will not be a source of any noise, of any nature or type whatsoever, between the hours of Midnight and 8:00 o'clock A.M., that would cause the ambient noise level as measured at the nearest point on the ██████████ property line with respect to its proximity to the nearest point on the ██████████ property line to exceed 50 dB(A). And yes, I am aware that the ██████████ Municipal Code specifies the hour as 7:00 A.M. rather than 8:00 A.M.; but as I explained during the ██████████ hearing, that is useful as a reference guideline, but it does not establish that anything within the guideline is not, by definition, either a public or private nuisance, or both. The Stipulation will need to also provide that the Final Judgment and Permanent Injunction may be recorded by the ██████████ so that it will become a covenant running with the land as to the ██████████ property, for the specific benefit of the ██████████ property, irrespective of who may own either property at some point in the future.

2. There can be no question that my clients are entitled to recover some amount in the way of monetary damages from Ms. ██████████ and/or Ms. ██████████ the only question is how much those damages should be. Their entitlement to damages is well-established by cases such as, e.g., *Alexander v. McKnight*, 7 Cal.App.4th 973 (Cal.App. 4th Dist., 1992), and others – just like I forewarned Ms. ██████████ in my unanswered and unheeded letter to her of ██████████, 2007. Just like the plaintiffs in *Alexander*, my clients will from this point forward be required by the mandates of *Civil Code* § 1102 *et seq.* to disclose to any potential purchaser of their property the very material fact that a dispute has arisen with a nearby homeowner; that attempts to resolve the dispute were made in good faith but repeatedly failed; and that ultimately, resort to litigation was required in order to obtain injunctive relief. I mentioned earlier in this letter that I have been speaking with local real estate brokers and appraisers. More specifically, I have been seeking their opinions regarding the answers to the following two questions:
 - How much do you think Mr. and Mrs. ██████████ home is presently worth in terms of fair market value (“FMV”), with FMV being defined as the cash price upon which a willing seller and a willing buyer, neither acting under any

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threat or other compulsion, would arrive at the conclusion of negotiations for a sale of the property?

- How much do you think the FMV is for Mr. and Mrs. [REDACTED] home, given the required disclosure concerning all facts surrounding the noise abatement problem, the resulting litigation, and the issuance by the Court of preliminary injunctive relief?
3. The answers that I have been hearing all have a common thread, and it runs along the following lines: First of all, the [REDACTED] must recognize that the very existence of this kind of problem will remove many parties who would otherwise be potentially interested buyers completely from the pool of candidates. Most people are simply not willing to “buy into the face of” a situation that has ended up in litigation. That’s part one. Part two is that out of the pool of potential buyers who are left over – the people who are willing to entertain the thought of purchasing a property given a somewhat tortured history – they will all expect to be buying at a substantial discount. How much of a discount? During my discussions I have heard 10% as the absolute low end of the scale, all the way up to as much as 25% or higher. If you assume an FMV of between \$475,000 and \$500,000 had the nuisance problem never arisen, which is the range I am hearing, that translates into monetary damages of between \$47,500 at the low end (10% of \$475,000) to \$125,000 at the high end (25% of \$500,000). The numbers are not pretty, but there they are, and my clients did absolutely *nothing* to bring about this situation. I can already hear the sound of Mr. [REDACTED] saying something ridiculous like “If they had just moved into their back bedroom, worn earplugs, and taken sleeping pills, they never would have had to sue.” Besides being ridiculous, that analysis would also be incorrect under holdings like *Alexander, supra*. The duty to disclose the noise problem would exist whether or not the matter had proceeded to litigation. In fact, the existence of the Preliminary Injunction is probably helping to ameliorate the degree of the damages – a benefit to the defendants – rather than increasing them. Looked at in this light, the folk living under the [REDACTED] roof should be happy the [REDACTED] finally sued when they did rather than leaving the problem unresolved and the damages continuing to accumulate in magnitude.

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4. The [REDACTED] have also incurred substantial attorneys' fees, and will continue to do so until such time as the matter is either settled or brought to final judgment. As I am sure you are aware and have advised your clients, *Civil Code* § 1354 expressly provides that Declarations of Covenants, Conditions and Restrictions ("CC&Rs"), such as those that govern the [REDACTED] community, may be enforced by either the homeowners' association or by any private member of the community. The Complaint in this action contains an express cause of action for this remedy. Further, subdivision (c) of Section 1354 expressly provides that "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." The primary gravamen of the Complaint lies in the injunctive relief sought, and the Court has already granted preliminary injunctive relief, so there can be little doubt that at the very least, the [REDACTED] will prevail on this claim if the matter proceeds to trial. The longer we stay in the case, of course, the higher the fees will mount. As of this writing, at my standard hourly rate of \$375.00, the [REDACTED] have already incurred slightly in excess of \$16,000 in attorneys' fees. This situation will get worse, not better, for your clients as time marches on.¹

5. The [REDACTED] have also incurred substantial costs of suit, and will continue to do so until such time as the matter is either settled or brought to final judgment. We have employed expert witnesses, retained private investigators (mainly in order to determine Ms. [REDACTED] correct identity after you decided to play "hide the ball" with me at the hearing on the TRO), incurred filing fees and process server fees (many of which would have not been incurred had the door of the [REDACTED] residence been answered when process servers appeared and heard voices coming from inside), and the like. These are all recoverable elements of damages and will need to be paid in full in order for any settlement to occur. And, just like most of the other features of

¹ It is true that I indicated to Ms. [REDACTED] in my letter to her of [REDACTED], 2007 that Mr. [REDACTED] would not have to suffer the consequences of paying attorneys' fees because he happens to be my best friend. That was written at a time when I assumed that the people on the other side of the table from me were rational folk who would act in good faith in attempting to reach a resolution of the problem. All of that changed when suggestions about relocating to back bedrooms and wearing ear plugs were unveiled as your client's answers to the problem. As is now obvious, we are in litigation that has already been needlessly protracted as a result of Mr. [REDACTED] ridiculous ideas about how to resolve the situation – a position you argued in favor of while opposing the issuance of the Preliminary Injunction – so as far as I am concerned, the free ride ended once the lawsuit actually had to be filed as my clients' only remaining last resort.

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this case, many of these expenses could have been avoided had your client(s) not continued having attacks of the “clevers” by thinking things like, sure, let’s play hide-the-ball about [REDACTED] real name, they’ll never figure it out (wrong); let’s not answer the door, they’ll never even know we’re here (wrong again); etc., etc., etc. My job so far has been fairly easy – I just keep sitting back, watching your clients shoot themselves in the foot over and over and over again.

6. Besides costs of suit, the [REDACTED] have also incurred various costs in an effort to mitigate their damages. These include the costs of the soundproofing materials that were used to board up their master bedroom window; the purchase of an Extech sound level meter that meets both ANSI and IEC Type 2 SLM standards as well as provides both “A” and “C” weighting, in order to measure the relative noise levels being emitted from the [REDACTED] property in comparison with the background ambient noise levels; and other palliative measures that, unfortunately, proved to be unsuccessful. So unsuccessful, just for your information, that Mr. [REDACTED] could still hear the Mustang GT start up while he was taking a shower in his master bathroom, behind all of the soundproofing material as well as an additional closed doorway. These costs presently stand at somewhere in the \$1,500 to \$3,000 range. A complete and exact accounting will be made available upon request if we reach the point where your clients get serious about making a good faith settlement offer.

There you have it, per your request. Summarized, what it will take to settle this case now, and thus minimize the damages for which your clients will ultimately be held to account, are the following:

1. An agreement to the Stipulation for entry of a Final Judgment and Permanent Injunction along the lines described above.
2. Reimbursement of my clients’ monetary damages as established by the holdings in *Alexander, supra*, and other cases of similar import. At the moment, the range seems to be somewhere between \$47,500 at the low end and \$125,000 at the high end. I will welcome any serious offer you care to make covering this area and pass it along to my clients for due consideration. But I would advise you to think it through carefully before trying to low-ball me on this one: If you seriously think you will be able to present a real estate broker, or appraiser, or some other expert at trial who will survive

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- cross-examination after trying to testify that the existence of the dispute and subsequent ensuing litigation would have had absolutely no deleterious effect on the FMV of the [REDACTED] residence whatsoever – well, good luck.
3. Reimbursement for my clients' attorneys' fees. That number can be capped at \$16,000, if a settlement takes place forthwith and without further nonsense from the likes of Mr. [REDACTED] about just "let[ting] this thing go." *That just isn't going to happen.* If settlement does not take place forthwith, the amount will simply continue to climb. If your client(s) want to keep digging themselves a bigger grave as each day passes, please don't come back and accuse me, as you did at the hearing on the OSC, of not telling you what would happen well in advance.
 4. Reimbursement of my clients' costs and expenses of suit. Currently, the amount is somewhere between \$2,000 and \$3,000; a more exact accounting is available if you are serious about settling the case. This category, too, will do nothing but increase as the litigation continues to proceed.
 5. Reimbursement of my clients' costs as incurred to date in an effort to mitigate their damages, as described more particularly above.

I am always willing to discuss settlement with opposing counsel, believing, as I told you in my very first telephone call to you that you never bothered to return prior to the hearing on the OSC, that it should be our job as advocates and professionals to facilitate the amicable resolution of disputes like this one wherever possible. To that end, I invite you to telephone me at your convenience to discuss this matter in more detail. But please don't even bother with that unless and until everyone who resides on the [REDACTED] premises gets real, and gets serious, about actually making a realistic settlement proposal. I am not interested in listening to any more of Mr. [REDACTED] complaints about the unfairness of life. The defendants and those associated with them (i.e., Mr. [REDACTED] got themselves into this mess all by themselves – you didn't; I didn't; and my clients most certainly didn't.

I have enclosed under separate cover by regular mail Plaintiffs' First Set of Interrogatories, First Set of Requests for Admissions, and First Demand for Production of Documents with respect to Ms. [REDACTED]. I will also shortly be filing a motion calling for the examination of the Mustang GT by one of our expert witnesses now that the Court has

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achieved *in personam* jurisdiction over Ms. [REDACTED]. If you end up representing her, perhaps you would be willing to save your clients some additional attorneys' fees by stipulating to this procedure and thus negate the necessity for my preparing and filing the motion. I will wait to hear back from you during the upcoming week concerning your answer to this question. Also, as a side note, if the Mustang GT suddenly disappears and becomes "unavailable" for examination, I will ask the Court to regard that as deliberate destruction and concealment of material evidence and will seek the imposition of sanctions accordingly.

Finally, you may also wish to advise your client(s) that I am considering filing a motion to amend the existing Complaint to add an additional cause of action for intentional infliction of mental and emotional distress, which would carry along with it a request for both actual damages plus exemplary and punitive damages. At the time I filed the original Complaint, I was not fully aware of the degree and magnitude of distress that Mrs. [REDACTED] in particular has been forced to endure, and the deleterious effects your client(s)' actions have had on her. If we are going to settle the case, fine, I see no need to take this additional step. But if we do not settle the case, and settle it soon, that is but one of the next salvos to which your clients can look forward.

This case can be settled and settled now on a reasonable basis, or your client(s) can continue down the same path toward destruction upon which they seem to have been bent since this situation first arose. Everything that I told them would happen has, so far, happened. They can either wise up, or keep on rolling the dice. Their call.

I shall await your response.

Very truly yours,

[REDACTED]
[REDACTED]

GLM/mpj

cc: Mr. and Mrs. [REDACTED] and [REDACTED]
[REDACTED], Esq.
LAW OFFICES OF [REDACTED]