Michael S. Winsten, Esq. (Cal. State Bar No. 126554)
WINSTEN LAW GROUP
27201 Puerta Real, Suite 140
Mission Viejo, CA 92691
Tel: (949) 429-3400
Fax: (949) 429-3500
E-mail: mike@winsten.com
Attorneys for Petitioner William Furniss

ORANGE COUNTY SUPERIOR COURT

CENTRAL JUSTICE CENTER

WILLIAM FURNISS, an individual,

Petitioner,

vs.

PAT HEALY, INTERIM CITY CLERK OF THE CITY OF RANCHO SANTA MARGARITA; NEAL KELLEY, REGISTRAR OF VOTERS OF THE COUNTY OF ORANGE; THE BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE, and DOES 1 through 10, inclusive,

Respondents.

JESSE PETRILLA, an individual; DONALD CHADD, an individual; JAMIE CASSIDY, an individual; and JOSEPH DAICHENDT, an individual; and DOES 11 through 20, inclusive,

Real Parties In Interest.

Case No.: 30-2014-00740289-CU-WM-CJC

Hon. Kirk H. Nakamura
Dept. C15

Reply Brief In Support of Petition for Writ of Mandate

[Suppl. Declaration of Carol Gamble and Reply Declaration of William Furniss Submitted Concurrently Herewith]

Hearing: August 27, 2014 [Reserved]
Time: 1:30 p.m.
Dept.: C15

Petition Filed: August 18, 2014

I. REPLY ARGUMENT.

A. **General Principles; Standard of Judicial Review.** Real Parties in Interest misleadingly characterize Petitioner's objections to Real Parties' ballot argument. Petitioner does not base its objections on a belief that Real Parties' objectionable statements are not "persuasive or cogent." Rather, Petitioner has provided verifiable and objective evidence demonstrating that Real Parties' statements are false and misleading in violation of applicable sections of the Elections Code. Real Parties now claim all of their objectionable statements to be "typical hyperbole" or "opinionated comments." Yet, many or most of Real Parties' statements challenged by Petitioner are presented in absolute terms (such as "all experts agree") or use terms which, by their nature, would be objectively verifiable (such as "owner" or "vacant"). They are not used in Real Parties' ballot argument as words or terms that are "elastic or ideological ideas". Both those who published an Argument in Favor of Measure Z – and those who published an Argument Against Measure Z – were constrained by a 300-word limit to explain their story to voters. However neither side is permitted to do so by using false and misleading statements. Real Parties' strenuous efforts to justify their own poor choice of words only confirm their intent to mislead RSM voters with falsehoods and loose language. Petitioner has demonstrated, with clear and convincing evidence, that such statements are false and/or misleading in violation of Elections Code Section 9295 – and for those reasons, each should be stricken.

B. Specific False and Misleading Words and Phrases.

1. Real Parties Admit that Mr. Daichendt is not the "Property Owner". Real Party Daichendt admits in his Declaration that he is not the Property Owner and that Rancho Canyon LLC is the legal owner. (Daichendt Decl. ¶8). Instead, Real Parties go to great lengths in an effort to try to explain Mr. Daichendt's remote relationship to the Property, as "a trustee and beneficiary of a family trust that is the sole member of a limited liability company that holds legal title to the Property". Apparently under the logic they don't have enough words in the Ballot Argument to accurately explain what relationship, if any, Real Party Daichendt has to the Subject Property – so they choose the improper shortcut "Property Owner". Real Party in Interest Daichendt may believe he is the public "face" of the commercial real property development company that owns the Property, and may represent the real property owner in certain proceedings before the City's elected or appointed officials and staff – but without question, Real Party Daichendt is not the "Property Owner". Just one month ago, Rancho Canyon, LLC was identified by Real Party Daichendt as the "Property Owner of Record" in the Development Case Application approved by the Property Owner and submitted by

Rancho Santa Margarita RV's and Vehicle Sales LLC with the City, seeking a Conditional Use Permit for the RV sales business presently operated on the Subject Property (Gamble Suppl. Decl ¶ 8, Ex. 3).

Real Parties cite *Shell Oil Co. v. City and County of San Francisco (1983) 139 Cal.App.3d 917, 919-920,* for the proposition that the term "owner" is subject to different meanings in varying contexts, that an "owner" may concededly include one not holding legal title. In *Shell Oil Co.*, a lessee (rather than the legal title holder) of a property was characterized as an owner over the objection of the title holder. The Court found persuasive the argument and reasoning the context in which the issue arose: "The subject lease expressly provides that the lessee has the right to use the property as a service station--and for no other purpose--for the term of the lease. In that context, Shell Oil is the owner of the exclusive right to use the property for such purpose and thereby is entitled to seek the necessary permit in order to carry out the agreed purpose of the lease. Accordingly, we conclude that Shell Oil has standing as an owner to apply for a conditional use permit."

Here, Real Party Daichendt can't claim a similar context. He does not hold a legally recognizable interest in the real property. His "interest" appears to be limited to his beneficial interest in a trust, and his capacity as trustee of a trust, which owns a membership interest in another entity, not the Subject Property. Whatever his motive in describing himself as the Property Owner, neither Real Parties' ballot argument nor the text of Measure Z identify any relationship between the proponents of Measure Z and their interests in or roles supporting the commercial real property developer for whose sole benefit the ballot initiative was designed – to change the zoning of a single piece of property in the City's successful Auto Center. Petitioner respectfully submits that Real Parties in Interest, including the proponents of Measure Z, carefully seek to conceal their economic self-interest in the development of the Property by avoiding reference to their commercial development objectives for the Property.

2. <u>"3 auto dealerships" Have Not Closed at the Subject Property</u>. In their Opposition, Real Parties failed to rebut – and chose to ignore the objectively verifiable information Petitioner submitted to this court (especially the facts set forth in the Declaration from Auto Industry Expert Joseph Hernandez) which confirmed that only one Nissan dealership ever failed and closed at the subject property – Family Nissan – which closed on May 16, 2008. From 2002 (when the original Nissan dealership at the subject property opened for business) until 2008, a Nissan dealership operated continuously at the subject property. Prior to the date Family Nissan began operating the Nissan dealership at the subject property, two other ownership teams had on a continuous basis operated this

Nissan automobile dealership (Superior Nissan and Spirit Nissan). Superior Nissan sold this Nissan dealership to Spirit Nissan – and Spirit Nissan subsequently sold the dealership to Family Nissan in 2006. [Hernandez Decl. ¶¶5-10, Exs. 1-2]

Set forth in the Declaration from Joseph Hernandez is the Annual Report on Form 10-K/A filed with the Securities and Exchange Commission on March 15, 2006 for Asbury Automotive Group, the owners of Spirit Nissan. This report states on Page 30 in pertinent part, ***"During the third quarter of 2005, we entered into agreements to divest of all our Thomason dealerships in Portland, Oregon and our Spirit Nissan store in Rancho Santa Margarita, California. When those sales close, we will exit the Portland, Oregon and Rancho Santa Margarita markets, thereby reducing our number of metropolitan markets to 21."*** (Hernandez Decl. ¶10). This statement provides objectively verifiable evidence that the Spirit Nissan dealership at the Subject Property did not fail and close – rather, it was sold as part of a larger corporate divestment strategy.

Real Parties also failed to rebut the evidence presented by Petitioner which demonstrated Real Parties statement that "3 auto dealerships" have closed at the subject property is false and misleading because it is inconsistent with the content of the proposed Ordinance included in Measure Z, which describes only the closure of one former Nissan Dealer in 2008. [Gamble Original Decl. ¶9, Ex. 1]
In their Opposition, Real Parties Improperly Distort the Definition of "Closed". Real Parties claim as narrow Petitioner's interpretation of the term "Closed" in the context of the history of the Nissan auto dealerships operated at the subject Property from 2002 to 2008. Real Parties rely heavily on a definition from the Merriam-Webster dictionary here (they stay away from Merriam-Webster where it suits their interpretive goal), but Real Parties apply that definition in a contrived fashion. If Spirit Nissan acquired the auto dealership operations formerly conducted by Superior Nissan, then Superior Nissan did not "cease operation" or "go out of business." Rather, their auto dealership business was acquired by a successor as a going concern. Similarly, Family Nissan acquired the operations of Spirit Nissan, there was not "closure" of the business. For these reasons, Petitioner respectfully requests the court strike this statement from Real Parties' "Argument in Favor of Measure Z."

3. <u>The Subject Property is Not In its 7th Year of "Vacancy"</u>. Real Party Daichendt admits in his Declaration that the property is not vacant. (Daichendt Decl. ¶13). Real Party Daichendt grossly mischaracterizes the extent to which the Subject Property is currently being occupied and used by operating businesses, describing such use as only "on an interim basis on a tiny portion of the Subject Property." (Daichendt Decl. ¶13). They describe the existing U-Haul Vehicle

Rental Business as occupying "less than 10% of the non-building square footage, apparently trying to come under the mysterious 31% occupancy standard they wish to establish as a threshold of vacancy. This is simply false.

Today, nearly all of the Subject Property is being utilized by the current occupants. As demonstrated by the photographs of the Subject Property taken today, August 25, 2014: dozens of recreational vehicles, other vehicles and boats are being stored across most of the front lot, two businesses (U-Haul and Rancho Santa Margarita RV's & Vehicle Sales have erected permanent signs at the Subject Property, additional recreational vehicles, boats, trailers and equipment are stored on the East Side of the Subject Property, numerous large U-Haul Trucks are lined up all along the West Side of the Subject Property, numerous U-Haul vans, Trucks and trailers cover the entire Back Lot of the Subject Property, and additional boats, vehicles, motorcycles and trailers are stored in the Upstairs Mezzanine Lot at the Subject Property (Furniss Decl. ¶¶ 5 and 6).

What Real Parties omit from their argument is the far more significant occupation of the Subject Property by the combination of the U-Haul business and the RV Sales/Storage business. In July 2014, Rancho Santa Margarita RV's & Vehicle Sales LLC ("RSM RVs") filed a Development Case Application with the City of RSM seeking a Conditional Use Permit for Retail Sales of Pre-Owned RVs on the Subject Property (Gamble Suppl. Decl. ¶ 8). The Application itself, which was signed by Real Party Daichendt on behalf of the Property Owner Rancho Canyon LLC indicating its approval of the action requested, illustrates a far greater use of the Subject Property than Real Parties admit. In the "Land Use and Parking Summary" in the Application, RSM RVs indicates a proposed use of 318 of the 362 parking spaces available on the Property, or 88% of the total amount of the parking lot available on a large parking lot designed for automobile sales. The U-Haul dealer, in its Development Case Application for the U-Haul business submitted to the City in July 2013 (which application was also approved by Rancho Canyon LLC, the Property Owner of Record, as indicated by Real Party Daichendt's signature), described a proposed use of 40 of the same 362 available parking spaces, or another 11% (Gamble Suppl. Decl. ¶ 9). Combined, the two operations presently occupy and use a total of 98.9% of the available parking capacity on this automotive dealer property – far more than the occupancy and use represented by Real Parties in their Opposition Brief.

Real Parties don't like to use Merriam-Webster dictionary definitions when application of those definitions don't support their false and misleading statements. Merriam-Webster defines the term "vacant" as "being without content or occupant <a *vacant* seat on a bus> <a *vacant* room>", "not

lived in <*vacant* houses>", and "not put to use <*vacant* land>." Real Parties search in vain for anything that supports their theory of "Vacancy". Real Parties have used the term "7 Years of Vacancy" in their literature to over-dramatize the history of the Subject Property since the last dealer closed operations in 2008, glossing over the reality that the Property was held by Nissan Motor Acceptance Corporation, the prior property owner, while its disputes with the prior Nissan Dealer, Family Nissan, were litigated and resolved. So Real Parties deploy a strategy, referring to a commercial property insurance policy's technical definition of the term "vacant" in a thinly veiled attempt to salvage their statement. Using Merriam-Webster's definition, the property is occupied, possessed and used, portions of it exclusively occupied, possessed and used by tenants operating vehicle businesses. Ironically, when the Court considers the significant extent to which the Subject Property is now being used, by the combination of the U-Haul Vehicle Rental and RV/Boat storage operations commenced in February 2013 with the significantly expanded scope of use associated with RV storage and sales, Petitioner submits that the Property cannot be considered vacant, even using Real Parties' strained interpretation of the term "vacant."

The average RSM voter does not use a commercial property insurance policy technical definition of "vacant", as suggested by Real Parties. Moreover, the average RSM voter would not be aware of the specific terms of the lease between Rancho Canyon LLC, the Property Owner, and the U-Haul business occupant, specifically, the provision which reserves the Property Owner the right to terminate the lease on 90 days' notice. Petitioner admits that the Property may not have been "occupied or used" for ordinary business operations for the period from May 2008 to February 2013, less than five (5) years. But Real Parties claim of "7 years of Vacancy" in their Ballot Argument is simply false and misleading.

Real Parties claim in another statement that the current Zoning of the Property (Auto Dealers or Auto-Related Use) has "failed" (Issue #3 below), basing their argument on the assumption that the Subject Property is not currently being put to a "viable or productive use." It is disingenuous of Real Parties in Interest to claim as non-viable or non-productive a use of the Property which was affirmatively approved by the Property Owner. Whether the use generates sufficient rental income to cover the Property Owner's expenses is the Property Owner's issue. Real Parties are creating the false impression that the Property is NOT being put to any viable or productive use, which is not the case as long as the Property Owner permits other businesses to occupy and use all or substantially all of the available outdoor space on the Subject Property.

4. <u>Auto Industry Experts do Not "All Agree"</u>. Real Party Daichendt also attempts to argue in his Declaration that he didn't really mean to say the actual words he included in his Argument in Favor of Measure (Daichendt Decl. ¶24). Real Parties included in their Opposition and supporting Declarations multiple references to a statement made by the owner of RSM Toyota/Scion (John Dinsmore) that no automobile manufacturer is interested in reoccupying the site and this situation is not going to change" -- however, Real Parties failed to rebut the objectively verifiable information Petitioner submitted to this court which confirmed that this very same John Dinsmore, owner of Santa Margarita Toyota, as recently as last week, reaffirmed his continuing desire to relocate his existing Toyota dealership to the Subject Property. (Gamble Decl. ¶¶ 38-40).

Real Parties defend their false and misleading statement, that "auto industry experts, including one hired by the City, all agree that no automobile manufacturer is interested in reoccupying the site and this situation is not going to change", by referring to several exhibits to Daichent's Declaration, a so-called "mountain" of evidence. In so doing, Real Parties prove the point – when the Court examines the statements and conclusion of the so-called experts, they say a number of things. But they don't "all" say the single thing that Real Parties claim. Real Parties combine a series of opinions of third parties about the condition of the automobile dealership market into a purported statement of fact (that they "all" agree on a single proposition). And Real Parties' compilation of material on this issue proves only one thing – that they don't "all" agree on anything.

Real Parties also misread Petitioner's objection relating to Mr. Reuel, the consultant engaged by the City. Although he tries mightily, (Daichendt Decl. ¶¶18-22) Real Party Daichendt cannot unilaterally anoint or otherwise grant Mr. Reuel the years of personal experience it would take for Mr. Reuel to qualify as an Auto Industry Expert – and he cannot put words into Mr. Reuel's mouth that he never said. Mr. Reuel has confirmed in writing he is not an Auto Industry Expert – and that he has never identified himself, or otherwise held himself out publicly, as an Auto Industry Expert (Reuel Decl ¶3). This simply is a fact. It also is a fact that Mr. Reuel simply did not render a formal conclusion that "no automobile manufacturer is interested" in the Subject Property or that "such situation is not going to change" – as Real Parties falsely allege. As for the London Group, the fact that the London Group did not offer any opinion contrary to the objectionable statement does not demonstrated that the London Group affirmatively agrees with the experts or other industry participants engaged by the Property Owner. If, as Real Parties suggest, they wish to assert an opinion that there is no reason to believe the purported situation will not change, their Ballot Argument should

present that statement as an opinion, not as a statement of fact (ie., that all experts agree with the same position).

5. <u>The City did not unlawfully refuse to put Measure Z on the Ballot</u>. Again, Real Parties distort the factual record to demonstrate their interpretation – the City never "refused to place this measure on the ballot." A legal question was raised by the City Clerk as to whether the proponents of Measure Z had properly published their notice of intent; however, at no time did the City refuse to place the measure on the ballot. In their Opposition Brief, Real Parties assert: "Simply put, Judge Glass found the City violated the law and he ordered the City (assuming the petition had sufficient valid signatures …) 'to perform your mandatory and ministerial duty … to either (a) adopt the Initiative Petition, without alteration, or (b) order said initiative ordinance to be submitted, without alteration, to the City's voters at the November 4, 2014, general municipal election. As stated in Petitioner's Brief, and as clearly indicated in Judge Glass' order, Judge Glass made never made a "finding" that the City Clerk had violated the law or otherwise acted "unlawfully." Furthermore, even if the City Clerk had accepted the petition signature submitted by Real Parties Daichendt and Cassidy, the City was not in a position to decide whether to put Measure Z on the ballot until the petition signatures had been verified and qualified by the Registrar of Voters. Once the petition signatures were so verified and qualified, the RSM City Council promptly and unanimously resolved to place Measure Z on the November 4, 2014 General Election Ballot on July 23, 2014.

Real Parties' reliance on *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123 is not persuasive. In *Alliance*, the Court found that the City Clerk in question exceeded her ministerial duty in rejecting the initiative petition submitted to her, based upon her actions in reviewing extrinsic evidence. The Court's analysis is informative, and indicates that the Rancho Santa Margarita Interim City Clerk did not engage in actions beyond her ministerial duty. "This is not to say that initiative circulators are free to ignore the requirements of the Elections Code, only that local elections officials are not empowered to adjudicate every potential violation. Local elections officials may refuse to certify a proposed measure if noncompliance is manifest on the face of the submitted petition." (*Alliance, supra,* at 108 Cal.App.4th 135.) Here, the RSM Interim City Clerk determined, from the face of the petition and materials submitted by the Initiative Proponents, that a procedural requirement of the elections Code had not been met. To be fair, Judge Glass did not offer any analysis on the underlying dispute. Judge Glass neither found nor held that the City's rejection of the Ballot Petition was unlawful. Judge Glass neither found nor held that the Initiative

Proponents satisfied the publication requirements of the Elections Code. The plausible explanation of Judge Glass' judicially noticeable order is simple – there was no violation of law. Real Parties' characterization of Judge Glass' Order, in its substance and its effect, is simply false and misleading.

6. City Council Members Have Not Denied RSM Voters the Right to Vote.

Ever Mayor in the history of the City of Rancho Santa Margarita, including current councilmembers Gamble and Beall, has officially opposed Measure Z. (Gamble Suppl. Decl. ¶ 4, Ex.1). The efforts of current councilmemebers to share their political point of view with voters during the signature gathering process do not evidence an attempt to deny voters the right to vote as Real Parties improperly suggest. Similarly, as set forth in the original evidence submitted by Petitioner, Real Parties' argument that somehow three City Council members directed and controlled the actions of the Interim City Clerk in rejecting the Initiative Petition and that, by so doing, they refused to put the initiative on the ballot is completely without merit. The two closed sessions referenced in Real Parties' Opposition both occurred **after** the City Clerk had already sent a letter to the Measure Z proponents rejection the signatures for a perceived failure to comply with the publication requirements of the Election Code. (Gamble Suppl. Decl. ¶¶ 6 and 7).

The "evidence" suggested by Real Parties is simply not there. A City Clerk, as the local elections official, has no legal authority to take direction from a City Council, City Attorney or City Manager, in exercising her ministerial duties under the Election Code. The fact that a closed session meeting of the Council was held, for the purpose of discussing the Initiative Proponents' lawsuit, does not compel the conclusion that the Council could have and should have directed the Interim City Clerk to accept and count the petition signatures submitted by Real Party/Initiative Proponent Daichendt. Real Parties' characterization of the activities of three individuals as actions in their official capacity as City Council members, is simply false and misleading.

7. The City Council did not Vote to Block the Productive Use of the Property.

Again, Real Parties characterize as "opinion" a statement that any reasonable voter would characterize as an assertion of fact. The voting record of the Rancho Santa Margarita City Council at all times since the Property Owner acquired the Subject Property is quite clear. Never has the City Council voted "to block the productive use of the Property." The statement may reflect Real Parties' opinion about a potential consequence of the City Council's decision on January 8, 2014 to reject the Property Owner's proposal to change the zoning of the Subject Property. But Real Parties cite no evidence

supporting their outrageous assumption that such City Council decision was a vote to block the productive use of the Property.

Petitioner notes with objection Real Parties' characterization of the zoning change proposal considered at the January 8, 2014 Council meeting as the "Daichendt family's request to rezone the Subject Property." Real Parties appear to lace their argument to add support for their position on False Statement number one, regarding ownership of the Property. The "applicant" seeking the zoning change was not the "Daichendt Family." The applicant was Rancho Canyon LLC. Petitioner will aggressively make arguments to RSM voters in opposition to Measure Z. Petitioner would prefer to do so with a level playing field, without a false or misleading Argument in Favor of Measure Z printed in the official voter pamphlet.

8. <u>Council Members are not "Wasting" Tax Dollars</u>. Real Party Daichendt improperly argues that a City Council vote to zone the Subject Property a certain way is "waste", and that this very lawsuit is evidence of City Councilmembers wasting tax dollars (Daichendt Decl. ¶36) – another baseless charge as the Petitioner is not a City Council member. For the reasons set forth in Petitioners' original submission to this court, the statement that three Council members, let alone any council members are "wasting your tax dollars…" is false simply makes no sense, is personally insulting to the City Council members and is inflammatory with no basis in fact. Such personally insulting material and unsubstantiated arguments unrelated to the ballot measure can and should be rejected as false and misleading. (*Patterson v. Board of Supervisors* (1988) 202 Cal App. 3d 22.)

9. <u>The Existing Zoning has not Failed</u>. Zoning does not have to produce the greatest return on a developer's investment in order to be valid or successful – to the contrary, zoning is designed to promote the orderly, long-term, comprehensive planning goals of a community. Real Party Daichendt bought the Subject Property with full knowledge of the existing zoning and wants to maximize his return on investment – but he may not substitute his desires for the zoning policy decisions enacted by the elected representatives of the residents of Rancho Santa Margarita. As set forth above, today nearly all of the Subject Property is being utilized by the current occupants. As demonstrated by the photographs of the Subject Property taken today, August 25, 2014: dozens of recreational vehicles, other vehicles and boats are being stored across most of the front lot, two businesses (U-Haul and Rancho Santa Margarita RV's & Vehicle Sales have erected permanent signs at the Subject Property, additional recreational vehicles, boats, trailers and equipment are stored on the East Side of the Subject Property, numerous large U-Haul Trucks are lined up all along the West Side

of the Subject Property, numerous U-Haul vans, Trucks and trailers cover the entire Back Lot of the Subject Property, and additional boats, vehicles, motorcycles and trailers are stored in the Upstairs Mezzanine Lot at the Subject Property. (Furniss Decl. ¶¶ 5 and 7). If the existing zoning had truly **"failed"** – then how is it that business operations that comply with the existing zoning are currently operating at the subject property? Furthermore, as set forth in Petitioner's original submission to this court, additional parties have expressed interest in opening a vehicle sales dealership at this site – with one submitting a written offer. The existing zoning has succeeded in achieving the City Council's policy goal of preserving the Rancho Santa Margarita Auto Center. If the existing zoning had truly "failed" – then why have multiple parties expressed an interest in opening new automotive businesses at the subject property that are consistent with the existing zoning? Real Parties assert as basis for this "opinion" the same series of arguments Petitioner has demonstrated to be false or misleading. Petitioner respectfully submits that Real Party's statement about the existing zoning should be removed in its entirety if and to the extent Real Parties other objectionable statements are amended or removed.

II. CONCLUSION. Real Parties failed to controvert the objectively verifiable evidence and clear and convincing proof Petitioner submitted to this Court that each of the nine objectionable statements of Real Parties in the Argument in Favor of Measure Z is false and/or misleading in violation of the Elections Code. What Real Parties have done is submit, in desperation, a distorted series of arguments that misinterpret and obfuscate their arguments. Real Parties seek to hide behind a general characterization as "opinion" several statements offered as statements of fact. RSM Voters are likely to be misled and misinformed if Real Parties' Argument in Favor of Measure Z is allowed to be published and delivered to RSM Voters without modifications. Petitioner respectfully request that this Court conclude there is clear and convincing evidence of the falsity or misleading nature of each of such statements and order such statements to be deleted.

Dated: August 25, 2014

WINSTEN LAW GROUP

By: Michael S. Winsten

Michael S. Winsten
Attorney for Petitioner William Furniss