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SUNROAD CENTRUM, L.P., SUNROAD ASSET
7 MANAGEMENT, INC. and SUNROAD ENTERPRISES

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN DIEGO

10 CENTRAL DIVISION

11
12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA and THE CITY OF SAN
DIEGO, a municipal corporation,

14 Plaintiffs,

15 v.

16 SUNROAD CENTRUM, L.P., a California
17 Limited Partnership, SUNROAD ASSET
MANAGEMENT, INC., a California
18 corporation, SUNROAD ENTERPRISES,
CALIFORNIA DEPARTMENT OF
19 TRANSPORTATION, AERONAUTICS
DIVISION, and DOES 1 through 50,
20 inclusive,

21 Defendants.

22 SUNROAD CENTRUM, L.P., a California
Limited Partnership, SUNROAD ASSET
23 MANAGEMENT, INC., a California
corporation, SUNROAD ENTERPRISES,

24 Cross-Complainants and
Petitioners,

25 v.

26 THE CITY OF SAN DIEGO, a municipal
corporation, and ROES 1 though 10,
27 inclusive,

28 Cross-Defendants and
Respondents.

No. GIC 877054

**DEFENDANTS' POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISQUALIFY
CITY ATTORNEY MICHAEL AGUIRRE
AND THE OFFICE OF THE CITY
ATTORNEY**

Date: June 8, 2007

Time: 10:30 a.m.

Dept.: 72

Judge: Honorable Kevin A. Enright

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AIRCRAFT OWNERS AND PILOTS
ASSOCIATION, INC., a New Jersey non-
profit corporation, and COMMUNITY
AIRFIELDS ASSOCIATION OF SAN
DIEGO, INC., a California non-profit
corporation

Real Parties In Interest.

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1 **I. INTRODUCTION**

2 Defendants Sunroad Centrum L.P., Sunroad Asset Management, Inc., and Sunroad
3 Enterprises (“Sunroad”) seek an Order disqualifying City Attorney Michael Aguirre and the San
4 Diego City Attorney’s Office. Mr. Aguirre and others in his office have systematically violated
5 the Rules of Professional Conduct and abused their powers as public prosecutors. Mr. Aguirre’s
6 most blatant misconduct includes: (1) bypassing Sunroad’s counsel and personally threatening
7 Sunroad and its executives with criminal prosecution unless they immediately capitulated and
8 provided the City with all relief sought in this civil action; (2) using the threat of a search warrant
9 obtained under questionable circumstances in *People v. Story*, a closely related criminal
10 misdemeanor action brought by the City Attorney against Sunroad executive Tom Story, to obtain
11 documents related to this civil action; (3) personally contacting Sunroad’s represented experts and
12 consultants, serving them with criminal subpoenas, and implying the threat of criminal
13 prosecution via offers of immunity in exchange for cooperation; and (4) authorizing the sharing
14 of information related to Sunroad between the Criminal and Civil Divisions of the City
15 Attorney’s Office and failing to observe any meaningful ethical wall between criminal and civil
16 deputies.

17 Defendant Story recently sought and obtained similar relief in *People v. Story*, wherein
18 Mr. Aguirre has accused Mr. Story of violating the City’s anti-lobbying ordinance. After
19 considering voluminous materials filed with the court, hearing two days of witness testimony, and
20 an afternoon of oral argument, Superior Court Judge Michael D. Wellington entered an Order on
21 May 8, 2007 recusing Mr. Aguirre and the entire San Diego City Attorney’s Office. In his 11-
22 page written decision, Judge Wellington summarized Mr. Aguirre’s misconduct warranting
23 disqualification:

24 Chief among [his acts are] his use of his prosecutorial authority to
25 threaten criminal charges and to offer immunity from prosecution to
26 gain advantage in the civil case; his extensive personal embroilment
27 in both cases; and his fatal weakening of what should have been a
28 protective “ethical wall” between the Criminal and Civil Divisions.
 Many of these factors individually would be sufficient to warrant
 recusal. Taken together, they demonstrate clearly that the conflict
 is so significant that it is unlikely the defendant will receive a fair
 trial if the City Attorney prosecutes.

1 (Defendants' Notice of Lodgment in Support of Motion to Disqualify ("NOL"), Ex. A, 10:16-24.)
2 Mr. Aguirre announced and filed an appeal contesting the ruling, staying that recusal order.

3 By abusing the extraordinary powers available to him as a prosecutor, Mr. Aguirre has
4 irreparably prejudiced Sunroad by obtaining information which he could not have received using
5 civil discovery procedures, and by obtaining discoverable information much more rapidly than he
6 would otherwise have been entitled. He has also disrupted and interfered with Sunroad's
7 relationships with key personnel and outside expert consultants. Sunroad will continue to suffer
8 this prejudice as long as Mr. Aguirre and his office are permitted to continue to pursue this action
9 against Sunroad. He and his office must be disqualified.

10 II. STATEMENT OF FACTS

11 This litigation involves a dispute between the City of San Diego and Sunroad regarding
12 the Centrum 12 Building (the "Building") located near Montgomery Field Airport. The Building
13 is a 12 story, 180' high office building that has been fully approved and permitted by the City of
14 San Diego. (NOL, Ex. B, ¶ 1.) Throughout the permitting process, the City, through its
15 Development Services Department, expressly assured Sunroad that no height limit applied to the
16 Building. (*Id.* ¶ 4.) Despite this, on October 27, 2006, the City Attorney directed the City to
17 issue a Stop Work Order, and on December 16, 2006, the City filed a civil suit against Sunroad.
18 (*Id.* ¶ 13, *see also* NOL, Ex. C.) In its complaint, the City alleged that the Building penetrated
19 FAA height guidelines by 20' and demanded that Sunroad be compelled to deconstruct the top
20 floors of the structure. (NOL, Ex. B, ¶ 56.) Sunroad contends that a FAA-mandated Notice to
21 Airmen (NOTAM) issued at the time of construction increased circling minimums for aircraft
22 landing at Montgomery Field and eliminated any potential threat to safety posed by the
23 Building's height, and has filed a \$40 million cross-complaint against the City for inverse
24 condemnation based on its vested property rights. (*Id.* ¶¶ 8, 18, 21.)

25 Despite the entirely civil nature of this dispute, Mr. Aguirre immediately sought to
26 "criminalize" it, plainly with the aim of gaining advantage over Sunroad. In the fall of 2006, Mr.
27 Aguirre formed a Sunroad "task force" comprised of investigators and personnel from both the
28 Criminal and Civil Divisions of his office to determine how best to proceed against Sunroad.

1 (Declaration of David Miller In Support of Motion to Disqualify ("Miller Decl.") ¶ 9.) Carmen
2 Brock, the attorney of record in this civil matter admitted she attended these meetings. (NOL, Ex.
3 D, 358:3-13.) Kimberly Urie, attorney of record in the criminal matter, received documents from
4 the Civil Division as a result of this cooperative group. (*Id.* at 266:6-9.) Criminal Division
5 Investigator Barry Bruins has testified that he shared information with Civil Division Investigator
6 Julio DeGuzman in March and April of 2007 concerning the nature of criminal misdemeanor
7 charges being considered against Tom Story and even *provided guidance on selecting evidence*
8 *that would be most useful for prosecuting such charges.* (*Id.* at 206-220.) Most importantly,
9 City Attorney Aguirre orchestrated and conducted these joint meetings. (Miller Decl. ¶ 9.) After
10 hearing two days of testimony on the subject, Judge Wellington found:

11 The testimony uniformly established that for an extended period of
12 time at least until early 2007, there were multiple joint meetings of
13 the Criminal and Civil Divisions presided over by Mr. Aguirre
14 personally. The purposes of these meetings was to share
 information, coordinate efforts and make decisions whether to
 proceed criminally and/or civilly and against whom.

15 (NOL, Ex. 1, 7:24-28.)

16 Through these joint meetings, City Attorney Aguirre blurred the lines between civil and
17 criminal efforts. In a January 23, 2007 press conference relating to the civil action, Mr. Aguirre
18 publicly stated the Building was the result of a "cabal" between greedy developers and corrupt
19 City officials, and called for a criminal investigation of Sunroad by the U.S. Attorney's Office.
20 (NOL, Exs. E, F.) Shortly thereafter, on January 31, 2007, the Criminal Division of the City
21 Attorney's Office delivered a letter written by Criminal Division Deputy Kim Urie directly to
22 Sunroad executives Aaron Feldman and Rick Vann, bypassing Sunroad's counsel. The letter
23 threatened criminal charges if Sunroad did not immediately reduce the height of the Building.
24 (NOL, Ex. G.) Reduction in the height of the Building is, of course, *the exact relief sought in*
25 *the civil matter.*

26 The very next day, on January 31, 2007, Mr. Aguirre reiterated his threat of criminal
27 prosecution against Sunroad and its executives in a published interview with the *San Diego Union*
28 *Tribune.* (NOL, Ex. H.) On March 20, 2007, Civil Division Deputy Carmen Brock wrote a letter

1 for Mr. Aguirre's signature demanding that Sunroad comply with the Stop Work Order issued in
2 October of 2006 and purporting to revoke an appeal determination made by Marcela Escobar-Eck
3 of the City's Development Services Department permitting certain work to proceed on the
4 Building. (NOL, Ex. I.) Mr. Aguirre *again* bypassed Sunroad's counsel and had the letter
5 delivered directly to Tom Story. (*Id.*)

6 A day after Mr. Aguirre delivered the March 20 cease and desist letter to Mr. Story, the
7 City Attorney obtained a sweepingly broad and sealed search warrant based on allegations that
8 Mr. Story and others at Sunroad and City of San Diego officials had obstructed justice and
9 conspired to obstruct justice – both felony conspiracy charges.¹ (NOL, Ex. J.) The warrant
10 obtained was problematic for several reasons. First, the City Attorney's office is only empowered
11 to prosecute misdemeanors. Second, the search warrant sought nearly every scrap of paper
12 related to the underlying civil dispute with no safeguards for the protection of attorney-client
13 communications or privileged work product that would inevitably be scattered throughout the
14 areas searched. (*Id.* ["all writings, documents, records, [etc.] directed to, received or reviewed by,
15 or sent or created by Thomas Story during the years 2005 and 2006"].) Third, the "sealed"
16 warrant was leaked to the press by the City Attorney's Office even before Sunroad was informed
17 of it, presumably so that the press would be present at its execution at Sunroad's offices. (NOL,
18 Exs. K, W.)

19 Ultimately, the City Attorney's ability to storm the Sunroad offices and collect all
20 documents he would need to prosecute the civil case was thwarted by his inability to get the
21 warrant executed. The San Diego Chief of Police, in an unprecedented action, declined to
22 execute the warrant due to concerns surrounding its issuance. (*See* NOL Ex. L.) Mr. Aguirre
23 then approached the District Attorney's office and the Attorney General's office to execute the
24 warrant. *Both refused.*² (*See Id.*, NOL Ex. M.)

25 ¹ The crime of conspiracy is known as a "wobbler" because it may be applied as either a felony or misdemeanor.
26 (*People v. Proctor* (1993) 18 Cal. App. 4th 1055, 1061.)

27 ² Perhaps not surprisingly, Mr. Aguirre threatened to file obstruction of justice and/or misdemeanor charges against
28 the Chief of Police. The Chief responded, stating: "Never in my four-decade career in law enforcement have I seen a
more blatant attempt by an elected official to misuse his powers for personal political gain. If you were to believe
Aguirre, it seems that everyone in San Diego is either corrupt or conspiring to commit a crime. Everyone of course
but himself. Joseph McCarthy would be very proud." (NOL, Ex. N.)

1 Knowing full well the warrant would not be executed that day, the City Attorney
2 nevertheless implied by his statements and conduct to Sunroad's counsel that it was in fact
3 pending and used that threat to obtain a "voluntary" production of documents from Sunroad.
4 Sometime after 5:30 p.m. on March 22, 2007, Sunroad's counsel spoke with Mr. Aguirre who
5 stated "we're coming to the building tomorrow by 9:00 a.m. and you can meet us there if you
6 want." (NOL, Ex. W at ¶ 7.) Believing this statement to be true, Sunroad's counsel negotiated a
7 "voluntary" document production to avoid execution of the sweepingly broad search warrant. (*Id.*
8 ¶¶ 7, 8.) In response to this abuse of power, Bonnie M. Dumanis, the District of Attorney of San
9 Diego County, personally revoked the City Attorney's ability to file "wobblers." (NOL, Ex. T.)

10 Next, Mr. Aguirre filed criminal charges against Mr. Story alleging misdemeanor anti-
11 lobbying violations under §267.3550 of the San Diego Municipal Code. (NOL, Ex. O.) More
12 specifically, the Complaint alleged that Mr. Story illegally lobbied the City to obtain permits to
13 construct the Building to its present height of 180 feet. (*Id.*) Mr. Aguirre offered Mr. Story a plea
14 bargain if he would cooperate against Sunroad. Mr. Story declined. (NOL, Ex. A, 415:10-16.)

15 Mr. Aguirre himself then began *personally* contacting and threatening Sunroad's retained
16 experts and consultants, despite the fact that these parties were represented by counsel. On April
17 10, 2007, Mr. Aguirre personally telephoned George Williams, a consultant retained by
18 Sunroad's counsel in June 2006 to advise on FAA issues. (NOL, Ex. X at ¶¶ 3, 5.) Mr. Aguirre
19 pressed Mr. Williams for substantive information about the civil case, including certain notices to
20 the FAA submitted by Mr. Williams to that agency, and his understanding as to the progress of
21 the construction of the Building. (*Id.*) Mr. Aguirre even asked if Mr. Williams helped Sunroad
22 "deceive" the FAA. (*Id.*) Mr. Aguirre asked for Mr. Williams' cooperation and advised him that
23 he should retain counsel because Sunroad would "only be looking out for itself." (*Id.*) The City
24 Attorney's Office later issued a subpoena for documents to Mr. Williams in the criminal matter.
25 The subpoena was broad enough in scope to encompass most of the documents in Williams file
26 related to this matter, all of which related to the civil action rather than to the relatively narrow
27 anti-lobbying charges at issue in the criminal action against Mr. Story. (NOL, Ex. P.)

28 Mr. Aguirre also personally contacted Stephen Laub, Sunroad's retained land use planning

