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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OSCAR DE LA TORRE and ELIAS SERNA,

Plaintiffs,

v.

CITY OF SANTA MONICA, and DOES 1 through 10, inclusive

Defendant.

CASE NO.: 21STCV08597

Assigned to Hon. Richard L. Fruin

DEFENDANT CITY OF SANTA MONICA'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Request for Judicial Notice in Support of Demurrer to Second Amended Complaint and Declaration of Brandon D. Ward filed concurrently herewith*]

Hearing Date: September 30, 2021
Hearing Time: 9:15 a.m.
Reservation No.: 905283036604

Action Filed: March 4, 2021
Dept.: 15

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on September 30, 2021, at 9:15 a.m., or as soon thereafter as the matter may be heard, in Department 15 of the above-entitled Court, located at 111 North Hill Street, Los Angeles, California 90012, Defendant City of Santa Monica ("City") will and hereby does bring a demurrer pursuant to Code of Civil Procedure § 430.10, subdivision (e), to the first and second causes of action in the Second Amended Complaint ("SAC").

The City demurs to the first and second causes of action on the ground that the SAC fails to state facts sufficient to constitute a cause of action for declaratory relief or violation of the Ralph M. Brown Act (the "Brown Act") for the following reasons:

A. Plaintiffs' first cause of action for declaratory relief fails as a matter of law because Plaintiff de la Torre has a common-law conflict of interest as a result of his personal relationship with both plaintiffs (Maria Loya and Pico Neighborhood Association ("PNA")) in the California Voting Rights Act litigation (the "CVRA Action") brought against the City and his extensive involvement on behalf of the plaintiffs in the CVRA Action, including encouraging both plaintiffs to file the CVRA Action, strategizing with his wife (Ms. Loya) and the CVRA Action plaintiffs' counsel on which claims to bring and which discovery to take, providing deposition testimony on an individual basis and as person most knowledgeable for PNA, serving as PNA's representative at trial, and providing trial testimony. Plaintiff de la Torre's personal, private interest in the CVRA Action renders him unable to "exercise the powers conferred on him [as an elected official] with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) Plaintiff de la Torre therefore has a common-law conflict of interest.

B. Plaintiffs' first cause of action for declaratory relief also fails as a matter of law because the City Council acted within its authority in disqualifying Plaintiff de la Torre from attending closed session discussions of the CVRA Action when Plaintiff de la Torre refused to recuse himself.

C. As to Plaintiff Serna, the first cause of action for declaratory relief also fails as a

matter of law because Plaintiff Serna is not the real party in interest and he therefore lacks standing to bring that claim.

D. Plaintiffs' second cause of action for violation of the Brown Act fails as a matter of law because (1) there is no requirement in the Brown Act that all members of a legislative body attend a closed session discussion and no published decision has construed the Brown Act as providing such a requirement and (2) the Brown Act does not compel a legislative body to permit attendance at a closed session of a member determined to have a conflict of interest, as doing so would eviscerate the common-law conflict of interest doctrine, which prohibits the conflicted official from taking part in discussions or voting in the matter in which he has a disqualifying personal interest. Accordingly, if Plaintiffs' declaratory relief claim fails as a matter of law, it necessarily requires dismissal of the Brown Act claim.

E. As to Plaintiff de la Torre, the second cause of action for violation of the Brown Act fails as a matter of law because, as a sitting councilmember, Plaintiff de la Torre lacks standing to bring a Brown Act claim challenging future City Council action.

F. To the extent Plaintiffs are seeking to challenge a past City Council action, Plaintiffs' second cause of action for violation of the Brown Act fails as a matter of law because Plaintiffs have failed to plead compliance with the cease-and-desist requirements of Government Code § 54960.2.

Pursuant to Code of Civil Procedure § 430.41, counsel for the City and counsel for Plaintiffs met and conferred on August 16, 2021 and continued their meet and confer on September 3, 2021, but the parties did not reach an agreement resolving the objections raised in the City's demurrer. The City therefore brings this demurrer as to the two causes of action alleged in the SAC.

This motion is based on this Notice of Demurrer and Demurrer, the accompanying Memorandum of Points and Authorities, the Declaration of Brandon D. Ward, the Request for Judicial Notice, the records and pleadings on file herein, any oral argument of counsel, and such other evidence as may be presented at the time of hearing.

Dated: September 3, 2021

Respectfully submitted,

By: */s/ Kirsten R. Galler*
Kirsten R. Galler

Attorneys for Defendant
CITY OF SANTA MONICA

DEFENDANT'S DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Pursuant to Code of Civil Procedure, §§ 430.10, subdivision (e), and 430.50, subdivision (a), Defendant City of Santa Monica ("City") demurs to the First and Second Causes of Action in Plaintiffs' Second Amended Complaint on the following grounds:

DEMURRER TO PLAINTIFFS' FIRST CAUSE OF ACTION

(DECLARATORY RELIEF)

1. The City generally demurs to the First Cause of Action for declaratory relief on the ground that it fails to state facts sufficient to satisfy the elements of the cause of action under the governing law. (Code Civ. Proc., § 430.10, subd. (e).)

DEMURRER TO PLAINTIFFS' SECOND CAUSE OF ACTION

(VIOLATION OF THE RALPH M. BROWN ACT)

2. The City generally demurs to the Second Cause of Action for alleged violation of the Ralph M. Brown Act on the ground that it fails to state facts sufficient to satisfy the elements of the cause of action under the governing law. (Code Civ. Proc., § 430.10, subd. (e).)

WHEREFORE, Defendant City prays that its Demurrer as to the First and Second Causes of Action be sustained without leave to amend and that Plaintiffs take nothing by reason of the First or Second Causes of Action in the Second Amended Complaint.

Dated: September 3, 2021

Respectfully submitted,

By: */s/ Kirsten R. Galler*
Kirsten R. Galler

Attorneys for Defendant
CITY OF SANTA MONICA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court sustained the City's demurrer to Plaintiffs' First Amended Complaint because "the decision made by the City Council—that Plaintiff had a disqualifying conflict of interest—was correct, and Plaintiff was properly excluded from participating in meetings in which the CVRA [California Voting Rights Act] litigation was discussed." (Order at p. 5.) Plaintiffs have not cured this fatal defect in their Second Amended Complaint ("SAC"). Plaintiffs' newly added allegations—that every member of the City Council supposedly has a personal interest in the CVRA litigation—fail to address the judicially-noticeable facts establishing that Plaintiff de la Torre's intimate involvement in every facet of the CVRA litigation and his close personal relationship with both plaintiffs in that litigation demonstrate a common-law conflict of interest. No other councilmember has the personal relationships to the plaintiffs in the CVRA litigation that Plaintiff de la Torre has. And no other councilmember encouraged the plaintiffs in the CVRA litigation to file suit and strategized how to defeat the City in that litigation. Plaintiff de la Torre's personal relationships and prior participation render him unable to participate in decisions relating to the CVRA litigation with the disinterested skill, zeal, and diligence required of a public officer. As a result, when Plaintiff de la Torre refused to recognize that the common-law conflict of interest required his recusal, the City Council acted properly in disqualifying him from attending closed session discussions relating to the litigation. Plaintiffs' declaratory relief claim challenging his disqualification therefore fails as a matter of law.

Plaintiffs' claim for violation of the Ralph M. Brown Act (the "Brown Act") is equally without merit. There is nothing in the Brown Act that requires a local governing body to allow all members to attend closed session, much less any requirement that it do so despite having found a disqualifying conflict of interest. Plaintiffs' effort to impose such a requirement would eviscerate the common-law conflict of interest doctrine, which prohibits the conflicted official from taking part in discussions or voting in the matter in which he has a disqualifying personal interest. In any event, as a sitting councilmember, Plaintiff de la Torre lacks standing to challenge future actions of the Council. Nor can either Plaintiff challenge the City's past actions because they

both have failed to comply with the Act's cease-and-desist requirements.

The SAC cannot be saved by further amendment. This Court should sustain the demurrer with prejudice.

II. FACTUAL BACKGROUND

A. Councilmember de la Torre's Active Involvement in the CVRA Action

Prior to his November 2020 election to the City Council, Plaintiff de la Torre and his wife were instrumental in bringing and advancing litigation against the City that alleged the City's use of an at-large election system to elect councilmembers violates the CVRA (the "CVRA Action"). (SAC ¶¶ 16-23.) The original complaint in the CVRA Action was filed on April 12, 2016 by three plaintiffs: the Pico Neighborhood Association ("PNA"), Maria Loya (Plaintiff de la Torre's wife), and Advocates for Malibu Public Schools. (Ex. A; SAC ¶ 15.)[1] That complaint alleged that the City's at-large elections for Council and the Santa Monica Malibu Unified School District ("SMMUSD") Board violated both the CVRA and the California Constitution's Equal Protection Clause. (*Ibid*.) A first amended complaint was filed on February 23, 2017 by Ms. Loya and the PNA only and dropped any claims relating to the SMMUSD Board. (Ex. B.) The CVRA Action proceeded to trial, judgment, and appeal on the first amended complaint. (Ex. I at p. 113.)

At the time the original and first amended complaint were filed in the CVRA Action, Plaintiff de la Torre was the co-chair of CVRA Action plaintiff PNA—an organization that his mother and father were involved in founding in 1979. (Ex. D at p. 55; SAC ¶ 15.) As Plaintiff de la Torre would later testify, "we have a long history of family involvement in the [PNA]." (Ex. D at p. 55.) Plaintiff de la Torre's wife, Ms. Loya, is also a member of the PNA board, and his niece at one time served as the agent for service of process of the PNA. (*Ibid*.) As recently as his November 2020 campaign for City Council, Mr. de la Torre continued to serve as chair of the PNA board, resigning from that position only after his election to the City Council. (SAC ¶ 32.)

Even before the CVRA Action was filed, Plaintiff de la Torre actively collaborated with the CVRA plaintiffs' attorney, Kevin Shenkman, to develop the claims and litigation strategy in

[1] Unless otherwise specified, all references to lettered exhibits refer to the exhibits attached to the concurrently filed Request for Judicial Notice.

that action. For example, on July 30, 2015, Mr. Shenkman, Plaintiff de la Torre, and Ms. Loya participated in a call regarding "progress and potential case." (Ex. E at p. 64.) A few months later, on September 29, 2015, Mr. Shenkman met with Plaintiff de la Torre regarding the "Santa Monica campaign and potential case and outreach to Latino leaders." (*Id*. at p. 65.) Those discussions continued and, the next month, on October 16, 2015, Mr. Shenkman again met with Plaintiff de la Torre and Ms. Loya about, "Santa Monica case and public campaign" and "to discuss initial findings and potential case." (*Id*. at p. 66.)

Plaintiff de la Torre's involvement in the CVRA Action only increased after the case was filed. He not only worked with the CVRA plaintiffs' attorney on deposition outlines and discovery, but also frequently consulted with Mr. Shenkman on case strategy issues. (Ex. E at p. 68 [8/9/16 meeting on deposition investigation, preparation, and general story/theme]; p. 70 [10/14/16 discussion on preparation for councilmember's deposition]; pp. 72-73 [meetings in December 2016 on discovery].) For example, in January 2018, Plaintiff de la Torre and his wife met with Mr. Shenkman to discuss the case, including "how to pursue resolution." (*Id*. at p. 74.)

When Plaintiff de la Torre was deposed in the CVRA Action in May 2018, both in his individual capacity and as the person identified by PNA as most qualified to testify on PNA's behalf on specified topics, he was defended by Mr. Shenkman, who stated that he represented both PNA and Plaintiff de la Torre in his individual capacity. (Ex. C at pp. 44-45; Ex. F at pp. 80-81.) Plaintiff de la Torre also testified on the CVRA plaintiffs' behalf at the trial on August 22 and 23, 2018. (Ex. D.) His wife—the other CVRA plaintiff—also testified at trial, explaining that Plaintiff de la Torre was the representative for PNA in the CVRA case. (Ex. G at pp. 88-89.)

B. The CVRA Action Remains Pending Before the California Supreme Court

After extensive post-trial briefing, on February 13, 2019, the trial court issued judgment in favor of the CVRA plaintiffs on both of their causes of action. (Ex. I at p. 114.) Thereafter, the CVRA plaintiffs' attorneys filed motions seeking approximately $23 million in attorneys' fees and costs. (*Ibid.*) Pursuant to an agreement between the parties, the City's response to the fee motion and the hearings regarding costs and fees have been continued to follow the resolution of proceedings in the Court of Appeal and the California Supreme Court. (*Ibid*.)

The City appealed the judgment. On July 9, 2020, the Court of Appeal issued an opinion holding that the City did not violate either the CVRA or the Equal Protection Clause of the California Constitution and reversed the trial court's judgment. (See generally *Pico Neighborhood Assn. v. City of Santa Monica* (2020) 265 Cal.Rptr.3d 530; Ex. I at p. 115.)

On October 21, 2020, in response to the CVRA plaintiffs' petition, the California Supreme Court granted review, but only on a limited question relating to the CVRA plaintiffs' claim under the CVRA. (Ex. I at p. 115.) The Court depublished but did not vacate the Court of Appeal's opinion, leaving intact its ruling in the City's favor on the Equal Protection claim. The briefing is complete. (SAC ¶ 24.) A number of amicus briefs have been filed; among these is an amicus brief filed June 11, 2021 by Councilmember de la Torre in support of the plaintiffs. (Ex. K.) Oral argument before the Supreme Court has not yet been set. (SAC ¶ 24.)

C. de la Torre's Election to City Council and Subsequent Refusal to Recuse Himself from Closed Session Discussions on the CVRA Action

On November 3, 2020—while still serving as PNA chair—de la Torre was elected to serve as a member of the Santa Monica City Council. He took his oath and assumed his duties as a councilmember on December 8, 2020. (SAC ¶ 5.) In anticipation of closed session meetings to discuss litigation strategy, the City Attorney sought an opinion from the Fair Political Practices Commission ("FPPC") on whether a financial conflict of interest exists.[2] (Ex. I at p. 116.)

On January 26, 2021, the Council held a special meeting prior to its regular meeting where the sole item for consideration was Councilmember de la Torre's common-law conflict of interest and disqualification. (Ex. H.) As detailed in the staff report, the City Attorney recommended that the Council determine that Councilmember de la Torre had a common-law conflict of interest and should therefore be disqualified from participating in or attempting to influence discussions or decisions relating to the CVRA Action. (Ex. I. pp. 112-118.) The staff report also explained that

[2] The City also sought guidance from the Office of the Attorney General ("AG") on whether Plaintiff de la Torre had a common-law conflict of interest. (Ex. I at p. 116.) The AG's office declined to provide advice, because Gov. Code, § 12519 now limits the issuance of opinions to a "city prosecuting attorney … relating to criminal matters." (*Ibid.*) Nevertheless, the AG's office provided a copy of a prior AG Opinion, 92 Ops.Cal.Atty.Gen. 19 (2009), which discusses the common-law doctrine and its application in a particular case. (See Section IV.B., *post.*)

the City had posed the financial conflicts question to the FPPC, the FPPC had not yet returned an opinion, but any decision from the FPPC would not address the common-law conflict of interest issue before Council at the January 26 meeting. (*Id.* at pp. 115-116.)

At the special meeting, the City Council reviewed the staff report, received the City Attorney's oral report, and heard public comment. (Ex. J; Ex N.) Councilmember de la Torre also spoke as to why he believed that a conflict of interest does not exist. (Ex. J at pp. 144-145; Ex. N at pp. 205-215, 232-238.) When presented by his City Council colleagues with the opportunity to recuse himself prior to a disqualification vote, he chose not to do so. (Ex. J at p. 145; Ex. N at p. 238.) Plaintiff de la Torre was one of only two councilmembers who voted against finding that a common-law conflict of interest exists. One councilmember abstained, and the remaining four voted to determine that Councilmember De la Torre had a common-law conflict of interest and, therefore, would be disqualified from participating in, voting, or attempting to influence discussion or decisions relating to the CVRA Action. (Ex. J at p. 145; Ex. N at 241.) The City Council proceeded to its regular meeting where it met in closed session, without Councilmember de la Torre, to discuss the CVRA Action. (SAC ¶ 41.)

On February 4, 2021, the City Attorney received a response letter from the FPPC. (SAC Ex. A.) In its letter, the FPPC stated that Councilmember de la Torre does not appear to have a financial conflict of interest. (*Id*. at p. 1.) The FPPC made clear that it was only providing advice on financial conflicts under the Political Reform Act ("PRA") and Gov. Code, § 1090, and not other general conflict of interest prohibitions, such as common-law conflict of interest. (*Ibid.*)

D. Plaintiffs File Suit and the Court Partially Sustains the City's Demurrer

On March 4, 2021, Councilmember de la Torre filed his Complaint, claiming that no conflict of interest exists and asserting that the FPPC's letter finding no financial conflict of interest under the PRA or Gov. Code, § 1090 is dispositive. On May 5, 2021, the City filed its demurrer. Instead of opposing, Plaintiffs filed a First Amended Complaint ("FAC"). On June 24, 2021, the City filed its demurrer to the FAC. On July 23, this Court sustained the demurrer on the declaratory relief claim and held that the City Council had the authority to disqualify Plaintiff de la Torre and that, due to his "disqualifying conflict of interest," "Plaintiff was properly excluded

from participating in meetings in which the CVRA litigation was discussed." The Court overruled the demurrer on the Brown Act claim. Plaintiffs filed their SAC on August 10, 2021.

III. STANDARD OF REVIEW

A demurrer "test[s] the sufficiency of a complaint by raising questions of law," including "whether the complaint states facts sufficient to constitute a cause of action." (*Award Metals, Inc. v. Super. Ct*. (1991) 228 Cal.App.3d 1128, 1131.) To survive a demurrer, "a pleading must contain factual allegations supporting the existence of all the essential elements" of the asserted claims. (*Mobley v. L.A. Unified School Dist*. (2001) 90 Cal.App.4th 1221, 1239.) In particular, a court may properly sustain a general demurrer to a declaratory relief claim without leave to amend when the controversy presented can be determined as a matter of law. (*California State Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 240-241.) And "the defect of a lack of standing to sue makes a complaint subject to general demurrer for failure to state a cause of action." (*Tarr v. Merco Constr. Engineers, Inc.* (1978) 84 Cal.App.3d 707, 713.)

Although courts "assume the truth of all facts properly pleaded," they need not assume the truth of "contentions, deductions or conclusions of fact or law." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) "'[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective.'" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20.) A court "must" "disregard allegations that are contrary to judicially noticed facts and documents." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337.) And where the contents of a document not attached to the complaint "form the basis of the allegations in the complaint, it is essential that [the court] evaluate the complaint by reference to [those] documents." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 & fn.3.)

IV. ARGUMENT

A. The Declaratory Relief Claim Fails as a Matter of Law Because Plaintiff de la Torre Has a Disqualifying Conflict of Interest

To obtain declaratory relief, not only must there be an actual controversy, but a court may refuse to issue a declaration if it is not proper or necessary under the circumstances. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618.) No actual controversy exists here and

it is neither necessary nor proper for this Court to issue declaratory relief because, as a matter of law, Plaintiff de la Torre has a disqualifying common-law conflict of interest and Council acted within its authority to disqualify him. The demurrer should be sustained without leave to amend.

1. Judicially-Noticeable Facts Establish That Plaintiff de la Torre Has a Common-Law Conflict of Interest Necessitating His Disqualification

California has long recognized that a "public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public" and that the "law will not permit [a public officer] to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) This common-law conflict of interest doctrine "'prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.'" (*Clark v. City of Hermosa Beach*, 48 Cal.App. 4th 1152, 1171 (1996) [citing 64 Ops.Cal.Atty.Gen. 795 (1981), 1981 WL 126816].) And this common-law doctrine has not been abrogated by the PRA, which "focuses on financial conflicts of interest, [while] the common law extends to noneconomic conflicts of interest." (*Id.* at p. 1171 fn. 18; see also *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 301 [Gov. Code, § 1090's "overlap with the common law rule is not complete[] because the statutes are concerned with *financial* conflicts of interest and the common law rule encompassed both financial and nonfinancial interests that could result in divided loyalty."].)

Courts today continue to apply the common-law doctrine. In *Clark*, for example, a councilmember had a disqualifying common-law conflict of interest because "the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence." (48 Cal.App.4th at p. 1173; see also, e.g., *Z.A. ex rel. K.A. v. St. Helena Unified School Dist.* (N.D. Cal., Jan. 25, 2010) 2010 WL 370333, at *4 [father's dual role as a school board member and guardian ad litem "creates an impermissible conflict of interest"].) The court in *Clark* explained that "it is irrelevant that [the councilmember] did not own his residence" and thus did not have a financial interest under the PRA because "an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment." (*Id.* at p. 1172.)

The common-law conflict of interest doctrine has also frequently been the subject of opinion letters issued by the AG's Office. The AG's office has explained that the "common law doctrine '*strictly requires* public officers to avoid placing themselves in a position in which personal interest may come into conflict with their duty to the public.'" (70 Ops.Cal.Atty.Gen. 45 (1987), 1987 WL 247237, at *2, italics added.) The AG's office has also repeatedly opined that "[w]here a common law conflict of interest exists, the official may not take part either in the discussion nor in a vote on the relevant matter." (101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at * 8; see 88 Ops.Cal.Atty.Gen. 32 (2005), 2005 WL 716501, at *6 [same]; 64 Ops.Cal.Atty.Gen. 795 (1981), 1981 WL 126816, at *2 ["the common law doctrine against conflicts of interest … may usually be avoided by complete abstention from any official action with respect to or attempt to influence the transaction"].)

While the AG's office declined to issue an opinion in this matter (see fn. 2, *ante*), the AG's office did direct the City's attention to a California AG Opinion (92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874), which advised that a common-law conflict of interest existed where the adult non-dependent son of an agency board member who also resided with the board member in the same rented apartment made an application to the agency for a loan. Although no financial conflict of interest existed, that did not preclude its finding of a common-law conflict of interest: "even if the agency board member cannot be said to have a statutory financial interest in her son's contract with the agency within the meaning of section 1090 or the Political Reform Act, it is difficult to imagine that the agency member has no private or personal interest in whether her son's business transactions are successful or not." (*Id*. at *4.) Thus, the opinion letter concluded that "[i]n our view, the agency board member's status as the private contracting party's parent and co-tenant places her in a position where there may be at least a temptation to act for personal or private reasons rather than with 'disinterested skill, zeal, and diligence' in the public interest, thereby presenting a potential conflict." (*Id.* at *5.) As a result, the opinion letter held, "to avoid a conflict between her official and personal interests, the board member should abstain from any official action with regard to the proposed loan agreement and make no attempt to influence the discussions, negotiations, or vote concerning that agreement." (*Ibid*.)

Here, just as it was "difficult to imagine that the agency member has no private or personal interest in whether her son's business transactions are successful or not" in the 2009 Opinion Letter (92 Ops.Cal.Atty.Gen. 19), it is difficult to imagine that Plaintiff de la Torre has no private or personal interest in whether the lawsuit brought by his wife and the nonprofit his parents helped formed and for which until very recently he served as chair is successful. Given Plaintiff de la Torre's close relationship with both named plaintiffs and intimate involvement with every facet of the CVRA Action—strategizing with his wife and the CVRA Action plaintiffs' counsel on which claims to bring and which discovery to take, providing deposition testimony on an individual basis and as PNA's person most knowledgeable, serving as PNA's representative at trial, and providing trial testimony—there can be no question that allowing Plaintiff de la Torre to participate in closed session discussion of the City's litigation strategy in the CVRA Action would place Plaintiff de la Torre "in a position where there may be at least a temptation to act for personal or private reasons rather than with 'disinterested skill, zeal, and diligence' in the public interest, thereby presenting a potential conflict." (92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, at *5.) While Plaintiffs try to liken Plaintiff de la Torre to other Santa Monica residents who may prefer district-based elections or other political figures who testified at the CVRA trial (SAC ¶¶ 20, 22, 49), Plaintiff de la Torre's extensive involvement with the CVRA Action and close relationships to both named plaintiffs distinguish him from others and would lead any reasonable person to question whether he can "exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public" (*Noble, supra*, 89 Cal.App. at p. 50)—the foundation for the common-law conflict of interest doctrine. That Plaintiff de la Torre's private, personal interests conflicts with his official duty to act with disinterested skill, zeal, and diligence is clearly demonstrated by his recent filing of an amicus brief supporting the positions taken by PNA and his wife his in CVRA Action—positions directly contrary and adverse to those taken by the City. In other words, as in *Clark*, Plaintiff de la Torre's private, personal interest here is "of such importance to him that it could have influenced his judgment" and thus disqualification is necessary. (48 Cal.App.4th at p. 1172.)

Plaintiffs attempt to deflect from Plaintiff de la Torre's common-law conflict of interest

by alleging that the councilmembers who voted to disqualify him when he refused to recuse himself are supposedly "self-interest[ed]" and suffer from their own conflicts of interest because they oppose the CVRA Action. (SAC ¶¶ 21, 42, 50.) This is nonsense. None of the other councilmembers has the type of close relationship that Plaintiff de la Torre has to both of the plaintiffs in the CVRA Action—one of whom is his spouse, and for the other of which he served as its chair after his parents helped in founding it. Nor have any of the other councilmembers been or attempted to be on both sides of the same litigation, which unquestionably poses a conflict of interest. Moreover, the City has every right to defend itself against an alleged violation of the CVRA. But, according to Plaintiffs, a governing body faced with a CVRA challenge would be conflicted from doing so unless each of the councilmembers resided in a different proposed election district *and* would be likely to win in district-based elections. (See SAC ¶¶ 50, 21.) The City is unaware of any authority that would interpret the CVRA or the common-law conflicts doctrine in such a manner. And surely had the Legislature intended such an extreme result in CVRA cases, it would have expressly provided so.[3]

Finally, any argument by Plaintiffs that the FPPC's letter exonerated Plaintiff de la Torre from any conflict—both financial *and* common law—as they continue to assert in the SAC [¶¶ 5, 34, 45] is wrong. The very first paragraph of the FPPC letter provides that the City Attorney requested advice regarding *financial* conflicts of interest. (SAC Ex. A.) To dispel any doubt, the FPPC's letter expressly states that it is "only providing advice under the [Political Reform] Act and [Gov. Code] Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest." (*Ibid*.) And because the statutory provisions on financial conflicts do not abrogate the common-law conflict of interest (see p. 16, *ante*), the FPCC letter has no bearing on whether Plaintiff de la Torre has a common-law conflict of interest.

2. The City Council Acted Properly and Within Its Authority in Disqualifying Plaintiff de la Torre When He Refused to Recuse Himself

There is no merit to Plaintiffs' assertion that the Council did not have the authority to

[3] Plaintiffs' argument would also mean that councilmembers have a disqualifying conflict precluding them from adopting any election code or campaign finance rule, because they may one day be impacted by such rules. The common-law doctrine has not been extended in that manner.

disqualify Plaintiff de la Torre when he refused to recuse himself and that only a court may make that determination in the first instance. The City's Charter vests in the City Council "[a]ll powers of the City," subject only to the "provisions of this Charter and to the Constitution of the State of California." (Ex. L.) This power is "all embracing" and provides a charter city, like Santa Monica, "plenary powers with respect to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter.'" (*Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 468; *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 259 [same].) Accordingly, "'questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts.'" (*People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 940.) One of those municipal affairs the Council is entrusted to make is a determination as to conflicts to ensure that, when the Council considers issues, it is not participating in decisions that violate the law because of a conflict—common law or financial. (*See* Ex. M at p. 190 ["Every Councilmember is entitled to vote unless disqualified by reason of a conflict of interest."]; see also *Kimura v. Roberts* (1979) 89 Cal.App.3d 871, 875 ["the finding of the mayor and the city council that an actual or implied conflict of interest existed, is eminently rational, practical and legally sound" where planning commissioner who was married to a newly elected councilmember was removed from office].)

While Plaintiffs may challenge the Council's policy and wisdom in court to the extent Plaintiffs can show—and they cannot—that the Council's action was unlawful (*Rizzo, supra,* 214 Cal.App.4th at p. 940), the decision whether to disqualify Plaintiff de la Torre when he refused to recognize the existence of his common-law conflict of interest was a determination properly made by Council in the first instance, subject to potential court review. The Council was not required to postpone action pending a judicial determination in the first instance, just as it is not required to do so in connection with many other situations in which the Council must weigh competing legal positions and then act, again subject to subsequent judicial review if a proper legal challenge is pursued. Plaintiffs' declaratory relief claim thus fails as a matter of law for this reason too.

3. Plaintiff Serna Lacks Standing to Challenge the Disqualification

Plaintiff Elias Serna, a Santa Monica resident who is alleged to have supported Plaintiff de

la Torre in the 2020 Election because of his "strong advocacy for district-based allegations" (SAC ¶ 5), brings the same declaratory relief claim as Plaintiff de la Torre. A plaintiff seeking declaratory relief, however, must have standing to bring such a claim. (*D. Cummins Corp. v. United States Fidelity & Guaranty Co.* (2016) 246 Cal.App.4th 1484, 1490.) Serna has no such standing. Plaintiff de la Torre—not Serna—is the real party in interest. (See Code Civ. Proc., § 367.) To be a real party in interest, the SAC must "specify any actual or threatened action which would injure [Serna] or violate [his] rights." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 60.) There are no such allegations as to Serna. On the contrary, the declaratory relief claim is premised on the alleged harm to Plaintiff de la Torre by the City's disqualification of him from attending closed session. But this disqualification does not injure Serna. Even if Serna voted for Plaintiff de la Torre due to his strong advocacy, the Council's action does not prevent Plaintiff de la Torre from continuing to advocate for a change from at-large to district elections, or participating in Council discussions regarding any such proposed change separate and apart from the CVRA Action. The only thing it does prevent is having him participate in closed session discussions and decisions relating to privileged litigation matters and strategy in the CVRA Action itself. Serna's claim should therefore be dismissed for lack of standing.[4]

B. Plaintiffs' Brown Act Claim Is Without Merit and Plaintiff de la Torre Lacks Standing in Any Event

1. There Is No Requirement in the Brown Act That All Members of a Legislative Body Attend Closed Sessions, Let Alone One Where They Are Disqualified Due to a Common-Law Conflict of Interest

Relying on language in Gov. Code, § 54953 providing that "all persons shall be permitted to attend any meeting of the legislative body of a local agency," Plaintiffs' second cause of action alleges that the City will violate the Brown Act by "holding closed session meetings accessible to a majority, but not all, of the members of its city council." (SAC ¶ 63.)

Plaintiffs' novel interpretation of the Brown Act does not withstand scrutiny. As an initial matter, the City is unaware of a single decision in the nearly 70-year history of the Brown Act

[4] Nor does Serna have taxpayer standing to challenge the City's exercise of discretion to disqualify Plaintiff de la Torre (*San Bernardino County v. Super. Ct.* (2015) 239 Cal.App.4th 679, 686) or public interest standing, which applies only to mandamus claims (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 874).

that has construed the Act in this manner. Rather, courts instead repeatedly refer to its purpose as "'ensur[ing] the public's right to attend the meetings of public agencies." (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1511.) Quite simply, no published case has applied the Brown Act to compel a governing body to have all of its members attend closed session.

Nor does the plain text of Gov. Code, § 54956.9—authorizing a "a legislative body of a local agency" to "hold[] a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation"—support Plaintiffs' interpretation. Plaintiffs focus on the lack of reference to "a majority … of the members of a legislative body" in that section (SAC ¶ 60), but this ignores that the Brown Act's definitions of the key terms already incorporate that language:

- A "meeting" is defined as "any congregation of *a majority of the members of a legislative body* at the same time and location" "to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." (Gov. Code, § 54952.2, subd. (a), italics added.)
- "[A]ction taken" is defined as a "collective decision made by *a majority of the members of a legislative body*, a collective commitment or promise by *a majority of the members of a legislative body* to make a positive or a negative decision, or an actual vote by a *majority of the members of a legislative body* when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Gov. Code, § 54952.6, italics added.)
- Following a closed session on litigation-related matters, the "legislative body of any local agency shall publicly report any *action taken* in closed session and the vote or abstention on that action of *every member present*" as specified in Gov. Code, § 54957.1. (Italics added.)

Construed together, these provisions show that a legislative body may convene a closed session and, provided that a majority is present, make a collective decision on how to proceed that is subsequently reported out if required by § 54957.1. There is simply nothing in the Brown Act itself or any published decision interpreting the Brown Act that provides a right for all members of a legislative body to be present at a closed session.

More fundamentally, the Brown Act clearly does not compel a legislative body to permit attendance at closed session of a member determined to be suffering from a conflict of interest. Plaintiffs' novel and contrary interpretation of the Brown Act would render meaningless any disqualification on the basis of a common-law conflict. As described above, "[w]here a common law conflict of interest exists, *the official may not take part either in the discussion nor in a vote on the relevant matter*." (101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at * 8, italics

added.) Because the City Council properly and within its authority determined that Plaintiff de la Torre had a disqualifying common-law conflict of interest, his exclusion from the closed session necessarily does not violate the Brown Act.

Hamilton v. Town of Los Gatos (1989) 213 Cal.App.3d 1050 is instructive on this point. There, a councilmember had a disqualifying financial interest due to his management of a business in a proposed special parking assessment district and abstained from voting on related issues. (*Id.* at pp. 1052-1053.) After the town was sued in an action challenging the formation of the district, the councilmember with the conflict did not attend the closed session discussing the lawsuit but then later requested to listen to the tape of the closed session. (*Id.* at p. 1053.) After considering the "two competing public policies" of "the right of the public to unbiased public decisionmaking and the right of the public to be actively represented by their duly elected public officials," the court of appeal held that the councilmember was not authorized to observe the closed session or review the tape recording. (*Id.* at 1058.) The court explained that "permit[ting] a financially interested council member to be privy, unnecessarily, to confidential information which might affect his business interests gives the appearance of impropriety" and "the disqualified member's mere presence, or knowledge thereafter, might also subtly influence the decisions of other council members who must maintain an ongoing relationship with him." (*Ibid.*) The court thus concluded that "the policy of promoting unbiased governmental decisions outweighs the public's right to know or to have all of its representatives be fully informed or actively participate in all governmental decisions." (*Ibid.*) In reaching this decision, the court also pointed to a concern that the town might be "denied effective assistance of counsel" because, in closed session, the "attorney, as well as the other council members, might not feel as free to disclose everything necessary when a 'biased' public official were present.'" (*Id.* at p. 1059.)

While Plaintiff de la Torre's conflicts here are not financial, the same concerns of having a "biased" councilmember present at a closed session exist when the conflict is noneconomic. These concerns—the appearance of impropriety, the impact on fellow councilmembers, the policy of promoting unbiased decisionmaking—outweigh any competing public policy of having all members present at a closed session. There is thus no Brown Act violation where a governing

body holds a closed session without the attendance of the member with the disqualifying conflict of interest, whether financial or common law. Accordingly, if this Court sustains the demurrer on the declaratory relief claim, it will compel sustaining the demurrer on the Brown Act claim too.

2. Plaintiff de la Torre Does Not Qualify as an "Interested Person" for Purposes of Challenging Future Council Action

Even if Plaintiffs had a Brown Act claim (and they do not), Plaintiff de la Torre's claim would still fail because he lacks standing as an "interested person" under Gov. Code, § 54960 to challenge future Council action. "[T]he standing conferred by the Brown Act is standing based on citizenship—precisely the kind of standing that a citizen forfeits when he or she becomes a public official." (*Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1257); see *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 800.) This is especially problematic where, as here, a councilmember claims to be "an interested member of the public (i.e., a taxpayer-citizen) in order to ensure compliance with the Brown Act in *future* meetings." (*Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 671, original italics.) "[A]s an elected member of the [City Council], [Plaintiff de la Torre] lack[s] standing to maintain such a cause of action." (*Ibid.*) His claim should therefore be dismissed with prejudice.

3. Plaintiffs' Brown Act Claim Fails to the Extent They Are Challenging the Council's Past Action

While Plaintiffs' SAC asserts that they are seeking only to prevent a "threatened violation" of the Brown Act (¶ 62), the remedy they seek—injunctive relief allowing Plaintiff de la Torre to view the recording of the January 26 closed session meeting (SAC, p. 19)—makes it apparent that they are seeking to determine the applicability of the Brown Act for "past actions of the legislative body" under Gov. Code, § 54960. Not only is their requested remedy improper here (see pp. 22-23, *ante*), Plaintiffs have failed to plead compliance by either of them with Gov. Code, § 54960.2's cease-and-desist requirements. (See *Center for Local Gov. Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1156.) Plaintiffs therefore cannot assert a Brown Act challenge to the City's January 26 action.

V. CONCLUSION

This Court should sustain the demurrer without leave to amend.

Dated: September 3, 2021

Respectfully submitted,

By: */s/ Kirsten R. Galler*
Kirsten R. Galler

Attorneys for Defendant
CITY OF SANTA MONICA

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. My business address is 1685 Main Street, Santa Monica, California 90401.

I hereby state that I electronically filed the foregoing document with the Clerk of the Court for the Superior Court of California, County of Los Angeles through First Legal, our Electronic Filing Service Provider, on **September 3, 2021** described as:

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Court Reservation Receipt

Reservation

Reservation ID: 905283036604	Status: RESERVED
Reservation Type: Demurrer - without Motion to Strike	Number of Motions: 1
Case Number: 21STCV08597	Case Title: OSCAR DE LA TORRE vs CITY OF SANTA MONICA
Filing Party: City of Santa Monica (Defendant)	Location: Stanley Mosk Courthouse - Department 15
Date/Time: September 30th 2021, 9:15AM	Confirmation Code: CR-XCJWUTUTYYASOBACT

Fees

Description	Fee	Qty	Amount
Demurrer - without Motion to Strike *** Fees Exempted by Gov Code 6103.1 ***	60.00	1	0.00
TOTAL			$0.00

Payment

Amount: $0.00	Type: GOVT_EXEMPT

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