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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,

Defendants.

CASE NO.: 21STCV08597

Assigned to Hon. Richard L. Fruin

DEFENDANT CITY OF SANTA MONICA'S REPLY IN SUPPORT OF DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

[*Reply in Support of Request for Judicial Notice filed concurrently herewith*]

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I. INTRODUCTION

This case is not about disqualifying councilmember de la Torre because he has strong views on the merits of the lawsuit brought by Maria Loya and Pico Neighborhood Association ("PNA") against the City for alleged violation of the California Voting Rights Act ("CVRA"). Instead, it is about his close personal relationships to both named plaintiffs—his wife is a plaintiff and, until December 2020, he served as the co-chair of PNA, the other plaintiff—and his personal involvement on behalf of the plaintiffs in nearly all aspects of the CVRA Action. He alone has these close personal relationships. They are the reason Plaintiff de la Torre has a disqualifying common-law conflict of interest while the other councilmembers, whether they oppose or support the CVRA Action, do not. Contrary to Plaintiffs' arguments, this is neither a novel nor extreme application of the common-law conflicts doctrine. Indeed, such close personal relationships pose precisely the concern the common-law conflicts doctrine is intended to address—that a public official may be tempted to act to benefit those with whom he has the close personal relationships rather than with the disinterested skill, zeal, and diligence required of a public official. Because undisputed facts establish this conflict, the City Council acted properly and within its authority in disqualifying Plaintiff de la Torre. Plaintiffs' declaratory relief claim thus fails as a matter of law.

Plaintiffs' Brown Act claim fares no better. Plaintiffs fail to cite a single case supporting their view that the Brown Act provides a right, much less an absolute right regardless of the presence of a conflict, for a member of a legislative body to attend a closed session. Nor can Plaintiffs' interpretation be squared with the Brown Act's plain terms. It would also abrogate the common-law conflicts doctrine, contrary to the settled rule that statutes are to be construed to avoid conflict with common-law rules. This claim also fails as a matter of law.

II. ARGUMENT

A. Plaintiffs' Declaratory Relief Claim on the Common-Law Conflict of Interest Doctrine Fails as a Matter of Law

1. Plaintiff de la Torre's Close Personal Relationship to Both Named Plaintiffs in the CVRA Action Gives Rise to a Common-Law Conflict of Interest

Plaintiffs do not dispute that 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." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) Plaintiffs contend, however, that Plaintiff de la Torre does not have a disqualifying common-law conflict of interest because he does not have a "personal interest in the requested relief" in the CVRA Action and the City Council disqualified him solely because of his "strong advocacy" for district-based elections. (Opp. at pp. 6, 9.) Plaintiffs are wrong on the law and the facts—their revisionist history fails to take into account Plaintiff de la Torre's close personal relationship to both named plaintiffs in the CVRA Action as well as his own intimate involvement on behalf of the plaintiffs in many aspects of that litigation, which establish a disqualifying common-law conflict of interest as a matter of law.

As this Court noted when it granted the City's demurrer to the FAC, a common-law conflict exists where there is "at least a temptation to act for personal or private reasons." (July 23, 2021 Order at p. 3, quoting 92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, at *5.) That temptation is indisputably present in cases such as this where the public officer has a close personal relationship to a party in the underlying transaction or dispute. That is why the AG's Office concluded that an agency board member had a disqualifying conflict of interest regarding her son's business transactions because 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," even though there was no disqualifying financial conflict or tangible benefit to the board member herself. (2009 WL 129874, at *4.) While Plaintiffs attempt to distinguish this opinion on the ground that the "loan had value to agency member's son, not to a large group of the agency's constituents" (Opp. at p. 10), that is not why the AG's Office found there to be a disqualifying common-law conflict. The common-law conflict arose because of the concern that the 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," namely, the desire that her son would be successful in the underlying transaction. (2009 WL 129874, at *5.) That same temptation to act for a personal or private reason—that Plaintiff de la Torre's wife and the non-profit he previously served as co-chair would be successful in the litigation against the

City—is present here and alone sufficient to establish a disqualifying common-law conflict.[1]

Plaintiffs contend that a disqualifying conflict of interest in connection with underlying litigation only arises if the public officer has a "personal interest in the requested relief" (Opp. at p. 6), but this only repackages an argument that the Court already rejected when ruling on the City's demurrer to the FAC. (See July 23, 2021 Order at p. 4 [rejecting argument that Plaintiff de la Torre "has no personal stake, financial or otherwise, in the Voting Rights Case"].) If the common-law conflict turned on whether the relief awarded would result in a tangible personal benefit to the public officer, it would mean that Plaintiff de la Torre could participate in decisions resolving any litigation brought against the City by a close family member so long only equitable relief is sought or the relief purportedly benefits other City residents. The City is unaware of any case or AG Opinion—and Plaintiffs have not cited any—that would endorse such an expansive view, which would eviscerate the common-law doctrine's application to noneconomic interests. Indeed, it should be without question that if a public officer's close family member sues a government entity, the public officer is disqualified from participating in any decisions on how the government entity should resolve that litigation, regardless of the relief sought.

The recognition that a close personal relationship gives rise to a disqualifying conflict of interest is also the reason why government officials, including elected judges, are required to recuse themselves if their spouse is a party to or the subject of the dispute. (See, e.g., Code Civ. Proc., § 170.2 [trial judge is disqualified from hearing a matter if the "spouse of the judge, or a person within the third degree of relationship to either of them, … is a party to the proceeding or an officer, director, or trustee of a party"']; Cal. Code Jud. Conduct, canon 3(E)(5)(e)(i) [same rule for appellate justices]; 8 C.F.R. § 45.2(a)(1) [no federal employee can participate in a "criminal investigation or prosecution if he has a personal or political relationship with … [a]ny person or organization substantially involved in the conduct that is the subject of the investigation

[1] The facts of this case are thus unlike those in the AG Opinion on which Plaintiffs rely, where a councilmember who served on a nonprofit trust created to support operations of a national historical park was permitted to participate in city council discussions on whether to grant a lease to a business that donated to the nonprofit and with which the councilmember was not alleged to have any familial relationship. (88 Ops.Cal.Atty.Gen. 32 (2005), 2005 WL 716501, at *1, 7.)

or prosecution"].) Like the common-law conflicts doctrine, such rules are "necessary not only to guard actual impartiality but also to insure public confidence." (*Kimura v. Roberts* (1979) 89 Cal.App.3d 871, 875 [pointing to judicial disqualification rules when holding that council acted properly in removing from office planning commissioner who was married to councilmember].) Here, too, disqualifying Plaintiff de la Torre from participating in closed-session discussions of the CVRA Action is required as a result of his close personal relationships to the plaintiffs in that action, one his spouse and the other an organization to which he has longstanding personal ties.

Nor is there any merit to Plaintiffs' argument that there is no conflict even if the council-member is "himself one of the litigants." (Opp. at p. 7.) Plaintiffs cite *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, as support for this proposition, but the councilmember there was not the real party in interest—he merely filed an appeal of the planning commission's decision to grant a conditional use permit ("CUP") for BreakZone to operate a billiards parlor, as allowed by the City of Torrance's rules. (*Id.* at p. 1213.) And other courts have found impermissible bias where a councilmember appeals a commission's decision. (See, e.g., *Petrovich Development Company, LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, 975–976 [councilmember who instituted appeal "should have recused himself from voting on the appeal" because he "took affirmative steps to assist opponents of the gas station [CUP] and organized the opposition at the hearing" and thus improperly "acted as an advocate"]; *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1029–1031.)

Moreover, the facts of *Breakzone* bear no similarity to those here. In that case, BreakZone filed a writ petition, claiming, among other things, that "it was denied a fair hearing" because four councilmembers received campaign contributions from a third party opposed to the CUP and the councilmember that filed the appeal participated in the decision. (81 Cal.App.4th at p. 1220.) As to the receipt of the campaign contributions, the Court of Appeal held that "BreakZone has not made the necessary record to invoke th[e] protections [from the appearance of unfairness], whether they be founded on statute or common law" and thus declined to apply the common-law conflicts doctrine. (*Id.* at p. 1212; see also *id.* at p. 1227.) As to the appealing councilmember's involvement, the court explained that a "party seeking to show bias or prejudice on the part of an

administrative decision maker [must] prove the same with concrete facts" and that standard was not met because there was "no allegation of prior personal animosity by [the councilmember] and no indication that he had a personal financial interest in the [CUP] application" or a "relationship" to the party making the campaign contributions. (*Id.* at p. 1237, 1238-1239.)

Here, by contrast and as described above, there is clear record of a personal relationship between Plaintiff de la Torre and *both* parties in the CVRA Action. Nor can Plaintiffs liken Plaintiff de la Torre's involvement in the CVRA Action to the councilmember in *Breakzone* by contending that Plaintiff de la Torre has simply "expressed his desire that one side—the plaintiffs—prevail in the Voting Rights Case so district-based elections are implemented for Santa Monica's City Council." (Opp. at p. 9.) This attempt to recast Plaintiff de la Torre as merely a strong advocate for district-based elections would require this Court to ignore Plaintiffs' own allegations demonstrating that he was the catalyst for PNA and his wife filing the CVRA Action against the City (SAC ¶ 17) as well as the judicially-noticeable facts establishing that Plaintiff de la Torre served as the representative for PNA in the trial itself, provided both deposition and trial testimony on behalf of PNA, was personally represented by the CVRA Action plaintiffs' attorney, and was intimately involved in all aspects of litigation strategy (and apparently still is, as evidenced by his recent amicus brief). (Mem. at pp. 11-13.)

Moreover, nothing about the City Council's disqualification of Plaintiff de la Torre from participating in privileged, closed-session discussions of the CVRA Action prevents him from continuing to advocate as a councilmember for district-based elections or participating in discussions of whether the City should pursue district-based elections. All Council's action did was to disqualify him from "participating in, voting, or attempting to influence discussion or decisions relating to [the CVRA] litigation." (RJN, Ex. J at p. 145.) Such a disqualification therefore raises none of the concerns identified in *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780, which addresses only whether "[c]ampaign statements" "disqualify the candidate from voting on matters which come before him after his election." Indeed, that this concern is not implicated is further illustrated by the fact that the other newly elected councilmembers who allegedly share Plaintiff de la Torre's views on the CVRA Action (see SAC

¶¶ 27-28) are allowed to participate in closed-session discussions on that case because they do not have the personal relationships that give rise to Plaintiff de la Torre's disqualifying conflict.

In sum, Plaintiff de la Torre has a common-law conflict because of his close personal relationship to both parties in the CVRA Action and his active involvement in virtually every facet of that litigation. Because the common-law conflicts 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* (1996) 48 Cal.App.4th 1152, 1171), disqualification is necessary as a matter of law.

2. As a Municipal Affair, the City Council Acted Within Its Authority in Disqualifying Plaintiff de la Torre on Common-Law Conflict Grounds

Relying on PRA provisions, Plaintiffs continue to assert that the Council lacks authority to disqualify Plaintiff de la Torre on common-law conflict grounds. This Court has already rejected this argument in ruling on the City's prior demurrer, and for good reason. As courts and the AG's Office have concluded, the 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." (*Clark, supra,* 48 Cal.App.4th at p. 1171 fn. 18; see also 70 Ops.Cal.Atty. Gen. 45 (1987), 1987 WL 247237, at *2.) Accordingly, whether the Legislature has delegated to the courts and the FPPC the resolution of certain *financial* conflicts questions has no bearing on whether the Council has authority to resolve questions on *non-financial* common-law conflicts.

As the City established in its Demurrer, the City Council has the authority to resolve common-law conflict questions because, as a charter city, Santa Monica has "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; Mem. at p. 20.) Neither the Constitution nor any other state law expressly forbids the City from making this determination. Tellingly, other than inapplicable PRA provisions, Plaintiffs have not cited any such authority. Because it is a municipal affair, 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.

(See *People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 940.) Plaintiffs' request for declaratory relief that the City lacks such authority absent a judicial determination that a common-law conflict exists therefore fails as a matter of law.

3. Plaintiff Serna Lacks Standing to Challenge the Disqualification

Plaintiffs do not deny that Plaintiff de la Torre is the real party in interest on the declaratory relief claim and that the SAC lacks allegations that Plaintiff Serna has suffered any injury. Rather, Plaintiffs contend that "Serna, like any other interested citizen of Santa Monica, has standing to compel Defendant to comply with the law." (Opp. at p. 13.) But *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439, the case on which Plaintiffs rely, concerns citizen standing to pursue a writ of mandate, and courts have since held that "this public interest standing exception has been consistently applied *only* in the context of mandamus proceedings" (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 874, italics added). Because Plaintiffs do not seek writ relief here—their FAC explicitly removed all references to writ relief—Plaintiff Serna cannot rely on citizen standing as a basis to bring the declaratory relief claim. Plaintiff Serna's claim should therefore be dismissed.[2]

B. Plaintiffs' Brown Act Claim Fails as a Matter of Law

1. Plaintiffs' Novel Interpretation of the Brown Act Lacks Support and Would Abrogate the Common-Law Conflict Doctrine

Plaintiffs do not cite a single case or AG Opinion that supports their novel interpretation that the Brown Act provides a right for all members of a legislative body to be present at a closed session, even where the member suffers from a common-law conflict of interest. Nor do Plaintiffs deny that their interpretation would render the common-law conflict of interest doctrine meaningless, as that doctrine provides 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

[2] Plaintiffs assert that the standing argument is untimely. But as Plaintiffs' own case establishes, "contentions based on a lack of standing involve jurisdictional challenges and may be raised *at any time* in the proceeding." (*Common Cause, supra*, 49 Cal.3d at p. 438, italics added.) In any event, given Plaintiffs' desire to resolve this action expeditiously, requiring the City to file a motion for judgment on the pleadings to raise this argument would only serve to prolong resolving this action. And because the question of standing can be resolved on the pleadings, it is not a question that should wait for the summary judgment stage.

Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at * 8, italics added.)

Instead, Plaintiffs assert, as they do in their SAC, that the Brown Act requires attendance of the entire legislative body at closed session, arguing that "where the Legislature wanted to refer in the Brown Act to 'a majority … of the members of a legislative body' rather than the entire legislative body, the Legislature did exactly that explicitly." (Opp. at p. 14.) This argument fails to address the City's showing that the Brown Act's definitions of key terms already incorporate that phrase. "If the Legislature has expressly defined a term, [the court] must apply that definition" when construing a statute. (*People v. Ward* (1998) 62 Cal.App.4th 122, 126.) For example, Plaintiffs point to the language in Gov. Code, § 54953 that "all persons shall be permitted to attend any meeting of the legislative body of a local agency," but that section must be read in light of the definition of "meeting," which 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).[3] Plaintiffs' contrary interpretation of the Brown Act is "inconsistent with the well-established principle that courts should, if possible, give meaning to every word of a statute and avoid constructions that make any word surplusage." (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 13.) Accordingly, far from supporting Plaintiffs, the plain terms of the Brown Act demonstrate that a legislative body can hold a closed-session meeting with only a majority of the members present.[4]

Plaintiffs also suggest that the Brown Act somehow abrogated the common-law conflicts doctrine. (Opp. at p. 15.) But again, Plaintiffs cite nothing to support this suggestion. It is also contrary to the "general rule" that "'[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules.'"

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[3] Similarly, the requirement that the "legislative body of any local agency shall publicly report any *action taken* in closed session," including on pending litigation, must be read in light of the definition of "action taken," which means a "collective decision made by *a majority of the members of a legislative body* …." (Gov. Code, §§ 54957.1, 54952.6, italics added.)

[4] Contrary to Plaintiffs' arguments, the City is not construing the statutory exception authorizing closed-session meetings on litigation broadly. Indeed, there is no allegation—nor can there be—that the CVRA Action does not qualify as pending litigation under Gov. Code, §54956.9 or that the City did not comply with the noticing and agenda requirements for closed-session discussions.

(*California Assn. of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297, internal citation omitted.) "Accordingly, '[t]here is a presumption that a statute does not, by implication, repeal the common law" [and] [r]epeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.'" (*Ibid.*) As described above, the Brown Act's restrictions on closed-session meetings and the common-law doctrine can be harmonized with one another: a majority of the legislative body may hold a closed-session discussion of pending litigation without the presence of a member who has a disqualifying conflict of interest without running afoul of either the Brown Act or the requirement that the official with a common-law conflict of interest "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.)[5]

Finally, Plaintiffs ask this Court to ignore the helpful discussion in *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050, because the court there did not expressly address whether a Brown Act violation occurred. But the City cited *Hamilton* to demonstrate that the same concerns of having a "biased" councilmember present at a closed session exist when the conflict is noneconomic, as here, or financial, as in *Hamilton*. As *Hamilton* held, where a conflict exists between 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" (*id.* at p. 1058), the right to unbiased public decisionmaking prevails.[6]

In sum, the Brown Act does not provide a right to attend a closed-session discussion when

[5] Nor can Plaintiffs point to Gov. Code, § 54958, providing that the Brown Act applies "notwithstanding the conflicting provisions of any other state law." "Failing to designate what if any laws are superseded, [§ 54958] has no greater force than a repeal by implication; it subordinates or repeals existing law only to the extent that the two laws are irreconcilable." (*Sacramento Newspaper Guild v. Sacramento County Bd. of Sup'rs* (1968) 263 Cal.App.2d 41, 55.) As described above, there is no repeal by implication here.

[6] Plaintiffs claim that Article I, § 3(b)(2) of the California Constitution, which provides that a "statute, court rule, or other authority … shall be broadly construed if it furthers the people's right of access and narrowly construed if it limits the right of access," undermines *Hamilton*'s policy considerations. No court has interpreted that provision to mean that a member of a legislative body has a broad right of access to closed-session discussions. Such an interpretation would mean that even the proscription in Gov. Code, § 87100 on financially interested officials participating in governmental decisions would have to yield to the official's supposed right of access. This interpretation would lead to absurd results and should not be credited. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.)

Plaintiff de la Torre has a disqualifying conflict. This claim thus fails as a matter of law.[7]

2. Plaintiffs Have Failed to Adequately Address the City's Standing and Exhaustion Arguments

The City is not, contrary to Plaintiffs' assertions, merely repeating the same standing and exhaustion arguments it made in its demurrer to the FAC. Rather, as to standing, the City has focused on the fact that, as an elected official, Plaintiff de la Torre lacks taxpayer-citizen standing to maintain a cause of action seeking to compel Council's *future* compliance with the Brown Act. (See Mem. at p. 25, citing *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 671.) Plaintiffs' prior opposition has no response to this specific argument. As to the exhaustion argument, the City has focused on the remedy that Plaintiff seeks—injunctive relief allowing Plaintiff de la Torre to view a recording of the January 26 closed session—to demonstrate that Plaintiff are seeking to apply the Brown Act to Council's past actions without complying with the cease-and-desist requirements. Again, Plaintiffs' cross-reference to their earlier opposition, which contends that "[a]ll of the relief requested in the FAC is prospective" (July 9, 2021 Opp. at p. 15), fails to adequately address the City's arguments.

C. This Court May Properly Consider Judicially-Noticeable Facts

Although Plaintiffs' SAC continues to expressly refer to many of the documents over which the City seeks judicial notice and the other documents consist of sworn testimony, a transcript of Council proceedings, and filings properly subject to judicial notice, Plaintiff seeks to avoid this Court's reliance on any of the facts set out in these documents, labeling them as "alternative facts." But these judicially-noticeable facts are properly before this Court. (See Mem. at p. 15.) And, as further explained in the City's reply to the request for judicial notice, there is no reasonable dispute as to any of the facts in the proffered exhibits, and thus the contents of the documents and their truthfulness may be considered when ruling on the demurrer.

III. CONCLUSION

This Court should sustain the demurrer without leave to amend.

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[7] There is no merit to Plaintiffs' argument that this argument is untimely. "[B]y filing the SAC, [Plaintiffs] opened the door to a demurrer to the entire SAC." (*Carlton v. Dr. Pepper Snapple Group, Inc.* (2014) 228 Cal.App.4th 1200, 1211.) Also, Code Civ. Proc., § 430.41, subd. (b)'s plain terms do not apply here because the prior demurrer to the Brown Act claim was overruled.

Dated: September 23, 2021

Respectfully submitted,

By: */s/ Kirsten R. Galler*
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PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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