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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 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF SANTA MONICA'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** Date: May 6, 2021 Time: 9:15 a.m. Dept.: 15 Reservation No: 661700682638 Action Filed: March 4, 2021 Trial Date: May 16, 2022

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INTRODUCTION

For six years, Plaintiff Oscar De la Torre was personally involved with and substantially assisted in the strategy, preparation, filing, trial, and appeal of a pending lawsuit against the City of Santa Monica ("City") challenging its at-large election system (the "CVRA Action"). His wife Maria Loya remains a plaintiff in that case today and De la Torre continues to collaborate with and receive free legal advice from the lead plaintiffs' attorney in the CVRA Action, Kevin Shenkman. After taking his City Council seat, however, De la Torre refused to recuse himself from discussions and decisions relating to the CVRA Action. His refusal led to a valid Council vote, whereby the majority voted to disqualify De la Torre from attending closed sessions discussing the CVRA Action. Notably, the Council *did not* disqualify two other newly elected councilmembers who (like De La Torre) support district-based elections, but who (unlike De La Torre) are not intrinsically intertwined with the CVRA Action and its attorneys. Dissatisfied with the Council's vote, De la Torre filed this action hoping his Court would overturn the Council's decision. But his desire to substitute this Court's judgment for that of the Council thwarts the democratic process, raises separation of powers concerns, and is unsupported by the facts and law.

Plaintiffs are not entitled to the declarations they seek. Legally, the Council has the power to disqualify its members. "'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.) And this court should avoid issuing declarations that are "not necessary or proper at the time under *all* the circumstances." (Code Civ. Proc., § 1061, italics added.) Here, declarations about the Council's past decisions are improper and declarations about future decisions would be guesswork because at present the future is unknown. Regardless, the undisputed evidence proves De la Torre has both common law and financial conflicts. Further, Plaintiffs cannot establish any future violation of the Brown Act. Plaintiffs argue that closed sessions require all councilmembers to be present. As a matter of law, a closed session may proceed where a quorum is present, which De la Torre conceded at his deposition.

Accordingly, based on the undisputed evidence and the law, summary judgment (or minimally summary adjudication) should be granted in the City's favor.

FACTUAL BACKGROUND

I. The CVRA Action

Prior to his November 2020 election to City Council, De la Torre and his wife Maria Loya ("Loya") brought suit alleging that the City's Charter requiring councilmembers to be elected at large violates the California Voting Rights Act ("CVRA") and equal protection under the California Constitution. (SF.8.) The plaintiffs are Loya and the Pico Neighborhood Association ("PNA") (of which De la Torre was the co-chair). (SF.6-8.) Plaintiffs won at the trial level, but the Court of Appeal reversed, ordered plaintiffs to pay costs, and directed the trial court to enter judgment for the City. (51 Cal.App.5th 1002.) The Supreme Court granted review on the CVRA standard but did not vacate the appellate decision. (RJN Ex. F.) The matter is awaiting oral argument.

After trial, the plaintiffs' attorneys filed motions seeking over $20 million in attorneys' fees, exclusive of costs. (SF.57.) Shenkman & Hughes PC, Kevin Shenkman's firm, sought over $13.3 million. (SF.9, 58.) Pursuant to an agreement, the City's response and hearings regarding costs and fees have been continued pending appellate resolution. (SF.59.) Hence, if the CVRA Action plaintiffs lose the appeal (and do not settle), Shenkman will not recover any attorneys' fees or costs.

II. Loya – De la Torre's Wife – Remains a Plaintiff in the CVRA Action

Loya and De la Torre were instrumental in bringing the CVRA Action. Loya was deposed, testified at trial, and confirmed that De la Torre was the PNA representative in the CVRA case. (SF.50, 56.) Loya remains the lead plaintiff today. (SF.136.) Loya has been a board member of the PNA since 2002 or 2003 and serves on the PNA board as the treasurer. (SF.2, 3.)

Beyond her work on the PNA, Loya is the sole owner of Holistic Strategies Coaching & Consulting LLC ("Holistic"), which she founded in in 2019. (SF.139.) Holistic does consulting work mainly on "social justice" and "socioeconomic issues." (SF.141-142.) Loya and De la Torre receive financial compensation from Holistic. (SF.143.) De la Torre does not get paid regularly, but Loya typically pays De la Torre when he requests money. (SF.144.) Loya discusses the CVRA Action with her husband, and he has asserted spousal privilege over such conversations. (SF.137.)

III. De la Torre's Involvement with the CVRA Action

At the time the CVRA Action was developed and filed, De la Torre was the co-chair of the

PNA and had been a board member since 2005. (SF.6, 7, 54.) His family has a long history of PNA involvement, including when the organization was founded in 1979. (SF.4.) De la Torre resigned as co-chair of the PNA board after his election to the City Council. (SF.62, 63.)

Even before the CVRA Action was filed, De la Torre actively collaborated with Shenkman to develop the claims and litigation strategy in that action. He participated in preparing the original and first amended complaint and could not identify any other non-attorney who contributed to those pleadings. (SF.11.) This includes multiple calls and meetings with Shenkman and other related attorneys in 2015 and 2016. (SF.12-25.) De la Torre also helped the plaintiffs' attorney with deposition outlines and discovery requests, attended depositions, and frequently consulted with Shenkman on case strategy and potential resolution. (SF.29-39, 41-49, 51.) 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. (SF.52.) De la Torre also testified at trial on the plaintiffs' behalf as the PNA representative. (SF.55.)

IV. De la Torre's Election and On-going Involvement with Shenkman and the CVRA Action

On November 3, 2020, De la Torre was elected to serve as a councilmember of the Santa Monica City Council, and took his oath of office on December 8, 2020. (SF.62, 67.) Before De la Torre was sworn in, and in anticipation of closed session meetings to discuss litigation strategy, in November 2020, the Interim City Attorney sought an opinion from the Fair Political Practices Commission ("FPPC") on whether De la Torre has a financial conflict relating to payments and liabilities from the CVRA Action. (SF.64, 67.) Although he also sought guidance from the state Attorney General, the office declined to do so as such advice was outside its authorization. (SF.80.)

In addition to being De la Torre's and Loya's lawyer in the CVRA Action, Shenkman is De la Torre's friend. (SF.9, 132.) In December 2020, after De la Torre stepped down from the PNA board, De la Torre received what he called "preliminary legal advice" from Shenkman. (SF.63, 65.) Around that time, De la Torre visited Shenkman's office to draft a letter to the FPPC using Shenkman's wife's computer and received Shenkman's input on the letter. (SF.66.)

In January 2021, before the Council held a special meeting where the sole item for consideration was De la Torre's common law conflict of interest and disqualification, Shenkman

again provided De la Torre legal advice. The two exchanged emails and had multiple calls in the days leading up to the hearing. (SF.68-70.) When asked in this case about these various discussions, De la Torre refused to provide testimony, standing on attorney-client privilege. (SF.71.) However, the emails demonstrated Shenkman provided advice about council rules and worked collaboratively to draft a script and questions for De la Torre to use during the meeting. (SF.68-70.)

On January 26, 2021, the special meeting was conducted remotely. (SF.73.) Shenkman was sitting in the same room close to De la Torre during that meeting. (SF.75.) The Council received the Interim City Attorney's oral report and heard public comment. (SF.77.) The staff report included the Interim City Attorney's recommendation that the Council find a common law conflict, disclosed the pending request to the FPPC on financial conflicts, but that any FPPC decision would not impact the common law conflict issue. (SF.78-79.) While some public comments supported De la Torre, others had significant concerns with De la Torre's participation in the CVRA Action closed session. (SF.81.) De la Torre also read the materials he prepared with Shenkman. (SF.83.) When asked by a fellow councilmember if anyone had communications with Shenkman about the conflict issue, De la Torre responded, "That's privileged information, right?" and did not disclose Shenkman's involvement in his script or physical presence in the room. (SF.76, 82.) When presented by Council with the opportunity to recuse himself, he chose not to do so. (SF.84.) The Council voted on a motion to exclude De la Torre from certain closed meetings of the City Council with four in favor, two opposed and one abstention, with De la Torre as one of the two councilmembers who opposed the motion. (SF.88.) The motion ultimately approved by the Council did not preclude De la Torre from addressing policy issues on district-based versus at-large elections. (SF.89, 91.) De la Torre has not put the issue of district-based elections on the Council agenda because he is concerned he would not have enough votes to enact it. (SF.92.)

On March 4, 2021, De la Torre filed this action. (SF.100.) He asked multiple attorneys before finding someone to represent him. (SF.95.) After De la Torre retained Trivino-Perez in this matter, he immediately notified Shenkman. (SF.96.) The same day, Shenkman and Trivino-Perez spoke about this action and the CVRA Action. (SF.97.) At his deposition, Shenkman did not deny assisting Trivino-Perez in drafting the pleadings in this action. (SF.99.) Trivino-Perez emailed

Shenkman the complaint and related documents the morning after it was filed. (SF.101.) Trivino-Perez repeatedly sent Shenkman filings, court orders, and communications in this action, often within minutes of getting them. (SF.113-119.)

Shenkman, Trivino-Perez, and De la Torre admitted to at least three additional conversations about this case and the CVRA Action. (SF.112.) However, De la Torre had technical issues with his email when he was searching for documents in this case, and although De la Torre's attorney found a "creative way to answer" the questions, the technical issues were not addressed. (SF.129-130.) Nevertheless, even the limited communications produced in this action demonstrate that Shenkman provided legal advice and work product assisting De la Torre in this case. In November 2021, Shenkman drafted a declaration entitled "KIS Decl. in Lieu of Discovery," and the declaration addresses issues relating to the deliberative process privilege in this lawsuit. (SF.121.) He then signed and submitted a declaration to support Plaintiffs' Opposition to the Motion to Compel Discovery and provided a declaration in support of Plaintiffs' Motion for Summary Judgment. (SF.121-122.) De la Torre has not compensated Shenkman for any of his legal work or advice, though Shenkman may try to recover his fees in the CVRA Action. (SF.126-127.)

SUMMARY JUDGMENT STANDARD

Summary judgment is proper where the action has no merit. (Code Civ. Proc., § 437c.) The defendant need only "'show [] that one or more elements of the cause of action … cannot be established' by the plaintiff." (*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1338, 1401, citing *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 853.) A motion for summary adjudication is a proper means for disposing of an action for declaratory relief. (*Shaw v. Regents of the Univ. of Calif.* (1997) 58 Cal.App.4th 44, 52.) "Thus, in a declaratory relief action, the defendant's burden is to establish the plaintiff is not entitled to a declaration in its favor." (*Gafcon, supra*, 98 Cal.App.4th at p. 1402.) "It may do this by establishing (1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief." (*Ibid.*) The court may also grant summary adjudication. (Code Civ. Proc.,§ 437c(f)(1).)

ARGUMENT

I. Plaintiffs Are Not Entitled to the Declarations They Seek

Where summary judgment on a declaratory relief claim is appropriate, "the court should decree only that plaintiffs are not entitled to the declarations in their favor." (*Gafcon, supra,* 98 Cal.App.4th at p. 1402.) Plaintiffs seek to declare that (1) the Council does not have the authority to disqualify De la Torre absent a voluntary recusal or judicial determination; and (2) De la Torre does not have a conflict of interest that prevents him from participating in closed session discussion on the CVRA Action. (SAC ¶ 52.) Such declarations are contrary to the law and the undisputed facts.

Moreover, declaratory relief is inappropriate. A court may decline to issue declaratory relief where it is "not necessary or proper at the time under *all* the circumstances." (Code Civ. Proc., § 1061, italics added.) It is neither necessary nor proper to issue declaratory relief on the City Council's past action of disqualifying De la Torre on January 26, 2021. "Declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497.)[1]

Nor can Plaintiffs obtain a prospective declaration that De la Torre does not have a conflict of interest. Not only would such a declaration be contrary to the undisputed facts (see Section I.B.), declaratory relief is neither necessary nor proper because the "action must be based on an actual controversy with *known parameters.*" (*Sanctity of Human Life Network v. California Highway Patrol* (2003) 105 Cal.App.4th 858, 872.) Where variables may change in the future, a court cannot "make a declaration at this point that will be applicable under all scenarios." (*Id.* at p. 873; see also, e.g., *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1585 [reversing declaratory judgment where relief would have required the court to "'speculate about unpredictable future events in order to evaluate the parties' claims'"].) Here, it would be impossible

[1] Any effort to invalidate the Council's prior action should have been brought as a traditional mandamus action, and Plaintiffs would need to show that Council's disqualification of De la Torre was "'was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.'" (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265.) That standard cannot be met here. In applying this "highly deferential test," "the trial court does not inquire whether, if it had power to act in the first instance, it would have taken the action taken by the administrative agency." (*Ibid.*) This is "'out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.'" (*Ibid.*)

for this Court to predict De la Torre's future actions and declare in all future scenarios that he does not have a disqualifying conflict of interest, rendering the requested relief unnecessary and improper.

Accordingly, and as further discussed below, Plaintiffs are therefore not entitled to any of the declarations they seek, and summary judgment should be entered in the City's favor.

A. The City Is Empowered to Determine Conflict of Interests

Plaintiffs seek a declaration that the Council lacks authority to disqualify De la Torre from attending closed sessions on conflict grounds. This is contrary to the law. Under Section 605 of the City Charter, "[a]ll powers of the City shall be vested in the City Council, subject to the provisions of this Charter and to the Constitution of the State of California." (RJN, Ex A.) 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.) "'[Q]uestions 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.'" (*Rizzo, supra*, 214 Cal.App.4th at p. 940.) One of those municipal affairs vested in the Council is the power to determine conflicts to ensure that, when the Council considers issues, it is not participating in decisions that violate the law because of that conflict. (SF.86 ["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 [city acted properly in finding that conflict of interest and removing planning commissioner from office]; 101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at *8 ["Where 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."]; Zerunyan Decl. ¶ 23.) The Council is not required to postpone and seek 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. Otherwise, Council would be placed in a position of acting unlawfully, opening itself up to litigation for violating conflicts of interest laws and having its actions reversed or voided on appeal. (E.g., *Davis v. Fresno Unif. School Dist.* (2015) 237 Cal.App.4th 261, 300-301 [claim against school district for allowing financial and common law conflicts of interest]; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1172-1173

[reversing council's decision where councilmember had disqualifying common law conflict].)

B. The Undisputed Facts Show That De la Torre Has a Disqualifying Conflict

Ethical principles are the building blocks of conflict rules – common law or statutory. Public trust and confidence are vital to the strength of a democratic system. (Zerunyan Decl. ¶ 12.) As such, public officials are bound by ethical principles such as undivided loyalties, veracity, disinterested zeal, and the public interest. Under California law, these ethical principles are expressed through common law conflicts (or bias) doctrine, the Political Reform Act ("PRA"), and Gov. Code, § 1090. (*Ibid*.) Enforcing such ethical rules – including the disqualification of a public official – does not thwart the political or democratic process. Democracy depends on it. (*Id.* at ¶ 14.)[2] "Erosion of confidence in public officials is detrimental to democracy," and "[t]o maintain confidence and to avoid public skepticism, conflicts of interest must be shunned." (*Consumers Union of the U.S., Inc. v. Cal. Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 444.) The undisputed evidence demonstrates that De la Torre has disqualifying conflicts, both common law and financial.

1. De la Torre Has a Common Law Conflict of Interest That Is Not Based on His Political Position on District-Based Elections

Under common law, courts have long held that a public official "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.) "There is neither a more wholesome nor a sounder rule of law than that which requires public officers to keep themselves in such a position as that nothing shall tempt them to swerve from the straight line of official duty." (*Ibid.*) "Officers ought not to be allowed to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public." (*Id.* at pp. 51-52.) The interest need not be financial, nor must it be tangible. "[E]xtreme caution should be exercised in concluding than an interest is too remote," as courts have approved instructions explaining that "'if the interest of the member is sufficient to cause him to be swayed in the slightest degree from his duty to the public, it is a violation ....'" (58 Ops.Cal.Atty.Gen 345, 355 (1975),

[2] As local democratic institutions, city councils act by majority. The council is the final arbiter of the issues before it. If people dislike the council's actions, then they can vote councilmembers out of office or petition for a recall. That is democracy in action. (Zerunyan Decl. ¶ 11.)

quoting *People v. Darby* (1952) 114 Cal.App.2d 412.) Common law conflicts of interest arise where there may be a temptation to act for personal or private reasons rather than in the public interest. (92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, at *5; see also, e.g., 56 Am. Jur. 2d Municipal Corporations, Etc. § 127 [same].) Thus, conflicts arise where there is an actual conflict or merely the appearance of one. (See *People v. Connor* (1983) 34 Cal.3d 141, 147, citing *Kimura, supra,* 89 Cal.App.3d at p. 875.) "Where 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; SF.86-87.) Courts today continue to apply the common law conflict of interest doctrine. (E.g., *Clark, supra,* 48 Cal.App.4th at p. 1171; *Davis, supra,* 237 Cal.App.4th at p. 301.)[3] For example, in *Clark*, the councilmember had a disqualifying common law conflict because "an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment." (48 Cal.App.4th at p. 1172.)

The Attorney General also continues to enforce common law conflicts, even where financial conflicts may not exist. In 92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, a common law conflict existed where an agency board member's adult non-dependent son who lived with her applied to the agency for a loan. No financial conflict existed, but "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, italics added; see also, e.g. 101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at *9 [councilmember with common law conflict could not participate in decision adverse to client].)

Here, too, it is difficult to imagine that De la Torre has no private or personal interest in whether the CVRA Action is successful. But De la Torre challenges his disqualification claiming it was based solely upon his political position about district-based elections and settlement of the CVRA Action (which is an improper backwards looking allegation that cannot be addressed through declaratory relief). Yet the undisputed facts demonstrate otherwise. Two other new councilmembers

[3] Common law conflicts have not been abrogated by either Government Code § 1090 or the PRA. (See, e.g., *Davis, supra*, 237 Cal.App.4th at 301 [§ 1090 is "concerned with financial conflicts of interest and the common law rule encompassed both financial and nonfinancial interests that could result in divided loyalty"]; *Clark, supra*, 48 Cal.App.4th at p. 1171 fn.18; Gov. Code, § 81013.)

– Brock and Parra – ran on similar platforms and were also elected to the Council in 2020. (SF.60, 62.) They were not disqualified from participating in closed sessions regarding the CVRA Action based on their similar campaigned-upon political positions.[4] (SF.90.) However, De la Torre is very differently situated. De la Torre's substantial involvement in the CVRA Action before and after becoming a councilmember along with his entwinement with the lead CVRA Action attorney, and his wife's continued role as a named plaintiff are the exact types of common law conflicts that give rise to divided loyalties and undermine public trust. (See *post*; see also Zerunyan Decl. ¶¶ 16-19.)

De la Torre was intimately involved with bringing and litigating the CVRA Action. (SUF.6-7, 11-25, 27-49, 51-56.) He refers to himself as a plaintiff in that action. (SF.10.) He strategized with Shenkman throughout the lawsuit, worked with Shenkman for nine months before the PNA was involved, spending many hours with Shenkman or his partner – reviewing the pleadings, working on discovery, and discussing litigation strategy. (SUF.6-7, 11-26, 27-49, 51-56.) He was deposed as the PNA representative and served as its witness at trial. (SF.52, 54-56.) He spent days attending depositions of City councilmembers. (SUF.29, 31, 37, 41, 48.) While he is no longer on the PNA board, De la Torre filed his own amicus brief in support of the plaintiffs in June 2021 – identifying him as a Councilmember in the title. (SF.109.) His enmeshment with the CVRA Action (and relationship with his wife) distinguishes him from councilmembers who have merely taken campaign positions, and results in him having divided loyalties and being unable to make impartial decisions concerning the CVRA Action. (See, e g., *Petrovich Devel. Co. LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, 976 [councilmember instituting appeal "should have recused himself from voting" because he "took affirmative steps to assist opponents … and organized the opposition at the hearing" and "acted as an advocate"]; *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484 [commissioner's advocacy piece taking a specific position gave rise to an unacceptable probability of actual bias]; *Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351 ["The decision may not be made by a decisionmaker who has become personally 'embroiled' in the controversy to be decided."].)

"Perhaps it goes without saying, but there is little better example of divided duties or loyalties

[4] None of the Councilmembers – including Brock, Parra, or De la Torre – has been precluded from bringing to Council the policy issue of whether the Charter should be amended to allow district-based elections. (SF.91.) Nor would they be in the future. Rather, De la Torre testified he did not bring such policy issues to the Council because he did not think he had the votes. (SF.92.)

than being a party on both sides of a lawsuit – or even, for that matter, being forced to pick a side." (*People ex rel. Lacey v. Robles* (2020) 44 Cal.App.5th 804, 821-822 [positions of mayor and board member of water replenishment district were incompatible under Gov. Code, § 1099].) That is exactly what De la Torre is attempting to do now by seeking to attend closed sessions on the CVRA Action. Faced with similar circumstances, the LA City Attorney advised that a nominee to the Board of Airport Commissioners, Ms. Velasco, was disqualified from decisions regarding a lawsuit filed by Alliance for a Regional Solution to Airport Congestion ("ARSAC"), a non-profit for which Ms. Velasco served as its president until she resigned after her nomination. (LAC Op. No. 2005:3 at pp. 1-3 [Appen. Supp. Authorities, Ex. 2].) Like the CVRA Action, the ARSAC litigation sought only equitable relief and attorneys' fees and Ms. Velasco renounced any financial interest in the lawsuit. (*Id*. at pp. 3-4.) Based on these facts, the City Attorney found that while there was no financial conflict of interest, it would "not be in the public interest" for Ms. Velasco to act on these particular matters, even though she had resigned from ARSAC. (*Id*. at pp. 8-9.) Based on her "substantial involvement with ARSAC and the ARSAC Lawsuit, a reasonable member of the public could conclude that [she] could not act objectively on decisions regarding the ARSAC lawsuit and is therefore disqualified from acting on such matters." (*Id*. at p. 9.) Here, too, with respect to the CVRA Action, De la Torre lacks the ability to act with the required disinterested skill, zeal, and diligence and primarily for the benefit of the public (*Noble, supra*, 89 Cal.App. at p. 51), and a reasonable councilmember would have recused himself or herself (Zerunyan Decl. ¶ 21-22; SF.85).[5]

a. De la Torre's Ongoing Embroilment with the CVRA Action and Shenkman

De la Torre remains intrinsically embroiled in the CVRA Action and with its lead attorney, Shenkman, whose firm is seeking over $13.3 million in fees therein. (SF.58.) Since his election, De la Torre has sought "preliminary legal advice" from Shenkman on at least three occasions, concerning such issues as his conflict, challenging his disqualification before the Council on January

[5] Plaintiffs cite *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, but this case does not apply. *Breakzone* rejected the notion that campaign contributions would perpetually disqualify a recipient. (*Id.* at p. 1228.) In contrast here, De la Torre, his wife Loya, and his "trusted attorney[]" Shenkman all stand to benefit from CVRA Action settlement. Further, Plaintiffs' argument that De la Torre has no conflict because the councilman in *Breakzone* participated in the decision on "his own appeal" is misleading. The municipal code there allowed any councilmember to file this type of appeal – and the council member was not a real party in interest. (*Id.* at p. 1224.)

26, 2021, and even this action. (SUF.68, 69, 70, 112, 120.) Before the January 26 Council meeting, Shenkman helped draft De la Torre's script, which he read nearly verbatim and attended the meeting with him from De la Torre's house. (SUF.70, 74-75, 83.) Although a councilmember inquired at the meeting whether anyone had discussions with Shenkman, De la Torre asked if it was privileged and did not answer – nor did he disclose that Shenkman was with him at that exact moment. (SF.82, 76.)

During this time, Shenkman and De la Torre have had an attorney-client relationship demonstrated by his assertion of attorney-client privilege in response to a Public Records Act request asking for communications with Shenkman (SF.93), his refusal to answer questions at his deposition on attorney-client privilege grounds (SF.138), and assertions of privilege throughout discovery. Indeed, Shenkman himself stated he would seek compensation for his legal work in this action in a fees motion in the CVRA Action. (SF.127.) And De la Torre drafted his letter to the FPPC at Shenkman's home office with Shenkman's input and using Shenkman's wife's computer. (SF.66.)

Moreover, Shenkman has met with De la Torre and/or his attorney in this action regarding this case or the CVRA Action on at least four occasions. (SUF.97, 112.) Trivino-Perez generally forwards all filings, orders, and communications with counsel in this action directly to Shenkman, often within minutes of receiving them. (SF.113-119.) Shenkman has provided legal argument on De la Torre's behalf, both during a two-hour discovery meet and confer with the City's counsel in this action, and by means of multiple declarations. (SF.120-123.) Shenkman provided documents for production in this case. (SF.131.) And when asked whether he participated in drafting or reviewing the briefs and other documents in this action, Shenkman did not deny his involvement. (SF.99.) De la Torre also considers Shenkman one of his friends and "trusted attorneys," while simultaneously stating he does not trust the City Attorney's Office.[6] (SF.132-134.)

De la Torre also has continued to appear publicly with Shenkman regarding the CVRA Action. In April 2021, De la Torre, Shenkman, and Loya made a joint presentation to the Santa Monica Democratic Club. (SF.102.) Although the Club asked De la Torre to limit his remarks to the policy of district-based elections, the three spoke about the need to settle the CVRA Action. (SF.103,

[6] This friendship raises whether De la Torre can act in an "evenhanded manner." (See *Schumb v. Super. Ct.* (2021) 64 Cal.App.5th 973, 981 [disqualification of "friend[s]" due to "reasonable possibility that [DA's] office may not exercise its discretionary function in an evenhanded nature"].)

105.) All three appeared at the Club meeting remotely and together from De la Torre's home. (SF.104.) In July 2021, Shenkman and De la Torre also coordinated materials and met with a newly-appointed councilmember to advocate the CVRA Action plaintiffs' position. (SF.110-111.)

De la Torre is intrinsically intertwined with the CVRA Action and Shenkman, further demonstrating his common law conflict. (See *Noble, supra,* 89 Cal.App. at p. 51.)

b. De la Torre's Wife Is a Plaintiff in the CVRA Action

De la Torre's relationship to his wife independently creates a common law conflict because "one cannot faithfully serve two masters at one and the same time." (*Darby, supra,* 114 Cal.App.2d at p. 425.) The law presumes that a close familial relationship will raise ethical issues and disqualification is "necessary not only to guard actual impartiality but also to insure public confidence." (*Kimura, supra,* 89 Cal.App.3d at p. 875.) In *Kimura,* the city found a conflict between a councilmember and his wife's position on the planning commission and, because having the council member simply recuse himself was not practical, the council removed her from office. (*Id.* at pp. 873, 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." (*Id.* at p. 875.) "A planning commissioner and a council member (with review powers) married to each other can conceivably raise a substantial question of fairness and bias, prejudice or influence in the vital county planning processes, obvious enough to have an effect on public confidence in such processes." (*Ibid.*)[7]

Those same concerns of fairness, prejudice, and undermining the public confidence apply here, where De la Torre seeks to attend closed sessions regarding litigation brought by his wife and where he admits that he has loyalty to his wife, he is proud of his wife's involvement in the CVRA

[7] Other cases recognize these familial concerns. In *People v. Jackson* (1985) 167 Cal.App.3d 829, 832, the court noted that opposing counsel "who are involved in a sustained dating relationship over a period of months are normally perceived, if not in fact, as sharing a strong emotional or romantic bond." This "close relationship" "reasonably gives rise to speculation that the professional judgment of counsel as well as the zealous representation to which an accused is entitled has been compromised." (*Ibid.*) In *Nielsen v. Richards* (1925) 75 Cal.App. 680, 689, 691, a contract between a superintendent and a teacher was "prohibited by law and contrary to public policy" because they were husband and wife: "'apart from [the] pecuniary interest, an intimacy of relation and affection between husband and wife, and of mutual influence of the one upon the other for their common welfare and happiness, that is absolutely inconsistent with the idea that the husband can occupy a disinterested position as between his wife and a stranger in a business transaction.'" That a close personal relationship gives rise to a disqualifying conflict is also why government officials, including 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; Cal. Code Jud. Ethics, canon 3; 28 C.F.R. § 45.2(a)(1).)

Action, and wants his wife to win. (SF.136.) And even De la Torre acknowledges such conflicts as a result of close relationships. When voting in favor of the City's anti-nepotism policy in November 2021, De la Torre recognized the conflict that arises when a councilmember is making a decision with respect to a close family member, explaining that "the issue is really is [sic] like sort of the conflict, you know, as we would call a conflict, because the husband, wife, registered domestic partner, son, daughter, mother, father, brother, and sister of a Councilmember would have a hard time sort of distancing themselves or it seems like they could be compromised, right, because of their relationship with a Councilmember." (SF.108.) De la Torre also recognizes that personal relationships can require disqualification. In fact, in one matter before the Council, De la Torre has recused himself because "some of those victims I had relationships with and it makes it very difficult for me to be impartial in this case because it's emotional, it's psychological, and it's very hard." (SF.106-107.) It would be equally difficult to appear impartial in the CVRA Action, given De la Torre's close relationship with his wife and their substantial involvement in that case for years.

2. De la Torre Has a Disqualifying Financial Conflict of Interest

In addition to having a common law conflict, De la Torre has a disqualifying financial interest in the CVRA Action as a result of free services received from Shenkman and because his wife's consulting company would financially benefit from any settlement of the CVRA Action.

a. De la Torre Has a Financial Conflict Because He Has Received Gifts of Services Valued over $520 from Shenkman

A key purpose of the PRA is to ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Gov. Code, § 81001(b).) The PRA prohibits a public official from "mak[ing], participat[ing] in making, or in any way attempt[ing] to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest." (*Id.*, § 87100.) "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of the official's immediate family, *or* on" "[a]ny donor of, or any intermediary or agent for a donor of, a gift or gifts" (*id.*, § 87103(e), italics added) that amounts to "a total of at least $520

provided to, received by, or promised to the public official within 12 months before the decision is made" (Code Regs., tit. 2, § 18700(c)(6)(E)). "A gift is a payment made by any person of any thing of value, whether tangible or intangible, real or personal property, a good or service that provides a personal benefit to an official when the official does not provide full consideration for the value of the benefit received." (*Id.*, § 18940; see also Gov. Code, § 82028(a).)

Since at least November 2020, De la Torre has received free legal and other services from Shenkman & Hughes (SF.65-66, 68-70, 120-123, 126) – the firm seeking over $13.4 million in fees and would stand to benefit from any CVRA Action settlement (SF.57-58) – and the receipt of this gift creates a disqualifying financial conflict. Interpreting the PRA, FPPC staff has advised that "free legal services may constitute 'gifts,' which can subject an official to the disqualification provisions of the Act." (FPPC Adv. I-95-287 (1995), 1995 WL 912275, at *2; see also, e.g., FPPC Adv. A-01-187 (2001), 2001 WL 1262266, at *2.) "Consequently, a public official may not participate in any decision if it is reasonably foreseeable that the decision will have a material financial effect on a source of gifts of $[520] or more." (FPPC Adv. I-95-287 (1995), 1995 WL 912275, at *2; Code Regs., tit. 2, § 18700(c)(6)(E).)

It is without question here that De la Torre received gifts valued at over $520 from Shenkman & Hughes – and specifically from his "trusted attorney[]" Shenkman (SF.133) – in the form of free legal and other services. In December 2020 and January 2021, De la Torre received "preliminary legal advice" from Shenkman & Hughes on the issue of conflicts and refused to answer questions at his deposition concerning this advice on grounds of attorney-client privilege. (SF.65-66, 68-70, 138.) He likewise claimed privilege and refused to answer a question addressed to him at the January 26, 2021 City Council meeting on whether he consulted with Shenkman on recusal and, again claiming attorney-privilege, refused to produce documents in response to a Public Records Act request seeking his communications with Shenkman since he became a councilmember. (SF.82, 93.) Since January 2021, Shenkman has continued to offer free services to De la Torre by attending a meet and confer at which he offered legal argument in support of De la Torre's discovery objections, filing declarations in this action and, notably, Shenkman has not denied that he was involved in the preparation of numerous other filings in this case, including the demurrer oppositions and discovery responses.

(SF.99, 120-123, 126.) As De la Torre has admitted, he has not compensated Shenkman for any of these services. (SF.126.) Shenkman has also conceded he has not received any compensation from De la Torre. (SF.126.) With Shenkman's billing rate at between $800 to $900 an hour, and those of his partner and associate at between $600 to $800 (SF.124-125), there can be no dispute that the amount of free services De la Torre has received is well over the FPPC's $520 annual gift limit.

De la Torre therefore has a disqualifying financial interest if the Council's decision on the CVRA Action will have a reasonably foreseeable material effect on Shenkman & Hughes. (Code Regs., tit. 2, § 18700(c)(6)(E).) It is reasonably foreseeable that that any settlement of the CVRA Action would involve payment of attorneys' fees and that Shenkman & Hughes would materially benefit from any such settlement. (*Id.*, §§ 18701(a), (b), 18702.4(d).) Shenkman's firm is seeking over $13.4 million in fees, and thus any payment of such fees would explicitly involve Shenkman & Hughes as the recipient. (SF.57-58; Code Regs., tit. 2, § 18702.1(a)(1).) Even if Shenkman & Hughes is viewed as only being indirectly involved in a decision settling the CVRA Action, any settlement where the City pays Shenkman & Hughes only $250,000 – just a fraction of the claimed fees – would well exceed the FPPC's materiality threshold for indirect beneficiaries. (*Id.*, §§ 18702.1(a)(3), 18702.4(d).)[8] De la Torre therefore has a financial conflict due to the gift of free services, and he "must not take part in the decision" relating to the CVRA Action and "must not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision." (*Id.*, § 18707(a)(4).)

b. Holistic Also Gives Rise to a Financial Conflict

Loya's business Holistic provides "consulting for nonprofits, labor unions, or businesses". (SF.141.) Any agreement to settle the CVRA Action would create an impermissible financial interest under the PRA and Gov. Code, § 1090. Holistic works mainly on "social justice issues [and] socioeconomic issues." (SF.142.) Loya counts it as a win "when an organization is able to achieve their goals in making their public policy campaign into a city ordinance." (SF.145.) And winning on

[8] The FPPC's February 4, 2021 letter does not absolve De la Torre of a financial conflict because the FPPC was not presented with these facts showing that he received free services from Shenkman. (See Code Regs., tit. 2, § 18329 ["Advice provided by Commission staff does not establish legal precedent and is not binding on any party"]; see also SF.94 ["we are not a finder of fact when rendering advice," "and any advice we provide assumes your facts are complete and accurate"].)

social justice issues is good for Holistic. (SF.146.) A settlement in the CVRA Action could lead to new customers and raise Holistic's prestige.

Both the FPPC and the Attorney General have recognized conflicts arising under similar facts. For example, Palm Springs's mayor had a financial conflict under the PRA where litigation and zoning decisions could increase the market for escrow services where his wife owned (and he invested in) an escrow agency. (CA FPPC Adv. A-95-352, 1996 WL 780484, at *1-2, 5.) The Attorney General found a conflict under § 1090 where the outcome of an action could raise the prestige of a business associated with a public official, even if no money changes hands. (86 Ops.Cal. Atty.Gen. 138 (2003), 2003 WL 21738753.) Thus, it is impermissible for a councilmember's law firm to give *free* legal services to the city because "[t]he law firm might well reap prestige, publicity, and goodwill associated with any success in the lawsuit [and] would be in a better position to compete for future clients and to requite qualified staff due to its enhanced goodwill." (*Id.* at *3.)

Both principles apply here. A positive outcome for Loya in the CVRA Action (via litigation or a settlement agreement) would likely result in increased business for Loya, De la Torre's wife, and Holistic, De la Torre's employer and his wife's company, and increase Holistic's prestige as well. De la Torre therefore has a disqualifying financial interest for this reason too.[9]

C. Plaintiff Serna Lacks Standing to Bring the Declaratory Relief Claim

Summary judgment on Plaintiff Elias Serna's declaratory relief claim should be granted for the additional reason that Serna lacks standing. "'Standing' derives from the principle that '[e]very action must be prosecuted in the name of the real party in interest.'" (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59, quoting Code Civ. Proc, § 367.) "To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved and protected over and above the interest held in common with the public at large.'" (*People ex rel. Becerra v. Super. Ct.* (2018) 29 Cal.App.5th 486, 496.) Serna has no such special interest or particular right. On the contrary, he conceded that any "injury" he has here is no different than any other voter. (SF.148.) That is not enough. "If Plaintiff

[9] The same reasons and facts that support De la Torre having a disqualifying conflict of interest (common law or financial) bar Plaintiffs' equitable relief due to unclean hands. (*Kendall-Jackson Winery, Ltd. v. Super. Ct.* (1999) 76 Cal.App.4th 970, 979 ["Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine"].)

were allowed to bring this suit, then every constituent believing his legislator had been mistreated by the legislative body would have a forum to air his grievances about the internal procedures of the legislative body" in court. (*Page v. Tri-City Healthcare Dist.* (S.D.Cal. 2012) 860 F.Supp.2d 1154, 1170 [voter lacked Article III standing to challenge district's exclusion of director from closed session because alleged injury was common to all district residents].)[10] And Serna cannot claim he has been denied "meaningful representation" on the Council due to De la Torre's disqualification because, "[g]iven the at-large multi-vote election system employed by the [City], each of the elected [councilmember] represents each [City] resident." (*Id.* at p. 1168.) Summary judgment should therefore be entered against Serna on this claim.

II. There Is No Evidence of Any Potential Future Violation of the Brown Act

The Brown Act is based upon a policy of public access. Thus, its provisions define when a closed session away from the public is permissible; not who must attend. Furthermore, it confirms that the general public, such as Serna, may not obtain information from the closed session, as it is confidential. (Gov. Code, § 54953,(a).) Nevertheless, the sole basis for Plaintiffs' Brown Act claim is Gov. Code, § 54953, which provides that "all persons shall be permitted to attend any meeting of the legislative body of a local agency," and Gov. Code, § 54956.9, which authorize legislative bodies to "hold[] a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation." Based on these provisions, Plaintiffs claim it is improper to hold closed session meetings accessible to only a majority but not all city councilmembers. (SAC ¶ 60.) There is no case law supporting this position, which is both contrary to the Brown Act's plain terms and nonsensical.

When interpreting a statute, a court must "'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) The stated intent of the Brown Act is to ensure that that most (but not all) actions of a public body are "taken openly and that their deliberations be conducted openly." (Gov. Code, § 54950.) In other words, its purpose is "'to

[10] Nor can Serna rely on public interest standing, which is "available only in a mandate proceeding." (*Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873-874.) Taxpayer citizen standing is also inapplicable to challenge the City's exercise of discretion to disqualify De la Torre. (*San Bernardino County v. Super. Ct.* (2015) 239 Cal.App.4th 679, 686.)

facilitate public participation in local government decisions and to curb misuse of democratic process by secret legislation.'" (*Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.* (2021) 62 Cal.App.5th 583, 600.) Beyond requiring a quorum to convene a meeting (Gov. Code, § 54952.3), the Brown Act does not provide that *all* members are entitled to attend a closed session, much less restrict the inherent authority of a charter city like Santa Monica from disqualifying a councilmember from attending closed session due to conflicts of interest. And because the discussion of the CVRA Action as pending litigation can properly occur during a closed session – and Plaintiffs do not and cannot contend otherwise – Plaintiffs' proposed construction that all legislative members must attend the closed session does not comport with the purpose of the Brown Act.[11]

In addition, the absence of language from the statute is meaningless here. There is no reason for Section 54956.9 to provide that a closed session may be attended by only a majority of the legislative body's members because the term "meeting" is already defined to mean "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(a), italics added.) As used in the Brown Act, "the terms 'meeting' and 'session' are used interchangeably" and "the Legislature intended the same usage in section 54956.9." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.) Plaintiffs therefore cannot read into Section 54956.9 a requirement that all members of the legislative body have a right to be present – especially where there is no such legislative intent.

Even De la Torre has conceded that only a quorum – i.e., a majority of the members – need be present for the City Council to meet in closed session by attending closed meetings with less than the full complement of councilmembers. (SF.153.) Were it otherwise the case, it would be impossible for a legislative body to hold a closed meeting without the attendance of every single member. That would grind council business to a halt. (Zerunyan Dec. ¶ 25.) Under Plaintiffs' reading of the Brown Act, each of those meetings would have been a violation because not all members were present. This Court must avoid this absurd interpretation. (*Torres, supra*, 26 Cal.4th at p. 1003.)

[11] Gov. Code § 54956.9 permits a legislative body to meet in closed session for litigation so long as the agenda states that litigation is pending and identifies the litigation to be discussed. The agenda for the regular meeting on January 26, 2021 indisputably met these requirements. (SF.151-152.)

Moreover, Plaintiffs' interpretation of the Brown Act would abrogate the conflicts of interest doctrine. (Zerunyan Decl. ¶ 25.) Where a conflict of interest exists – whether financial or common law – the "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 also 92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, at *5 [same]; Code Regs., tit. 2, § 18707(a)(4); SF.87 ["Any Councilmember who is disqualified from voting on a particular matter by reason of a conflict of interest … shall leave the dais prior to Council consideration of the matter."].) Again, Plaintiffs have yet to cite a single case that would support their extreme view.

Hamilton v. Town of Los Gatos (1989) 213 Cal.App.3d 1050 holds that a councilmember with a financial conflict may not have access to closed session. A town councilmember could not even observe the closed session meeting or review the tape recording, because the "reason for the closed session was to have the town council confer with legal counsel about the parking issues" and the town might be "denied effective assistance of counsel" if the conflicted councilmember was present. (*Id.* at p. 1059.) "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." (*Id.* at p. 1058.) 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.*) Here, too, there is no Brown Act violation when a councilmember with a conflict does not attend a closed session.[12]

CONCLUSION

The Court should enter summary judgment or at least summary adjudication for the City.

Dated: February 12, 2022

Respectfully submitted,

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[12] Summary judgment should also be granted because De la Torre is not an "interested person" under Gov. Code, § 54960 with standing 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.) "[A]s an elected member of the [Council], [De la Torre] lack[s] standing to maintain" a Brown Act claim "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.)