Electronically FILED by Superior Court of California, County of Los Angeles on 03/10/2022 09:09 PM Sherri R. Carter, Executive Officer/Clerk of Court, by K. Martinez, Deputy Clerk

JOSEPH LAWRENCE (SBN 99039)
Interim City Attorney
joseph.lawrence@santamonica.gov
KIRSTEN R. GALLER (SBN 227171)
Deputy City Attorney
kirsten.galler@santamonica.gov
BRANDON D. WARD (SBN 259375)
Deputy City Attorney
brandon.ward@santamonica.gov
1685 Main Street, Room 310
Santa Monica, California 90401
Telephone: (310) 458-8336
Facsimile: (310) 395-6727

CAROL M. SILBERBERG (SBN 217658)
ROBERT P. BERRY (SBN 220271)
BERRY SILBERBERG STOKES PC
csilberberg@berrysilberberg.com
155 North Lake Avenue, Suite 800
Pasadena, CA 91101
Telephone: (213) 986-2688
Facsimile: (213) 986-2677

Attorneys for Defendant
CITY OF SANTA MONICA

Exempt from filing fee pursuant to Government Code § 6103

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 OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: May 6, 2022
Time: 9:15 A.M.
Dept.: 15

Action Filed: March 4, 2021
Trial Date: June 13, 2022

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 1

A. The CVRA Action 1

B. Loya – De La Torre's Wife – Remains a Plaintiff in the CVRA Action 2

C. De La Torre's Involvement with the CVRA Action 2

D. De La Torre's On-going Involvement with Shenkman and the CVRA Action 2

III. LEGAL STANDARD 4

IV. ARGUMENT 5

A. Plaintiffs' Motion on the Declaratory Relief Claim Is Procedurally Improper 5

B. Plaintiffs Do Not Meet Their Burden on Summary Judgment of Establishing the Lack of Any Conflict of Interest 5

1. Plaintiffs' Conflict of Interest Argument Is Myopic and Unsupported 5

2. *BreakZone* Cannot Carry the Weight Plaintiffs Have Placed on It 8

3. Plaintiffs' Strawman Argument That He Was Excluded Due to His Political Position and Reliance on Inapposite Authorities Should Be Rejected 10

C. Additional Material Facts Preclude Summary Judgment Here 11

1. De la Torre's Prior and Ongoing Embroilment in the CVRA Action and with Shenkman Gives Rise to a Common Law Conflict of Interest 12

2. De la Torre's Wife Is a Plaintiff in the CVRA Action 13

3. De la Torre Has a Disqualifying Financial Conflict of Interest 14

D. This Court Cannot Award the Declaratory Relief Sought by the Motion 16

E. Plaintiffs' Brown Act Theory Fails as a Matter of Law 17

F. This Court Should Not Award the Mandatory Injunctive Relief 19

V. Conclusion 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Aerojet-General Corp. v. Commercial Union Ins. Co.
(2007) 155 Cal.App.4th 132 5

Aguilar v. Atlantic Richfield Co.
(2001) 25 Cal.4th 826 .... 4, 11

BreakZone Billiards v. City of Torrance
(2000) 81 Cal.App.4th 1205 .... 8, 9

Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan
(2007) 150 Cal.App.4th 1487 17

Carrancho v. California Air Resources Board
(2003) 111 Cal.App.4th 1255 17

Catalano v. Super. Ct.
(2000) 82 Cal.App.4th 91 5

City of Fairfield v. Super. Ct.
(1975) 14 Cal.3d 768 10

Clark v. City of Hermosa Beach
(1996) 48 Cal.App.4th 1152 .... 6, 7, 9

Daly v. San Bernardino County Bd. of Supervisors
(2021) 11 Cal.5th 1030 20

Davis v. Fresno Unified School Dist.
(2015) 237 Cal.App.4th 261 9

Drew v. Mumford
(1958) 160 Cal.App.2d 271 20

Gafcon, Inc. v. Ponsor & Associates
(2002) 98 Cal.App.4th 1388 20

Hamilton v. Town of Los Gatos
(1989) 213 Cal.App.3d 1050 19

In re Tobacco II Cases
(2009) 46 Cal.4th 298 20

James v. Desta
(2013) 215 Cal.App.4th 1144 11

Janney v. CSAA Ins. Exchange
(2021) 70 Cal.App.5th 374 5

Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist.
(2021) 62 Cal.App.5th 583 18

Kendall-Jackson Winery, Ltd. v. Super. Ct.
(1999) 76 Cal.App.4th 970 12

Kimura v. Roberts
(1979) 89 Cal.App.3d 871 .... 6, 14

Mennig v. City Council
(1978) 86 Cal.App.3d 341 .... 7, 10

Midway Venture LLC v. County of San Diego
(2021) 60 Cal.App.5th 58 20

Nasha v. City of Los Angeles
(2004) 125 Cal.App.4th 470 .... 7, 10

Noble v. City of Palo Alto
(1928) 89 Cal.App. 47 5

Page v. Tri-City Healthcare Dist.
(S.D.Cal. 2012) 860 F.Supp.2d 1154 17

People ex rel. Becerra v. Super. Ct.
(2018) 29 Cal.App.5th 486 17

People ex rel. Lacey v. Robles
(2020) 44 Cal.App.5th 804 12

People v. Connor
(1983) 34 Cal.3d 141 6

People v. Darby
(1952) 114 Cal.App.2d 412 .... 6, 13

People v. Jackson
(1985) 167 Cal.App.3d 829 6

Petrovich Devel. Co. LLC v. City of Sacramento
(2020) 48 Cal.App.5th 963 .... 7, 12

Petrovich Development Company, LLC v. City of Sacramento
(2020) 48 Cal.App.5th 963 9

Roberts v. City of Palmdale
(1993) 5 Cal.4th 363 19

Sanctity of Human Life Network v. California Highway Patrol
(2003) 105 Cal.App.4th 858 17

Schumb v. Super. Ct.
(2021) 64 Cal.App.5th 973 6

Tahoe Keys Prop. Owners' Assn. v. State Water Resources Control Bd.
(1994) 23 Cal.App.4th 1459 20

Torres v. Parkhouse Tire Service, Inc.
(2001) 26 Cal.4th 995 18

Wilson & Wilson v. City Council of Redwood City
(2011) 191 Cal.App.4th 1559 17

Statutes

28 C.F.R. § 45.2 6

Code Civ. Proc., § 1061 17

Code Civ. Proc., § 170.2 6

Code Civ. Proc., § 437c 5

Gov. Code, § 1090 16

Gov. Code, § 1099 12

Gov. Code, § 54950 18

Gov. Code, § 54952.2 18

Gov. Code, § 54952.3 18

Gov. Code, § 54956.9 .... 18, 19

Gov. Code, § 81001 14

Gov. Code, § 82028 15

Gov. Code, § 87103 .... 7, 14

Regulations

Code Regs., tit. 2, § 18329 11

Code Regs., tit. 2, § 18700 .... 7, 14, 15

Code Regs., tit. 2, § 18701 15

Code Regs., tit. 2, § 18702.1 15

Code Regs., tit. 2, § 18702.4 15

Code Regs., tit. 2, § 18707 .... 16, 19

Code Regs., tit. 2, § 18940 15

Other Authorities

101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010 .... 6, 9, 19

56 Am. Jur. 2d Municipal Corporations, Etc. § 127 6

58 Ops.Cal.Atty.Gen 345 (1975) 6

6 Ops.Cal.Atty.Gen. 138 (2003), 2003 WL 21738753 7

86 Ops.Cal.Atty.Gen. 138 (2003), 2003 WL 21738753 16

88 Ops.Cal.Atty.Gen. 32 (2005), 2005 WL 716501 10

92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874 .... 6, 9, 14, 19

CA FPPC Adv. A-95-352, 1996 WL 780484 .... 7, 16

Cal. Code Jud. Ethics, canon 3 6

FPPC Adv. A-01-187 (2001), 2001 WL 1262266 15

FPPC Adv. I-95-287 (1995), 1995 WL 912275 15

LAC Op. No. 2005:3 11

I. INTRODUCTION

Representative democracy imposes duties upon elected officials, including city councilmembers like De la Torre. Such duties include acting within an ethical framework to promote public trust. And that ethical framework includes avoiding even the appearance of a conflict of interest and acting with undivided loyalty, disinterested skill, and fairness. Plaintiffs' Motion ignores these basic ethical principles, and instead is based upon myopic and narrow views of the law and facts in this case and an absurd reading of the Brown Act. Nothing in the law limits the common law conflicts doctrine in a litigation context to an analysis of the remedies sought. Nothing in the facts supports De la Torre's argument that he was or would be disqualified over merely his campaign positions or that he cannot address the policy issue of district-based elections. In fact, other candidates who ran on the same positions were not excluded from closed sessions and De la Torre admitted he has not raised the policy question of district-based elections because he does not think he has the votes to win. In contrast, the actual evidence adduced here and a proper legal analysis of Plaintiffs' claims demonstrate that De la Torre has multiple disqualifying conflicts of interest, including his wife being a party to the CVRA Action, his embroilment with the CVRA Action and Shenkman, and his financial conflicts. Tellingly, all of these issues are ignored by Plaintiffs' Motion. Similarly, Plaintiffs cite no authority supporting their interpretation of the Brown Act, which seeks to read language into the statute that simply does not exist. Thus, Plaintiffs' Motion must be denied.

II. FACTUAL BACKGROUND

A. The CVRA Action

Prior to his November 2020 election to City Council, De la Torre through the Pico Neighborhood Association ("PNA") 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. (AMF 1, 6, 8.)[1] Plaintiffs won at the trial level, but the Court of Appeal reversed, ordering plaintiffs to pay costs and the trial court to enter judgment for the City. (51 Cal.App.5th 1002.) The Supreme Court granted review on

[1] Additional Material Facts in Response to Plaintiffs Separate Statement are referred to as "AMF" followed by the paragraph number. For the Court's convenience, except for handful of facts beginning at AMF.155, all AMF paragraph numbers correspond to the SF paragraphs numbers in the City's Motion. for Summary Judgment (e.g., AMF.1 is the same as SF.1).

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 (which have been stayed) seeking over $20 million in attorneys' fees, exclusive of costs. (AMF.57, 59.) Shenkman & Hughes PC, Kevin Shenkman's firm, sought over $13.3 million. (AMF.9, 58.) Hence, if the CVRA Action plaintiffs lose the appeal (and do not settle), Shenkman will not recover any attorneys' fees or costs.

B. 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 remains the lead plaintiff today. (AMF.50, 136, 157.) Loya has been a PNA board member since 2002 or 2003 and serves on the PNA board as the treasurer. (AMF.2, 3.) Beyond the PNA, Loya is the sole owner of Holistic Strategies Coaching & Consulting LLC ("Holistic"), which she founded in 2019. (AMF.139.) Holistic does consulting work mainly on "social justice" and "socioeconomic issues." (AMF.141-142.) Loya and De la Torre receive financial compensation from Holistic. (AMF.143.) De la Torre does not get paid regularly, but Loya typically pays De la Torre when he requests money. (AMF.144.) Loya discusses the CVRA Action with her husband, and he has asserted spousal privilege over such conversations. (AMF.137.)

C. 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. (AMF.6, 7, 54.) His family has a long history of PNA involvement, including when the organization was founded in 1979. (AMF.4, 5.) He resigned as co-chair after his election to the City Council. (AMF.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 – participating in preparing the pleadings, having multiple calls and meetings with Shenkman and other attorneys, helping the attorneys with deposition outlines and discovery requests, attending depositions, and consulting with Shenkman on case strategy and potential resolution. (AMF.11-25, 27-39, 41-49, 51.) De la Torre was deposed in May 2018, both in his individual capacity and as the person most qualified to testify on PNA's behalf on specified topics. (AMF.52.) De la Torre also testified at trial on the plaintiffs' behalf as the PNA representative. (AMF.55.)

D. De La Torre's 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. (AMF.62, 67, 153.) Before being sworn in, and in anticipation of closed sessions 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. (AMF.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. (AMF.80.)

In addition to being De la Torre's and Loya's lawyer in the CVRA Action, Shenkman is De la Torre's friend. (AMF.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. (AMF.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. (AMF.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 (AMF.72), Shenkman again provided De la Torre legal advice. They exchanged emails, had multiple calls in the days leading up to the hearing, and worked collaboratively to draft a script and questions for De la Torre to use. (AMF.68-70.) When deposed about these various discussions, De la Torre refused to testify, standing on attorney-client privilege. (AMF.71.)

On January 26, 2021, the special meeting was conducted remotely. (AMF.73.) Shenkman was sitting in the same room close to De la Torre at De la Torre's house during that meeting. (AMF.74-75.) The Council received the Interim City Attorney's oral report and heard public comment. (AMF.77, 81.) De la Torre read the materials he prepared with Shenkman. (AMF.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. (AMF.76, 82.) When presented with the opportunity to recuse himself, he chose not to do so. (AMF.84.) The Council voted on a motion to exclude De la Torre from certain closed sessions with four in favor, two opposed (including De la Torre), and one abstention. (AMF.88.) The motion approved by the Council did not preclude De la Torre from addressing policy issues on district-based versus at-large elections. (AMF.89, 91.) De la

Torre has not put the issue of district-based elections on the Council agenda, however, because he is concerned he would not have enough votes to support it. (AMF.92.)

On March 4, 2021, De la Torre filed this action. (AMF.100.) After De la Torre retained Trivino-Perez in this matter, he immediately notified Shenkman. (AMF.96.) The same day, Shenkman and Trivino-Perez spoke about this action and the CVRA Action. (AMF.97.) When deposed, Shenkman did not deny assisting Trivino-Perez in drafting the pleadings in this action. (AMF.99.) Trivino-Perez repeatedly sent Shenkman filings, court orders, and communications in this action, often within minutes of getting them. (AMF.101, 113-119.)

Shenkman, Trivino-Perez, and De la Torre admitted to at least three additional conversations about this case and the CVRA Action. (AMF.112.) Despite producing only limited communications (due to unaddressed technical issues and finding a "creative way to answer" the discovery [AMF.129-130]) and deleting text messages (AMF.128), these communications 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. (AMF.121.) He then submitted a declaration to support Plaintiffs' Opposition to the Motion to Compel Discovery and one in support of Plaintiffs' Motion for Summary Judgment. (AMF.122-123.) 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. (AMF.126-127.)

III. LEGAL STANDARD

A plaintiff asserting there is "no defense" to an action can be awarded summary judgment only if "there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations], and that the 'moving party is entitled to a judgment as a matter of law.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The Court must view the evidence and all related inferences "in the light most favorable to the opposing party." (*Ibid.*) A moving plaintiff must prove each element of every claim upon which it seeks judgment, and this showing shifts the burden to the opposing party, who can identify facts showing that a triable issue of fact exists or demonstrate that plaintiff failed to establish one or more elements. (*Id.* at pp. 849, 853.)

1 "'The burden of persuasion remains with the party moving for summary judgment.'" (*Janney v.*
2 *CSAA Ins. Exchange* (2021) 70 Cal.App.5th 374, 389.) Plaintiffs do not meet their burden here.
3

IV. ARGUMENT

4

A. Plaintiffs' Motion on the Declaratory Relief Claim Is Procedurally Improper

5 Plaintiffs' declaratory relief claim seeks a declaration that De la Torre does not have a conflict
6 of interest *and* that the City Council lacks power to exclude him based upon any such conflict. (SAC
7 ¶¶ 52-54; Memo. at p.2.) However, despite their allegations and requested remedies, Plaintiffs'
8 Motion is silent on the City's authority to declare a conflict and exclude De la Torre. This is not
9 surprising, because there is no support for such assertions. However, since the Court cannot make all
10 the declarations Plaintiff seeks in their first cause of action, Plaintiffs are not procedurally entitled to
11 summary adjudication on that cause of action. (See Code Civ. Proc., § 437c(f)(1) ("A motion for
12 summary adjudication shall be granted only if it completely disposes of a cause of action ....");
13 *Catalano v. Super. Ct*. (2000) 82 Cal.App.4th 91, 97 ["the basic concept [is] that summary
14 adjudication is meant to dispose of an entire substantive area"].)
15

B. Plaintiffs Do Not Meet Their Burden on Summary Judgment of Establishing the Lack of Any Conflict of Interest

16

1. Plaintiffs' Conflict of Interest Argument Is Myopic and Unsupported

17 Plaintiffs' Motion seeks a ruling that De la Torre has no conflict of interest. According to
18 Plaintiffs, "[w]here the question of a common law conflict arises in connection with an underlying
19 litigation or other dispute where an elected official may have some decision-making role, the
20 existence of a personal interest is determined by evaluating the relief sought in the underlying
21 dispute." (Mem. at p. 6.) But that is not the law; it is an overly simplistic and improperly narrow
22 interpretation of the common law conflicts doctrine.[2]
23 Courts have long held that a public official "is impliedly bound to exercise the powers
24 conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the
25 public." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) "Officers ought not to be allowed to
26 place themselves in a position in which personal interest may come into conflict with the duty which
27
28

[2] Plaintiffs' insinuation that the Court's demurrer ruling is law of the case is unfounded. Not only has additional discovery been obtained since then, not only is the City not judicially estopped, the Court may now look beyond the four corners of the complaint and is not bound by its earlier demurrer ruling. (*Aerojet-General Corp. v. Commercial Union Ins. Co.* (2007) 155 Cal.App.4th 132, 139 n.6.)

they owe to the public." (*Id.* at pp. 51-52.) The interest need not be financial, nor must it be tangible. "'[I]f 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), quoting *People v. Darby* (1952) 114 Cal.App.2d 412, 435. [Appen. Supp. Authorities, Ex. 1])

Rather than limited to a direct and unique remedy in a lawsuit (as Plaintiffs assert without authority), 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., *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171; Am. Jur. 2d Municipal Corporations, Etc. § 127 [same].) Common law conflicts are based upon ethical principles of undivided loyalty, disinterested skill, and fairness. (Zerunyan Decl. ¶ 14.) 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 v. Roberts* (1979) 89 Cal.App.3d 871, 875.)

Consequently, unlike Plaintiffs' myopic view, common law conflicts can arise in a variety of situations, including based upon relationships, familial and otherwise,[3] embroilment in the underlying dispute, as such conflicts undermine public confidence. (Zerunyan Decl. ¶¶ 17-19.) Examples of such conflicts include **marital relationships**: *Kimura, supra,* 89 Cal.App.3d at p. 875 [conflict due to spousal relationship]; **parental relationship**: 92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874; **other relationships**: 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];[4] and **embroilment or**

[3] Because personal relationship gives rise to a disqualifying conflict, 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).) Similarly unmarried romantic partnerships or close friendships can lead to conflicts. (See *Schumb v. Super. Ct.* (2021) 64 Cal.App.5th 973, 981; *People v. Jackson* (1985) 167 Cal.App.3d 829, 832.)

[4] Plaintiffs attempt to distinguish 92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, by trying to claim that the "financial value to the agency member's son" was close enough to the government official to create a conflict. (Mem. at p. 11.) But this opinion was not based on any financial conflict or financial gain – there was none for the agency member. Rather, it focused on the *relationship* between the member and her son, who was living with her at the time: "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. At the least, an appearance of impropriety or conflict would arise by the member's participation in the negotiations." (2009 WL 129874 at *7.) Thus, a common law conflict existed because the agency member was "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.)

personal interest in the underlying controversy: *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."]; *Clark, supra,* 48 Cal.App.4th at p. 1172.[5] Additionally, conflicts can arise from financial considerations, such as **gifts**: Gov. Code, § 87103(e), Cal. Code Regs., tit. 2, § 18700(c)(6)(E); potential company **prestige**: 86 Ops.Cal.Atty.Gen. 138 (2003), 2003 WL 21738753; or potential **increase in business**: CA FPPC Adv. A-95-352, 1996 WL 780484, at *1-2, 5.

All of these types of conflicts exist here, see *post* § IV.C., yet Plaintiffs' Motion addresses none of these issues. Instead, Plaintiffs attempt to focus their factual inquiry on the extremely narrow question of whether De la Torre or his wife can receive a share of any potential award of attorneys' fees in the CVRA Action. Not only does this ignore governing law and his relationships with the parties and attorneys in the CVRA Action (see *post* § IV.C.1-2), it also ignores the impact that any success in CVRA Action would have on De la Torre's employer, Holistic Strategies, which his wife owns, or De la Torre's friend and attorney Shenkman, who has provided De la Torre with hours of free legal services and intends to be compensated for his time here as part of any award of attorneys' fees in the CVRA Action. (See *post* § IV.c.3.) And Plaintiffs totally disregard De la Torre's own embroilment in the CVRA Action, in which he invested substantial time. (See *post* § IV.C.1.)

Similarly, Plaintiffs ignore that De la Torre has acknowledged that conflicts arise in broader contexts than their Motion tries to construct. In fact, when voting in favor of the City's anti-nepotism

---

[5] Plaintiffs discount *Clark* because the councilmember (Benz) was unable to exercise his duties with disinterested zeal due to a personal interest in an ocean view. (Mem. at p. 12.) While no ocean views are at stake here, De la Torre's personal interest manifest through his own embroilment in the CVRA Action and relationships with the CVRA Action plaintiffs and attorneys that, as in *Clark*, are "of such importance to him that it could [] influence[] his judgment." (48 Cal.App.4th at p. 1173.) Moreover, *Clark* also focused on "Benz's personal animosity toward the Clarks [that] contributed to his conflict of interest" (*ibid*) – a point Plaintiffs entirely ignore. But De la Torre has also expressed his animosity towards the City in multiple declarations in this case alone. (AMF.163-164.)

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." (AMF 108.) De la Torre not only voted in favor of the proposed policy, he made the motion to approve it. (AMF108, 158).

De la Torre has also recognized that non-familial relationships can require disqualification. On April 13, 2021, shortly before the City Council entered into a closed meeting to discuss a different lawsuit against the City, De la Torre stated that recusing himself was "appropriate for this matter" because "there are some of those victims I had relationships with." (AMF.106.) De la Torre's connection to this other lawsuit was neither direct nor monetary but was merely a friendship or acquaintance, yet De la Torre realized that it was "appropriate" for him to exclude himself from such closed sessions. (AMF.106-107.) It is even more appropriate under the circumstances here.

Plaintiffs are wrong on the law governing conflicts and their reliance on overly narrow arguments precludes the granting of summary judgment here.

2. *BreakZone* Cannot Carry the Weight Plaintiffs Have Placed on It

Plaintiffs rely nearly exclusively on *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, but that case is entirely distinguishable from the facts here. There, a billiard parlor in Torrance sought to modify its previously-issued conditional use permit (CUP) to allow it to sell alcoholic beverages and to expand its operations. (*Id*. at p. 1209.) The CUP was approved by the planning commission. (*Id*. at p. 1213). As allowed by the Torrance Municipal Code, councilmember Walker, in his role as councilmember, exercised his option to have the city council undergo a discretionary review of the underlying approval. (*Id.* at pp. 1213, 1221, 1224, 1239). Walker was never a real party in interest, nor the applicant. (*Id.* at pp. 1213, 1239.) Additionally, Walker, among other councilmembers, received campaign contributions 17 months before the decision from someone opposed to the CUP and who was in litigation against BreakZone. (*Id*. at pp. 1219-20). The City Council voted to deny the CUP, and the applicant filed a writ of mandate challenging the denial.

The court held there was no conflict of interest because the PRA only applied where a public official had received campaign contributions from a donor aggregating $250 or more within 12 months prior to the decision. (*Id*. at pp.1227-29.) The court also considered whether BreakZone obtained a fair hearing in light of Walker's alleged bias. Ultimately, the court determined it did under the facts. In so ruling, the court distinguished the case from other "'situations in which a decision maker should be disqualified because of the 'probability' of bias, such as when the decision maker has a personal or financial interest in the outcome, or is *either familially or professionally related to the litigant*.'" (*Id.* at p. 1237, italics added.) Because such facts did not exist, bias or prejudice had to be established through "concrete facts," which BreakZone could not do because there was no evidence of personal "embroilment" or personal history of animosity by Walker. (*Id.* at pp. 1238-39.)

Thus, *BreakZone* does not support Plaintiffs' assertion that a councilmember can participate in closed sessions regarding litigation that he was instrumental in bringing and to which his wife remains a party. Not only was the councilmember in *BreakZone* not the applicant, other cases have expressly disagreed with *BreakZone* on this issue. (See *Woody's Group Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1030-1031 [*BreakZone* inapplicable where appeal by councilmember not authorized and councilmember was "*strongly* – his word – committed to overturning the planning commission's decision"]; *Petrovich Development Company, LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, 975-76 [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"]. As *Woody's* noted, "[a] person cannot be a judge in his or her own cause." (233 Cal.App.4th at p. 1027.) But that is essentially what Plaintiffs are asking this Court to allow here. De la Torre instituted the CVRA Action as the PNA party representative, his wife is still a party, he remains intrinsically involved in the litigation to this day, and is strongly committed to a specific litigation result.[6] As even *BreakZone* recognizes, there is a probability of bias solely due to De la

[6] Plaintiffs claim that a common law conflict of interest may no longer exist and that courts should be reluctant to find one. (Mem. at p. 6.) Courts before and after *BreakZone* and the Attorney General, have affirmed that the common law doctrine remains viable. (E.g., *Davis v. Fresno Unified School Dist*. (2015) 237 Cal.App.4th 261, 301; *Clark, supra,* 48 Cal.App.4th at pp. 1172-1173, n.18; see also Zerunyan Declaration and Exhibit A thereto; 101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at *9; 92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874 at *4.)

Torre's familial and professional relationships with the litigants, and that alone is reason to find a disqualifying conflict of interest.

3. Plaintiffs' Strawman Argument That He Was Excluded Due to His Political Position and Reliance on Inapposite Authorities Should Be Rejected

Plaintiffs rely on cases like *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768 for the proposition that campaign positions alone are insufficient to establish bias. However, there are no facts establishing – and Plaintiffs have cited none – that the City excluded De la Torre based on his campaign positions or excluded him from participating in discussions about the policy of district-based elections. Rather, it is undisputed that the City has not excluded De la Torre (or the other two members of the "Change Slate") from any meetings or discussions regarding at-large or district-based elections generally. (AMF 89-91.) And De la Torre has admitted that he has not brought this policy issue before Council because he does not think it has enough votes to pass it. (AMF 92.) Rather, Council only disqualified De la Torre from participating in closed sessions regarding a single piece of litigation brought by De la Torre (as co-chair of the PNA) and his wife by his friend and "trusted attorney" Shenkman. (AMF89-91, 133.) Further, the premise of Plaintiffs' argument – that campaigning on an issue means a councilmember could never be disqualified due to conflicts – would completely undermine the conflict-of-interest rules. Indeed, were that the case, candidates could run on an issue for which they would have disqualifying conflicts and use their campaign statement as a shield against disqualification. Rather, as various courts have held, while campaign statements on an issue are insufficient *on their own* to result in disqualification, embroilment, personal relationships, and financial conflicts may result in disqualification (e.g., *Nasha, supra,* 125 Cal.App.4th at p. 484; *Mennig, supra,* 86 Cal.App.3d at p. 351), as is the case here (see post § IV.C.).

Plaintiffs also cite a 2005 Attorney General opinion that has little bearing on this case. (88 Ops.Cal.Atty.Gen. 32 (2005), 2005 WL 716501.) The city councilmember in question served on the board of a nonprofit trust and had, in that capacity, solicited (but apparently did not actually receive) donations from an individual who had another matter before the council. (*Id*. at *1.) The absence of a conflict hinged upon the facts that the councilmember was not involved in the transaction with the city, he was not compensated for his services to the nonprofit, and the common law conflicts as applied to noncompensated officers of a nonprofit had been statutorily abrogated. (*Id*. at *3, 5, 7.)

The facts there did not address a councilmember's spouse, close friend, or employer. Nor did it involve litigation where a councilmember had spent years suing the city. Rather, the facts here are more akin to a situation faced by the LA City Attorney, who 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.) Nonetheless, the City Attorney found that 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.)

Finally, despite Plaintiffs' assertions (Mem. at p.4), the FPPC's February 4, 2021 letter has not decided the issues in this case. The FPPC was not presented with the complete facts in this case, including evidence that De la Torre 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"]; AMF.94, 159, 160-161 ["any advice we provide assumes your facts are complete and accurate" and "we are not a finder of fact when rendering advice"].)

Because Plaintiffs' overly narrow Motion does not address a full view of the law (or the facts), it must be denied. (See, e.g., *James v. Desta* (2013) 215 Cal.App.4th 1144, 1165 [denying summary judgment where moving party failed to address one theory of liability].)

C. Additional Material Facts Preclude Summary Judgment Here

Even assuming Plaintiffs met their initial burden and the burden then shifted to the City,[7] a full examination demonstrates De la Torre's numerous conflicts.[8]

[7] All the City needs to demonstrate is a triable issue of fact or the Plaintiffs failed to establish one or more element. (*Aguilar, supra*, 25 Cal.4th at pp. 849, 853.) The City has minimally done that. But as set forth in the City's own Motion for Summary Judgment, these undisputed material facts demonstrate that the City is entitled to summary judgment.

[8] In addition to demonstrating minimally a triable issue, these facts also establish the existence of an

1. De la Torre's Prior and Ongoing Embroilment in the CVRA Action and with Shenkman Gives Rise to a Common Law Conflict of Interest

"Perhaps it goes without saying, but there is little better example of divided duties or loyalties 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].) Such is the case here. Despite trying to claim that he merely "expressed his desire" for the CVRA plaintiffs to prevail (Mem. at p. 10), De la Torre was intimately involved with bringing and litigating the CVRA Action since 2015. (AMF.6-7, 11-25, 27-49, 51-56.) He refers to himself as a plaintiff in that action. (AMF.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. (AMF.6-7, 11-49, 51-56.) He was deposed as the PNA representative and served as its witness at trial. (AMF 55-56.) He spent days attending depositions of City councilmembers. (AMF.29, 31, 37, 41, 48.)

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. (AMF.58.) In June 2021, De la Torre filed his own amicus brief in support of the plaintiffs – identifying him as a councilmember in the title. (AMF.109; see *Petrovich*, *supra*, 48 Cal.App.5th at p. 976 [councilmember who "acted as advocate, not a neutral and impartial decisionmaker" "should have recused himself"].) And 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 26, 2021, and even this action. (AMF.68, 69, 70, 112, 120.) Before the January 26 Council meeting, Shenkman helped draft De la Torre's script and attended the meeting with him from De la Torre's house. (AMF.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. (AMF.82, 76.)

During this time, Shenkman and De la Torre have had an attorney-client relationship

---

unclean hands defense. (*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"].)

demonstrated by his assertion of attorney-client privilege in response to a Public Records Act request asking for communications with Shenkman (AMF.93), his refusal to answer deposition questions on attorney-client privilege grounds (AMF.138), and assertions of privilege throughout discovery (AMF.165). Indeed, Shenkman himself stated he would seek compensation for his legal work in this case in the CVRA Action. (AMF.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. (AMF.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. (AMF.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. (AMF.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. (AMF.120-123.) Shenkman provided documents for production in this case. (AMF.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. (AMF.98-99.) 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. (AMF.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. (AMF.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 that case. (AMF.103, 105.) All three appeared at the Club meeting remotely and together from De la Torre's home. (AMF.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. (AMF.110-111.)

This vast, ongoing embroilment demonstrates De la Torre's conflict of interest.

2. 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*.)

Those same concerns 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, is proud of his wife's involvement in the CVRA Action, and wants his wife to win. (AMF.135-136.) Given De la Torre's close relationship with his wife and their substantial involvement in that case for years, "it is difficult to imagine that [De la Torre] has no private or personal interest in whether [his wife's lawsuit is] successful or not." (92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, at *7.)

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

Beyond his common law conflict, De la Torre has a disqualifying financial interest due to his receipt of free legal services from Shenkman and the impact a settlement would have on Holistic.

First, a key purpose of the PRA is to ensure that public officials "perform their duties in an impartial manner, free from bias caused by" "the financial interests of persons who have supported them." (Gov. Code, § 81001(b).) "A public official has a financial interest in a decision within the meaning of [the PRA] if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, 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 (AMF.65-66, 68-70, 120-123, 126) – the firm seeking over $13.3 million in fees and which stand to benefit from any CVRA Action settlement (AMF.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).) Here, De la Torre received gifts valued at over $520 from Shenkman & Hughes – and specifically from his "trusted attorney[]" Shenkman (AMF.133) – in the form of free legal and other services. As described above, De la Torre received "preliminary legal advice" from Shenkman & Hughes in December 2020 and January 2021 (65, 68, 70), invoked the attorney-client privilege on multiple occasions – during discovery, in response to a Public Records Act request, and at the January 26, 2021 Council meeting (AMF.65-66, 68-70, 82, 93, 138, 165) – and, in this action, received services through Shenkman's legal arguments made at a meet and confer and the filing of declarations (AMF.120-123). Notably, Shenkman has not denied that he was involved in the preparation of numerous other filings in this case. (AMF.99, 120-123, 126.) De la Torre has admitted, he has not compensated Shenkman for any of these services (AMF.126), and Shenkman agrees. (AMF.126.) With Shenkman's billing rate at between $800 to $900 an hour, and his partner and associate's between $600 to $800 (AMF.124-125), there can be no dispute that the free services De la Torre has received is worth 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 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); 18702.1(a)(1), (a)(3); 18702.4(d).) 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).)

Second, Loya's business Holistic gives rise to a financial conflict because 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." (AMF.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." (AMF.145.) And winning on social justice issues is good for Holistic. (AMF.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 section 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.

D. This Court Cannot Award the Declaratory Relief Sought by the Motion

Plaintiffs' Motion should also be denied because 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.)[9]

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, 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, italics added.) 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"] (quotation omitted).) Here, it would be impossible for this Court to predict De la Torre's future actions and declare in all future scenarios that he does not have a conflict of interest, rendering the requested relief unnecessary and improper. Summary judgment should therefore be denied. [10]

E. Plaintiffs' Brown Act Theory Fails as a Matter of Law

Plaintiffs' Motion makes two unsupported arguments relating to their Brown Act Claim, despite the City's compliance with the Brown Act. (AMF.150-151.) First, Plaintiffs claim that the Brown Act was violated because De la Torre was improperly disqualified on conflict grounds.

---

[9] 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.*)

[10] Plaintiffs Motion makes no attempt to address Serna. This is not surprising he conceded that any "injury" he has here is no different than any other voter. (AMF.148 *see People ex rel. Becerra v. Super. Ct.* (2018) 29 Cal.App.5th 486, 496; *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].)

(Mem. at p. 12.) However, Plaintiffs cite no authority that the Brown Act applies to any such claim - because it does not. The stated intent of the Brown Act is to ensure 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 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.) Nothing in the Brown Act creates a remedy from exclusion of a councilmember due to a conflict of interest or a vote of the city council to the same.

Second, Plaintiffs claim that the "Brown Act does not permit a closed session accessible to just a majority of the members of a legislative body rather than all the members." (Memo. at p. 13.) Again, Plaintiffs cite no authority (because there is none) and offer a tortured reading of the statute that requires this Court to ignore its plain language. 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. 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 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'

[11] 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. (AMF.152.) Were it otherwise the case, it would be impossible for a legislative body to hold a closed meeting without the attendance of every member. That would grind council business to a halt. (Zerunyan Decl. ¶ 25.) Under Plaintiffs' argument, every such meeting would violate the Brown Act because not all members were present. This Court must avoid this absurd interpretation. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [stating court must avoid an interpretation that would lead to absurd results].)

1 and 'session' are used interchangeably" and "the Legislature intended the same usage in section
2 54956.9." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.) Plaintiffs therefore cannot read
3 into Section 54956.9 a requirement that all members of the legislative body must be present –
4 especially where there is no such legislative intent.
5 Moreover, Plaintiffs' interpretation of the Brown Act would abrogate the conflicts of interest
6 doctrine. (Zerunyan Decl. ¶ 25.) Where a conflict of interest exists – whether financial or common
7 law – the "the official may not take part either in the discussion nor in a vote on the relevant matter."
8 (101 Ops.Cal.Atty.Gen. 1 (2018), 2018 WL 1971010, at *8; see also 92 Ops.Cal.Atty.Gen. 19 (2009),
9 2009 WL 129874, at *5 [same]; Code Regs., tit. 2, § 18707(a)(4); AMF.87["Any Councilmember
10 who is disqualified from voting on a particular matter by reason of a conflict of interest … shall leave
11 the dais prior to Council consideration of the matter."]; *Hamilton v. Town of Los Gatos* (1989) 213
12 Cal.App.3d 1050, 1058 [councilmember with a financial conflict could not have access to closed
13 session to observe because the "disqualified member's mere presence, or knowledge thereafter, might
14 also subtly influence the decisions of other council members who must maintain an ongoing
15 relationship with him."].) Again, Plaintiffs do not cite a single case supporting their extreme view.
16 Finally, De la Torre claims that Council cannot exclude him based upon unfounded
17 confidentiality concerns. While De la Torre has not been excluded for that reason, there is a basis for
18 concern about disclosure of confidential information. On February 8, 2022, the City Council
19 disclosed that there have been repeated "leaks" from closed sessions of Council. (AMF.155.).
20 Moreover, if De la Torre were to disclose confidential information to his wife as the CVRA Plaintiff,
21 the City would be unable to discover such violations because he would then assert, as he has done in
22 this action, spousal privilege. (AMF.137.) Moreover, De la Torre's friend and "trusted attorney"
23 Shenkman is also reported to have been involved in receiving confidential closed session information
24 from a councilmember in another city. In November 2020, the City Council for the City of Albany
25 discussed a "leak" from closed session by a councilmember to Shenkman. (AMF.156.).
26 Accordingly, any concern about the confidentiality of closed session discussions is well founded.
27 **F. This Court Should Not Award the Mandatory Injunctive Relief**
28 Coupled with their request that the Court declare that De la Torre has no conflict of interest,

Plaintiffs also seek injunctive relief requiring the City to allow De la Torre attend closed session. (SAC Prayer for Relief ¶¶ 3-6.) Not only does Plaintiffs' Motion fail to address any injunctive relief, the injunctive relief requested in their prayer is wholly improper. As with their declaratory relief claim, Plaintiffs' request for injunctive relief is backwards looking. But injunctive relief "is available to prevent threatened injury and is not a remedy designed to right [alleged] completed wrongs." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403 n.6; see *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320.) Plaintiffs' requested relief is also mandatory in nature because it "mandates the performance of an affirmative act" and thus "commands some change in the parties' position" (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1041) – here commanding the City to allow De la Torre to attend closed sessions on the CVRA Action.[12] "Mandatory injunctions are rarely granted in the absence of a clear showing of irreparable damage under particular circumstances indicating the party seeking the injunction is deserving of injunctive relief and has offered to do equity." (*Drew v. Mumford* (1958) 160 Cal.App.2d 271, 273.) Plaintiffs have made no such showing here. Nor could they "make a significant showing of irreparable injury" (*Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58, 77), as they are required to do when seeking an injunction against a government entity. Finally, Plaintiffs cannot show, as they must, that public policy supports injunctive relief here, given the myriad ethical concerns with De la Torre attending closed sessions on the CVRA Action. (See *Tahoe Keys Prop. Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472–73 ["Where, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties the public interest must be considered."].) This Court should decline to grant any injunctive relief.

V. CONCLUSION

For the reasons stated herein, Plaintiffs' Motion should be denied.

[12] Plaintiffs' SAC tries to frame the injunctive relief as only "prohibiting" the Council from excluding De la Torre from closed sessions. But that does not transform their required relief to a prohibitory injunction. Any requirement that the City Council must allow De la Torre to attend closed sessions on the CVRA Action "is not a necessary means to a prohibitory end, but the end in itself" and is therefore mandatory in nature. (*Daly, supra,* 11 Cal.5th at p. 1047 [rejecting argument that order requiring Board to oust member and seat her replacement "were merely incidental to parts of the judgment declaring [member's] appointment null and void"].)

Dated: March 10, 2022

BERRY SILBERBERG STOKES PC
CAROL M. SILBERBERG

By /s/ *Carol M. Silberberg*
Carol M. Silberberg

Attorneys for Defendant
CITY OF SANTA MONICA